

G2 HACKATHON CHALLENGE

How to Make the WTO
Fit for Future Trade



INSTITUTE OF INTERNATIONAL
ECONOMIC LAW
GEORGETOWN UNIVERSITY LAW CENTER



Geneva Trade
Platform

Akin Gump
STRAUSS HAUER & FELD LLP

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2021 Hackathon Submission

Coding new Topical Agreements into GATT
and GATS

Women in Trade (WIT)

Khaliun Purevsuren

Yulia Yarina

Riya Roy

Fiama Angeles

Watch the Video



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Question #1

Define the substantive issue that your team is addressing, why it's a problem, and why your team believes the WTO is the right forum to address it.

The WTO has been subject to severe criticisms on account of its inability to conclude any negotiations. The lack of consensus among its heterogeneous Membership, who differ considerably in terms of their economic, socio-political structures and interests, has been at the core of the discussion. These differences impede the creation of new rules in upcoming and critically important areas. While e-commerce, MSMEs and investment issues are currently being discussed through JSIs, there are other potential trade-related concerns on queue (such as carbon trade adjustments) that do not have an implementation way forward with the status quo.

WTO's inability to adapt to new trade-related concerns makes it detrimental with regards to its capacity to remain relevant. Members are losing hope with the institution being the forum to tackle new issues. Without a way to integrate newly arising trade aspects within the WTO framework, rulemaking is limited to traditional trade matters that no longer represent important obstacles to further integration. Regardless of whether new issues are currently being discussed in JSIs or not, the challenge of finding a path for their insertion into the WTO framework is stronger as ever. Hence, our proposal focuses on the substantive issue of integrating new topics into the WTO.

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In this context, there is an inherent dichotomy in the approaches to dealing with new topical issues between mostly developed countries and some developing countries and LDCs. For instance, Members supporting JSIs are currently considering implementation methods that go against the expectations of some non-Party developing Members. Overall, WTO Members have suggested two principal implementation methods for JSIs: as RTAs (preferred by some developing Members) or as amendments of their GATS schedules of commitments (preferred by developed Members)[1]. These two negotiating positions reflect each group's individual cost-benefits analysis. Those who want more ambitious regulations support JSIs, whilst those against worry about setting a baseline that diminishes their policy space. Therefore, there seems to be a contradiction in expectations regarding how to address new topics in the WTO.

A compromise is necessary, and we believe the WTO is the best-suited institution to do so. The WTO is undoubtedly one of the most successful examples of IOs in balancing national sovereignty and international commitments. Its success is reflected through the massive trade liberalisation outcomes, the wide-spread use of the DSM and the 164 Members who joined the organisation throughout the years. In order for the WTO to remain as relevant, it is imperative that it adapts with the changing times. Moreover, since March 2021, the WTO is under the fresh leadership of Dr. Ngozi Okonjo-Iweala, who has publicly acknowledged the importance and necessity for the WTO to address cutting-edge issues. We believe Members should capitalise on the current momentum in order to take steps towards allowing greater integration in non-traditional trade matters, taking into account the diverse interests of the WTO Membership.

[1] Please refer to: <https://www.tradeexperettes.org/tradeexperettes-blog/are-joint-statement-initiatives-the-world-trade-organizations-future>

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Question #2

Propose a specific treaty text, or more informal commitment/declaration text, that addresses either the concern or a particular, detailed aspect of it.

GATT Article XXIV bis.: Topical Agreements

GATS Article V ter.: Topical Agreements

The contracting Members recognise the need to ensure the adaptability of the WTO and the desirability of regulatory harmonization in order to better respond to changes in the international trading environment, through voluntary Topical Agreements (TA).

Accordingly, the provisions of this Agreement shall not prevent any group of Members from forming such a TA, provided that: it fulfills a legitimate regulatory objective, without creating unnecessary obstacles to or constituting a disguised restriction on international trade along with being open in membership.

1) TAs shall build on new aspects not already included in the WTO covered agreements. They have to set out regulatory measures consistent with the covered agreements and necessary to address the agreed topics by the signatories.

2) Rights and obligations under the TA will be extended only to its signatories. In addition, within the TA, signatories can condition certain benefits on further regulatory requirements. In case of agreement among its signatories, benefits can be extended to the rest of the Membership on an MFN basis following certain conditions, if any, set out by the signatories of the respective TA.

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Question #3

Suggest a legal/technical or institutional way to implement your textual proposal within the broader WTO framework (500 words)

In order to insert a new article into the GATT/GATS, Members have to adopt a Ministerial Decision by consensus pursuant to Art. X:1 of the WTO Agreement. Should consensus fail, however, we propose a further set of steps to move forward with the proposal. The amendment process outlined in Art. X of the WTO Agreement provides for the fall back option of majority voting. Specifically, according to Art. X:3 of the WTO Agreement amendments to the WTO agreements of Annex 1A (GATT) can be voted by two-thirds majority (66.7%). Amendments to Annex 1B (GATS Part II) can also be subject to majority voting pursuant to Art. X:5 of the WTO Agreement.

In order to illustrate how feasible this exercise is, we can look at JSIs' progress. Building on the latest stocktake provided by JSI coordinators in December 2020 [1], we note the JSI with most support - JSI for Investment Facilitation for Development - accounts for 106 Members (65% of WTO Membership). For reaching the two-thirds threshold, only 4 Members need to join. In general, a two-thirds majority for Topical Agreements seems to be a feasible option.

Since the voting mechanism has not been used in practice, it is questionable whether it would be used for TAs. However, goals envisioned under TAs can be introduced through different avenues. The first fallback option, as preferred by mostly developed countries, consists of some new rules being introduced by "unilateral" amendments of the GATS schedules of commitments. This would introduce a baseline within the WTO system without properly following the certification process (as per S/L/84). As witnessed from the objection to the JSIs' negotiations, some Members, in order to protect their policy spaces, would prefer similar initiatives to take the form of RTAs. This second fallback option, however, would lead to a more pervasive misuse of RTA provisions, as the condition of substantially covering all trade and sectors would definitely not be met.

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To avoid the undermining of the WTO system, our solution addresses the above-mentioned negative externalities. Our proposal creates a procedural baseline for TAs within the WTO system while outsourcing their substantive elements to separate RTA-like structures.

Our proposal, although legally binding, offers flexibility on MFN application and topical coverage as long as the requirements of Art. XXIV bis./Art. V ter. are met. It ensures that TAs will be notified to the CRTA and will be subject to the WTO's DSM, which is imperative for non-signatories to hold the TAs accountable. Hence, only transparency-related and dispute settlement aspects will be managed by WTO bodies, serving the interests of both signatories and other non-party Members. Technical assistance and capacity building needed for negotiating and implementing a TA shall be provided by developed and capable signatories to developing and LDCs Members in need.

The proposal thus allows for flexibility in forming TAs, does not diminish Members' policy space, ensures accountability to the DSM and thus has higher chances of achieving consensus.

[1] Please refer to:

https://www.wto.org/english/news_e/news20_e/jsec_18dec20_e.pdf