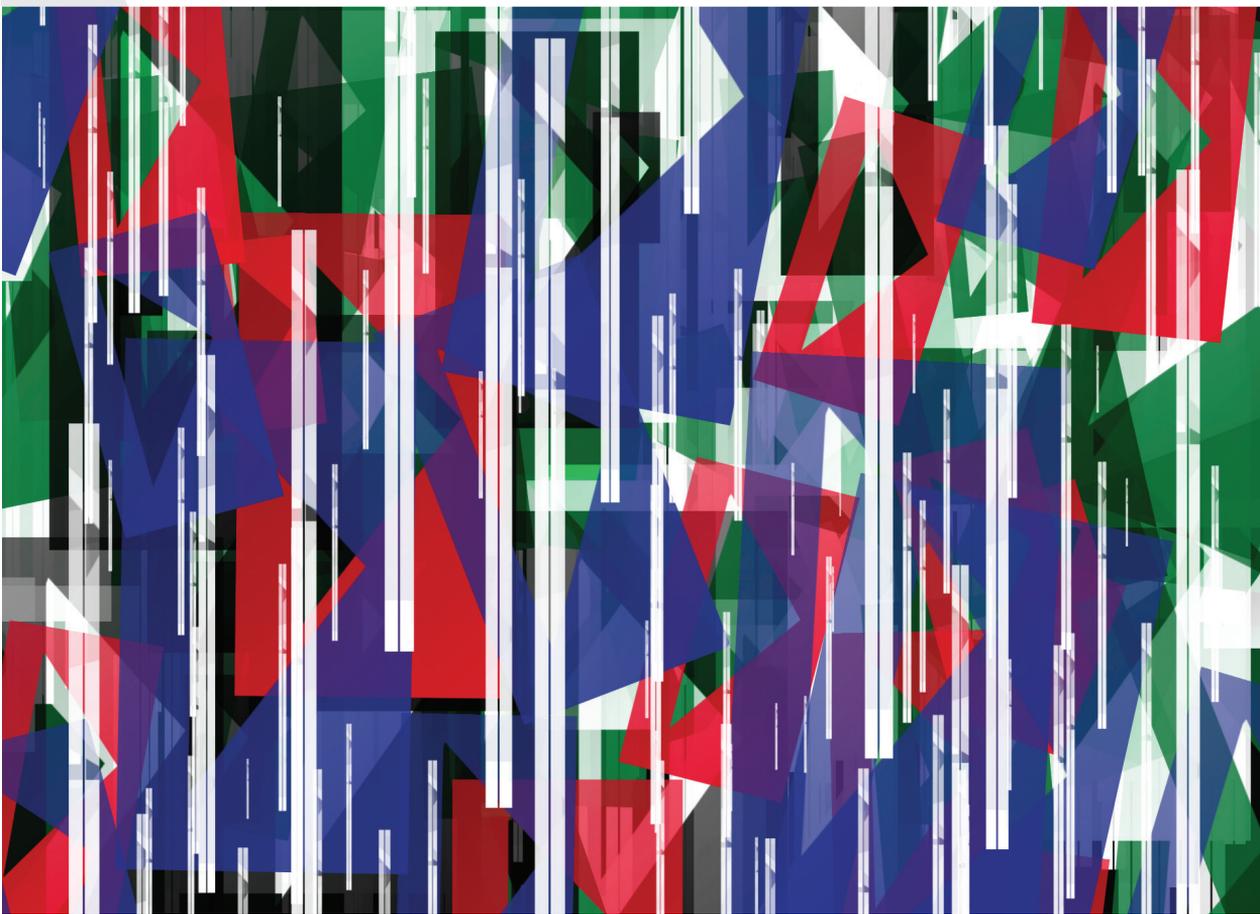


# WTO Reform

Reshaping Global Trade Governance  
for 21st Century Challenges

*Edited by Teddy Soobramanien, Brendan Vickers  
and Hilary Enos-Edu*



The Commonwealth

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The Commonwealth

Commonwealth Secretariat  
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Pall Mall  
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## Abbreviations and Acronyms

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|       |   |
|-------|---|
| AOWL  | Advisory Centre on WTO Law  |
| BIA   | WTO Built-In Agenda   |
| BRICS | Brazil, Russia, India, China and South Africa                         |
| CETA  | Canada-EU Trade Agreement   |
| CPTPP | Comprehensive and Progressive Agreement for Trade Pacific Partnership |
| CTE   | WTO Committee on Trade and Environment                                |
| DDA   | Doha Development Agenda   |
| DSU   | WTO Dispute Settlement Understanding                                  |
| EU    | European Union  |
| FDI   | Foreign Direct Investment   |
| FOGS  | Functioning of the GATT'S System                                      |
| FOWTO | Functioning of the WTO System   |
| G20   | Group of Twenty   |
| GATT  | General Agreement on Tariffs and Trade                                |
| GDP   | Gross Domestic Product  |
| GPA   | Government Procurement Agreement                                      |
| GVC   | Global Value Chain  |
| IISD  | International Institute for Sustainable Development                   |
| IMF   | International Monetary Fund   |
| ITO   | International Trade Organization                                      |
| LDC   | Least Developed Countries   |
| MC    | Ministerial Conference  |
| MEA   | Multilateral Environmental Agreement                                  |
| MFN   | Most Favoured Nation  |
| MSMEs | Micro, Small and Medium Enterprises                                   |
| MTS   | Multilateral Trading System   |

|        |  |
|--------|--|
| NAFTA  | North American Free Trade Agreement                                    |
| NGO    | Non-Governmental Organisation  |
| OECD   | Organization for Economic Cooperation and Development                  |
| PPMs   | Production and Process Methods   |
| RTA    | Regional Trade Agreement   |
| S&DT   | Special and Differential Treatment                                     |
| SDG    | Sustainable Development Goal   |
| SIA    | Sustainable Impact Assessment  |
| SIDS   | Small Island Developing States   |
| SPS    | Sanitary and Phytosanitary Measures                                    |
| SSA    | Sub-Saharan Africa   |
| TBT    | Technical Barriers to Trade  |
| TFA    | Trade Facilitation Agreement   |
| TPP    | Trans-Pacific Partnership  |
| TRIPS  | WTO Agreement on Trade-Related Aspects of Intellectual Property Rights |
| TTIP   | Transatlantic Trade and Investment Partnership                         |
| UN     | United Nations   |
| UNCTAD | United Nations Conference on Trade and Development                     |
| UNEP   | United Nations Environmental Programme                                 |
| USA    | United States of America   |
| USMCA  | United States-Mexico-Canada Agreement                                  |
| WEF    | World Economic Forum   |
| WTO    | World Trade Organization   |

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# Chapter 1

## Introduction

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*Brendan Vickers, Teddy Y. Soobramanien and Hilary Enos-Edu\**

As the World Trade Organization (WTO) approaches its 25th anniversary in 2020, the mood is far from celebratory about the organisation's performance, functioning and future. The rules-based multilateral trading system, with the WTO at its centre, stands at a crossroads at a time when transparency, predictability and stability in world trade are needed to counter the implications of rising protectionism and unilateralism by some countries, and to trigger greater global trade growth, especially to assist developing countries achieve the Sustainable Development Goals (SDGs).

The Doha Round, launched in November 2001, is the longest-running trade round in the history of the multilateral trading system, and there is no clear sense of *when/how/if* it can actually be concluded. This multilateral impasse has shifted some rule-making away from Geneva to Regional Trading Arrangements (RTAs) covering new and broader areas and trade rules, as well as leading to a rise in plurilateral initiatives among subsets of WTO members. Most recent has been the decision by 76 WTO members to begin meaningful negotiations on the trade-related aspects of e-commerce. Under these circumstances, the WTO's role and relevance in further opening up world trade and in providing governance are under increased scrutiny, and calls for reform have intensified.

Rule-making in the WTO has become ever-more challenging as the number of members increases and the range of issues to tackle broadens. The recurrent deadlock and failure to conclude the Doha Round partly reflects the growing weight, diversity and expectations of the organisation's 164-country membership, as well as competing narratives about the role of trade and trade policy in development and the benefits of globalisation. The need for efforts to narrow these differences in narratives and rebuild mutual trust among the member countries are paramount to making progress. New international dynamics – especially the rise of the emerging economies, such as Brazil, China and India, as well as the more assertive role of developing country coalitions – now portend greater multi-polarity, further complicating collective global action on trade. The rapid growth and improved economic prospects of these emerging economies has led some development countries to call for greater differentiation among the WTO's developing country members, with implications for recourse to the principle of special and differential treatment. Some developed countries expect these emerging economies to take on greater global responsibilities by contributing to the provision of the public good of free trade and the strengthening of the multilateral trading system.

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\* Brendan Vickers is Adviser and Head of International Trade Policy Section; Teddy Y. Soobramanien is Economic Adviser and Head of Hub and Spokes Programme; and Hilary Enos-Edu is Assistant Research Officer in the International Trade Policy Section of the Trade, Oceans and Natural Resources Directorate of the Commonwealth Secretariat, London. The views expressed in this essay are those of the authors and do not necessarily represent those of the Commonwealth Secretariat.

While these factors all have an impact on the efficiency of the multilateral process, some WTO members and trade policy commentators point to a more fundamental flaw in the procedural and functional aspects of the organisation. Two of its functions under pressure are the negotiating forum and the adjudicating body of trade disputes. The design of the negotiations, and the principle of the single undertaking, may need to be addressed. It is argued that the WTO's established rules, principles and practices of decision-making – most of them carried over from the previous Uruguay Round of the General Agreement on Tariffs and Trade (GATT) – are ill-suited to respond to the fast-changing needs of 21st century world trade. Today, intricate connections exist in global production networks between goods, services, investment, intellectual property, logistics and digital trade. These are underpinned by the need for sustainable production and trade to help combat climate change. It is argued that the WTO disciplines have not kept abreast of these new external realities.

Amid the Doha impasse, there have been some achievements. WTO members have struck landmark agreements in a variety of formats, showing some flexibility in the organisation. Two major achievements in recent years are the adoption of the Trade Facilitation Agreement at the Bali Ministerial Conference in 2013 and the ban on agricultural export subsidies at the Nairobi Ministerial Conference in 2015. However, the call for new pathways to decision-making and the launch of Joint Initiatives on e-commerce, investment facilitation and micro, small and medium enterprises (MSMEs) at the Buenos Aires Ministerial Conference in 2017 signal a major departure from the entirely consensus-based/single undertaking paradigm that has been the hallmark of previous decision-making.

The WTO's dispute settlement function, the crown jewel of the system, is also under threat. One major economy member, the USA, is blocking the appointment and reappointment of the WTO judges whose rulings help resolve the trade disputes. This may soon reduce the WTO Appellate Body from its full roster of seven judges down to the minimum of three needed to decide an appeal.

While discussions of WTO reform are not new, a significant number of WTO members now recognise and agree the organisation does require urgent change to remain credible and relevant for 21st century global economic governance. Some WTO members, including Canada, the EU and the USA, have identified their own reform priorities. Concurrently, the G20 Leaders Summit in Buenos Aires in December 2018 supported the necessary reform of the WTO to improve its functioning. The trade literature also has a raft of reform proposals from former WTO officials, experts and academics (e.g. Lawrence, 2006; Cottier and Takenoshita, 2008; Low, 2009; Steger, 2009; Jones, 2010; WEF, 2010; Ismail and Vickers, 2011; Hoekman, 2012). Additionally, at least three expert group reports – namely, Consultative Board (2004), the Warwick Commission (2007) and Bertelsmann Stiftung (2018) – have considered overall governance reforms for the organisation but also delivered specific recommendations to make the WTO a more effective and efficient negotiating institution.

For most Commonwealth developing countries, and especially for small states, least development countries (LDCs) and sub-Saharan African (SSA) countries,

international trade is a crucial driver of growth, poverty reduction and employment. If these countries are to achieve the SDGs, they need an enabling global trading environment that both supports and enhances their participation in world trade. The Commonwealth and its members remain at the forefront of global advocacy to promote free trade in a transparent, inclusive, fair and open rules-based multilateral trading system to help achieve the SDGs, as reflected in the first-ever Commonwealth statement delivered to the WTO, at the 11th Ministerial Conference in December 2017. Canada has tabled a proposal on how to strengthen and modernise the WTO and has convened a small representative group at ministerial level to explore the proposal; the group includes Commonwealth member countries Australia, Kenya, New Zealand and Singapore, as well as Brazil, Chile, the EU, Japan, Korea, Mexico and Switzerland. The outcomes of these discussions have been shared and inputs invited from the Commonwealth WTO membership in Geneva.

This compilation of essays offers timely and expert commentary on some of the challenges confronting the multilateral trading system today, and what reforms could help modernise and strengthen the WTO as the custodian of global trade governance for the 21st century. The essays build on current debates and existing initiatives on WTO reform, as outlined earlier, by providing specific policy recommendations and identifying gaps in current debates and proposals, including areas where reform ought to take place but where attention is not currently focused. The publication is not intended to be exhaustive across the full range of specific WTO reform topics, but focuses on the subject at an overall strategic level. What is unique about this collection is its recognition of the broader historical, geo-economic and geo-strategic context in which the current calls for reform and reform proposals must be properly situated.

The five essays that follow provide key messages and suggestions for trade policy-makers and negotiators as they consider and contemplate the challenges and opportunities to improve the functioning, effectiveness, efficiency and inclusiveness of the WTO. The views expressed in these essays are those of the authors and do not necessarily represent those of the Commonwealth Secretariat.

**Rorden Wilkinson**, in *‘Revisiting WTO Reform’*, examines the longstanding history of WTO reform discussions, describing the organisation as one characterised by compromise, happenstance and opportunism. He asserts that the continuing discussions demonstrate a growing frustration among member states defined by their varying negotiating capacities and differing perspectives. Wilkinson argues the organisation in its current state not only fails to deal with contemporary issues such as digital trade, but also has failed to fully address past challenges that were swept under the rug during the establishment of the WTO. His chapter argues that, while many of the current reform proposals are laudable in themselves, they are likely to have an impact only at the margins, and their net effect will be to preserve the institution largely as it is. The consequence will be that system malfunction and member frustration will continue to be features of the multilateral trading system in the medium term.

**Amrita Narlikar**, in *‘Trade Multilateralism in Crisis: Limitations of Current Debates on Reforming the WTO, and Why a Game-Changer Is Necessary’*, confronts the historical and technocratic challenges faced within the WTO, from the Doha Development

Agenda in 2001 up to the present day, and unpacks the national and global reasons why reform is needed. She highlights a disconnect between local and global gains, and a failure to address developing countries' concerns. Her chapter assesses the limitations of the current discussions and advocates for a multi-pronged approach that understands interlinkages between trade and security, trade and industrialisation, among others. Narlikar argues that, for effective change to occur, it is important to adopt a more holistic approach to reform and develop better narratives about trade.

**Carolyn Deere Birkbeck**, in '*WTO Reform: A Forward-Looking Agenda on Environmental Sustainability*', diverges from the discussions on reforming WTO functionalities to look at the inclusion and significance of environmental sustainability at the multilateral level. Her chapter points out existing tensions and concerns between trade and the environment, particularly fears that sustainability requirements will limit market access, hinder local development and threaten competition. She argues that, while much of the environmental discussion and many of the initiatives are now citizen- and industry-led, there remains room for expansion and decision-making at the WTO level. She also unpacks environmental areas on which the WTO is expanding, such as fossil fuel subsidies, and those on which negotiations have slowed down, such as fisheries subsidies and addressing environmental dimensions of trade in services, agriculture and industrial products, as well as established negotiations, such as trade and investment. Birkbeck argues that a comprehensive solution lies in linking process and institutional design through strengthening the existing WTO environmental committee, policy dialogue, capacity-building, monitoring and evaluation.

**Lorand Bartels**, in '*WTO Reform Proposals: Implications for Developing Countries*', focuses specifically on three core areas of the institutional reform agenda, mainly the categorisation of developing country status, the functioning of the Appellate Body and the compliance with notification obligations by member countries. Bartels notes the contentions driving the institutional reform agenda stem from the Doha Round and a concern of developed countries about the effect of WTO rules on state capitalism. His chapter outlines the proposals and joint communiqués raised by the US, EU, China, the Africa Group, and other member countries and evaluates how each proposal seeks to address the challenges raised as well as its impact on developing countries.

**Teddy Y. Soobramanien and Brendan Vickers**, in '*Reshaping the WTO: Reflections on a Way Forward*', unpack the successes and shortcomings of two of the WTO's discrete functions – namely, the negotiating function of the organisation and its adjudicating role on trade disputes. The authors outline some of the recent challenges confronting trade multilateralism and then present some practical recommendations for a way forward. The solutions centre around the main principles of the trading system: trade without discrimination; freer trade through negotiation; transparency; fair and inclusive competition; and development.

As a complement to the various discussions and literature around WTO reform, *WTO Reform: Reshaping Global Trade Governance for 21st Century Challenges*, is designed to serve as a valuable resource for government officials, trade negotiators, journalists

and those in the academic and research community who are attempting to sort through the complexities of the organisation and the role they can play in supporting a fairer, more inclusive WTO and multilateral trading system. The strengths of the collection are that it is topical and provides historical and up-to-date insights into how reform can potentially be transformational and progressive in nature. Further, the collection broadens the debate on WTO reform by focusing not only on new pathways for decision-making but also on important issues and topics that should animate a 21st century WTO agenda, including environment and the SDGs. Finally, it highlights the importance of keeping the multilateral trading system alive for the benefit of all states, particularly for small states, LDCs and SSA countries.

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## Chapter 2

# Revisiting WTO Reform

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*Rorden Wilkinson\**

### 2.1 Introduction

WTO reform is once again a matter of debate. While this debate is far from new, current interest is distinguished by the breadth of agreement among WTO members that change has to occur, and the extent of member involvement in shaping and seeking agreement on specific proposals.

The reasons for this widespread engagement are clear. The WTO's negotiating function has proven unable to deliver a far-reaching multilateral deal since the organisation was established. The WTO's maiden round of trade negotiations – the Doha Development Agenda (more commonly known as the Doha Round) – produced only modest outcomes after 14 years. And resolutions remain elusive to longstanding issues such as agricultural subsidies, food security and cotton; disagreements about how to move forward in areas such as e-commerce; and rules designed to take account of real-world changes in production and consumption.

Complicating matters further, the status of the Doha Round is itself ambiguous. The decision at the WTO's 2015 Nairobi Ministerial Conference to respect different positions on the future of the Doha Development Agenda led to diametrically different interpretations. For some, the Nairobi outcome was seen as an abandonment of the Round in all but name and an opening of the way for (largely) plurilateral negotiations in areas of specific interest. For others, it was genuine recognition that the negotiations had reached a point of impasse but that Doha remained the enduring programme of work (Froman, 2015; Prabhu, 2017).

Other events have added weight to calls for reform and underpinned concerns that, without meaningful adjustment, the future of the WTO – and the global trading system – is imperilled (Isaac, 2018). A series of protectionist trade measures implemented in March 2018 by the Trump administration – and responded to by key trading partners – has placed the system under considerable pressure. The effective functioning of the WTO's dispute process has been tested by US refusal to agree replacement appointments to the Appellate Body because of perceived derogations from agreed rules and creeping judicial overreach. And, perhaps most significantly,

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\* Rorden Wilkinson is Professor of Global Political Economy and Deputy Pro-Vice-Chancellor for Education and Innovation at the University of Sussex, and a Fellow of the UK Trade Policy Observatory (UKTPO). The views expressed in this essay are those of the author and do not necessarily represent those of the Commonwealth Secretariat.

the Trump administration has called into question US membership of the WTO (Donnan and Baschuk, 2018).

It is not just unilateral and retaliatory trade actions that have generated cause for concern. Established regional trade arrangements have been subject to significant realignment – in Europe with the UK's exit from the EU; and in North America with the renegotiation of the North American Free Trade Agreement (NAFTA) and its replacement with the US–Mexico–Canada Agreement (USMCA) (Thrush, 2018). Nascent regional initiatives have also come under pressure. Two of the opening acts of the Trump presidency were to put on hold negotiations for the Transatlantic Trade and Investment Partnership (TTIP) and to withdraw from the Trans-Pacific Partnership (TPP) Agreement. Suggestions have since been made that the TTIP could be revived (Bravo and Chatterley, 2018). Meanwhile, the remaining members of the TPP agreed a revised version, known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Schott, 2018).

There are other reasons why reform of the WTO may be desirable. The basic arrangement of negotiations has remained largely undisturbed since the multilateral trading system was created in 1947. The WTO's legal framework requires updating to deal with – among others – complex supply chains and contemporary production and consumption patterns (Froman, 2015; also Drezner, 2015). The relationship between the Sustainable Development Goals and the multilateral trading system has been muddied by the ambiguity of the Doha Round. WTO rules and work programmes are not well aligned to deal with particular social and environmental issues. Business and civil society interests are not well integrated into the trading system, relying on the lobbying of members and their advocacy, or working via representations on the side-lines of ministerial conferences and at WTO Public Forums (see Hannah et al., 2017 for more on this). And the WTO Secretariat remains relatively small and underfunded in comparison with other international organisations, and its remit (and capacity to act) is narrowly defined.

All of that said, the system is still some way from the precipice. It continues to function despite the many pressures it faces; support remains robust among the vast majority of WTO members; and 76 WTO members (including the USA) have recently signalled their intention to begin meaningful negotiations on the trade-related aspects of e-commerce (WTO, 2019). So, while it may be an exaggeration to suggest – as a European Commission Concept Paper recently did – that the multilateral trading system 'is facing its deepest crisis since its inception' (European Commission, 2018), these and other events have nonetheless combined to generate broad agreement that now is the time to have a long hard look at how the system functions and the role the WTO plays as its principal custodian. As the G20 Leaders' Buenos Aires Declaration put it, 'We recognize the contribution that the multilateral trading system has made... [But] The system is currently falling short of its objectives and there is room for improvement' (European Council, 2018).

This chapter contributes to debate about reform of the WTO. Its purpose is to identify key areas where reform ought to take place but where attention is not currently

focused. It begins by putting the current calls for reform into context by briefly recounting a little of the history of the multilateral trading system. The aim of this is to show how key aspects of the system's character have given rise to fundamentally different experiences of, and perceptions about, the purpose, shape and direction of the trade agenda; how they underpin continuing dissatisfaction with the functioning of the multilateral trading system; and how, in the absence of an approach to reform that differs from most of the proposals currently being made, this is likely to continue to be the case. The chapter then identifies where meaningful action could be taken and highlights where significant oversights exist. It suggests that, while many of the proposals are laudable in themselves, they are likely to have an impact only at the margins; and their net effect will be to preserve the institution largely as it is, with the consequence that system malfunction and member frustration will continue to be features of the multilateral trading system in the medium term. The final section offers some concluding comments.

## 2.2 Reform redux

This is not the first time an overhaul of the WTO has been an item vying for members' attention. Pressure to address system omissions and oversights has been evident since the Uruguay Round was concluded and the WTO established; and demands for reform have been expressed openly since. Yet, despite the weight and frequency of these calls and the introduction of small adjustments along the way, a meaningful process of reform has yet to be put in place. As former WTO Director-General and European Commissioner for Trade, Pascal Lamy, put it as far back as 2001, 'We [have] failed to... set the WTO on the path to much-needed reform.'

Calls to reform the multilateral trading system are not unique to the WTO era either; nor are the complaints being made novel. In many cases, they are echoes of frustrations with aspects of the system's functioning that have been evident since the WTO's predecessor institution, the General Agreement on Tariffs and Trade (GATT), was first negotiated. Pressure to revise and update global trade rules was a feature of GATT business during (and between) each of its negotiating rounds. And at least two attempts were made to put a different system in place – first in 1956 through a process of codification that would have resulted in the creation of the Organization for Trade Cooperation (USCIB, 1955; Bronz, 1956); and second by establishing what was considered at the time a rival trade body in the form of the United Nations Conference on Trade and Development (UNCTAD) (Gardner, 1964; Weintraub, 1964; Cordovez, 1967) – before a third finally succeeded and resulted in the establishment of the WTO.

Importantly, it was the prospect of significant institutional augmentation that was instrumental in bringing the Uruguay Round to a successful conclusion (Wilkinson, 2015). However – and crucially for understanding some of the enduring frustrations of many of the WTO's developing country members – the agreement was reached on the understanding that certain unresolved anomalies (particularly with regard to agriculture) would be addressed once the new institution was up and running. These anomalies were not addressed. It is this lack of remedial action, coupled with the

sheer amount of time that has passed since the issues were first raised, that lie at the heart of much developing country frustration.

If calls for reform are not new, nor are the kinds of responses they have elicited. Many of the modifications, adjustments and enhancements currently being proposed have been countenanced before; those that have been implemented have all too often enabled only temporary blockages in negotiations to be resolved; and very few have been designed to address the system omissions, problematic behavioural practices or core concerns that were drivers of frustration in the first place. The result is that reforms have tended either to preserve existing ways of operating or else to put in place adjustments that have subsequently proven unpopular with those very members that were proponents and proposers of change in the first place. We might think of the difficulties of translating the democratisation of negotiating processes among WTO members during the past three ministerial conferences (MC 9–11) into similarly democratic outcomes (Wilkinson et al., 2014, 2016; Ismail, 2017; Hannah et al., 2018a); the current enthusiasm for plurilateral negotiations as a solution to the stasis of multilateral endeavours (Wilkinson, 2017); and the nostalgia in some quarters for GATT era dispute settlement as three such examples (BRIDGES, 2018).

There is also little to suggest that current proposals will disrupt these patterns anytime soon. This would be a major deviation from the ‘muddling through’ and ‘development-by-bricolage’ manner in which the multilateral trading system has evolved. Returns to existing ways of operating have simply tended to prevail. But the absence of more substantive approaches that thoroughly revise how the system functions is precisely why crises and calls for reform have been – and are likely to continue to be – features of multilateral trade politics (Wilkinson, 2006).

In short, current interest in WTO reform may differ from previous debates in its intensity and the extent of member engagement, but it is unlikely to be unique in terms of the effect any reform may have – that is, unless longstanding path dependencies are broken. What the history of the multilateral trading system so far shows is that the sum of all reform efforts to date has been to leave largely undisturbed a system of operation that would not be unfamiliar to the early observers of the GATT.

### 2.3 Causes, consequences, responses

Why is this the case? What accounts for the tendency towards system preservation? Some of the answers here lie in the way the system has evolved and the engine that has been harnessed to drive forward the development of the multilateral trading system. These are worth noting because it is here that we can find some of the roots of the differing perceptions about the purpose and function of the system, which are key complicating factors in debates about WTO reform.

#### The bricolage problem

Some of the reasons why the multilateral trading system needs reforming and why meaningful change has been so hard to bring about can be found in the way the system has evolved over time. Particularly important here are the roles of compromise, happenstance, opportunism and unintended consequence.

It is worth recalling that the multilateral trading system was the product of a response to blockages in the post-World War II negotiations for the International Trade Organization (ITO). By the time the 1947 Havana Conference on Trade and Employment was convened, it was clear that divergent positions had emerged and the chances of salvaging the ITO project were slight. The response of the USA and the UK – as the lead architects – was to begin a round of negotiations that eventually produced the GATT. Meanwhile, continuing disagreements about the content of the ITO Charter eventually led to abandonment of the organisation. And, by default, the GATT was elevated to the role of steward of the nascent multilateral trading system.

What matters here is that the multilateral trading system emerged through happenstance and opportunism. The GATT was originally intended to be a provisional agreement drawn from Chapter IV of the ITO Charter designed to begin the process of liberalising trade among a limited group of 23 contracting parties. It was not designed to be an all-encompassing set of rules governing global trade as the ITO had been. However, these features set the tone for the development of the institution over time.

The contracting parties that acceded to the GATT after it was created often did so with dramatically different interests to the founding 23. Once the first rounds of accession had taken in the remaining industrial states, those that acceded were increasingly newly created, post-colonial states. Despite the growth in the number of signatories, GATT negotiations seldom involved or were binding on all of the contracting parties. Areas of significant economic concern to large groups of contracting parties were excluded (such as agriculture) or else subject to quota systems and other controls (e.g. textiles and clothing) for long periods of time (Heron and Richardson, 2008; Scott, 2017). Custom and diplomatic practice substituted for substantive procedure. And processes of reform and institutional development invariably took the form of augmentation and extension rather than substantive change and evolution – the outcome of the Uruguay Round and the creation of the WTO included.

The result was a process of institutional evolution that drew from and built on happenstance; did not occur in accordance with a clear plan or vision; largely preserved the character of the original agreement and the advantages that the first contracting parties accrued; and pieced a system of rules, norms, customs and procedures together as if it were a bricolage.

### The nature of negotiating

The problems embedded in this bricolage have been compounded by the way bargains are reached among WTO members. The multilateral trading system itself, the trade opportunities it affords, the rules governing the conduct of negotiations and the procedures for the administration of the system – among many other things – are all outcomes of competitive negotiations. Because the negotiations are competitive, and member interests are determined by the advantages they seek to accrue and the concessions they aim not to give away, the resulting outcomes tend to reflect the capability of members to realise strategic gains while protecting areas of special interest (Lang and Scott, 2009; Steinberg, 2009). In other words, the interests of more powerful, economically more significant and more capable members usually prevail.

Understanding that this system is the product of – and generates outcomes that result from – negotiations between members varying dramatically in size, economic significance and negotiating capacity is important. It helps explain why reform tends not to change fundamentally existing ways of operating; and it means that the interests of the industrial states more often than not lie in supporting proposals for reform that make adjustments to suit their purposes but that leave the system largely intact. This does not preclude outcomes emerging that bring genuine system-wide benefits, but it does mean they are likely to be agreed only as part of an overall outcome that reflects prevailing relations of power.

This system characteristic has two noteworthy consequences. First, the competitive and adversarial nature of trade negotiations ensures they are frequently politically charged and prone to crises. These crises provide moments – often over extended periods of time – in which outcomes are negotiated and bargains agreed, which in turn act to move the system forward but tend to do so only in keeping with existing patterns. A common feature of periods of crisis is that they give rise to debates about institutional reform; and the outcomes of these debates can help bring wider agreements across the line – as they did with the Uruguay Round. Second, reform processes offer both positive and negative opportunities. Positive opportunities are those that address system malfunction and specific iniquities. Negative opportunities are those seek to recapture lost or claim new advantages. For some, the pressure to ‘graduate countries’ from Special and Differential Treatment, as well as those specifically targeting China, are seen in this regard (Tsuji, 2018).

### Differences of perception

A third complicating element is the difference in perception about the purpose of the WTO that exists across the membership. These differences derive from the interests of members. The way they clash is instructive when considering why seemingly unbridgeable divides exist. And they are important in explaining how the multilateral trading system bricolage has evolved as well as what influences proposals and responses in reform debates.

The divide in member perceptions over the purpose of the WTO lies along a spectrum from those that see the organisation as a narrow mechanism for administering a set of agreed rules, to those that see its contribution as more than just international commercial regulation. Some members – largely developing countries – see the WTO as a mechanism for correcting anomalous trade rules and obstacles to development; and they value multilateralism as a means of negating the power disadvantages they encounter in bilateral trade deals. Other members – such as the EU – see the multilateral trading system as a system of governance and a source of law and precedent. In this understanding, trade governance does not have clearly defined limits and spills over into trade-related areas. This is quite different from those who perceive the multilateral trading system to be a commercial space defined by narrow contractual arrangements (bilateral, regional and multilateral), and the WTO – and its dispute settlement mechanism particularly – to be a narrow technical machinery for overseeing the application of rules and obligations, and not a source of jurisprudence. This view most closely approximates that currently expressed by the Trump administration.

These differences in perception matter because they frame the way members engage in debates about reform; they inform the proposals they generate and the potential outcomes to which they agree; and the distances between these positions explain why striking a deal on a substantive and meaningful programme of reform is so difficult to achieve. Thus, the focus of reform for many developing countries is on achieving better and more effective participation, improved trade outcomes and the resources to build capacity. For the EU, reform tends to focus on deepening existing commitments and harmonising trade practices globally. For the USA – particularly under the Trump administration – reform of the WTO is about rolling back on any provisions seen as restricting or disadvantaging US economic activity and its capacity as to act as a sovereign entity.

It would be a mistake to assume that these positions are new. Developing countries have always sought to use the multilateral trading system as a mechanism to unpick enduring iniquities. The EU has consistently favoured increased legalisation and the extension of trade governance into related areas. And the USA has always worried about a system of trade governance encroaching on its sovereignty and bleeding beyond narrow commercial arrangements. These positions were all on display during the ITO negotiations. They have been throughout the history of the multilateral trading system. And they are very much in evidence today.

### The trouble with rounds

These factors are compounded by the use of big-ticket negotiating rounds as the means of pursuing market openings and further regulation. At least two issues are worth highlighting here. First, rounds come with an expectation that big market access or other gains must be negotiated. The smaller everyday gains that can be made from on-going, technical and piecemeal negotiations do not suffice. This is a problem at the aggregate level, where the expectation is that a concluded round will produce significant global benefits. It is also a problem at member level, where all negotiating teams are expected to bring home gains that outweigh those of their competitors.

Second, rounds do not take place in isolation from the history of trade negotiations. Rather, they unfold in relation to the outcome of a previous round or rounds. This means that delegations approach any new negotiation mindful of what has gone before, cognisant of any prior inequities and determined to improve on any previous deal *relative* to the gains – perceived or otherwise – of their competitors. The result is that the outcome of one round inevitably shapes the way future negotiations unfold.

This ‘iterated’ form of bargaining predictably accentuates the degree to which members are placed at loggerheads with one another. For developing countries, the asymmetries of previous rounds ensure they approach new negotiation seeking to rectify past anomalies (and, as time goes by, more determinedly so). While this position has also been the case for a number of industrial countries, their primary position is one of seeking to protect sectors of decreasing competitiveness and political sensitivity as well as opening up new areas of commercial opportunity.

Thus, the problem is that, in approaching a new round, those seeking some kind of rectification are encouraged to agree to new concessions in return for remedial action.

This is the logic of any bargaining-based system. Yet, it is because of the requirement to offer something in return for that which is received – coupled with existing power inequalities between participating states – that asymmetries in outcome have been compounded by successive GATT/WTO rounds.

The point here is that the use of exchange as the mechanism of liberalising (and governing) trade among members of vastly different capabilities in institutional confines that have traditionally favoured the already powerful has produced bargains that are of dramatically different value to participating states. As negotiations take place in bursts over time, the inequities of one negotiation influences others; and, as it is only in reciprocating for concessions received that a round can hope to reach a conclusion, it is only through a process of exchange that past anomalies can be redressed. Yet it is precisely because each exchange is asymmetrical that, as negotiations take place over time, the imbalance of commercial opportunities among participating states is exacerbated rather than attenuated. While it may be the case that least developed countries are often relieved of the requirement to reciprocate, this itself is not unproblematic precisely because their lack of significance in world trade excludes them from influencing in any way the shape of the negotiations.

The consequence is that one asymmetrical bargain has been produced after another (Gowa and Kim, 2005). However, it is only when all of the negotiations are taken as a whole – that is, viewed over the lifetime of the multilateral trading system – that the extent of the asymmetries can be appreciated. Moreover, it is only when perceived in this way that it can be appreciated how entrenched and embedded in the bricolage the imbalance in the distribution of trade opportunities has become. It is this feature that has steadily ground down the negotiating function of the WTO and that underscores the necessity of a programme of reform.

## 2.4 The art of reform

The preceding discussion is intended to provide a lens through which to observe and understand debates about reform of the WTO. The key ‘take-away’ points are:

- Debates about reform of the multilateral trading system are neither new nor novel.
- They have often been bound up with moments of institutional crisis.
- Those debates that have produced outcomes have tended to do so as component elements of wider deals.
- Reform outcomes, like every other aspect of the system, result from competitive negotiations among members differing dramatically in size, economic significance and negotiating capacity.
- The system is a product of these competitive negotiations most often played out in (and exacerbated by) big-ticket rounds.
- The multilateral trading system has evolved via a series of compromises in which dominant interests have tended to prevail and that have resulted in a bricolage-like character.

- Moments of debate about reform – like all competitive negotiations – comprise both positive and negative opportunities.
- Member interests tend to be selfish rather than common.
- Perceptions of the purpose of the WTO – and thus the focus of reform – differ significantly among members.

The problem here is that many of these issues have become a focus of attention. They have generated debate about how they can be solved. But they have often been explored in isolation. Thus, the solution to the problem of negotiating in rounds is presented as a move to smaller group negotiations. However, this runs the risk of excluding members that are not sufficiently weighty in global trade to get a seat at the table. For developing countries, the means of correcting past anomalies is to focus on those aspects of the multilateral trading system that are not fit for purpose; but doing so requires that a hold is put on forward movement in other areas, which would not be attractive to the industrial countries. The solution to the deadlock in the dispute settlement mechanism is to fettle aspects of its functioning so it appeases the Trump administration but does not disrupt its smooth function or ignore the accumulated body of trade jurisprudence. And the solutions to the lack of attention to issues such as e-commerce, gender and the environment all too often focus on well-meaning statements of intent but not on substantive action. So, how to move forward?

### The case for a FOWTO

One way forward may lie in looking back at how previous blockages were overcome. In preparing for the Uruguay Round, the GATT contracting parties established a negotiating group on the Functioning of the GATT System (FOGS). Its purpose was to enhance how the GATT operated as a negotiating body; refine its role as an arbiter of trade disputes; improve its notification, surveillance and dispute settlement functions; examine its institutional structure; and increase its contribution to achieving greater coherence in global economic policy-making. However, it was not until the market access and other commercial aspects of the Uruguay Round negotiations were faltering that contracting parties realised agreement could be reached in making improvements in almost all of these areas.

It is here that a potential solution may lie. If we treat the creation of the WTO as one moment in an on-going process of institutional development, then the creation of a group that explores the Functioning of the WTO System (FOWTO) would be entirely appropriate. The group could pick up on the unfinished business of the Uruguay Round, focus attention on areas of pressing need and divert attention towards system reform and continual improvement, crucially taking a panoptic view of the balance of endeavours.

What might this process entail? While this is for WTO members to consider and design, it could nonetheless comprise:

- A thorough and forensic review of the manner in which trade deals are negotiated;
- Developing a set of rules governing the conduct of negotiations that enable the representation of all interests;

- Lending clarity to the substantive agenda of negotiations and specifying how they will unfold;
- Enabling parties to the negotiations to establish a clear sequence of realisable aims;
- Requiring all members to make the process, progress and substance of the negotiations transparent;
- Developing measures that allow for a process of arbitration to intervene in instances where differences of interpretation and/or blockages exist, and which allow for redress;
- Offering technical assistance on the practice, substance and organisation of negotiations to smaller, less able, developing delegations; and
- Outlawing practices that give members undue advantages over their competitor states.

To really capitalise on the gains these endeavours could bring, a move away from highly pressured big-expectation rounds towards less ambitious, piecemeal negotiations that operate on a continuing and continual basis could also occur. Seeing negotiations as on-going and continuous programmes of work on manageable issues would have utility in removing blockages and reducing political tensions. These could also be run as individual projects in ‘task and finish’ groups overseen by the Secretariat. Ministerial Conferences could then move away from being pressured negotiating points in the WTO calendar towards events focused on reviewing a programme of work and its delivery. And getting rid of this lumpiness would help remove the WTO’s version of ‘boom and bust’ by making Ministerial Conferences more mundane, ordinary and expected.

There are other areas that require focus, and which would bring important gains. The key to any reform is to find a way to negate the divisions that arise from the divergent interests of members and to create incentives for cooperation. Equally as important is a process that clarifies the purpose of the multilateral trading system so members have a clear and shared understanding of the value and role of the WTO. This could be achieved through the negotiation of a Ministerial Declaration on the role of the WTO and the part members play in making the system function, akin to the Declarations of Understanding negotiated during the Uruguay Round. This kind of clarification could go some way towards reconciling the tensions between narrow functionalist and technically oriented understandings of the organisation and those that see it much more broadly. It would also be useful in sorting out the relationship with – and delineating the relations between – the WTO and other international organisations. An allied endeavour would be to clarify once and for all the status of the Doha Round.

The very real need to deal with social and environmental sensitivities notwithstanding, attention in the immediate term should focus less on expanding the trade agenda and more on getting right what the WTO does. This should include – but not be limited to – clarifying dispute settlement functions, procedures and outcomes; and

expanding the trade policy surveillance, review and research and analysis functions of the Secretariat. Delivery should be a system mantra. Too many negotiations and agreements are either not, or only partially, implemented, or else they do not fulfil their promise. Had this been the case after Uruguay, many developing country concerns would have been addressed. It would also mean that more would have already been made of the trade facilitation agreement.

A conscious effort needs to be made to get ahead, in a substantive and meaningful way, of new trade agendas. Thought should also be given to the representation of public debate in the WTO. Recent research on Ministerial Conferences and the Public Forum, for instance, shows that the business and diplomatic communities are well represented but that public participation has fallen off considerably (Hannah et al., 2018b). A properly constructed FOWTO could provide a meaningful answer to the reform conundrum.

## 2.5 Conclusion

Although the current conjuncture provides a potentially fruitful opportunity to attend to aspects of the WTO's functioning and organisation, there is a risk that a shift in gear towards a reform mode might prove satisfactory only in that it translates pent-up frustration into action and speaks only to the politics of the day and not the solutions required of tomorrow. It does not guarantee that such a shift would bring about the kind of analysis, reflection and action required to address the deeply rooted problems that generate the afflictions of the multilateral trading system.

It is also worrisome that current debate about WTO reform lacks innovation and risks resulting in little change. This is because it does not allow more foundational questions and concerns to be raised. In turn, this lends thinking about reform of the multilateral trading system a path-dependent quality and ensures that all too often proposals are aired and discussed that either attempt to recover lost functionality or else implement modest adjustments to the existing system. While incremental evolution is in principle a reasonable way to bring about measured reform, the bricolage-like qualities of the multilateral trading system require more than just minor adjustments, particularly if it is to be enhanced. This suggests that, rather than persisting with piecemeal approaches to reform, we need think a little more about taking the system apart, preserving what is good and discarding the ill and then putting it back together in a way that enables trade-led growth to occur in a manner that offers greater equity of opportunity across the board and substantial corrective action for those that have been negatively affected by the system's past functioning. As George Orwell reminded us in 1946, 'The imagination, like certain wild animals, will not breed in captivity.' Why would we imagine that thoughts about reform of the WTO would do otherwise?

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## Chapter 3

# Trade Multilateralism in Crisis: Limitations of Current Debates on Reforming the WTO, and Why a Game-Changer is Necessary

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*Amrita Narlikar\**

As the old adage goes: never let a good crisis go to waste. Many policy-makers across the world – representing individual countries and international organisations – deserve credit for having launched a serious debate about reforming the WTO, in light of the many serious challenges the system faces today. This reform debate has been a long time coming. But in its current state, the conversation remains largely inward-looking, and thus fundamentally inadequate. The problems confronting trade multilateralism have deep roots; technocratic fixes within the WTO, while important, can play only a small part in resolving them. A fundamental rethinking and renegotiation on the narratives that underpin globalisation is necessary if we are to address the crisis trade multilateralism faces today. This article offers some concrete recommendations to facilitate this.

### 3.1 Is trade multilateralism in crisis?

There are several reasons to believe trade multilateralism faces a crisis of existential proportions today.

The WTO – the central international body that oversees multilateral trade governance – has been in a quagmire for some time now. The Doha Development Agenda – the first round of trade negotiations launched under the auspices of the WTO, and the ninth if we take into account the trade rounds negotiated under the General Agreement on Tariffs and Trade (GATT) – has been plagued by deadlock. The negotiations were initiated with much fanfare in 2001 and were scheduled to be completed in 2005. Seventeen years later, the conclusion is still nowhere in sight; the Doha Round has the dubious distinction of being the longest-running trade round in the history of the post-war multilateral trading system.

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\* Amrita Narlikar is Professor at Universität Hamburg, and President of the German Institute of Global and Area Studies. Prior to moving to Germany in 2014, she was Reader in International Political Economy at the University of Cambridge and Fellow of Darwin College. She has authored or edited nine books, and published over sixty articles in international journals or edited collections. The views expressed in this essay are those of the author and do not necessarily represent those of the Commonwealth Secretariat. She thanks the editors, and especially Brendan Vickers, for their valuable suggestions.

Recurrent deadlocks and constant delay in the WTO have naturally produced discontent and disillusionment, as well as much recrimination and finger-pointing, from all sides. The turn to bilateral, regional and mega-regional trade agreements (including USA-led initiatives like the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP)) was also, in good measure, a reaction to the failures of the WTO. But this turn to bilateralism and regionalism further exacerbated disengagement from trade multilateralism.

The year 2015 should have been a proud celebration of the 20th anniversary of the organisation but it turned out to be the year of the Nairobi Ministerial Conference, where the Ministerial Declaration was unprecedented in not reflecting a consensus; rather, the statement displayed fundamental division among the members of the WTO on whether or not to even reaffirm the Doha mandates. The Buenos Aires Ministerial Conference in 2017 marked a new low for the WTO: the membership failed to even produce a Ministerial Declaration. In 2018 things took a turn for the even worse.

On 2 March 2018, US President Donald Trump declared on Twitter, ‘Trade wars are good and easy to win,’ and announced that the USA had plans to slap tariffs on steel and aluminium imports. The USA not only followed through on this threat against major trading partners and allies (and thereby triggered a series of retaliatory and counter-retaliatory measures from different sides) but also chose to hold up the appointments of members to the WTO’s Appellate Body. Donald Trump as presidential candidate had repeatedly declared his intention of finally putting ‘America First’; as President of the USA, he has framed his hostility to global trade governance in terms of the same narrative, and even threatened to pull the country out of the WTO. Both the negotiating and the dispute settlement arms of the WTO now risk paralysis – an alarming proposition in its own right, but all the more so in a world of escalating trade wars.

The problem with trade wars is that they produce lose–lose situations (Narlikar, 2018a). Especially in a world of integrated global value chains, it is often difficult to restrict their adverse effects to targeted countries.<sup>1</sup> They generate victims across the board, including within the country that has instituted protectionist measures (e.g. Huang et al., 2018). In the case of the USA, for example, it is predicted that the trade war with China will hit some of the poorest in the USA – the very same group in whose name the Trump administration claims to act via the tariff measures (Heeb, 2018). Trade wars create uncertainty and unpredictability in the system, which causes harm to all, as well as undermining one of the most promising engines for growth available to developing and least developed countries.

These costs are not to be scoffed at. But the harm that the current trade conflicts are causing goes considerably beyond the involved countries and third parties; rather, they are damaging the system as a whole. The fact that the WTO is being sidelined at each step (declarations to slap on new tariffs, retaliations and counter-retaliations, and even bilateral deals and arrangements among warring parties to de-escalate the situation, are usually made outside of the WTO, even though some of the actions are also in parallel being referred to the DSM) – is delivering bigger blows to an already emaciated system.

This combination of real and potential threats is tantamount to a crisis of trade multilateralism. If the system of trade rules were to break down, this would be sub-optimal for all parties and especially for the poorest and weakest among them.

### 3.2 Explaining the crisis<sup>2</sup>

It is commonplace to blame President Trump for the institutional paralysis the WTO faces today and escalating trade wars outside. But to do so is to confuse symptom with cause. There are at least three reasons for the crisis of trade multilateralism, and all three illustrate more fundamental and deep-rooted problems.

First, backing Trump's narrative of 'America First' is a significant portion of the US electorate that is convinced that the gains of globalisation have passed them by. They attribute increasing inequality within their society, and the job losses and declining wages that they personally endure, to the costs of international trade. Usually, the extreme hardships these groups suffer have several causes. They range from technological change to inadequate welfare mechanisms that could allow for better distribution of the gains of globalisation. But trade is often the easy scapegoat, especially as blame can be all too conveniently attributed to the international level.<sup>3</sup> Plus, imports are somewhat easier to control and curtail than technological change. The current US administration has harnessed this discontent very effectively – perhaps even fanned it further by building a narrative that links domestic inequalities and poverty within the USA to global trade governance. But the scepticism towards different aspects of globalisation – including international trade – had been building up for some time now, even prior to Trump's arrival on the scene.<sup>4</sup>

Second, while few major trading partners have escaped his ire, China has attracted particularly scathing accusations from President Trump for not playing by the rules. Here, too, it is worth recalling that this blame game is not new; prior US administrations also pointed their fingers at the rising powers in the course of the Doha negotiations. Susan Schwab, for instance, famously compared the unwillingness of the rising powers to make concessions to 'elephants hiding behind mice'; Bob Zoellick similarly expressed his frustration with the 'can't do' countries at Cancún. Nor was this mere "cheap talk" on the part of US trade negotiators; the same behaviour patterns were evident at the highest echelons of power, and expressed themselves through not just talk but action. It is often forgotten that the Obama administration also had some strong protectionist leanings, which were not so far removed from President Trump's. It was under President Obama that the USA imposed a fivefold increase on steel import duties from China, dabbled in the rhetoric of protecting US workers, showed great reluctance to make concessions in the Doha negotiations and precipitated a turn away from the WTO's multilateralism and towards the mega-regionals of the TTIP and TPP.

In large measure, this behaviour pattern (which predates Trump) is a reaction of the USA to a changing balance of power. As the BRICS (Brazil, Russia, India, China and South Africa) – and especially China and India within this group – have acquired

greater economic clout and political weight in the WTO, the expectation that will take on greater global responsibilities has risen. Amid the changing international balance of power and the domestic discourse of discontent, it is perhaps not surprising that the ability of the large middle-income countries to use/misuse loopholes in the trading system appears galling to the developed countries. Local content requirements, intellectual property rights' violations, forced technology transfer requirements and the use of subsidies might have been tolerated in the early years of Chinese accession to the WTO but now attract hostility, with China's now the world's second-largest economy and the dominant geo-political power in Asia.

Third, frustration with trade multilateralism is not unique to the USA or other Organisation for Economic Co-operation and Development (OECD) countries. The rising powers and other developing countries have also expressed their dissatisfaction with the system in the past few years. Brazil, for instance, has long pointed to the hypocrisy of the USA and the EU in demanding market access in developing countries, while keeping their own markets in agriculture highly protected. India has argued that the agricultural negotiations of the Doha Development Agenda disregard the food security concerns of its poorest farmers. The development focus of Doha, in fact, reveals just how polarised the trade debate can be between countries that often have very different visions of development and how development may be achieved with reference to individual governance structures, social priorities and national/local histories and cultures (Narlikar, 2010).

The persistence of the Doha deadlocks (going back to 2003, when the first deadlock of the round shook the Cancún Ministerial) is an important indication of just how dissatisfied virtually all parties are with the workings of the WTO. Trade multilateralism has been in desperate need of fundamental reform for a long time now.

### 3.3 Limitations of the current reform debate

The crisis of trade multilateralism has finally triggered a serious debate on reform. This debate now involves members, and concrete proposals coming from their governments (Australia et al., 2018; Canada, 2018; EU et al., 2018; European Commission, 2018). As such, it goes beyond the commendable but limited impulses provided by independent commissions, which lacked the necessary leader-level political backing to put their innovative ideas into practice.<sup>5</sup> The proposals offer different levels of detail on vision, substance and process. Some have been advanced by individual coalitions, others via coalitions of like-minded countries. But, for all the good intentions that underpin them, these efforts suffer from three limitations.

#### Technocratic content in the face of populist challenges

First, the proposals – although showing considerable variation in their degrees of generality versus specification – remain restricted to the functioning of the WTO. As such, they operate at a fairly technocratic level. And, given the scale of the problems the system faces today, even the most far-reaching of them come across as a case of being ‘too little too late’.

The European Commission's Concept Paper – perhaps the most detailed and wide-ranging in reform ideas thus far – offers a case in point. In contrast to the relatively trite and unenforceable platitudes (e.g. agreeing to fight protectionism together or reinforcing the multilateral trading system) that usually abound in many proposals and political declarations, this proposal deals seriously with some concrete problems. It tackles a variety of issues, including decision-making processes to overcome the recurrence of deadlock in the WTO and the functioning of the Appellate Body (i.e. efficiency concerns); 'levelling the playing-field' via improved transparency mechanisms, notification of subsidies, curtailment of forced technology transfer requirements and graduation requirements (i.e. fairness concerns, with measures targeting some restrictive practices of developing countries, especially China); and addressing sustainability and development concerns (i.e. fairness and legitimacy concerns, seen from the perspective of developing countries and especially least developed countries).

In identifying a range of problems that afflict the WTO, as well as opening up the discussion on reform by suggesting some concrete lines of action, the proposal is timely and useful. It works at the level of feasible technocratic detail rather than just grand political rhetoric. But in this strength also lies its biggest weakness. The paper effectively ends up preaching to the choir of the same global 'elites', and remains broadly within the same framework of a liberal institutionalism, which many trade sceptics are up in arms against. Hence, although one might expect the paper to rightly generate much interest in Brussels, Geneva and New York, it is unlikely to reassure the many groups of people – across countries – who genuinely believe they have been short-changed by the multilateral trading system. If anything, reform proposals that fail to acknowledge and address the concerns of those who fear globalisation and the power of international bureaucracies – even when well-intended and equipped with innovative ideas – risk exacerbating the resistance against free trade and strengthening the hands of the demagogues who drive it.

### Preaching to the choir

Second, there is a serious danger that the reform debate will be perceived as being dominated by the usual suspects – that is, major OECD economies plus a few token developing countries.

The Canada-led ministerial initiative, which comprised 13 parties (Australia, Brazil, Canada, Chile, the EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland), provides a powerful illustration of the problem. At face value, this would appear to be an important exercise in leadership and responsibility. With the USA and China at loggerheads in the past few months, it is perhaps not surprising that they were not at the mini-ministerial table. And one can also imagine that this mini-ministerial was not just a knee-jerk reaction to the recent months of trade drama, but a response to the years of deadlock in the WTO, during which a cacophony of multiple voices has seemed to have drowned out any attempts to reach consensus.

But this initiative seems to have forgotten another very important lesson of the multilateral trading system of the past decades, which remains relevant even today.

Multiple parties still believe that they have been marginalised not only from the gains of free trade but also from the key decision-making processes that govern it.

Several states have shared resentments about exclusion and marginalisation from trade multilateralism in the past. Recall, for instance, the long-standing complaints of developing countries that the GATT operated as a Quad-dominated 'Rich Man's Club', and their persistent bitterness about similar practices in the early years of the WTO. Similar grievances today unite a motley crowd of states and peoples: we have not only countries that refuse to accept the status of 'rule-takers' but also *people* within rich and poor countries who believe their absolute or relative poverty stems from a system of international rules in which they have no say.

Against this backdrop, the Canada-led initiative – which included neither any least developed countries/small and vulnerable economies and only one of the BRICS group of rising powers (i.e. only Brazil was included) – appears to be unfortunate. While one can see the merits of having a small group of countries revitalise the reform debate, the G20 (both at the leaders' level and at the trade ministers' level) provides just such a forum with greater legitimacy and greater critical mass. Its legitimacy derives from the more systematic representation of countries across regions and development levels as well as its extensive public outreach activities (via the T20, B20, W20 and so forth). Its critical mass stems from its inclusion of the world's largest economies. It is difficult to see what value-added initiatives like the recent Canadian one can bring that can go beyond the reach and influence (however limited) of the G20. Additionally, such an approach risks creating new fault-lines by exacerbating perceptions of marginalisation among excluded parties and ignoring their concerns.

The first two problems then can be summarised as follows: if trade multilateralism is to be injected with new life, it needs the support of the many different constituencies that are affected by it (and its breakdown). This cannot be done solely through technical discussions on the workings of the WTO behind closed doors among small groups of self-selected states.

### **It's the geo-economics, stupid!**

The third problem with much of the conversation on reform is that it takes place in an echo chamber of trade issues. This reinforces the first two limitations: the debate continues to operate at a narrow technical level, and takes place largely among those who are generally still convinced about the merits of the system. But it does something even more detrimental: by keeping the conversation focused mainly on trade issues, the reform debate fails to capture critical linkages between trade and security concerns. The severity of the challenge to trade multilateralism derives at least in part from a factor exogenous to the WTO: the changing balance of power in the system. And, while the use of economics for geostrategic purposes is far from new, fears about this are rife today in light of China's meteoric rise and controversial expansionism. This rise has certainly been facilitated by the multilateral trading system, which created new market opportunities for China's state-led economy. The fact that there are loopholes in the system that China and others have been able to exploit has contributed to the fundamental questioning of the WTO by President Trump and others.

Even if the first two problems were to disappear, and large swathes of populations across the world did not need convincing on the gains of globalisation, this third problem would remain serious enough to wreck trade multilateralism. Technocrats need to recognise that trade need not always represent a 'good' for its own sake, or even a potentially positive force for growth and development. Rather, it can and has been used and misused also for geostrategic purposes. Functionalist ideas of reform that focus solely on the trade silo are unlikely to find feasible and lasting solutions, precisely because they miss out on the bigger picture of power politics and global governance.

### 3.4 Developing a game-changer: Recommendations

The WTO, and the system of trade multilateralism that it underpins, is in a rut. The reform debate thus far, while a step in the right direction, has not been able to break free from this rut and create new points of departure. Can a game-changer be developed? And, if so, how?

Despite all the caveats highlighted in the last section, there is considerable scope for action. Below are two routes whereby steps might be taken to rescue and reform trade multilateralism – one develops an academic agenda for researchers, and the other offers policy recommendations for practitioners.

#### Academic agenda

The academic community bears a share of the responsibility for the backlash against globalisation and the imminent breakdown of trade multilateralism, in two ways. First, scholars from different academic disciplines, but perhaps especially from the field of economics, assumed that the gains from multilateral trade were so obvious to everyone that they did not explaining. In contrast, the tirades of the anti-trade brigades have been much louder and better organised in recent years. And second, different disciplines were so caught up in the stories of aggregate success that they did not take seriously enough the anger of those who had incurred losses from different aspects of globalisation. Through these omissions, academia helped fuel misunderstandings and exaggerations against 'elites' and 'the establishment'. Four steps may be important, if we wish to correct some of the damage that has resulted from these academic inadequacies.

First, the study of narratives needs more academic attention. Systematic analysis of why some narratives win over others is imperative today (e.g. why the anti-trade rhetoric has acquired so much credence in the USA in recent years, or why nationalist narratives are driving domestic politics and international policies across countries). Interestingly, and partly in cognisance of the failures of the 'dismal science', behavioural economics has taken some pioneering steps in this direction (Akerlof, 2007; Akerlof and Shiller, 2009; Shiller, 2017). Other fields can also make valuable contributions to this cutting-edge field of research, including on the important normative implications of particular narratives (Narlikar, 2019 forthcoming).

Second, while the Doha deadlocks offer us several interesting and detailed insights into the problematic workings of the WTO, a particularly important lesson relates

to the extent of polarisation among the members. If trade multilateralism is to be brought into functioning order again, it will not be enough to come up with new formulae for decision-making within the WTO. Rather, it is extremely important to understand and integrate not only the *interests* of groups and countries that believe themselves to have been marginalised from the agenda-setting process, but also the different *values* and *visions* they bring to the negotiating table.

To do this effectively, we need to adopt a 'global approach' to social science research, which decentres the West and tries to understand the countries of the Global South (and also groups of people in the North and the West) on their own terms and based on their own experiences (rather than only Western lenses) (Narlikar, 2016). For example, to understand India's recalcitrance to make concessions in the Doha Development Agenda's agriculture negotiations, one must take into account the country's historic concerns with food security as well as its negotiating culture. Similarly, to understand President Trump's antipathy towards multilateralism, it is essential to study this administration's preference to engage in bilateral deals, as well as the long-standing isolationist streak in US foreign policy. In order to achieve negotiation breakthroughs in a world of increasing multi-polarity, the study of the human cultural dimension will be essential.

Third, even the most innovative efforts to reform the WTO will not yield success if researchers do not devote enough attention to understanding issue linkages between trade policy and security. To facilitate a better understanding of the matter, scholars will have to step outside of their comfort zones and engage in research that transcends disciplinary/sub-disciplinary divides. For example, collaborations between political economists and those working in strategic studies, and also economists and political scientists, could be fruitful for exploring the links between Chinese trade policy and geo-political ambitions and thereby generating appropriate policy responses.

Finally, more research needs to go into the impact that automation and Artificial Intelligence will have on our societies, economies and possibly even identities. A good proportion of the anger about job losses in Western countries is usually misdirected towards trade and migration, whereas technological change is often the real 'culprit'. Social scientists need to systematically distinguish between the different effects of different aspects of globalisation, and also communicate these distinctions more clearly through public engagement activities. They also need to engage with philosophers as well as natural scientists and engineers to develop ways in which societies might best harness the opportunities of technological innovation, and also manage the challenges.

### Policy recommendations

Given the severity and urgency of the problems that trade multilateralism faces, is there any scope for or hope of policy action? Three avenues may be especially timely.

First, the temptation to secure bilateral deals under conditions of uncertainty at the multilateral level is high, but it must be avoided. But this is a risky strategy for two reasons: it fails to address the real problems that afflict the system and it weakens multilateralism further by bypassing it via bilateral arrangements. And, the greater

the number of major economies that give in to such deal-making, the more likely it is that there will be a further unravelling of the system, with costs to everyone involved.

Second, bypassing the system through bilateralism is not the only strategy to be avoided. Practitioners would also be well served to go beyond the usual banal statements that reiterate support for the rules-based multilateral trading system. The time for empty promises is over. Concrete measures need to be taken to reform the system. While the reform debate represents an important step in this direction, as per the reasons outlined in the previous section, this narrow and technocratic approach will not suffice. A more holistic approach is necessary, which should include technocratic fixes but also bring together a broader vision for making trade fairer and more sustainable. While this process was begun under the German Presidency of the G20 in 2017, it has stalled amid the escalatory dynamic of trade wars in 2018. Many of the ideas developed as part of the G20 process then (such as the idea of ‘legitimate trade defence instruments’ (G20, 2017) are still worth reviving and developing further.

Third, the most difficult but also the most important policy response would be for practitioners to work hand in hand with scholars on the issue of narratives. Politicians and policy-makers, especially of liberal and pro-trade persuasions, have been at least as remiss as most scholars in assuming that the benefits of trade multilateralism are obvious to everyone. This positioning stands in stark contrast to the much more systematic and concerted efforts from both the Left and the Right to discredit different aspects of globalisation and trade multilateralism, as well as other values such as the rule of law and democracy. Even if we were to come up with a silver bullet of a solution for reforming the WTO, and we were to do this in tandem with other measures for reforming global governance across multiple fronts, all these efforts would be futile if they were not framed with reference to credible causal stories that people could identify with.

Importantly, the last two measures – adopting a more holistic approach to reform and developing better narratives – cannot be restricted to the international level. Debates about reforming trade multilateralism need to bring in voices from within states and also across countries. Any proposed policy measures would need to encourage and open up space for countries to come up with new social contracts with their people, which would allow for better welfare measures to make use of the national gains from globalisation. Smarter narratives would need to work *within* countries at all levels, and also *across* countries to build networks and alliances around these narratives. Such multi-level, cross-country action will certainly not be easy to achieve. But a new bargain on trade multilateralism, built on such measures and reinforced via such narratives, holds unprecedented promise for being not only more inclusive and egalitarian but also more efficient and more sustainable.

## Endnotes

- 1 The scale of potential damage was likely to be higher still, given that the Trump administration, especially in its first few months, chose to target a range of countries, from its competitors like China to close allies like Canada and the EU.
- 2 This section draws directly on Narlikar (2018b), as do parts of the previous section.

- 3 Scholars and technocrats, by assuming that the gains countries and people accrue from the WTO are self-evident, have certainly not helped bolster the cause of trade multilateralism.
- 4 The USA, moreover, is not the only country where we are seeing an emergence of anti-trade, anti-multilateralism narrative. The result of the Brexit referendum represented a triumph of the Brexiters' narrative, for example on 'Take Back Control', in contrast with the somewhat complacent and lackluster Remain campaign.
- 5 Examples are the Warwick Commission, the Bhagwati-Sutherland Commission and the Bertelsmann Commission, usually comprising independent experts, retired international civil servants and former trade ministers.

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## Chapter 4

# WTO Reform: A Forward-looking Agenda on Environmental Sustainability

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*Carolyn Deere Birkbeck\**

### 4.1 Introduction

As the WTO approaches its 25th anniversary in 2020, discussion of a reform agenda is taking centre stage. This chapter argues that environmental sustainability warrants a prominent position in any WTO reform agenda, especially in light of the UN's Sustainable Development Goals (SDGs).<sup>1</sup>

At present, deliberations on WTO reform have two main intersecting streams: the first considers what the substantive forward-looking agenda of the WTO should be (primarily in terms of the topics for negotiation); and the second looks at how the multilateral trading system's institutional design and processes could be improved.<sup>2</sup> Proponents hope that a WTO reform agenda may mitigate uncertainty about the WTO's future, address systemic challenges and make the organisation more relevant and 'fit for purpose'.

Calls for WTO reform are not new;<sup>3</sup> they have arisen in the wake of each successive crisis in WTO negotiations.<sup>4</sup> Environmental advocates have been at the forefront of such calls since the WTO's first days. Environmentalists, for instance, led the charge for improved transparency of WTO negotiations and dispute settlement and spurred many governments to take more seriously the need for stakeholder participation in domestic trade policy-making processes. Since 1999, failed efforts to launch a Millennium Round of negotiations at the Seattle WTO Ministerial have served as a reminder of the power of environmental constituencies to alter the political feasibility of new trade deals.

Over the subsequent 20 years, the economic relevance and environmental urgency of sustainability considerations has grown enormously. Mounting alarm about the pressing need for more concerted action to meet the Paris Agenda climate goals, environmental crises on multiple fronts, growing evidence that earth's 'planetary boundaries' are already being surpassed, and the UN's 2030 Sustainable Development

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\* Carolyn Deere Birkbeck is a Senior Research Associate at the University of Oxford's Global Economic Governance Programme and a Visiting Fellow at the Graduate Institute's Global Governance Centre. The views expressed in this essay are those of the author and do not necessarily represent those of the Commonwealth Secretariat. The author is grateful for informal feedback on drafts and ideas over the past year from Christophe Bellmann, Bernice Lee, Ricardo Meléndez-Ortiz, Jean-Marie Paugam as well as from the Commonwealth Secretariat and their external reviewers.

Agenda all underscore the need for a more environmentally sustainable and resilient global economy.

The quest for greener global markets has clear trade and commercial dimensions. New business opportunities linked to a more sustainable global economy are estimated to reach US\$12 trillion or more by 2030 (Business & Sustainable Development Commission, 2017). Global trade in environmental goods alone is projected to reach US\$2–3 trillion by 2020. In addition, a range of international organisations have published reports outlining ways that the green economy could boost employment opportunities through green jobs, revitalize ailing economic sectors and regions, and aid progress on development, inclusiveness and poverty reduction.<sup>5</sup>

Although many companies continue to lobby to weaken or limit the scope of environmental legislation, many business leaders have rightly concluded that their long-term commercial success is intrinsically linked to sustainability considerations, such as ensuring reliable access to natural resources, reducing exposure to environmental risks, including climate-related natural disasters, and minimising reputational risks that can flow from poor environmental performance (Whelan and Fink, 2016). Already, a growing number of the world's largest businesses are working to improve the sustainability of their global value chains and to respond to growing demand for more sustainable consumption options. Environmental pressures on business to decarbonise, integrate environmental considerations across the life cycle of goods and services (from extraction to production, distribution and disposal) and promote 'circularity' (where businesses models better design, recover and reuse resources for maximum use throughout their production processes) (Circle Economy, 2019) each also have implications for trade officials charged with designing coherent trade policy frameworks (Yagamuchi, 2018).

In good news, there is now broad recognition in both the trade and environmental policy arenas, that trade and investment flows, rules and policies can both exacerbate environmental challenges and support environmental protection. The leaders of the WTO and the UN Environment Programme (UNEP) each argue, for instance, that greater coherence between trade and environmental policy-making is vital for boosting sustainable trade<sup>6</sup> and for promoting innovation and markets in sustainable goods, services, technologies and business models. From across the spectrum of the WTO's membership, senior trade officials regularly highlight the role that trade must play in advancing progress on the SDGs, which include numerous trade-related goals, targets and indicators. Building on such statements, the time is ripe not only for renewed political attention to the trade–environment interface but also for updating the trade–environment agenda to 'see and treat the economy and environment as one' (Bacchus, 2018).<sup>7</sup>

In terms of the current WTO reform discussion, both the European Union and Canada have circulated papers that refer to the importance of sustainable development. The EU, for instance, argues that a modernised WTO needs to address the sustainability objectives of the global community.<sup>8</sup> The fact that sustainable development is already on the table provides a further basis from which to strengthen the linkages between the need for WTO reform and a more prominent environmental agenda.

And yet, despite the clear imperatives for action, environmental priorities do not yet have the prominence they deserve with regard to either the substantive or the institutional aspects of current WTO reform discussions.<sup>9</sup> To date, aside from ongoing efforts to conclude WTO negotiations on fisheries subsidies in 2019, few concrete recommendations have been advanced on how a WTO reform process could be harnessed to help advance the many environmental dimensions of the SDGs, or, indeed, any other environmental issues at all. Further, on WTO reform, as on WTO agenda-setting more broadly, the voice of the smallest and poorest countries that most urgently need action on trade opportunities, as well as on the SDGs and environmental challenges such as climate change, is missing.

Nonetheless, growing interest in a WTO reform agenda offers an opportunity to take stock of the trade–environment agenda in light of wider sustainable development goals, reinvigorate strategic thinking on how address long-standing environmental priorities, update the trade–environment agenda to reflect new and emerging sustainability concerns and opportunities, and set priorities. More focused attention among trade officials to key global environmental priorities may also provide a much-needed lever for building public support for a rules-based multilateral trading system and for re-energising negotiations.

This chapter aims to spur discussion on priorities for a forward-looking environmental agenda on WTO reform. The first part reviews the evolving trade and economic policy landscape, the evolution of tensions on the trade–environment interface and the current state of play on environment at the WTO. Drawing together an otherwise fragmented picture, the second part of the chapter takes stock of the broad range of trade-environment concerns as well as proposals and perspectives on how the WTO could better promote environmental sustainability. The chapter concludes with a set of specific recommendations for institutional improvements.

## 4.2 The evolving context and state of play on trade and environment

### Evolving global trade context

Central among the factors contributing to revived interest in WTO reform is the widespread view that multilateral trade rules must be updated to respond to the evolving global trade context, 21st century economic realities, and pressing global challenges.<sup>10</sup> Strategic discussion of a future environmental agenda on trade must reflect ongoing changes in what is traded and among whom, as well as future trade trends.

The past three decades have seen tremendous growth of trade overall, and especially growth of trade in commodities and services (now representing more than a quarter of the value of world trade). This growth has been coupled with the expansion of logistics, shipping and airfreight industries, and increasing links between trade and investment flows. Since the Uruguay Round established prevailing WTO rules, the way trade happens has changed considerably, with important environmental implications. Together, the integration of supply and production networks through

global value chains (GVCs) and the rise of the digital economy have changed how many goods and services are produced and delivered around the world (WEF, 2018; WTO, 2018b, McKinsey & Co, 2016). The growing role in the global economy of new technologies – such as the Internet of Things, 3D printing, Artificial Intelligence, blockchain and big data – is transforming the context for trade policy-making, while also generating new environmental opportunities and challenges.<sup>11</sup> Further, the top issues on the trade negotiation agenda increasingly intersect with decision-making at the border (such as on customs and trade facilitation) and ‘behind the border’ by national legislators, government agencies, regulatory authorities and courts, including on environmental matters.

Meanwhile, the economic dynamics and geo-political context for trade negotiations, including on environmental questions, has been complicated by the rise of developing countries’ share of world trade in terms of both exports and imports; the growing role of China and emerging economies; the expansion of South–South trade; the retreat of the United States from leadership on trade; and the recent spate of tariffs imposed by the world’s largest trading powers.

### Trade and environment: An evolving debate with enduring tensions

In the 30 years since public concerns propelled ‘trade and environment’ into the global political and media spotlight, the range of issues on the table has expanded, the number of engaged stakeholders has grown, and the priorities, strategies and diversity of actors have evolved considerably. Despite initial resistance from most trade negotiators – especially from developing countries fearful of an environmental agenda dominated by Northern civil society groups – there is now broad acknowledgement that international trade rules and policies are directly and deeply relevant to environmental performance. In addition, this is growing understanding among trade officials that environmental considerations will increasingly impact commercial and trade prospects.

The potential and need for trade, environment and sustainable development to be ‘mutually supportive’ is now routinely integrated into numerous international declarations and high-level statements,<sup>12</sup> and is also reflected in repeated appeals to pursue win-win opportunities on trade and environment.<sup>13</sup> In 2018, the titles of two WTO publications – *Making Trade Work for the Environment, Prosperity and Resilience* (WTO and UNEP, 2018) and *Mainstreaming Trade to Attain Sustainable Development Goals* (WTO, 2018a) clearly convey recognition of the importance of greater coherence.

Recognition, however, falls far short of consensus on priorities or on concrete actions required. Faced with competitiveness concerns, pressing development priorities, pressures to promote economic growth and political shifts towards populism, governments continue to spar over which are the critical environmental priorities, who should be empowered to decide, how to share the economic costs of environmental action (and of failures to act), and the extent to which trade rules should be put at the service of environmental goals.

Underpinning these debates are a set of long-standing trade–environment tensions – most centrally those related to apprehensions that environmental measures can

disguise protectionism, distort trade, and limit market access. In particular, developing countries frequently express concern that sustainability requirements in importing countries can hamper the success of efforts to boost value-added production and exports, deemed vital to local development prospects. Recent trade disputes highlight the enduring relevance of arguments about the efficiency of trade measures as a means for achieving environmental goals and the challenges associated with crafting trade-related environmental measures that adhere to trade rules.

More broadly, there are ongoing debates about the most effective processes for cooperation on environment and trade matters, and which level of governance – national, bilateral, regional or multilateral – is most appropriate. Although few dispute that key to success on environment-trade intersections is the strengthening of environmental laws, institutions and enforcement at the national level, questions abound about the ‘right’ trade policy solutions where national and international responses to shared environmental problems flounder. Further, frustration with traditional modes of global governance and policymaking on both trade and on the environment - has spurred a rising emphasis on citizen- and industry-led initiatives, private-public partnerships and ‘bottom-up’ solutions by cities, such as on climate change. On fisheries, trade-related instruments are being deployed at the regional level by fisheries management organisations and in multilateral environmental agreements.<sup>14</sup> Such examples have prompted calls for refocusing trade-environment efforts on ‘bottom-up solutions through local and regional partnerships...’ while supporting and linking these together through ‘conducive, enabling international rules and frameworks’ (Bacchus, 2018).

Finally, many environmental activists point to more profound tensions between sustainability imperatives and business as usual on trade policymaking, arguing that environmental imperatives demand a systemic transformation of the global trading system (FOE, 2018). The Our World Is Not For Sale global network of civil society groups, for instance, describes existing trade agreements as mercantilist exercises dominated by big business interests that entrench a model of capitalism – and associated investment, production and consumption patterns – that are fundamentally at odds with ecological sustainability (OWINFS, 2014, 2015). Amidst growing array of environmental crises, the cumulative scale effects of current economic models and the demands of an expanding global population, there is little doubt that protecting the environmental for future generations will demand difficult trade-offs, innovation, and radical changes in consumer behaviour, business strategy, and economic policymaking, with numerous implications for trade policy and rules as well.

## State of play on trade and environment at the WTO

At the WTO, there are some encouraging signs of progress on the environment. The breadth of the WTO’s engagement on environmental matters is expanding, as is the array of environmental topics under consideration.

A select set of environmental issues features on the WTO’s current negotiating agenda and in recent years Members have made formal submissions on a number of trade-environment issues, including fisheries subsidies, environmental goods, fossil

fuels, intellectual property and genetic resources, and climate change adaptation. The WTO's Committee on Trade and Environment (CTE) has a regular agenda of mandated environmental topics for discussion<sup>15</sup> and also facilitates information sharing on an array of environmental topics beyond those formally on the table for discussion or negotiation.<sup>16</sup> In addition, a growing range of environmental topics also arise in other WTO Regular Committees (such as those charged with Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS)), negotiating sessions (e.g., some aspects of agricultural negotiations focus on environmental questions) and informal consultations (such as on fossil fuel subsidies). Meetings of the SPS Committee, for instance, cover a range health and safety measures that have environmental dimensions, such as those that restrict imports of biotech products and food bans (WTO, 2018d).<sup>17</sup> Environment issues are also the focus of WTO processes for notification of environmental standards,<sup>18</sup> and routinely arise as a subject of WTO training, capacity-building and Aid for Trade (such as to build capacity to meet environmental standards),<sup>19</sup> as well as research and *ad hoc* workshops.<sup>20</sup>

On the other hand, environmental advocates are rightly concerned about the slow pace of progress in the WTO on many longstanding trade-environment issues (such as environmentally-harmful subsidies and sustainable agriculture) and stress the need to update the WTO's environmental agenda (particularly on critical environmental challenges such as climate change).

Rooted in negotiations conducted over 25 years ago, the WTO's existing environmental provisions reflect political compromises on what environmental issues warranted attention and how.<sup>21</sup> Even on issues that have been on the WTO negotiation agenda since 2001 – such as fisheries subsidies in the rules negotiations – concrete solutions remain elusive, meaning that no practical benefit to the sustainability of the world's increasingly threatened fish stocks has emerged.<sup>22</sup> Similarly, negotiations to address the relationship between the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Convention on Biological Diversity (an issue of particular importance to developing countries) have not produced concrete outcomes. Widely hailed efforts to open trade in environmental goods and services have stalled. Interest in addressing the environmental dimensions of trade in services, agriculture and industrial products, weak to begin with, has dwindled along with the Doha negotiations on those topics. Meanwhile, both the environmental impacts of trade (such as scale effects) and the market access impacts of environmental measures are poorly understood, in large part because there is little by way of systematic assessment or reporting on trade-environment intersections at the WTO.

Although the track record of WTO dispute settlement proceedings has put to rest some of environmentalists' worst fears about WTO jurisprudence trumping or chilling national environmental regulation,<sup>23</sup> WTO rulings (such as on consumer labelling initiatives and national policies relevant to climate changes) prompt continuing calls to update and clarify trade rules to reflect pressing environmental

imperatives. Meanwhile, the clean energy industry is subject to an escalating number of retaliatory trade remedies at the WTO.<sup>24</sup> In 2018, China's ban on imports of non-industrial plastic waste (two thirds of the world's plastic waste had previously been shipped to China for recycling) was raised for discussion in the WTO's TBT Committee (WTO, 2018f) and is poised to renew wider debate on the opportunities, challenges and efficacy of using trade policy tools to advance environmental objectives, whether at the national level or in international environmental agreements (Grosz, 2011).

### 4.3 Updating the WTO trade and environment agenda: Taking stock

Priority setting on an environmental agenda on WTO reform demands a clear overview of the breadth of the trade–environment policy challenges and opportunities WTO members will face over the coming decade. Not every trade–environment issues demands or warrants multilateral attention at the WTO. Some issues may warrant inclusion on the WTO negotiation agenda, while others may benefit from attention through the WTO's other functions, such as through notifications, research, or a boosted WTO role in facilitating policy dialogue and assessment. Some issues may be more productively pursued through other international processes, while a focus on stronger policy action and coordination at the national or regional level would be most effective for others. Further, some trade–environment topics may be more swiftly addressed outside the policy-making arena through practical initiatives and partnerships led by business or civil society.

The following discussion takes stock of the range of issues that could form part of an updated and forward-looking trade and environment agenda at the WTO.<sup>25</sup> Importantly, the review is not limited to trade–environment topics already accepted by WTO members as worthy of attention or that arise in the context of WTO deliberations, but also steps back to consider proposals and ideas present in wider trade–environment discussions beyond the WTO. The review clusters trade–environment issues in five categories: 1) well-established topic-based negotiations; 2) long-standing cross-cutting issues of enduring relevance but in need of updating; 3) critical, established global environmental priorities; 4) vexed, neglected and (re)-emerging topics; and 5) proposals for bolder, more systemic rethinking due to shifts in economic dynamics, technological trends as well as new environmental approaches. The review starts with topics that have the greatest 'maturity' in the WTO setting – namely those that already have a place on the agenda of WTO negotiations and committees, but this does not reflect an assessment of priorities in terms of urgency, the prospects of political success, or potential environmental pay-offs. Looking ahead, there are clearly strategic choices to be made about priorities in terms of where the environmental impacts or gains might be greatest, and how much to target 'low-hanging fruit' that could produce immediate environmental benefits versus more vexed trade–environment issues where positive environmental outcomes may be more significant but take longer to achieve.

## Well-established and ongoing negotiation topics

- **Concluding negotiations on fisheries subsidies.** At the 2017 Buenos Aires Ministerial Conference (MC11), ministers decided on a work programme to conclude negotiations on WTO disciplines on fisheries subsidies launched in 2001,<sup>26</sup> with the goal of adopting an agreement at the 2019 WTO Ministerial Conference (MC12) that delivers on the multilateral commitment made in the SDG 14.6.<sup>27</sup>
- **Negotiations on environmental goods.** Over two years have lapsed since governments failed to conclude a plurilateral deal to eliminate tariffs on certain environmental products at the WTO. Although there are ongoing debates about definitions, methodologies, the appropriate scope of the negotiations, and the scale of anticipated environmental benefits, a number of participants in the negotiations say they remain fully committed and ready to re-engage when conditions are appropriate.<sup>28</sup>

## Long-standing cross-cutting issues of enduring relevance

A number of long-standing crosscutting trade-environment issues warrant a fresh look and updating as part of a forward-looking agenda:

- **WTO, MEAs and international standards.** The relationship between WTO rules, MEAs, and the specific trade obligations some include have been on the WTO agenda in various forms since its creation, as has the status of international environmental organisations. From an environmental perspective, the underlying objective has been to ensure trade rules do not trump MEAs or trade-related provisions taken to implement them. In recent years, calls for trade benefits to be conditioned on ratification and implementation of certain MEAs, such as the Paris Agreement on climate change, signal that the 'old' issue of MEA-WTO linkages may re-emerge.<sup>29</sup> In addition, as the focus on environmental standards in the global market place grows, we can also expect greater scrutiny of international standards and standard-setting processes, particularly those referred to in WTO dispute settlement proceedings.
- **Trade rules and environmental measures.** A long-standing environmental priority on trade has been to ensure trade rules (such as on TBT, SPS, subsidies and government procurement) do not prevent, weaken or discourage governments and stakeholder groups from adopting and enforcing standards and other measures to protect the domestic environment. Although the environmental impacts of trade agreements are widely assessed in terms of the trade flows of international goods and services, their environmental impact is increasingly found in how they shape domestic regulatory environments, along with the organisation of production and consumption. While the expanding array of voluntary, private environmental standards has long been a focus of trade-environment discussions at the WTO, growing pressures on governments to be more active on environmental product standards and labels are likely to spur renewed discussion of the WTO's rules on labelling.<sup>30</sup> Similarly, the trade implications of growing efforts by governments to use taxes and government procurement to advance environmental goals will also raise their profile as key trade-environment issues.

- **Regulatory cooperation and the environment.** As international trade negotiations increasingly focus on smoothing regulatory differences to reduce business costs, closer scrutiny of domestic regulation can be expected. This in turn is likely to reignite debate on how to balance efforts to strengthen regulatory cooperation with concerns for sovereignty, democratic decision-making by national legislatures, and the ‘right to regulate’ as well as different national preferences with regard to ethical concerns, environmental and health risks, the use of scientific evidence, and the precautionary principle.<sup>31</sup>
- **‘Like products’ and production and process methods (PPMs).** Private environmental standards and voluntary labelling initiatives place growing emphasis on differentiating ‘like’ products based on the sustainability of production and process methods. Both consumers and governments alike are asking more questions about the sustainability of goods and services on matters as diverse as the carbon footprint of products, the greenhouse gas emissions of production, the amount of water used, product design, the amount of recycling of industrial materials used, the cost of cleaning up-related pollution, and packaging. This growing spotlight on production and processing methods, along with pressures for greater policy measures to promote greener global value chains, provide strong reasons to consider whether and how trade rules may need updating (Vogel, 2009). In the trade policy arena, efforts are already underway to promote coherence among schemes to minimise consumer confusion and market access barriers (particularly for developing countries), explore how some standards could create new market access opportunities, especially for developing countries (Lernoud et al, 2017; UNFSS, 2018), and encourage greater transparency and input from developing countries and the public.
- **Dispute settlement and environmental protections.** Here, a key focus of environmental groups is to ensure dispute settlement proceedings do not override national environmental laws or ‘chill’ environmental law making and implementation by reducing the scope – or perceived scope – to develop and apply environmental standards for products and services. Although many trade experts consider that legal questions related to the interpretation of Article XX exceptions in WTO Agreement have been settled, as new disputes arise we can expect continued discussion of how WTO rules can strike the balance between core WTO principles, such as non-discrimination, and environmental imperatives, as well as on the interpretation of WTO rules by the WTO’s Appellate Body and possibilities for more cooperative approaches to dispute resolution on trade-environment issues.
- **Trade barriers, liberalization and the environment.** Key issues at hand include the environmental impacts of the recent spate of new tariff barriers, as well as the environmental efficacy and WTO compatibility of environment-related export restrictions and import bans. In terms of liberalization, the potential environmental gains from removing trade restrictions and distortions continue to merit focused attention. Key proposals at hand include trade liberalisation to boost flows of more innovative, environmentally beneficial goods or services, as well as the removal of measures, such as certain subsidies, that are both

trade distorting and that protect or support industries with environmentally harmful production/processes. A key challenge for discussions on stronger WTO disciplines on environmentally harmful subsidies is to adequately address development considerations, particularly for small-scale producers.

- **WTO and Regional Trade Agreements (RTAs).** The proliferation of regional, bilateral and plurilateral trade agreements has yielded a diversity of environmental provisions, which in turn signal an evolving set of environmental possibilities for the WTO. We can anticipate ongoing efforts to discern what lessons RTAs may provide for WTO negotiations and rules (Monteiro, 2016; Morin, 2018). The recent Canada-EU Trade Agreement (CETA) has the most comprehensive and innovative environmental chapter to date, as well as a chapter on trade and sustainable development, along with numerous environment-related provisions in other chapters. Despite important reservations from some environmental groups, the CETA is widely viewed as a new benchmark for future environment-trade efforts.<sup>32</sup>
- **Assessment.** Despite a flurry of *ad hoc* activity around Sustainability Impact Assessment in the early years of the Doha Round, there is no routine process in the WTO for assessing the environmental impacts of trade and investment flows, rules and policies or how trade rules address environmental goals,<sup>33</sup> and there are no mechanisms for systematically integrating such evidence into trade and investment decision-making processes. Efforts to monitor implementation of the UN's 2030 Agenda will add to political pressures on assessment.

### Critical, established global environmental priorities

- **Progress on the SDGs.** A broad range of stakeholders and governments regularly appeal to the need for trade flows, rules and policies to contribute to the achievement of the SDGs. SDG 17 – Partnerships for the Goals – recognises trade as a means for implementation of the 2030 Agenda as a whole, and gives the WTO a clear role in promoting a ‘universal, rules-based, open, non-discriminatory and equitable multilateral trading system’. In addition, specific SDGs are routinely cited at the WTO to build the political case for action on particular negotiating topics and proposals (Bellmann and Tipping, 2016). Specific environment-trade-related goals and targets in the SDGs include those related to fisheries and fossil fuel subsidies, for instance, as well as hunger, sustainable consumption, healthy oceans,<sup>34</sup> and illegal wildlife trade.<sup>35</sup> There are also efforts to harness Aid for Trade efforts to advance the SDGs and to engage the WTO in monitoring and reporting on progress (Tipping and Wolfe, 2015). To date, however, endorsements of the SDGs in the WTO context are yet to be matched by the range of concrete, practical actions that their achievement will demand.<sup>36</sup>
- **Disciplining fossil fuel subsidies.** SDG 12 includes a target to rationalise inefficient subsidies that encourage wasteful consumption. At the 2017 WTO Ministerial Conference in Buenos Aires, a group of 12 countries issued a Ministerial Declaration on Fossil Fuel Subsidy Reform (see Norway in Geneva, 2017), arguing that the WTO has a role to play as a forum for advancing negotiations on disciplines to

phase out subsidies offered for the production and consumption of fossil fuels, and through enhanced transparency and reporting. While opponents insist the WTO is not the appropriate venue to discuss climate matters, some delegations do support information sharing and discussion of the many methodological issues in the WTO's CTE.<sup>37</sup> Meanwhile environmental advocates are focused on consolidating political will and discerning the most effective modalities for addressing fossil fuel subsidies reform through trade disciplines.

- **Wider climate action.** While many governments fear that climate action in the WTO arena could threaten their competitiveness, pressure is mounting. In addition to action on fossil fuel subsidies, stakeholders and governments have made numerous proposals on other ways in which trade and trade rules could assist climate change mitigation and adaptation and also facilitate more emissions-efficient production. These include proposals on the liberalisation of products with climate benefits (including but not limited to clean and renewable energy technologies); carbon-pricing, including through emissions trading regimes, border taxes and other border carbon adjustments; trade-related transportation emissions; energy policy (such as proposals on a Sustainable Energy Trade Agreement and on biofuels); carbon passports; consumer-facing policy instruments such as labels, information campaigns and regulatory standards that differentiate products based on carbon footprints; and unilateral actions at the national level to restrict carbon emissions. Small island developing states (SIDS) have also highlighted the particular trade-related challenges they face in the context of climate change and extreme weather events, such as with regard to their tourism sectors.

### Vexed, neglected, and (re)-emerging trade-environment topics

A number of trade-environment issues have been under discussion for many years, or even decades. In the case of some 'vexed issues,' a combination of complex technical challenges, divergent interests and/or political differences frustrates efforts to achieve solutions. Many trade-environment topics are relevant to more than one WTO Agreement, intersect with other trade-environment challenges, and have development dimensions, all of which are difficult to address in the context of long-established silos of WTO agreements, negotiating sessions and committees. Some new topics are emerging, although many of these represent updated versions of long-established trade-environment topics. Meanwhile, some important enduring trade-environment tensions continue to be neglected; they are routinely sidestepped, ignored or deferred for attention in other venues or at some future time. In some cases, this is because governments judge the topic too contentious, too complex, too premature, or beyond the remit of the WTO. In other cases, the political will or incentives to engage are missing, or proponents deem the chances of political success too slim to justify resource-intensive campaigns for action.

A clear example of a neglected crosscutting issue relates to **the scale effects of trade**. In a world where most governments still struggle to provide effective environmental governance, the long-standing environmental concern is that trade opening can expand market opportunities in ways that fuel and exacerbate unsustainable

production processes and environmental degradation, or facilitate a ‘race to the bottom’ whereby industries locate production where environmental regulations and institutions are weak. We can expect pressure to address the role trade policy should play with regard to the climate impacts of the growing scale of global trade, and in particular to the **emissions related to increased transportation** – by air, sea and land – as well as debate on the extent to which these may be offset by trade in more sustainably produced goods (Coe, 2014).<sup>38</sup>

The issue of **environmental taxes and charges** has been on the CTE’s agenda for discussion since the creation of the WTO. While environmental taxes are not new, the push for greener growth and a more low-carbon future is prompting many governments to consider and implement a far more comprehensive set of environmental charges and taxes. The range of environmental taxes includes pollution taxes, energy taxes, transport taxes, and resource taxes.<sup>39</sup> On the trade policy front, there is already active discussion among experts and some governments of the implications of proposals for border taxes and other border carbon adjustment proposals that aim to price carbon.

On the agricultural front, there is a push for trade policy frameworks that better support **sustainable, regenerative agriculture and food systems** (Needelman, 2014; FOE, 2018). Amidst growing recognition of the links between global agricultural supply chains and trade flows as drivers of deforestation,<sup>40</sup> biodiversity loss,<sup>41</sup> land degradation, soil erosion and desertification (Brack et al, 2016), the vital importance of agricultural trade for many developing countries makes action on these issues politically complex. Already, concerns about the links between trade, deforestation, and expanding palm oil, beef and biofuel production have spurred calls for more integrated policy-making on energy–agriculture–forests and trade, as well as initiatives to promote ‘deforestation-free’ commodities. As climate advocates argue in favour of more plant-based diets, we can also expect calls for agricultural trade policy to the better address intersections between climate, environment, public health and animal welfare agendas.

**Growing trade in commodities and natural resources** is accompanied by concerns about environmental impacts of extractive industries, including on ecosystem services, and about the economic and commercial risks associated with uncertainties about long-term access to resources (Koellner, 2013; Lee et al, 2012). With global demand for both renewable and non-renewable resources growing, increased competition over natural resources has seen some governments use trade and investment policies as instruments to secure access at home and abroad. Given the heavily traded nature of fuels and non-renewable minerals, there is growing attention to the contribution that improved international trade and investment frameworks could make to greater sustainability (Bellmann, 2016), including with regard to PPMs in extractive industries (Cottier, 2016), local content requirements for sustainable development purposes (Ramdoo, 2015), and export restrictions (Espa, 2015).<sup>42</sup>

Meanwhile, developing country governments and civil society groups continue to call for action on the relationship between the TRIPS Agreement, biodiversity, the protection of traditional knowledge (TK) and folklore. They argue for the completion

of a review, mandated by the TRIPS Agreement, of its provision on exclusions from patentability in Article 27.3(b).<sup>43</sup> They have also called for negotiations to address the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity, tabling proposals for requirements to disclose the source of biological material and associated traditional knowledge used in inventions. Developed countries on the other hand argue that the 2001 Doha Declaration called for discussion by the TRIPS Council of that relationship, but not negotiations.

Any resurgence of WTO services negotiations will likely revive debate about the intersection of **trade in services and the environment**.<sup>44</sup> There is considerable optimism about the environmental opportunities that could emerge from more liberalised trade in environmental services (such as sewage services, waste disposal, recycling, reduced vehicles emissions, nature protection services, eco-tourism, and environmental construction and engineering). However, environmentalists have also voiced fears about the potential environmental impact of services liberalisation in certain sectors, most notably in regard to trade in water services (FOE, 2001).

A particularly vexed trade-environment issue relates to **investment provisions in trade agreements**. While the WTO's existing provisions on trade-related investment are not as comprehensive as those now regularly incorporated in bilateral, regional and plurilateral trade agreements, environmental concerns about investment provisions are an essential part of wider trade-environment discussions, and will undoubtedly arise were investment to emerge as a more prominent negotiation topic at the WTO. Prime concerns of environmental groups relate to investor-state dispute settlement provisions, and the right to regulate and uphold levels of environmental protection.

Growing public alarm about the scale of waste (especially plastic and e-waste) in the global economy – and the environmental and health implications of **growing trade in waste** – can be expected to prompt a new chapter of trade-environment discussions on waste. In the trade policy arena, discussions about trade in hazardous waste and exports of domestically prohibited goods pre-date the WTO, and were among the first trade-environment matters discussed under the auspices of the GATT; some aspects continue to feature in discussions of illegal trade in environmentally sensitive goods, including both hazardous waste and chemicals, such as ozone-depleting substances (OECD 2012). More recently, China's 2018 import ban on non-industrial plastic waste signals that the role of trade policy and rules is highly likely to be part of debates on how to address the world's waste problem. In addition, in the wake of the UN's recent spotlight on the public health and economic costs of pollution (Landrigan et al., 2018), we can expect a revival of concerns about links between export-led growth, industrial pollution and chemicals regulation.<sup>45</sup> Already, a high number of notifications of environment-related measures at the WTO relate to **pollution and chemical safety concerns**.

Finally, the push to boost trade in environmentally friendly goods, services and technologies is prompting interest in harnessing **green industrial policy** to help countries insert themselves into green GVCs and deliver a low-carbon circular future (Altenburg and Assmann, 2017; Curiak and Singh, 2015; Low and Tijaja, 2015). In addition to efforts to promote tariff liberalisation and duty-free import arrangements

for environmental goods and services, the imperative of a green transition is also prompting discussion on how WTO rules on intellectual property, technology transfer, subsidies, government procurement and local content requirements could better facilitate the cost-competitiveness, availability and dissemination of sustainable technologies (Cosbey, 2013; Rodrik, 2014; Wu and Salzman, 2014; ICTSD and WEF, 2016a). In addition, interest of WTO members in promoting **micro, small and medium enterprises** (MSMEs) in the global economy is stimulating discussion of how updated trade policy frameworks could simultaneously promote environmentally positive trade and support MSMEs, which are recognised as leaders on sustainability in many sectors.<sup>46</sup>

### Beyond 'more of the same': The case for bolder vision and a more fundamental rethink

A number of 21st century issues and dynamics warrant specific consideration as part of a future environmental agenda, especially as they may challenge traditional ways of approaching environment–trade issues.

- **The Fourth industrial revolution and major technological shifts.** The rise of the digital economy and rapidly changing technological possibilities are not only reshaping trade trends and the trade policy context, but also environmental implications and opportunities. On sustainable sourcing, for instance, big data and blockchain technologies are already being used to provide information along GVCs about the source of products, potentially transforming trade policy debates on matters like environmental labelling. As noted above, new possibilities associated with the digital economy – including the Internet of Things and the rise of 3D printing – could redistribute the location of production of key products. New technological and scientific frontiers in Artificial Intelligence, biotechnology, nanotechnology, gene-editing, materials innovation and biomimicry (Murray, 2018) are not only expanding the range of goods and services that enter into global trade, but also the array of production methods. These technological advances are forcing governments to grapple with how to update intellectual property laws as well as fears around environment and health impacts (WEF, 2015), and raise uncertainties about the nature of 'like products' and the grounds on which countries can discriminate between products.
- **Coherence between trade, investment and environmental law.** Progress on many environmental challenges relies on coherent approaches to international policymaking on trade and investment, and environmental law.<sup>47</sup> Environmental campaigns on fossil fuels, for instance, already combine a focus on stronger trade disciplines on fossil fuels with calls for international investment rules that more explicitly promote sustainability, as well as campaigns calling on private investors, export promotion authorities, export credit agencies, and development banks to divest from fossil fuels and refrain from investing in related infrastructure (Viñuales, 2015).
- **The power and global reach of multinational companies in GVCs.**<sup>48</sup> We can expect a growing focus on the influence that major market-leading companies

can yield in favour of practical measures to address trade–environment intersections.<sup>49</sup> At the Worldwide Fund for Nature, one of the world’s most powerful environmental groups, the significance of intra-company trade has prompted it to prioritise working directly with companies to improve environmental performance (through public–private partnerships, self-regulation schemes and corporate social responsibility systems, with the aid of consumer pressure) over campaigning for improvements in global trade and investment rules and policies. On the flipside, the global dominance of multinationals and the impacts of their cartels in key sectors where environmental concerns are high (such as natural resources, agriculture and commodities) add an environmental dimension to the case for stronger WTO attention to global-level anti-trust and competition policy (Murphy, 2017).

Further, the pursuit of more environmentally sustainable trade policy is just one part of a broader search for economic policy-making, systems and business models that are more in sync with the earths’ environmental capacities. At a time of bold new thinking on environment-economy intersections, following are four cross-cutting issues that highlight the need for an equally bold rethink of how to better align trade policy with environmental imperatives:

1. **Circularity, decarbonisation and de-materialisation** (using fewer materials through greater efficiency). In addition to providing greater market access and trade opportunities for those producers advancing environmental sustainability (Cooper-Searle, 2017), calls for decarbonisation, de-materialisation and a more circular economy are both re-energising and reframing discussion on how trade rules could better incentivize resource efficiency and promote sustainability in sourcing, producing, transporting and disposal across value chains.
2. **Sustainable consumption and the global ecological footprint of national consumption.** SDG 12 on sustainable consumption is spurring greater interest in links between national consumption in one country and the trade, socio-economic and environmental pressures on production regions in other countries. In addition to pressures for sustainability standards in global value chains, environmental taxes, and environmental labelling, the rise of consumption-based environmental accounting may be a game-changer for trade negotiations in the coming years. By making it possible to track the total internal and external environmental pressures associated with a country’s domestic consumption and related imports of goods and services along global supply chains, efforts to track the global ecological footprint of national consumption are spurring new thinking about the definition of a country’s imports and exports, how governments measure and allocate responsibility for environmental harm, and how to share the costs of solutions.
3. **Moving beyond gross domestic product (GDP) growth.** Over the past 10 years, growing interest in ‘green growth’ and what the transition to a ‘green economy’ demands in terms of greener trade and investment policies (UNEP, 2011, 2013; IISD and UNEP, 2015) has been accompanied by a wider rethinking of economics and economic growth in light of sustainability and social justice

considerations (Raworth, 2017). Beyond GDP growth as the overarching national economic imperative, there is rising interest (and use by some governments) of complementary and alternative indicators of national progress (such as indexes on human development, on happiness and on well-being). Together, mounting recognition of the need to focus less on GDP growth as the core goal, but rather on the pursuit of thriving economies that better support sustainability and social objectives, should also prompt new thinking on trade policy goals and the purpose of international trade rules.

4. **Planetary boundaries, commons and environmental systems.** Over the past decade, scientific understanding of environmental challenges and intersections has greatly evolved. Environmental literature on ecosystem approaches encourages policy-makers not to consider merely the health of fish stocks but also the health of the ecosystems they require to thrive. New thinking on environmental systems underlines that few contemporary environmental challenges can be addressed in isolation; rather, they demand attention to interactions, as in the case of a water–energy–food security–deforestation–climate nexus. In the trade policy arena, addressing this nexus calls for an approach that works across and beyond traditional categories of trade negotiations and agreements. Established concepts such as the global environmental commons and newer ones, such as shared planetary boundaries (Rockström et al., 2009), highlight the need for attention to the cross-border dimensions of nature’s services and of environmental degradation, again raising questions about traditional approaches to trade policymaking.

#### 4.4 A forward-looking trade–environment agenda

This chapter has argued that evolving global economic, commercial and environmental trends give rise to new questions with regard to how the WTO can respond and should evolve to address the imperatives of environmental sustainability. Not only should greater environmental sustainability be a key component of the WTO reform agenda, it could also play a critical role in reviving the economic relevance, political credibility and dynamism of the multilateral trading system.

A forward-looking environmental agenda on WTO reform would link substance with appropriate processes and institutional improvements. Institutional elements already present in current discussions of WTO reform agenda include improvements to the organization’s dispute settlement system and strengthening of the WTO’s transparency, monitoring, and deliberative functions and capacities – each of which will be important elements in terms of advancing an environmental agenda at the WTO too. Further environment-specific dimensions that warrant consideration include:

1. **Strengthening the CTE.** The CTE could be given a stronger role in widening the scope of formal and informal discussion on trade–environment at the WTO, and as an incubator for ideas to advance the trade–environment agenda. This could include a broader mandate for research to explore emerging issues, a clearer

process for adding informal items for discussion, and greater initiative on the part of the Chair in facilitating informal processes for practical cooperation, consensus-building and policy dialogue.

2. **Mainstreaming environment across WTO committees.** All WTO committees could be called upon to include environmental issues as a standing agenda item, to report to the General Council on a regular basis on the environmental aspects of its work, and to boost opportunities for international environmental organisations to observe and participate in its work. In addition, governments could give all committees a standing environmental mandate, requiring them to report to the Ministerial Council every two years.
3. **Environmental news and information.** For each CTE meeting, the Secretariat could be called on to prepare a summary of the key environmental issues and reports that have arisen across the WTO's Regular and Negotiating Committees, and the organisation's other activities.<sup>50</sup> This could be collated on an annual basis to provide an organisation-wide picture of the environmental dimensions of the WTO's work.
4. **Policy dialogue.** The critical need for more dynamic formats and processes within and outside the WTO that better enable deliberation, dialogue, information-sharing, mutual understanding and problem-solving is widely recognised. At the CTE, more purposeful and innovative leadership from chairpersons could create opportunities for more informal policy dialogue. Further, in collaboration with other IGOs active on trade-environment issues, the WTO could co-host a regular forum for engagement among trade-environment policy leaders from IGOs, government, industry and civil society, as well as expert roundtables on critical trade-environment topics. As has occurred in the past, governments could also agree to a bi-annual trade and environment ministerial conference, either as part of or alongside the WTO Ministerial Conference.
5. **Environmental notifications, transparency and assessment.** There are numerous new empirical and methodological questions about trade-environment intersections that warrant research at the WTO, in partnership with other intergovernmental and non-governmental organisations with relevant expertise. Assessment of environment-trade linkages of existing and proposed agreements at the WTO could also be promoted, such as through an enhanced Trade Policy Review process or the creation of independent mechanism that draws on inputs from other international organisations, stakeholder groups and scholars (Casier et al., 2014). Improved notification and transparency of trade-related environmental measures could also be promoted as a key environmental component of the WTO reform agenda.
6. **Boosting public transparency and participation.** There is unfinished work at the WTO on public transparency (in terms of timely, easy and fuller public access to information about negotiations and impacts) and greater opportunities for public and parliamentary participation. An array of proposals already exists to regarding a greater role for observers to negotiations, Ministerial Meetings,

dispute settlement proceedings and Regular Committee meetings. The CETA provides several practical examples of ways to institutionalise stakeholder consultation regarding the implementation and evolution of trade agreements at the national and international level.

As in the past, agenda-setting on WTO reform will be shaped by underlying differences among the WTO's membership about the organisation's purpose and priorities in the context of geo-political tensions, efforts to secure competitive advantage and pressures from domestic stakeholders. As governments work to forge a practical way forward on WTO reform, environmental challenges and opportunities must also be high on the agenda. Critically, the smallest and poorest countries – most immediately affected by many of the environmental challenges at hand – must have a stronger voice in the discussions on WTO reform and on the urgent task of ensuring greater coherence on trade and sustainability.

## Endnotes

- 1 The SDGs cover an expansive set of issues, including ending poverty in all its forms everywhere, tackling world hunger, achieving gender equality, ensuring access to modern energy, building resilient infrastructure, moving towards sustainable consumption and production patterns, conserving oceans and taking urgent action to combat climate change.
- 2 In the most high-level statement on WTO reform to date, the G20 noted in December 2018 that the multilateral trading system was currently falling short of its objectives, and declared the group's commitment to supporting the 'necessary reform of the WTO to improve its functioning' (G20, 2018). Notably, whereas earlier Declarations defended the multilateral trading system as a public good in its own right, the most recent Declaration's wording implies a pragmatic view that multilateralism is desirable 'where it works' to achieve objectives, and is worth defending and promoting only to the extent that it can be reformed to be more effective.
- 3 Calls from member states, scholars and analysts for attention to 'systemic' challenges facing the WTO have been most acute following the Seattle, Cancún and Hong Kong WTO Ministerial Conferences, and more recently in the face of the on-going failure of members to conclude the Doha Development Agenda and to forge a new negotiating agenda. Examples of proposals can be found in, for instance, Consultative Board (2004), Warwick Commission (2007), Deere (2009), Steger (2009), Deere Birkbeck (2011), WTO (2013), ICTSD and WEF (2015, 16). For a recent set of proposals, see Bertelsmann Stiftung (2018) and for a review of WTO reform proposals over the WTO's first 15 years, see Deere Birkbeck and Monagle (2009).
- 4 While there has never been sufficient political appetite for a comprehensive institutional overhaul, a number of incremental changes in formal procedures and informal practice at the WTO have strengthened the transparency of dispute settlement and negotiation and developing country participation.
- 5 In recent years, the World Bank, the ILO, UNEP, UNCTAD and OECD have each published flagship reports on these topics. See, for instance, (ILO 2018), Lange et al (2018), UNEP (2011), UNCTAD (2011a) and OECD (2017).
- 6 In early 2018, the heads of the WTO and UNEP along with 11 high-level government representatives launched an effort entitled Friends Advancing Sustainable Trade in Davos 2018, keen to engage private sectors and catalyse leadership on sustainable trade.
- 7 In 2018, for instance, the former head of UNEP highlighted the need to harness sustainable trade as a driver for achieving the SDGs, the importance of unlocking trade in long-term green solutions, and potential 'trade, investment and job opportunities resulting from the emerging shift towards more sustainable modes of production and consumption'. Arguing that a healthy environment is essential for prosperous and resilient economies, the WTO director general echoed his views, stating that, '[t]rade can make green technologies more affordable and help sustainable business expand'. See WTO (2018c).

- 8 The Canadian paper also refers to sustainable development under its priorities for modernising rule (WTO 2018e).
- 9 See, for instance, a September 2018 Canadian Discussion Paper submitted for the consideration of WTO member states on strengthening and modernizing the organisation (Canada, 2018).
- 10 Other factors that have revived interest in creating a WTO reform agenda include proliferating bilateral, regional and plurilateral trade arrangements, on-going tariff wars, a governance crisis in the WTO's dispute settlement mechanism, and unresolved tensions on how to apply WTO rules to the diversity of the WTO's developing country members – especially to China and other emerging powers. A further key factor driving renewed discussion of a WTO Reform Agenda has been ailing confidence about the WTO's relevance as a forum for concluding trade negotiations.
- 11 For an expanding range of goods, the rise of 3D printing broadens the possibilities in terms of production processes and the geographical location of production, which may also alter the flows in intermediary and final products, with a range of potential environmental implications. The potential of blockchain technologies to help trace and verify the source of some sustainably produced products is already being tested.
- 12 At the WTO's 2018 Public Forum, for instance, the heads of UNEP and WTO jointly hosted the main high-level session. Each emphasised that linking trade and environment policies more closely together could deliver pro-trade and pro-environment benefits for both prosperity and sustainability, and propel action on the achievement of the SDGs. Also see Lydgate (2012) for a review of the concept of mutual supportiveness in the WTO context.
- 13 The salience of the trade–environment issue has been reinforced by burgeoning analysis from a range of international organisations including the *Trade and Green Economy Handbook* (IISD and UNEP, 2015), the OECD and its Joint Working Party on Trade and Environment, the UN Conference on Trade and Development (UNCTAD) (such as through its work to promote the idea of a development-led Green Economy (UNCTAD, 2011a, 2011b), the International Trade Centre (ITC), and the World Economic Forum (WEF) (on the environment and global value chains) (WEF, 2018), and regional developments such as the Asian Development Bank (see Andrew, 2017, as well as Helble and Shepherd, 2017).
- 14 Examples of the adoption or threat of trade-related 'compliance measures' include Convention on International Trade of Endangered Species (CITES) trade bans as well as trade measures undertaken through regional fisheries organisations to combat Illegal, Unreported and Unregulated fishing (Young, 2015).
- 15 As of December 2015, the CTE agenda items as per the 1994 CTE work programme and the updated following the 2001 Doha Ministerial were listed by the WTO as: 1) trade rules, multilateral environmental agreements (MEAs) and their dispute settlement mechanisms (in Doha Round negotiations); 2) environmental protection and measures with significant trade effects and the trading system; 3) environment charges and taxes and requirements for environmental purposes relating to products, such as standards and technical regulations, and packaging, labelling and recycling requirements (CTE Item of Focus); 4) transparency of environmental trade measures; 5) relationship of trade rules, MEAs and dispute settlement mechanisms (in the Doha Round); 6) environment and trade liberalisation (CTE Item of Focus); 7) exports of domestically prohibited goods, in particular hazardous waste; 8) intellectual property (CTE Item of Focus); 9) services and the environment; and 10) input to relevant WTO bodies on appropriate arrangements for relations with other intergovernmental organisations and non-governmental organisations (In Doha Round negotiations).
- 16 In 2018, the WTO's CTE took up topics as diverse as the trade-distorting and climate impacts of fossil fuel production and consumption; how trade and trade policy frameworks might help support the shift toward a circular economy; and trade policies that could encourage growth of ocean-based 'blue economy' industries, promote green technology and address challenges such as plastic and marine waste. In light of concerns about potential trade measures, palm oil-producing countries also provided information on their efforts to address environmental concerns. To keep members abreast of wider developments in environment–trade-related decision-making, CTE members also received briefings from observer organisations such as the UN Framework Convention on Climate Change and the International Maritime Organization (IMO) (on efforts to reduce emissions from shipping). See [www.wto.org/cte](http://www.wto.org/cte).

- 17 At the July 2018 meeting of the WTO's SPS Committee, for instance, members took up a total of 26 specific trade concerns. These included import restrictions on apples and pears, papaya seeds and swine meat; fumigation requirements for cashew nuts; and import restrictions on poultry owing to highly pathogenic avian influenza. The Committee also heard previously raised concerns regarding import restrictions on processed fishery products; certification requirements for food imports; a proposal for categorisation of compounds as endocrine disruptors; dimethoate-related restrictions on imported cherries; regulations on the safety assessment of agricultural genetically modified organisms; and a seafood import monitoring programme. See WTO (2018d) and WTO (2017).
- 18 In 2018, the WTO Secretariat launched an online Environmental Database (<https://edb.wto.org/>), which contains all environment-related notifications submitted by WTO members as well as environmental measures and policies mentioned in their Trade Policy Reviews. The most common environment-related objectives included chemical, toxic and hazardous substances management; general environmental protection; and energy conservation and efficiency.
- 19 The WTO participates for instance, in the Standards Facility and also in the UN Sustainability Standards Forum. It provides technical support to the ITC's efforts to promote more sustainable trade flows and to help developing country governments and businesses integrate sustainability considerations into GVCs.
- 20 In 2018, for instance, the WTO hosted a symposium on climate change, the intensification of natural disasters, and climate-resilient approaches to development and trade. Approved by member states and financed by Australia, this work also engaged the Food and Agricultural Organization of the UN and the UN Office for Disaster Risk Reduction. See WTO (2018e).
- 21 See Foreword in IISD and UNEP (2015), p. ix.
- 22 Although negotiations have entered a promising new phase, 18 years of talks on a topic long-recognised as an urgent priority and win-win trade-environment opportunity represents a woeful track record from a sustainability viewpoint.
- 23 Disputes to date have shown that WTO agreements provide significant scope for environmental provided some requirements and principles are respected to avoid unnecessary barriers to trade, abuse and protectionism – namely, non-discrimination (among partners and between imported and domestic products) – and to promote transparency.
- 24 Between 2010 and 2015, for instance, countries imposed nine anti-dumping and seven countervailing duties on products associated with solar photovoltaic cells or wind energy, and launched more than two dozen WTO anti-dumping and countervailing measure investigations on these (Ang and Steenblik, 2015).
- 25 The following analysis draws on a wide literature on global environmental priorities, environmental economics and economic policy in light of sustainable development priorities; reports from stakeholders in business and civil society; and reports and statements of international organisations on ways forward.
- 26 Ministers agreed to negotiate with a view to adopting an agreement on comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to illegal, unreported and unregulated (IUU) fishing. The Buenos Aires decision recognises that appropriate and effective special and differential treatment for developing country members and least developed country members should be an integral part of the negotiations.
- 27 SDG 14.6 calls for the prohibition, by 2020, of fisheries subsidies that contribute to overcapacity and overfishing, and the elimination of subsidies that contribute to IUU fishing, with special and differential treatment for developing and least developed country WTO members to be an integral part of the negotiations.
- 28 Sceptics contend that negotiations were primarily an economic agenda; although there were many potential environmental benefits, they argue that the negotiating agenda was far less ambitious than it could have been (by for instance failing to incorporating the services associated and embedded in goods).
- 29 Both the environment minister and the economy minister of France have, for instance, declared climate change a top challenge for the global trading system. In September 2018, France put the

- environment–trade issue squarely on the global political agenda, declaring at the UN General Assembly that new trade agreements and benefits should be conditioned on appropriate efforts by countries to implement the Paris Agreement.
- 30 In some markets, certified products account for an impressive 20 per cent of market share. However, many environmentalists argue that voluntary efforts do not appear likely to significantly expand the market share for sustainable products much further, and that government action will be required to achieve many environmental goals.
  - 31 Beyond ministries of trade or commerce, the array of domestic actors that influence trade and investment opportunities includes national standard-setting bodies, national trade facilitation bodies, trade promotion agencies, consumer protection bodies and food and drug regulatory agencies, as well as sector-specific regulatory authorities. Other relevant policies include those related to special economic zones and exclusive economic zones, as well as decision-making processes related to tariff levels, anti-dumping duties, countervailing and safeguard duties, export credit and export financing initiatives.
  - 32 The CETA, for instance, includes language on the integration of trade and sustainable development policy, the alignment of policy processes, and promotion of trade that supports sustainable development. It also includes provisions on impact assessment, stakeholder consultation and a civil society forum, transparency, as well as issue-specific norms on trade and fisheries (beyond subsidies) and forests. It also establishes commitments for the Parties to promote trade in a manner that contributes to the objectives of sustainable development, for example by encouraging businesses to adopt voluntary practices of corporate social responsibility that promote economic, social and environmental objectives, and by promoting practices such as the use of eco-labeling and setting environmental performance goals and standards.
  - 33 In 2006, for instance, the European Commission commissioned an independent Sustainability Impact Assessment of the Doha Development Agenda. See Kirkpatrick et al. (2006). For an overview, see <http://www.sia-trade.org>
  - 34 Beyond work on fisheries subsidies, WTO member state engagement on healthy oceans (SDG 14) has included discussion of the ‘blue economy’ at the CTE, where several members affirmed their support for the sustainable use of ocean resources (with a focus on sustainable fisheries) and the integration of blue economy initiatives into national development strategies. The WTO Secretariat also participated in the Second Oceans Forum on trade-related aspects of SDG 14 on healthy oceans, which was hosted by UNCTAD and a range of other international organisations and focused on ‘enabling sustainable and integrated seafood and living marine resources value chains and related services’.
  - 35 The WTO is not directly engaged in illegal trade in wildlife, which is primarily addressed by CITES, with cooperation from customs authorities, Interpol and the UN Office on Drugs and Crime.
  - 36 In 2015, a WTO decision to eliminate export subsidies in agriculture delivered on SDG target 2.B.
  - 37 In September 2018, the UN’s Inter-Agency Expert Group on SDGs agreed on a methodology to measure fossil fuel subsidies.
  - 38 In 2018, the IMO announced an initial plan to substantially reduce greenhouse gas emissions from ships, seeking to reduce emissions by at least 50 per cent by 2050 compared with 2008, for instance. On trade and shipping, we can also expect discussion of environmental and geo-political challenges linked to the opening of new Arctic sea lanes (Brewer, 2015).
  - 39 The OECD has published an extensive array of working papers on environmental taxes and environmental fiscal reform. See, for instance OECD (2012).
  - 40 Although governments and stakeholders have chosen other venues for policy action on illegal logging and trade in threatened timber, trade rules and WTO rules in particular remain a recurring concern for environmental activists (Brack, 2013; Gulbrandsen and Fauchald, 2015).
  - 41 On biodiversity loss, Lenzen et al. (2012) conclude that ‘some 30 per cent of global species threats are due to international trade’, including demand from consumers in developed countries. The authors suggest some of these threats are specifically due to imports of coffee, tea, sugar, textiles, fish and other manufactured items that cause a large biodiversity footprint at origin.
  - 42 The issue of export restrictions arose in WTO dispute between China and several countries led by the USA, concerned China’s export restrictions on rare earth elements as well as tungsten and

molybdenum, which are used in the production of many electronics. While the USA, the EU and Japan argued that the restrictions violated WTO rules, China (which controls 97 per cent of the production) argued the restrictions aimed at resource conservation and environmental protection. In 2014, the WTO ruled against China, which removed the export quotas in 2015.

- 43 Key concerns relate to the patentability or non-patentability of plant and animal inventions, the definition of 'effective' protection of plant varieties, and the commercial use of genetic material and TK by those other than the communities or countries in which they originated, particularly when these are the subject of patent applications.
- 44 In 1994, the WTO Decision on Trade in Services and the Environment called on governments to determine whether any modification of Article XIV of the General Agreement on Trade in Services (GATS) was required to take account of measures necessary to protect the environment, calling on the CTE to examine and report, with recommendations if any, on the relationship between services trade and the environment, including the issue of sustainable development. The CTE was also asked to examine the relevance of inter-governmental agreements on the environment and their relationship to the GATS.
- 45 In 2017, the annual cost of pollution worldwide was estimated to be US\$4.6 trillion, or around 6 per cent of global gross domestic product.
- 46 In a significant first, for instance, the 2016 Canada-EU Trade Agreement includes specific provisions to promote practices that support corporate social responsibility and sustainability assurance schemes (such as eco-labelling).
- 47 Investment agreements, for instance, could be used to help mobilise and direct private investments to the green economy.
- 48 According to some estimates, multinationals may be linked to as much as 80 percent of gross global trade in one way or another, whereas intra-company trade accounts for around a third of world trade. Similarly, multinational companies are estimated to control around two thirds of the world's foreign direct investment stock, thus placing them at the heart of the further entwining of trade and investment (Sauvant and Hamdani, 2015).
- 49 At the Worldwide Fund for Nature, one of the world's most powerful environmental groups, the significance of intra-company trade has prompted the organisation to focus less on changes to global trade and investment rules and policies and more on direct efforts to work with companies to improve environmental performance through public-private partnerships, self-regulation schemes and corporate social responsibility systems, with the aid of consumer pressure.
- 50 There is precedent for such work. In 2006, for instance, the WTO reported to Member States on environment across the negotiations, although not in regard to the regular work of committees. See WT/CTE/W/243.

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## Chapter 5

# WTO Reform Proposals: Implications for Developing Countries

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*Lorand Bartels\**

### 5.1 Introduction

There is currently a great deal of activity at the WTO focused on reforms to the organisation's functioning. This reform agenda has a complicated background. In part, it is a response to the failure of the Doha Development Round, for which different WTO members have different explanations, and hence different solutions. In part, it stems from a concern among developed countries that existing WTO rules do not adequately cover state capitalism (see USA et al., 2017, 2018), which, in the case of the USA, is exacerbated by what it sees as misinterpretations of WTO law by the WTO Appellate Body (US Trade Representative, 2019). This, in turn, is connected with wider concerns expressed by the USA, and at times other WTO members, about the functioning of the WTO dispute settlement system. And then there is the special and urgent problem that, for various reasons, including but not limited to these, the USA has blocked the filling of Appellate Body vacancies since 2017, jeopardising the functioning of the WTO dispute settlement system as a whole.<sup>1</sup> This has led other WTO members to seek to reform the dispute settlement system in a way that will assuage US concerns, but also some of their own.

Against this background, this chapter describes and evaluates the various reform proposals that WTO members have advanced, especially their implications for developing countries. These fall into three main categories: the self-designation of WTO members as developing countries; sanctions for failing to meet notification obligations; and reforms to the functioning of the Appellate Body.

### 5.2 Definition of developing countries

Several developed WTO members have taken issue with the longstanding practice of WTO members declaring themselves to be developing countries, which is seen as one of the causes of blockage in Doha negotiations, as well as being unfair in its own right. On 18 September 2018, the European Commission presented a Concept Paper that argued that an overly broad categorisation of developing countries represents 'an obstacle to the progress of negotiations' because 'the demand for blanket flexibilities

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\* Lorand Bartels is Reader in International Law and Fellow of Trinity Hall at the University of Cambridge. The views expressed in this essay are those of the author and do not necessarily represent those of the Commonwealth Secretariat.

for two thirds of the WTO membership dilutes the call from those countries that have evident needs for development assistance, leads to much weaker ambition in negotiations and is used as a tool to block progress in, or even at the beginning of, negotiations'. The EU had little difficulty finding common ground on these points with other developed countries. One week later, on 25 September 2018, the trade ministers of the EU, Japan and the USA had issued a Joint Statement including the following paragraph:

Overly broad classifications of development, combined with self-designation of development status, inhibits the WTO's ability to negotiate new, trade-expanding agreements and undermines their effectiveness. The Ministers called on advanced WTO Members claiming developing country status to undertake full commitments in ongoing and future WTO negotiations (USA et al., 2018).

Others agree that something needs to change in the way development is handled at the WTO, albeit in softer and more ambiguous terms. The Ottawa Group ministers – comprising Australia, Brazil, Canada, Chile, the EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland – issued the following communiqué one month after this, on 25 October 2018:

Development must remain an integral part of our work. We need to explore how the development dimension, including special and differential treatment, can be best pursued in rule-making efforts. Our officials will examine and develop concrete options for engagement to reinvigorate the negotiating function.

What this means for developing countries is a highly charged issue. In its Concept Paper, the European Commission proposed that WTO members be encouraged to voluntarily 'graduate' from developing country status, and that 'flexibilities available to other Members should move away from open-ended block exemptions toward a needs-driven and evidence-based approach that will ensure that SDT [special and differential treatment] will be as targeted as possible'. The Commission also suggested the following principles for agreeing new SDT provisions:

- The agreement in question will eventually be universally implemented, so that the core rights and obligations will apply to everyone and any exceptions will be time-bound.
- In-built flexibility in the form of additional commitments going beyond a core set of provisions should cater for differences among members.
- The flexibilities available in any agreement should be proportional to the number of members participating and the ambition of the agreement.

Some of these themes moved to the WTO, spearheaded by the USA. In a January 2019 Communication (WT/GC/W/757), the USA argued against a binary distinction between 'developed' and 'developing' countries.<sup>2</sup> It asserted, as did the above Concept Paper, that several WTO members were claiming developing country status that, on certain metrics, should be considered developed countries.<sup>3</sup> Again like the European Commission, the USA also argued that an overly broad categorisation of 'developing country' impeded trade negotiations, because those members claiming developing

country status used that claim to argue for exemptions from newly negotiated disciplines. Several examples were mentioned, including the exemption of developing countries from the new tariff rate quota administration disciplines agreed at the 2013 Bali Ministerial Conference,<sup>4</sup> and a new proposal by China and India to eliminate all agricultural domestic support for developed countries as a prerequisite to developing country WTO members making any reforms of their own.<sup>5</sup>

The US Communication sparked a negative reaction. On 4 February 2019, the African Group responded that '[t]he proposals for graduation and differentiation are... divisive and unlikely to yield results [and] [t]rying to change the principle of self-declaration is also impractical'. It continued:

A more productive approach would acknowledge that S&DT principles are sufficiently flexible to address differences in the actual negotiating process and to not worsen imbalances. For all their shortcomings, the agricultural and NAMA texts under the Doha agenda were replete with examples of differentiation and flexibility to accommodate real differences in the actual circumstances of Members. Notably, in the fisheries subsidies negotiations, flexibility and S&DT is required to address our capacity constraints and to build our fishing industry capabilities in the future. The African Group will not agree to any proposals disadvantaging any of its Members through a change to the negotiating mandate or by using irrelevant criteria.

The USA followed this up with another communication (WT/GC/W/764), on 15 February 2019, which proposed a draft General Council Decision establishing the following objective criteria for a WTO member to be able to claim developing country status:

To facilitate the full implementation of future WTO agreements and to ensure that the maximum benefits of trade accrue to those Members with the greatest difficulty integrating into the multilateral trading system, the following categories of Members will not avail themselves of special and differential treatment in current and future WTO negotiations:

- i. A WTO Member that is a Member of the Organization for Economic Cooperation and Development (OECD), or a WTO Member that has begun the accession process to the OECD;
- ii. A WTO Member that is a member of the Group of 20 (G20);
- iii. A WTO Member that is classified as a 'high income' country by the World Bank; or
- iv. A WTO Member that accounts for no less than 0.5 per cent of global merchandise trade (imports and exports).

Nothing in this Decision precludes reaching agreement that in sector-specific negotiations other Members are also ineligible for special and differential treatment.

The two US Communications sparked negative reactions from developing countries. A Communication (WT/GC/W/765) was issued on 18 February 2019 by China,

India, South Africa and Venezuela<sup>6</sup> that took issue with the US argument that the developed/developing country distinction was insufficiently differentiated. This Communication focused on different figures, such as per capita income, overall capacity constraints shared by developing countries, dependence on low value-added agriculture and low company efficiencies, while adding that in certain respects the WTO had even accepted 'reverse' SDT for developed countries.

The matter was then debated at the General Council meeting of 28 February 2019. India<sup>7</sup> rejected the US Communications as 'arbitrary', 'divisive' and 'profoundly insidious', and described its suggested criteria for developing country status as 'a strategy to ultimately terminate special & differential treatment at the WTO'. India added that:

[M]ost SDT provisions in the WTO covered agreements are imprecise, unenforceable and in the form of 'best endeavour clauses' and therefore the assertion that onerous SDT obligations are making the WTO irrelevant is untenable. It is also important to note that though Members can declare themselves as developing, their specific rights and obligations are still subject to negotiations.

India argued that the real reason for the deadlock in Doha negotiations was 'the inability of the developed Members to abide by the agreed negotiating mandates of the Doha Round and the progress made thereunder'. China added that WT/GC/W/757 'selectively picks indicators which exaggerate the level of development of some developing Members, and uses them to challenge the practice of self-declared development status at the WTO' and that the USA's proposed redefinition of developing country status in WT/GC/W/764, based on a 'flawed' analytical paper, 'can only be a groundless "hanging garden" floating in the air'. For its part, the USA issued a document in which it alleged several factual and analytical errors in the developing countries' document WT/GC/W/765 and reiterated that 'using purchasing power parity (a proxy for spending power) on a per capita basis, the six wealthiest economies in the world – Qatar, Macao China, Singapore, Brunei Darussalam, Kuwait, and the United Arab Emirates – are self-declared developing Members of the WTO'.

*Evaluation:* It does not seem that this discussion will disappear any time soon, and it is worthy of detailed consideration. First, it is notable that all WTO members participating in this debate seem to have abandoned the notion of issue linkage as a way of equalising benefits, and to be resorting to a pre-Uruguay Round modality of issue-by-issue reciprocity and (for some) non-reciprocity (Rolland, 2010). This may be the inevitable outcome of the Doha failure.

On this basis, then, it may be observed that the debate on *a priori* criteria for developing country status is likely to remain sterile. There are simply too many variables and interests at stake (Cui, 2008). But it is also not likely to matter. The claim that trade negotiations are hampered by self-designation must be seen in light of the fact that, as India has pointed out, rights and obligations attaching to developing country status are themselves negotiated during trade negotiations. From this perspective, developing country status is no more than a shorthand description of a negotiating

position, and its validity will rise or fall with the strength of that position (Cui, 2008; Lamp, 2015).

It might also be commented that the importance of developing country status is not new. Article XXXVI:8 of the General Agreement on Tariffs and Trade (GATT) 1994, introduced in 1966, states that '[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties'. Importantly, the Interpretative Note to this provision continues:

It is understood that the phrase 'do not expect reciprocity' means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

This approach differs from the present discussion about *a priori* developing country status by instead looking at what developing country status means on an issue-by-issue basis. But it can also show how to escape what seems to be turning into a negative and probably fruitless debate about *a priori* status. Given that, in practice, self-designation is probably here to stay, it might be suggested that the negotiating efforts of all WTO members be redirected towards an understanding of what the 'development, financial and trade needs' of developing countries might be in different circumstances. This would have the added advantage of establishing objective criteria for the operation of Generalised System of Preferences programmes, which are required to be a positive response to such 'needs', and which are also forbidden from discriminating between developing countries that have similar 'needs' (Appellate Body, 2004).

Second, negotiating effort could also be spent on defining the 'contributions' developing countries can be expected to make, given their particular 'needs'. A useful model for such considerations in practice is the Trade Facilitation Agreement, which conditions developing country obligations on their capacity to perform those obligations, which in turn depends on developed countries helping build that capacity.<sup>8</sup>

It is in this light that the European Commission's further proposals in its Concept Paper on the outcome of negotiation need to be appraised. To recap, the EU suggests that core rights and obligations eventually apply to all WTO members; that additional commitments can go beyond the core provisions; and that the flexibilities available in any agreement should be proportional to the number of members participating and the ambition of the agreement. Insofar as this proposal distinguishes between 'core' and 'additional' obligations, there is not much to be gainsaid, except that there may be some agreements that do not permit any 'core' provisions at all, and that the designation of such 'core' provisions will be of key importance. More important, perhaps, is the notion that this question should depend on the scope of the agreement at issue. This appears to be a rather arbitrary formula, based not on the capacity of parties to implement the agreement at issue but on criteria that, all things considered,

appear to be rather arbitrary. This third limb of the Commission's proposal is deserving of greater scrutiny.

### 5.3 Notifications

A second topic under discussion with important implications for developing countries is whether WTO members that breach their regular (i.e. not *ad hoc*) notification obligations should be subject to any sanctions.<sup>9</sup> Again, this is a topic that has obtained a degree of consensus among developed countries. It seems first to have been raised in a communication by the USA on 30 October 2017 (JOB/GC/148), which proposed certain sanctions for what were termed 'delinquent Members'. After discussion (Council for Trade in Goods, 2017), the USA issued a revised communication (JOB/GC/148/Rev.1) on 12 March 2018, which removed the word 'delinquent' and changed some of the proposed sanctions.

The USA's revised proposal gained traction after being included in the Joint Trilateral Meeting of US, Japan and EU Trade Ministers in September 2018 (USA et al., 2018), and at the Ottawa meeting in October 2018 (Australia et al., 2018a,b). On 1 November 2018, a further revision was resubmitted (JOB/GC/204), which by 4 December 2018 had gained Argentina, Australia, Chinese Taipei, Costa Rica, the EU and Japan as co-sponsors. The sanctions currently proposed, described as 'administrative measures', are as follows:

12. (a) After one but less than two full years from a notification deadline, the following measures shall be applied to the Member at the beginning of the second year:
  - (i) representatives of the Member cannot be nominated to preside over WTO bodies;
  - (ii) questions posed by the Member to another Member during a Trade Policy Review need not be answered;
  - (iii) the Member will be assessed a supplement of [x][5] percent on its normal assessed contribution to the WTO budget, to be effective in the following biennial budget cycle;
  - (iv) the Secretariat will report annually to the Council for Trade in Goods on the status of the Member's notifications; and
  - (v) the Member will be subject to specific reporting at the General Council meetings.
- (b) After two but less than three full years following a notification deadline, the following measures shall be applied to the Member at the beginning of the third year, in addition to the measures in subparagraph (a):
  - (i) the Member will be designated as an Inactive Member;
  - (ii) representatives of the Member will be called upon in WTO formal meetings after all other Members have taken the floor, and before any observers; and
  - (iii) when the Inactive Member takes the floor in the General Council it will be identified as such.

There is an important exception in paragraph 12(c), which states that '[t]he administrative measures identified in paragraph 12(a) and 12(b) shall not apply to Members that have submitted information on the assistance and support for capacity building that the Member requires, as set out in paragraph 10.' In turn, paragraph 10 states:

Each developing country Member is encouraged to submit to the relevant committee and to the Working Group by [x date] and by [x date] of each subsequent year information on those notifications ... that it has not submitted due to a lack of capacity, including information on the assistance and support for capacity building that the Member requires in order to submit complete notifications.

The Communication also contains another important innovation. It proposes that '[a]t any time, Members are encouraged to provide a counter notification of another Member concerning notification obligations under the agreements listed in paragraph 1' (paragraph 7). Mechanisms for counter-notifications exist in several WTO agreements, including GATT 1994, the General Agreement on Trade in Services and the Agriculture Agreement. But this proposal would extend this mechanism to other WTO agreements. This suggestion has proved controversial, as discussed below.

## Evaluation

WTO members generally agree that regular notification obligations are important, but in practice there are few who do not fail to meet these obligations. Developing countries argue that, for them, these obligations are particularly onerous for reasons of capacity constraints. For example, on 14 November 2018, the African Group argued in the Council for Trade in Goods that 'the heart of the problem is the lack of institutional capacity to comply with notification requirements on technically complex matters' and that the burden is placed 'disproportionately on developing and least developed countries' (Third World Network, 2018).

This may very well be true. However, it is to be noted that the revised proposal takes into account capacity constraints, insofar as paragraph 12(c) removes sanctions mechanism for developing country WTO members that have notified their capacity constraints to the WTO Secretariat. The South Centre has issued a research paper on the US proposal in which it criticises the proposal for unduly burdening developing countries. However, interestingly, this paper does not mention paragraph 12(c). Rather, it focuses on the introduction to paragraph 12, which states that the administrative measures set out in paragraph 12(a) and (b) will apply 'if a Member fails to provide a complete notification within one year of the deadline set out in paragraph 8(a) or (b) and that Member has not requested assistance from the Secretariat identified in paragraph 9 or if such assistance is requested but the Member has not cooperated with the Secretariat' (Kwa and Lunenborg, 2019: 21). The research paper argues that this would improperly involve the Secretariat in what are, in reality, sensitive political issues (ibid.: 21–22). This may be a valid criticism, but it is also somewhat beside the point, when paragraph 12(c) requires mere notification of capacity constraints to avoid the administrative measures that would otherwise apply.

It would appear that the introduction to paragraph 12 is therefore targeted primarily at developed countries and also at any developing countries that have not notified any capacity constraints. One might of course argue that even an obligation of this type is onerous, but in fact this is far less onerous than the existing obligation to notify measures themselves (although at present this existing obligation is essentially unenforceable). A judgement call will therefore be needed on whether it is plausible to claim that an enforceable obligation to notify capacity constraints is a step too far.

The encouragement of counter-notifications raises more significant issues. As noted, the possibility of submitting counter-notifications is not new, but a counter-notification will generally require a response. This may be a challenge for developing countries with limited resources, and at a minimum any such proposal should be entertained only on the basis of a Trade Facilitation Modality by which an obligation is conditioned on capacity and relevant technical assistance.

Also, at a minimum, to avoid any unnecessary misunderstandings, a counter-notification mechanism should require prior bilateral consultations (Kwa and Lunenborg, 2019: 17). However, even more may be at stake. In its September 2018 Concept Paper, the European Commission suggested that any subsidy that had been counter-notified should be presumed to cause serious prejudice and thus be actionable.<sup>10</sup> This suggestion would amount to a radical change in the burden of proof for subsidising countries and should be carefully reviewed on its own merits. It also indicates that extending the counter-notifications mechanism may have serious implications beyond those that are now easy to envisage. Overall, these are suggestions that need to be considered with some care.

## 5.4 Dispute settlement

A third area where reform is being discussed is WTO dispute settlement. As mentioned above, there is a special background to these discussions – namely, the US blocking of new Appellate Body appointments. The reform proposals therefore come specifically in response to US concerns.

### 90-day deadline for Appellate Body reports

Article 17.5 of the WTO Dispute Settlement Understanding (DSU) requires the Appellate Body to issue a report 60 days after a notice of appeal, or, provided it notifies the Dispute Settlement Body of the reasons for a delay, 90 days.<sup>11</sup> In practice, between 1995 and 2010, the Appellate Body exceeded the 90-day limit in 5 per cent of disputes. From 2010 to the present, it has exceeded this period in over 80 per cent of cases.

There are two main reasons for the increase in delays. First, the workload of the Appellate Body has increased over time, as panel reports have become longer and more detailed and more issues have come to appeal. The Appellate Body is also under an obligation, under Article 17.12 of the DSU, to address ‘each of the issues’ before it. Second, the US blocking of new Appellate Body nominations has itself exacerbated the problem. The Appellate Body recently explained that it would not

be able to issue a report within the 90-day period in part because ‘in view of the backlog of appeals pending with the Appellate Body at present, the overlap in the composition of all divisions resulting in part from the reduced number of Appellate Body Members, together with the shortage of staff in the Appellate Body Secretariat, Division Members can currently spend only very little time preparing for this appeal’ (Appellate Body, 2018).

There have been several responses to these delays. Some have focused on resources. A Joint Communication from the EU, China, India and Montenegro (WT/GC/W/753) on 29 May 2018 proposed increasing the number of Appellate Body members from seven to nine,<sup>12</sup> to make membership permanent rather than, as it is at present, part time,<sup>13</sup> and to expand the resources of the Appellate Body Secretariat. These proposals originate in the earlier European Commission Concept Paper, which added the further suggestion that three divisions of three members might hear an appeal at any time, with no overlaps with regard to the membership of these divisions, and a longer six to eight year term for Appellate Body members.

Other proposals have focused on reducing the workload. A Joint Communication from the EU, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro (WT/GC/W/752) suggests that:

[T]he Appellate Body could propose to the parties to voluntarily focus the scope of the appeal, set an indicative page limit on the parties’ submissions or it could take appropriate measures to reduce the length of its report. This could also include the publication of the report in the language of the appeal only, for the purposes of meeting the 90-day timeframe (the translation to the other WTO languages and formal circulation and adoption would come later).

A different approach has been suggested by Chinese Taipei (WT/GC/W/763), based on the different predicate that the Appellate Body was originally meant to be a comparatively rare failsafe for errant panel reports, and that from this perspective the high rate of appeals on virtually all matters is a distortion of that intention. Chinese Taipei puts it this way:

From this perspective, the very tight timeframe set out in Article 17.5 of the DSU may not be interpreted simply as an outdated or bad piece of legislation. Instead, it might be viewed as another element laid down deliberately by the negotiators in order to circumscribe the Appellate Body’s function.

Accordingly, Chinese Taipei proposes that ‘Members immediately enter into discussions for the purpose of developing guidelines on the future functioning of the Appellate Body’ with a view, among other things, to ‘clarify[ing] certain DSU provisions so as to provide better, more clear-cut operational rules for the Appellate Body to follow’. It suggests that this might lead to an authoritative interpretation under Article IX:2 of the WTO Agreement. Though without specific reference to the Appellate Body, this suggestion is echoed in a Communication from Australia, Singapore, Costa Rica, Canada and Switzerland proposing that it may be possible to identify ‘options for binding or non-binding guidance to be provided to adjudicative

bodies on specific issues, such as through the development of a clear pathway for the potential negotiation and adoption of “authoritative interpretations”.

Canada has also suggested ‘[d]iverting certain disputes or issues from adjudication... through a renewed commitment to self-restraint, the improvement and use of alternative mechanisms such as mediation to settle disputes or at least narrow their scope, and possibly even formal exclusion of certain types of disputes or certain issues from the jurisdiction of adjudication’ (Canada, 2018: 3). This reflects an interest in rebalancing what some have seen as an overreliance on dispute settlement to resolve issues that could be resolved in negotiations (McDougall, 2018).

*Evaluation:* In general, these proposed reforms are uncontroversial. Possible issues affecting developing countries would be limits on the use of official languages in dispute settlement, if this incurs translation or other costs for certain developing country members. It will also be important to ensure that any increase in the costs of the Appellate Body system is borne equitably. As to the notion that the function of the Appellate Body should be reconsidered, and further guidance provided, the central question is whether appeals benefit or harm WTO members. On the one hand, appeals increase costs; on the other, they improve the quality of WTO law. WTO members will most likely have a range of opinions on this point. It may also be difficult for WTO members to agree on any meaningful interpretations, so, even if this appears to be a sensible suggestion, it is probably unworkable in practice. As to Canada’s suggestion that certain matters be removed from adjudication, suffice it to observe that smaller actors generally benefit from the rule of law.

### Excess of Appellate Body powers

A related US concern is that the Appellate Body has exceeded the 90-day limit in a non-transparent manner. In particular, since 2011, the Appellate Body has not obtained the agreement of disputing parties prior to delaying a report beyond the 90-day limit just discussed, and it has failed to give proper reasons to the Dispute Settlement Body for any delays. For example, and somewhat counterintuitively, the Appellate Body has omitted to mention that the parties have agreed that it may exceed the 90-day limit.<sup>14</sup>

In response to these criticisms, Joint Communication WT/GC/W/752 Revision 2 proposes requiring the Appellate Body to obtain the agreement of the parties to a dispute in the event of any delay, and, if it cannot, to ‘take appropriate organizational measures... with a view to enabling the Appellate Body to submit its report within that period’.<sup>15</sup> Canada has also supported the idea of ‘developing guidance related to consultations with parties when the Appellate Body is unable to meet its deadline’ (Canada, 2018), although without making further concrete proposals.

*Evaluation:* These are fairly technical issues of little significance from a developing country perspective.

### Transitional rules for outgoing Appellate Body members

Rule 15 of the Appellate Body Working Procedures states that, if the term of an Appellate Body member expires during an appeal, the Appellate Body may ‘deem’

that person to be an Appellate Body member for the purposes of completing the appeal (Appellate Body, 2017). The USA has objected that this exceeds the Appellate Body's authority.

One response to this objection is to limit the situations in which an Appellate Body member continues to hear an already commenced appeal after the expiry of his or her term. Honduras suggested in JOB/DSB/2 of 23 July 2018 that Appellate Body members should be able to continue when oral argument has commenced. It also suggests that no new appeals be assigned to an Appellate Body member whose term will expire within 60 days. Joint Communication WT/GC/W/752 Revision 2 suggests a narrower continuation when the oral hearing has been completed rather than commenced. Joint Communication WT/GC/W/753 proposes a more radical solution – namely, that '[i]n order to ensure an orderly transition between the outgoing and new Appellate Body members, the outgoing Appellate Body members should continue discharging their duties until their places have been filled but not longer than for a period of two years following the expiry of the term of office.' This is evidently intended to push out the deadline for the cliff-edge currently facing the Appellate Body, perhaps past the current US presidential term.

Another question is whether the transition should take place automatically, as assumed by Joint Communication WT/GC/W/752, or by a decision, and, if so, by whom. Honduras has suggested a range of options for a decision: first, that the Appellate Body could decide, and notify the Dispute Settlement Body; alternatively, the Dispute Settlement Body could decide, either by negative consensus (so one WTO member alone cannot issue a veto) or by positive consensus but minus the parties to the dispute. At the Dispute Settlement Body meeting on 29 October 2018, the USA welcomed Honduras' communication but insisted that the Dispute Settlement Body should have the power to decide on any such issue.<sup>16</sup>

*Evaluation:* Considering that dispute settlement is proportionately more important for smaller than for larger WTO members, any proposals protecting the dispute settlement system are to be welcomed. There are no obvious budgetary or other considerations warranting special attention.

### Jurisprudential issues

The USA has made a series of complaints about the Appellate Body's approach to its decision-making that are properly considered jurisprudential. One US objection is that the Appellate Body makes legal pronouncements that are not necessary to decide the dispute (*obiter dicta*). Joint Communication WT/GC/W/752 essentially agrees with the US view by suggesting an amendment of Article 17.12 of the DSU to provide that '[t]he Appellate Body shall address issues raised on appeal to the extent this is necessary for the resolution of the dispute'.

Another US objection is that the Appellate Body wrongly treats its earlier reports as precedents. In fact, the Appellate Body stated in 'US – Stainless Steel' that it would expect panels to follow Appellate Body reports in the absence of 'cogent reasons' to the contrary (Appellate Body, 2008). The response of Joint Communication WT/GC/W/752 is to propose a system of annual meetings between the Appellate Body

and WTO members in which members could voice their views on general matters. Canada has in this context made the stronger suggestion that ‘mechanisms might be developed that allow Members more opportunity to provide binding and non-binding guidance to adjudicative bodies on specific issues’, which has been supported by Joint Communication WT/GC/W/754 in paragraph 1.6. Honduras has also produced an interesting paper making various suggestions about precedent, seemingly based on its civil law system (Honduras, 2019). It is not clear that these lessons are easily transposable to the WTO.

A third US objection relates to the Appellate Body’s treatment of municipal (i.e. national) law. The issue is whether, given that the Appellate Body only has a legal jurisdiction, it is able to make any rulings on a panel’s factual findings about a given WTO member’s national law. As a point of jurisprudence, it is widely accepted that the Appellate Body has made an error. Several communications agree.<sup>17</sup>

*Evaluation:* These issues are of only tangential relevance to developing countries. At most, one could imagine that those practices of the Appellate Body that seek to clarify the law beyond that which is strictly necessary to resolve the dispute at issue (e.g. *obiter dicta* and precedent) might benefit non-litigants who thereby indirectly obtain clarity in the law. On the other hand, the more the Appellate Body seeks to cover, the more burdensome litigation can be. There are no especially compelling arguments in either direction.

## 5.5 Conclusions

Of the three main institutional reforms being discussed at present, clearly those relating to the status of developing countries and sanctions for non-compliance with notification obligations are of most pressing interest to developing countries.

As to the question of developing country status, developing countries can contribute much that is constructive to the reform discussion. At present, it appears that various WTO members are engaged in a tit-for-tat debate on the very notion of development. This does not appear to be a profitable discussion. It would make more sense to seek to breathe life into the existing rules on non-reciprocity in trade negotiations, which have not been addressed for many years. The time is ripe in particular for a discussion of what is meant by the ‘trade, financial and development needs’ of developing countries, and the extent to which developing countries can be expected to make obligations in light of these ‘needs’.

When it comes to proposals for sanctioning non-compliance with notification obligations, developing countries should ensure their interests are protected. It is certainly true that any such rules are likely to affect developing countries disproportionately. However, again, rather than simply resisting efforts to bring greater enforceability to these obligations, it may be more constructive, and in the interests of all WTO members, to propose an agreement on the model of the TFA – that is, developing countries will undertake new obligations in this area provided that they have the capacity to perform these obligations, and that

developed countries will undertake to ensure they assist them in obtaining this capacity.

Finally, there are a great many proposals on the WTO Appellate Body, largely in response to the USA's particular concerns about the functioning and rulings of this part of the WTO dispute settlement system. Few of these proposals have any direct implications for developing countries. At most, it might be reiterated that smaller actors generally benefit from the rule of law, and to that extent it benefits such actors to have a functioning dispute settlement system that is able to clarify the law even for non-litigants, that is able to take into account the special status of developing countries both within the WTO and beyond, and that more generally has the authority to apply the law in order to protect the weak from the strong.

## Endnotes

- 1 This has implications beyond the unavailability of an appeals mechanism. Because WTO members have the right to an appeal before a panel report is adopted, a respondent WTO member can legally block the adoption of an adverse panel report indefinitely. Absent a workaround, the entire dispute settlement system is therefore at risk.
- 2 See also WT/GC/W/757/Rev.1.
- 3 Ibid. The Communication highlighted the high rankings of WTO members such as Hong Kong, Israel, Korea and Singapore on the Human Development Index, and China's high rankings on lists of total exports, high technology trade, intellectual property royalties, foreign direct investment, corporate size, supercomputers, space and defence spending. Certain other self-declared developing countries, such as Korea, and to some extent Brazil and India, also feature, though less consistently. The Communication also pointed to the relative development gains made by almost all developing countries other than those in sub-Saharan Africa over the past 20 years.
- 4 Understanding on tariff rate quota administration provisions of agricultural products, as defined in Article 2 of the Agreement on Agriculture — Ministerial Decision of 7 December 2013, WT/MIN(13)/39, WT/L/914, 11 December 2013, Annex A, para. 4, noted as 'the first time that Members agreed to use developing status to exempt all self-declared developing Members from a new commitment rather than take a smaller cut or a longer time to implement' (WT/GC/W/757 of 16 January 2019, paragraph 4.4).
- 5 WT/GC/W/757 of 16 January 2019, paragraph 4.6.
- 6 Co-sponsors include: Bolivia, Central African Republic, Cuba, Kenya, Laos and Pakistan. See WT/GC/W/765/Rev.2, 4 March 2019 for a full list of co-sponsors.
- 7 See India's Statements at the General Council meeting held on 28<sup>th</sup> February 2019 at: [https://www.pmindiaun.gov.in/pdf/India's\\_upStatements\\_GC\\_28%20Feb%202019.pdf](https://www.pmindiaun.gov.in/pdf/India's_upStatements_GC_28%20Feb%202019.pdf)
- 8 The TFA is also cited as a precedent in Canada (2018).
- 9 This topic is addressed in detail in Kwa and Lunenborg (2019).
- 10 This followed an earlier proposal to deem non-notified subsidies to be actionable. See EU (2017: paragraphs 8 and 9).
- 11 In theory, it is supposed to be legally impossible to issue a report after 90 days have elapsed. Indeed, the USA has questioned whether late Appellate Body reports can even be considered valid.
- 12 This would require a change to Article 17.1 of the DSU.
- 13 This would require a change to a Dispute Settlement Body Decision – namely, Establishment of the Appellate Body, 19 June 1995, Decision of 10 February 1995, WT/DSB/1.
- 14 See the compilation of WTO member comments in Stewart (2018).
- 15 This would require an amendment to Article 17.5 of the DSU.
- 16 Statements by the United States at the Meeting of the WTO Dispute Settlement Body.
- 17 Including Joint Communication WT/GC/W/752, Annex, and Canada (2018: 3).

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## Chapter 6

# Reshaping the WTO: Some Reflections on a Way Forward

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*Teddy Y. Soobramanien and Brendan Vickers\**

### 6.1 Introduction

The arrival of the WTO marked a new era for the multilateral trading system. When it was set up in 1995, a new set of multilateral trade agreements was established, designed to bring greater transparency, predictability and stability to the global trading system; to provide improved market access for trade in goods and services; and to promote fairer world trade by disciplining unfair trade practices and protecting intellectual property rights and investment. A comprehensive and effective Dispute Settlement Mechanism was also embodied. Importantly, the Preamble to the 1994 Marrakesh Agreement Establishing the WTO recognised the objective of ‘sustainable development.’<sup>1</sup> The creation of this new multilateral organisation, with the capacity to effectively adjudicate trade disputes, to provide a forum for trade agreement negotiations and implementation, to review trade policy and to deliver technical assistance to developing and least developed countries (LDCs), signified a landmark feat in global trade governance.

However, as the WTO approaches its 25th anniversary in 2020, there is a sense of crisis rather than celebration about the organisation’s performance and functioning. Trade multilateralism stands at a crossroads, with serious questions about the WTO’s continuing role and relevance in 21st century global economic governance. The centre-piece of the WTO, the Doha Round of multilateral trade negotiations, launched in 2001, is the longest-running trade round in the history of the multilateral trading system, with no clear sense of *when/how/if* it can be concluded. In fact, the WTO has delivered only one landmark multilateral trade agreement – namely, the Trade Facilitation Agreement (TFA), adopted at the Bali Ministerial Conference in 2013.

In more recent years, there has been a proliferation and deepening of Regional Trading Arrangements (RTAs) covering new and broader areas and trade rules, as well as a rise in plurilateral initiatives among subsets of WTO members, most

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\* Teddy Y. Soobramanien is Economic Adviser in the International Trade Policy Section of the Trade, Oceans and Natural Resources Directorate of the Commonwealth Secretariat, London. Brendan Vickers is Adviser and Head of Section in the International Trade Policy Section of the Trade, Oceans and Natural Resources Directorate of the Commonwealth Secretariat, London. The views expressed in this essay are those of the authors and do not necessarily represent those of the Commonwealth Secretariat.

recently the decision by 76 WTO members to begin negotiations on the trade-related aspects of e-commerce.

Today, the WTO's role and relevance in further opening up world trade and in providing governance are under increased scrutiny, and calls for reform have intensified. Against this backdrop, this chapter outlines some of the recent challenges confronting trade multilateralism and then presents some practical recommendations that could help the WTO move forward. It focuses on two of the WTO's discrete functions: the negotiating function of the organisation and its adjudicating role on trade disputes.

## 6.2 The WTO: From confidence to crisis

The initial operating years of the WTO as a new member-driven multilateral organisation were successful in terms of it achieving its mandate and global outreach. Many countries that were not founding members rapidly applied to join. Today, the WTO's membership is near universal, with 164 member countries, as against the 128 contracting parties to the General Agreement on Tariffs and Trade (GATT) at the end of 1994. During this early period, WTO members explored new areas for multilateral cooperation, including the so-called 'Singapore issues',<sup>2</sup> while some member countries adopted further commitments on trade in services, notably financial services, or launched plurilateral initiatives to deepen liberalisation, such as the Information Technology Agreement.

However, the new organisation was not immune to critique, crisis or challenge. The Seattle protests in 1999 and the failure to launch the 'Millennium Trade Round' represented the first reckoning for the WTO with regard to its actual and perceived participatory and legitimacy deficits. The WTO quickly learnt from this setback, and perceptions of it being a closed 'rich man's club' like the GATT, and sought to embrace greater internal and external transparency, openness and inclusivity. Resultantly, developing countries started to exert greater voice, influence and agency in the decision-making process (Narlikar, 2010). Civil society, once opposed to the system and critical of its perceived corporate-led model of globalisation, also began working more constructively with the organisation by sharing its views on trade issues during events such as the WTO Public Forum. Non-governmental organisations (NGOs) began attending Ministerial Conferences, and trade dispute proceedings were opened for NGOs and the public to observe. The organisation's success continued, with major world economies obtaining membership, most notably China in 2001.

China's accession to the WTO coincided with the launch of the WTO's maiden round of multilateral trade negotiations, the Doha Development Agenda (DDA). Hopes were high for the Doha Round, and it was expected to bring a development face to the multilateral trading system. However, the rise of emerging economies like Brazil, China and India, as well as the more assertive role of developing country coalitions in trade negotiations, further intensified the more multipolar balance of power in the WTO. Such imbalance has since complicated collective global action on trade, as was apparent in the deadlock at the conclusion of the 2003 Cancún Ministerial

Conference. Deep divides were revealed between the ambitions and aspirations of developed countries and those of developing countries, which, in turn, highlighted the inability of the organisation to advance negotiations on traditional issues or to embrace new trade issues. Setbacks for the WTO began accumulating one after the other, beginning with the failure of the membership to conclude the DDA negotiations on time, with endless extensions being put in place.

Despite the Doha impasse, there have been some noticeable achievements, including the decision in 2003 on flexibilities in Trade-Related Aspects of Intellectual Property Rights (TRIPS) in dealing with public health issues and the subsequent amendment of the TRIPS Agreement; a Transparency Mechanism for RTAs established in 2006 that has been operationalised on a provisional basis; various decisions in favour of LDCs, including duty-free quota-free market access for goods and provision of preferences in services for LDCs and its operationalisation; and the decision to abolish export subsidies for agriculture. Another significant achievement of the Round has been the launch of a multilateral Aid for Trade initiative and establishment of the Enhanced Integrated Framework for LDCs and other dedicated funds for technical cooperation. Developed countries, as well as the development (donor) community, have provided substantial resources to support least developed and developing countries to implement agreements.

The WTO's implementation, monitoring and dispute settlement functions have progressed relatively well and delivered results. Some functions have evolved in tandem with shifting global trade dynamics. For example, two initiatives have improved the WTO's monitoring role: a 2006 decision by the General Council to provisionally establish a new transparency mechanism for RTAs; and an initiative under the auspices of the Trade Policy Review to monitor trade policy responses to the financial crisis that had erupted in late 2008. The major challenge and aforementioned initial cracks were primarily in relation to the WTO's negotiating – or legislative – function.

Without tangible progress in negotiations, however, the organisation began losing credibility on its capacity to deliver. Given the dynamics of modern global trade issues, the redundancy of the WTO has been raised to an extent as countries embrace new development paradigms and as technology and globalisation shape new ways of trading and doing business.

On top of this, major economies such as the USA have started to engage in trade wars with major trading partners, taking unilateral actions as a way to correct supposedly alleged trade malpractices. The cracks have widened and spread to the hitherto successful WTO Dispute Settlement Mechanism, with the USA blocking the nomination of members of the Appellate Body – the highest adjudicating body of the WTO. With major deadlock and disruption to both its legislative and its judicial functions, the WTO has stalled and is in existential crisis.

Could the WTO have been a victim of its initial years of success in creating an attractive global trade order with an effective dispute settlement system? History is suggesting this could have been the case – but it may not be the sole reason; rather,

an amalgamation of factors could have been at play. After the long and protracted negotiations of the Uruguay Round, the creation of the WTO led to a new dynamism, with global trade governance with quasi universal membership. While this is central to the WTO principle of inclusiveness, it has become increasingly difficult for all member countries to come to agreement. Furthermore, the inclusion of major economies such as China and Russia has not only added a new dynamism but also made it increasingly difficult to accommodate developing countries' concerns.

Countries from all quarters of the globe have become well versed in WTO negotiations, prompting them to be more forthcoming with proposals to address concerns and interests. The model of a multilateral agreement that is decided among a few and imposed on others is long gone and, in essence, to command success today, a trade agreement must accommodate the varying concerns of all 164 member countries, developed, developing, least developed, small, newly acceded and so on.

Thus, it will be absolutely necessary to reshape the organisation to contemporary realities if it is to remain the premier trade organisation and, above all else, relevant. Some members have already submitted proposals for modernisation and reform. In the past, such attempts, building on reports from eminent people, have attracted harsh opposition; nowadays, by contrast, the looming danger is compelling everyone to have a fresh look at the organisation. While it is extremely important to reform the organisation, it is also crucial to maintain those core values that, forged over several years, have been its major strength – namely, universality and inclusivity. While this combination is difficult to achieve, the membership has at times shown its capacity to bridge differences and be creative, as was evident in the aforementioned decisions on TRIPS and public health and in the TFA.

### 6.3 The WTO as a negotiating forum

Article III (2) of the Marrakesh Agreement establishes the WTO as a negotiating forum. However, apart from the landmark TFA and some substantive outcomes in other areas, especially important decisions favouring LDCs, the WTO has achieved few concrete results. The reasons for this poor rule-making performance are both structural and systemic: structural, because of the structure of the negotiations and the agreements; and systemic, because negotiation principles have not been adapted to modern-day realities.

#### Single undertaking vs. reasonable and balanced negotiating mandate

The Uruguay Round introduced the notion of the 'single undertaking', which was subsequently carried into the Doha Round. This is the procedural notion that 'nothing is agreed until everything is agreed', in order to maximise cross-linkages and trade-off possibilities within a 'grand bargain' package deal. The premise is that all parties will obtain a net benefit from an overall deal. However, given the number of WTO member countries and the increasing breadth and scope of the 21st century trade agenda, it is worth questioning whether the single undertaking approach is still feasible and practical for modern trade negotiations, especially given the different issues and challenges being tackled in an omnibus trade round like the DDA.

With the entry into force of the TFA, there is already some departure from the single undertaking principle that has been the hallmark of previous decision-making.<sup>3</sup> Looking towards future trade rounds, it would be helpful to have a more realistic and balanced mandate on what could be achieved within a reasonable time period, and which would be reflective of the interests of the wider membership. Given the experience of the DDA negotiations, an ambitious mandate will not deliver results within a reasonable period of time.

### Single undertaking vs. plurilaterals

Another alternative to the single undertaking is to provide for plurilateral discussions among subsets of WTO members, as with the launch of the joint initiatives at the Buenos Aires Ministerial Conference in 2017; and, in January 2018, announcement by 76 WTO members of their decision to launch negotiations on the trade-related aspects of e-commerce. Plurilateral discussions that involve a critical mass of WTO members or substantial world trade coverage could be provided with the necessary space to evolve, with any decisions left to participating members, so long as these outcomes do not have multilateral implications. Should these discussions progress to rule-making, plurilateral agreements can take two forms.

The first is critical mass agreements. These are open plurilateral initiatives under which a group of countries agree to specific trade policy commitments they inscribe into their WTO schedules and apply on a most-favoured nation (MFN) basis to all WTO members. In other words, the benefits of such agreements apply to all WTO members, including those that did not sign them. The foremost example is the Information Technology Agreement, where the participating WTO members represent about 97 per cent of world trade in IT products and aim to abolish tariffs on products covered by the Agreement.

The second is plurilateral trade agreements under Article II (3) of the Marrakesh Agreement. These differ from critical mass agreements in that they may be applied on a discriminatory basis – that is, benefits need not be extended to non-signatories. Two such agreements currently exist – namely, the Agreement on Civil Aircraft and the Government Procurement Agreement (GPA). Both are inscribed in Annex 4 of the WTO Agreement. Given the discriminatory nature of plurilateral agreements, they require consensus to be incorporated into the WTO, as stipulated in Article X (9) of the Marrakesh Agreement.

There are potential benefits to pursuing plurilateral approaches. This option allows subsets of like-minded countries to agree to rules in a policy area that is not covered by the WTO, or goes beyond existing disciplines, as long as the membership as a whole perceives that this is not detrimental to their interests. This could reduce the diversion of liberalisation initiatives to RTAs outside the WTO; provide more efficient differentiation in the levels of rights and obligations among a community of highly diverse economies; and offer a mechanism for promoting greater efficiency at lower cost in WTO negotiations. For example, the GPA allows non-signatories such as China to steadily negotiate their access and commitments, providing a ‘building block’ for multilateralism.

However, there are also concerns that plurilateral agreements could create a two-track/speed system in the WTO with differentiated commitments and some erosion of the MFN principle. It is advisable that any future plurilateral initiatives in the WTO, including the intended negotiations on the trade-related aspects of e-commerce, be open and inclusive and entail some elements of non-discrimination, as discussed later (under *Structure of trade agreements: A progressive geometry approach*). This will help counter the perception that these processes resurrect the old Principal Supplier Principle of the GATT era, which had the effect of locking out developing countries and marginalising them from the negotiations.

### Clear guidelines for submitting negotiation proposals

When initiated, the Doha Round negotiating agenda included almost all the trade issues of interest to both developed and developing countries. However, it also established a clear hierarchy among them. The so-called 'development issues'<sup>4</sup> were to be dealt with first, to be followed by the WTO Built-In Agenda (BIA)<sup>5</sup> and thereafter other issues (e.g. trade and environment, fisheries subsidies and rules for RTAs). The Doha Ministerial Declaration was replete with references to 'development' and undertook to place developing countries' needs and interests at the heart of the Work Programme adopted in the Declaration. This is why it was dubbed the 'Doha Development Agenda'. However, in hindsight, the Doha mandate was overly ambitious in terms of the results to achieve. The process made the negotiations much more complex, resulting in the emergence of various interpretations of the mandate and expansion on existing approaches, such as the proposed sectoral tariff negotiations for Non-Agricultural Market Access, or specific issues such as food security in the context of the agriculture negotiations. Member countries have the legitimate right to submit proposals on what they consider necessary to achieve the given mandate. However, without checks and balances, this can easily run out of control, resulting in loss of intent of the original mandate.

To this effect, stricter guidelines should be utilised for the submission of negotiating proposals, which should respect the agreed mandate. The chairs of the negotiating bodies, as well as the Trade Negotiations Committee, should also have a greater role in terms of accepting/rejecting proposals for negotiations that are outside of the mandate. Alternatively, a critical mass support or a certain degree of representativeness of member countries should be required to push for a proposal in a negotiating body.

### Consensus as a core 'multilateral' principle

Multilateral trade negotiations should remain as inclusive as possible, with consensus providing the necessary comfort to member countries to proceed in the negotiations. Consensus-based decision-making is a cardinal principle of the WTO and has distinguished the WTO as a more formally democratic forum than the International Monetary Fund (IMF) or the World Bank, where a system of weighted voting is used.<sup>6</sup> Consensus forces WTO members to build convergences in their positions and make compromises in the interests of the system as a whole. It may not be politically feasible at this stage to eliminate the consensus principle when

adopting multilateral decisions that are binding on all WTO members. However, consideration could be given to whether consensus is required for every decision in the WTO.

The Sutherland Report, for example, recommended strengthening the consensus principle. The report's authors proposed a procedural change that would require WTO members blocking adoption of a measure in instances where the majority is in favour of proceeding to declare in writing that the matter was one of vital national interest to it (Consultative Board, 2004). This recommendation, if implemented, could help the WTO strengthen the consensus approach to decision-making and neutralise the efforts of some members to block consensus where the underlying reasons are extraneous to trade issues.

### Structure of trade agreements: A progressive geometry approach

Another element to take into consideration is the structure of multilateral trade agreements. Currently, it is very difficult to negotiate multilateral agreements that can accommodate the concerns of all member countries. The solution potentially lies in the structure of trade agreements. Adopting a 'progressive variable geometry' approach, whereby members have different rights and obligations under the agreement, can help solve this problem. The agreement could be structured in two parts.

The first part provides a basic framework agreement on a given issue with core principles, including but not limited to definitions, transparency, a 'no rolling back' clause, technical assistance and capacity-building, partnership and collaboration. This section may not be subject to the usual WTO dispute provisions, but the intention is to allow certain categories of member countries to familiarise themselves with certain issues, to build capacity and to garner support from other organisations in this initial process. This could include all member countries and be as inclusive as possible.

The second part broadens and deepens the ambition of the agreement in terms of allowing member countries that are willing and able to join to elevate their participation by undertaking specific commitments that are binding and subject to dispute settlement. Members that gain interest in the course of participation in the first step can join as and when ready. The agreement would become a multilateral agreement only once all member countries join. The specific commitments in the second section will not be extended on an MFN basis, to avoid free-riding. However, as a way to encourage more members to join, the first section will get much attention from participating members.

The advantage of the above approach is that it allows those members that are able and willing to proceed without leaving behind other members that cannot, through the provision of a mechanism allowing participation and capacity-building to let them 'catch up' and accede to the agreement when ready. Those who are part of it would also have an interest in ensuring greater participation in order for the agreement to succeed. This will create greater dynamism in the negotiations and promote inclusivity.

## Descaling the Doha Round with a balance

Continuing with the Doha mandate in its current form is unlikely to achieve success. Trade ministers would need to take the unenviable position of descailing the Doha mandate to manageable proportions, by including a mix of issues that would satisfy all members, including incorporating some new ones. These would include issues of extreme urgency, such as fisheries subsidies, and inevitable issues, such as e-commerce. Further, recognising the importance of special and differential treatment (S&DT) would also be necessary, and it may be useful to take a fresh look at what a development package in the WTO would look like today. In that regard, the S&DT model in the TFA provides a useful approach that could be replicated or adapted in other areas under the current or future trade rounds. Under the TFA, implementation of members' obligations is linked directly to their capacities and to the extent of availability of the assistance they require to meet their obligations.

## Partnership, coordination and collaboration

The WTO negotiating forum provides for partnership, coordination and collaboration with other international bodies. However, the latter remains an untapped and under-utilised resource for supporting multilateral trade negotiations, given the lack of a formal structure for engagement among the organisations on the one hand, and between the organisations and the member countries on the other hand. Many of these organisations lead the substantive policy and technical work in areas that now feature prominently on the WTO's agenda, including climate change; e-commerce; investment facilitation; and micro, small and medium enterprises and entrepreneurship. Consideration should therefore be given to whether these organisations and specialised agencies could play a more proactive role in supporting the negotiations on specific issues.

For example, the negotiations for the TFA engaged a range of specialised agencies with expertise in this area – such as the World Customs Organization, the World Bank, the UN Conference on Trade and Development and the IMF. These agencies, together with the WTO, undertook assessments at country level of the trade facilitation situation, gaps and priorities; raised national awareness of the importance of trade facilitation; and helped mobilise development (donor) community resources. This demonstrates how such organisations have a stronger interest and more buy-in for particular WTO agreements compared with others. Where appropriate, and to ensure greater coherence in global governance, the active support and cooperation of other organisations in negotiating WTO agreements can be better structured and, to a certain extent, formalised.

## Increase resources to the WTO Secretariat

The WTO Secretariat confronts staffing and resource constraints in its efforts to effectively support member countries in administering the agreements, dispute settlement cases and the negotiating rounds. Given the increasing breadth and scope of the 21st century trade agenda, the WTO Secretariat should be provided

with additional resources when being asked to tackle new negotiating issues. In the same vein, putting all the responsibility on individual chairs for the Negotiating Committees, and the director-general as the chair of the Trade Negotiations Committee, is a daunting challenge. It may help if the chairs are assisted by co-chairs, who would be given specific responsibilities for consultations. Chairs can also assign more substantive assignments to the Secretariat, such as preparing 'non-papers' and other material summarising areas of agreement/disagreement, and making contributions on selected topics. Thus, the workload can be shared and more time devoted to specific issues for consultations and deliberations on a way forward. If agreement cannot be reached on an issue within a given timeframe, then this simply should be 'parked until more favourable days'. This would leave space for other issues where there is greater possibility for convergence towards consensus, rather than drawing on the Secretariat's limited resources. Issues that have been parked may then be revived, after a given time, to see whether there has been any movement on positions. The chairs will have a critical role in this process.

### A managed process for Ministerial Conferences

The WTO has formal Ministerial Conferences that are required to take place at least every two years. Ahead of the Ministerial Conference, the General Council is tasked with preparing outcomes for trade ministers, including many issues that are still under negotiation in the Trade Negotiations Committee. The success of a Ministerial Conference is too often measured by whether trade ministers are able to resolve outstanding negotiating issues and adopt new multilateral decisions – like the TFA at Bali in 2013 or the decision to abolish export subsidies for agriculture at Nairobi in 2015. In some cases, the Ministerial Conference prematurely takes up negotiating issues without fully exploring and exhausting the possible trade-offs and convergence of positions in Geneva, as part of the normal course of negotiations. In reality, it is simply not conceivable to defer most decisions to be thrashed out in the politically pressured environment of a two- or three-day Ministerial meeting.

The Ministerial Conferences should be limited to making decisions that the General Council believes are ripe for adoption or that require political guidance at the highest level for finalisation by the Trade Negotiations Committee in Geneva. These decisions should be jointly agreed to by the WTO director-general, as the chair of the Trade Negotiations Committee, the General Council chair and the chair of the Ministerial Conference, in consultation with member countries. A work plan, prepared by the chair of the General Council, leading up to a Ministerial Conference, will help in providing guidance, clear milestones and reasonable expectations for all parties. In this way, associating results of Ministerial Conferences with failures of the organisation or the multilateral trading system is minimised.

## 6.4 The dispute settlement function

During its initial years, the WTO Dispute Settlement Mechanism worked formidably well, and, as mentioned above, may now be a victim of its own success. Why reinvent

something that has proven its effectiveness? Similar to the negotiating forum, much has changed over the past two decades and, if one is to revisit the other functions of the WTO, one must also improve its dispute resolution function. When it comes to the remits of the dispute settlement body – namely, the panels and the Appellate Body – the Dispute Settlement Understanding (DSU) is fairly comprehensive. The recent deadlock and enduring lack of consensus, led by the US administration's refusal to reach a consensus on replacement appointments to the Appellate Body, have illustrated underlying frustrations members have had concerning the DSU.

During the Doha Round, member countries committed to negotiate on improvements and clarifications on the DSU. Amendments to certain provisions are currently being reviewed and innovative ideas have been submitted as part of the reform process.<sup>7</sup> This process should be allowed to continue, with a view to ensuring the process is inclusive, preserves the essential features of the system and is given due attention by all members.

### Enhancing capacity and efficiency

The DSU has been actively used since its inception, with a total of 573 requests for consultations, 282 panels established and 334 disputes covered by panels established from 1995 to 2018.<sup>8</sup> The increasing activity of the system has led to apprehension about the efficiency and capacity of the Appellate Body on issues concerning the timelines for proceedings, and, ultimately, adhering to the required 90-day timeframe stipulation.<sup>9</sup> In this regard, the resources of the Legal and Appellate Body should be increased to enable its ability to undertake an increasing number of cases. The EU-led coalition of states<sup>10</sup> reform proposal, including China and India, calls for extended terms for members from six to eight years and an increase in the number of Appellate Body members from seven to nine. It is also noted that this reform would improve the 'geographical balance on the appellate body after numerous accessions to the WTO since 1995' (EU et al., 2018). Additionally, strengthening the mediation and consultation processes will alleviate the burden on the constituent bodies.

### Maximising the use of the DSU by small states and LDCs

Small countries and LDCs have remained fairly poor users of the system (Nottage, 2015). Financial, technical and domestic capacity constraints, among others, mean they require support to enable them to benefit and participate more meaningfully at all stages of the process. Solutions to address the cost constraints include the establishment of a separate dispute settlement fund, within the WTO, for small states and LDCs (ibid). The support of international organisations, such as the Commonwealth Secretariat, could be broadened to include such dispute resolution support. Other legal resources, such as those provided by the Advisory Centre on WTO Law (AOWL), are accessible, for a fee. It is critical nowadays to recognise the universality of the WTO in terms of membership capacity when providing support. Some organisations are trusted partners of certain member countries and provide critical support to them when tackling disputes. These organisations should be better supported. Other concerns, such as elements of cross retaliation and the possibility for the DSU to recommend measures that could have a proportional effect, could

be a way of compensating for the low trade of certain countries, or their inability to retaliate could be further discussed in the context of an overall DSU review.

## 6.5 Conclusion

This chapter has touched on the potential reforms of two main functions of the WTO. Achieving successful reform will require these two functions to be addressed in a balanced way, from within the specific roles as well across the board, to ensure the equilibrium is maintained. Trust is the underlying principle of any agreement, be it between two individuals or a multilateral agreement, and it works only if every member state trusts the system. Otherwise, it will be highly skewed. It has now become the priority of all member countries to ensure the efficiency of the WTO and to maintain its preeminent role in the global trading system.

## Endnotes

- 1 The Preamble recognises the importance of 'raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.'
- 2 These refer to four working groups set up during the WTO's Ministerial Conference in Singapore in 1996 covering transparency in government procurement; trade facilitation (customs issues); trade and investment; and trade and competition.
- 3 However, the Doha Ministerial Declaration recognises that reaching a consensus agreement on all the DDA issues could be challenging and therefore allows provisional agreement on certain issues in advance of the overall agreement. Paragraph 47 of the Declaration states that, 'Agreements reached at an early stage may be implemented on a provisional or a definitive basis' and 'Early agreements shall be taken into account in assessing the overall balance of the negotiations.'
- 4 At the outset of the Round, a set of three issues – TRIPS and public health, implementation-related issues and concerns and special and differential treatment (S&DT) – were considered priority development issues in the DDA.
- 5 The BIA refers to planned negotiations on agriculture and services, as well as various reviews of several Uruguay Round Agreements that were already mandated at the start of the WTO.
- 6 In the absence of consensus, Article IX of the Marrakesh Agreement provides for voting for particular circumstances, each requiring specified majority thresholds ranging from unanimity to a two thirds majority. However, voting has almost never been used in the WTO and is considered 'counter cultural' (Consultative Board, 2004: 29) to the organisation's consensus-based approach.
- 7 Proposals have been submitted by the EU-led coalition of states.
- 8 See disputes at [https://www.wto.org/english/tratop\\_e/dispu\\_e/disputats\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm)
- 9 Article 17.5 of the DSU.
- 10 Countries include Australia, Canada, China, Costa Rica, the EU, Iceland, India, Mexico, Montenegro, New Zealand, Norway, Republic of Korea, Singapore and Switzerland.

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## Chapter 7

### Conclusion

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*Brendan Vickers and Teddy Y. Soobramanien\**

This collection of essays has examined some of the critical challenges confronting trade multilateralism today, and proposed several concrete recommendations to improve the functioning, effectiveness, efficiency and inclusiveness of the WTO. While calls for WTO reform are not new, and have often been bound up with moments of institutional crisis, the current discussions on reform offer an opportune political moment to modernise and strengthen the WTO as the custodian of global trade governance for the 21st century, especially to help the world's smallest, poorest and most vulnerable countries achieve the Sustainable Development Goals (SDGs). This view is echoed by Director-General of the WTO Roberto Azevêdo, who reaffirmed the need for reform at the World Economic Forum at Davos in January 2019:

The word we keep hearing is 'reform'. Members are exploring possible reforms that would help to diffuse the current tensions, fix the impasse in appointments to the Appellate Body, improve monitoring and transparency in the system, and speed up our negotiating processes both on the longstanding issues and on other initiatives that been launched more recently. We must do more to make the WTO work faster, and be more flexible and responsive to members' needs – building on the progress of recent years. The G20 leaders' declaration made this clear. It called for 'necessary reforms' to the WTO so that it can keep playing its essential role in the global economy. All this has created a political window to modernize the WTO. We must seize that opportunity (WTO, 2019).

The preceding essays contribute valuable perspectives and insights into some of the fundamental challenges confronting the rules-based multilateral trading system, as well as the opportunities for institutional innovation and reform to help revive and strengthen the global trade regime at a time of rising protectionist measures and a backlash against globalisation in many countries around the world. Several key issues and messages appear to emerge from the analysis.

First, today's crisis of trade multilateralism has deep roots that extend well beyond the disappointing performance of the WTO as a negotiating forum, whether measured by the recurrent failure of member countries to conclude the Doha Round or by

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\* Brendan Vickers is Adviser and Head of International Trade Policy Section and Teddy Y. Soobramanien is Economic Adviser and Head of Hub and Spokes Programme of the Trade, Oceans and Natural Resources Directorate of the Commonwealth Secretariat, London. The views expressed in this essay are those of the authors and do not necessarily represent those of the Commonwealth Secretariat.

their inability to update WTO disciplines for modern and integrated 21st century world trade. There is an important – and often overlooked – historical, geo-economic and geo-strategic context to the current calls for reform, and it is these factors, especially the ‘big picture’ of shifting global power politics and the rise of emerging economies, that will condition the possibilities for WTO reform, as well as the constraints confronting reform initiatives. For example, given the nature of how the multilateral trading system has evolved over the past 70 years, and the imbalanced distribution of trade opportunities embedded by successive trade rounds dominated by advanced economies, perceptions of the purpose of the WTO – and thus the focus of reform – appear to differ significantly among WTO member countries today. Our contributors suggest that conversations about WTO reform, whether in Geneva or in national capitals, will need to strike some balance and compromise between reform as ‘rectification’ of past trade imbalances and reform as ‘renewal’ for future trade multilateralism (e.g. negotiations on new issues).

Second, the WTO does require pragmatic and incremental reforms to help tackle and resolve some of the immediate challenges confronting the organisation and improve its functioning. For that reason, some of our contributors propose concrete and pragmatic recommendations to improve the efficiency of multilateral trade negotiations and the functioning of the Dispute Settlement Mechanism, as well as the overall strengthening of the WTO. One novel and innovative proposal is to create a group that explores the Functioning of the WTO System (FOWTO), which draws on and learns from a similar exercise undertaken by the General Agreement on Tariffs and Trade (GATT). This group could pick up on the unfinished business of the Uruguay Round, focus attention on areas of pressing need and divert attention towards system reform and continual improvement, crucially taking a panoptic view of the balance of endeavours.

Some of our contributors also recommend recasting trade negotiations from ‘big-ticket’ rounds to continuous and on-going work programmes that reduce the pressure on Ministerial Conferences to deliver major multilateral outcomes, like the Trade Facilitation Agreement, or face collapse, failure and recriminations. Others propose pragmatic improvements to the actual negotiations process (e.g. framing plurilateral approaches, setting reasonable and balanced mandates, better structuring trade agreements through progressive geometry and greater resources and delegation to the WTO Secretariat, among others).

Third, as the WTO agenda widens to accommodate new issues, environmental sustainability warrants a prominent position in this reform agenda, especially in light of the SDGs, which include numerous trade-related goals, targets and indicators. However, despite calls for greater coherence and ‘mutual support’ between trade and environmental policy-making, environmental priorities do not yet have the prominence they deserve with regard to either the substantive or the institutional aspects of WTO reform. Aside from calls to conclude WTO negotiations on fisheries subsidies in 2019, to date the proposals tabled and informal discussions underway offer few concrete suggestions on how WTO reform could help advance progress on the many environmental dimensions of the SDGs, or, indeed, any other environmental issues at all.

Finally, despite the merits of the current reform proposals, there are some concerns that they do not sufficiently address the underlying deep-rooted causes of the crisis of trade multilateralism. The recent proposals on WTO reform and informal discussions point to useful technocratic adjustments and modifications to improve the organisation's efficiency and functioning, but lack a transformative vision of a 'new bargain on trade multilateralism'. Some of our contributors call for a more holistic approach to WTO reform, which combines technocratic reforms with a broader vision of making trade fairer and more sustainable, as envisaged by the SDGs.

In many countries around the world, there is a perception that the benefits of globalisation have bypassed cities, communities and citizens, and international trade is blamed for rising inequality, job losses and declining wages, despite the impact of technological change and growing automation. This rise in populism and discontent about globalisation has triggered demands for greater protectionism – and ultimately the pursuit of trade wars. Some of our contributors suggest that a revival of trade multilateralism requires a fundamental rethinking and renegotiation on the narratives that underpin globalisation.

Looking ahead, Commonwealth members – working individually, collectively and with international partners – can contribute towards reshaping these narratives, especially how international trade can be better harnessed, to play an effective role in realising the SDGs. Building on the Commonwealth's diverse experiences and crucial dependence on international trade, Commonwealth members can contribute valuable perspectives within global discourse, through the WTO, the UN, the G20 and other multilateral and regional organisations, on the role of trade in promoting growth, jobs and sustainable development. Given popular discontent about globalisation in many countries, they can accompany this with a new global narrative that trade represents an abiding force for human advancement.

Throughout this collection of essays, there is a reaffirmation of the importance of the rules-based multilateral trading system for the world's smallest, poorest and most vulnerable countries. If these countries are to achieve the SDGs, they need an enabling global trading environment that both supports and enhances their participation in world trade. It is therefore imperative that calls for WTO reform, current reform proposals and the informal discussions accommodate and secure the interests of these countries. In this interpretation, modern global trade governance – a WTO 2.0 as it approaches its 25th anniversary – should work to raise living standards and reduce poverty, establish and enforce reasonable development-friendly rules for global trade and protect the environment. This requires a critical and sober assessment of the organisation's shortcomings and strengths.

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The Commonwealth

This collection of essays offers timely and expert commentary on some of the challenges confronting the multilateral trading system today, and what reforms could help modernise and strengthen the WTO as the custodian of global trade governance for the twenty-first century.

The publication provides historical and up-to-date insights into how reform can be transformational and progressive in nature, and broadens the debate by focusing not only on new pathways for decision-making but also on important issues such as the environment and the SDGs. Finally, it highlights the importance of keeping the multilateral trading system alive for the benefit of all states, particularly for small states, Least Developed Countries and sub-Saharan African countries.

*WTO Reform: Reshaping Global Trade Governance for 21st Century Challenges*, is designed to serve as a valuable resource for government officials, trade negotiators, journalists, academics and researchers who are attempting to sort through the complexities of the organisation and the role they can play in supporting a fairer, more inclusive WTO and multilateral trading system.

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