

## **Urgent and Important: Improving WTO Performance by Revisiting Working Practices**

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**Abstract:** *The rules of the game embodied in the World Trade Organization (WTO) date back to the 1980s. They have not kept up with a rapidly changing world economy in which countries increasingly use trade-distorting measures designed to advantage national industries. This article reflects on why cooperation in the WTO unraveled to the extent that it did in 2017-18 and argues that improving the performance of the organization in fulfilling its mandate requires re-visiting and updating WTO working practices.*

### **Introduction**

The bargains struck at the time the World Trade Organization (WTO) was created (in 1995) and China acceded to the organization (2001) are embedded in a set of rules mostly designed in the 1980s. Since then the structure of the world economy has changed significantly. Servicification, with associated cross-hauling of foreign direct investment (FDI), cross-border data flows and digitization of production requires updating multilateral trade governance. Growth of emerging economies, notably China, has led to trade tensions and globally welfare-reducing competition between governments to attract (retain) investment and technologies. WTO members have done too little to confront and address these challenges. As a result, the multilateral trading system is in crisis. WTO members failed to conclude the first round of multilateral trade negotiations launched under WTO auspices in 2001, the Doha Development Agenda. Many WTO members do not abide with notification commitments, reducing transparency. Since 2016, the US has blocked new appointments to the WTO Appellate Body, reflecting dissatisfaction with the way it has operated. In parallel, the US has reverted to 'aggressive unilateralism' (Bhagwati and Patrick, 1990), seeking to induce changes in policies of trading partners through action under Section 301 of the Trade Act of 1974 (as amended), and by imposing protectionist measures on spurious national security grounds (under Section 232 of the 1962 Trade Expansion Act). The latter undermines the foundation of the trade regime as it renders meaningless negotiated tariff commitments (bindings). Retaliation by targeted countries – including Canada, China, the EU, India, Mexico, Russia and Turkey – further reduces policy predictability and lowers global welfare.<sup>2</sup>

All WTO members have a stake in sustaining the rules-based multilateral trading system. Large trade powers need a functioning multilateral trade regime because many of their concerns regarding foreign trade practices cannot be addressed effectively on a bilateral basis. Bilateral deals will be eroded by market forces that drive investment towards other countries; moreover, many trade practices generating negative spillover effects are not unique to one country. Most developing countries have

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<sup>2</sup> See Bown and Zhang (2019) for a summary of the state of play as of February 2019; Morrison (2019) for a brief description of the Section 301 case against China, and Fefer and Jones (2018) on Section 232.

little market power vis-à-vis large trading nations – only the WTO offers small countries the opportunity to influence the development of new trade rules. Likewise, citizens in all countries concerned with ensuring that trade supports societal goals and sustainable development have an interest in a functioning multilateral trade regime that supports the realization of these goals.

Two operating modalities of the WTO – consensus-based decision-making; and special and differential treatment (SDT) of developing countries – have weakened the ability of the WTO to function as a venue to address trade tensions and promote cooperation. The first has been used by WTO members to veto initiatives and block efforts that seek to go beyond the issues that were agreed to comprise the Doha Development Agenda. The second has allowed advanced developing countries to offer less than full reciprocity in trade negotiations and the application of certain WTO rules, feeding perceptions that large emerging economies have an ‘unfair competitive advantage’.<sup>3</sup>

Deadlock in the WTO has induced many countries seeking to strengthen trade governance to negotiate preferential trade agreements (PTAs). PTAs allow countries to deepen integration of markets with trade partners but they risk fragmenting the rules that apply to global value chains and offer only partial solutions to companies seeking disciplines on trade-distorting policies. A major reason for this is that large emerging economies have not been willing to participate in deep PTAs that include disciplines on investment, competition, industrial and regulatory policies. Any agreements to extend and update rules of the game in such areas must span the large emerging economies, notably China, to be meaningful.

The WTO is the forum where such agreements should be negotiated. WTO Members should launch a process to identify a work program to update and expand the rulebook to address trade-distorting nontariff policies that are not or only incompletely covered by WTO disciplines. The recent unilateral protectionist actions by the US government and its decision to block appointments to the Appellate Body have raised the stakes. It is clear that business as usual approaches, including insistence on consensus-based operating modalities and special and differential treatment for large, successful developing countries, are no longer viable.

The situation confronting the trading system has parallels with the 1980s, which saw extensive recourse to trade-distorting measures in response to a rapid rise in exports from East Asian economies. This motivated a preparatory process that led to the launch of the Uruguay Round in 1986 (see e.g., Hoekman and Kostecky, 2009). A similar effort is needed today, aimed at resolving trade conflicts and tensions that are of greatest relevance from a systemic perspective. There are three areas where such efforts are both urgent and important from a systemic perspective: (i) cooperation to address issues that underlie rising trade tensions; (ii) resolving the impasse on the functioning of the Appellate Body; and (iii) pursuing new approaches to address disparities in capacity and economic development in a more meaningful way.

Progress on the first two of these areas requires agreement between the major proponents: China, the EU, Japan and the US. All four entities have engaged in bilateral discussions with each other. In addition, in 2018 the EU, Japan and the US launched a trilateral process to identify ways to strengthen

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<sup>3</sup> See Bertelsmann Stiftung (2018) for a more extended discussion.

disciplines of subsidies, state-owned enterprises (SOEs) and technology transfer policies.<sup>4</sup> A necessary condition for meaningful outcomes is that such engagement is quadrilateral. There is no magic bullet: the key players need to negotiate with each other, with whatever is agreed applied on a most-favored-nation basis. At the time of writing it is quite uncertain whether a quadrilateral agreement will emerge. The same applies to the dispute on the operation of the Appellate Body, which will cease to function at the end of 2019 when two of the remaining three sitting members reach the end of their mandate unless a deal is reached with the US. In the absence of a deal,<sup>5</sup> a majority of WTO Members may agree to adopt arbitration or engage in a vote on filling the vacant seats, but such stop gaps will be very much second best.<sup>6</sup>

A premise of this article is that no matter what happens with the US-China-EU trade conflicts and the Appellate Body, it is necessary to reflect on why cooperation in the WTO unraveled to the extent that it did in 2017-18 and what could be done to improve the performance of the organization in fulfilling its mandate. There is a large and growing agenda confronting WTO members. The use of trade-distorting policies by many WTO members has been rising steadily since the global financial crisis erupted in 2008-09. Many are long-standing in the sense that they are well understood and been the subject of deliberation. Examples include agricultural support policies; tariff escalation that constrains developing country firms from moving up the value chain; tax incentives to attract FDI; and the use of subsidies to support local production or exports. Subsidies and measures with equivalent effect (e.g., tax concessions) accounted for about one-half of the 9,000 trade-distorting actions imposed by G20 countries between 2009 and 2019 (Evenett and Fritz, 2018). While the rapidity and magnitude of Chinese economic growth and perceptions that the increasing role played by Chinese SOEs and the extent of industrial policies are major factors driving calls for action to ensure there is a level playing field, it is important to recognize that the challenges confronting global trade governance and cooperation extend beyond China. Policies towards the digital economy and associated spillovers concern all countries. Trade or competition-distorting measures are used by many WTO Members, including OECD nations (e.g., investment and tax incentives, agricultural support, tariff escalation).

Rule-making on policies that are perceived to generate negative trade spillovers is a core function of the WTO. What is needed is concerted action by WTO members to define a new work program for the organization. A key ingredient in establishing a road map for the WTO is analysis of the size and incidence of the spillover effects of contested policy measures. A common understanding of the magnitude of negative welfare effects generated by policies that are only partly, if at all, subject to multilateral rules is needed to distinguish between those that are of systemic importance and distort competition in a major way and those that do not. This requires information on applied policies (evidence) and analysis of their effects. Analysis is also needed to identify how best to attenuate major spillovers and what types of remedies are needed to establish effective incentives to comply with

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<sup>4</sup> See, e.g., Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, 9 January 2018. At: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/joint-statement-trilateral-meeting>.

<sup>5</sup> Absent a resolution of the dispute on the operation of the Appellate Body, conflict resolution will revert back to the pre-WTO situation in which panel reports may remain unadopted if the losing party disagrees with the panel's findings – with attendant risks of escalation in the use of unilateral trade policies.

<sup>6</sup> See Hillman (2018) for a discussion of both the dispute on the Appellate Body and suggestions that have been made on responding to the US decision to block new appointments to the body.

commitments. Generating such a foundation for stronger cooperation requires revisiting WTO operating modalities to enable the organization to provide such services.

What follows suggests action on two lines: (i) creating space/focusing on identifying where new rules may be needed, including through new approaches to generating information on applied policies and monitoring of implementation of WTO agreements, including regular review of the operational performance of WTO bodies and engagement with stakeholders; and (ii) greater pursuit of open plurilateral agreements among groups of WTO members. Action on both these tracks can be designed to revisit how economic development differences are recognized and addressed. Much has already been achieved on the latter front, reflected in stronger linkages between the WTO and international development banks and agencies and the 2013 Agreement on Trade Facilitation, with its innovative approach to recognize capacity differentials and differences in priorities across countries.

## **2. Improving the operation of WTO bodies**

WTO bodies are charged with different functions. Negotiations and dispute settlement attract most attention, but the “normal work” of WTO bodies is an important part of the equation. It is through the normal work that potential negotiating agendas are identified, agreements are monitored and discussed, potential conflicts defused through consultations and information exchange, difficulties in implementation tabled, and more generally, WTO members raise matters of concern to them. A greater focus on ensuring WTO bodies are fulfilling their mandates effectively, learning from experience, and periodic performance evaluation can help WTO Members cooperate more effectively.

Discussion of the international spillover effects of new and evolving use of policies is a necessary condition for identifying where the WTO rulebook may need updating to promote sustainable economic development. Devoting more attention to the regular work of WTO bodies could help to revitalize the deliberative function of the organization. Specific areas that are salient in this regard include dispute settlement; enhancing transparency; performance review; addressing the concerns that many developing countries have regarding the implications of WTO rules for economic development; learning from the implementation of PTAs; and enhancing the relevance of WTO activities for constituencies in Members. A premise of what follows is that working practices have been part of the problem and addressing them is a necessary condition for improving the performance of the WTO as the global apex institution governing the trading system.<sup>7</sup>

### **2.1 Dispute settlement**

The WTO dispute settlement system is unique among inter-governmental treaties in comprising compulsory third party adjudication. It involves a two-step process. Panels of independent practitioners are tasked with assessing allegations of violations of WTO commitments by a WTO member. Parties to a dispute may subsequently appeal panel findings to an Appellate Body (AB). Over 500 disputes have been adjudicated since the establishment of the WTO in 1995, with judgments mostly implemented by the losing party (WTO, 2017). If a WTO member decides not to comply with rulings, the parties that brought the case will be authorized to retaliate, up to a maximum amount of trade that is determined through an arbitration process.<sup>8</sup>

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<sup>7</sup> Torres (2017); Bertelsmann Stiftung (2018).

<sup>8</sup> See e.g., Mavroidis (2016a).

A key objective of many countries in acceding to the WTO (and accepting a significant expansion in the coverage of multilateral disciplines on trade policies, including services and requirements to protect intellectual property), was to reduce the threat of US unilateralism (Hoekman and Kostecky, 2009). This was achieved — between 1995 and 2017 the US worked through the WTO to challenge foreign trade practices covered by the WTO agreements. Moreover, small countries have successfully challenged the policies of large nations. The track record of cases brought forward and compliance with rulings suggests that the system has been effective (e.g., Sacerdoti, 2017).

This achievement does not mean all countries are happy with the system. The United States has been particularly critical of how the Appellate Body functions (USTR, 2018).<sup>9</sup> This was reflected in the 2016 decision by the Obama Administration to oppose reappointment of a sitting Appellate Body member. The Trump Administration took this approach further and to date (February 2019) has blocked all new appointments. While the US has been most vocal, it is important to recognize that other WTO Members have also raised concerns regarding the consistency and coherence of Appellate Body rulings, as have assessments of parts of the WTO case law by scholars (e.g., Mavroidis, 2016b). Even before the attack on the Appellate Body by the US that commenced in 2017, the dispute settlement system was under considerable strain.

What has been lacking is a willingness by WTO members to engage in an open discussion on the performance of the system and to consider that reforms may improve the system. After more than twenty years there are lessons to be learned from the track record to date, and a need to consider whether Appellate Body interpretation of specific provisions of WTO agreements conform with the intent of the WTO membership. The long-running review of the functioning of the Dispute Settlement Understanding, which commenced in 2001, generated numerous proposals for improving and clarifying dispute settlement procedures and processes, but the need for consensus prevented adoption of any such proposals (Hoekman, 2012). Putting in place a process to clarify applicable rules to ensure the Appellate Body does not engage in interpretations that do not reflect the intent of the WTO membership could be part of the solution.<sup>10</sup> Resolving the Appellate Body conflict is urgent, but should be placed in the context of the broader challenge of improving conflict resolution procedures. Formal dispute settlements (litigation) is not the only way to resolve conflicts. Reducing the weight put on litigation may be another part of the solution (McDougall, 2018). WTO bodies offer a venue for governments to discuss concerns and find solutions without recourse to formal dispute settlement procedures – as has been done to good effect in WTO committees dealing with product regulation (Kartunnen, 2016).

## 2.2 Transparency

Transparency is essential for reducing uncertainty and is one of the main tasks of the WTO. A process of self-reflection at the level of WTO bodies regarding the information available to Committees could be a public good, an important output and a key rationale for the various transparency and surveillance

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<sup>9</sup> One source of US dissatisfaction is that the Appellate Body has not adopted the deferential standard of review regarding the use of so-called zeroing methodologies in antidumping investigations that the US believes it had obtained agreement on at the end of the Uruguay round negotiations. Other concerns tabled by the US include disregard for the 90-day deadline for appeals, continued service by persons who are no longer Appellate Body members, issuing advisory opinions on issues not necessary to resolve a dispute, review of facts, and claims by the Appellate Body that its reports are entitled to be treated as precedent. See USTR (2018, pp. 22-28).

<sup>10</sup> An example suggested in the literature is the case law on global safeguards, where the Appellate Body has made use of this instrument very difficult. See Sykes (2006). See more generally Mavroidis (2016a, b).

mechanisms included in the WTO (Wolfe, 2018). Information is primarily beneficial for countries themselves – a necessary input for understanding national policies. A useful role that WTO bodies can play is providing a venue for members to learn about their own policies as well as those of others and to identify where policies may be having negative international effects. Using regular meetings to promote discussion of policies that would limit adverse trade effects while not undercutting the ability to attain underlying regulatory goals could both promote learning, defuse potential disputes and help make the WTO a more effective mechanism to support economic development.

A first step could be for each WTO body to ask themselves what is needed to become more relevant to the constituencies/stakeholders that have a direct interest in the respective policy areas covered.<sup>11</sup> Is the Committee dealing effectively in helping to attain national objectives in their area? What information is needed to fulfill the mandate/objectives established in the relevant WTO agreements? What is of concern to the officials and agencies in capitals that deal with each of the associated issue areas? Questions that arise in this connection concern the quality and comprehensiveness of the information provided to (by) the WTO in terms of allowing analysis of whether it is attaining its objectives (listed in the Preamble); helping economic actors navigate the system; and helping citizens and stakeholders to see inside the system. Is WTO data comprehensive? Of high quality? Tracking emerging issues? Are members willing suppliers of information (statistics, notification) in one area but reluctant in another? Why? Is this a matter of differences in perceived legitimacy of the WTO Secretariat across committees? Does it reflect resource or capacity constraints? Why are some committees more successful in generating relevant information than others? Are there any common good practices? Could technology be used more effectively? And of the information that is being provided, for instance, though notifications, could better use be made if its content?

Answers to these questions can help to enhance transparency and enable better information provision, including how to ensure timely and satisfactory notifications by members and inform decisions whether the secretariat should be given a mandate to collect more information itself, working with other international agencies and stakeholders, on matters of relevance to the different WTO bodies. Alternatively, it may be that provision of assistance would help improve the ability of developing country members to collect and provide information. The point is for members to ask themselves in each committee if they have the information they need to do their job and, if not, what can be done to ensure they obtain it.

This process of self-assessment by Committees is not the same as recognizing that Members are not living up to notification obligations and calling on them to do better in abiding by the many notification requirements embodied in the WTO. There is a general recognition that WTO notification obligations are not being fully adhered to by many members. Instead of engaging in negative finger-pointing, we suggest a positive approach – asking WTO members in each Committee what specific types of information are needed. It may well be that many notification requirements in WTO agreements are not deemed to be useful. Conversely, WTO members may miss information that does not have to be notified at present.

The aim here would be to shift the focus from a “business as usual” approach centered on defending long-standing positions to one that focuses on what each WTO body’s activities should be – and based on the answer to this, an assessment of what information is needed to fulfil those tasks. This goes

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<sup>11</sup> What follows draws on Wolfe (2018).

beyond the question whether members are living up to notification obligations embedded in the WTO agreements. It entails reviewing these and considering if they should be revised or simplified given changes in the organization of global production. Such self-assessment of WTO information provision, on a WTO committee-by-committee basis, could feed into an annual synthesis report (a “Trade Policy Review of the System”) that could be discussed in the General Council as part a broader review of the functioning of the WTO.

### **2.3 Review operational performance**

The WTO is unique among international organizations in not having either an independent evaluation office or an internal review mechanism that assesses the operation of the institution (Torres, 2017). Periodic assessments of the WTO’s institutional performance can foster learning about what works well and what does not. Formal review mechanisms can act as a mirror for members, presenting them with facts they may not be fully aware of, as well as provide information that is useful in considering what might be done to improve performance. Review can foster learning and incentivize constructive engagement by members. Assessing the performance of the different parts of the WTO can help to identify both good practices and reasons why performance in some areas may be below what it could be.

Two options can be considered: an internal process or an independent, external evaluation mechanism. External evaluation is used in many organizations as an efficient way of facilitating learning. Prominent examples are the World Bank Independent Evaluation Group and the IMF Independent Evaluation Office. Putting in place a similar evaluation function could help identify weaknesses that may not emerge through internal reflections and generate ‘hard facts’ that some WTO members might prefer to ignore (Torres, 2017).

Creating an independent external evaluation function will require substantial preparation to attract the necessary consensus. An internal reflection process, in contrast, may be easier to implement. Internal review could build on the model put in place at the OECD. This involves a small internal unit that works with each Committee’s ‘bureau’ but drafts its own report on the operation of the relevant Committee. Thus, there is no independent external evaluation (and evaluators) – the process relies on delegations supported by a small number of OECD staff (Wolfe, 2018). A feature of the process is that it encourages learning across Committees and helps identify potential ‘silo problems’ created by the issue-specific focus of Committees and that preclude a more holistic focus on a problem area. The OECD structure is not dissimilar to the WTO in that it relies heavily on working groups and committees that report to an overarching Council and a Ministerial Conference.

Considering whether the issue-specific focus of WTO bodies results in policy areas being addressed in a too piecemeal fashion and identifying areas where more regular interaction between WTO bodies can fill gaps and exploit synergies can help ensure the WTO is responsive and remains relevant (Hoekman, 2012). The need for cross-cutting approaches is increasing as a result of production processes that span many sectors and are affected by many different policy instruments. There is substantial scope for cross-Committee learning, including on working practices. An important dimension of what the WTO does is compiling information on new trade measures, largely based on notifications by members. As is well known, WTO Member performance on notification leaves much to be desired, as is reflected inter alia by WTO monitoring of trade policies, annual reports on notifications by WTO members. Performance of WTO bodies varies widely, with some Committees doing a much better job than others in inducing notifications. Regular review of the work of these

Committees can help identify differences in performance and reasons for them, and inform assessments of whether successful practices might be emulated in other areas.

For example, the notification record of WTO bodies dealing with product regulation – the Committees on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures – swamps that of other WTO bodies. While this is in part a function of the types of policy measures concerned, differences in performance may be related to procedures used by these committees to develop and implement work programs that may be transferable. One such procedure is the ability to raise ‘specific trade concerns’ regarding proposed or existing product standards. Over 800 issues were raised between 1995 and 2015. This process is widely regarded as being a useful mechanism to address the concerns raised – about 40% of specific trade concerns relating to sanitary and phytosanitary measures reportedly were resolved (Kartunnen, 2016). What has been done in these Committees contrasts with other WTO bodies, which have been less pro-active and innovative in engaging with each other on substantive policy issues, debating the potential effects on trade of extant or proposed policies, or on mapping out and learning about the operation and effects of policies.

At present there is too little focus on operation and performance of WTO bodies. Any WTO-wide review should involve the Committees and draw on a bottom-up committee-by-committee self-assessments of weaknesses in WTO information provision. It should go beyond this to also report indicators of participation by Members and engagement with stakeholders. The WTO Annual Report includes some measures of participation – e.g. the number of questions raised by developed vs. developing countries on notifications made to Committees; number of specific trade concerns raised in Committees; contributions to the Global Trust Fund; and participation in dispute settlement. More such specific information on metrics that are salient from the perspective of the operation of the institution would help to assess performance of WTO members.

The goal here should not be to engage in a bean-counting exercise but to collect and present information that helps to inform delegations as well as business and other groups at home. Examples of potentially useful performance indicators could include the number of proposals put forward by individual members; the number of joint papers/proposals made; support requested and provided by the Secretariat; the number of agenda items addressing thematic issues as opposed to narrow implementation of WTO agreements; how long specific proposals for deliberation on an issue have been on the table without consensus being possible; measures of capital-based engagement in meetings; and indicators to measure interactions with and participation by non-governmental entities (international organizations, business representatives, NGOs).

The compilation of such information would complement the annual reporting by subsidiary bodies and internal review of the operation of subsidiary bodies to inform an annual discussion in the General Council as part of its broader appraisal of the functioning of the trading system. As part of its oversight function, the WTO General Council already conducts a year-end review of WTO activities, based on annual reports of its subsidiary bodies. However, the latter are largely limited to summaries of meetings and topics discussed. There is little substantive deliberation in the General Council on the operation and performance of subsidiary bodies. The current annual review by the General Council of the activities of subsidiary bodies as summarized in the WTO Annual Report is primarily focused on the trade policy matters covered by each body. There is no evidence of effort to reflect on lessons or transferability of approaches from one committee to other bodies. A greater focus on review of the functioning and operation of the WTO as an organization would make this process more meaningful

and informative. More important, it could help identify opportunities to improve performance and clarify the intent of the membership. As already noted, one area where this is needed is dispute settlement: institution a process to assess rulings of panels and the Appellate Body and permit the WTO membership to clarify their intent could be an important mechanism to course correct where all members agree this is necessary. An example mentioned previously is the WTO case law on global safeguards, which made this instrument much more difficult to use than was envisaged by the negotiators of the Agreement on Safeguards.<sup>12</sup>

## **2.4 Economic development**

A factor underlying the difficulties experienced in using the WTO as a platform for negotiations to update the rulebook is insistence by many developing countries that provisions in WTO agreements aimed at promoting economic development are implemented. Specifically, these nations want to be able to use trade policies to promote economic growth, even if these have adverse consequences for trading partners. The engagement of many developing nations in the WTO is premised on SDT: less than full reciprocity in trade negotiations and acceptance that developing nations should be less constrained in the use of trade policies than high-income countries.

There is an inherent tension between the national welfare benefits that accrue from making binding (enforceable) trade policy commitments and the associated constraints on the ability of governments to assist domestic industries by restricting imports or supporting exports. A loss in 'policy space' is the price that WTO members pay for other countries to undertake trade policy commitments and to comply with the procedural disciplines that have been negotiated over time. If countries could freely (re-)impose trade barriers or increase their support to domestic exporters there would be no value in WTO membership. The multilateral disciplines that constrain the use of trade policy are particularly important for small countries that do not have the power to prevent large economies from shifting the terms of trade in their favor by restricting imports or subsidizing exports. Reducing the policy space of large trading powers is a core dimension of the value added generated by the WTO for small countries. Such constraints benefit all countries, large and small.

A central feature of SDT is that it applies to all developing countries. The WTO, following precedent set under the GATT, does not define what constitutes a developing country, leaving it to members to self-determine their status. Outside the group of 47 (UN-defined) LDCs, the only distinct group of developing countries identified in the WTO, there are no criteria that allow differentiation between developing countries. In general, upper middle-income countries that have become competitive exporters, and nations that have large and rapidly growing economies, can claim the same SDT privileges as small lower-income countries that are not classified as LDCs. That said, in practice differentiation has been agreed on an issue-specific basis. An important example is the classification of developing countries based on per capita GDP and export competitiveness in Article 27 of the Agreement on Subsidies and Countervailing Measures. As part of the Doha round negotiations, several draft texts made distinctions between developing countries and included different categories for SDT.

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<sup>12</sup> The Uruguay Round Safeguards Agreement was designed to make safeguard actions easier to use as a quid pro quo for stronger disciplines on less transparent and more distortive voluntary export restraints and similar measures. See Hoekman and Kostecki (2009).

The focus of the WTO is on measures that affect products when they cross borders. Such measures – trade policies – generally will do little to address the types of market failures prevailing in low-income countries. These call for domestic interventions targeting the source of the market failure. This presumption has become stronger in light of the changes to the organization of the global economy. The constituent elements of SDT date back to the mid-1960s and were designed for a world economy that no longer exists. The challenge today is to identify and implement policies that promote economic development in a world of global value chain-based production, e-commerce and digitalization where small firms can become micro-multinationals by using electronic platforms and exploiting mobile information and communications technologies. Capacity constraints that impede the scope for poorer developing countries to identify, implement and benefit from such policies are an important dimension of this challenge. Such policies will not revolve around tariffs but center on measures that enhance access to finance, technologies, cross-border payments systems and efficient logistics.

Changes in the structure of global production have made traditional trade barriers much less effective instruments to assist domestic firms – helping to explain why other types of policies increasingly are being used by countries. An implication is that attention should be given to understanding the effectiveness of such policies in attaining their objectives and determining to what extent they give rise to significant negative spill-over effects for trading partners and should be subject to multilateral rules. This is something that concerns all WTO members. All countries have disadvantaged regions where the incidence of poverty is higher than average or where employment opportunities are scarce.

This does not mean that trade policies are not relevant to economic development. Specific Doha round agenda items are legitimately regarded by countries as very relevant from a development perspective – tariff escalation in large import markets that constrains movement up the value chain is an important example; subsidies for agricultural production that distort international competition another. Developing countries have a strong case for insisting on stronger multilateral disciplines on such policies. But this should be complemented by a willingness to re-think SDT. Rather than continuing to fight old battles, it would be more productive to do more to identify where specific WTO rules impede the implementation of policies that would enhance their economic welfare and engage in a process to identify good practices and policies to address market failures. This should be complemented by provision of assistance where needed. An important step forward on the latter front was the launch of the Aid for Trade initiative in 2005 and the Enhanced Integrated Framework to assist the LDCs. These programs reflect a common recognition that more needed to be done to bolster supply side capacities and capabilities of firms in developing countries to benefit from trade opportunities (Hoekman and Kostecki, 2009).

The building blocks for a renewed approach towards economic development are already largely in place. They are reflected in issue- and agreement-specific approaches to addressing development concerns that differentiate between developing countries. Examples include the Agreement on Subsidies and Countervailing Measures, negotiating texts that were on the table in the Doha round on agricultural and non-agricultural market access, and the flexible approach taken in the 2013 Trade Facilitation Agreement (TFA) towards scheduling of commitments by developing countries and the opportunity it offers for developing countries to link implementation to technical assistance. The TFA experience suggests an issue-by-issue approach aimed at building a common understanding on what types of policies make sense (constitute good practice) is in principle feasible. This is a core feature of the TFA – all WTO members agreed on its substantive provisions, reflecting the outcome of a long

process of dialogue that was informed by national experiences and inputs from specialized international agencies such as the World Customs Organization (see e.g., Hoekman, 2016).

Greater deliberation on whether and how WTO agreements support sustainable development could provide a basis for incrementally addressing tensions that surround SDT provisions. A development-focused policy dialogue in the various WTO bodies could consider factual questions: What kind of SDT could help countries develop world class industries in sectors where they have comparative advantage? What kind of SDT would support better insertion in GVCs? Was SDT a factor in attracting foreign investors? Could there be situations where SDT actually prevents development? What could the WTO and the Secretariat do to assist governments and economic operators address coordination problems and other market failures that impede investment? Are development agencies providing aid for trade that addresses such constraints? A corollary benefit of such substantive deliberation on development dimensions of WTO agreements is that it may help WTO Members to extend the approach reflected in the TFA to other policy areas.

## **2.5 Learning from preferential trade agreements**

Another useful focal point for deliberation in WTO bodies is the operation and implementation of PTAs in the different policy areas covered by each body. This would complement the focus of the Committee on Regional Trade Agreements on the legal content (provisions) of the PTAs that have been implemented by WTO members. This Committee does not discuss the experience of how PTAs are implemented or assess the economic effects of different approaches that may be taken in PTAs towards a given policy area. Discussion of implementation experience in the areas covered by the various WTO bodies is best done in the respective bodies as these will bring together officials from capitals responsible for the specific areas covered by each WTO agreement. This has been done in the past on an ad hoc basis – making this a regular agenda item, with preparation of background documentation by the Secretariat would support a more structured and regular process aimed at learning from PTA experiences.

PTAs may encompass innovative approaches to attenuate the market-segmenting effects of regulatory policies that other countries might usefully emulate. All WTO Members have a strong interest in understanding what innovative PTAs do and achieve. Documenting alternative approaches used in PTAs would not only improve transparency but, more important, potentially inform a process of learning about what works and what does not and identify options that might eventually be multilateralized through initiatives under the WTO umbrella.

## **2.6 Connecting better to constituencies**

A general precondition for the process of self-reflection and policy dialogue proposed here to be feasible is that it is not blocked by the consensus practice. A necessary condition for this is to credibly address concerns that issues tabled for discussion may give rise to eventual negotiations. Fears that this is the ‘end game’ of policy dialogue may induce some members to take tactical positions to oppose deliberative activities. The rationale for doing so is not compelling given that consensus implies that countries can always refuse to engage in negotiations to establish new rules for a policy area.<sup>13</sup>

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<sup>13</sup> If a WTO member insists on blocking open-ended discussion, there is nothing that prevents a group of WTO members from pursuing this outside the WTO. This is very much a second-best outcome however, as it is important that the Secretariat can support such deliberations and is able to ensure there is transparency vis-à-vis WTO members that do not participate in them.

The practice of interpreting consensus as an unlimited capacity to exercise veto power has been a factor impeding the effectiveness of the operation of the WTO. There is no easy solution to the problem given the consensus that exists on consensus. This suggests the focus should be on reducing the scope for WTO members to engage in hostage-taking by increasing the costs of such behavior, or, equivalently, reducing the return that can be achieved. The latter can be done through subsets of WTO members pursuing a matter through open plurilateral agreements – see Section 3 below. The former can be pursued by doing more to engage with constituencies at the national level that have a strong interest or stake in making progress in each policy area.

A common factor underpinning constructive engagement between WTO members in some WTO committees – notably those dealing with product regulation – is that they connect a specific constituency, officials responsible for achieving regulatory objectives, with trade officials who are interested in reducing trade costs. The joint engagement results in greater ‘ownership’ of the work of these Committees. Necessary conditions are that work programs are relevant to what officials are responsible for, and that the activities of the Committee can be justified to parliaments, businesses and citizens as delivering useful results. Determining if and how the various WTO Committees and related bodies connect to specific groups in and outside national government – and how to do so more effectively – may both improve the usefulness of their work and the political support by economic operators and national interest groups for WTO engagement.

A first step is to identify the constituencies that have an interest in the work of a Committee and reflect on how to better engage them. This includes the relevant regulatory communities at both national and international level whose work impacts on the policy area covered by a WTO agreement. Interacting with these regulatory communities, including regulatory agencies that have indirect impacts on trade costs (trade facilitation objectives), can assist Committees identify how they can help achieve national regulatory objectives more efficiently and effectively.

Changes in the modus operandi of Committees may help increase participation and ‘ownership’ of activities. One possibility in this regard is to provide more support for Chairpersons of Committees by creating a steering group or bureau of three or four WTO member representatives who are appointed for several years. In existing practice, the chairpersons, except for those of Special sessions, stay only for one year, which causes problems of continuity. The practice of establishing a steering group has been adopted in some of the joint initiatives launched at the 2017 Ministerial in Buenos Aires. This approach is used in other international organizations such as the OECD, where each Committee has a ‘bureau’ comprising a small group of member country Ambassadors who help guide the implementation of work programs. This helps to ensure continuity, follow-up and engagement. An ancillary benefit of broadening the management of Committees is that it can reduce the use of consensus to prevent a majority from moving forward in engaging in a specific activity. Assuming the steering group or bureau is representative and unified on a proposed course of action, this raises the reputational costs for a member to block initiatives as well as reducing incentives to do so.

Other practical steps can also be considered to facilitate policy dialogue of the type advocated here. Adding items to a standing agenda can be problematic as it implies taking time from other issues. The processes suggested here will also have resource implications raising potential concerns of resource diversion. Such concerns can be addressed by holding informal or thematic sessions alongside regular Committee meetings, with sponsors of an issue put forward for informal dialogue providing additional funding, where needed.

Finally, and importantly, it is vital that policy dialogue in WTO bodies is framed as an open process with a view to consider whether there is a problem and to learn from experience as opposed to starting from the premise that this reflects a search for rules. The latter may well be a solution, but first it is necessary for there to be a common understanding of an issue, and whether and how rules are needed to address it. The process should not be framed as a prelude to negotiations, as this is a key factor why some WTO members have opposed policy dialogue on new matters in the first place. Such concerns are misplaced as consensus ensures that countries can always block the launch of a multilateral negotiation process that spans all WTO members.

### **3. Greater pursuit of open plurilateral agreements**

There is strong support for consensus-based decision-making in the WTO (Hoekman, 2012). At the same time there is an increasing perception by many WTO Members that consensus has been used beyond its intended remit – to ensure that proposed new rules can only be adopted if every member agrees to them – to constrain the launch of discussions on new issues. While there are good reasons for consensus to apply for new rules and agreements, it should not preclude subsets of WTO members from pursuing discussions on a matter or potentially cooperating with each other.

Three types of mechanisms can be used by subsets of WTO members to collaborate on a policy area: preferential trade agreements (PTAs), in which substantially all trade in goods is liberalized on a discriminatory basis, so-called critical mass agreements (CMAs), and ‘closed’ Plurilateral Agreements under Article II.3 WTO, where benefits may be restricted to signatories (Lawrence, 2006; Hoekman and Mavroidis, 2015; 2017). Of these, by far the most frequently used are PTAs.

CMAs 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 non-discriminatory basis to all WTO members. A major example is the Information Technology Agreement (ITA), which abolishes tariffs on information technology products. This was re-negotiated in 2015 to expand the number of products covered. The ITA has increased global trade substantially in electronic products and improved access to key technologies that underpin the digital economy.

CMAs have also been concluded for services sectors – an example is an agreement on basic telecommunications that was appended as a protocol to the GATS in 1997, with 69 WTO members signing it. The benefits of the agreement apply to all WTO members, including those that did not sign it. The basic telecom agreement includes a so-called Reference Paper that establishes regulatory principles (good regulatory practices) that signatories commit to apply.

A key feature of CMAs is that disciplines are negotiated among a subset of interested WTO members and apply only to countries that sign on to them, while the benefits must be extended on a most-favoured-nation basis to all WTO members, including those that do not participate. Such agreements do not require consensus to be incorporated into the WTO – if Members decide to join a CMA they can inscribe the provisions of the agreement into their schedules of commitments under the GATT and/or the GATS. The agreements become part of the WTO and are serviced by the WTO Secretariat. Members interested in discussing possible future CMAs can request WTO Secretariat support for the process.

Art. II.3 Plurilateral Agreements differ from CMAs in that they may be applied on a discriminatory basis – that is, benefits need not be extended to non-signatories. Because of this, Plurilateral Agreements require consensus to be incorporated into the WTO. Two such agreements currently exist – the

Agreement on Civil Aircraft and the Government Procurement Agreement (GPA). Because Article II.3 WTO Plurilateral Agreements may be applied in a discriminatory manner, they are subject to the approval of all WTO members, including those that have no intention of joining. Art. X.9 of the Agreement Establishing the WTO stipulates that the Ministerial Conference of the WTO may decide to add a new Plurilateral Agreement to the existing ones ‘exclusively by consensus’.

WTO members have devoted much more effort and resources to the negotiation of PTAs than to open plurilateralism in the WTO but there has always been interest in pursuing cooperation on a critical mass basis. Aside from the expansion of the ITA in 2015, examples include negotiations on a possible Environmental Goods Agreement. These commenced in July 2014 and span the EU and 16 other WTO members. At the 2017 Ministerial Conference in Buenos Aires different groups of WTO members launched four joint initiatives on micro, small and medium-sized enterprises (MSMEs), e-commerce, investment facilitation and domestic regulation of services. WTO members that joined these groups demonstrated that consensus cannot be used to prevent groups of countries discussing issues of common interest. Participation in these groups spans a broad cross-section of the membership. The EU participates in all four groups, as does China.<sup>14</sup> The US is part of one (e-commerce). India as well as many African countries decided not to participate in any of the groups.

The scope for open plurilateral initiatives – i.e., CMAs – will be limited if an issue is characterized by strong free riding concerns, so that many WTO members will need to participate so that benefits are mostly internalized by signatories (as was the case for the ITA). The types of subjects that may lend themselves to open plurilateral agreements initiatives will not include policy areas such as industrial policy or subsidies unless all the major trading powers join. However, for such subjects it is also not necessary that a large number of countries participate as most countries will not be able to create large spillovers (i.e. the costs associated for members of a potential agreement of free riding by others may be small). There may be much more scope for open plurilateral cooperation than is often assumed, especially for technical issues where cooperation will reduce trade costs. There are potentially many such policy areas. Examples include using the scope under the GATS to make additional commitments, extending the ITA to encompass digital trade, or agreement on standards for using block chain technology to facilitate trade under the WTO Trade Facilitation Agreement.

At a minimum, open plurilateral agreements provide an opportunity to insert new oxygen into the system. They offer a mechanism for groups of WTO members to engage on matters of interest to them and to determine whether there is potential scope to agree on what constitutes desirable policy. They can serve as experiments and laboratories to identify areas where cooperation is feasible and demonstrate that the WTO need not be hamstrung by its consensus practice in providing a platform for cooperation. Even where no agreement proves possible, the associated deliberations are useful as they will help inform decisions on the set of issues that could be considered as part of a broader effort to construct a forward-looking agenda to update rules that will apply to all WTO members.<sup>15</sup>

An important question with respect to open plurilateral initiatives is whether any specific conditionality that is included in an agreement could violate the MFN rule. The benefits of such initiatives among a subset of countries will need to be extended to all WTO members, including those

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<sup>14</sup> China initially was not a member of the Buenos Aires group establishing the joint initiative on e-commerce, subsequently join the group when it launched negotiations on e-commerce-related policies in January 2019. See <https://chinaeconomicreview.com/china-joins-talks-for-global-e-commerce-rules-at-last-minute/>.

<sup>15</sup> Hoekman and Sabel (2019) discuss the potential benefits of open plurilateral agreements in greater depth.

that do not participate in the agreement. However, such benefits may be conditional on satisfying specific preconditions that relate to the quality or capabilities of regulatory institutions and frameworks. In this respect, the situation may be akin to mutual recognition agreements for conformity assessment of product standards. WTO rules require these to be accessible (open) to any WTO member that is interested in participating in an extant agreement, but this openness requirement does not nullify the need to satisfy the conditions that are necessary for mutual recognition. Similar approaches will need to apply to open plurilateral initiatives that involve regulatory cooperation.

#### **4. Conclusion**

The success of the multilateral trade regime in the post-Second World War period was attributable in large part to US leadership and the fact that the organization was dominated by broadly like-minded countries. Today, the US continues to participate actively in the normal WTO committee work, but it is casting itself in a different role than it has in the past, calling for WTO reform and contesting the operation of the Appellate Body. It laid out its view of key elements of a reform agenda at the 11<sup>th</sup> WTO Ministerial Conference in Buenos Aires in 2017, stressing better compliance with WTO obligations, greater differentiation among developing countries, and action to ensure that litigation is not used as an alternative to negotiation.

The European Commission and the United States have tabled specific ideas to modernize the WTO, some of which have been developed in cooperation with like-minded WTO members. Canada is leading a group of countries interested in supporting WTO reform, including strengthening of the normal work of the organization (the committees). The EU, Japan and the US have launched a trilateral effort to identify ways of bolstering multilateral rules on subsidies and technology-related policies. These are positive developments. For them to make a difference the three largest players – China, EU, and the US – will need to agree on key policy areas that have become the source of serious trade tensions. This need not involve all WTO members and arguably should not, as this will inevitably give rise to issue linkage attempts and veto playing. Three of the four largest trading powers – China, the EU and Japan – account for more than one-third of world trade in goods and services and more than half of the WTO budget. Jointly these countries must play a leadership role in responding to the challenges confronting the organization.

Leadership cannot come from large trading powers alone. Safeguarding the WTO is particularly important for smaller countries, not least because only the multilateral trading system offers them the opportunity to influence the development of new trade rules. Due in part to growth in global value chain production and the success of the system, many countries have a large stake in international trade. Different possibilities may exist to pursue plurilateral agreements on a critical mass basis. Economies pursuing deep integration of markets are best placed to play a complementary role. Examples include the eleven members of the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), countries that have signaled interest in joining the CPTPP (e.g., South Korea), the Pacific Alliance countries, and, more broadly, the WTO 'Friends of the Multilateral System' group of smaller nations.<sup>16</sup> Taken together with the EU, these economies collectively account for over

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<sup>16</sup> The Friends of the Multilateral System comprises Albania; Argentina; Australia; Bangladesh; Benin; Canada; Chile; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; Ghana; Guatemala; Hong Kong, China; Iceland; Israel; Kazakhstan; Republic of Korea; Lao People's Democratic Republic; Liechtenstein; Malaysia; Mexico; Montenegro; Moldova; Myanmar; New Zealand; Nigeria; Norway; Pakistan; Panama; Papua New

75 percent of world trade. They constitute a critical mass that is more than large enough to sustain multilateral cooperation and drive the trading system forward.

Any process to agree on an agenda and a roadmap to expand the WTO rulebook; the prospects for developing countries to accept to re-consider traditional SDT are conditional on actions to improve the operation of the organization. If this cannot be achieved, the likelihood rises that the trading system will fragment into a set of PTA-based arrangements among countries that see value in accepting common rules on policies affecting competition on markets (notably the EU and the CPTPP member countries) and those that do not. A corollary of this scenario is an increasing prospect of discrimination in world trade and investment policies, undermining the open, rules-based global trade regime. Bringing the joint initiatives launched at MC11 in Buenos Aires and the plurilateral e-commerce negotiations that commenced in early 2019 to a successful conclusion will do much to signal that the WTO can be revitalized. Clearly this is not sufficient, as the membership as a whole should consider reforms that will improve accountability and prevent the type of situations that gave rise to the US decision to block new appointments to the Appellate Body and engage in unilateral trade action. Mechanisms to review the operation of WTO bodies, including the Appellate Body and the conflict resolution function of the WTO more generally (whatever the form it may take in the future as a result of the dispute on dispute settlement), are critical to ensure legitimacy and continued 'ownership' of the institution and what it does.

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Guinea; Paraguay; Qatar; Russian Federation; Singapore; Sri Lanka; Switzerland; Chinese Taipei; Thailand; The former Yugoslav Republic of Macedonia; Tonga; Turkey; Ukraine; Uruguay; Vanuatu; Viet Nam. Together these countries account for some 40 percent of global trade.

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