

WTO Reform: Back to the Past to Build for the Future

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Abstract

Since its formation, with a few notable exceptions, WTO members have not been able to negotiate new rules on policies that generate negative international spillovers. The Doha Development Agenda negotiations, launched in 2001, became deadlocked in 2008. Problems extend beyond negotiations – other functions of the WTO are also not performing well. The dispute settlement mechanism, long perceived as the crown jewel of the organization, no longer is operational because of US refusal to appoint new WTO Appellate Body members. Calls for WTO reform have been mounting. This article provides an overview of the WTO reform agenda, drawing on the findings of recent multidisciplinary research to provide context for the papers included in this special issue on trade conflicts, multilateral cooperation and WTO reform.

Policy Implications

- The WTO faces two interconnected challenges: reestablishing an effective dispute settlement mechanism and reviving the negotiation function. Doing one and not the other will not suffice to revitalize multilateral trade cooperation.
- Overcoming the legislative crisis calls for direct engagement among China, the EU and the US on new rules for subsidies, state-owned enterprises and industrial policy. Agreement to address associated policy spillovers is needed to permit reestablishment of an Appellate Body.
- Negotiations on open plurilateral agreements among groups of WTO members are a way to address the WTO consensus working practice constraint and to complement traditional trade agreements with issue-specific cooperation among like-minded economies.
- Reforms should build on innovations adopted in several WTO bodies to open and encourage greater participation by stakeholders in committee meetings, including business, regulators, and other international organizations.
- The WTO reform agenda should include a focus on improving the ability of the Secretariat to provide information and analysis, link the WTO to epistemic communities in regulatory policy areas that are salient for trade, and ensure that adjudicators at the panel and appellate level fully control the WTO dispute settlement system.

The World Trade Organization (WTO) was created to support cooperation on trade policies to achieve shared economic goals – increasing real incomes, expanding employment, sustainable growth and development. It does so by providing a forum to help members overcome domestic political economy forces impeding adoption of welfare-improving practices and to attenuate the negative international spillovers of national policies. Although the WTO has been effective in overseeing the implementation of the multilateral agreements concluded during the Uruguay Round, with some notable exceptions, including the Agreement on Trade Facilitation and the Information Technology Agreement, WTO members have not managed to conclude new agreements to liberalize trade in goods and services.

This has had serious repercussions. For one, it shifted the focus of many members to bilateral and regional trade cooperation. For another, it has meant that the WTO has

not played a significant role in defusing and addressing the trade conflict between the US and China. The WTO was largely ‘missing in action’ during the first stages of the global COVID-19 pandemic – many members resorted to unilateral imposition of export restrictions for medical supplies and personal protective equipment. Such actions can – and did – have negative repercussions for trading partners and may have impeded supply responses by disrupting global production networks. WTO members missed the opportunity to use the organization as a coordination mechanism for efforts to boost global trade in medical products.

Many suggestions have been made on actions that could be taken by WTO members to help the world economy to recover from the COVID-19 pandemic and prepare for similar shocks that may materialize in the future. Examples include calls for cooperation on trade in vaccines (Bollyky and Bown, 2020); action to support the operation of global

value chains producing and distributing critical supplies (Fiorini et al., 2020b); and negotiation of an agreement to govern the use of trade restrictions during a global public health crisis (Evenett and Winters, 2020). Some WTO members have also made proposals in this vein.¹ These types of suggestions are additional to the large agenda for cooperation that already confronted WTO members before the COVID-19 crisis. Perhaps most important for the trading system is to launch a rethink of the WTO subsidies-regime. The COVID-19 pandemic generated a massive expansion in fiscal policy, appropriately so, but many of the subsidies are firm- or activity-specific and thus may distort international competition. Similarly, subsidies of different kinds are called for to address (global) market failures such as climate change, but will also affect international competition. Dealing with the competitive spillovers caused by subsidy policies and more broadly governing the desire of governments to pursue 'strategic autonomy'—motivated industrial policies and regulation of the digital economy requires the large powers to agree to cooperate.

As discussed by Hoekman and Sabel in their contribution to this special issue, getting to yes may be possible for some contentious policy areas through domain-specific open plurilateral agreements. Others require cross-issue linkages for agreement to be feasible. An example are programs to address global market failures such as climate change by using border taxes and subsidies as instruments to 'level the playing field' for domestic industries that compete with imports and control carbon leakage. Establishing when cooperation requires linkage and when it does not, and supporting plurilateral domain-specific cooperation requires the organization to bolster its capacity to be a forum for constructive policy dialogue based on analysis of the negative policy spillovers created by domestic policies. As important is action to reinstate an effective dispute settlement mechanism. Absent progress on these fronts there is little prospect that the WTO can play a significant role in helping to address major trade tensions between the large trading powers. A necessary condition for progress is a willingness to consider and implement reforms to make the WTO a more effective forum for trade cooperation.

WTO reform priorities

The policy agenda is large. Prominent items include resolution of conflicts regarding the use of industrial-cum-tax-subsidy policies, taxation of digital services, data privacy regulation, localization requirements, and the role of trade policy in efforts to reduce the carbon intensity of economic activity. Although many WTO members tend to view matters through a 'US' or a 'China lens', it is important to recognize that the need for international cooperation spans a range of issues areas that are salient to a broad cross-section of the WTO membership.

Whether the political will exists to reengage multilaterally and pursue WTO reform is an open question. What is clear is the failure of the Trump Administration's unilateral trade policy actions. Plurilateral initiatives spanning the large trade

powers are a necessary condition for sustaining an open, rules-based world economy. There is much to build on, including ongoing e-commerce and domestic services regulation negotiations, concluding an Environmental Goods Agreement, and restarting talks on a trade in services agreement. In what follows we discuss five areas of WTO reform that have been highlighted in recent multidisciplinary research on bolstering the effectiveness of the WTO as a forum for trade cooperation:² (1) revisiting the working practices of the organization; (2) improving transparency: collection and reporting of information on relevant (contested) policies and complementing this with analysis of the spillover effects of policies; (3) preparing the ground for negotiation of new agreements through evidence-based deliberation and support for plurilateral initiatives where no consensus exists to proceed on a multilateral basis; (4) reforming the WTO dispute settlement system; and, last but not least (5) addressing what Wu (2016) has termed the 'China Inc.' problem.³

Working practices

WTO working practices, notably consensus decision-making, a 'member-driven' governance model and invocation of 'special and differential treatment' by developing countries have played an important role in reducing the effectiveness of the WTO as a forum for cooperation (Hoekman, 2019). The consensus working practice has often led to deadlock, not only because of substantive differences between large members, but more generally because of unwillingness of many developing nations to discuss emerging/new issues. While appropriate for adoption of results of substantive negotiations, WTO working practices have been abused by members to impede the day-to-day functioning of WTO bodies. The most notable recent example was the US and South Korea blocking consensus on the choice of a new Director-General in the fall of 2020. In 2018–19 the consensus practice permitted the US to make the Appellate Body non-operational.

In considering WTO working practice reforms, it is helpful to differentiate between day-to-day activities of WTO bodies and negotiation and adoption of substantive disciplines. There are very good reasons for consensus when it comes to (changes in) the substantive rules of the game that apply to specific trade-related policies. WTO members should be able to decide not to participate in new agreements that alter their rights and obligations. But consensus should not enable countries to block others that wish to discuss potential cooperation or conclude agreements with commitments that bind only signatories. Nor should consensus apply to matters such as setting the agenda of WTO committee meetings. The 'member-driven' mantra has constrained deliberation in WTO bodies and limited the scope of the Secretariat to provide information and analysis to assist WTO members develop a common understanding on trade issues. It has also restricted engagement with other actors, both stakeholders (international business and civic society representatives) and other international organizations and regulatory bodies with relevant knowledge and expertise.

These are matters that directly impact on the day-to-day operations of the organization.⁴ They should be central to WTO reform discussions. The contributions to this special issue by Wolfe and by Alben and Brown discuss options for increasing interaction with stakeholders and learning from experience. Opening the WTO to greater participation by nongovernmental entities is an important area for reform.

From notification and review to monitoring and evaluation

Information is a necessary condition for substantive deliberation in WTO committees and Councils. As things stand, monitoring is entrusted to members, who supply information through notifications, complemented by WTO Secretariat preparation of periodic Trade Policy Reviews (TPRs) for all members. The reliance on notification leaves important gaps in coverage. Cross-notifications of Chinese subsidies by the United States, for example, make clear that the notification process results in a (very) incomplete picture in some areas of trade policy. These gaps are not filled by TPRs as they are associated with long lags. Independent monitoring by the Global Trade Alert initiative reveals many more subsidies than are notified by WTO members or compiled by the WTO in its reports (Evenett, 2019). As a result, an increasing share of trade measures put in place by WTO members risk being missed, given that over half of all measures put in place since 2009 comprise subsidies of some sort. Although many subsidies are removed each year, more harmful measures are introduced each year than are removed, and the gap has been increasing (Figure 1).

One element of WTO reform is to improve transparency by complementing extant notification obligations with compilation by the WTO Secretariat of publicly available information on national policies.⁵ The WTO does undertake efforts to compile information but needs support from WTO members to collect more salient information. Rather than insist that WTO members abide by notification requirements and seek to put in place penalties to induce compliance, reforms

are needed to encourage greater use of cross-notification and to assist WTO members to collect data that is salient to their own needs (Wolfe, 2018). Mandating the WTO Secretariat to collect and compile relevant information, including on policies that affect trade and global competition that are not, or only partially, covered by WTO agreements would help WTO members understand trade policy dynamics and trends. The need goes beyond subsidy measures and includes policies affecting investment and trade in services and cross-border data flows. On services, for example, the WTO only reports data for a subset of the membership. As a result, WTO members need to go elsewhere if they want an up-to-date and comprehensive view of applied services policies in trading partners.⁶

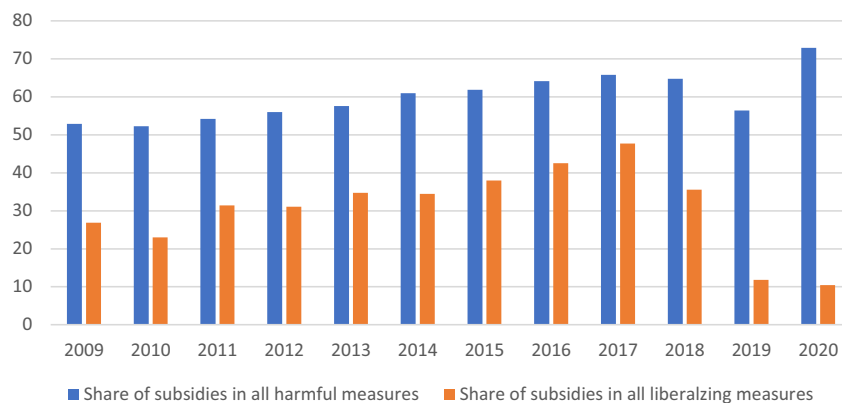
The WTO cannot outsource this core function but would benefit from cooperating with other organizations in this effort. The IMF, World Bank, UNCTAD, ITC and OECD all collect information on relevant policy variables. A concerted effort by these organizations to work together to construct a comprehensive and up-to-date repository of information on relevant policies – including instruments that can affect trade flows but are not subject to WTO disciplines – would bolster the evidence base needed to inform and sustain multilateral cooperation on trade. A focal point for such collaboration could be the G20 Trade and Investment Working Group, in which all these organizations participate.

Preparing the ground for negotiations

Cooperation requires a common understanding of the issues. Greater deliberation in WTO bodies, informed by analysis, stakeholders and pertinent national regulators, is another area for WTO reform.

Analyzing spillovers in the WTO: in addition to actions to improve the availability of timely information on trade-related policies, more effort is required to undertake assessments of the effects of policies. In 2020 such analysis was requested by the Ottawa Group, focusing specifically on

Figure 1-. Share of subsidies in all G20 post-GFC trade measures (% , 2009–2020).



Note: 2020 data are for the period up to December 7.

Source: Global Trade Alert. <https://www.globaltradealert.org/>.

COVID-19 measures (Ottawa Group, 2020). The need for analysis arguably is much more general. The Secretariat is not permitted to do any evaluation of policies. It is prohibited from expressing a view whether policies are consistent with WTO rules and/or a member's specific commitments. Evaluation of the legality of policies is entrusted to the various committees of the WTO, and if needed is determined by WTO dispute settlement procedures. The Secretariat also is not tasked with assessing the *ex post* impacts of WTO agreements or the cross-border spillover effects on trade of policies that are not subject to WTO rules. A striking finding of the stakeholder survey described by Fiorini et al. in their article in this special issue is that evaluation – as distinct from monitoring – was ranked last as a priority for the next DG. The outlier on this question was NGOs, which accorded it a high priority. This illustrates a major difference in priorities between the 'trade community' and civic society, and more specifically, relative disinterest in understanding and learning about the effects of implementation of WTO agreements on the part of the trade community.

Creating more space for the Secretariat to analyze the global economic effects of policies affecting competitive conditions on markets – including policy areas where WTO rules are weak or missing altogether – would help determine whether policies cause spillovers that are systemic in nature. Analysis of this sort should inform assessments of priority areas for cooperation. As noted, at present the WTO Secretariat does not undertake such analysis as part of its regular activities. It does cooperate with other international organizations that have greater analytical capacity and expertise in the preparation of ad hoc reports but does not collaborate in work programs that address matters of interest to (subsets of) the WTO membership. An example would be collaboration to assess the extent and incidence of subsidy programs in systemically important economies, bringing together national Finance and Economy ministries, and relevant international organizations such as the IMF and the World Bank (Hoekman and Nelson, 2020). A solid information base on the incidence of subsidies and size of potential trade distortions is a necessary input into any negotiation on new rules of the game. A call to undertake analysis-informed deliberation may be criticized as kicking the can down the road. As argued at greater length in Hoekman and Nelson (2020), it is not. WTO members simply do not have enough of a common understanding of the magnitude of international spillovers caused by contested policies and need to invest time in considering alternative approaches to attenuating them.⁷

Soliciting input and feedback from stakeholders: the various WTO committees and bodies charged with overseeing the implementation of WTO agreements are a natural forum for deliberation in the WTO. Greater use of 'thematic sessions' of WTO bodies – in which external actors are invited to participate and the agenda includes matters that are not (yet) subject to multilateral rules – and overcoming silo problems by establishing dedicated working parties spanning all WTO bodies that deal with different dimensions of a given policy area are pragmatic ways of fostering deliberation. These

issues are the subject of the contribution by Wolfe in this special issue.

There is a general presumption among trade negotiators that domestic interests are adequately represented through their national governments, and that effective mechanisms exist for communication between stakeholders and their national governments. This view can be contested, as it depends in part on effective transparency of policies and deliberation on their impacts. Alben and Brown, in their contribution to this special issue, argue for more direct participation of the business community in the workings of the WTO, citing lack of transparency as a key reason why. Consistent with Coglianesi (2009) who distinguishes between fishbowl and reasoned transparency, Alben and Brown argue that the WTO does too little to engage with the business community. As production and trade increasingly occurs through international production networks and value chains that individual national government only encompass partially, greater direct involvement in the operation of the WTO by the business community can help keep the WTO relevant by providing officials with up-to-date information from the core constituency they represent.⁸

Supporting plurilateral engagement: in late 2017 many WTO members launched plurilateral initiatives to define good practices and new rules in four areas: e-commerce, investment facilitation, services domestic regulation and supporting micro, small and medium-sized enterprises to exploit trade opportunities. Dubbed Joint Statement Initiatives (JSIs), these plurilateral initiatives are a positive development. Plurilateral approaches are not a panacea, but they offer a mechanism for large trade powers to engage and cooperate without engaging in negotiations on a trade agreement that liberalizes substantially all trade. As discussed by Hoekman and Sabel in this special issue, plurilateral domain-specific cooperation that focuses on policies underlying current trade tensions offers a means for WTO members to engage meaningfully with like-minded trade partners on subjects of common interest. This extends to the large powers that are unlikely to be able (willing) to sign deep trade agreements with each other.

The MFN constraint may of course block plurilateral cooperation because of free riding concerns. The obvious solution to this problem – restricting the benefits of cooperation to participants – is virtually impossible under WTO rules, as the incorporation of new plurilateral agreements into the WTO that are discriminatory in their application require all WTO members, including all those who do not participate, to agree to this. While this may be less of an issue than it appears, as some policy areas giving rise to systemic trade tensions – notably subsidies – do not lend themselves to discriminatory solutions, others, for example, data privacy, data flows or use of trade policy when implementing national climate change programs, are premised on the ability to discriminate. Creating a legal basis in the WTO to incorporate and govern discriminatory agreements is an important area for reform (Bronckers, 2020; Hoekman and Mavroidis, 2015).

Open plurilateral agreements (OPAs) that are applied on an MFN basis are in principle straightforward to incorporate

into the WTO but may nonetheless raise potential concerns for nonmembers. As argued by Hoekman and Sabel (2019) and in their contribution to this special issue, creating a governance framework for OPAs through a binding code of conduct for signatories of new OPAs will help assure nonsignatories of their compatibility with the WTO by providing legal recourse to nonsignatories to contest their operation.⁹ Ensuring agreements are truly open to any country wishing to join, are fully transparent, and include mechanisms to assist countries not able to participate despite being interested in doing so because of weaknesses in institutional capacity and capabilities will help make OPAs part of the solution to WTO negotiating deadlock.

Re-conceptualizing special and differential treatment for developing countries: a factor underlying the difficulties experienced by members in using the WTO as a negotiating platform is the approach taken to recognize that the WTO encompasses countries with very different income levels. Special and differential treatment (SDT) of developing countries, a basic principle of the WTO, implies that developing nations may offer less than full reciprocity in trade negotiations and claim greater freedom to use certain trade policies than high-income countries. Conceived in the 1960s, SDT is no longer acceptable to many higher-income countries, in large part because WTO members can self-determine if they are developing. Outside the group of UN-defined LDCs, the only distinct group of developing countries formally identified in the WTO, there are no criteria that define what constitutes a developing country in the WTO. Long a bone of contention because this permits advanced emerging economies to claim SDT, suggestions have been made repeatedly over the years to adopt formal criteria to determine when 'graduation' should occur, to no effect.

Effort to do so arguably is misconceived. In practice WTO members can and do negotiate on a reciprocal basis with large emerging economies and have been able to put in place approaches that address economic development disparities on an issue-specific basis. An example is Article 27 of the Agreement on Subsidies and Countervailing Measures, which uses a per capita GDP and export competitiveness criterion to determine when export subsidy disciplines apply. A more recent example is the flexible approach taken in the Trade Facilitation Agreement (TFA) towards scheduling of commitments by developing countries and the opportunity it offers for countries to link implementation to technical assistance. Differentiation can be achieved in specific agreements, with large emerging economies taking on more obligations and offering greater reciprocity than low-income countries. As discussed in Low et al. (2018), what is needed is a new bargain on what differentiation means, and designing SDT in terms of specific individual country needs at the sectoral or activity level.

Dispute settlement

A central dimension of the 'value proposition' offered by the WTO is independent, third-party adjudication of trade

disputes reflected in the principle of de-politicized conflict resolution (Hoekman and Mavroidis, 2020). An effective dispute settlement mechanism is critical for existing WTO agreements to remain meaningful, and for the negotiation of new agreements. The value of negotiated outcomes depends on the ability of signatories to enforce them. If the prospects of effective enforcement decline, there will be serious negative consequences for future rule-making efforts in the WTO. The different pillars of the WTO are interdependent. Concerted action to address the institutional design weaknesses of the Dispute Settlement Understanding (DSU) is therefore a priority area of WTO reform.

Since its establishment in 1995, some 600 bilateral trade disputes (597 as of end December 2020) were adjudicated through the DSU. The International Court of Justice (ICJ), a state-to-state court that adjudicates disputes in all areas of international law, has only addressed 178 disputes since 1947.¹⁰ Given that the number of states that can submit disputes to the ICJ surpasses the WTO membership by one third, and that the ICJ also knows of non-litigious procedures (advisory opinions) that are not available to WTO adjudicators, the sheer volume of dispute settlement activity under the WTO has been impressive.

Although frequently heralded as the 'crown jewel' of the WTO, critics of the dispute settlement system point to its reliance on forward looking compliance, that is, to only recommend prospective remedies and a failure to 'complete' the contract through methodologically sound reasoning and understanding of the various WTO provisions. Others, notably the US, have been critical of the system for the opposite reason, alleging that the Appellate Body (AB) has too frequently overstepped its mandate. The AB ceased operations in December 2019 because of US refusal to agree to appoint new AB members and/or re-appoint incumbents. Resolution of the crisis requires reform of how the system works. This is not a matter that was idiosyncratic to the Trump administration. US concerns are long-standing, and some are shared by other WTO members (Fiorini et al., 2020a).

Observers often point to the antidumping zeroing case law as the core US concern. Other issues are arguably as, if not more important: AB rulings on the use of safeguard actions, and, as discussed by Ahn in his contribution to this special issue, the case law on 'public body'. As explained by Ahn, the latter is a fundamental element of the WTO Subsidies Agreement, but the case law is unclear to say the least: ownership does not create a presumption that an entity is linked to the state, while the possibility is left open to show that a private operator is a state agent without having to inquire into its conduct. The objective function of courts is to make law predictable. There is no predictability generated by the rulings discussed by Ahn. If anything, the AB made the law impenetrable.

Resolving the AB crisis and bolstering the dispute settlement function is critical for the continued relevance of the WTO. As of October 2020, 14 appeals were pending before the dysfunctional AB, raising the question what the status is of the associated panel reports (Hoekman and Mavroidis, 2021). Article 16.4 DSU permits appeal of panel reports even

if the AB is non-operational. If appeal 'into the void' remains possible, panel reports will have no legal value, unless the disputing parties forego their right to appeal, and accept panel findings.¹¹

US dissatisfaction with dispute settlement has focused primarily on the operation of the AB. As a result, the emphasis of WTO members has centered almost exclusively on the AB. Resolving the WTO dispute settlement crisis goes beyond the AB, however, and reform discussions should consider the dispute settlement system more broadly. WTO members most concerned with effective dispute settlement need to launch negotiations on specific *procedural* dispute settlement reforms. As far as the AB is concerned these can build on the 'Walker principles' (Walker, 2019), which address core US concerns, for example, that adjudicators do not exceed their mandate and engage in rulemaking.

Both the multi-year review of the DSU and extensive legal scholarship makes clear that there is significant scope to improve the quality of the work of panels and to reduce the recourse to appeals (Hoekman and Mavroidis, 2020). This suggests reform efforts should include a focus on the first stage panel process and the role of the WTO bodies and the Secretariat in helping to defuse and resolve disputes. Wauters, in his contribution to this special issue, points to the role of Secretariat staff as 'invisible experts' who may exercise undue influence in the preparation of dispute settlement reports. Echoing previous analysts (Nordström, 2005; Pauwelyn and Pelc, 2019), Wauters argues that the current system is in disequilibrium as a result of the heavy reliance on Secretariat staff who are unaccountable to anyone but their own Director, and not on the appointed adjudicators.

The key goal here should be to maintain the de-politicized nature of WTO dispute adjudication. This need not require an appeals board if WTO members were willing to improve the first stage panel process (Hoekman and Mavroidis, 2020). Most WTO members have made clear, however, that they prefer to maintain the two-stage process.¹² Rob Howse, in his contribution in this special issue, argues an AB is necessary, especially if the current panel structure remains intact. He points to the need to have a body that will provide guidance as to the future direction of law, including to address instances of conflicting case law or movement of case law in directions deemed unsatisfactory by the WTO membership.¹³

Other mechanisms to defuse and address potential conflicts exist. These are important elements of the WTO machinery, but tend to be neglected. Significant innovations have been made in this respect by WTO members. Mandating WTO adjudicating bodies to request that WTO members clarify and/or address gaps in WTO agreements and putting in place measures that support deliberation in WTO committees on such matters is a complementary area of reform that can improve conflict resolution (Hoekman and Mavroidis, 2020, 2021; Wolfe, 2020). In the context of the TBT (Technical Barriers to Trade), and the SPS (Sanitary and Phyto-sanitary) Agreements, members have resorted to a process in which they may raise 'specific trade concerns' (STCs) in committee deliberations (Karttunen, 2020). Similar

discussions take place in other committees.¹⁴ This illustrates the scope for constructive engagement under WTO auspices to defuse potential disputes. Emulating these examples in other WTO bodies and incorporating them into the design of future plurilateral agreements could help reduce recourse to formal conflict resolution processes.

China

The elephant in the room when it comes to WTO reform concerns the terms of engagement with China, specifically the rules of the game that (should) apply to state-owned and/or state-controlled enterprises and more generally to subsidization of firms and economic activities that distort international competition. As Mavroidis and Sapir note in their contribution to this special issue, China's accession, hailed initially as a milestone for the multilateral trading system, has become a source of acrimony.¹⁵ The US especially has raised a series of complaints before the WTO, mostly dealing with the role of the state in the workings of the economy – what Wu (2016) has termed the 'China Inc.' problem. The behavior of state-owned enterprises (SOEs) and measures requiring transfer of technology have been central to US concerns. Unhappiness with WTO Appellate Body rulings and a perception that WTO agreements and China's accession protocol were inadequate, led the US to turn to unilateral measures to address perceived competitive distortions. This has not worked. China has not changed its policies because of US measures. If the major trade powers do not (cannot) negotiate new, specific disciplines for SOEs and transfer of technology, the various reform areas discussed above will have much less salience. On the other hand, more transparency, constructive deliberation, willingness to negotiate on a plurilateral basis, and resolution of the dispute settlement crisis are all arguably necessary ingredients for the WTO to be able to play a role in resolving tensions and concerns regarding China Inc.-related conflicts. But they are not sufficient. Absent a willingness to negotiate clear rules of engagement by the major players – China, the EU, Japan, and the US – the prospects rise for deepening of regional blocs and greater economic decoupling reflected in unilateral policies targeting competition from China.

Conclusions

The WTO has 164 members, soon to expand to 168. Because of the heterogeneity of the membership, WTO agreements are 'shallow' – largely limited to disciplines on the scope to use discriminatory policies. The question looking forward is whether rulemaking, which increasingly has shifted to deep regional trade agreements (e.g. Mattoo et al., 2020) can occur under WTO auspices. For the WTO to open its doors to deeper forms of cooperation the membership must accept variable geometry (Hoekman and Mavroidis, 2015). It is simply unrealistic if not irrational to expect members at very different stages of development to have similar concerns and priorities, never mind sharing a common view on how best to address them.

For a long time, it was thought that the primary problem confronting the organization was the negotiating function, and that the difficulty of getting agreement to new liberalization commitments in multilateral trade talks was in large part due to the unwillingness of major emerging economies to offer OECD member countries sufficient reciprocity. Insistence on special and differential treatment is often held to be a core part of the problem by high-income country negotiators. While a proximate cause, this is not the whole story. Non-agreement in part has reflected perceptions that the threat point or 'best alternative to a negotiated agreement' (BATNA) was the status quo ante. This is no longer the case, as revealed by increasing recourse to unilateral action to address perceived gaps in WTO agreements – the US trade war with China; the EU White Paper on subsidies (European Commission, 2020); unilateral imposition of digital services taxes by various WTO members; data localization requirements around the world – and restrictive policies in areas not subject to WTO rules, for example, screening of inward FDI and takeovers. Reforms to facilitate the informed deliberation and negotiation needed to resolve conflicts among the large trade powers and reduce the trade costs of regulatory heterogeneity are one part of the solution. Another is cooperation on a 'club' basis, designed around open plurilateral agreements. In parallel, the dispute adjudication function needs to be rethought and made operational again.

To a certain extent the reforms that are discussed in some of the papers that follow imply a return to the past. As noted by Hoekman and Sabel in their contribution, in the GATT variable geometry was a feature, not a bug. The various codes that were negotiated in the Tokyo round were essentially OPAs. Dispute settlement was aimed at resolving conflicts and was less 'legalistic' (formalized) than what became standard operating procedure in the WTO. Building on nascent green shoots reflected in the JSIs and the potential for plurilateral cooperation on other subjects, revisiting dispute settlement to ensure adjudicators limit themselves to what has been negotiated by the principals, and opening the WTO to greater participation by non-state actors are elements on which reform efforts should focus.

The appointment of a new DG and a new US Administration that is more supportive of multilateral engagement provides an important opportunity for a reset and serious deliberation on reform. The status quo is neither sustainable nor desirable. The new DG has an important role to play in this regard. The survey results presented by Fiorini et al. in this special issue make clear that the trade community mostly agrees on the areas for reform but also that there is heterogeneity across different stakeholders, including on questions such as how to address differences in economic development. Going beyond the annual Public Forum meeting and engaging more substantively with stakeholders in WTO bodies and committees, including through surveys, could help bolster the political support the organization – and its management – will need to change working practices to become a more effective instrument to support

multilateral trade cooperation and use trade to achieve sustainable development goals.

Notes

We are grateful to Patrick Low and Robert Wolfe for comments on an initial draft and to participants in numerous zoom meetings and workshops on WTO reform held during 2020, including the EU-WTI World Trade Forum 2020 conference. Many of the contributions to this special issue draw on papers prepared for two research projects: a Bertelsmann Stiftung-supported initiative on revitalizing the WTO; and a European Union Horizon 2020 research and innovation supported project on realizing European soft power in external cooperation and trade (RESPECT) (grant agreement 770680).

1. WTO members that have put forward proposals or concept papers on WTO reform include the EU, the US, Canada and the 'Ottawa Group' (Australia, Brazil, Canada, Chile, EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland). See e.g., Canada (2018a, 2018b), China (2019), European Union (2018).
2. Many of the contributors to this special issue draw on papers prepared for a Bertelsmann Stiftung-supported initiative on revitalizing the WTO that build on an initial task force report (Bertelsmann Stiftung, 2018). Project papers are posted at: <https://globalgovernance-programme.eui.eu/research-project/revitalizing-multilateral-governance-at-the-wto-2-0/>.
3. Related research on WTO reform issues includes Bronckers (2020), Charnovitz (2020), and Fitzgerald (2020). Evenett and Baldwin (2020) bring together a complementary compilation of suggestions for a more immediate post-COVID-19 work program for the WTO.
4. Possible solutions to the problem suggested by the Warwick Commission (2007) include greater recourse to critical mass-based deliberation – as is now being pursued (see below) – and calling on members to explain reasons for objecting to proposed agenda items in WTO committees, including why deliberation on a matter would hurt its interests.
5. This has begun to be done – see e.g., WTO (2020).
6. See Hoekman and Shepherd (2020) for a more in-depth discussion of indicators of services trade policy. Wolfe (2021) discusses the role that indicators of producer support played in agreeing to multilateral rules for agricultural trade-related policies.
7. It is not sufficient to point to recent PTAs that include new disciplines as providing the basis for agreements in the WTO, whether plurilateral or multilateral. The trilateral talks between the EU, Japan and the US to agree on new rules for subsidies, state-owned enterprises and technology transfer-related policies are illustrative – they were not informed by independent analysis and by not engaging with the subjects they proposed to regulate (China), the effort is doomed to failure.
8. For specific proposals on mechanisms to do this see Findlay and Hoekman (2020).
9. See also Bronckers (2020) on this.
10. International Court of Justice. Available at: <https://www.icj-cij.org/en/cases>.
11. In response to the demise of the AB the EU developed the MPIA (Multi-Party Interim Appeal Arbitration Arrangement). This commits signatories that are complainants or respondents in panels to either accept a panel report or to use the MPIA to appeal findings through a process that closely mirrors what the AB would do. Participation is open to any WTO member. At the time of writing only 23 WTO members had joined the MPIA, including the EU and China.
12. This is also a clear finding emerging from the survey of practitioner views on the DSU and the AB crisis by Fiorini et al. (2020a).
13. The need to consider the panel process as well as the role of the AB reflects the fact that many appeals address matters that are not strictly legal but center on factual matters that the AB does not

have a mandate to consider and the heterogeneity in professional background and expertise of panelists resulting from the ad hoc nature of panel appointments. Moving to a standing body of professional panelists would improve the quality of panel findings and reduce the need for appeal (Hoekman and Mavroidis, 2020).

14. A corollary of the STC process is that members have a greater incentive to notify new measures coming under the purview of the TBT and SPS committees. The notification track record in these areas is good as is reflected in the databases that are maintained by the Secretariat on new TBT and SPS measures (Karttunen, 2020).
15. Since 2011, under President Xi, there has been a shift towards increasing the role of the state in the economy.

References

- Bertelsmann Stiftung (2018) *Revitalizing Multilateral Governance at the World Trade Organization*. Report of the High-Level Board of Experts on the Future of Global Trade Governance.
- Bollyky, T. and Bown, C. (2020) 'The Tragedy of Vaccine Nationalism: Only Cooperation Can End the Pandemic', *Foreign Affairs*. Available from: <https://www.foreignaffairs.com/articles/united-states/2020-07-27/vaccine-nationalism-pandemic>.
- Bronckers, M. (2020) 'Trade Conflicts: Whither the WTO?', *Legal Issues of Economic Integration*, 47 (3), pp. 221–244.
- Canada 2018a Strengthening and modernizing the WTO. JOB/GC/201, 24 September. Geneva: WTO.
- Canada 2018b. Strengthening the deliberative function of the WTO. JOB/GC/211, 14 December. Geneva: WTO.
- Charnovitz, S. (2020) "Solving the Challenges to World Trade," Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736069.
- China 2019 China (2019) 'China's Proposal on WTO Reform', WT/GC/W/773 May, 13'. Geneva: WTO.
- Coglianesi, C. (2009) 'The Transparency President?', *The Obama Administration and Open Government, Governance*, 22, pp. 529–544.
- European Commission. (2020) *White Paper on levelling the playing field as regards foreign subsidies*. Brussels: European Commission.
- European Union. (2018) Concept Paper on WTO Modernization, Available from: https://trade.ec.europa.eu/doclib/docs/2018/septembre/tradoc_157331.pdf
- Evenett, S. (2019) 'Protectionism, State Discrimination, and International Business since the Onset of the Global Financial Crisis', *Journal of International Business Policy*, 2 (1), pp. 9–36.
- Evenett, S. and Baldwin, R. (eds.) (2020) *Revitalising Multilateralism: Pragmatic ideas for the new WTO Director-General*. London: CEPR Press.
- Evenett, S. and Winters, L. A. (2020) Preparing for a Second Wave of COVID-19: A Trade Bargain to Secure Supplies of Medical Goods. Available from: <https://www.globaltradealert.org/reports/52>.
- Findlay, C. and Hoekman, B. (2020) 'Value Chain Approaches to Reducing Policy Spillovers on International Business', *Journal of International Business Policy*. <https://doi.org/10.1057/s42214-020-00083-5>
- Fiorini, M. B., Hoekman, P. C., Mavroidis, M. Saluste and Wolfe, R. (2020a) 'WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences', *Journal of World Trade*, 54 (5), pp. 667–698.
- Fiorini, M., Hoekman, B. and Yildirim, A. (2020b) 'COVID-19: Expanding Access to Essential Supplies in a Value Chain World', in R. Baldwin and S. Evenett (eds.), *COVID-19 and Trade Policy: Why Turning Inward Won't Work*. London: CEPR Press.
- Fitzgerald, O. (ed.) (2020) *Modernizing the World Trade Organization*. Waterloo: CIGI.
- Hoekman, B. (2019) 'Urgent and Important: Improving WTO Performance by Revisiting Working Practices', *Journal of World Trade*, 53 (3), pp. 373–394.
- Hoekman, B. and Mavroidis, P. (2015) "Embracing Diversity: Plurilateral Agreements and the Trading System", with Petros Mavroidis', *World Trade Review*, 14 (1), pp. 101–116.
- Hoekman, B. and Mavroidis, P. C. (2020) "To AB or Not to AB? Dispute Settlement in WTO Reform", with Petros Mavroidis', *Journal of International Economic Law*, 23 (3), pp. 1–20.
- Hoekman, B. and Mavroidis, P. C. (2021) 'Preventing the Bad from Getting Worse: Is it the End of the World (Trade Organization) As We Know it?', *European Journal of International Law*, forthcoming.
- Hoekman, B. and Nelson, D. (2020) 'Rethinking International Subsidy Rules', *The World Economy*, 43 (12), pp. 3104–3132.
- Hoekman, B. M. and Sabel, C. (2019) 'Open Plurilateral Agreements, International Regulatory Cooperation and the WTO', *Global Policy*, 10 (3), pp. 297–312.
- Hoekman, B. and Shepherd, B. (2020) 'Services Trade Policies and Economic Integration: New Evidence for Developing Countries', *World Trade Review*. <https://doi.org/10.1017/S1474745620000439>
- Karttunen, M. (2020) *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown*. Cambridge: Cambridge University Press.
- Low, P., Mamdouh, H. and Rogerson, E. (2018) *Balancing Rights and Obligations in the WTO – Shared Responsibility*. Stockholm: Government of Sweden.
- Mattoo, A., Rocha, N. and Ruta, M. (2020) *Handbook of Deep Trade Agreements*. Washington, DC: World Bank. <http://hdl.handle.net/10986/34055>
- Nordström, H. (2005) 'The WTO Secretariat in a Changing World', *Journal of World Trade*, 39, pp. 819–853.
- Ottawa Group (2020) 'COVID-19 and Beyond: Trade and Health'. Communication from Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, Republic of Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, WT/GC/223, 24 November. Geneva: WTO.
- Pauwelyn, J. and Pelc, K. (2019) 'Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement', *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3458872>
- Walker, D. (2019) Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand). JOB/GC/222. Geneva: WTO.
- Wolfe, R. (2018) 'Is World Trade Organization Information Good Enough? How a Systematic Reflection by Members on Transparency Could Promote Institutional Learning', *Bertelsmann Stiftung Working Paper*. <https://doi.org/10.2139/ssrn.3299015>
- Wolfe, R. (2020) 'Reforming WTO Conflict Management. Why and How to Improve the Use of 'Specific Trade Concerns'', *Journal of International Economic Law*, 23(4), pp. 817–839.
- Wolfe, R. (2021) 'Yours Is Bigger Than Mine! Could an Index Like the PSE Help in Understanding the Comparative Incidence of Industrial Subsidies?', *The World Economy*, DOI: 10.1111/twec.13069.
- WTO (2020) Overview of Developments in the International Trading Environment. WT/TPR/OV/23. Geneva: WTO.
- Wu, M. (2016) 'The 'China, Inc'. Challenge to Global Trade Governance', *Harvard International Law Journal*, 57, pp. 1001–1063.

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