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THE SOFT-LAW, SOFT-ENFORCEMENT APPROACH IS KEY TO REINVIGORATING THE WTO

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- The current crisis of the WTO is partly caused by overreliance on the hard-law, hard-enforcement approach – adopting binding rules and enforcing them through binding dispute settlement procedures.
- More active use of the soft-law, soft-enforcement approach – forming non-binding flexible guidelines and implementing them through an informal and amicable process – can overcome the weakness of the hard-law, hard-enforcement approach and eventually reinvigorate the WTO.
- The soft-law, soft-enforcement approach can be particularly useful in creating a global framework on digital trade.

The hard-law, hard-enforcement approach was a symbol of the success of the WTO until recently. The Uruguay Round was successfully concluded with a comprehensive package of legally binding trade rules (hard law), and the rules were vigorously enforced through a two-tiered binding dispute settlement mechanism composed of WTO panels and the Appellate Body (hard enforcement).

Despite its undoubted success over the years, the hard-law, hard-enforcement approach currently faces critical challenges. This crisis started with the failure of the Doha Round negotiations, which were buried in oblivion only to create distrust in the validity of the WTO as a negotiating forum. A few subsequent instances of success, such as the conclusion of the Trade Facilitation Agreement and the expansion of the Information Technology Agreement, have fallen short of dispelling the perception that the WTO keeps failing to modernize its rules despite the new global economic reality.

In addition, the WTO dispute settlement mechanism, once the WTO's crown jewel, is also at a critical juncture, with the Appellate Body having only three members left, two of whom will be finishing their term by the end of 2019. Unless the WTO Members agree on dispute settlement reforms and reach a consensus on the nomination of new Appellate Body members, the seven-member appeal body will become dysfunctional in the very near future.

A number of proposals have been made to revitalize the hard-law, hard-enforcement approach. In November 2018, Japan, the United States, the European Union, and a few other WTO Members tabled a proposal to enhance and strengthen notification requirements with the possibility of suspending certain membership benefits in case of non-compliance. Another proposal has been made by a group of several WTO Members, led by the European Union but not including Japan, to strengthen the independence of the Appellate Body. These proposals should be carefully considered, as the hard-law, hard-enforcement approach should remain an essential part of the WTO.

However, it is not necessarily the hard-law, hard-enforcement approach itself that has caused the current impasse in the WTO, but rather it is the overreliance on this approach that we have to reconsider. In other words, the

soft-law, soft-enforcement approach should be used more vigorously to overcome the weakness of the hard-law, hard-enforcement approach. By way of a simple definition, the soft-law approach seeks to form non-binding flexible guidelines instead of legally binding rules, and the soft-enforcement approach promotes the resolution of disputes through an informal and amicable process rather than binding judicial procedures.

The rest of this commentary explains the limits of the hard-law, hard-enforcement approach and the potential of the soft-law, soft-enforcement approach through an example of digital trade.

Readers may recall that 76 WTO Members released a joint statement on 25 January 2019 that confirmed their intention to commence WTO negotiations on trade-related aspects of electronic commerce. A few days earlier, Prime Minister Abe had delivered a speech at the World Economic Forum in Davos, calling for “a new track for looking at data governance” to be launched at the 2019 G20 summit in Osaka. It is hoped that an agreement, either multilateral or plurilateral, on digital trade will be struck eventually in the WTO.

While it remains to be seen whether this ambition will come to fruition, the innovative nature of digital trade cannot help but raise doubts as to the validity of the hard-law, hard-enforcement approach. First, digital trade continues to develop at an unprecedented speed. It is likely that an agreement that is adopted after lengthy and painful negotiations will have already become obsolete at the time of adoption. Second, digital trade involves a number of regulatory issues that neither the WTO nor any other international institution has ever fully addressed. It may be premature to adopt binding international rules on issues such as consumer protection and privacy. Third, considering the dominant power of a few IT companies, conventional WTO rules covering only government measures may not be sufficiently effective. Finally, domestic regulations on digital trade are still under development even in developed countries, let alone in developing countries. Any global framework needs to be capable of addressing not only existing regulatory issues but also prospective ones, while respecting the regulatory autonomy of WTO Members.

These weaknesses of the hard-law, hard-enforcement approach can be overcome by the soft-law, soft-enforcement approach in the following ways. First, the WTO negotiations on digital trade should aim to establish a regulatory cooperation framework rather than adopt an agreement. More specifically, a new committee on digital trade, which is primarily mandated to adopt nonbinding flexible guidelines, should be established in accordance with Article IV:6 of the WTO Marrakesh Agreement. Unlike an agreement, guidelines could be readily updated at the initiative of the committee in accordance with the development of digital trade and relevant regulations. It would also be possible for guidelines, unlike an agreement, to cover not only government measures but also the conduct of private actors such as IT companies. Second, disputes arising out of guidelines should not be subject to binding WTO dispute settlement procedures. Given the lack of consensus on how to regulate digital trade, it would be counterproductive to refer yet-to-be-answered regulatory questions to WTO panels and the Appellate Body. Instead, any specific concerns related to the implementation of guidelines should be dealt with through flexible consultations between interested parties.

The WTO is facing a new global economic reality. Unless it moves on from its past success, it is doomed to irrelevance.

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