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A framework for WTO reform: Less law and more politics

BY JOOST PAUWELYN

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Introduction

The evolution of the world trade system has been one where more rules and legalization, meaning fewer "exit options" for participants, were only made possible by and required more politics and participation.

More than 20 years ago[1] at the apex of the World Trade Organization's (WTO) power and centrality, a time that some have referred to as "peak globalization",[2] I issued a stark warning call. Against the conventional wisdom, I wrote that "the world trade system is out of balance", that we "risk a fortress WTO", that "the WTO now lives in what one could call the worst of both worlds".

The red line through my 2005 paper, published in the Michigan Law Review, was that we should not view the evolution of the world trade system — from its creation as the General Agreement on Tariffs and Trade (GATT) in 1947 to its establishment as the WTO in 1995 — as a uni-directional move from the vagaries of power and politics to the certainty of rules and law. Instead, the evolution has been one where more rules and legalization, meaning fewer "exit options" for participants, were only made possible by and required more politics and participation (fewer "exit options" requires more "voice").

The original GATT offered a balance of "little law" (flexible rules, no binding dispute settlement) and limited politics or member control (decision-making by majority vote). Over time, the GATT-WTO normative structure hardened (less "exit"), enabled by and requiring more politics or member control (more "voice"), in particular by a practice of consensus decision-making:

"As squeezing a balloon on one side will automatically inflate the other, squeezing exit options inflated the need for voice or participation," I wrote in 2005.[3]

Over time, the GATT-WTO normative structure hardened, enabled by and requiring more politics or member control.

Fortress WTO: A trading system out of balance

The WTO is perceived as a fortress even by those *inside*, that is, governments and domestic polities, tied up in the straitjacket of the WTO single package, with no way out or forward, either because of economic necessity or because of the consensus rule and an ever-stricter enforcement mechanism.

Back then, I concluded, however, that the WTO's balance between "exit" and "voice" was already out of kilter: "Too much law or discipline and not enough politics or participation, risk an unsupported organization such as the current WTO":

"The threat of a WTO fortress is looming, both for those outside and inside of the system.

Many countries and people, in particular the poor and vulnerable, feel left behind or locked *outside* the WTO. For most developing countries, participation in the system remains elusive. Ordinary citizens in both poor and rich countries perceive the WTO as a fortress hard to penetrate, a system that operates, behind closed doors, in the interest of powerful producers and exporters, but is oblivious of the rural poor, and the plight of workers or the environment...

The increase in participation or politics that *did* take place over the years, in particular the insistence by WTO members on a political veto in decision-making, is currently stifling further welfare-enhancing liberalization and preventing much-needed reforms to make the system more equitable for developing countries and more open and supported by civil society. The deadlock in the political branch, combined with an automatic dispute process, also risks giving too much power to what many see as un-elected, faceless bureaucrats on the judicial branch.

As a result, the WTO is perceived as a fortress even by those *inside*, that is, governments and domestic polities, tied up in the straitjacket of the WTO single package, with no way out or forward, either because of economic necessity or because of the consensus rule and an ever-stricter enforcement mechanism.

In sum, the WTO now lives in what one could call the worst of both worlds".[4]

Where do we stand 20 years later?

No “voice” and increasing “exit” combined with little “loyalty”, and the result is inevitable: the demise of the WTO or at least a steady slide into irrelevance.

Fortress WTO, with its lack of both input and output legitimacy, has amputated both the judicial and the political arms of the organization.

On the judicial side, dispute settlement has become voluntary (as appointments to the Appellate Body are blocked), and “exit” (from the rules) is rampant. As I wrote then, “the WTO suffer[ed] from a lack of popular support, loyalty, and input legitimacy to continue its highly disciplined and legalized operation”.[5] “[F]urther legalizing the WTO … risks rather serious pressure on the exit side … under increased legalization [as happened under the practice and rulings of the Appellate Body up to 2019], WTO members, especially the most powerful ones, could walk away from their obligations”.[6]

At the same time, on the political side, diversity in economic organization and geopolitical tensions have turned the consensus practice from a process of participation, contestation, and member input into a guarantee of stalemate and the status quo. Indeed, “[b]ecause WTO norms [were] enforced through an automatic dispute process with limited exit options … WTO members continue to defend zealously the consensus rule and carefully preserve their veto right over any changes to the WTO bargain”.[7]

From a relative balance between reduced exit options (more law) and increased opportunities for voice (more politics) at the creation of the WTO 30 years ago, we landed in a catastrophic situation where (i) the rules-based system as a whole is at risk (not enough law) and (ii) political progress, input, and reform seem completely elusive (not enough politics).

No “voice” and increasing “exit” combined with little “loyalty” (as the shared values of the early GATT club seem to have evaporated), and the result is inevitable[8]: the demise of the WTO or at least a steady slide into irrelevance (yes, technical discussions at the WTO’s Technical Barriers to Trade (TBT), Sanitary and Phytosanitary (SPS), and Trade Policy Review Mechanism (TPRM) committees continue, but for how long?).

What can be done?

A better framework for reform realizes the fluid equilibrium between law and politics, discipline and participation, and the bidirectional relationship that brings it about.

As I wrote in 2005, reform proposals "focused exclusively on either the politics pole, such as getting rid of the consensus rule, or the law pole, such as reverting to old GATT practices [with vetoes in dispute settlement] or, in contrast, further legalization" will not work:

WTO reform must "take sufficient account of the interaction between law and politics ... This law-and-politics, exit-and-voice balance is in constant flux and under constant threat. A minute alteration on one side can change the balance the way pulling out one brick at one end of a building can cause major cracks on the other end, and even the demise of the entire construction.

A better framework for reform realizes the fluid equilibrium between law and politics, discipline and participation, and the bidirectional relationship that brings it about".[9]

At the time, I argued for less law and legalization *combined with* more politics and participation. Today, even more so than in 2005, I remain convinced that this is the way ahead.

Reform proposals focused exclusively on either the politics pole or the law pole will not work.

Less law

In today's context, where the new normal is to "appeal into the void", a revived dispute system should focus on settling disputes and maintaining a balance of concessions, not abstract rule compliance and the further development of "trade law".

What could WTO reform leading to "less law and legalization", compared to the levels we witnessed before the breakdown of the Appellate Body, look like?

Here is what I wrote 20 years ago, with some updates in light of the present situation:

1. Revive the "logic" and legal flexibilities in the original GATT

"What kept the GATT together was not so much an abstract respect for legal rules, but rather the political and economic need to keep intact a negotiated balance of tariff concessions ... No strong enforcement mechanism to keep this balance afloat was needed ... This balance was ... kept because of the threat of reciprocal withdrawals of concessions in case a country would not meet its end of the bargain. This was the secret of the GATT's early success ... Its objective was to settle trade problems, not to create or clarify trade law".[10]

All the more so in today's context, where the new normal is to "appeal into the void", a revived dispute system should focus on settling disputes and maintaining a balance of concessions, not abstract rule compliance and the further development of "trade law". Quick decisions — a matter of months, not years as is currently the case — on whether the balance is upset, caused by breach or non-violation, and authorizations to suspend "equivalent" concessions are more important than consistency and getting things 100% "correct". From this perspective, a two-tiered system with an Appellate Body is not a "must have".

GATT flexibilities ranging from exceptions and trade remedies to unilateral tariff and schedule modifications under both GATT and the General Agreement on Trade in Services (GATS) and non-violation complaints must be dusted off and revivified. Panels and especially the Appellate Body may have seen it as their task to gradually reduce these "exit options" in pursuit of free trade ideology. However, "[r]ather than being birth defects that need to be cured through gradual legalization, these flexibility and exit options ... must be clarified and maintained".[11] They remain "crucial preconditions for trade deals to stick".[12]

2. "Resisting the temptation of ever more legalization"

Resist "the temptation of ever more legalization, including the temptation of judicial activism and a strict rule of precedent."[13]

3. Allow for "deal-making" as long as third-party rights are respected

"The scope for bilateral settlement of trade disputes and the conclusion of nontrade agreements in other international fora must be clarified. Given that WTO obligations are not collective obligations binding *erga omnes partes*, settlements and non-WTO treaties in deviation of WTO rules must be accepted as permissible for as long as they do not affect the rights of third parties".[14]

Even soft law, or political declarations or targets that are not legally binding, as an alternative to the usually hard WTO commitments could, in certain cases, be considered.

4. Revive "the umbilical cord between the political and judicial branch"[15]: Enhance WTO members' control over dispute settlement

Consensus appointment of Appellate Body members has proven to be the technical "Achilles' heel" of the WTO's Dispute Settlement Understanding (DSU). More control by WTO members should not be equated to political interference. As Appellate Body reports were automatically adopted and rule change or authoritative interpretations by the members themselves require consensus, no single act of "legislative correction" of dispute practice or outcomes has taken place since the WTO's creation more than 30 years ago. This is not sustainable for the advancement of global trade.

While resisting political interference, adjudicators ought to be more sensitive to members' reactions.

At present, a losing defendant can block the dispute process by appealing "into the void". This gives a de facto veto power to any single WTO member. Adoption of panel reports by a majority of votes cast (as was originally foreseen and practiced in the early GATT days) or a system whereby a substantial minority of WTO members can block a ruling, would facilitate the process. Yes, it would be a step back from what was set out in the 1994 DSU (automatic adoption), but it would be an improvement compared to today's deadlock. The threat of a vote could be enough to deter vetoes and enable adoption by positive consensus.

5. "The WTO should relinquish its obsession with the single-package idea"

"Given the huge diversity among WTO members, both in terms of economic development and noneconomic preferences, WTO agreements and rules ought not always be binding on all WTO members. With close to 150 [166 today] members, differentiation or a multiple-speed WTO is unavoidable …

Even soft law, or political declarations or targets that are not legally binding, as an alternative to the usually hard WTO commitments could, in certain cases, be considered.

The need for consensus amongst all WTO members to add a plurilateral agreement to the WTO treaty, even if such agreement is binding only on some WTO members, must be revisited … Although some control by the entire WTO membership over new agreements is useful, for example to make sure that plurilateral agreements do not harm the rights of third parties, a single member ought not have a veto to block further WTO progress by others."[16]

More politics

In today's situation, with maximum tensions and minimum trust between WTO members, and a long history of blocking and obstruction, formal vetoes are "cheap".

What could WTO reform offering "more politics and participation", compared to the WTO stalemate we have witnessed in the last two decades, look like?

Here is what I wrote 20 years ago, with some updates in light of the present situation:

1. **"To increase participation and support, the consensus rule must be maintained".[17] But it can be tweaked.**

Consensus should be much easier to reach than unanimity.[18] Consensus means that "no Member, present at the meeting when the decision is taken, formally objects".[19] In normal circumstances, with basic trust between participants, repeat play and a healthy "shadow of the future", formal vetoes should only arise when vital interests are threatened. In today's situation, with maximum tensions and minimum trust between WTO members, and a long history of blocking and obstruction (by now a habitual practice by many members), formal vetoes are "cheap". They have become the new normal. However, bluntly killing the consensus rule would be the death knell for the WTO. This drastic reduction in participatory "voice" would surely lead to even more "exit".

Instead, more subtle mechanisms must be found to turn today's tone-deaf vetoes and blockages into constructive debates. Firstly, oblige countries that veto to "explain in writing why the matter is one of vital interest to them".[20]

In today's situation, with maximum tensions and minimum trust between WTO members, and a long history of blocking and obstruction, formal vetoes are "cheap".

Consensus in the shadow of a vote (even if the probability is remote) is an altogether different game compared to consensus in the shadow of a (cheaply obtainable) veto.

Secondly, when discussions are blocked, try to untangle them by sending the matter up to a higher political level, or down for a more technical debate. This may require "more active and frequent participation of senior policymakers in Geneva-based discussions … and implementing the currently dead letter rule that when consensus cannot be reached at a particular meeting, the matter must be transferred to the WTO's General Council,[21] thereby exposing contentious issues to a more visible and political debate".[22]

In addition, whereas today the same consensus practice applies for all decisions at the WTO, a distinction could be made between housekeeping or internal WTO matters (such as appointments of committee chairs and the adoption of agendas) and other more consequential decisions. The rather astonishing reality is that current WTO rules already provide for fallback majority voting in case no consensus can be reached.[23] With one exception,[24] however, voting has never happened in the WTO. This is a matter of practice, which could be changed without treaty reform. Starting bottom-up with some purely internal matters, even the threat of voting would sharpen the minds, push for compromise, and facilitate consensus building. Consensus in the shadow of a vote (even if the probability is remote) is an altogether different game compared to consensus in the shadow of a (cheaply obtainable) veto.

As more decisions are taken, cross-issue bargains can be made and repeat play incentives may reemerge. Slowly and incrementally, this may rebuild some level of trust and untangle the wheels of WTO decision-making.

What should not be done is imposing new obligations on a WTO member against its will. What should also not be expected is that decision-making at the WTO, with close to 170 members that are increasingly diverse, should be easy:

"[T]he lourdeur in the political WTO process is a natural response to higher levels of law and discipline, in particular a stricter dispute process, and this lourdeur is, moreover, a political condition or *sine qua non* for WTO members to establish the DSU as well as to digest and accept the WTO's increased levels of discipline, taking away the safety valve of consensus and veto would undermine the support for a strong WTO dispute mechanism. It could eventually threaten WTO disciplines more broadly in that WTO members, faced with weaker outlets for voice and the prospect of being outvoted, would more frequently seek to exit".[25]

2. More openness and transparency at the WTO

"Other ways to ensure participation and contestation in WTO decision-making include more transparency in the process itself, such as public meetings, readily available and readable documents and position papers, and openness in the formation and membership of smaller informal groups that meet even before an issue is put on the WTO table".[26]

Too often it is not so much that developing country interests are not sufficiently *defended;* it is that they are not sufficiently *defined*".

3. More involvement of business and civil society[27]

"Increased voice or participation by nonstate actors, such as NGOs, small businesses, the rural poor, and citizens at large, ought not focus so much on having a seat or microphone in WTO meetings (as useful as this may be), nor does it require any explicit approval by WTO members … nonstate actors can and do influence the WTO political process even without a formal say or vote in WTO decision-making. In fact, rather than NGOs and citizens needing the help or blessing of the WTO, for example through formal permission to attend WTO meetings, it is the WTO that needs the input and support of NGOs and citizens to implement and legitimize its activities".[28]

"To bring the WTO closer to the public, the creation of regional WTO offices must be considered".[29]

4. Increasing the voice and participation of smaller and less resourceful WTO members

"[T]echnical assistance from the rich world is needed to ensure that the poorest countries are at least represented at WTO meetings that affect them, and to clearly define what the interests of a given developing country are in a specific trade matter. Too often it is not so much that developing country interests are not sufficiently *defended;* it is that they are not sufficiently *defined*".

5. WTO openness to other international organizations and non-trade concerns

"Both in its lawmaking and dispute settlement, the WTO must take account of activities and rules created elsewhere, in particular those that the disputing parties themselves have consented to. This is not a call for the WTO itself to engage in environmental or human rights lawmaking. Rather, let other organizations do this, but when such is done, the WTO, as a part of the broader international system, must take cognizance and when appropriate defer to the rules agreed to in those other fora. WTO cooperation with other international rules and organizations is part and parcel of greater contestation and participation in the world trade system itself".

Conclusion

Equally, stronger outlets for voice and participation — more politics and hence more support for WTO rules — should increase the legitimacy of the trade system, strengthen the support for and effectiveness of the DSU, and eventually reduce pressure on the exit option.

The WTO is in a dire situation. The rules-based system as a whole is at risk. Political progress or reform seem completely elusive.

The demise of the WTO or at least its slide into irrelevance was predictable: not enough "voice" to support the WTO's efforts to reduce "exit options" for members.

Based on a 20-year-old paper, this sequel holds that any WTO reform still must take into account the fluid equilibrium between law and politics, discipline and participation, and the bi-directional relationship that brings it about.

"When implemented with care, the increase in politics and participation ought not deadlock the political process; nor should maintaining certain exit options undermine the WTO's normative structure. On the contrary, the mere availability of certain exit options, such as safeguards or temporary compensation/suspension in the event of violation, should facilitate reaching a political consensus and thus make rulemaking more efficient. Equally, stronger outlets for voice and participation — more politics and hence more support for WTO rules — should increase the legitimacy of the trade system, strengthen the support for and effectiveness of the DSU, and eventually reduce pressure on the exit option. Coming full circle, this reduced pressure to exit because of higher levels of support would mean that the flexibility or exit options built into the system would be used only in exceptional circumstances. They would, in other words, strengthen, not undermine, the credibility of the WTO".[30]

The mere availability of certain exit options, such as temporary compensation/suspension in the event of violation, should facilitate reaching a political consensus and thus make rulemaking more efficient.

Author bio: Joost Pauwelyn

Joost Pauwelyn is Professor of International Law at the Graduate Institute of International and Development Studies in Geneva, Switzerland and Co-Director of the Institute's Centre for Trade and Economic Integration (CTEI). He is also a member of the Brussels bar and a founding Partner of the Brussels-based boutique trade law firm Cassidy Levy Kent (Europe) ("CLK") which has offices also in Washington DC and Ottawa. Previously he was Professor of Law at Duke University (2002-2007). He has also taught at Georgetown, Columbia, NYU, Stanford and Harvard law schools and worked as legal adviser for the WTO Secretariat (1996-2002).

Joost specializes in international economic law, in particular trade law and investment law, and its relationship to public international law. He also frequently advises governments and industry in WTO dispute settlement and investment arbitration and is a leading force behind the global www.tradelab.org network of legal clinics on international economic law.

From 2015 to 2020, Joost was the Co-Editor in Chief of the Journal of International Economic Law. In late 2020, Professor Pauwelyn was appointed to the WTO's multi-party interim appeal arrangement (MPIA, nominated by the EU).

Joost received degrees from the Universities of Namur and Leuven, Belgium as well as Oxford University and holds a doctorate from the University of Neuchâtel. He was appointed on the roster of WTO panelists and as arbitrator under Free Trade Agreements and the Energy Charter Treaty.

Joost is one of the editors of the online International Trade Law: A Casebook for a System in Crisis.

In 2009, he received the Francis Deak prize, awarded to a younger author for meritorious scholarship published in The American Journal of International Law for his article on non-discrimination.

Joost Pauwelyn

Professor of International Law,
Geneva Graduate Institute

Endnotes

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2. Bruce Nussbaum, *Peak Globalization*, Harvard Business Review, 20 Dec. 2010.
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5. Ibid. at p. 6.
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8. See Albert O. Hirschman, Exit, Voice, and Loyalty (1970).
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10. Ibid. at p. 12-13.
11. Ibid. at p. 8.
12. Ibid. at p. 53.
13. P. 49.
14. P. 62.
15. P. 49.
16. P. 61.
17. Ibid, at p. 57.
18. See the meaning and practice of consensus in the standard-setting world ("thick" consensus as opposed to the WTO's "thin" consensus), discussed in J. Pauwelyn, R. Wessel & J. Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 European Journal of International Law (2014) 733-763 at p. 754-762.
19. Footnote 1 to Article IX:1 of the WTO Agreement.
20. Pauwelyn, *Transformation*, at p. 58.
21. See Rule 33 of the respective Rules of Procedure of the subordinate Councils, Committees, and other bodies of the WTO.
22. Pauwelyn, *Transformation*, at p. 58.
23. Article XI:1 of the WTO Agreement.
24. The decision on the accession of Ecuador, see General Council Decision, Accession of Ecuador—Decision of 16 August 1995, n.1, U.N. Doc. WT/ACC/ECU/5 (Aug. 22, 1995) ("This Decision was adopted by the General Council by a two-thirds majority.").
25. Ibid. at p. 38.
26. Ibid. at p. 58.
27. For more on this see J. Pauwelyn, *Taking Stakeholder Engagement in International Policy-Making Seriously: Is the WTO Finally Opening-Up?*, 26 Journal of International Economic Law (2023) 51-65.
28. Ibid. at p. 58-59.
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30. Ibid. at p. 56-57.

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inquiry@hinrichfoundation.com