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Over the last decade, far from hurtling toward disintegration or irrelevance as the Doha talks have stalled and as the global economic and financial crisis has emerged, the WTO has, become a stronger and more legitimate, and indeed more important, international organization. This has happened despite the difficulties in the Doha negotiations, and suggests that the fate of the negotiations is not a litmus test for the Organization's future.

The WTO's Members have increasingly had recourse to the rules and dispute settlement institutions of the WTO to solve their trade disputes, including disputes with a high level of political and social sensitivity. This is by no means trivial: it is a significant vote of confidence in the legitimacy of the Organization, and also its real world effectiveness in managing trade conflict. Despite the much remarked proliferation of Preferential Trade Agreements, where there is a choice WTO Members have preferred, more often than not, to take their disputes to the much more highly developed WTO system. Moreover, even where the WTO dispute settlement institutions have ruled in very sensitive or controversial cases, the rulings have generally been respected, even if in some cases not immediately; reactions by civil society constituencies to rulings in cases such as *Hormones-Suspension* and *Tuna/Dolphin III* have been responsible and balanced, and have not led to broadside attacks on the legitimacy of WTO dispute settlement.

More generally, global civil society has become much more knowledgeable about how the WTO really works, and its criticisms have, generally speaking, become more focused, balanced, and constructive. There is much less of a tendency to blame the WTO for all or most of the ills of globalization, and greater appreciation that other institutions and players bear more of the responsibility for some of these problems (especially the international financial system). During the Doha Round, civil society focused its energies not on simply attacking the WTO itself or trying to bring the system down, but on contributing constructively to and pressing (rather successfully) for more transparency in negotiating proposals. "Think tank" NGOs, such as the International Center for Trade and Sustainable Development often had more useful suggestions on pushing the Doha development agenda forward than the government negotiators or the WTO Secretariat. Greater public scrutiny and civil society participation with respect to the negotiating proposals may have made agreement more difficult and contributed to the Doha Round's failure, on some views; however, the result is a legitimacy gain for the Organization as a whole, seen as more inclusive and transparent than in the past. With respect to inclusiveness, there is some evidence that developing countries, particularly after the Cancun summit, have been able to organize their participation in WTO negotiations so as to counter the traditional power imbalance in favor of the largest and richest nations. It

[1] These remarks are a revised and updated version of the Conclusion in Trebilcock, Howse, Eliason, *The Regulation of International Trade*, 4th edition, Routledge, 2012.

has become more difficult to push developing countries to agree to proposals that are not clearly in their interests. Again, while this may have contributed to the Doha impasse, in the long run it signals an at least somewhat less unequal and somewhat more legitimate WTO.

Another respect in which the relevance and legitimacy of the WTO have been enhanced in the last decade has been in the successful negotiation of the accession of China and now Russia. The importance of these nations for world trade is obvious, and had they remained outside the system for much longer it is inevitable that the WTO's claim to be a genuinely multilateral organization would have been weakened. In the case of China, there are important questions about the fairness of the price China had to pay, as it were, to accede, in the form of undertakings or commitments going beyond what is required by the WTO covered agreements themselves. Be that as it may, China has become an active participant in the dispute settlement system of the WTO and seems committed to constructive engagement in evolving the Organization's future. The membership of Russia, as well as Saudi Arabia and other Gulf states, gives the WTO the legitimacy to tackle issues of trade in energy, of obvious increasing significance.

Outside the framework of the Doha Round, it has been possible to make positive changes that respond to human rights and related values: the instruments on access to medicines and the waiver for the Kimberly Accord on conflict diamonds are two examples. Open hearings are increasingly the norm in panel and Appellate Body proceedings, even without any change to the DSU. Committees in the WTO (for example, the TBT Committee) have started to play a very important governance and dispute avoidance function. Petros Mavroidis notes:

> "the WTO has a very important mandate anyway which is independent of the success/failure of rounds: discussions in the various committees manage to produce better communication across trading nations, and resolve many disputes as well: a look into the TBT Committee for example, suffices to persuade the observer that dozens of specific trade concerns are being resolved at this level with no need to go to dispute settlement and the ensuing administrative cost for the WTO; through its publications it disseminates information about all issues coming under its purview."

Finally, and perhaps most importantly, the WTO system has passed a very significant test over the last 4 years. During the financial and economic crisis or crises of those years, considerable risk existed that countries would respond to the pressures in question by a wide scale reversion to protectionism. In one of the strongest examples of leadership in the WTO as an institution, Director General Pascal Lamy and members of the Secretariat moved swiftly to establish means of monitoring responses to the crisis for protectionism, opening a multilateral conversation aimed at ensuring that the countries in question were aware of the importance of operating within WTO disciplines, and ensuring that there would be early warnings of any protectionist slide. In fact, despite some slippage, Members responded well to the call to maintain the integrity of rules-based liberal trade, even under enormous pressure. Uncertainty about the WTO's long-term future might

easily have led to an attitude of short-term advantage taking under pressure. Again despite uncertainty and even pessimism about *Doha's* future, WTO Members displayed continuing allegiance to, and faith in, the notion of a multilateral system of legal disciplines to constrain protectionism; through the period of the crisis trade tensions have been channeled through the dispute settlement mechanism of the WTO, and escalating trade wars largely avoided. While the legitimacy of the WTO was threatened in the 1990s when the WTO and its epistemic community became agents of the Washington Consensus and neo-liberalism, the value of the basic rules on non-discriminatory free trade in constraining the pressure for beggar-thy-neighbor protectionist policies has highlighted the durability or vitality of embedded liberalism as a vision of the multilateral trade regime in the face of the crisis of neo-liberalism. An emerging challenge for the WTO that squarely falls within the embedded liberalism vision is to manage competition for scarce natural resources and commodities. To what extent should individual states be able to adopt policies that place the needs of their own citizens over those of others in the face of the challenges of resource scarcity and food security? As the *China-Raw Materials* and the *China-Rare Earths* disputes illustrate, the GATT/WTO acquis affords some basic rules and a functioning institution (the DSM) that can prevent a free-fall into beggar-thy-neighbor export restraints,[2] even as other sites of global governance have not kept up with the need to manage these challenges co-operatively.

Why, however, has Doha failed?

First of all, we should appreciate that the Doha negotiating agenda was essentially defined as what appeared, at the time of the Singapore Ministerial in 1996, to be the unfinished business of the Uruguay Round. Much has changed in the global political economy since. There was a failure to add to the agenda issues of intense concern in more recent years, such as food security and climate change and trade. Secondly, two of the main items on the agenda, investment and anti-trust, ended up as not acceptable matters for multilateral negotiation to many developing countries. These items were put on the table by the EU and were in fact a major focus of its interest in the Round; they were taken off as a last ditch effort to save the Cancun Ministerial from collapse. In fact, the failure of both the Seattle and the Cancun Ministerials to produce a declaration on the basis of which to launch a new round of negotiations reflected a basic lack of consensus on the direction forward for the WTO. The Doha Ministerial occurred in the shadow of the 9/11 terrorist attacks; leaders of the major global powers were clearly unwilling to send a signal of failure at a time of enormously heightened anxiety about world (dis) order. But differences of view were more suppressed or shunted aside rather than resolved.

This is reflected most dramatically in the decision to call the new round a "development" round. From Seattle onward, many developing countries, and also progressive constituencies in developed countries, insisted that any new round must correct the perceived imbalance of the Uruguay Round outcome, its orientation towards neo-liberal

[2] See Howse and Josling, "Agricultural Export Restrictions and Trade Law: A Way Forward", International Food and Agricultural Policy Council, 2012, http://www.agritrade.org/Publications/documents/Howse_Josling_Export_Restriction_final.pdf

ideology (privatization and regulatory reform in services for example), and restriction of policy space in areas such as intellectual property and subsidies. The main developed country players saw the essential goal of a new round as more liberalization on a neo-liberal model, pushing even further inside the border with disciplines on investment and competition. Calling Doha a development round raised expectations that the case of developing countries for a rebalancing of the Uruguay Round result was finally being heard. However, other WTO Members had no such intention, and conceived the "development" orientation of the Round as a willingness to search for market access concessions of interest to developing countries, while pressing even further ahead on "beyond the border" liberalization. But with investment and competition off the table since Cancun, and this narrow conception of "development" on the part of developed country WTO Members, neither developed nor developing countries would see their most important objectives, and their future ideal vision of the WTO, reflected in the actual Doha negotiations.

Earlier rounds of multilateral trade negotiations had, of course, been anchored in the possible gains from tariff concessions and other bindings on border measures, negotiated on an MFN basis. In the presence of the prospect of large mutual gains from such reductions, differences of principle and vision might have been put aside or been more manageable. However, by the time of Doha negotiations most of world trade was being conducted at preferential tariff rates (either through PTAs or GSP preferences), and there was continuing unilateral liberalization in some cases-including in services-driven by a range of technological factors as well as matters such as IMF conditionalities in the case of debtor developing countries. With low applied rates of tariff in many sectors, the case for MFN-based liberalization became greater legal certainty for existing arrangements rather than a major boost to growth from the reduction of actual protectionism. Even fervent supporters of Doha, such as the World Bank's Bernard Hoekman, admit that such a boost would not have resulted even on optimistic scenarios about what further market access could be achieved in a successful Doha Round, Moreover, the value of such gains would have to be measured against the counterfactual that some of the liberalization would occur anyhow, in the absence of a Doha result, through new PTAs and more unilateral liberalization.

Finally, we must recognize (as already suggested), that we are no longer dealing with a relatively small club, where the negotiating agenda can be set and a successful result concluded based on the interests of the large players taking precedence, and others coaxed or strong-armed to go along (the so-called "Green Room" problem). The diversity of today's WTO Membership is immense; smaller developing countries have formed coalitions with major global players such as China and India, and cannot be picked off selectively through the wielding of carrots and/or sticks by the United States and the EU.

What does all this mean for going forward?

As suggested above, while the Doha agenda remained dominated by issues left over from the Uruguay Round, the world has moved on and issues not on the Doha agenda (except indirectly and peripherally) such as the relation of climate change to trade have taken on

a greater urgency and significance to many of those that are being discussed pursuant to the Doha Declaration.

But it is not only the subject matter of WTO negotiations that needs to be reconsidered; the structure of negotiations and of WTO agreements also needs to be rethought. In particular, we must reflect on the extent to which the current impasse is a product of what might be called the ''Single Act'' mentality: the notion that the WTO must move forward through comprehensive rounds of negotiations, resulting in a package of agreements to which all WTO Members must adhere on the same terms. Even in the Uruguay Round itself, this rigidity was not fully followed—the Government Procurement Agreement is plurilateral and the GATS permits individual WTO Members to tailor many of their obligations, based on what they are prepared to commit. Today, more than ever, the WTO membership exhibits enormous diversity in levels and trajectories of economic development, political systems, and capacities. In these circumstances, we need to re-imagine the round in more flexible terms. First of all, why not simply admit that some elements of the Doha package are much harder to obtain agreement on than others? It is quite feasible to re-conceive the ''conclusion'' of the round as an on-going process, rather than a grand finale where everything is agreed upon at once. An assessment needs to be done of which areas are close to agreement and which areas represent a greater challenge to achieving common ground. Moving forward to agreement on the former, while simply admitting that the latter are not ripe for agreement, will give a sense of greater momentum on the one hand, and greater realism, on the other, to the Doha exercise. In defining these different areas, and taking stock of where things really stand, the Director-General with his senior counselors and officials, have the opportunity to exercise real leadership.

Second, a similarly hard-headed assessment needs to be done of whether in certain areas it is simply not realistic to expect all WTO Members to agree, or it might be the case that there is already a wide range of agreement among a considerable number of Members, but certain others are simply not ready to proceed (one possible example is liberalization of trade in environmental goods and services). In such cases, it may make sense to imagine a plurilateral outcome: an agreement among the Members who are ready to agree, while leaving it open for others to join. In reality, this is what happened with basic telecommunications and financial services in the Uruguay Round, although official WTO dogma does not admit that these arrangements are genuinely plurilateral. A recent example of successful plurilateralism outside the WTO is the agreement on liberalization of trade in green goods at APEC; the EGS negotiations were stalled in the WTO for lack of basic definitional agreement on what is an environmental good. It was possible within APEC-which includes as members the US, China, Japan among others-to achieve consensus on a list of green goods, something that has eluded the WTO negotiators.

Third, a careful examination needs to be undertaken of the way in which various kinds of flexibilities can be built into new accords to address the needs and concerns of particular Members, whether for policy space or capacity building, for example. The existing flexibilities in WTO agreements need to be inventoried and examined for their effectiveness in managing diversity within a multilateral framework. These include

safeguards, exceptions and limitations provisions, phase-in periods, obligations to provide technical assistance, and so forth. In the heat of the negotiations themselves, there is little opportunity to consider carefully these structural possibilities, or to think about basic design choices: for instance, which flexibilities need to be offered on a general basis, and which can be tailored to particular Members or groups of Members?

Fourth, one dimension of the current negotiations that limits the range of options for achieving agreement is resistance among a number of key players, and supported by what appears to be the overall outlook of the WTO as an institution, to adjusting or amending the Uruguay Round Agreements—as if they were some kind of divine, or super-constitutional law set in stone.

Fifth, interpretative understandings could be used to fix some of the difficulties of the Dispute Settlement Understanding, particularly in the relationship between compliance panel actions and the imposition of countermeasures. It would even be possible to have interpretative understandings that would apply as between a sub-set of WTO Members, provided these do not diminish the rights of Members who do not subscribe to the Understanding in question. Such inter se agreements between some of the states parties to a multilateral accord are explicitly contemplated in the Vienna Convention on the Law of Treaties. Even if not in the form of treaties, understandings along such lines would constitute relevant practice to guide the Appellate Body in disputes to which adherents of the understandings in question are parties. If the legitimacy of the dispute settlement organs is not to be stretched to the limit, there must be some way of addressing gaps and ambiguities in the existing law other than through judicial activism or comprehensive renegotiation. Here, one immediate step would be to attempt to identify those issues and areas where more rapid and satisfying progress can be made through interpretative understandings or similar devices that fall short of formal legal amendments. Fixing some of the concerns about the existing law in this way could build confidence and momentum for new accords, and might be considered in some instances as an intermediate step.

Governance and Accountability

The fact that the WTO is based on consensus decision-making by delegates of Member governments has been invoked to suggest that there is no need for further accountability of the activities of the WTO as an institution. This ignores the considerable role of the Secretariat as well as particular delegates assigned, for example, as Chairs of negotiating or other committees in the WTO to set agendas, 'frame' the way that issues are discussed, make judgments that have normative impact about the meaning of WTO rules, and even (e.g. the case of Secretariat reports with respect to the Trade Policy Review Mechanism or technical assistance) to judge and advise the policy-makers of individual WTO Members.

- Is a more transparent and participatory process required for senior appointments in the Secretariat and perhaps Appellate Body? How might it work? Are clearer and more developed conflict of interest rules required?

- How can WTO Secretariat officials and delegates carrying particular responsibilities (chairing committees etc.) be more accountable to the public throughout the world? Should there be a supervisory board of citizens, including some elected officials in individual states, which would oversee the conduct of business by WTO Secretariat officials and delegates with particular responsibilities?

- Should there be a WTO code of best practices to guide such individuals, particularly in their dealings with stakeholders and the public?

- Should the everyday workings and deliberations of the WTO be more transparent? If so, how should this be accomplished?

Technical assistance, policy development and policy surveillance

- How is it possible to ensure that these functions are performed in a manner that is sensitive to controversies about free trade and globalization, and does not unduly advocate a particular approach to domestic regulation and trade policy?

- Should the WTO's choice of 'experts' to perform technical assistance, including training functions, be subject to a more open, pluralistic process?

- Should the materials used to communicate to those who are being provided with technical assistance the meaning of their WTO obligations and the WTO view of desirable policies and policy reforms be subject to outside review, perhaps by a board of individuals of diverse backgrounds, including officials in other organizations such as UNCTAD and UNDP?

- How could the Trade Policy Review Mechanism be reformed to capture better the social and environmental impacts of trade liberalization, and the difficult choices that countries face in finding an ideal policy mix? Should NGOs and broader social interests more generally be engaged directly in the trade policy review exercise?