



TRADE AND DEVELOPMENT SYMPOSIUM

Perspectives on the Multilateral Trading System

A Collection of Short Essays

Should the WTO deal with private sector initiatives?

By Pedro da Motta Veiga
Sandra Polónia Rios



International Centre for Trade
and Sustainable Development



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Economic Affairs FDEA
State Secretariat for Economic Affairs SECO

Introduction

The aspiration to international recognition of Brazil, the “founding myth” of Brazilian foreign policy (Soares de Lima, 2005), was pursued through an active presence on multilateral fora since the second half of the 20th century, when the first efforts at multilateral coordination began, including in the area of trade (creation of the GATT).

Until the mid-80s, Brazil practically did not negotiate specific questions in the GATT. Instead, it focused its attention on some principles, including “special and differentiated” treatment of developing countries, in regards to commitments assumed in a multilateral scope. Until then, Brazil had stayed out of the target of demands for liberalization made by the developed countries, and did not present demands to the other members of the GATT.

Beginning with the Uruguay Round, the negotiating limits of the Brazilian strategy were to become clear, in a period in which a large number of developing countries adhered to the liberal paradigm of policies and engaged into structural adjustment programs with the IMF and the World Bank. On one side, the developed countries began to demand greater market opening in large developing countries, and on the other, Brazil laid out its demands in a sector that was brought to the GATT’s agenda during the Uruguay Round, and in which the country was rapidly developing a new competitive advantages: agriculture.

From defensive stances to protagonism

At the beginning of this century, Brazil defended the launching of a new multilateral Round, and actively participated in negotiations that made it feasible in Doha, in 2001. In addition to the demands for liberalization in agriculture, the Brazilian agenda at this time included a review of the agreements on subsidies and countervailing measures, especially in regards to the rules applicable to export credits, based on the OCDE Arrangement Rules - a direct result of the Brazilian experience with the Embraer - Bombardier controversy during the post-Uruguay Round period.

Throughout the Doha Round, Brazil became one of the main actors in the negotiations, alongside the USA, the European Union, India and China. Among the factors that help to explain the increase in importance of Brazil in these negotiations are:

- The political environment in which these negotiations took place, which favored the integration of large emerging countries to the decision making processes of the Round. The hegemony of the liberal views and policies, unchallenged during the 1990s, had dissipated, and the non-trade concerns, among them the “development issues”, had again become a priority. In this new environment, it became politically unfeasible to maintain the typical decision making mechanisms of previous Rounds (restricted to the Quad) and the large developing countries played a relevant role in defining the multilateral agenda itself.
- The leadership exercised by Brazil in creating the G-20. The G-20 was an unlikely coalition of developing countries in the area of agricultural negotiations, perceived, after the Cancun Ministerial meeting, as the result of a legitimate effort by those countries to “push” their interests on the WTO negotiations.
- The pragmatism and flexibility shown by Brazil in negotiations on topics considered sensitive by the country, like the regulations and access to markets for industrial goods, etc.

Brazil’s actions in the G-20 and its pragmatic positions in the final stage of the Round increased the legitimacy of Brazilian positions in the negotiations and gave the country the political

capital to participate in the select groups of members that would become the actual, although informal, mechanisms of negotiation and decision making (the G-5 then the G-4) throughout the Round.

The economic crisis and Brazil’s “new agenda” at the WTO

With the failure of the efforts to approve the “Lamy Package” (during the European summer of 2008), the discussion on the factors capable of explaining the difficulties and impasses of multilateral trade negotiations intensified. Even before this, the difficulties in making progress to liberalize trade on a multilateral bases and the simultaneous proliferation of low quality regional/bilateral trade agreements had been leading to debates on the governance of the multilateral trade system.

In these debates, Brazil generally adopted a clearly conservative stance in relation to the decision making processes, the modalities of negotiation and dispute settlement and the scope of the WTO agenda, etc. This official position of Brazil reflects the historic hegemony of defensive domestic interests (*import-competing*) over the Brazilian trade agenda, as well as the perception that the country has been a beneficiary of the multilateral trade system. Within this system, and thanks to it, Brazil has become a protagonist in trade negotiations and gained an international political projection which largely overcomes its weight in world trade.

The defense of the *status quo* of trade multilateralism by Brazil was shown very clearly in the resistance to enlarging the scope of the negotiations agenda. In the Uruguay Round, Brazil opposed the introduction of the topic of services; it resisted the so-called “Singapore topics” at Doha; and it has always criticized the attempt to associate environmental and social themes with trade matters.

Nevertheless, with the outbreak of the international economic crisis in the second half of 2008, Brazil’s activity at the WTO began to reflect an overarching concern about the impact of exchange rate misalignments on competitive conditions in the international markets a concern that government representatives made explicit in the G20. More recently, this led Brazil to present, for the first time, what could be considered a proposal for a “thematic enlargement” of the WTO agenda.

It was necessary for a large-scale international crisis to occur for Brazil to formulate a proposal that would lead in practice to a broadening of the multilateral negotiation agenda. In fact, principally after 2011, Brazil intensified its efforts to bring to the WTO the discussion on the trade effects of exchange rate misalignment. The objective of Brazil is to fight alleged “exchange-rate dumping” resulting from exchange rate policies of trade partners that promote competitive devaluations of their currencies. These policies were alleged to be “eroding” of the protection granted by import tariffs.

Within this context, Brazil presented a proposal to the WTO Working Group on Trade, Debt and Financing¹ for the member countries to discuss the trade policy instruments available in the multilateral trade system to compensate for policies that lead to high levels of artificial devaluation of exchange rates. This document recommends that the parties find a way for international trade regulation to include an agreement on tariff raising and trade defense mechanisms to compensate for these practices.

The impasse that characterized the Doha Round and the difficulties in dealing with this topic within the scope of the G20 do not indicate any likelihood of an agreement on new rules applicable to this topic within the scope of the WTO.² To the IMF

1 WT/WGTDF/W/53, of April 13 2011 and WT/WGTDF/W/56 - 20 Sep 2011

the task of establishing a level of devaluation considered “anti-competitive” would also require that a technical and political consensus be reached within this entity, which is highly unlikely to occur.

New topics in the multilateral agenda: adapting the Brazilian position to its interests

Within the current context of impasse of the Doha Round, it would seem that not only the Brazilian proposal, but any other related to enlarging the scope of the multilateral trade agenda are doomed to failure. The political environment in which the negotiations are taking place is not conducive to innovation and does not create opportunities for governments or actors of the civil society to “push” new topics on the WTO trade agenda.

Therefore, overcoming the current scenario, even partially, appears to be a requirement for any innovative proposal in the area of negotiations to be feasible. Having stressed this, it is possible to list two topics for which the treatment in a multilateral scope corresponds to the interests of a country like Brazil.

Rules, regulations and public and private certification³

Although the international debate over the relationship between climate change and trade is concentrated on the possible negative impacts of border adjustment measures in developed countries, technical regulations and certification requirements of a governmental or private nature are already affecting exports of developing countries.

Since these rules and regulations can restrict trade even more effectively than those that result from adjustment measures at the border - as a product that does not meet the established criteria will not be allowed across the border - they have been affecting a variety of industries.

Some regulations originate from negotiations in international organisms, like the International Standardization Organization (ISO), but most have a national and unilateral nature. The industries most regulated tend to be those that use energy intensively, like the automobile and electric and electronic products industries.

Recently, there has been a proliferation of private initiatives, by major retailers or organized consumers, demanding compliance with a variety of standards, like emissions limits in the production process of certain food items, or “voluntary” labeling. In this case, products are required to show information on GHGs emissions during the production process (carbon footprint) and during the transport of goods (food miles) on their labels.

Requirements of a private nature, to comply with rules or “voluntary” labeling, can have a relevant impact on Brazilian food exports. In this case, Brazilian suppliers are at a clear disadvantage in destination markets compared to local competitors or those from nearby regions. The concern over the information on emissions related to merchandise transportation tends to benefit producers closer to major consumer centers. In general, relations between, on the one hand, private regulations and standards, and, on the other, the WTO rules, which are applicable to public policies and government measures, constitute a “grey zone” that is favorable to *de facto* discrimination against imported goods.

Another industry that has been strongly affected by technical regulations is biofuels. If, on one side, Brazilian exports can benefit from the trend in regulations in several countries requiring the addition of a minimum amount of biofuels to the fuel mix used for transportation, on the other, the use of ethanol is subject to technical and sustainability regulations, particularly in the European Union, as previously emphasized. Brazil has been seeking to participate in fora and international work groups dedicated to the discussion of international regulations for biofuels.

The Brazilian ethanol industry has also been engaged in announcing the characteristics of the ethanol production in Brazil. As a result, it has been able to influence the regulations of the European block and to obtain recognition of the US Environmental Protection Agency (EPA) for Brazilian sugar cane ethanol as an advanced fuel (in other words, one whose GHGs emissions during its life cycle are 50% lower than those resulting from the use of petroleum derived fuels). According to the verdict of the Agency, Brazilian ethanol reduced greenhouse gas emissions by some 65% over its life cycle, thus achieving the “trigger” set by the US regulation.

In general, the proliferation of regulations and standards, both public and private, introduces new risks and threats for Brazilian exporters with regards to the predictability of their access to foreign markets, especially in the developed countries. As Veiga and Rodrigues noted (2010), in most of the commodities exported by Brazil, “there are several transnational initiatives of institutional arrangements that compete among themselves. For sugar, there are more than fifty initiatives for certification and standards that mix the global, transnational, public and the private.”

This question has led to intense debate among the members of the WTO. The Sanitary and Phytosanitary Measures Committee (SPS) has been working on this topic since June 2005, when Saint Vincent and the Grenadines manifested a concern over the operation of the EurepGAP⁴ scheme in relation to the sale of bananas to supermarkets in the United Kingdom. These debates evolved, and in March 2011, the members agreed to adopt five initiatives, referring essentially to cooperation and transparency. There are doubts among the Committee members themselves as to the relevance of dealing with private standards in a forum (the WTO) whose attribution is to deal with governmental measures.⁵

According to Mbengue, 2011⁶, “the multilateral trading system was conceived primarily to deal with “public” standards, i.e. standards formulated by public regulatory agencies and/or elaborated by agreed international standardization organizations like the Codex Alimentarius. Unless an evolutionary interpretation of some of the core WTO Agreements involved in private standards is fashioned, the import of private standards into the WTO may be limited by legal impediments. For the time being, discussions on a so-called integration of private and commercial standards within the WTO framework remain slow and cautious, not to say controversial.”

The proliferation of private standards and rules has not only been affecting agricultural product trade, but is also having a growing impact on industrial goods and services. The emergence of the agenda of climate change mitigation and transition to a low carbon economy is bringing additional stimuli to establish private regulations, which are becoming more and more related to production methods and processes. Therefore, this is a cross-section issue for several Committees and Councils of the WTO.

2 The regulatory framework at the WTO on this matter came from the original text of the GATT, from 1947, and is based on the fixed exchange rate regime, with no adherence to the current global macroeconomic context.

3 CINDES (2011)

4 EurepGAP is a private agency that defines voluntary standards for certification of agricultural products.

5 G/SPS/GEN/746 of January 24, 2007.

6 See Mbengue, M.M. Private standards and the WTO Law, In BioRes Review. Volume 5. Issue 1. Spring 2011.

The Agreement on Technical Barriers to Trade (TBT) contains a Good Practices Code (*TBT Code of Good Practices for the Preparation, Adoption and Application of Standards*), which applies to governments and para-governmental regulatory agencies. But it is not clear whether this code applies to private actors.

The WTO is an organization that regulates relations among governments and discipline public policies. But in a context in which the importance of private agents is growing in the definition of rules and standards that affect the flows of trade and investments, it is clear that this question must be addressed. This discussion should not be restricted to specific committees, but should be incorporated into the discussions on the future of the multilateral trade system.

Investments

The Brazilian government's position in regards to inter-governmental initiatives related to foreign investments has been characterized by defensive stances aimed at limiting the scope of the negotiations and the reach of regulations. This explains not only why Brazil has never ratified a single Bilateral Investment Agreement, but also the defensive position taken by Brazil in relation to the efforts (of other countries) to bring investment rules under the umbrella of the WTO.

These positions are rooted in both the goal of preserving from these international regimes Brazil's autonomy to formulate and implement active industrial policies, as well as in the fact that Brazil is a typical receiver of FDI, and until recently, a marginal issuer of these types of flows.

Brazil continues to be a major receiver of FDIs and maintains, even deepening it in recent years, its preference for active industrial policies. What has changed, among the factors that shape Brazil's official positions regarding this matter, is the weight of the flows of outward FDI.

These have grown significantly during the first decade of the 21st century, but this evolution has not changed the Brazilian position in regards to investment protection agreements. In the Doha Round negotiations, Brazil has also always had a defensive stance in investments negotiations, as previously stated.

In recent years, the questioning on a global scale of bilateral investment protection agreements has led to a series of new instruments focused on holding investors liable for the impacts, especially the socio-environmental ones, of their activities in host countries. Some of these initiatives can be considered the functional equivalent, in the investment area, of standards and certifications applied to the trade of goods (see 4.1. above).

This results in the multiplication of public and private instruments applicable to FDI flows, producing a "regulatory pulverization" which does not seem to be of interest to an economy, like that of Brazil, which is the origin of increasing flows of FDI.

The agenda of negotiations in this area should not be restricted to "access to markets" for investments. This is an opportunity to conduct a broad evaluation of the international experiences with bilateral investment agreements (BIAs) and the investment chapters in different free trade agreements in effect.

The negotiation agenda for a multilateral investment agreement should allow convergence and adaptation of the rules in effect in these agreements to what can be learned from recent experience, particularly in regards to the mechanisms of settling controversies between investors and Governments, and to the balance between the space for Government regulations and the property rights of investors.

As in the case of private standards, the negotiation of such an investment agreement within the scope of the WTO would bring to the organization's agenda the theme of the relationships between private and government actors and their role in the international arena.

Conclusion

The structural transformations that the Brazilian economy underwent in the past fifteen years produced the emergence of offensive interests in the trade and investment areas, in a marked contrast to the previous situation, in which the political economy of trade negotiations was completely dominated by the defensive interests of the import-competing industries.

Brazil's conservative stances at the WTO, especially with regards to the topics on the negotiation agenda, is the external counterpart to this domestic economic policy. This position gradually loses functionality as offensive interests emerge in the Brazilian economy: exporters of agro-industrial products and companies in the process of internationalization acting in politically sensitive industries (mining, infrastructure) demand agendas that have not been on Brazil's favorite menu previously.

The two topics indicated here are expressions of this new composition of Brazilian interests in the area of trade. Above all, for a country that is not very receptive to preferential agreements like Brazil, there is ample evidence of the advantages for them to be dealt with and regulated on a multilateral level.

These two topics also represent important challenges for the WTO. As an institution whose purpose is to regulate relations between governments, how should the WTO deal with private sector initiatives that could represent barriers to trade or limit the regulatory capacity of countries?

Pedro da Motta Veiga, Regional Coordinator for TKN South America. Pedro is also the Director of CINDÉS—Centro de Estudos de Integração e Desenvolvimento (Rio de Janeiro, Brazil) and works on trade policies and negotiations as well as on industrial policy issues. He is a permanent consultant to Confederação Nacional da Indústria (CNI) of Brazil and to the Swiss Agency for Development (SDC). He coordinates the activities of the Latin American Trade Network (LATN) in Brazil. He has also acted as consultant to many international institutions such as the IADB, World Bank, OECD, UNCTAD, CEPAL and ALADI.

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Please note that this paper is in draft form. It will be revised and included in an e-book that ICTSD will publish shortly after the WTO ministerial conference.

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