

Restoring Multilateral Trade Cooperation

Recommendations from Dialogues in and Involving Developing Countries¹

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Background

As the Members of the World Trade Organization (WTO) gather in Nairobi for the organization's tenth ministerial conference, everyone present knows that the WTO faces an enduring systemic crisis. Failure to conclude the Doha Round, and to forge ahead with broad-based negotiations, mean that the institution's negotiating function is seriously compromised, and its rule-making function is effectively paralysed. While the dispute settlement mechanism (DSM) continues to operate reasonably effectively, the longer the crisis continues in both the negotiating and rule-making areas, the more the institution will be bypassed and the more likely it is that even the DSM will lose relevance. In a world characterised by increasing geopolitical contestation, in a broader environment of power shifting from the established developed country powers to emerging markets, this is an outcome to be avoided.

In this light we, the undersigned, actively participated in a two year series of dialogues centered on developing countries, exploring how to restore multilateral trade cooperation and the WTO specifically, to the centre of the global trading system.² Based on this rich series of discussions, many insights and recommendations were generated. We wish to proffer the following key recommendations for consideration by all WTO member states.

I. Recommendations for Preserving the WTO's Role in Trade Negotiations and Implementing the Rules Governing Trade

In response to the stagnation and likely failure of the Doha Round, coupled with the turn to Mega-Preferential Trade Arrangements (MPTAs) by the developed countries (led by the U.S.)

¹ These recommendations draw on a comprehensive diagnostic report based on a series of international dialogues, conceived by the Cordell Hull Institute, financed by the World Bank's Development Grant Facility, and implemented by the South African Institute for International Affairs (SAIIA) in cooperation with trade and economic institutes in developing countries. The project, now concluded, was entitled "Restoring Multilateral Trade Cooperation". Its purpose was to explore, with particular emphasis on the views and needs of the developing world, the new paths that trade negotiations have taken since the 2008 stalemate in the Doha Round, and to build an intellectual framework for restoring multilateral cooperation on trade in a way that can enable meaningful agreements that further both trade liberalization and economic development. Details and background documents can be found at: <http://www.saiia.org.za/news/new-project-restoring-multilateral-trade-co-operation>.

² Details including documents, opinion editorials, and a comprehensive diagnostic report, can be found at: <http://www.saiia.org.za/news/new-project-restoring-multilateral-trade-co-operation>.

and by others (notably China-led Asian regional initiatives) we recommend that the WTO's Members take steps in five categories:

i. End or Suspend the Doha Round

We see no way in which Doha can be successfully concluded as now constituted. Even if some minimalist group of agreements could be reached, they almost certainly could not be ratified by the United States and other countries which, after all, turned to MPTAs and plurilaterals because what was on the table in Doha in mid-2008 did not deliver a, to-them, acceptable level of liberalization. It is also important to understand that, on the agricultural subsidy issues that are for many developing and agricultural exporting countries a *sine qua non* of their Round expectations, the EU and U.S proposals of July 2008 cannot now remain on the table. The EU has emphasized that its proposal to eliminate agricultural export subsidies was contingent on an acceptable overall Round result. And the provisions of the United States' 2014 Farm Bill make it politically impossible for the U.S. to offer now the reductions in farm supports that it had on the table in mid-2008.

Even though there is growing recognition that Doha is no longer viable, its continued existence acts as a barrier to constructive alternatives. This is in part because debate still focuses almost entirely on the (to us, unachievable) task of finding ways to re-negotiate the issues now on the Doha table. Extend and pretend has become increasingly detrimental for the trading system. Our preference would be to terminate the Round. Keeping it alive implies that the route to new and productive multilateral negotiations is stymied. If abandoning Doha is too politically difficult, however, the Round should at the least be suspended indefinitely.

ii. Finalize the Trade Facilitation Agreement

As we understand, to date some one-third of the WTO membership has ratified the TFA and scheduled the required commitments. We strongly urge that a major effort be made to obtain the required ratification of two-thirds of the membership and a "critical mass" of full TFA commitments by developing countries. We say this not only because TFA is to date the only major Doha achievement that has the potential to generate significant benefits for traders, but because the TFA is an innovative agreement for the WTO. It represents a new way of addressing "behind the border" issues and a constructive approach to special and differential treatment with its particular emphasis on LDCs' self-selection of their country's level of ability to implement and on the "Aid for Trade" commitments to assist developing countries to implement the agreement where this is needed. The TFA template may well be an important step toward finding ways to deal with other issues of a regulatory nature that we expect will increasingly figure in trade agreements looking forward.

iii. Find Ways To Achieve a “Docking” into the WTO System of Agreements Reached in the Current Plurilateral Negotiations

“Docking” the current efforts to negotiate plurilateral agreements into the WTO system is important to maintain the central role of the WTO in the global trading system. But it is also important in order to ensure consistency of plurilateral rules with those of existing WTO Agreements, and to subject those rules to the WTO Dispute Settlement Understanding.

There are several vehicles in the WTO Agreements for the “docking” of the plurilaterals now under negotiation. Most desirable is the achievement in the plurilateral of a “critical mass”, and the extension of negotiating results to all Members on a most favoured nation (MFN) basis. Plurilateral market access negotiations in goods (ITA 2; a Trade in Environmental Goods Agreement—TEGA) must be applied on a MFN basis, but this is not the case for ongoing plurilateral services talks (TISA). Ultimately achievement of critical mass depends on participation of at least China and probably one or more of the other large emerging economies.

Of the plurilaterals, TISA presents the most urgent case for “docking,” because services represent such a high and increasing percentage of world production, trade and employment – both separately and as intertwined with trade in goods. But TEGA should be on the “docking agenda” as well—especially when it comes to provisions that involve policy disciplines that go beyond the simple reduction or removal of tariffs.

iv. Consider WTO-Authorized Plurilaterals for Some Issues that Have Resisted Multilateral Agreement

The Doha Round has shown that some issues are particularly difficult to resolve in multilateral negotiations because they are politically sensitive in a few countries. Various aspects of the agriculture negotiations fall into this category, including market access, farm supports and geographical indications. The trade remedy portion of the Rules Negotiations is another example. One could add rules on investment, competition policy and transparency in government procurement, the Singapore issues that were dropped from Doha early in the negotiations.

For plurilaterals where “critical mass” cannot be achieved, consideration can be given to the model used for the Government Procurement Agreement (GPA), where the WTO Membership as a whole has sanctioned a small group to move forward on a non-MFN basis. In such a case, however, it is essential that the ensuing plurilateral’s accession provisions work effectively, especially for developing and emerging WTO members. The approach taken in the TFA to provide a mechanism for countries to request and commit to provide assistance offers one way to support gradual expansion of the country coverage of new plurilaterals in the WTO.

GPA-type agreements may work for those “behind the border” rules that address issues not covered by present WTO Agreements, but in many cases plurilaterals may address subjects covered by, inter alia, TRIPS, TRIMS and the TBT and SPS Agreements. Such overlaps present issues that will have to be resolved. Of particular importance in this regard is that the WTO does not have any mechanism through which a subset of the membership can make commitments on additional policy disciplines in a covered area that are applied to non-participating countries as well on a MFN basis.

Our basic recommendation in regard of new plurilateral agreements in the WTO is that WTO members consider whether a WTO-authorized plurilateral approach would promise success. The way to do this is to establish deliberative mechanisms – working groups, task forces, etc. – to canvass the issues and explore the possibilities and parameters. To further this aim we suggest that WTO members establish a working group to explore how plurilaterals on rules, or market access where critical mass is not obtained and hence the results of the agreement would not be made available on an MFN basis, could be constructed in ways that do not harm the interests of outsiders. Working towards establishing and agreeing on a “code of conduct” for plurilaterals could draw from the TFA’s example, explicitly building in S&DT provisions in a “laddered” approach tailored to developing country capacities.

Docking of the MPTAs presents a much more difficult challenge, especially with respect to their preferential market access provisions, which accord to their participants a greater degree of liberalization (among themselves). One problem is that most PTAs are explicitly discriminatory. But there may be ways of separating out, and docking into the WTO system, some or all of the rules elements of the MPTAs. Here a first necessary step is to better understand what different MPTAs do in a given area and what the economic pro’s and con’s are of what is done. In our view the WTO at present does far too little to engage with PTAs, to assess the effects of new approaches in policy areas covered by PTA disciplines and to disseminate information that allows non-members to learn about the experience that is obtained from the implementation of PTAs. Ultimately charting routes for “docking” plurilateral and PTA initiatives into the WTO must start with much better information and knowledge so as to support the needed agreement as to what constitutes good practice in a given area.

v. Exercise the WTO’s Responsibility as Steward of the Global Trading System

The WTO’s role as steward of the trading system is specifically applied to PTAs (including the MPTAs) by Article 24 GATT and Article 5 GATS. Neither provision is enforced by the WTO membership as a whole—it is left to individual Members to use the DSU in instances where they perceive a PTA to violate the relevant provisions. The WTO should do more to exercise its responsibility. Given that all major players are living in glass houses and have a clear revealed preference for PTAs, we believe that the main role the WTO should play is to become much

more effective in monitoring and providing assessments of PTAs – to identify where discrimination results in diversion of both trade and investment and, equally important, to provide a forum for deliberation on the lessons that can be drawn from initiatives that have been pursued in different PTAs. WTO members could also consider whether efforts should be made to encourage PTA members to use the WTO DSM to address disputes. Such a deliberation could extend to “new” issues such as investor-State disputes, where in the context of recent PTAs – notably TTIP and CETA – there has been discussion of the desirability of developing specialized, standing investment dispute settlement systems modelled on the WTO.

vi. Recognize the Conceptual Divide over Deepening Global Integration

Until and unless a consensus can be reached as to the proper relationship between trade liberalization and associated policy commitments (“bindings”) and national development and growth policies, we see no way to move forward with meaningful multilateral negotiations of the type that characterized the Uruguay Round and was tried in the Doha Round. This is a major reason why we advocate greater effort to conclude plurilateral agreements that are applied on a MFN basis and more flexibility on the part of the WTO membership in accepting non-MFN plurilateral arrangements such as the GPA. If this is not done, the counterfactual is clear – more MPTAs and the associated danger that most developing countries are excluded and/or subjected to the power politics that the rules-based trading system was created to address.

We also urge that the WTO and WTO members sponsor workshops in developed and developing countries, similar to those conducted in our project, and to pursue and support deliberative processes that are aimed at identifying good practices and areas where international cooperation will help governments achieve national growth and development objectives. In this regard, the economic institutes that have participated in our project would welcome the opportunity to add to the WTO’s effort the understanding and information we have developed. We are convinced that a precondition for multilateral cooperation to reduce the negative trade effects of differences in ‘behind the border’ policies is a common understanding of what constitutes good policy and practices. The TFA experience has also shown that the way forward need not centre on negotiating binding disciplines – equally important may be to put in place systems that identify priority areas for aid for trade assistance and to create platforms for the public and private sector to work together to address factors that impede investment into tradable sectors.

One area for such a deliberative effort would be to assess the extent to which the issues relevant to global value chains offer potential benefits across the spectrum of developing and developed countries that could expand the basis for finding common ground between those who see trade liberalization as the predominant goal and those who place principal emphasis on stimulating economic development. In this regard, we urge that attention be paid to the

responsibilities of companies in establishing global value chains – perhaps by enunciating best practices or codes of conduct.

Another theme – necessary in our view to find any true consensus – would be to find ways to adapt trade rules and disciplines to the variety of situations that now exist within the developing and emerging countries. This would not only involve potential gradations in levels of economic development, but also situations in which, within a large economy that has a significant impact (in demand or supply) on world trade, there exists a substantial extent of continuing poverty and economic vulnerability.

vii. Address the Question of Leadership

The GATT's success was attributable in large part to the leadership of the United States. But the US was "leading" an organization that was dominated by more or less like-minded countries as regards the issue of trade liberalization. Today, the U.S. and other major OECD member countries (the EU, Japan) have lost their focus on ensuring progress in multilateral liberalization. The same is true of "middle powers" – smaller high income-countries that in the past have played a leadership role in moving multilateral trade cooperation forward – such as Canada or Switzerland. On the other hand, no countries among the developing and emerging Members have stepped forward to take a complementary position of leadership.

Multilateral negotiating progress is extremely unlikely if there is not effective leadership by WTO Members to push forward a constructive, pro-active agenda. Arguably the single most important task of the WTO Director-General is to (re-)create an environment where (groups of) WTO Members see it as worthwhile to invest efforts to strengthen the trading system and build on the existing *acquis*. While we strongly support greater focus on plurilateral cooperation, it is clear that many policy issues can only be addressed on a multilateral basis – subsidies (not just in agriculture) and digital trade/data privacy policies being two prominent examples. Others would benefit from multilateralization. In an interdependent, global supply chain-driven world economy, regulatory cooperation and coherence is a general priority. Creating islands of cooperation (MPTAs) is second-best—firms should be able to source goods and services from any country and be able to sell their goods and services anywhere without having to incur duplicative testing and certification requirements and uncertainty as to whether they are in compliance with regulatory norms.

What is needed is focusing the attention of the U.S. (and, to a lesser extent, the EU) on the importance of looking beyond the MPTAs and walking the talk that multilateral approaches are preferred. It is in the long-term interest of all players to maintain and extend the WTO, and to secure access to the areas of future demand growth in countries that will not be MPTA participants. With respect to the developing world, this entails persuading major emerging

economies – most importantly China, but also Brazil, South Africa and perhaps India – that they must find a way to exercise leadership in support of the view that liberalization must be accomplished in ways that take account of development needs.

A corollary of this is that the Director-General must pay particular attention to the two largest trading nations, encouraging the U.S. and China to pursue an effort to find common ground on trade in general and the WTO in particular.

II. Policy Options for WTO Members

Our Roundtable discussions made two things clear:

First, that many of the developing and emerging countries are disillusioned with the U.S.-led turn to non-multilateral negotiations. And second, that most LDCs and (with some exceptions such as China and Turkey) most of the major emerging economies have not been able to formulate policy responses to the MPTAs and plurilaterals. In our view, the majority of the WTO membership cannot simply remain as bystanders and should consider the following policy responses:

A. Urge the WTO To Seek Ways To Return to Multilateral Liberalization

The preceding section outlined ways in which trade liberalization might be steered back to the WTO and to multilateralism. Only in the multilateral context will developing and emerging nations be able to participate meaningfully in either the development of new trade rules or the shaping of MPTAs in ways that minimize the diversion (away from non-participants) of both trade and investment. The first and most important step in this policy response is effective leadership – discussed above. This need not come from the major emerging countries— leadership can come from middle-income countries or from groups of countries (e.g., recently-accessed members, a set of countries that have made the most far-reaching policy commitments of all WTO members and that have demonstrated their commitment to the WTO as an institution). Leadership is also required from the main proponents and participants in PTAs with a view to accepting to engage with the broad WTO Membership on their experience with PTA implementation. Examples include countries that have been the most active in negotiating PTAs – e.g., Korea, Chile and Mexico.

One way to move forward on combining agreement on specific policy reforms with achievement of development objectives is to build on the TFA precedent. This agreement takes the need for S&DT seriously by linking implementation to aid for trade assistance where this is deemed to be needed by governments, while at the same time embodying a universal set of agreed good practices. A similar model could be applied to other areas in the future.

B. Assess Whether To Join MPTAs and/or Plurilaterals

Each country must make its own decision as to which, if any, of the MPTAs and plurilaterals it will try to join. For some countries in Asia and elsewhere, failure to join a specific MPTA may have serious adverse consequences in terms of diversion of trade and – more particularly – foreign direct investment. Thus Bangladesh, Thailand and Taiwan will feel intense pressure to join TPP, and Turkey to join TTIP. Other, particularly more advanced developing countries like China, South Korea and the Pacific Alliance nations, may see an MPTA as providing significant economic advantages. However, the degree to which accession by new countries is achievable will depend on the accession provisions of the MPTAs and the domestic politics of participating countries' ratification of new participants' accession. In practice most WTO members will not be eligible or able to join the TPP or TTIP.

Joining issue-specific or sector-specific plurilaterals will raise different questions. From a systemic point of view, participation by developing and emerging nations in the initial negotiating process of such agreements is desirable from the standpoint of influencing the development of new trade rules in more development-friendly ways. At present this is only an issue for TISA, as the ITA and TEGA talks are limited to tariffs and will apply on a MFN basis. Unfortunately, with the exception of China – which thus far has not been able to join the TISA talks – this concern does not appear to be motivating LDCs or most emerging economies to join the negotiations.

Once a plurilateral is finalized by the initial group of participating countries, non-participants are likely to face a *fait accompli* as to any plurilateral that has “critical mass.” This is not a problem as the focus of the agreement is market access, since the MFN rule ensures that benefits will apply to non-signatories as well. It is a potential problem if the agreement implies new policy disciplines or regulatory cooperation. If such plurilaterals are “docked” into the WTO in their negotiated form, even though they will by definition not bind non-signatories, non-participating developing countries will have had no say about the substance of what a club has agreed to do.

Where plurilaterals are not “docked” into the WTO, and if their provisions are not extended to non-participants on an MFN basis, developing countries will have to weigh whether the disadvantages of not joining outweigh their dissatisfaction with the negotiated provision. Here again, each plurilateral's accession provisions, together with the politics of any required ratifications, will strongly influence the prospects for and desirability of accession.

C. Enact Domestic Reforms To Mitigate Trade and FDI Diversion

The negative spillover effects of PTAs and MPTAs on non-members result from agreement provisions that increase market access on a discriminatory basis and that create conditions

more hospitable to foreign direct investment (FDI) from participating economies. A developing or emerging country affected by such diversion of trade or (more importantly) FDI to MPTA participants has the option of unilaterally enacting measures that parallel provisions of the MPTA. On the one hand, this option offers the possibility that unilaterally-enacted measures may substantially mitigate diversion without requiring the country to adopt other measures of the MPTA “package” that it finds particularly distasteful. On the other hand, history suggests that domestic legislation in areas like investment protection, IPR, SOEs and worker rights faces substantial opposition from entrenched domestic interests that may not be possible to overcome outside the context of ratification of a trade agreement. Moreover, MPTA members may not recognize actions by non-members to adopt MPTA-equivalent provisions on a unilateral basis. Notwithstanding these considerations, unilateral reforms that enhance the competitiveness of firms and the attractiveness of a country to investors—both domestic and foreign—is an important instrument to address the potential negative effects of PTAs.

D. Pursue Regional PTAs independent of US or EU-centred arrangements

This course is already being pursued in most regions of the world. In the Asia-Pacific region there are now several initiatives led by China. What is regarded by the U.S. and EU as “lesser ambition” in those initiatives (RCEP, a new Silk Road – “one road, one belt” – and the Asia Infrastructure & Investment Bank) are provisions that many developing countries may find less intrusive upon their “policy space” than TPP or TTIP. Whether those “less ambitious” provisions will in fact mitigate diversion of trade and FDI from participants in (for example) RCEP to participants in TPP is hard to assess at this point. While there are clearly strong economic and political rationales for deeper and more extensive pursuit of regional integration initiatives, regional considerations may make such initiatives difficult, most notably in Africa where fragmentation and “thick” borders constitute major barriers to trade expansion. We have concerns with the policy option of forming competing or overlapping, regional PTAs. Such a course strikes us as inconsistent with a global rules-based trading system. Moreover, it raises the prospect of a “balkanization” of trade into competing blocs.

III. Specific Recommendations

Flowing from the above, we advance the following recommendations:

1. ***Commit that ongoing plurilateral negotiations will be incorporated into the WTO.*** TISA participants should commit that any agreement they conclude will be embodied into the GATS and, in all areas where this is feasible, be applied on an MFN basis to non-members. This would complement the ITA-2 and TEGA which by their nature are critical mass agreements.

2. ***Bolster the transparency function.*** All WTO members should agree to substantially increase the organization's transparency role. This should include a regular focus on developments in the major PTAs, and a much more intensive effort to monitor and analyse the use and effects of policies that distort trade – including measures that are not subject to WTO disciplines such as investment subsidies and local content requirements for services. Recent reports by the WTO and the Global Trade Alert initiative make clear that governments continue to increase their use of trade-distorting policies and regulatory measures. A concerted effort to assess and analyse the stock of all extant measures (as opposed to the focus to date on the flow of new measures) will help to identify where attention should be focused looking forward.
3. ***Learning and knowledge sharing on PTAs.*** PTA members should engage in a periodic process in which they explain to the WTO membership as a whole how they are implementing major PTAs and what their experience has been with aspects of PTAs that go beyond the WTO. In addition, the WTO Secretariat should be mandated to assess the impacts of WTO+ initiatives on non-PTA members.
4. ***Demonstrate that the WTO is responsive to the needs of its poorest members.*** The monitoring of implementation and analysis of the effectiveness and economic impacts of LDC-specific commitments made by WTO Members, including with respect to the services waiver, preferential rules of origin, and DFQF should be substantially strengthened. It is important for the legitimacy of the system that there is greater accountability for implementation and evaluation of outcomes and results.
5. ***Lay the groundwork for a new multilateral negotiating agenda.*** WTO members should agree to create working groups, or other structures, but essentially deliberative platforms on Doha-plus issues. Our initial list would include: investment policies, e-commerce/data flows, the governance of GVCs and associated private standards, the regulation of subsidies broadly defined, and agricultural policies and food security. The overall aim should be to seek an intellectual consensus on the proper relationship between sustainable economic development on the one hand and trade and investment policy-related disciplines on the other. Such deliberation should include an explicit focus on how the approach embodied in the TFA can be adapted so as to ensure that development objectives and capacity constraints are addressed in any given area.
6. ***Address systemic concerns and impediments to new WTO plurilaterals.*** WTO members should set up a task force on a code of conduct for new plurilateral agreements that apply to and benefit only signatories. This code would establish the basic principles that such plurilaterals must satisfy to be consistent with the principles of the multilateral trading system, as well as substantive criteria for the rejection of proposals to pursue such cooperation under WTO auspices. While we are strongly of the view that future cooperation should be multilateral and extend to all countries, we also are of the view

that addressing the conceptual divide that currently separates many WTO Members will take time, and that not all issues are of interest to all countries at a given point in time.

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