

Why the WTO needs reform

Sébastien Jean (CEPII & INRA)

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The world trading system is probably facing its most serious crisis since World War II. With significant disagreements about rules and their interpretation, multiplying unilateral measures, and the paralysis of appointment of members at the Appellate Body of its Dispute Settlement Body (DSB), the World Trade Organization (WTO) finds itself in a critical situation, where its existence, or at least its relevance, seems called into question. This threat should be taken very seriously. While the benefits of a rules-based trading system are widely recognized, it should be emphasized that the capacity of the present system to make commitments clear and enforceable is unprecedented. Rather, historical precedents were in many cases characterized by uncertainty, unreliability, and in many cases unfairness, with widespread political interference. Falling back to disorganized and unpredictable trade relationships would be especially costly at a time where international economic relationships are as close as ever, with global value chains ubiquitous. Still, the only guarantee against such a leap backward is the willingness of the organization's members to find a way to adapt it to today's challenges.

Recent initiatives and political statements show that such willingness exists in several countries, rooted in the widespread acknowledgement of the shortcomings of the present situation. The concerns extend to the all three main functions of the WTO: negotiation, surveillance, and adjudication. Given the complementarities between these different functions, the three of them must be dealt with jointly, in a coherent way.

Negotiation and rules

On negotiation, despite the agreements reached on trade facilitation and export disciplines, little has been achieved since the organization's inception, more than 23 years ago. This is a problem, because the world economy has changed profoundly since then. Countries' development levels and competitive capacities have evolved significantly, with several large emerging countries now playing a central role in world markets. The structure and organization of many economies has deeply changed. Information and communication technologies have created distant coordination capacities unheard of in the early 1990s. Digitization is everywhere, originating what some have called a fourth industrial revolution. Against this background of radical change, it is no surprise that the rules adopted almost a quarter of century ago do not fit today's needs.

Improving the capacity of the WTO to hold negotiations bearing substantive fruits is obviously desirable if such gaps between rules and reality are not to widen further in the future. As of now, though, this calls for a rethinking of rules in several areas. Without being exhaustive nor limitative, a few stand out.

One is the special and differential treatment granted to developing economies, because, putting aside the additional flexibilities allowed for least developed countries, the present system relies on a dichotomy whereby two thirds of the member states are self-declared as

developing. This falls short of doing justice the wide variety of development levels and competitive capacities among developing countries. A more flexible approach would allow taking better this variety into account, while recognizing that the value of less stringent commitments to cope with development needs and economic vulnerabilities greatly differs across issue areas. Even though their context is different, the graduation processes included in various Generalized Systems Preferences (GSPs) shows that such flexibilities can actually be put into practice.

Another sensitive issue has to do with state's involvement in the economy, either through state-owned enterprises (SOEs) or subsidies. While the rules and disciplines included in the Agreement on Subsidies and Countervailing Measures (SCM) were designed to make sure that such involvement is not incompatible with a fair competition, concerns have been widely voiced about their suitability in today's context, where the modalities of state's involvement have evolved significantly and are taking central importance in some sectors. In particular, it is questionable whether the way SOEs and subsidies are defined is clear and precise enough. In addition, in this area where information is often difficult to collect and interpret, transparency is indispensable to make disciplines effectively enforceable. Judging by the latest report of the relevant committee, the current situation is not satisfactory in this respect (WTO, G/SCM/152, 29 October 2018). A last dimension of this question is countervailing measures, since these are instruments supposed to level the playing field, where appropriate. The rules defining the conditions under which such measures can be used is an integral part of a suitable framework to deal with states' involvement.

Technology and intellectual property rights are another bone of contention between members. Needless to say, these are key determinants of competitive positions on world markets. The TRIPS Agreement as well as disciplines related to investment and market access already constitute a set of rules which are relevant in this respect, but it is necessary to make sure that existing rules and their practical enforcement are suitable to strike the right balances in this area.

An additional concern is to make sure that trade rules are fully consistent with the achievement of non-trade objectives. Common challenges such as tackling climate change or the preservation of biodiversity and the environment more in general are of decisive importance and their interactions with trade and trade rules are widespread. This has been recognized from the outset through GATT General Exceptions (Article XX). As international trade relationships intensify, it is increasingly important to make sure that trade disciplines are likely to play a constructive role in meeting these common challenges, while avoiding to open a Pandora Box of rules easily instrumented for other purposes.

Surveillance

Surveillance has been markedly improved compared to previous periods, significantly increasing the transparency of trade-related practices, but it has not been without issues. In many areas, notification obligations have been met with very long delays, when they have not been purely and simply ignored. Deliberations have often left important questions unanswered, hence frustrating their capacity to develop into constructive dialogues.

This is a serious concern, because accurate and timely notifications, together with substantive deliberations, are an integral part of a functional system where commitments are enforceable.

In this regard, the present situation is not satisfactory and raises questions about the way to make sure that WTO members do abide by their transparency obligations, and that public exchanges can play a more constructive role.

Dispute settlement

Adjudication, i.e. the quasi-judiciary function of dispute settlement, has been widely lauded as one of the main achievements of the WTO. As a matter of fact, it has shown a previously unmatched capacity to settle trade-related disputes between sovereign states on the basis of internationally agreed rules. Today, however, this system is facing several difficulties. Practically, given the sustained number and the increasing complexity of disputes, it is increasingly unable to respect the delays planned in the texts, an illustration of the disproportion between the workload faced by the DSB and the human and financial means at its disposal. This situation is unlikely to improve in the near future absent any significant reform, given the large number of extremely important and politically charged disputes being submitted to the Body.

The problem is also one of substance, though, with significant disagreements about the way the DSB is functioning and about what its mission should be. Since no agreement is complete and without ambiguity, interpretation of its terms is consubstantial to application, but WTO members have voiced different positions about the way such interpretation should be carried out and codified. This is all the more important in a context where the world is changing fast while, as already emphasized, rules are not substantially updated. The enduring paralysis in the appointment of members at the Appellate Body (AB) is a concrete manifestation of these disagreements. It represents a serious threat to the capacity of this body to remain functional in the near future.

Safeguarding the dispute settlement system is a sine qua non condition to preserve the reality of a rules-based trading system. It requires addressing these different concerns in a meaningful way.