ISSN 2413-3175
2016/21

The Commonwealth

INTERNATIONAL TRADE WORKING PAPER

The World Trade Organization post Nairobi: New Approaches and Architectures

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International Trade Working Paper 2016/21
ISSN 2413–3175

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Please cite this paper as: Bartels, L (2016), 'The World Trade Organization post Nairobi: New Approaches and Architectures', International Trade Working Paper 2016/21, Commonwealth Secretariat, London.

Abstract

The single undertaking negotiating model, whereby consensus agreement must be reached on all issues on an agenda, has led to a stalemate in the Doha Round negotiations. This has led to some WTO members reaching the conclusion, reflected in paragraph 30 of the 2015 WTO Nairobi Ministerial Declaration, that they 'do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations.' This International Trade Working Paper discusses some of these approaches, with particular attention to how these would impact upon small states.

JEL Classification: F02, F13, F40, F42, F53

Keywords: small states, the single undertaking negotiating model, the World Trade Organization (WTO), WTO negotiation models, Doha Round negotiations, trade policy, international organisations

Contents

1. Introduction

The Uruguay Round of multilateral trade negotiations was carried out (at least towards the end) and concluded on the basis of a 'single undertaking' negotiating model, according to which nothing was agreed until, by consensus, everything was agreed. In that round, the single undertaking model had several advantages, including for developing countries, by ensuring that their interests remained on the agenda and that, at least in theory, the final package was balanced.[1] However, for various reasons, including an increase in the membership of the World Trade Organization (WTO), an increase in the relative power of WTO members, greater awareness of the implications of trade negotiations, and a certain scepticism about the value of unfettered trade liberalisation, in the Doha Round negotiations the single undertaking model has led to a stalemate.

It has of course always been recognised that it can take time to reach a consensus agreement on all issues on the agenda, and that it might be possible to reach provisional agreement on certain issues in advance of such an agreement. The 1986 Punta del Este Ministerial Declaration, which established the 'single undertaking' model for the Uruguay Round negotiations on trade in goods (the other areas of negotiations were added later), stated that:

> The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations.[2]

Almost exactly the same wording was included in paragraph 47 of the 2001 Doha Ministerial Declaration launching the Doha Round of negotiations.[3] However, there is a difference between a delay in reaching a consensus agreement and an inability to reach such an agreement, and at least some WTO members have now come to the conclusion, reflected in paragraph 30 of the 2015 WTO Nairobi Ministerial Declaration, that they 'do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations'.

The purpose of this note is to discuss some of these new approaches, and their implications for small states. It is appropriate to begin, however, with an acknowledgement that these new approaches are not merely theoretical. For some years a number of WTO Members have, in practice, increasingly been negotiating outside the single undertaking model. They have made regional trade agreements, which are now increasingly significant in size, as well as plurilateral agreements, such as the Trade in Services Agreement (TiSA), whose final relationship to the WTO is yet to be determined. At a recent meeting, the European Union's (EU's) WTO Ambassador even stated that the EU's approach is to reserve the WTO as a forum for negotiating only those topics that cannot properly be negotiated outside the WTO, such as subsidies.[4] This development carries significant risks for small states. The more the larger players exit the WTO, the less they will be interested in the interests of small states within the WTO as a negotiating forum. Small states therefore have a clear interest in taking a proactive view of alternatives to the single undertaking, while at the same time making sure that these alternatives do not undermine their own interests.

2. WTO negotiation models

2.1 Consensus agreements

It is often noted that the WTO may have failed to deliver a comprehensive negotiation round, but it has nonetheless succeeded in delivering agreements on eliminating duties on information technology, eliminating export subsidies and facilitating trade, as well as a large number

of waivers. On closer inspection, however, each of these agreements was reached only because one of a number of alternative necessary conditions was fulfilled; and those conditions are manifestly absent from the general run of subjects included in the Doha mandate.

The first of these conditions is that an agreement concerns an issue in which interests are identical, or at least similar, and therefore it is not necessary for one negotiating party to trade a concession here against another elsewhere. Such agreements might include the WTO decisions on transparency in regional trade agreements. However, such agreements are likely to be more concerned with institutional or procedural issues than with substantive trade issues, where trade-offs are more likely to occur. Examples include the 1989 agreements on dispute settlement, and the 2010 decisions on transparency for notifications of regional and preferential trade agreements. Even on institutional and procedural matters not all WTO members will necessarily have the same interests, as differing positions in relation to the Dispute Settlement Understanding (DSU) review have shown. In practice, then, this condition is unlikely to be met very often.

Second, consensus agreement can be reached when there is a political or moral imperative that overrides ordinary trade interests. One might understand in this light the 2001 Cotonou and Trade-Related Aspects of Intellectual Property Rights (TRIPS)/public health waivers, the 2003 Kimberley Process waivers and the numerous waivers that have been granted for least developed countries. It is not inconceivable that issues of similar importance, such as climate change, land-grabbing, child or slave labour or illicit trade, could lead to a consensus agreement despite the trade interests of some WTO members. However, political or moral imperatives are unlikely to generate consensus agreement on the wider sets of issues found in the Doha mandate.

Third, consensus agreement can be reached where the parties' interests diverge but concessions are internally balanced (or differentiated) within the agreement. The Trade Facilitation Agreement (TFA) is an agreement in which there is both internal balance and a differentiation of obligations, insofar as developing country commitments are contingent upon capacity and, ultimately, financial and technical assistance.[5] In principle, internally balanced agreements should not be impossible to negotiate. However, even internally balanced agreements may be more valuable to some members than to others, and for some members they are therefore more valuable as bargaining chips for agreement on a matter of greater relative importance to those members. This means that there will inevitably be some need to bundle issues in a 'package', whether to be implemented simultaneously or in sequence, and with 162 members it is self-evidently difficult to agree on such a package.

It should be noted that these three conditions can work in conjunction. An agreement to eliminate fossil fuel subsidies, for example, could conceivably be based on a commonality of interests for some members, a moral or political imperative for others and, depending on the structure of the agreement, an internal balance for others. It is not inconceivable that, for these reasons, a WTO multilateral agreement based on consensus could be reached on topics such as the elimination of fossil fuel subsidies or of fisheries subsidies, or environmental goods and services. It is also conceivable that, as some suggest, such matters are best addressed in WTO committees rather than in stand-alone negotiation forums. But the essential point remains: where the conditions identified here are not met, consensus agreement will prove difficult, and most likely impossible. The most obvious alternative, then, is some form of plurilateral agreement.

2.2 Plurilateral agreements

In its broadest meaning, a plurilateral agreement is one under which a subset of all WTO Members make commitments on an issue. They may make these commitments to *all* WTO Members on a most-favoured-nation basis (in a non-discriminatory plurilateral agreement), or they may make these commitments only to the subset of WTO members on a reciprocal basis (in a discriminatory plurilateral agreement). At present, there are two discriminatory plurilateral agreements in force in the WTO, namely the Agreement on Government Procurement (GPA), and the Agreement on Civil Aircraft. These are inscribed in Annex 4 of the WTO Agreement.

For participants in a plurilateral agreement, there is an initial disadvantage in opting for a non-discriminatory plurilateral agreement, insofar as non-participating WTO Members can then 'free-ride' on the results. However, this cost can be outweighed by the benefit of reaching an agreement, particularly where there is a 'critical mass' of participants, and when non-participants are likely to accede in future. Both of these points may be illustrated by the 1996 Information Technology Agreement (ITA). This was a plurilateral agreement to eliminate duties on information technology products, initially concluded by 29 WTO members, which now covers 81 members, representing about 97 per cent of world trade in information technology products. Should a plurilateral agreement also cover non-market access issues, free-riding may even turn out to be an advantage, insofar as it effectively means that non-participants are adopting the regulatory preferences of the participants. Indeed, this is one of the reasons why some developing countries are sceptical of plurilateral agreements. This is precisely why the safeguards described below are so important.

3. Legal aspects

The type of agreement reached – whether consensus or plurilateral, and in the latter case whether non-discriminatory or discriminatory – and whether or not the agreement is to be enforceable within the WTO dispute settlement system are all factors affecting the way in which these agreements are given legal force within the WTO legal system. In addition, any agreements adopted outside the WTO that set out measures that would affect WTO rights and obligations are still subject to WTO law, insofar as WTO rules will continue to apply to these measures.

3.1 Scheduled commitments

The easiest option for giving legal force to negotiated agreements is, where possible, for WTO members to schedule their commitments under Article II of the General Agreement on Tariffs and Trade (GATT) (measures affecting trade in goods) or Article XX of the General Agreement on Trade in Service (GATS) (measures affecting trade in services). This option is most suitable for market access commitments, but it is worth noting that, so long as commitments do not undermine other GATT or GATS obligations, they can cover any measures affecting trade in goods and services, including regulatory measures.[6] There was, for example, no conceptual problem in using Article II GATT to schedule subsidy commitments following the Uruguay Round. It would also appear that Article II is being envisaged for the 2015 Nairobi commitment to eliminate (most) export subsidies.

3.2 Amendment

An alternative route for adopting the results of negotiations is to amend the relevant WTO agreement in accordance with the procedures set out in Article X of the WTO Agreement. One advantage of this route is the involvement of the WTO framework for the implementation, administration and operation of the plurilateral agreement, guaranteed by Article III:1. This is also likely to have the advantage of enhancing knowledge and institutional support for any future accessions.

For amendments to the WTO agreements (subject to certain exceptions), the ordinary amendment procedure is Article X:3, and this is the paragraph that is being used for the amendments concerning TRIPS and public health and the TFA.

For plurilateral agreements, the relevant provision is Article X:9, which states that a plurilateral agreement may, by consensus, be added to Annex 4 of the WTO Agreement. Article II:3 states that such agreements are binding on those WTO members that have accepted them but do not create rights or obligations for other members. This is generally considered to mean that plurilateral agreements in Annex 4 do not need to be extended to other WTO members on a most-favoured-nation basis.[7] For a plurilateral agreement to be

enforceable by WTO dispute settlement proceedings, it will also need to be added to the list of agreements covered in Appendix I of the DSU. This requires a separate consensus decision under Article X:8 as well as a decision, by the parties to the agreement, on how the DSU is to apply to that agreement, taken under the final paragraph of Annex 1 of the DSU.

A point that is often overlooked is that Article II:3 has the effect of *precluding* non-signatories to a plurilateral agreement included in Annex 4 from obtaining rights under that agreement, and also from enforcing those rights under the DSU. For any plurilateral agreement that is extended to non-participants on a non-discriminatory basis, then, it would be preferable to adopt the agreement as an ordinary amendment under Article X:3.

3.3 Informal commitments

These legal options are frequently preceded by agreements that are recorded in a ministerial declaration or some other legal instrument. It is important to note that such instruments must meet strict conditions for them to have any legal effect in WTO law, and the extent to which they can have legal effect within WTO law is also limited. This is true even when the instrument at issue is agreed by all WTO members. For example, the commitment in the 2015 Nairobi Declaration on the elimination of export subsidies has political force, and may even constitute an agreement under general international law, but its legal force within the WTO is limited to providing interpretive context to a relevant WTO provision (which does not exist in the case of export subsidies).[8]

3.4 Application of WTO law to plurilateral agreements negotiated outside the WTO

Plurilateral agreements formed outside the WTO framework cannot be enforced within the WTO dispute settlement system. However, any measures adopted in implementing these commitments are still governed by WTO law, and in particular the most-favoured-nation obligations in GATT, GATS and TRIPS. The only relevant exceptions to those obligations are those available for regional trade agreements. This means, for example, that any preferential treatment offered under TiSA will have to be extended to all WTO members on a most-favoured-nation basis, unless TiSA qualifies as a regional economic integration agreement under Article V GATS.

4. Comparable experiences

4.1 The European Union

The EU provides several mechanisms to reach agreement without a consensus of all EU Member States. One is qualified majority voting (QMV), which applies as a general rule to matters affecting all EU Member States, but this is of little present relevance to the WTO. Of more interest is the EU's 'enhanced cooperation' procedure, which allows a subset of (at least nine) EU Member States to adopt measures of further integration on certain issues, applicable only to participating Member States. Importantly, all EU Member States may take part in deliberations within this procedure, which serves to protect the rights of non-participating EU Member States, and may also encourage their subsequent engagement. Third, Member States may be permitted to opt out of a given EU policy. Opt-outs, which are enshrined in the basic EU treaties, permit closer co-operation among the Member States that are *not* opting out. Currently, the UK, Denmark, Ireland and Poland have opt-outs variously on the Schengen visa regime, the euro, defence, human rights and security.

4.2 Association of Southeast Asian Nations

Flexible integration is also present in the Association of Southeast Asian Nations (ASEAN) Community in the form of various formulas for reaching agreement on certain issues. Chief among these is the 'ASEAN Minus X' formula,

which, where there is consensus, allows an ASEAN subgroup to proceed with certain economic commitments even though other ASEAN Member States may not be ready to do so at that time. The formula is referred to in the ASEAN Charter but not defined, and in practice there are a number of variants. For instance, the ASEAN Australia New Zealand Free Trade Agreement adopted an ASEAN minus six agreement, while the ASEAN–Korea and ASEAN–India agreements adopted an ASEAN minus nine formulation.

5. Recommendations

This brief survey of flexibility mechanisms in the EU and ASEAN demonstrates that mechanisms are available that can address the concerns of small states that admitting any plurilateral agreements within the WTO system will necessarily undermine their interests.

First of all, plurilateral agreements should, where possible, be based on a critical mass of WTO members such that they consider themselves able to extend the benefits of these agreements to non-participants on a most-favoured-nation basis. For the reasons mentioned, this may require that the agreement be adopted, by consensus, under Article X:3 of the WTO Agreement, not Article X:9, as with discriminatory plurilateral agreements. Second, it is desirable that, as in the EU's enhanced cooperation procedure, negotiations should be open to participation by all WTO members, even if they choose not to conclude the final agreement. Third, opt-outs from certain parts of the agreement should not be excluded *ex ante*, especially for developing countries.[9]

Even on the basis of these recommendations, it is not suggested that plurilateral agreements will necessarily be in the interests of small states and developing countries. Plainly this is not the case. Losing the possibility of issue linkage can reduce the negotiating power of these countries; beyond this, it is conceivable that some negotiations, especially involving regulatory matters or entailing preference erosion, could undermine their interests as a matter of substance. What is suggested is more modest. It is, first, that, in determining whether small states and developing countries should adopt a flexible posture, the true counterfactual is not a veto on the issues set out in the Doha mandate, but a veto on those issues that will survive a defection of WTO members frustrated with the WTO process. Second, the result of such a calculation should not be predetermined, but may lead to the conclusion favouring, on a case-by-case basis, a smaller package reflecting reciprocal negotiating interests or even, provided no other harm is entailed, an open, non-discriminatory plurilateral agreement.

Endnotes

1 Rodriguez Mendoza and Wilke (2011), 492.
2 Part I.B(ii) of the 1986 Punta del Este GATT Ministerial Declaration, 20 September 1986.
3 For discussion, see Bartels (2014).
4 Comments by Mr Vanheukelen, 16th Annual BIICL Conference on WTO Law, Geneva, 11 June 2016.
5 Bartels (2014).
6 See the examples, for goods schedules, in WTO Negotiating Group on Market Access (2007), paras 13–17. The matter is explicit for services. Article XVIII GATS states that 'Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.'
7 The conventional view is that, as a result of Article III:2 of the WTO Agreement, signatories to a plurilateral agreement under Annex 4 do not need to apply them to non-signatories. However, it has been suggested that the most-favoured-nation obligations in GATT, GATS and TRIPS would continue to apply to matters covered by a discriminatory plurilateral agreement. The argument is that Article III:2 of the WTO

Agreement concerns only rights under the plurilateral agreement, and not rights under the ordinary WTO agreements. See Nottage and Sebastian (2006), 1012–13, n. 93. The point is well taken, but Article III:2 could also be read as stating that plurilateral agreements do not affect the rights of WTO members in respect of the measures laid down under these plurilateral agreements.

8 For discussion see Bartels (2016).

9 Cf. also the recommendations of Hoekman and Mavroidis (2015).

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