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Reform of WTO Decision-making and Negotiating Models: Balance, Flexibility and Harmony

HU Jianguo
School of Law, Nankai University
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1. Reform needed



1.1 WTO in Crisis/Danger/Challenged

- **Slow negotiation and failure of Doha Round**
- **Appellate Body in Crisis/ICU/ 10 December 2019 as deadline**
- **Trump Administration's unilateralism attack, Sino-US Trade War, 232 steel and aluminum tariffs and more 232 measures are coming**
- **All of these issues are related to the WTO decision-making rules and negotiating models**

1.2 WTO reform is a very hot topic since 2018

- **A few of proposals for WTO reform have been submitted to WTO or published and to some extent touched the reform of decision-making and negotiating models, such as proposals by EU and Canada.**

1.Reform needed



1.3 There still exist some differences between a few of WTO members and many developing countries on these issues.

- **E-commerce Negotiation launched this year**

1.4 Part of the Program “WTO Reform: China’s Plan and International Consensus” cooperated by China Federation of Returned Overseas Chinese(ACFROC) and WTO Law Research Society of China Law Society

- **Very complicated topic**
- **Emphasis is put on legal aspects**
- **Findings and some thinking**
- **All opinions and errors are mine**



2.The Nature of Reform: Changes in Practices vs WTO Law

The nature of reform is not changes in WTO law, but fine tuning in practices.

2.1 Amending WTO decision-making rules require approval by all WTO members, which makes it extremely impossible.

2.2 The WTO practice of consensus can be improved without amending WTO Agreement.

- Imposing certain procedural limits on the member who is intended to object a proposal with very broad consensus (as put forward by Sutherland Report)**
- Introducing constructive abstention**



3.The Goal of Reform: Balance

The reform should achieve a proper balance between contributing to improve the **efficiency** of WTO decision-making and negotiating, and taking into account **fairness**.

3.1 WTO should respond to the rapidly changing world and make itself more relevant to the global economic governance. Or the Mega-FTAs will undertake the dominant role.

- **CPTPP**
- **USMCA**
- **JEEPA**
- **CETA**
- **RCEP**

3.The Goal of Reform: Balance



3.2 Fairness is of legal and political necessity.

- **WTO MFN obligations mean that new Plurilateral Trade Agreements(PTAs) cannot deviate existing WTO rules, since there are no such arrangements as for GPA or FTAs.**
- **The new negotiating multilateral or plurilateral trade agreement can only be integrated into WTO Agreement by consensus or two-thirds majority.**

4. The Implementation of Reform: Flexibility



4.1 Much flexibility is left by the WTO Agreement

- **As for the decision-making, consensus is not legally compulsory and voting is available. But no voting in practice.**
- **No obligation is directly imposed on the choice of negotiating models, though there are many other legal and political restrictions relating to it.**
- **Legally, the choice of negotiating models is related closely to the decision-making. If some WTO members launch a multilateral trade agreement negotiation without much support by other members, the integration of this finally negotiated agreement into WTO Agreement may fail or become very slowly due to the lack of required two-thirds approval by WTO members.**



4.The Implementation of Reform: Flexibility

4.2 WTO members practiced the much flexibility left .

- Traditional multilateral trade negotiation model, regardless of round or not, and plurilateral trade negotiation model (GPA model) are still available.**
- In practice, ITA model and TFA model proved to be very successful.**
- WTO members have many options for different negotiating topics and the chosen negotiating model can be altered over time, depending on a number of changing factors. For example, the newly launched E-commerce negotiation for now seems to be plurilateral, being ITA or GPA model. But it also can develop into TFA model or traditional single undertaking model with more and more WTO members taking part in the negotiation.**

5. The Result of Reform: Harmony



5.1 Big issue: **How does the WTO reform negotiation unfold?**

- **Big or small round and issue linkage. How to deal with Doha Round or Doha Issues?**
- **Agreement by agreement, such as EGA, E-Commerce, fishing subsidies**
- **Multilateral vs Plurilateral? single undertaking/TFA/ITA/GPA?**
- **To be left to the politicians/negotiators**

5.2 **Abandoning existing legal system and establish a wholly new legal system is not feasible option.**

- **WTO multilateral trade system is successful in general**
- **Restricted by the WTO decision-making rules**
- **Politically impossible**

5.The Result of Reform: Harmony



5.3 The negotiating results of WTO reform should properly be integrated into WTO Agreement.

5.3.1 The multilateral negotiating results can be integrated into WTO existing legal system by amending WTO agreements, as exemplified by the TFA.

- **Article 10.3 of WTO Agreement: Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it.**

5. The Result of Reform: Harmony



- New multilateral trade agreements can be part of annex 1A, 1B or 1C, or they can independently exist as annex 1D or 1E (**amend WTO Agreement**).

5.3.2 New plurilateral agreements can become a part of annex 4 or annex 4a (as proposed by EU), if approved consensually by WTO Ministerial Conference.

- **Article 10.9 of WTO Agreement: The Ministerial Conference, upon the request of the Members parties to a trade agreement, may **decide exclusively by consensus** to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4 (default **simple majority**) .**

5.The Result of Reform: Harmony



5.3.3 Issue : GATT style's a la carte or fragmentation?

- **Codes of Tokyo Round related closely to GATT1947 VS Annex 4 Plurilateral Trade Agreements(PTAs) relates not so closely to Annex 1 Multilateral Trade Agreements(MTAs)**
- **The relationship between Annex 4 PTAs and Annex 1 MTAs can be dealt with properly in advance**
- **Uniform Application of DSU**
- **Annex 4 PTA can change to Annex 1 MTA(delete from Annex 4 by consensus or simple majority voting and add to Annex 1 by two-thirds majority voting)**
- **[Map of WTO Law System.docx](#)**

The Result of Reform: Harmony



5.3.4 The harmony problems of the existing legal system should also be dealt with during the course of WTO reform.

- What is relationship among WTO Agreement's annexed agreements?**
- What is the legal status of WTO new members' accession protocols (APs)?**
- Is Article XX of GATT 1994 available to other WTO agreements (including APs)?**



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Thanks for listening!

Welcome to NKU at her 100th anniversary!