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Rise and Fall of Trade Multilateralism: A Proposal for 'WTO à la carte' as an Alternative Approach for Trade Negotiations

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Abstract: In the Uruguay Round under the auspice of the GATT, the idea of 'single undertaking' was introduced to get rid of what is called 'GATT à la carte' in the Tokyo Round and to strengthen the trading system. However, that approach, combined with other factors, in particular the (also strengthened) consensus decision-making rule, greatly increased the difficulties of decision making in the WTO. This paper proposes a 'WTO à la carte' approach for trade negotiations and discusses its implications for global legal governance.

I. Introduction

Since its inception in 1995，the World Trade Organization (WTO) was widely conceived as a great achievement of the Uruguay Round trade negotiation. However, recent years also witnessed the great difficulties and challenges it is facing in its operation. Focusing on the principle of 'single undertaking', this paper seeks to join the already vast debate on the governance structure of the WTO and to draw some lessons therefrom. It is organized as follows. After the introduction, it examines the current problems with the WTO and post-war multilateralism, and the extent to which the 'single undertaking' principle should be responsible for those problems. Next, it discusses the possibility of introducing an alternative 'WTO à la carte' approach into the WTO legal system. Implications of the new approach for global legal governance are examined in Part IV. The last part concludes.

II. The WTO in Crisis: the 'Single Undertaking' Approach as A Trouble-maker?

The multilateral trading system (MTS), operated by the General Agreement of Tariffs and Trade (GATT) and the WTO in the past 60 years, has played a key role in 'raising standard of living, ensuring full employment and a large and steady growing volume of real income and effective demand, and expanding the production of and trade in goods'.[1] Despite several 'birth defects'[2], the overall performance of the GATT system is remarkable. With the end of

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[1] Preamble, Agreement Establishing the World Trade Organization (WTO Agreement).
[2] See John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed. (the MIT Press,

the cold war and the transformation the multilateral trading system in the Uruguay Round negotiation (1986-1994) in terms of legal structure, institutional design, dispute settlement, etc., there was widespread optimism that the WTO, established in 1995 as the new institutional basis of the MTS, will be able to better fulfill its mandate in the governance of economic globalization.

Yet contrary to the high hopes at the very beginning, the WTO is now increasingly the target of criticism, controversies or even violent protest. Meantime the operation of the organization is frequently stalemated. In the 1999 ministerial conference held in Seattle, members failed to launch the first negotiation round of the WTO (the 'Millennium Round'), which never happened before since 1948. Though a new round was launched in November 2001 in Doha, Qatar with great difficulties, this 'Doha Round' or 'Doha Development Agenda' negotiation (originally mandated to end by January 1st 2005) turns out to be largely unsuccessful so far. What accounts for the trouble of the WTO?

One obvious fact is that after 60 years of trade liberalization the post-war multilateral trading system is faced with much more difficult tasks in the liberalization agenda. With the significant lowering of tariffs and other trade barriers 'at the border', the negotiation increasingly has to tackle issues 'behind the border', such as services, environmental protection, etc. which are much more controversial among members.

The expansion of membership is another notable development within the MTS. With 23 original contracting parties, the GATT operated as a small club of western industrialized states most of the time. In contrast, the membership of the WTO increased by more than 6 times. [3] More importantly, the structure of WTO membership has now become much more diversified in terms of level of economic development, political and social system, market power, etc. Therefore, **in the process of globalization, the interests and preferences of WTO members is diversified rather than harmonized**. Accordingly, the governance structure of the MTS also calls for greater flexibility to accommodate the wide variation among its members.

However, the development of the MTS after the Uruguay Round went to the opposite direction, *inter alia*, by replacing the so-called 'GATT a la carte' with the principle of single undertaking.

'GATT a la carte' refers to a series of voluntary 'codes' adopted in the Tokyo Round

1997) 36-43.
[3] Currently there are 153 members in the WTO.

negotiation, which include the Agreement on Government Procurement, the Agreement on Custom Evaluation, the Agreement on Technical Barriers to Trade, the Agreement on Antidumping, the Agreement on Subsidies and Countervailing duties, and the Agreement on import licensing. According to Bernard M. Hoekman and Michel M. Kostecki, the use of codes in the Tokyo Round was partly driven by the fact that developing countries objected to expansion of GATT disciplines to non-tariff barriers, implying that the two-thirds majority required to amend the GATT could not be attained. By negotiating a code, like-minded countries were able to cooperate without having all GATT contracting countries on board. [4]

The 'GATT à la carte' approach has been controversial since the conclusion of the Tokyo Round. While it reflected the flexibility and pragmatism of the GATT and compromised the disagreements among developed and developing countries, there's also the view that it led to the fragmentation of the GATT system and undermined the MFN principle. [5]

During the Uruguay Round, alternative means were explored to get ride of the 'GATT à la carte' scenario. One of the noteworthy changes brought about by the negotiating results of the round is that, beyond the expanded agenda to include such new issues as services, investment, and trade-related intellectual property, all the major agreements has to be accepted as a 'single undertaking' to ensure a tight and comprehensive trade accord.[6]

The concept of 'single undertaking' is not clearly defined either in the GATT or in the WTO but well enshrined by the system since the Uruguay Round. According to the 1994 Marrakesh Agreement Establishing the World Trade Organization, the WTO 'shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement', while '[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.'[7]

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[4] See Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System—The WTO and Beyond*, 2nd ed. (Oxford, Oxford University Press, 2001), 104.

[5] See Andreas F. Lowenfeld, *International Economic Law* (Oxford, Oxford University Press, 2002), 56-57. Prof. John Jackson also held that the development of side codes (or stand-alone ancillary treaties, posed technical, legal and administrative difficulties, as the complex nature of inter-relationship between the various codes and the GATT will likely reduce public support for the GATT-MFN system, will hurt those countries that cannot devote additional governmental expertise to GATT representation problems, will inevitably give rise to a variety of legal disputes among GATT parties, and will contribute to the belief that richer nations can control and manipulate the GATT for their own advantage. See Jackson, above n 2, at 71-72.

[6] John H. Barton et.al. *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and WTO* (Princeton: Princeton University Press, 2006), 47-48.

[7] Article 2, WTO Agreement.

This approach, though theoretically more consistent with the principle of reciprocal MFN and practically acceptable in the Uruguay Round when the US and EC was able to make use of their market power to ensure widest possible acceptance of new rules on intellectual property, services, etc.,[8] has greatly increased the difficulties of decision making in the WTO. Combined with the consensus decision-making procedure, which was also reinforced rather than relaxed in the Uruguay Round, [9] it means that as long as one member could not accept the negotiating result of one issue, then the whole negotiation—including possible progress on other issues-- will likely be blocked. Thus, together with other factors such as the expanding membership, changing power structure and controversial nature of most 'behind the border' trade barriers, rigidity of single undertaking has put consensus decision-making in the WTO under insurmountable pressure.

The collapse of the 'Mini-Ministerial' held in Geneva in July 2008 offered a good example. Mandated to reach an agreement on modalities for agricultural and non-agricultural market access (the key 'stumbling block' of the long-delayed Doha Round negotiation), the conference failed primarily because several key members of the WTO (especially India and the U.S) could not agree with each other on the 'Special Safeguard Mechanism' (SSM) designed to protect developing countries' agriculture.

It has to be admitted that the crisis that the WTO currently faces is of a systematic nature, i.e arises out of a number of factors. For example, the waning public support for multilateral trade liberalization and hence the lack of leadership on the part of major developed countries, the imbalance between the political and judicial branches of the WTO, the energies devoted to and challenges of regionalism, are all, to various extent, responsible for the status quo. However, one of the root problems for the WTO is that its governance structure failed to respond to the diverse needs and preferences of its members in the new international trade environment of 21st century. On the contrary, out of the motive to fully involve developing countries into the negotiation package of the Uruguay Round, the US and EU has led the MTS to the direction that can be characterized by 'one size for all'. Unfortunately, that has not strengthened, but rather weakened, the multilateral trading system. To be sure, it should not be underestimated that in the light of the strengthened consensus decision-making rule, the single

[8] See Barton et.al., above n 6, at 66.

[9] In the Uruguay Round negotiation, the Draft Final Act called for the future organization to respect the customary practice of GATT, including the normal decision making procedure of consensus and, in the absence of consensus, a two-thirds majority voting (made up more than half the members) for treaty interpretation, waivers, and amendments, etc.. However, some countries, particularly the US and Japan, were cautious about 'a possible tyrannous majority', the revised final text required a much higher threshold for voting, i.e. a three-fourths majority of the full membership for interpretation, waivers, etc, and unanimity for amendment of some key provision. See John Croome, *Reshaping the World Trading System: A History of the Uruguay Round*, (The hague: Kluwer Law International, 1998 updated version), 294, 316.

undertaking principle has increasingly become a 'trouble-maker' for the WTO. In view of the frequent stalemate in the multilateral trading system, countries now tend to negotiate with 'like-minded' groups and entering into preferential trade agreements (PTAs) at regional or bilateral level. To a large extent, that accounts for the relative 'rise and fall' between multilateralism and regionalism.

So what could be done? As stated by the former WTO Director-General Mike Moore, 'the consensus principle which is at the heart of the WTO system—and which is a fundamental democratic guarantee—is not negotiable',[10] it's the viewpoint of this author that the single undertaking requirement should be relaxed to add elements of 'variable geometry' into the overburdened WTO system. A new 'WTO à la carte' approach of trade negotiation will be of essential importance for the continuing vitality of trade multilateralism in the 21st century.

III. What Does the 'WTO à la carte' Approach Mean for the WTO?

It should also be noted that the 'WTO à la carte' approach I'm proposing differs from the traditional 'GATT à la carte' in several ways.

Firstly, the WTO, basically functioning as a 'club of the clubs' (in the words of Prof. Robert Z. Lawrence of Harvard University)[11] under the new approach, not only accommodates different clubs, but also oversees their operation by specifying which agreements constitute the non-derogatable 'hard core', what should be the threshold of having a 'club' etc., so that minimum consistence with WTO principles will be guaranteed.

Let me elaborate a little bit. In order to have a sub-club, e.g, for competition policy in the WTO, the agreement has to be negotiated by the whole membership. In the end, any member can freely decide whether or not to join the club. The agreement comes into force when it is signed by one fourth of the entire membership; however, if the same number (one fourth) of members expressly object the agreement, then it should be abandoned or negotiated again. As the Sutherland Report stated, the rules under which any such negotiations take place in the future should be clear in advance and appropriate to the institution, so that it will not be used by small groups of Members to bring into the WTO issues which are strongly and consistently

[10] C.f. Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd ed. (Cambridge: Cambridge University Press, 2008), 145. Prof. John Jackson also stated that one of the 'mantras' of the WTO is that the WTO is a 'member driven' organization, in which decisions are made by consensus among its members. See John H. Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited', 4 *Journal of International Economic Law* (2001), at 71.

[11] Robert Z. Lawrence, 'Rulemaking Amidst Growing Diversity: A Club-of-club Approach to WTO Reform and New Issue Selection', 9(4) *Journal of International Economic Law* (2006), at 824.

opposed by substantial sections of the rest of the membership.[12] Moreover, this will ensure the balance between the legitimate interests of 'insiders' and 'outsiders'.

Secondly, 'WTO à la carte' also entertains the possibility for members to make reservations to certain agreements in accordance with Art.19-21 of the 1969 Vienna Convention on the Law of Treaties, again with explicit prohibition on reservations to certain agreements and provisions, and other relevant details.

Thirdly, As the ability of members to implement WTO-related obligations differs, it might be plausible for certain future agreements (especially those related to regulatory reform and infrastructure) to allow members to self-declare the intended transitional period for implementation within the confines of the agreements concerned (e.g. a maximum of 8 years for developing countries and 15 years for Least-developed countries). This is based on the fact that many of the Uruguay Round special and deferential treatment provisions relating to transitional period have been complained that they are ill-suited to the needs of developing countries.

In sum, the new approach, arguably plurilateralism in nature (or, as a compromise between multilateralism and regionalism), will be able to better accommodate competing interests of WTO members and increase the flexibility as well as appeal of multilateralism, and hence will enable the organization to better 'multilateralizing regionalism' by clarifying and improving existing disciplines as well as by devising new ones for the effective supervision of regional trade agreements (RTAs).[13]

IV. Between Flexibility and Fragmentation: Some Further Discussions

Understandably, some will question the utility of the 'WTO à la carte' approach by arguing that it will inevitably take the WTO back to the kind of fragmentation before the Uruguay Round. However, the reality is that the WTO, including its MFN principle, is already fragmented. It suffice here to recall that EU applies MFN tariffs to only 9 trading partners and around half of world trade now take place on a non-MFN basis. Greater flexibility will not make thing worse, while continuation of the status quo will threaten the survival of the WTO system.

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[12] Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (the 'Sutherland Report'), para. 134. http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm (visited on 4 April 2009).

[13] For the general idea of 'multilateralizing regionalism', see Richard Baldwin and Patrick Low (eds.), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009).

Indeed, globalization is significantly changing the world. Importantly, the interests and preferences of States has become more and more diverse, especially in the post cold-war era. Accordingly, greater flexibility is required to accommodate the differences and disagreements among states.

In retrospect, it should be admitted that much of the success of the GATT is derived from its flexibility and pragmatism (though those features were once very often criticized).[14] The overall legalization of the MTS under the umbrella of the WTO, operated to the detriment of the trading system. In particular, the single undertaking principle, which in reality means 'nothing is agreed until everything is agreed', has been part of the problems and proved to be no longer sustainable. Hopefully, the idea of a new 'WTO à la carte' scenario will be able to avoid the 'one size fits all' problem.

No surprise, the 'important challenges to the WTO and the multilateral trading system largely derive from the increasing integration and complexity of the world economy and the difficulty of providing the requisite supply of international governance'.[15] Yet one important lesson drawn from the experience of the WTO is that we do need greater flexibility in regulation and administration of globalization.

V. Conclusions

The continued credibility and importance of the WTO is prefaced upon it being able to function effectively to improve trading conditions and opportunities.[16] The 'bundling' of agreements based on the principle of single undertaking since the Uruguay Round, has on the one hand led to difficulties experienced by many members to adhere to Uruguay Round obligations and on the other decreased support of multilateral trade liberalization on the part of many countries. With the growing divergence of interests of the membership, decision-making in the WTO becomes more and more ineffective. Rather, countries now tend to pursue their 'enlightened self-interest' by negotiating with 'willing' groups based on similar interests.

Indeed, as the process of globalization proceeds, the WTO is becoming a unique laboratory for multilateral negotiations. Thus, options for decision making should be

[14] See Barton et.al., above n 6, at 208.
[15] Americo Beviglia Zampetti, 'A Rough Map of Challenges to the Multilateral Trading System at the Millennium', in R.B.Porter et. al. (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press, 2001), at 35.
[16] Bryan Mercurio, 'The WTO and Its Institutional Impediments', 8 *Melbourne Journal of International Law* (2007),

considered in a very broad perspective.[17] While consensus decision-making was widely perceived by WTO members as a fundamental democratic guarantee and not negotiable, changing the 'one size for all' mindset by replacing single undertaking with 'WTO à la carte' will be a much more feasible and practical way of improving the agility of the institution. In essence, the proposed 'WTO à la carte', though surely not an optimal solution, seeks to enhance the agility by recognizing and accommodating differences and diversity among States. Building upon that idea, it seems warranted that the principle of flexibility should be enshrined in the architecture of global legal governance.

[17] See Sutherland Report, above n 12, at para. 290.