

Group of Punta del Este (GPE)

In defense of multilateralism and the reform of the World Trade Organization

February 2019

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Inspired by the recent Declaration¹ made by 33 Latin American international trade professionals, we have established a group to undertake analysis and make proposals to defend the multilateral trading system and reform the World Trade Organization (WTO).

This group is an independent network that does not represent any member of the WTO, nor any private or public institution. We act individually, voluntarily and based on our direct and extensive personal experience in different responsibilities in the governance of the Multilateral Trading System (MTS)².

We have two purposes:

- a) contribute -particularly in Latin America- to the awareness of the seriousness and complexity of the current situation of the multilateral trading system, and
- b) contribute to identify solutions to its problems by promoting constructive and practical debate at a global level.

¹<http://www.iei.uchile.cl/noticias/149594/a-latina-en-pro-del-multilateralismo-y-la-modernizacion-de-la-omc>

²The group is made up of Fernando de Mateo, Hernando José Gómez, Alejandro Jara, Héctor Torres, and interacts with: Arancha González, Pascal Lamy, Patrick Low, Carlos Pérez del Castillo, and former presidents at the start and end of the Uruguay Round; Enrique Iglesias and Sergio Abreu. Senior officials of international organizations such as Mr. Martin Piñeiro were also consulted. The invaluable support of taking of notes during the three days of work, was provided by expert María Cassarino. The logistical and general support was arranged by Carla Antonelli. Special thanks to Horacio Sánchez-Caballero, mentor and inspirer of this group, for his initiative and support for the constitutive meeting that took place in Punta del Este, Uruguay, from January 8 to 10, 2019.

1. DIAGNOSIS

1.1. The problem.

Power politics, always present in the international system, is now replacing and stifling rules-based international cooperation.

There is a rapid and growing predominance of unilateralism in the conduct of economic and trade relations and, at the same time, a dangerous erosion of the system of rules, institutions and principles which has been the foundation of the growth of trade and the world economy since 1947.

Legal security is at stake and the consequent increase in uncertainty has very negative consequences for commercial operators, investors, consumers and governments. In the short term, this weakens the prospects for economic expansion; and, in the long run, hinders the potential of international trade to boost growth and finance development.

1.2. Urgency: From dysfunction to paralysis

The dysfunctions of the WTO are evident in three areas of its mandate, namely, as a forum for negotiation, the resolution of disputes and the administration of implementation of the agreements covered by the WTO.

This dysfunctional situation could quickly become a paralysis, from which perhaps it would be very difficult to pull out from.

Dispute settlement. The current status quo will immobilize the dispute settlement mechanism. Lacking the minimum number of "judges" in the Appellate Body will cause an unprecedented situation in the WTO. Out of a total of seven members, the Appellate Body currently operates with 3 which is the minimum. In December 2019, two members complete their term. With only one member left it will cease to operate. While the panels will continue to be constituted, it is very unlikely that the Dispute Settlement Body will be able to adopt reports that are appealed and will therefore not be able to "issue a final judgment".

Normative function. Legislative progress was made in 2013 (Trade Facilitation Agreement) and in 2015, at the tenth Ministerial Conference (elimination of subsidies for agricultural exports and exemption from certain measures regarding public stocks for food security purposes). However, the WTO has been unable to continue the reform of agricultural policies (as committed in 1995) or to act multilaterally to address the challenges of 21st century trade (for example, investments, regulatory coherence and digital economy). The WTO has been unable to reach multilateral consensus to face old but current problems and the new challenges.

In the short term, this situation will be aggravated if, at the next Ministerial Conference in June 2020 in Kazakhstan, no minimum multilateral agreement is reached on the prohibition of subsidies for illegal, undeclared and unreported fishing. (IUU).

Administrative function. The efficient operation of existing multilateral agreements ensures the transparency of trade policies and effective collective monitoring. However, it is notorious that many members fail to notify - as required by existing agreements - measures that affect trade. This especially affects countries with fewer resources to identify those that can affect them. This problem is particularly serious in the area of subsidies. The negative impact is compounded by the decision to decrease the frequency of the trade policies review of members, which does not seem to be a measure that contributes to the necessary transparency.

2. THE REQUIRED ACTION

The collective task that lies ahead involves rethinking multilateralism for trade and adapting it to the requirements of the 21st century.

Not everything requires WTO reform, and not all imaginable reforms are possible immediately. International trade is perhaps only one third of the problem; the other two thirds have to do with how we process both the malaise with globalization, and the dissatisfaction with global and unprecedented prosperity but poorly distributed.

The change in the economic power structure of the world seems to have a direct impact on the multilateral trading system. The post-war conditions that allowed the GATT of 1947 are certainly not present. The GATT went from being a provisional trade agreement to become the robust institutional framework of the WTO. This was carried out in the framework of a general convergence between its main Contracting Parties and with an increasing participation of developing countries in the world economy.

The changes were not only in terms of share in the gross world product. The main economies that participated in this convergence process were market economies, had a high per capita income, were liberal democracies and had some strategic security dependence with the United States. In each and every one of the four aspects mentioned, the relationship now with China is very different. This poses a central challenge and we ask whether the system of rules to be reconstructed is not one that, while striving for convergence, accepts and preserves coexistence.

Immersed in a context of such profound changes, we realize that the institutional relaunch will be a long-term task. This will not succeed without minimal understandings between the new G2 -China / United States. We believe that Latin American countries and, in general all those that have to lose without the guarantees and certainties provided by the multilateral trading system, are called to promote understandings between China and the United States that help to preserve and improve the system.

While this happens, it is necessary to differentiate between what requires immediate solution (the urgent), and what needs a patient consensus-building process (the important).

With these realities in mind, we have decided to make proposals to

- a) Avoid irreversible damage to the multilateral system.
- b) Restore trust and gradually create the conditions for reform.
- c) Process institutional changes in an organic, gradual and bottom-up manner.

2.1. The urgent

A. In the Dispute Settlement function

The most urgent is to avoid the collapse of the Dispute Settlement Mechanism with the paralysis of the Appellate Body.

A fundamental political and legal balance has been broken and it is necessary to urgently restore it. A system of compulsory arbitration like WTO's, with exclusive jurisdiction and a very high degree of automaticity, but inserted in a strong inter-governmental body, is only viable on the basis of the principle that it cannot add or diminish the rights and obligations provided in the covered agreements reached by the Member States, as a result of a negotiation. This principle -which could be called the keystone of the system- is enshrined in articles 3.2 and 19.2. of the DSU.

Also of concern is the informal but doctrinaire elaboration of the Appellate Body of a kind of vertical "stare decisis" system (mandatory precedents), according to which panels must act in accordance with the precedents established by the Appellate Body.

Recommendation

A truce is necessary to begin the restoration of trust. This requires a serious political dialogue to unblock the current situation and appoint the members of the Appellate Body.

This dialogue seems to have begun around Ambassador David Walker and this process should be seriously supported by all.

In our view, the members of the WTO should, as soon as possible, begin by reaffirming some elementary principles and basic understandings based on the provisions of the Dispute Settlement Understanding, such as:

a) **Dispute Settlement Body (DSB)** The superior entity in charge of the administration of the dispute settlement system is a body of an intergovernmental nature, that is, the DSB, and not the Appellate Body. Both the latter and the Special Groups are subsidiary bodies that "assist" the political body (DSB) to formulate recommendations or resolutions.

b) **Objective.** The aim of the DSB is to achieve "... a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements" (Art.3.4 of the DSU)

c) **Legitimate interpretation.** As provided in Article IX 2 of the Agreement establishing the WTO, the Ministerial Conference or the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. This logically implies that the interpretations by Panels and the Appellate Body must be restrictive and abide by the negotiated texts.

d) **Supremacy of members.** Since the WTO is an intergovernmental institutional framework driven by its members, there is no "secondary law" or other sources of law in the system other than the texts of the agreements and related instruments included in the annexes to the Marrakesh Agreement establishing the WTO.

e) **Non-binding jurisprudence.** The reports of panels and/or the Appellate Body adopted by the DSB establish obligations only for the parties to the dispute and constitute only a guide to subsequent disputes.

f) The reaffirmation of these principles would facilitate dialogue and could be a solution to the impasse in which the Appellate Body finds itself, allowing the appointment of all its members.

The proposal we present is aimed at addressing the urgency and does not imply, for the time being, amendments to the text of the DSU, but rather reaching an agreement that reaffirms existing principles, that over the years appear to have been put into question in the actual functioning of the system.

However, undoubtedly a serious effort by Members is needed to improve the dispute settlement mechanism. This could be obtained through a political dialogue to build the necessary consensus to resolve the different problems identified in the functioning of the dispute settlement system. In section 2.2.a) below we make a proposal in this regard.

B. In the negotiating function

WTO member need to urgently show they can reach agreements on relevant issues. This could be achieved by reaching without delay an agreement, even if minimal, temporary and evolutionary, on comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that foster overcapacity and overfishing, and eliminate subsidies that contribute to illegal, unregulated and unreported fishing.

This objective has been repeatedly committed at ministerial level, the latest in 2017 at the WTO Ministerial Conference in Buenos Aires. 22 years have passed since the issue of subsidies that contribute to overfishing was raised for the first time in the WTO and 14 since the ministers agreed at the Hong Kong Conference to negotiate their ban. In the meantime, the percentage of the population of fish exploited at a biologically unsustainable level increased from 23% to 33%, according to FAO. Overfishing is undoubtedly multi-causal, but the contribution of the subsidies is significant and shows the extremely high opportunity costs we pay for inaction, both in terms of natural resources, as well as employment opportunities and food security.

Beyond the benefits of such an agreement, if once again a conclusion of these negotiations is postponed, the damage to the credibility of the WTO, in the present circumstances, could be definitive.

Several Latin American countries played a leading role in installing and defending this agenda. It would be important that -with pragmatism- they now contribute to reach the necessary consensus for an agreement.

It is also important to recognize and support the initiative of almost half of the WTO membership to launch negotiations on electronic commerce. Since 1998 WTO has pursued work on electronic commerce. To reach an agreement now would be a major institutional boost for the WTO.

C. In the administration of agreements function

To restore trust in the system and among members, it is equally urgent to strengthen the transparency and monitoring mechanisms, particularly with regards to breaches of the notification obligations. In this regard, we will be making concrete proposals of measures that can be quickly implemented (see point 2.2.3.).

2.2. The important

a) Policy dialogues to restore trust and thus create the conditions for reform

We believe that the **preparation of an agenda for "policy dialogues"**, and the creation of a "closed" space where participants can without prejudice freely dialogue and explore innovative solutions, could encourage constructive discussions, improve mutual trust and understanding and awareness of common challenges.

Dialogue is necessary to address the use of trade-distorting policies that are of systemic importance, as well as to discuss the new challenges brought by the digital revolution.

"Policy dialogues" can serve to build consensus and be a prelude to negotiation, but we conceive them as separate from the latter. The definition of the "policy dialogues" agenda will be fundamental to its success. The practice of using consensus to block the initiation of policy dialogues should be avoided. No less important will be selecting a capable chairperson who should have proven independence and diplomatic skills; and be a reliable consensus-builder that could help participants to assess real problems in their practical dimension.

b) Five proposals to process changes organically, gradually and bottom-up.

The multilateral system is not an end in itself, but it is impossible to imagine an interdependent world without a system, without rules.

Consequently, to focus on the issue of WTO reform involves rethinking multilateralism in the 21st century. With this approach we will elaborate five brief proposals in specific areas. Far from nostalgically trying to recreate a WTO that is no longer functional, we aim to contribute to a debate about the future and the necessary reform to have an organization adapted to the needs of the 21st century. In the beginning, we will be presenting proposals on:

1. Open a political dialogue on Special and Differential Treatment appropriate to the present realities.
2. Explore the possibility of an Integrated Agenda on Non-Tariff Measures.
3. Strengthen the transparency of trade policies through a robust system of notifications and monitoring.
4. Strengthen and bring coherence to the research and technical cooperation of the WTO.
5. Facilitate institutional cooperation and coherence with other international organizations.

In conclusion, we in the Group of Punta del Este are convinced that it is multilateralism and not unilateral policies that will respond to the multiple challenges of an inevitably interdependent world economy. It is necessary to rethink the multilateral system according to the new economic, political and social realities, but without losing sight of the need for a system of rules that provides predictability and legal certainty to all actors. Only then will it be possible for trade to continue to be an instrument to achieve our sustainable development goals. The reform of the WTO must be carried out in a formal process, necessarily preceded by a restoration of trust and dialogue. Latin America must be fully aware of the challenges of the moment and we are ready to make our contribution in this regard. Likewise, we are prepared to contribute to the global debate, contributing our knowledge, experience and proposals.