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Abstract

Despite progress on Doha Development Agenda (DDA) in Nairobi in December 2015, it is a pity that WTO members failed to come to a decision on whether the WTO should start to look at some new issues, such as investment, competition or digital economy. During the reflection process in 2016 on the future of the WTO including negotiations, it is important that members begin to brainstorm how to deal with these new issues so as to respond to the needs of 21st century trade and investment reality. They should try to answer questions such as: what new issues could be brought in? what form could future WTO negotiations take? how could plurilateral negotiations be incorporated with the WTO? what role should major developing countries play? Given its positive attitude on new issues and its important role as a trade and investment power, including as the host of G20 in 2016, China may play a leadership role in helping push the WTO to start at least discussing some new issues.

Keywords

WTO, negotiations, new issues, China.

Introduction*

For the WTO, 2015, particularly the year-end Nairobi Ministerial Conference, was decisive for its negotiation function. After more than a decade of stalemate, Doha Development Agenda (DDA) made some progress in Nairobi with six ministerial decisions on subjects such as agriculture export competition, special safeguard mechanism for developing countries, public stockholding for food security purposes and LDC concerns. A critical mass of WTO members also managed to clinch a \$1.3 trillion new deal to liberalize an additional 201 products as part of an expansion of the existing Information Technology Agreement (ITA).

However, most disappointingly, members failed to come to a decision on another subject, i.e. whether the WTO should start to look at some new issues, such as investment, competition or policies affecting the digital economy, which various stakeholders, particularly the private sector, think that the WTO should have done years ago. Paragraph 34 of the Nairobi Ministerial Declaration states that "(w)hile we concur that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation; others do not..."

With that awkward language, the rift among Members on new issues couldn't be more obvious. This is mainly due to repeated failure to conclude the DDA negotiations, as some members have no appetite at all to consider bringing in any new issues before the old agenda has been addressed. Other members, however, are strongly of the view that it is past time to embark on a new path of negotiation within the WTO on both old and on new issues, especially policy areas which they believe are of great pertinence to the 21st century reality of global trade and investment.

Despite the achievements that were made in both Bali – especially the Trade Facilitation Agreement – and the 6 decisions that were negotiated in Nairobi mentioned previously, the positions of WTO members in Nairobi on how to deal with the DDA were no less divergent. Paragraph 30 of the Nairobi Declaration states that “many Members reaffirm the Doha Development Agenda, ... and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations.”

Therefore, WTO DG Azevedo at the closing ceremony of Nairobi had to point out the “persistent and fundamental divisions on our negotiating agenda” and appealed to “find ways to advance the negotiations” and “what path this organization should take” in 2016. With the long-standing divergence of members and the vast changes that have occurred in the global political and economic landscape since 2001 as well as imminent elections in some major players, one would be naïve to believe that the WTO membership will be able to make the needed tough decisions on the DDA and then on new issues in 2016. Most probably we will have to wait longer before such decisions can be made.

However, it will be a great loss if WTO Members continue to remain idle on new issues. Take investment for example. Investment, together with trade, has become a twin engine driving economic growth through global supply chains. But international investment is still governed in a fragmented manner, with rules on international investment submersed into numerous bilateral, regional and plurilateral agreements, rather than a single multilateral agreement on investment. This situation has caused great difficulties and extra cost for business operators in designing and implementing their

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global investment and operation strategy. It also illustrates the importance of serious reflection during 2016 by Members on the negotiation function of the WTO, including on how to deal with new issues.

What follows puts forward some thoughts on a number of related questions that need to be addressed in order to move forward the discussion on WTO rule-making on new issues.

1. What new issues could be brought into the WTO portfolio?

Quite a number of issues have been mentioned by proponents of pursuing new issues in the WTO, including investment, environment, energy, labor standards, competition, state-owned enterprises, e-commerce, etc. Some of these are already being addressed on a bilateral or plurilateral basis through other channels and mechanisms. Thus, investment policy is on the table in China-US and China-EU bilateral investment treaty (BIT) negotiations, and environment, labor standards and disciplines for state-owned enterprises have been negotiated in regional initiatives like the TPP.

Among the various issues, investment is probably a subject that could be the first to be discussed in the WTO. This is because the operation of global value chains implies that each and every WTO Member is already part of global investment, either as an investor or recipient or both, hence more or less aware what investment means for them. Many countries already have a large number of BITs in place and regional trade agreements increasingly include investment. It is likely that TTIP negotiations will innovate when it comes to enforcement of investment disciplines in a way that is relevant for other countries as well (i.e., in dealing with concerns regarding investor-state dispute settlement), and as already mentioned, China is in the process of negotiating BITs with the EU and the US. International organizations such as UNCTAD, the OECD and the World Economic Forum have in recent years also done a lot of work in clarifying what the issues lying beneath investment are, which should facilitate cooperation in this area.

2. What form could future WTO negotiations take?

One has to recognize that we are now in a totally different reality from that prevailing 20 years ago when the WTO was established and the DDA was launched. Since 1995, 34 new Members have joined the organization, ranging from big economies like China and Russia to LDCs like Laos and Yemen. With 162 Members that have vastly different development levels and development priorities, and with developing countries better organized through various negotiation groups, it is a simple fact that the negotiating process has become much more complicated than in previous rounds and achieving consensus on any issue is increasingly more difficult.

Therefore, Members need to seriously reflect upon potential format of future WTO negotiations. The DDA model, with a round bundling a large number of issues together, a consensus-based decision-making model that requires all Members to agree – and therefore giving all members a veto – and the approach of a “single undertaking” of binding commitments on all issues, will be very difficult, if not impossible, to follow.

WTO Members have in recent years already begun to look at different approaches to push forward negotiations. One model is the multilateral Trade Facilitation Agreement (TFA) concluded in Bali in 2014, which embodies flexibility for members to decide when to implement commitment provisions and to link it to technical assistance to help implementation. Another model is the critical mass agreement such as the ITA and the ongoing negotiation on environmental goods (EGA), which are meant to be applied on a MFN basis even for non-participants. A third model is plurilateral negotiations where only some members participate and the benefits and costs of what is agreed are limited to only signatories, like the Government Procurement Agreement (GPA).

3. How could plurilateral negotiations be incorporated under the WTO umbrella?

Obviously, plurilateral negotiations would have limited effects if they are always left outside the WTO, eroding the multilateral trading system through fragmentation effects. Instead, they should be brought into the WTO legal framework sooner or later. Options could be that goods and services market access commitments, such as EGA, are incorporated into Members' schedules, while other plurilateral agreements are incorporated under Annex IV of WTO Agreement.

To achieve that, WTO Members need to brainstorm about what guidelines should apply to facilitate the inclusion of plurilateral initiatives into the WTO legal framework. Issues such as transparency of the negotiating process, openness and non-discrimination for new participants, MFN application of results based on critical mass, capacity building efforts to help developing countries understand and participate, and special treatment for LDCs, are some key elements that will need to be considered in the brainstorming.

4. What role should major developing countries, including China, play?

Many developed countries have been very vocal in pushing the WTO to embark on negotiations on 21st century issues. However, the reaction from developing countries has been blunt refusal or at most lukewarm. The consequences are that WTO has not yet had any meaningful discussion on any of these new issues, not even in regular committee meetings, which do not encompass real negotiations. Without the participation of at least the major developing countries, it is hard to imagine that any negotiation results on new issues would be meaningful.

Interestingly, China, as one of the major developing countries, seems to become more open-minded on launching discussions on new issues. In a numerous articles written by its ministerial officials, China has indicated the need "to participate in negotiations dealing with '21st century new issues' with a more open mind so as to foster a global high-standard free trade network". Chinese minister of commerce Mr. GAO Hucheng stated in Nairobi that "the WTO should respond to the expectations of the business sector to explore the discussion on new issues". Some FTAs recently concluded by China such as those with Korea and Australia include quite some new issues that have been suggested for discussion in the WTO.

The reasons behind this new attitude of China are probably three-fold:

First: the need to use external pressures to help push domestic reform on tough issues, as China has done throughout the past three decades of reform and opening up. Chinese President Mr. XI Jinping noted recently that "(a)fter 30 years, China's reform has entered into an abyssal zone...Reforms on those easy issues always culminating in a happy ending are already done. It is like that tasty meats are taken and what are left are hard bones to crack." Therefore, "it would be much harder to push reforms domestically, so we earnestly need to use stronger, broader and higher opening-up to help crack those 'hard' bones."

Second: the fear of losing out in the competition on global rule-making. As noted by Chinese Minister Mr. GAO Hucheng in a recent article, "(g)lobal economic and trade rules are under restructuring with developed countries vigorously pushing forward high-standard FTAs marked with (new rules) on '21st century new issues'...If we simply shy away, delay opening-up or are self-complacent in low-level opening-up, we would most probably miss (the opportunity to benefit from) the dividends of a new round of global trade and investment liberalization, with our external development space extruded and pace of domestic reform delayed."

Third: possibly just emerging, the aspiration to play a leadership role in global rule-making. Again as said by Mr. GAO Hucheng, "(we should) actively participate in global governance, forwardly table new proposals, new initiatives and new action plans, so as to strengthen our capacity

to provide public goods and fulfil the responsibilities of a great power.” “Instead of observers or followers, we should be participators and leaders.”

In 2016, the G20, with China as its host, may play a leadership role in pushing WTO to start at least discussing some new issues. As the world No.1 trader in goods and No.2 trader in services as well as an emerging power in global investment, with its overseas investment expanding by an annual 33.6% over the past 13 years, China has a great stake in pushing forward global trade and investment rule-making.

At the end of 2015, Mr. XI Jinping, President of China, while presenting the theme and key agenda items of G20 2016, emphasized that G20 “should be encouraged to discuss new trade and investment related issues of common interests in the WTO.” Early 2016, Mr. NING Gaoning, Chair of the B20 Trade and Investment Taskforce, also announced that “the construction of a global investment governance” will be one of the three key agenda items of the Taskforce.

On February 25th 2016, Mr. WANG Yi, Foreign Minister of China, went further by declaring at an event of the Center for Strategic and International Studies in Washington DC that “(n)ot only do we need to defend an open and a free trade system, but also we want to extend that further into the field of investment...the G-20 summit...in China this year has an important agenda, i.e. the G-20 members should discuss jointly how to explore and form global investment rules observed by all and open to all.” While underlining the determination of China to get such a discussion started, he cautiously admitted the difficulties to achieve any rapid progress, saying that “this is not something that can be achieved overnight”

To conclude, WTO Members should lose no time in starting to reflect upon its future rule-making, including on new issues such as investment. While imminent negotiations on these new issues seems to be unrealistic, serious discussion on these new issues should be started as soon as possible. For that, G20 and China has an important role to play.

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