



TRADE AND DEVELOPMENT SYMPOSIUM

Perspectives on the Multilateral Trading System

A Collection of Short Essays

Towards “plurilateral plus” agreements

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Introduction¹

WTO members have been struggling to complete the Doha negotiations for more than ten years now. A final deal, however, will continue to be elusive if a way is not found to do away with the so-called “single undertaking” whereby nothing could be agreed, much less implemented, if agreement is still lacking in some areas of the negotiations. This idea has wrongly been given the category of a legally binding “principle” that must inform all negotiation conduct. Rather, the “single undertaking” is becoming an ideal formula for failure in an environment of more than 150 diverse countries struggling to reach consensus on a wide variety of technical and sensitive issues.

While initially introduced during the Uruguay Round to level the playing field, allowing reciprocity and stronger linkages in the negotiations, the “single undertaking” nowadays artificially limits the flexibilities of WTO Members, and is being used as an argument in favour of blockage - much to the detriment of developing countries.

This needs to change and change rapidly. The “single undertaking” is neither a legally binding “principle” of the WTO or a tool to shape progress in the negotiations. It played a critical, positive role in putting together all the Uruguay Round agreements and, ultimately, establishing the WTO, but is now being misused and should be set aside as soon as possible.

The way countries undertake trade negotiations may have to be redesigned in the future, moving away for all encompassing “rounds” of negotiations on an always increasing number of subjects to more “a la carte” negotiations when subjects are more likely to produce significant and quicker results. At present, the task is to find a way out for Doha to succeed, and this may ultimately require dealing with the serious limitations posed by the “single undertaking”. A way to do it is by moving towards “plurilateral plus” agreements, as discussed below.

The “short” history of the single undertaking

No “single understanding” guided the (mainly) tariff negotiations conducted under the aegis of the GATT. There was no need for all countries to agree on all (mostly) bilateral deals concluded in these negotiations, which involved almost exclusively principal suppliers and principal markets. The non-participating countries, however, benefitted from these agreements by virtue of the Most Favoured Nation (MFN) clause. This changed, however, with the Tokyo Round (1973-1979), as in addition to a set of tariff reductions it ended with the adoption by most industrialized countries of a number of “codes” to deal with some non-tariff barriers. The codes were not applied on a Most Favoured-Nation (MFN) basis, and this created a duality of rights and obligations among the GATT members that fractured the multilateral trading system. This unfortunate construct came hand in hand, a few years later, with a push, mainly from the US, to further expand the coverage of the GATT to include issues such as trade

in services, investment and intellectual property (later called the “new” issues).

It is against this background that the emergence of the “single understanding” needs to be understood. As countries set to prepare and launch new trade negotiations - the so called Uruguay Round - they tried to avoid the experience of the Tokyo Round by ensuring that the issues of interest to all participants, developed and developing countries, would be given a similar treatment, i.e. would be negotiated and eventually agreed to in the form of a “single” agreement. To put it in the words of those days, they tried to ensure that no progress would be made on the “new issues”, which interested mainly developed countries, while neglecting the most traditional issues, which were mainly of concern to developing countries.²

Towards the end of the Uruguay Round there emerged the need to create a new institutional framework to deal with all future agreements. Members thus agreed that the GATT was to be replaced by a new organization which would include rules on intellectual property and trade-related investment measures, as well as an agreement on services. Eventually all the Uruguay Round agreements (including most of the “revised” Tokyo Round codes) as well as a framework agreement establishing the WTO were presented as a “take it or leave it” package, that is, as a *single undertaking*. This move transformed it from a negotiating tool into a procedural device to get together all the agreements negotiated during the Uruguay Round.

Thus, in retrospect it can be argued that the “single undertaking” played a rather positive role during the Uruguay Round. First, it helped to move away from the fragmented system that emerged from the Tokyo Round. Second, it contributed to a more balanced multilateral trading system, as developing countries undertook more obligations and were entitled to more rights, making the trading system more a partnership and less the rich man’s club in place until then. Finally, the single undertaking facilitated the establishment of the WTO, and the setting up of the universal multilateral trading system as we know it today.

That positive role is not there anymore. History does not repeat itself. The “single undertaking” has been transformed during the Doha negotiations into a straight jacket that holds hostage any negotiating outcome. It is not that WTO members have been unable to agree on anything, as it is often said. It is rather that they have been prevented from concluding Doha by the generalized perception that they cannot reach agreement if they do not, at the same time, agree on all the issues under negotiation.

The ability of WTO members to reach agreements have been demonstrated once and again, before and during the Doha negotiations and when the opportunity has presented itself they have not hesitated to undertake new commitments. For instance, shortly after the entry into force of the WTO, a significant number of countries agreed to craft new agreements on telecommunications and financial services. Many agreed, during the Singapore Ministerial in 1996 to put in place an ambitious agreement to open up trade in high technology goods - the Information Technology

1 This text draws extensively from an article published by the author and Marie Wilke, Revisiting the Single Undertaking - Towards a More Balanced Approach to WTO Negotiations, in Making Global Trade Governance Work for Development.

2 These included topics such as safeguards, tropical products, agriculture, textiles and tariff escalation.

Agreement (ITA). Later on, during the preparatory process of the Doha negotiations an understanding on the TRIPS agreement and public health was reached. More recently, a mechanism to channel financial resources to help the poorer countries to increase their participation in international trade - the Aid for Trade mechanism - was also put in place.

Interestingly, some of the agreements mentioned above were not, *strictu sensu*, multilateral agreements, as they were not adopted by all WTO members. This was the case in particular of the agreements on telecommunications, financial services and information technology where only a “critical mass” of countries joined in the negotiations and accepted the final agreements. They were, however, applied multilaterally as the benefits of the agreements were extended to all WTO members by virtue of the MFN clause, much as the GATT tariff negotiations operated, and in so doing they strengthened rather than debilitated the multilateral trading system.

No such “a la carte” approach has been allowed during the current Doha negotiations. The single undertaking has been repeatedly presented as an immutable principle under which nothing could be agreed if all is not agree at the same time. This has prevented negotiating countries from putting in place potential “interim” agreements on matters where the linkages with the core of the negotiations, where bargaining and mutuality of concessions put their imprint, are weak or nonexistent. Issues of critical importance to the poorer developing countries, such as the “cotton dispute” and the agreement on “duty free, quota free” for exports from the least developed countries are, on the name of the “single undertaking”, left in limbo until the end of the negotiations.

It is naturally not the single undertaking alone that can be blamed for the failures of the Doha negotiations. Other issues play a more significant role. The large number of participants, the wide differences in size and level of development and the great variety of economic interests among them as well as the complexities of crafting agreements on the large number of issues under negotiation account for a larger share of the current deadlocks. However, the single undertaking exacerbates this situation by providing countries not with a negotiating tool any more, but with a blocking tool holding the negotiations captive of those least willing to enter into new commitments.

Towards “plurilateral plus” agreements

To move out of the current and future deadlocks, a different approach to the WTO negotiations should be put in place. This approach should be predicated on the need for the WTO to move to a more cooperative understanding, where negotiations, launched by the entire WTO membership, could be undertaken by groups of interested countries if and when certain conditions are met, and, importantly, provided that the multilateral nature of the agreements reached is preserved. This overall approach should have an important exception: negotiations involving only a limited

number of countries would not be appropriate when they include existing disciplines and commitments. Thus, there is a need to differentiate between negotiations that involve existing rules or agreements, and those on new subjects or sectors.

When existing disciplines are at stake, the entire WTO membership should be involved from the beginning to the end. This is of fundamental importance. The WTO is a legal and institutional framework that links its members to conduct their trade and trade policies in a clearly defined manner. The rules of the system cannot be modified without the acquiescence of the whole membership nor can new agreements be incorporated into the existing multilateral rules and disciplines without the acceptance of all WTO members. A case in point was the amendment introduced to the TRIPS Agreement in 2001. The agreement on TRIPS and Public Health, was debated by the TRIPS Council, negotiated by all WTO members and implemented by a decision adopted during the Doha Ministerial Conference. The TRIPS agreement could only be modified by a collective decision of WTO members and the same applies *mutatis mutandis* to all existing WTO agreements. Thus, when existing rights and disciplines are to be reviewed no group or sector negotiations should be allowed.

In almost all other instances, negotiations among groups of interested countries could take place, and their results incorporated within the WTO framework. This is in fact the rationale behind the idea of having “plurilateral” agreements in the WTO. These agreements are normally entered into by groups of “like minded” or interested countries that decide to establish among themselves a common set of rights and obligations to deal with a particular subject matter or sector. Plurilateral deals are part of the Marrakech Agreement³ and have among its defining characteristics the fact that they create rights and obligations only among the participating WTO members, so they are not multilateral agreements, hence their name.⁴

That is why there is a need to move beyond plurilateral agreements as defined by the Marrakech Agreement; if they are allowed to expand the WTO may end up in a situation similar to such of the GATT after the Tokyo Round, divided and fragmented. An alternative would be to move towards a “plurilateral plus” environment, where the benefits of the agreements would be extended to all WTO members, while their obligations would bound only the initial members of the agreements and others as they join it. And the model that comes to mind is the Information Technology Agreement. This agreement was negotiated in 1996, in Singapore, during the first WTO Ministerial Conference, by a group of 29 countries (including the then 15 EC members) and entered into force shortly thereafter (in 1997) when others joined making it an agreement that would cover more than 90 percent of the trade in the sector. Market size was an important consideration for the agreement to come alive, and there are at present more than 70 ITA members. More importantly, though, from the beginning on, participating countries decided that the benefits of the agreement would be extended to all WTO members, no matter whether they participated

3 They are included in Annex 4 of the Marrakech Agreement. There are currently only two “plurilateral” agreements included in this Annex: the Agreement on Civil Aircraft and the Agreement on Government Procurement. Two other plurilaterals, on bovine meat and dairy products were ended in 1997.

4 Article II.3 of the Marrakech Agreements reads: “The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as “Plurilateral Trade Agreements”) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them”.

in the ITA or not. Thus, one can say that the ITA is a "plurilateral plus" agreement.

Inspired perhaps by the ITA, some authors have proposed that negotiations among groups of WTO members should be allowed to proceed if the countries participating in those negotiations represent a significant percentage of the trade in the chosen sector, i.e. the "critical mass" approach to negotiations in its simplest form. In fact, critical mass requirements are not completely alien to the WTO/GATT negotiations: tariff negotiation and the negotiations of the Tokyo Round codes were arguably conducted on such basis and during the Uruguay Round the (unsuccessful) zero-to-zero negotiations on a number of sectors were also founded on the critical mass approach.⁵

The "critical mass" approach may indeed offer some possible ways out to the increasing complexities of the WTO negotiations, but it cannot be of application in all cases. For instance, it would be difficult and probably impossible to define a "critical mass" when negotiations deal with new rules and disciplines outside a particular sector; how to define a critical mass, for instance, in negotiations on future rules on trade and climate change? Negotiations on based on a "critical mass" approach could only be relevant in the case of market access negotiations, where the importance of producers and markets could easily be quantified.

Groups of WTO members should have the possibility of undertaking negotiations among themselves on matters of their interest. Not to allow them to do so would result ultimately in those negotiations to move out of the WTO; thus the importance of a common understanding on how to move in that direction. There has to be rules to create new rules. A decision to allow group's negotiations should be taken by a consensus decision of all WTO members, independently of which of them subsequently joins in the negotiations. In other words, all countries should participate in the process of determining the requirements for WTO negotiations among subset of WTO members, and this should include at least three key considerations: first, to provide for an "opt in" and "opt out" approach, as all WTO members would be entitled to participate in the negotiations, but can also withdraw from them if they so decide during or at the end of the negotiations; second, the results of negotiations should be applied unconditionally to all WTO members; and, third, the agreements reached should be incorporated into the multilateral set of rules and regulations as "plurilateral plus" agreements, with appropriate accession clauses.

Such an approach would have several advantages, and help overcome numerous procedural difficulties. Firstly, all countries would be entitled to participate in the negotiations if they so chose thus preserving their multilateral nature; secondly, they may decide to withdraw from the negotiations or not to join the concluded agreements if they considered to be better off by doing so; and thirdly, the multilateral dimension would be further strengthened by the application of the agreements on a

MFN basis, thus avoiding the "fragmentation" of the system as happened with the Tokyo Round codes⁶. It is true that the decision to initiate this sort of negotiations may be a difficult one - as difficult as any decision that requires a consensus by all WTO members. This may be overcome by asking the WTO secretariat to present a detailed report on the merits of the proposed negotiations with appropriate recommendations, which would then be accepted or rejected by WTO members with a (qualified) majority vote, consistent with the Marrakech Agreement.⁷

To sum up, an alternative approach to trade negotiations not based on the single undertaking needs to be founded in a cooperative approach among WTO members, setting aside the confrontational nature of the current negotiations. This alternative approach would require, first, the abandonment of the idea that WTO negotiations can only be conducted in all encompassing "rounds" of negotiations. Second, a recognition that all WTO members are bound by the existing rules and regulations, the "acquis multilateral", and these can only be modified and implemented by all WTO members; and finally, the development of some specific procedures to tackle new issues and leading to "plurilateral plus" agreements using the "critical mass" approach or "a la carte" negotiations.

After sixty years of periodical and mostly successful rounds of trade negotiations the time has come to adopt a new approach. The increase in the number and diversity of WTO members, the wide variety of their trade concerns, and the differences in their level of development make extremely difficult the reaching of agreement, simultaneously - as prescribed by the "single undertaking" - on the often complex set of issues included in a round of negotiations.

The approach suggested here would help preserving the integrity of the multilateral trading system. It is difficult to see how a continuation of the current deadlocks in the Doha Round or a repetition in the future of the same approach to trade negotiations would be in the interest of WTO members, particularly developing countries. The successes of the past cannot serve as an excuse to continue with an approach that is currently showing its limitations. Although it would be difficult to apply this new approach to the Doha negotiations, it is not impossible to do so and this matter should be given serious consideration, and the sooner the better.

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5 Some authors even assert that 'successful negotiating outcomes in the GATT/WTO system have been based not on a single undertaking approach, but rather on what has come to be called the critical mass approach' (Gallagher and Stoler 2009: 383).

6 An issue to be considered carefully is that of "free riding", i.e. the fact that countries will benefit from the agreements without undertaking any obligations whatsoever. This issue can only be tackled on a case by case basis and not under general principles. If the plurilateral deals are well thought and designed, countries will have an incentive to join them at some point.

7 Articles IX (Decision-Making) and X (Amendments) of the Marrakech Agreement provide, under certain circumstances for decisions by qualified majority of WTO members.