

trade hot topics

‘The Right to Trade’: A Mechanism for Revitalising Pro-Development WTO Negotiations?

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Joseph Stiglitz and Andrew Charlton make ambitious and innovative proposals for revitalising and rebalancing the World Trade Organization (WTO) in a new report for the Commonwealth Secretariat: *The Right to Trade: Rethinking the Aid for Trade Agenda*.¹ They argue that, to make the global trading system fairer, developing countries should have a ‘right to trade’ and a ‘right to development’ enshrined in WTO rules and enforced through its dispute settlement mechanism. Making the global trading system fairer would, they contend, help ensure that international trade works for developing countries and would provide new impetus for negotiations.

This issue of *Commonwealth Trade Hot Topics* sets out the core argument made by Stiglitz and Charlton, raises some challenges and makes suggestions on how their reform proposals might be taken forward.

Aid for trade: a salvo for the multilateral trading system

The reform proposals put forward by Stiglitz and Charlton stem directly from their evaluation of ‘aid for trade’, from its origins in 2005 until present. This evaluation merits close reading, since it constitutes the majority of their paper and is fundamental to understanding their reform proposals.

‘Aid for trade’ was created, Stiglitz and Charlton argue, as a salvo created in response to the crisis confronting the multilateral trading system in the early 2000s. Developing countries walked out of the 2003 WTO Ministerial in Cancun and the Doha Round then stumbled into a deadlock from which it never recovered. By July 2005, negotiations had reached an impasse. ‘Aid for trade’ was born in this context, and was, at least in part, a bid to keep developing countries at the negotiating table. In the words of the authors, ‘Once the developing countries began to lose faith in the prospects for multilateral liberalisation, the rich countries had to put something else on the table ... the fundamental driver of the aid for trade initiative was that the trading system was in crisis.’

Stiglitz and Charlton argue that two factors lay at the heart of the crisis. First, the outcome of the Uruguay Round was deeply unbalanced and unjust, with the result that developing countries were very reluctant about engaging in a new round of negotiations. As is well documented, the final terms of the Uruguay Round reflected the priorities of the advanced countries, providing them with gains in services, intellectual property and advanced manufacturing, but did not reflect the priorities of the poorer

¹ Joseph E Stiglitz and Andrew Charlton (2013), *The Right to Trade: Rethinking the Aid for Trade Agenda*, Commonwealth Secretariat, London.

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countries, failing to address agricultural subsidies and providing greater market access for textiles. Even in areas where commitments were reciprocal on paper, it was *de facto* unbalanced as the exporters in richer countries were better placed to take advantage of market access opportunities than their counterparts in developing countries. Developing countries also found themselves subject to 'a remarkable range of additional obligations and responsibilities', which were costly to implement and further compounded these imbalances.

Second, and in tandem, Stiglitz and Charlton note that there was a growing scepticism among developing country governments of the 'Washington Consensus' and the argument that trade liberalisation was necessarily beneficial for development. They cite a series of academic studies in the early 2000s that reappraised the links between trade liberalisation, growth and poverty, and showed that trade liberalisation was only likely to be beneficial in very specific sets of circumstances, which were rarely present in developing countries. Other studies showed that countries that had developed successfully, including Britain and the USA in the nineteenth century, and East Asia in the 1980s, had often relied on managed trade regimes.

Aid for trade: failing to live up to its promises

Since its launch in December 2005, 'Aid for Trade' has gained a high level of visibility and is now an integral part of the multilateral trading system and aid programming. A full 25 per cent of all overseas development assistance is now labelled 'aid for trade'. Stiglitz and Charlton evaluate 'aid for trade' and examine the extent to which it has succeeded in making international trade work for development.

The first metric they use to assess 'aid for trade' is the extent to which it has promoted trade and development. Here the authors draw on recent studies and conclude that, while the evidence is scarce, aid for trade does appear to have promoted trade. Trade facilitation projects appear to have been particularly effective at boosting developing country exports.

Yet 'aid for trade' fares less well when the authors assess it against a second, tougher metric: the extent to which the emergence of 'aid for trade' has increased the overall effectiveness of aid. As they note, there were concerns at the outset that 'aid for trade' would prove to be merely a 'semantic façade' and that existing aid flows would merely be

relabelled 'aid for trade'. Earlier this year, WTO Director-General Pascal Lamy lauded 'aid for trade' arguing that more than US\$200 billion has been raised, with US\$60 billion directed to least developed countries.² However Stiglitz and Charlton argue that there is 'scant evidence' that this aid is really additional. Indeed, they point out that many Organisation for Economic Co-operation and Development (OECD) countries continue to fail to meet their commitment of allocating 0.7 per cent of GDP to aid. Given this, it is hard to argue that it is new aid. In their words 'it is certainly not additional to what they [OECD countries] had previously promised to deliver'.

The debate over additionality raises wider problems with the institutional set-up for managing 'aid for trade'. There is no rigorous mechanism for monitoring and evaluating 'aid for trade'—the system relies on self-assessment by donors. This means that there is minimal independent verification, which makes it hard to assess additionality and impact. Stiglitz and Charlton also raise concerns that 'aid for trade' financing may be skewed towards the preferences of donors. If this is the case, then 'without additionality, aid for trade is just another form of conditionality'. Some developing country representatives may object to this characterisation, as 'aid for trade' is often perceived as a welcome corrective to the relative neglect of productive activities by the aid community.

Even if a more effective mechanism for managing 'aid for trade' existed, it would still have to confront a classification problem. As Stiglitz and Charlton note, the line between general aid for development and 'aid for trade' is arbitrary: how close to a port does a road need to be to count as 'aid for trade'?

Overall their verdict is that 'aid for trade' has 'failed to live up to its promise of additional, predictable and effective finance to support developing countries' integration into the global economy'. More importantly it has become a 'means for both the aid and trade communities to paper over their weaknesses without doing much for the fundamental concerns of poor countries'.

Enshrining a 'right to trade' and a 'right to development' in the WTO

Having raised deep concerns about the failure of 'aid for trade' to address the fundamental iniquities

² Keynote address to the OECD Policy Dialogue on Aid for Trade, Paris, 16 January 2013. Available at http://www.wto.org/english/news_e/sppl_e/sppl262_e.htm

at the heart of the impasse in the multilateral negotiations, Stiglitz and Charlton make an ambitious proposal for rebalancing the global trading system. Their proposal has two pillars.

The first pillar proposes enshrining and enforcing a 'right to trade' and a 'right to development' through the WTO's dispute settlement mechanism. What exactly are these rights, and how would they operate? The authors propose the 'right to trade' as a means for addressing the trade barriers facing exporters from developing countries. They argue that the global trading system is still stacked against the poorest countries, as the areas of trade where barriers are highest are precisely the areas of greatest importance to developing countries. The 'right to trade' would give developing countries the ability to 'bring an action against an advanced country on the basis that a specific policy materially impedes the development of an identified community in a poor country by restricting their ability to trade'.

The complementary 'right to development' is a means for addressing the challenges that arise when developing countries implement multilateral trade rules. The authors argue that aspects of the existing trade rules may impair development in many ways including by impeding industrialisation, limiting the ability of developing countries to access technology and knowledge, and reducing public budgets. The 'right to development' would 'limit the applicability of WTO obligations when the enforcement of such obligations would have a significant adverse effect on development'. Alternatively put, it is the 'right not to be harmed by the imposition of trade rules'.

In effect, these two rights, enforced through the WTO's dispute settlement mechanism are a bid to remedy the power asymmetries present in the negotiating arena. As the authors note, enshrining these rights recognises that 'in the formulation of the trade rules, the voices and concerns of the least-developed countries were not given sufficient weight; that provisions on special and differential treatment were not adequately "hard-wired" into the international trading system; that development itself is a complex matter; and that trade ministers have neither necessarily the competence nor interests to design a global trading system that promotes development'.

Establishing a Global Trade Facility

The second pillar of the Stiglitz and Charlton reform proposals is the creation of a Global Trade Facility, which would fund 'genuine aid for trade' and

support developing countries to uphold the new 'right to trade' and 'right to development'. The Global Trade Facility would be a dedicated fund for channelling, monitoring and evaluating 'aid for trade' finance, helping to overcome many of the institutional shortcomings of 'aid for trade' highlighted above.

The funds channelled through the Global Trade Facility would be used to finance 'aid for trade' projects; provide compensation to developing countries in the event that they find themselves subject to retaliation (such as an advanced country reducing aid) after they lodge a 'right to trade' dispute; and provide developing countries with adjustment support if they are adversely affected by changes in the trade policies of advanced countries.

The Global Trade Facility would not implement 'aid for trade' programmes directly but would allocate resources based on proposals from a wide range of development organisations. It would provide robust tracking and assessment, and be governed in a way that ensured a high degree of developing country oversight. The authors propose that it be housed in the United Nations Conference on Trade and Development (UNCTAD) and supported by a small independent secretariat. UNCTAD is proposed as it is an institution in which developing countries have a strong voice and is 'less committed to the neoclassical model ... and more committed to development' than alternative options, including the World Bank.

There are strong reasons to support the channelling of funds through an independent third party. In addition to making the allocation of funds more transparent, predictable and responsive to developing country needs, it would help insulate 'aid for trade' finance from the political interests of donor countries. Conflicts of interest are particularly likely to occur in the provision of support to build the negotiating capacity of developing countries as donors sit on the opposite side of the negotiating table (Page 2006; Jones *et al.* 2010).

The Facility would be funded from three sources: advanced countries would transfer 0.05 per cent of their GDP to the Facility to finance 'aid for trade' (as part of their broader commitment to dedicate 0.7 per cent of GDP to aid); a small fee would be levied on advanced country exports to developing countries (a mechanism for compensating developing countries for tariff revenues foregone as the result of trade liberalisation); and advanced countries would pay the equivalent of 5 per cent of all their agricultural subsidies and 15 per cent of all arms sales.

Questions for further discussion

As might be expected, such bold reform proposals stimulate a series of questions, particularly about the ways that these reforms might be put into practice. Five are highlighted below for further discussion.

First, what exactly is the scope of the ‘right to trade’ and the ‘right to development’? Stiglitz and Charlton make it clear that the ‘right to trade’ (and presumably the ‘right to development’) would transcend any existing agreements and apply to all trade-related policies of advanced country member states. While they note that these rights would be ‘subject to appropriate safeguards’, they do not set out the types of safeguards that they envisage as limiting the scope of these rights. This leaves many questions unanswered. For instance, how much and what type of harm would have to be caused in order for the ‘right to trade’ or the ‘right to development’ to be invoked? On what grounds should an advanced country be able to invoke a safeguard?

During discussions over an earlier draft of their paper, Stiglitz and Charlton were challenged to be more specific about exactly what is and is not embraced within these two ‘rights’. In particular there was concern that these rights are so broad that they would provide countries with the right to complain about and challenge all aspects of international trade rules.

Stiglitz and Charlton recognise that being more specific about these rights would bring some benefits (such as providing traders with certainty). However they are concerned that a high degree of specificity is likely to lead to circumvention, whereby developed countries find ways to devise policies that are consistent with the letter of the law but against its spirit. For this reason they propose that the rights be enshrined at a high level of generality. This implies delegating a high level of discretion to the experts appointed to WTO panels, who would be tasked with interpreting these rights and determining their scope in each dispute case. Whether or not these experts interpret the rights in the manner Stiglitz and Charlton envisage would depend greatly on the selection of experts and the depth of their expertise on development.

Second, which parties should be granted the right to bring a dispute under these new ‘rights’? One of the most novel aspects of the Stiglitz and Charlton proposal is that private individuals should have the right to file a dispute. They rightly point out that there are clear limits in relying on individual

countries to file disputes as poor countries may refrain from filing disputes out of fear that they will come under coercive pressure from large countries. Indeed, recent research suggests that trade negotiators from small developing countries often perceive themselves as operating under high levels of coercive pressure from large states (Jones et al., 2010).

To offset these power asymmetries Stiglitz and Charlton propose three remedies. The first is to empower groups of developing countries to jointly lodge a case. This is feasible under the current WTO arrangements where countries can be co-complainants.³ Stiglitz and Charlton go further and propose that ‘any group of poor individuals harmed by the trade policy of another country’ should be able to lodge a case. The authors justify this move on the grounds that under the extensive network of bilateral investment treaties, corporations already have the right to lodge international disputes against governments.

Providing civil society and citizen groups the right to file WTO dispute cases against states is appealing as it would expand participation and could increase legitimacy. However granting individuals the right to bring cases would fundamentally alter the nature of the WTO, moving it from a purely inter-state to a transnational system of trade governance. Such a move deserves careful reflection, as the ramifications are likely to be substantial. For instance, on what grounds is it justifiable to allow some groups of citizens the right to file a dispute but not others? Why should a group of poor people in an advanced country not have the same right to file a case under the ‘right to trade’ as a group of poor people in a least developed country?

An obvious risk of opening up avenues for private actors such as citizen groups to lodge disputes is that powerful private actors, including companies, are also likely to lobby for such rights. At present, companies do not have access to the WTO dispute settlement mechanism — their right to bring cases against states is limited to investment disputes filed under bilateral investment treaties and preferential trade agreements (where this right is highly contentious).

Stiglitz and Charlton also propose that a new office be created called the ‘defender of the right to trade’. This office would have the right to bring cases against any member state seen to be violating the

³ See for instance the bananas dispute case: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm

'right to trade'. This is a similar logic to the office of the prosecutor of the International Criminal Court, which has the mandate to proactively investigate and prosecute instances of serious human rights violations such as genocide. Their proposal echoes the recent proposals to create an ombudsperson function in the WTO. Civil society groups could request the ombudsperson to examine inadequacies in the multilateral trading system that relate to development and transparency, and the ombudsperson would investigate and produce non-mandatory technical opinions (Pena 2011).

A third question is whether the 'right to trade' and 'right to development' should only be made available to least developed countries or made available to all developing countries. The authors propose that both rights be made enforceable for least developed countries but that for 'emerging markets' a 'softer' version might be appropriate, whereby they could ask for a declaratory judgement from the WTO as to whether a given rule is adversely affecting their right to trade or development. While it is the case that advanced industrialised countries are more likely to accept such a two-tier system, it is not clear that this more modest 'rebalancing' of the trading system would provide emerging economies with sufficient gains to unlock the negotiating impasse and revitalise WTO negotiations which is the authors' aspiration.

Fourth, and related, should least developed countries be able to bring a case against emerging markets for infringing on their 'right to trade' and, if so, should emerging markets have the same responsibilities as developed countries to provide redress? The authors are silent on this, but as trade with emerging markets is becoming increasingly important for least developed countries, this is a question that merits further reflection.

The final question concerns the political viability of the reforms: Why would the key actors in the international trading system (advanced industrialised countries and emerging markets) embrace these reform proposals given that the costs to them could be significant while the gains will accrue almost exclusively to the least developed countries?

Next steps

The proposal made by Stiglitz and Charlton is big, bold and a welcome breath of fresh air in the debate about the way forward for the WTO. As with any big and bold idea, their proposal raises many questions, and we need to reflect on the degree to

which these reforms are desirable, technically feasible, and politically viable.

To take these proposals forward, two concrete steps could be taken. First, a detailed discussion is required about both the desirability and legal feasibility of enshrining a 'right to trade' and a 'right to development' through the WTO dispute settlement mechanism. This is a discussion that should include least developed countries and citizen groups (the intended beneficiaries) as well as top legal experts. Second, it would be helpful to pilot the Global Trade Facility to test its efficacy, whereby donors allocate an initial tranche of funding and its performance is evaluated vis-à-vis traditional forms of 'aid for trade'. This would also help stimulate a discussion about the ways to evaluate 'aid for trade' and ensure that it meets its development objectives. If the proposals are considered to be desirable and technically feasible, then the question of political viability needs to be addressed. A strategy is needed for convincing advanced industrialised countries and emerging economies that these reforms are worth their while.

While some may argue that the Stiglitz and Charlton proposals are unrealistic, it is worth remembering that when 'aid for trade' was first proposed it met with a high level of scepticism and opposition from many advanced industrialised countries. A decade from now the trade community may similarly perceive the 'right to trade' and the 'right to development' as an integral part of the global trading system.

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4-8 March 2013: Commonwealth Workshop on Trade Policy and Negotiations Skills for the Eastern Caribbean Region held in Castries, St. Lucia

4-8 February 2013: Commonwealth Workshop on Trade Policy and Negotiations Skills for the Pacific Region held in Port Vila, Vanuatu

29-31 October 2012: Commonwealth Investment Guide and Promotion of the New Negotiator's Handbook for Developing Countries held in Port of Spain, Trinidad & Tobago

11-13 September 2012: South Asia Economic Summit (SAES V) held in Islamabad, Pakistan

7-8 September 2012: Istanbul Programme of Action for LDCs (2011-2020): LDC IV Monitor Expert Group Meeting held in Dhaka, Bangladesh

3-4 September 2012: Strengthening Competitiveness of South Asia through Regional Supply Chains — consultation workshop on leather and Leather products, held in Chennai, India

29-August 2012: A Commonwealth Roundtable with Prof. Joseph Stiglitz on 'Aid for Trade: Perspectives on Progress and Emerging Issues' held in Marlborough House, London

9-13 July 2012: A Briefing Session on Commonwealth Secretariat's Work Programme on International Trade, 24th WTO Geneva Week, held in Geneva, Switzerland

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