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Research Report

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ECIPE Policy Brief, No. 8/2014

Provided in Cooperation with:

European Centre for International Political Economy (ECIPE), Brussels

Suggested Citation: Harbinson, Stuart (2014) : Can plurilateralism save the Bali Agreement on Trade Facilitation?, ECIPE Policy Brief, No. 8/2014, European Centre for International Political Economy (ECIPE), Brussels

This Version is available at:

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Can Plurilateralism Save the Bali Agreement on Trade Facilitation?

By *Stuart Harbinson*

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New life seemed to have been breathed into the World Trade Organization with the ground-breaking Agreement on Trade Facilitation at the Bali Ministerial Conference in December 2013. The potential benefits of the deal include cutting red tape, reducing opportunities for corruption and speeding up supply chains, resulting in cheaper goods and more trade-related jobs.

Under the Bali package, by 31 July 2014 WTO Members were to have adopted a Protocol to trigger the Agreement's entry into force. But this has not materialised because a few countries, most notably India, have sought to use this deadline to try to increase their leverage on another Bali agreement relating to public stockholding for food security purposes.

This stand-off makes no sense. Trade facilitation is in everyone's interest. India itself has stated that it

is in favour of trade facilitation. At a time of serious concern about the health of the global economy, the world badly needs the boost to trade that the Agreement could deliver. Moreover, serious damage is being done to the credibility of the WTO, both as a forum for conducting trade negotiations and more broadly. Director-General Roberto Azevedo is in no doubt about the seriousness of the situation:

"My assessment is that we risk disengagement if we do not solve this impasse shortly... Many areas of our work may suffer a freezing effect, including the areas of greatest interest to developing countries, including agriculture."¹

1 Speech to UNCTAD Trade and Development Board, 22 September 2014

EXECUTIVE SUMMARY

The new package of trade accords that was concluded at the World Trade Organisation's Bali Ministerial Meeting late last year was a fresh start for the battered international trade body. Yet defeat has been snatched from the jaws of victory. A small number of countries refuses to agree on a protocol for the Bali deal on trade facilitation – and the entire agreement is now endangered.

In this policy brief, Stuart Harbinson asks if the many countries which support implementation of the agreement

on trade facilitation should now find an alternative way forward. There are good reasons to go ahead without the support of the entire membership – frequently referred to as a "plurilateral" approach. The economic benefits of trade facilitation are undisputed and well documented. But are there feasible options that sit comfortably with core WTO principles and rules?

Harbinson surveys different routes for a plurilateral agreement on trade facilitation and argues that it may be possible

to use a hybrid form of non-discriminatory plurilateralism, based on the Information Technology Agreement (ITA) and the way that some obligations under the Basic Telecommunication Agreement was scheduled in the General Agreement on Trade in Services (GATS). This technique could also be applied to some other WTO negotiations. However, discriminatory plurilateral agreements should not become the norm of the WTO.

In the wake of the crisis, the WTO's consensus-based system of decision making is again being called into question. But viable alternatives are not immediately apparent. Voting is anathema to large single-country entities with major stakes in international trade. It would be practically impossible to agree on an alternative "executive committee" approach which would satisfy smaller trading nations that their interests would be adequately taken into account.

There is therefore now increasing focus on a so-called "plurilateral" solution to bring the Trade Facilitation Agreement into effect. This appears to mean that the many countries wanting to go ahead with the Agreement would so over the objections of the few. It is easier said than done, but it is worth contemplating what the options are.

APPROACHES TO A PLURILATERAL AGREEMENT

THE TERM "PLURILATERAL" is vague and means different things to different people. Would a "plurilateral" agreement be inside the WTO, or outside? In either case, how would it square with the WTO's overarching principle of non-discrimination, often referred to as the "Most Favoured Nation (MFN)" principle? WTO Members – and there are now 160 of them - are bound to observe this in virtually all their trade relations. This short article attempts to bring a little more clarity.

Commentators often seem to imply that a "plurilateral" trade agreement would involve a subset of the WTO membership and that these wish to implement the agreement in a way which would discriminate against other WTO Members. Broadly speaking, there are three approaches to pure plurilateralism of this type which might be considered to be consistent with WTO rules.² There is a fourth approach which might be considered as a hybrid between plurilateralism and multilateralism.

First, the country or countries wishing to implement such an agreement could seek a WTO "waiver" from the

2 A more detailed analysis can be found on the U.S. National Foreign Trade Council website at <http://www.nftc.org/default/trade/WTO/NFTC21stCenturyTradeAgenda2012.pdf>

MFN obligation. There are however significant limitations. In particular, a waiver can only be granted in "exceptional circumstances" and for a limited period of time.³ The waiver approach does not seem very useful for an ambitious agreement such as in trade facilitation. It is also unlikely that the proponents of the Trade Facilitation Agreement are seeking to discriminate against others: it would seem very difficult in practice - and counter-productive - to apply different customs procedures to different trading partners.

Secondly, there is the "Free-trade Area" (FTA) approach under Article XXIV of the GATT 1947.⁴ This exception to MFN is applicable when a group of two or more customs territories eliminates customs duties and other restrictive regulations of commerce on "substantially all trade"⁵. While the Trade Facilitation Agreement might deal with some of these restrictive regulations on trade, it does not address the elimination of duties. Moreover WTO dispute settlement does not apply to FTAs. Again, this does not seem a viable route.

Thirdly, there is the "WTO Plurilateral" approach. Annex 4 to the *WTO Agreement* covers Plurilateral Trade Agreements. Two such agreements are currently in force – the *Agreement on Trade in Civil Aircraft* and the *Agreement on Government Procurement*. Both were incorporated into the WTO on its establishment in 1995 and no new agreements have been added since then. Annex 4 is an integral part of the WTO legal framework and the WTO's dispute settlement system is applicable. These Annex 4 plurilateral agreements only impose obligations on the WTO Members that are party to them. Members that are not party to them cannot directly claim the benefits of the commitments therein.⁶

3 See Article IX:3 and 4 of the *WTO Agreement*.

4 Since trade facilitation relates primarily to trade in goods, the General Agreement on Trade in Services (GATS) is not considered here. But it has comparable provisions in its Article V.

5 See GATT 1947 Article XXIV:8(b).

6 There is a legal question as to whether non-parties might indirectly benefit from the commitments. However in the case of government procurement this is not an issue since government procurement activities are carved out from basic GATT obligations pursuant to Article III:8.

An important limitation on the addition of new agreements to Annex 4 is that a decision to do so must be made “exclusively by consensus”.⁷ This does not seem workable in the case of trade facilitation. Why would those countries currently blocking a multilateral Protocol agree to a potentially discriminatory plurilateral agreement becoming part of the WTO legal system?

This leaves us with a fourth, or hybrid, option which is based primarily on the precedent of the *Information Technology Agreement* (ITA). The original ITA participants were relatively few - some 14 countries or separate customs territories which however (in 1994) accounted for some 80 per cent of international trade in the products covered by the Agreement. The product coverage had been negotiated between them. Customs duties on these products would be eliminated by stages and the results bound in WTO schedules of tariff concessions – in other words, the benefits would be available to all WTO Members even if they were not parties to the agreement. In order to minimise the problem of “free riding”, the modalities for the ITA provided that implementation would be subject to participation reaching a “critical mass” threshold⁸ of 90 per cent of world trade, which was duly achieved not long after. Participation now covers 70 countries and 97 per cent of trade.

The ITA also provided that the participants would meet periodically under the auspices of the WTO’s Council for Trade in Goods. A Committee of ITA participants was subsequently formed.⁹ The Committee is open to representatives of all participants; representatives of non-participants may be invited to attend.

The ITA is thus a hybrid. It was negotiated plurilaterally but, with increasing participation, its results were imple-

mented multilaterally. Could this be a model which, in the WTO’s current predicament, the Trade Facilitation Agreement might follow?

In favour is the fact that a very large number of countries want to implement the Trade Facilitation Agreement. No doubt a potential “critical mass” exists. Moreover, it is neither desirable nor sensible to implement the Agreement in a discriminatory manner - customs and related authorities do not want to run separate systems side by side. In any case India has said that it is implementing trade facilitation reforms autonomously.

Technical and legal questions arise. The ITA is a relatively simple tariff-cutting exercise, easy to reflect in WTO schedules of commitments. Section I of the Trade Facilitation Agreement on the other hand contains complex rules on a wide variety of topics – publication and availability of information, procedures for appeal or review, disciplines on fees and charges, border agency cooperation, and freedom of transit, to name just a few. Section II of the Agreement sets out three categories of commitments which are to be implemented by individual countries in potentially widely differing ways. It is not immediately obvious how all of this could be reflected in WTO Members’ individual schedules.

Experience from the successful post-Uruguay Round WTO negotiations on Basic Telecommunications might be relevant.¹⁰ Some 53 governments participated in these negotiations (with another 24 observing). In recognition of the close relationship between market access and domestic regulation, a “Reference Paper” was drawn up incorporating a set of regulatory principles on such matters as competition safeguards, interconnection guarantees and the independence of regulators. This was then used as an aid for participants in scheduling their commitments. Many WTO Members simply inscribed “additional commitments on regulatory principles (Details at Annex)” in their Services schedule, with the Reference Paper annexed. The *Fourth Protocol to the General Agreement on Trade in Services*¹¹ provided that it, and thus the related

7 Article X:9 of the *WTO Agreement*.

8 There is no rule or convention on what constitutes a “critical mass”. The threshold is set by the participants and could vary from subject to subject. In the case of the ITA the participants decided on 90 per cent.

9 It appears to be a slightly grey area as to whether the Committee of Participants is a formal part of the WTO structure. On the WTO website, the name of the Chairperson appears on the list of Chairs of subsidiary bodies of the Council for Trade in Goods. However the Organisation Chart shows only a “dotted line” to the Council.

10 These negotiations were mandated by a Ministerial Decision adopted in Marrakesh in 1994 and took place between 1994 and 1997.

11 WTO document S/L/20, 30 April 1996.

multilateral commitments, would only enter into force when it had been accepted by “all Members concerned”. It entered into force on 5 February 1998.

While the Basic Telecommunications Reference Paper is a much simpler document than the Trade Facilitation Agreement, it sets a useful precedent in terms of enshrining rules in individual Members’ schedules of commitments.

Whether this would be a feasible approach in trade facilitation, given its complexity and the much greater degree of differentiation in terms of countries’ commitments, requires a detailed legal and technical study. WTO proponents of trade facilitation may already be undertaking, or have undertaken, such a task. Implementation would almost certainly take some time.

If it were to emerge that the Trade Facilitation Agreement, in its essentials, could be implemented autonomously and in a non-discriminatory way using this technique, the leverage currently exerted by those blocking the fully multilateral path would be removed. In that case, it might be as well to reach a settlement sooner rather than later, while some leverage still exists.

DISCRIMINATORY PLURILATERALISM NO PANACEA

EVEN IF THE Trade Facilitation Agreement can be saved, serious damage has already been done to the credibility of the WTO as a negotiating forum. When a Director-General says (as quoted above) that “we risk disengagement” it is most likely the case, since the DG is the ultimate custodian of the system and cannot be too downbeat, that this has already happened. Indeed there is evidence of that everywhere – primarily in the multiple trade negotiations that are taking place outside the WTO. This serves no one, and especially not the small and the vulnerable.

Is the situation irreparable? Certainly not. But “plurilateralism” in the form of discriminatory agreements between subsets of countries is not the way forward. The hybrid approach – plurilateral negotiation, followed by increased participation, followed by multilateral implementation – surely offers a better prospect. In this

scenario, the plurilateral approach can be seen as a valid negotiating technique to reach multilateral agreement rather than an end in itself.¹²

There is one caveat. In some circumstances (depending on the complexity of the subject matter) the original participants should leave adequate room, within limits, for negotiation with potential new adherents. Without that, the process may resemble an unpalatable, asymmetric accession-style negotiation, reducing the chances of attracting “critical mass”.

While the WTO is taking a beating at present, it is still possible to imagine a world in which the Organization harvests in the foreseeable future, based on this non-discriminatory hybrid plurilateral approach, agreements not only on trade facilitation but also on environmental goods, trade in services and an updated information technology agreement. Who knows, a similar technique might even produce a package to end the Doha Round.

12 There is no constraint on WTO Members entering into informal discussions and negotiations with other Members. This happens all the time in a wide variety of contexts and configurations. The only limit is that the results should not affect the legal rights of other Members under the WTO-covered agreements.

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