

Strengthening and Modernizing the WTO: Discussion Paper

Background

Despite clear evidence that trade has contributed to unprecedented global prosperity and development, the rules and institutions that facilitate trade seem increasingly fragile. The challenges facing the multilateral trading system cannot be attributed to any single cause or any single country. The structural transformation of the global economy, combined with technological change, has disrupted national economies and societies, some more so than others. The resulting insecurity and inequality have led to growing concern that the benefits of trade have not been shared fairly and that the existing rules no longer reflect a fair balance of rights and obligations. These pressures exacerbate existing differences among members of the World Trade Organization (WTO) in their need, capacity or willingness to take on new commitments.

The vast majority of trade continues to take place in a secure and predictable environment. However, the combination of disruption and paralysis has begun to erode respect for rules-based trade, and the institutions that govern it, paving the way for trade-distorting policies. As a result, all three main functions of the WTO are currently affected: the monitoring of existing commitments appears unable to contain escalating trade tensions; beset by the increasing complexity of disputes, the dispute settlement system struggles to cope with demand; and longstanding negotiations to update the trade rules to reflect modern economic realities have delivered only modest results.

In this context, action to restore confidence in the multilateral trading system and discourage protectionist measures and counter-measures will require leadership, creativity and patience. In the absence of a single WTO member with the capacity, willingness or credibility to lead, an alliance of members who share a commitment to the multilateral trading system can engage in a deliberate and transparent process to develop a progressively broader consensus on how to strengthen the WTO and modernize the trade rules.

In support of such a process, this discussion paper outlines a number of pragmatic and realistic actions and confidence-building measures. This is not an exhaustive list but rather is illustrative of some possibilities with the aim of starting a discussion. This includes actions and measures to: 1) improve the efficiency and effectiveness of the monitoring function; 2) safeguard and strengthen the dispute settlement system; and, 3) lay the foundation for modernizing the substantive trade rules when the time is right. Some of these can be pursued immediately, others may take more time and discussion to develop and implement. A range of instruments can be used to modernize and strengthen the WTO incrementally, in most cases without amending existing agreements.

Theme 1: Improving the Efficiency and Effectiveness of the WTO Monitoring Function

Monitoring the implementation, administration and operation of existing agreements is central to a well-functioning rules-based trading system. Transparent information-sharing and deliberation helps members learn about each other's measures and how to achieve policy objectives with the least trade restrictive effect. Informed policy dialogue can mitigate the temptation to take trade-distorting measures, diffuse potential trade disputes and support discussions of the need for negotiations on new commitments. More broadly, transparency builds confidence in the trading system and provides certainty in international markets. Improving the monitoring function involves making the regular bodies of the WTO more efficient and effective. Action might be contemplated in three areas.

1. Improve notification and transparency of domestic measures:

Effective deliberation depends upon the availability of reliable and objective information. For this, action must be taken to improve the notification record of members. This might begin with a comprehensive review of the notification requirements to ensure they are not unnecessarily complex and burdensome. Based on this review, updates to the requirements could be considered or incentives and technical assistance could be provided to countries that have fallen behind. Counter-notifications from other members and independent information gathering by the Secretariat might fill in the remaining gaps. A high-level endorsement of the importance of notifications and transparency would generate momentum to develop effective solutions.

2. Improve the capacity and opportunity for deliberation:

Engaged and informed deliberation is critical to helping members understand the complex challenges of trade cooperation in the modern world. For this, the work of the regular bodies of the WTO might be organized to allow for more timely and relevant deliberation on thematic issues that involves multiple bodies and information from diverse sources. A number of steps could be taken to improve the capacity and responsibility of the member representatives leading such discussions, as well as that of the Secretariats supporting them. High-level support will be crucial for developing new and innovative approaches to multilateral dialogue on trade.

3. Improve the opportunities and mechanisms to address specific trade concerns:

Discussion in some regular bodies of concerns about specific trade measures can lead to clarification and even resolution without the need for formal dispute settlement proceedings. Opportunities for such exchanges could be improved by making more robust mechanisms available in all regular bodies, sharing information about specific concerns

between relevant bodies, and providing for referral to confidential third-party mediation and conciliation when appropriate. High-level support for addressing specific trade concerns in the regular bodies will provide momentum for new ideas in this area.

Theme 2: Safeguarding and Strengthening the Dispute Settlement System

The availability of compulsory, binding and impartial dispute settlement is critical for the preservation and support of rules-based trade. A number of significant challenges need to be addressed to safeguard and strengthen the WTO dispute settlement system.

1. Diverting some disputes or issues from adjudication:

Aging trade rules, the increasing complexity of disputes and an erosion of self-restraint combine to overburden the dispute settlement system. Adjudication has taken on a more prominent role in sustaining trade cooperation than originally envisaged, in some cases substituting for negotiation. Diverting certain disputes or issues from adjudication can be accomplished 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. High-level endorsement of actions that would reduce reliance on formal dispute settlement would help safeguard and strengthen the system.

2. Streamline adjudicative proceedings:

The complexity and increasing length of dispute settlement proceedings undermine the system's accessibility, creating incentives for short-term trade-distorting measures and unilateral counter-measures. The adjudicative procedures could be made more flexible and adaptable to the diverse nature of disputes. This might include developing alternative procedures tailored to specific kinds of disputes, supplementary procedures for specific features of existing proceedings and a mechanism for more interaction between panel and appeal levels (i.e., remand). High-level endorsement of the need to streamline the dispute settlement system and make it more adaptable would generate momentum in the stalled discussions of improvements.

3. Updating and ensuring appellate review:

The impasse over the appointment of Appellate Body members threatens to bring the whole dispute settlement system to a halt. Resolving it and restoring the Appellate Body to a full contingent of members will require addressing concerns raised about the functioning of the Appellate Body and perhaps even about perceived imbalances in the rights and obligations of members. Beyond the specific solutions that might be required to address the concerns, the most important contribution that Ministers can make would be to acknowledge the concerns expressed by some Members and indicate a willingness to work with those members to find mutually agreeable solutions.

The first set of concerns relate to whether the Appellate Body has, through its clarifications of WTO provisions, added to the rights and obligations of WTO members.

Addressing concerns about specific obligations raised in past disputes may require agreement of members to override those interpretations, which may be difficult. In the meantime, mechanisms might be developed that allow members more opportunity to provide binding and non-binding guidance to adjudicative bodies on specific issues. This might include holding thematic discussions of issues that arise in disputes, and developing a formal pathway for some of these discussions to progress to the adoption, by consensus, of “authoritative interpretations” (a decision-making option already available in the WTO Agreement) of the WTO obligations in question.

The second set of concerns involve systemic and procedural practices of the Appellate Body. Actions to address these concerns could include:

- narrowing the scope for “advisory opinions” by clarifying that the primary objective of the dispute settlement system is the settlement of specific disputes and that only findings that are necessary to achieve this objective are required;
- focusing appellate review on legal issues by clarifying the standard of review to be applied by the Appellate Body to panels, especially with regard to factual findings and those related to the operation of domestic law;
- promoting a more robust adjudicative dialogue by allowing for the expression of minority views in panel and Appellate Body reports and reiterating that interpretations adopted by the panel and Appellate Body apply only to the disputes in which they are adopted; and
- developing guidance related to consultations with parties when the Appellate Body is unable to meet its deadline.

Theme 3: Modernizing the Trade Rules for the Twenty-First Century

The ageing trade rules need to be updated urgently to respond to the needs of the modern global economy. For most issues, this is unlikely to happen as a single undertaking, at least not for the foreseeable future. Instead, alternative approaches to cooperation and rule-making may be required to reflect the realities of a WTO membership with increasingly diverse needs, levels of development and capacity. This might involve approaches that allow for differentiated participation in negotiations and for accommodating differentiated levels of development.

1. Identifying Priorities for Modernizing the Rules

While there is a consensus that modernization of the trade rules is essential, there is divergence about the priorities. A sustained and open policy dialogue on possible priorities and identifying what is required to facilitate greater convergence should begin immediately. A first task for a group of members committed to making progress might be to identify those issues that might be subject to efforts to achieve multilateral agreement and those that might be better achieved through plurilateral initiatives or other approaches to upgrading the rules. Such a discussion can draw upon a combination of issues such as those:

- outstanding from previous negotiations, including issues from the Doha Round such as agricultural support and development issues, and especially those facing Least Developed Countries;
- required to modernize the rules for the modern economy and address the social dimensions of globalization, such as digital trade, inclusive trade, sustainable development, MSMEs, investment and domestic regulation; and,
- required to address more recent concerns about distortion of competitive conditions, for example through the market-distorting effects of SOEs, industrial subsidies, transfer of technology and trade secrets, and transparency.

2. Means to modernize the rules

While no WTO member should be expected to take on obligations to which it did not consent, likewise no member should expect to be able to prevent others from moving forward in various configurations in areas where they are willing to make greater commitments which could vary from political statements to more ambitious binding agreements, e.g. plurilateral initiatives. Binding initiatives should be inclusive, open and provide clear rules for accession by other members or eventual multilateralisation. They could take on several forms, both inside and outside the WTO legal framework:

- “open” agreements where the benefits are extended on a Most-Favoured Nation (MFN) basis (e.g., Information Technology Agreement), if critical mass of coverage is achieved or the risk of free-riding is low, do not require agreement of all members;
- “closed” agreements that apply only to the participants (e.g., Government Procurement Agreement) are subject to agreement by all members, but might be feasible in certain areas;
- closed agreements can also be pursued outside the WTO framework (e.g., TiSA), but these may be less transparent and may not be subject to WTO dispute settlement.

3. The Development Dimension

It is uncontested that countries with different levels of development have different capacity to engage in trade and take on new trade commitments. While these differences need to be accommodated in a way that strikes a balance between reciprocity and flexibility, disagreement over how to achieve this has become one of the most intractable barriers to progress in negotiations over new multilateral rules. A new approach is required, one that recognizes the need for flexibility for development purposes while acknowledging that not all countries need or should benefit from the same level of flexibility. The regime for special and differential treatment in the Trade Facilitation Agreement (TFA) provides a precedent and a possible blueprint. Based the features of the TFA, a new approach might include:

- recognizing that while the development needs of certain countries justifies transitional implementation, the long-term objective is the convergence and full implementation of all obligations by all members;
- developing categories of need, differentiated by obligation, by country and by the length of the transition required, to be applied based on evidence of need and subject to negotiation; and,
- linking implementation of the most onerous obligations, at least for countries with the least capacity, to the acquisition of capacity to do so, for which other members might have an interest in providing support and assistance.

The Way Forward

A group of WTO members that seek to support the rules-based multilateral trading system can provide leadership through advocacy and leadership through action: advocacy about the benefits of rules-based cooperation on trade and the importance of the WTO as an institution; and actions to demonstrate commitment to these principles and build confidence in the various functions of the WTO. A number of potential actions have been outlined above. There may be others.

The format of the actions pursued will require creativity and flexibility. The most realistic choice of instrument in the near term will likely need to be plurilateral in participation. While new binding multilateral agreements or significant institutional changes to the WTO are unlikely in the near term, alternative instruments may still be feasible. Very few of the actions proposed above require amendments to existing agreements or formal institutional reform. Most can be pursued using alternative instruments that work in more incremental and flexible manner.

The next step is to set priorities for action. In the immediate term, urgent action is required to restore the dispute settlement function and improve the monitoring function, in order to restore confidence in rules-based trade and build momentum toward new rules. Longer term deliberation will be required to develop more ambitious improvements to the regular bodies and to the dispute settlement system, to build consensus around the use of plurilateral agreements and accommodating different levels of developments, and to developing priorities for issues and formats for formally updating the trade rules.

Finally, the growing number of initiatives by WTO members, pursued in different configurations, demonstrate how widely held the view is that action is required to preserve rules-based cooperation on trade and to modernize the WTO. These initiatives will eventually need to converge around a common vision for the future of the rules and institutions of the multilateral trading system. In the meantime, it will be important to maintain frequent engagement and coordination with other members and to progressively expand the dialogue to include others who are ready and willing to participate constructively.

Annex: Options for Instruments of Action

Plurilateral Instruments

Available plurilateral instruments may vary from political statements of intention, similar to those adopted at the 2017 Ministerial Conference, to more ambitious binding legal agreements on new rules such as the examples provided above under Theme 3. For more operational actions, instruments such as plurilateral codes of conduct or procedural agreements could be considered. Examples of this approach are the procedural agreements notified under the DSB *Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes* (see JOB/DSB/1).

Multilateral Instruments

In other areas where multilateral consensus may be achievable on operational actions, but where treaty commitments are still too ambitious, a number of approaches are possible:

- WTO bodies could adopt non-binding instruments (i.e., soft law) covering both the procedural aspects of their work and incremental adjustments to existing commitments. The adoption of such instruments might require a clear statement that they are not intended to affect the interpretation of existing obligations;
- The General Council and the DSB could make greater use of formal Decisions to administer their work. There are limits to the scope of new obligations created by instruments other than new agreements or amendments. However, the *Decision on Export Competition* adopted at the Nairobi Ministerial Conference illustrates that even new commitments can be made using these kinds of instruments;
- Authoritative interpretations could be adopted under Article IX.2 of the WTO Agreement to clarify certain existing obligations. These might be used to complete previously incomplete negotiations, fill gaps that existed or that have emerged through changes in commercial practices, or override interpretations that have emerged in past disputes.