

GLOBAL AND REGIONAL ORDER

# WTO REFORM: OLD DEBATE NEW REALITIES

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The challenges faced by multi-lateralism include increased protectionism in the last few years, coupled with rapid changes to the global order – economic, socio-political and technological.



The system is also facing unresolved and emerging challenges brought about by increasing inequality among and within nations.



This paper provides a historic perspective to the debate on reforming the WTO, while noting that developing countries were the initial proponents of the reform agenda.



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## Executive Summary

The challenges faced by multilateralism and increased protectionism in the last few years, coupled with rapid changes to the global order – economic, socio-political and technological – have warranted adaptation, changes and in some cases overhaul of existing protocols and arrangements. The multilateral trading system has not been spared; the system is facing unresolved and emerging challenges brought about by increasing inequality among and within nations.

The World Trade Organization (WTO), as one of the global governance institutions, has been under pressure in recent years to reform. The debate about reform is not new but reflects the evolving realities of global trade. The trade rounds during the GATT era were accompanied by various needs to adapt to changes and realities. The GATT started with 23 members, while the WTO was established in 1995 with 128 members. As of 2019, the WTO had 164 member countries. The increasing membership and the evolution of the world trading system have made the process of negotiations and decision-making complicated and the scope of the issues has also widened beyond tariffs. It must also be noted that consensus is more and more difficult to achieve because a small number of major economic powers are unable to resolve their differences over old and new issues.

Bertelsmann Stiftung (2018) cited issues emanating from structural transformation driven by technological change as major forces affecting labour markets independently of trade. Moreover, the rapid expansion of the digital economy, reflected in shifts to e-commerce, the servicification of manufacturing and associated cross-border flows of data, services and digital products are changing demand for skills and the organisation of international production.

Various reports, including the Sutherland Report (2004), the Warwick Commission (2007) and Bertelsmann Stiftung (2018) have concluded that the WTO is not the panacea for all economic ills, but that it provides an opportunity for governments to define and operationalise rules that govern trade with and among countries.

This paper provides a historic perspective to the debate on reforming the WTO, while noting that developing countries were the initial proponents of the reform agenda. Chapter 1 focuses on issues of concern to developing countries and the calls for institutional reform in the early years of the WTO in

relation to its three key functions: administering trade agreements, facilitating trade negotiations and settling trade disputes. Lastly, it delves into lessons learned from over 20 years of reform debates. Chapter 2 attempts to address the current realities – new external and internal realities – that have brought the reform debate to the forefront at the WTO in recent years. This will include analysis of current proposals by members on the three key functions of the WTO and identify areas of divergence and convergence. Chapter 3 addresses the need for a holistic approach towards a more inclusive, fair and efficient WTO.

## 1

## TWENTY YEARS OF REFORM DEBATES: A ZERO-SUM GAME?

World Trade Organization (WTO) reform debates and proposals are not new. Developing countries were the first to criticise the institutional setting of the WTO in its early years in the late 1990s. Their criticism at the time principally targeted the exclusive nature of the Green Room<sup>1</sup> and called for reforms to level the playing field and enhance representation and transparency within the organisation. Their calls led to further use of coalitions as a means to reduce criticism of the Green Room and to achieve fairer representation (Birkbeck, 2009). It could also be argued that the Doha Development Agenda (DDA), launched in 2001, is »the biggest reform agenda agreed to by all WTO members« (Maonera, 2018) as it included several specific reform mandates in favour of developing countries.

The floundering of the Doha agenda led to the start of an 'experts' track' of reflection and the issuing of a series of expert-led WTO reform reports, namely: the Sutherland Report (2004), the Warwick Commission (2007) and Bertelsmann Stiftung (2018). The trade literature is also rich with reform proposals from former WTO officials and academics. A deadlock in the DDA negotiations since 2008, following a number of ministerial meetings that began in 2001 but which did not yield the desired outcomes, has brought again the focus on reform of the institution. At the time, critics argued that the rules, principles and practices of decision-making within the institution – carried over from the old GATT system – were simply ill-suited to the rapidly evolving challenges of our time. New approaches were called for to overcome the paralysis (ICTSD and the World Economic Forum, 2016). The global economy has changed drastically since the Doha negotiations began; trade has contributed to improving living standards in developing countries, reducing poverty levels and increasing household incomes. The changing global economy also brought new complexity and a divergence of interests within the negotiating pillars of the WTO where some of the developing-country members have become major trade partners and competitors of developed-country members while abiding by WTO rules and commitments. The Bertelsmann Stiftung report noted that the rapid increase in emerging developing countries' share of

global trade has given rise to increased scrutiny of their economic policies and their consistency with WTO rules. The matter has increased tensions between developed and developing members, resulting in the deadlock of the DDA negotiations, which are complex and politicised; hence the increasing interest and debate about reform of the WTO since 2008. While there is an increased need for reforms, it must also be recalled that the DDA itself includes key reform mandates, sought by developing members, that are still unresolved after 18 years of negotiations.

Therefore, there is benefit in reflecting on the issues of concern to developing countries from two vantage points – WTO institutional reform and the reform agenda. The rationale behind this perspective is that reform of the WTO depends on the varying interests of developing and developed members. Firstly, in the late 90s, the major issue of developing members from an institutional perspective related to decision-making processes within the WTO. The founding agreement of the WTO, the Marrakech Agreement Article IX, establishes that members will take decisions by consensus, as was the case with GATT 1947. However, one should bear in mind that the architects of the GATT had created a system to address the interests of major developed countries (Ismail, 2009). The various trade negotiating rounds that followed, including the Tokyo Round, and then the establishment of the WTO in 1995 saw increasing membership of developing countries, which posed an equality challenge for developed countries. The main players in the GATT had insisted on the 'principal supplier' method of negotiation that only included the main economic powers and excluded the developing countries from the main negotiating table. To ensure equality, developing members pursued reforms of the WTO to address the imbalances in the trading system.

### ISSUES OF CONCERN TO DEVELOPING COUNTRIES IN WTO INSTITUTIONAL REFORM

Developing-country members have called for certain reforms to the WTO since 1996 in an effort to address asymmetries, bring balance to WTO rules and create more policy space for themselves to pursue development and to use the same policy tools as developed countries to industrialise. The reform agenda put forth by developing countries was incorporated into the DDA in 2001. This included the strengthening of

<sup>1</sup> Informal name of the Director-General's conference room where meetings of a small number of selected members were convened during the GATT era. The practice of convening meetings where only a small subset of members is invited has continued under the WTO.

special and differential treatment (S&DT) provisions, implementation issues, addressing asymmetries in WTO agreements, particularly in agriculture, with a view to facilitating fair competition, addressing food security and alleviating rural poverty through trade. However, the WTO seems to be moving increasingly away from the principles entailed in the Marrakesh Agreement and the negotiations mandate of the DDA, which sought to place the needs and interests of developing countries at the heart of its work.<sup>2</sup>

### Decision-making process

Consensus is deeply ingrained in and strongly supported by the WTO membership. It is part of the WTO's culture. Countries – large and small – rely on the consensus rule to guarantee that they cannot be forced to accept obligations which they do not deem to be in their interest. Consensus ensures that all WTO members have an equal opportunity to make their points and that they can withhold support until they see their interests and concerns have been accommodated (Bertelsmann Stiftung, 2018). The Bertelsmann Stiftung report argued that this principle has effectively been the common denominator in the failure of the Doha round, the WTO's inability to launch discussions on new policy areas and the recent impasse in appointments to the Appellate Body. In fact, the decision-making process of the WTO has been debated for years. Steger (2009) argued that more emphasis should be placed on the processes by which decisions are made in the WTO. Formal structures should be developed within the WTO at the front end of the decision -and rule-making system to allow for proposals to be presented to WTO councils and committees for approval under the existing provisions of the WTO Agreement. The problem lies in the front end (input part) of the WTO process, rather than in the back end or voting rules themselves. It is not the approval of proposals at the end of the process that seems to be the problem, but rather the lack of formal mechanisms and procedures at the beginning of and during the process that hampers decision-making. The problems with the rule-making and decision-making apparatus in the WTO may lie in its internal governance structures as well as in the attitudes of members. In order to fulfil its mandate, the WTO must have the necessary structures to enable it to function effectively, efficiently and accountably.

The Marrakesh Agreement calls for fairness, transparency and participation in the negotiations as key to the governance of the multilateral trading system. Alqadhafi (2007) argued that the WTO needs an effective democratic governance structure to address political »fairness«, where all WTO members are equally represented and influential within the organisation. However, the practice of consensus and fairness has not been followed fully as prescribed in the Marrakech Agreement in that some members, especially developing and least-developed countries, could be viewed as not having equal representation. Alqadhafi supported his argument by identifying three main ways that developing countries are disadvantaged in the governance structure and de-

cision-making process of the WTO, namely participation, prioritisation and resolution. He argued that a core group of developed countries control the issues under discussion in the WTO and make key decisions before developing countries have entered the process. This is exemplified by the Green Room process. The Green Room meeting is an informal arrangement; the deliberations have a quasi-official character, which is designed to provide a credible imprimatur for purposes of presenting the results to the general WTO membership for approval. The meetings are often led by the Director-General, who determines who to invite, but major developed (e.g., the United States and the European Union) and developing countries (e.g. Brazil, China, India) are always present. Jones (2004) also argued that Green Room meetings are designed to facilitate discussions among the selected group and lead to a convergence of views and eventually to drafts of critical negotiating issues that will form the basis for consensus among all WTO members. This led to a push by developing countries for reform of the WTO. Concerned about the exclusive nature of the Green Room, they called for formalisation of the negotiating process to enhance representation and transparency. They felt that only a few big countries were setting the agenda and directing the outcomes or decisions, disadvantaging developing countries.

The Doha round had marked a positive, significant shift, with developing countries spearheading the agenda setting and placing development »at the centre« of the issues. When progress was not achieved and new issues were tabled primarily by developed countries, developing countries rallied behind the core principle of development and adopted a defensive position on other issues, which has contributed to the collapse of the DDA negotiations. The experience of Seattle and Cancun illustrated the political power that developing countries had managed to accrue. In Cancun, leading developing countries refused to negotiate the Singapore issues<sup>3</sup> in the absence of balanced concessions from the developed countries, especially on the issue of agricultural trade (Dube, 2012). Unfortunately, not all the issues of interest to developing countries have been attained until now.

The failure of Seattle and Cancun led to the Warwick Commission (2007) that called for greater flexibility in reaching outcomes among members, introducing the concept of 'variable geometry' where some members may choose to take on more or fewer obligations – obligations that may or may not be enforceable through the dispute settlement mechanism.

The Commission urged WTO members to seriously consider »critical mass as part of the decision-making procedures for delineating the WTO agenda« (Ismail, 2009). The critical mass approach was described by Jackson (2000) as »a practice where countries refrain from blocking consensus when a critical mass of countries supports a proposed change. This

<sup>2</sup> See WTO WT/GC/W/778 of 11 July 2019

<sup>3</sup> The four issues introduced to the WTO agenda at the December 1996 Ministerial Conference in Singapore were trade and investment, trade and competition policy, transparency in government procurement and trade facilitation.

critical mass of countries could be expressed as an overwhelming majority of countries and an overwhelming amount of the trade weight in the world, such as 90 percent of both of these factors.« Critical mass is not a decision-making procedure, but rather a different negotiating configuration under which decisions can be taken by consensus or vote. The recommendation will, however, not see the light of day as it would have to be adopted by consensus and developing countries are firm in retaining consensus for decision-making. Their concern is not only the need to preserve the consensus-based approach in negotiations but also to sustain the multilateral approach to negotiations as opposed to seeking plurilateral agreements.

The inclusiveness of the principle of consensus is in itself a double-edged sword. Many developing countries favour retaining the principle of consensus in decision-making even though it reduces the efficiency of the functioning of the WTO as a governance institution, because it protects the most vulnerable members. The Sutherland Report recommended that any member considering blocking a measure should declare in writing, with reasons included, that the matter is one of vital interest to the member. However, if the current system of consensus is dropped in favour of voting, it is likely that all decisions would favour developing countries as they form the majority of WTO members and, without the support of the superpowers, the multilateral trading system would be rendered redundant (Dube, 2012). In exploring alternate methods of negotiating and, ultimately, decision-making, Hoekman (2011) argued that shifting to a system of weighted voting or to a critical mass approach would generally lead to the creation of an executive board, but not necessarily.

Another suggestion by the Sutherland Report (2004) was to bolster the role of the Secretariat, permitting it to do more in terms of providing intellectual leadership and undertaking policy analysis. Following on from this idea, Bertelsmann Stiftung (2018) argued that there is a need for members to reconsider the role played by the Secretariat. Currently, the member-driven practice in the functioning of the WTO limits the ability of the Secretariat to take initiatives to support the work of WTO bodies. The Secretariat only provides background notes and analytical support, at the request of members, during policy dialogues and deliberations. The Sutherland Report and the Future of Trade: The Challenges of Convergence panel report further suggest that the Secretariat has a role in rules' reform, not just in an information-providing role but by presenting its own proposals. The reports also reaffirmed that decision-making power would still remain with the membership but that augmenting the role of the Secretariat could be a way of facilitating consensus. The Secretariat remains a vital lubricant of this member-driven organisation, providing a range of services essential to the smooth and effective running of the institution.<sup>4</sup> Granting the Secretariat flexibility to provide analytical support could

also enhance the participation of smaller delegations in the various committees and bolster negotiations with factual and comprehensive perspectives of the issues being negotiated. In other words, a strong, efficient, neutral and well-funded Secretariat could improve efficiency and propose outcomes. The Secretariat, while providing support, can never replace members. Decision-making, either in the regular committees or the negotiating committees, continues to be the responsibility of members.

### Development dimension

The debate about development in the WTO, as argued in Ismail (2009), is that development is often assumed to be about increasing the effectiveness of special and differential treatment for developing countries. Development is thus regarded as an afterthought, as a 'nice to do' or, at worst, an 'optional extra' rather than a critical need for developing countries to improve their living standards through trade. This perception by developed-country members of the development dimension is misconceived. Developing countries have fundamental interests in the WTO that are at the core of the trading system and its functioning and contributing to sustainable development. Bertelsmann Stiftung (2018) argued that the insistence by many developing countries that provisions in WTO agreements aimed at promoting economic development be implemented is the underlying factor behind difficulties in the WTO negotiations.

The engagement of many developing nations in the WTO has been premised on S&DT, which entails less than full reciprocity in trade negotiations and acceptance that developing countries should be less constrained in the use of trade policies than developed countries. S&DT is only one side of the development dimension – aspects which deal with the more defensive interests of developing countries. On the offensive side, there is significant scope for improving disciplines (for example, removing agriculture trade distortions or harmful fisheries subsidies) in a way that contributes to development. S&DT only takes care of the need for fewer constraints on domestic policies in developing countries.

Keck and Low (2004) further noted that the principle of S&DT is to address the difficulty some developing countries encounter as they seek to implement their obligations, bearing in mind the costs, administrative aspects and human capital requirements of implementation. The Doha Declaration of 2001, para 44 called for review of S&DT provisions »with a view to strengthen them and making them more precise, effective and operational«, S&DT was seen as a means for rebalancing the gains from the Uruguay Round rather than an essential tool for addressing systemic biases of the trading system. While some implementation issues are being attended to through technical assistance and capacity building, they do not reach too far towards the core demand for development. Developing countries are still seeking modifications that are more supportive of development and/or less restric-

<sup>4</sup> See Report of the Panel on Defining the Future of Trade convened by WTO Director-General Pascal Lamy: The Future of Trade: The Challenges of Convergence



tive and allow policy space and flexibilities.<sup>5</sup> Keck and Low (2004) argued further that a generalised insistence on the political right to enjoy S&DT tends to assume that the best contribution the WTO can make to development is to ensure developing countries assume minimum obligations under the system. However, developing countries have not focused on assuming minimal obligations but on ensuring that the system enables them to achieve higher living standards and increase their competitiveness.

Another challenge of a generalised and excessively politicised approach to S&DT is linking the debate to »graduation« of developing countries. A sensitive issue that the GATT and WTO have never been able to agree on is the definition of developing countries. These challenges of political rights and graduation are politicised, making it difficult to see how countries would be able to engage constructively on the development dimension in the WTO. Thus, treating S&DT primarily as a political right, rather than as a rule-specific instrument to support development in particular policy areas, is a recipe for inconclusive discussion and mutual frustration. Imboden (2017) argued that the challenge of using trade rules for economic development presents opposing views from developed and developing countries. The absence of shared perceptions of what represents balance has compromised the ability of members to find common ground and contributed to a sense of institutional stasis (Low, Mamdouh and Rogerson, 2018). This source of disagreement has inevitably spilled over into multiple aspects of the WTO's work and slowed progress on agenda setting and negotiations at the expense of development. The challenge has become more acute as WTO membership has grown over the years in number and diversity, resulting in a more complex range of priorities among members. The evolving competitive global economy in recent years has increased the need for strengthening S&DT that will support development efforts of developing countries to improve their living standards, benefit from opportunities of trade and improve their competitiveness. On the other hand, the positive benefits gained primarily by emerging developing-country members have shifted the attitude of developed countries in granting flexibilities and policy space to those countries that have become major trading partners, hence the increasing demand by developed countries for graduation.

The complexity, sensitivity and politicisation of graduation cannot be usefully discussed in a binary, aggregated fashion whereby countries calling themselves developing are deemed at one stroke to have graduated to developed country status. The process should be gradual, provision-specific and driven by detailed analysis of development needs.<sup>6</sup>

## REFORMING KEY FUNCTIONS OF THE WTO: ADMINISTRATING TRADE AGREEMENTS, FACILITATING NEGOTIATIONS AND SETTLING TRADE DISPUTES

The effective functioning of the WTO to some extent lies in the eye of the beholder. Various experts, members of academia and former WTO employees have presented mixed opinions on the future functioning of the WTO, with the divergence going to the organisation's core mandate. Those who support the notion that the WTO, like the GATT, should only adhere to the mandate of trade liberalisation argue there is no need for reform. Those supporting an increased mandate beyond trade liberalisation, and who view the WTO as an international organisation overseeing global economic regulation and governance, strongly argue for reform. The two views therefore require balancing outstanding implementation issues from the Uruguay Round and institutional reforms.

### Administering trade agreements

In the administration of trade agreements, the WTO acts as an overseer through discussions in its regular committees, transparency and notification mechanisms and the Trade Policy Review Mechanism (TPRM). Essentially, the conclusion and implementation of trade agreements should reduce policy distortions in world markets that negatively affect developing countries, discipline the use of trade-distorting subsidies and remove barriers to trade in environmental products. They should support integration of small-scale producers and enterprises into value chains through global trade and investment facilitation in an increasingly digital economy (Bertelsmann Stiftung, 2018). These bring to mind the outstanding issues of interest to developing countries, the »implementation-related issues« or »implementation issues« which remain the issues and concerns raised by developing countries with respect to the implementation of the GATT (1947) and/or the WTO Agreement and its annexed trade agreements and relevant decisions and understandings. The DDA mandate 2001<sup>7</sup> reaffirmed the implementation issues which had been on the GATT and WTO agendas since the mid-1990s. Developing countries demanded that developed countries comply with their commitments to create a fair and equitable economic playing field in which developing countries would be able to enjoy the benefits of economic growth and development that were sustainable and consistent with their development priorities and policies.<sup>8</sup> Africa has championed calls for reforming global rules to create a level playing field in international trade. Its positioning has been a complex puzzle seeking to attain far-reaching concessions from lucrative markets while maintaining its own right to policy space.<sup>9</sup> Nevertheless, developing countries continue to face these challenges (as raised under the Implementation Issues) in order to fully benefit from trade.

<sup>5</sup> See Keck and Low 2004. Special and Differential Treatment in the WTO: Why, When and How?

<sup>6</sup> Ibid

<sup>7</sup> See WTO Doc. Ref. WT/MIN(01)/DEC/1, 20 November 2001.

<sup>8</sup> See South Centre 2002. SC/TADP/AN/IRI/1

<sup>9</sup> See CUTS 2018 Reforming the WTO: Suggestions for an African Agenda

On implementation issues, Zhang (2003) highlighted three concerns for developing countries: (1) the ability to implement the large number of agreements before the transition periods expire. This requires the necessary legislative and administrative capacity, sound legal and institutional infrastructure, financial resources and expertise; (2) encouraging developed members to deliver on promised commitments to developing countries under the »best endeavour« obligations, specifically S&DT provisions in the various WTO agreements. He asserted that developed members have shown less consideration of developing-country interests than anticipated and developing countries require assistance to improve their capacity; (3) compatibility of WTO agreements with national development priorities of developing countries. These concerns have not been addressed and remain priorities for developing members for improving living standards and contributing to the attainment of the Sustainable Development Goals (SDGs).

### Facilitating trade negotiations

The negotiating mandate of the WTO remains governed by reaching decisions through consensus as contained in the Marrakech Agreement establishing the WTO, Article IX:1. During the GATT era and currently under the WTO, a provision exists for using votes where consensus cannot be reached. But the provision has not been used whatever the configuration for negotiations, be it the biennial ministerial conference, the General Council, specific negotiating bodies, etc. There is no dispute that reaching decisions through consensus is complex, but some important decisions have been reached, such as on the Trade Facilitation Agreement (TFA), etc.

The second principle driving negotiations is the member-driven approach for setting the agenda and pace of negotiations where members submit proposals that have to be adopted by consensus. The lack of success in reaching agreement in the different negotiating groups resulted in the impasse in the WTO, most significantly the deadlock of the DDA under the single-undertaking principle. Vickers (2013) argued that the consensus-based bargaining underpinned by the single-undertaking led to an overly politicised and inefficient process.

The Doha impasse has resulted in some members opting to explore alternative avenues to negotiate issues of interest that respond to evolving needs and align with rapid global developments. The difficulty in making progress in negotiating new agreements in the WTO has increased incentives for WTO members to negotiate preferential trade agreements (RTAs) preferential trade agreements among themselves<sup>10</sup>. The system allows for such agreements and provides a mechanism to integrate them into the WTO rule book. The number of RTAs has been rising steadily since the early 2000s with more than 400 RTAs in force currently, some of which span more than one region of the world.<sup>11</sup> The rise of RTA

negotiations, while they may overcome some inefficiencies of the multilateral negotiations, has also led to the creation of a two-speed system, thus compromising the principle of inclusiveness. Moreover, the RTAs are discriminatory by design and in effect, generating potential trade diversion as well as steering policy attention away from matters that call for multilateral cooperation. The Sutherland Report also expressed concern about a »multi-class membership structure« that takes the multilateral system backward to the old 'principal supplier' principle of the GATT era, which has the effect of locking out developing countries and marginalising them from the negotiations.

### Settling disputes

The compliance with WTO rules is supported by the Dispute Settlement Body that administers the Dispute Settlement Understanding (DSU). The DSU governs the functions of WTO panels, the Appellate Body (AB) and the Dispute Settlement Body (DSB), which together comprise the WTO dispute settlement system. Reform of the DSU has been on the agenda since the establishment of the WTO in 1995, with an initial deadline to complete the review by 1998. But that deadline was not met and members agreed by consensus to extend it until July 1999, which was also not met. In 2001, as part of the Doha Ministerial Conference, members agreed to enter into negotiations on improvements and clarifications of the DSU, setting a deadline of not later than May 2003,<sup>12</sup> but again the deadline was not adhered to. At the Hong Kong Ministerial Conference in 2005, members directed the DSB Special Session (where these negotiations are taking place) to continue to work towards a rapid conclusion of the negotiations without specifying a deadline.<sup>13</sup>

A former Chair of the DSB Special Session, Ambassador Saborio Soto, reflected that members are conducting the negotiations on the basis of certain principles, such as: any improvements and clarifications should benefit the entire membership; focus should be on systemic improvements and clarifications that would increase the effectiveness of the dispute settlement system, leading to its predictability and security, and; that negotiations should achieve overall balance and do no harm where the system currently functions well.<sup>14</sup>

The negotiations for improving and clarifying the DSU have been grouped into 12 thematic categories comprising: third party rights; panel composition; remand; mutually agreed solutions; strictly confidential information; sequencing; post-retaliation; transparency and amicus curiae briefs; timeframes; flexibility and member control; developing country interests, including special and differential treatment, and; effective compliance. Under each of these themes are a plethora of issues that form the subject of the negotiations.

<sup>12</sup> See paragraph 30 Doha Ministerial Declaration WT/MIN(01)/DEC/1

<sup>13</sup> See paragraph 34 Hong Kong Ministerial Declaration WT/MIN(05)/Dec

<sup>14</sup> Reflected in, Special Session of the Dispute Settlement Body: Report by the Chair, Ambassador Ronald Saborio Soto; TN/DS/27, dated 6 August 2015

<sup>10</sup> These are known as regional trade agreements (RTAs) in WTO jargon and can include, bilateral, sub-regional, regional, and inter-regional trade agreements among two or more countries.

<sup>11</sup> Ibid

The unending negotiations and number of proposals on the reform of the DSU reflect the importance of the matter to members as well as the difficulty of the issues.

## **LESSONS LEARNED FROM OVER 20 YEARS OF REFORM DEBATES**

Reform of the WTO was and continues to be challenging to implement. Developing countries, which have pursued reform since the beginning of the WTO, continue to seek it to balance the interests and benefits of trade between developing and developed countries. Therefore, there is a need for balancing the interests of members by addressing institutional reforms and disciplines as envisaged under the Doha mandate, such as agriculture subsidies, S&DT provisions and outstanding implementation issues. The WTO has to adapt to changing global developments; the world economy has evolved, as have domestic policies in the majority of WTO members. There is a corresponding need to re-balance the rules to ensure that prevailing policies are subject to multilaterally defined disciplines that reduce the scope for trade and competition distortions. Such re-balancing should extend to past commitments, including instances where countries acceding to the WTO were requested to take on stronger disciplines than those applying to incumbent members.

The floundering of the Doha Round and its failure to allow trade to support development and to level the playing field for developing countries have led to a time freeze, where new sources of policy tension are unable to be addressed to cope with changes that the global economy has witnessed in the past 20 years. They have led to the delay of key reforms that would have allowed the WTO to respond better to the emerging challenges. Continuing demands by developing countries for the WTO to reform have included the pursuit of strengthening S&DT provisions to support their levels of development. Ensuring that »best-endeavour« development proposals in WTO agreements are strengthened would support developing members to benefit from opportunities in developed countries and increase their competitiveness. The focus of reform proposals, therefore, ought not to be limited to helping sustain the WTO per se, but rather on whether reforms help foster progress toward a WTO system that better delivers on the goals set out in its preamble. If sustainable development and improving the plight of developing countries should be, and indeed are, at the heart of political debates about the global trading regime, the discussion of institutional reform and WTO governance should also be motivated by, and judged against, its ability to address these challenges. Birkbeck (2009) suggested that proposals for WTO reform needed to address two critical political priorities: (1) how to bolster the relative power of developing countries in the system, and (2) how to ensure the system better responds to sustainable development priorities.

## 2

## NEW PROPOSALS ... NEW REALITIES?

The debate on WTO reform has been significantly intensifying since 2015, this time with a clearly broader range of members involved in presenting and discussing proposals, especially developed countries. Such an expression by members of an urgent need to reform the WTO reflects the rise of new international dynamics affecting the organisation and leading to the rise of a series of internal pressures, like calls for new pathways for decisions; the e-commerce Joint Statement is an example as is the deadlock in the appointment of Appellate Body members (Vickers, Soobramanian and Enos-Edu, 2019). Looking at the positive side, a number of proposals clearly addressing the amelioration of the three key functions of the WTO have now been put forward for discussion and negotiation among members.

### NEW EXTERNAL AND INTERNAL REALITIES

#### New international power dynamics

Steger (2009) noted the challenges faced by the WTO emanate from the rapid rise in the economic and political power of large emerging economies, such as China, India and Brazil, impacting power dynamics among members and thus the functioning the WTO. The deadlock in the Doha Round, especially since 2008, gave a clear sign that all is not well with the decision-making and rule-making machinery of the WTO. Another symptom is the proliferation of regional trade agreements, partly in response to the impasse in the multilateral negotiations, which divert precious government resources and attention from the WTO toward regional negotiations.

Bertelsmann Stiftung (2018) also stated that developing and emerging economies have come to account for almost half of the value of global merchandise trade and global GDP. Many proposals for WTO reform have focused on the consensus norm – based on a diagnosis that consensus is a source of inefficiency and deadlock, impeding a majority from moving forward on an issue and giving excessive scope for a small minority to block a decision (Steger, 2009).

As a result of the deadlock in the DDA negotiations, not much progress was seen at the WTO until the ministerial conferences in Bali and Nairobi in 2013 and 2015, respectively. The limited progress led to increased pressure, especially from developed-country members, that WTO rules needed

updating to gain new relevance and adapt to rapidly changing economic, social and political developments. This resulted in a number of WTO members launching talks at the Ministerial Conference in Buenos Aires (December 2017) on four policy areas, three of which are outside the DDA: e-commerce; obstacles to trade confronting micro, small and medium-sized enterprises (MSMEs); investment facilitation, and; domestic regulation of services (which has been and remains part of the GATS and the DDA, but a new plurilateral initiative was launched). These areas of focus and plurilateral initiatives provide an important signal that many countries – both developed and developing – are willing to pursue cooperation on trade policy matters in the context of the WTO but in a different configuration. It was also noteworthy that several developing countries played leadership roles in getting these initiatives launched. For example, China and Brazil are among emerging developing countries pursuing interests in investment facilitation and e-commerce.

#### Rising protectionism

Political developments in the United States and Europe, and the rise of China as a peer competitor to the transatlantic economies, have led many to question the fundamental assumptions and operations supporting the WTO. Chinese mercantilism, the Trump Administration's use of unilateral tariff measures and the inability of WTO members to reach consensus on expanding WTO disciplines to important new sectors and forms of commerce in the modern economy reinforce the critique of the WTO (Duesterberg, 2019). The increasing tensions have also given rise to 'retaliatory', unilaterally determined trade policies that constitute a serious threat to the rules-based trade regime of the WTO (Bertelsmann Stiftung, 2018). Some of the challenges of the WTO relate to a wider 'crisis of multilateralism', but others can be understood as the result of a confluence of factors rooted in the legal commitments that WTO members, and those that acceded afterwards, undertook in 1995. While WTO rules, such as those on border trade measures, have helped developing countries by providing certainty to trade, developing members found themselves constrained more often than not from pursuing their development and industrialization objectives due to other rules which have been overly intrusive or imbalanced.<sup>15</sup>

<sup>15</sup> See. WTO WT/GC/W/778 of 11 July 2019

## RECENT COUNTRY-LED PROPOSALS

### Administrating trade agreements

In 2019, a group of countries in the WTO presented a proposal that the General Council adopt a set of »procedures to enhance transparency and strengthen notification requirements under WTO agreements«<sup>16</sup> that was accompanied by 'administrative measures' should members fail to comply. The topic is not new and has been raised by members before; for example, a US proposal<sup>17</sup> in the lead up to the Ministerial Conference in 2017 that did not gain consensus. Transparency is a key pillar of the WTO. China, in another proposal,<sup>18</sup> stated that it is imperative to enhance the transparency of members' trade policies and ensure predictability. Greater transparency will help create an open, stable, predictable, equitable and transparent international trading environment, and raise members' confidence in the multilateral trading system. A Canadian proposal<sup>19</sup> further highlighted the need to begin with a comprehensive review of notification requirements to ensure they are not unnecessarily complex and burdensome, a concern that has been raised over a number of years by developing countries that lack the capacity to abide by the transparency requirements.

There is general agreement among members on the principle of transparency, but there is divergence on meeting the requirements and adhering to the stipulated timeframes; it has been demonstrated that non-compliance is a fact with all the members. Notifications have been a part of the multilateral trading system since the GATT, but the failure of members to comply fully with these requirements remains challenging. It has to be noted though that, while most developed countries appear to file most of the required notifications most of the time, and the same can be said for some of the developing countries, the record is less encouraging among developing countries in general and especially among the poorer and smaller ones (VanGrasstek, 2013). Transparency is not an end in itself and should help ensure compliance. Transparency is more important for large players and commitments may reflect this reality. The new dimension of punitive measures for non-compliance to transparency and notification requirements is viewed by developing countries as overreaching, especially when some members are already not meeting the current requirements, particularly the deadlines for submitting notifications. As such, adopting the new proposal (as mentioned at the start of this section) places them at a disadvantage due to lack of capacity, whether institutional or in terms of human resources. Therefore, the discussion should also adopt an S&DT approach to enable those with limited capacity to attain the higher levels of development needed to meet the requirements, or to have lower obligations, as long as they account for a minimal share of world trade.

<sup>16</sup> Argentina, Australia, Canada, Costa Rica, the European Union, Japan, New Zealand, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States, see. WTO JOB/GC/204/Rev.1 of 1 April 2019

<sup>17</sup> See. WTO JOB/GC/148; JOB/CTG/10 of 30 October 2017

<sup>18</sup> See. WTO WT/GC/W/773 of 13 May 2019

<sup>19</sup> See. WTO JOB/GC/201 of 24 September 2018

### Special and differential treatment/development

In the preamble to the Marrakesh Agreement establishing the WTO, the parties recognised that »their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development....«. To adhere to this principle developing-country members have and continue to pursue the implementation of the S&DT provisions to make them meaningful in line with paragraph 44 of the Doha Ministerial Declaration, which mandates the review of all S&DT provisions with a view to strengthening them and making them more precise, effective and operational.

The US proposal<sup>20</sup> touches on two interrelated issues – differentiation between developing countries and the concept of self-declaration by developing countries. The proposal argues that self-declaration and its first-order consequence — an inability to differentiate among members — puts the WTO on a path to failed negotiations. The proposal stipulates that it is also a path to institutional irrelevance whereby the WTO remains anchored to the past and unable to negotiate disciplines to address the challenges of today or tomorrow, while other international institutions move forward. It proposes setting a criterion for graduating some developing countries and LDCs out of benefitting from S&DT provisions. This approach of selecting some members from the developing countries to benefit from S&DT, while others are excluded, has been argued about before and led to deadlock in the WTO negotiations.

China, India, South Africa and the Bolivarian Republic of Venezuela<sup>21</sup> responded arguing that S&DT is an integral part of the multilateral trading system and that self-declaration of developing-country member status – a fundamental WTO rule – has proven to be the most appropriate classification approach in the WTO. Despite the impressive economic and social progress made by many developing-country members over the past decades, the development divide persists and has actually widened. UNCTAD<sup>22</sup> has argued that structural divide and 'premature de-industrialisation' continue to be persistent challenges to developing countries. Moreover, development goes beyond trade and includes multiple economic, social and environmental challenges and their interaction. These factors would have to be considered should members agree by consensus to engage in any discussion that would lead to differentiation between developing countries. The fact of the matter is that developing countries are at different levels of development and it would only be appropriate for countries to self-declare as a developed country

<sup>20</sup> See WT/GC/W/757/Rev.1

<sup>21</sup> See WT/GC/W/765

<sup>22</sup> See UNCTAD Research paper No. 33

when the living standards of their citizens have been raised, according to agreed-upon development indicators.

An EU concept paper<sup>23</sup> reaffirmed the centrality of development within the WTO. But it also highlights the challenge regarding some developing countries that have seen rapid economic growth and now display significant economic differences with other members of the developing-country group. In some cases, the paper noted, they even present a level of development which surpasses that of certain members that are designated within the WTO as developed. The concept paper presented three options:

1. Graduation: Members should be actively encouraged to »graduate« and opt-out of S&DT, whether across the board or agreement by agreement.
2. Special and differential treatment in future agreements: particularly flexible treatment of LDCs, while flexibilities available to other members should move away from open-ended block exemptions towards a needs-driven and evidence-based approach that would ensure that S&DT would be as targeted as possible.
3. Additional S&DT in existing agreements: Existing S&DT provisions in current agreements should not be contested, but when members request additional S&DT this should be done only on the basis of case-by-case analysis. Depending on the outcome of this analysis, various approaches could be used to consider additional flexibilities.

While there are divergences on S&DT positions, most WTO members agree differences in economic capacity and levels of development should be recognised in the design and application of trade policy commitments. But some WTO members also argue that greater differentiation is needed between developing countries – like the US proposal defining the criteria for differentiation, while the EU proposal advocates flexibilities be granted to those members who actually need them. Unfortunately, the net effect for those countries meeting the new criteria or opting out would be the loss of their right to S&DT, which is contrary to provisions of WTO agreements. Part IV of the GATT (articles XXXVI – XXXVIII) embeds S&DT as a fundamental *acquis* for developing countries; the loss of the right is also contrary to GATS Article IV and all the 148 S&DT provisions in WTO agreements (Kwa and Lunenburg, 2019). S&DT has been and continues to be a vital component in WTO negotiations, including the current fisheries subsidies negotiations that ministers have mandated members to attain as an outcome by the end of 2019.

A group of members<sup>24</sup> has also proposed that S&DT should be adapted to the particular situations faced by developing members in different areas of economic activity and appropriately adjusted as those situations evolve. The underlying challenge to the effectiveness of the trading system, which predates the present crisis, is the relentless struggle to agree

upon and maintain an appropriate balance of rights and obligations among members. The absence of shared perceptions of what represents balance has compromised the ability of members to find common ground and contributed to a sense of institutional stasis. This source of disagreement has inevitably spilled over into multiple aspects of the WTO's work and slowed progress on agenda setting and negotiations. The challenge has become more acute as GATT/WTO membership has grown over the years in number and diversity, resulting in a more complex range of priorities among members.<sup>25</sup>

Therefore, as noted by Lamy (2013), the challenge is to »find a new balance between reciprocity and flexibility in a multi-dimensional membership [to be able] to deliver on multilateral trade opening«. Bertelsmann Stiftung (2018) also noted that developing countries have a strong case for insisting on stronger multilateral disciplines on trade policies. But this should be complemented by a willingness to re-think S&DT rather than continuing to fight old battles. It would be more productive to do more to identify where specific WTO rules impede the implementation of policies that would enhance their economic welfare and engage in a process to identify good practices and policies to address market failures and provide assistance. A similar recommendation in the EU concept paper is that S&DT should be complemented by provision of assistance where needed. This approach has worked with the Trade Facilitation Agreement. In it, S&DT provisions allow developing countries and LDCs to categorise and determine when they will implement individual provisions of the agreement and to identify provisions that they will only be able to implement on receipt of technical assistance and support for capacity building. But it is not a panacea for resolving the question of improving the S&DT provisions in WTO agreements in line with paragraph 44 of the Doha Ministerial Declaration.

## Negotiation function

The continued stalemate has resulted in the lack of a big package as envisaged under the original Doha mandate where members would have been able to balance concessions and benefits across the various agreements. This has narrowed the negotiating space on all sides, leading to no substantive progress. While decision-making by consensus has been cited as one of the inefficiencies that have resulted in this lack of progress, the dynamics of global interests have also changed, especially with the rise of the South. Some of the developing countries, while abiding by their obligations and commitments, have become large players, but some of the old players have reduced their levels of ambition and engagement in the WTO. As Hoekman (2011) concluded, trade agreements are self-enforcing treaties: if the large players do not see it in their interest to deal, no amount of fiddling with alternative institutional arrangements will make a difference. Any outcome, even if endorsed by a majority, will not be implemented if one or more large countries find it unaccept-

<sup>23</sup> See EU concept paper on WTO reform - [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)

<sup>24</sup> Norway; Canada; Hong Kong, China; Iceland; Mexico; New Zealand; Singapore and Switzerland, see WT/GC/W/770/Rev.3

<sup>25</sup> See Low, Mamdouh and Rogerson Balancing rights and obligations in the WTO – A Shared Responsibility

able. The current geopolitical tensions and associated national politics, particularly between the United States and China, may preclude a consensus on launching the needed dialogue and eventual negotiations. It must be recognised that geopolitical considerations have been a factor impeding substantive discussions in the WTO (Bertelsmann Stiftung, 2018).

With regard to negotiations in the DSU Special Session, they are still continuing based on the 2001 mandate. However, developments since 2016 relating to the blocking by the United States of appointments to the Appellate Body have resulted in reform proposals being presented partly to avoid paralysing the dispute settlement system of the WTO at the end of 2019. Maonara (2018) further stated that these proposals to reform and amend the DSU are not based on any specific mandate but are simply based on the fact that the WTO is a forum for negotiations and any member can propose amendments to any of the WTO agreements.

The EU concept paper argued that the blockage of the WTO's negotiating function confirms the need for flexibility in terms of negotiating approaches. It proposed flexible multilateralism where members interested in pursuing a certain issue which is not yet ready for a full multilateral consensus should be able to advance the issue and reach an agreement, if its benefits are made available to all other members on a most favoured nation (MFN) basis. The proposal is not new as plurilateral negotiations are already allowed within the WTO. However, a majority of developing countries hold a strong preference for multilateral negotiations. Plurilateral agreements are limited to those members that have voluntarily signed up to them, and the rights and obligations are only binding on these members and not universal as in a multilateral agreement.

There is, however, general agreement among experts, academia and members that efforts to change the governing mechanism of WTO would not be successful. Therefore, Duesterberg (2019) contended that there are several fundamental reasons for urgency about finding common ground on updating and improving the scope and functioning of the WTO, noting that the organisation has simply not kept up with the pace of economic change in the 21st century. To overcome the impasse in the negotiating pillar of the WTO members have turned to bilateral agreements, for example, the EU-Japan agreement and mega-regional agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Moreover, some 76 members commenced plurilateral negotiations on e-commerce on the side lines of the World Economic Forum at Davos in January 2019. While these have been, or could be successful, they do not fully provide members with the full benefits of a multilateral agreement. Therefore, potential negotiating approaches recommended by some experts, as mentioned in the previous chapter, must be considered to help the debate gradually build towards a multilateral agreement that helps keep the WTO relevant. These suggested approaches include:

### Critical mass approach for trade liberalisation

A critical mass approach as advocated by the Warwick Commission could be effective and efficient in reaching agreement on sectoral market access on trade in goods and services. But it may not be adequate in rule-making negotiations as it would create a situation where rules and obligations negotiated and agreed among a limited number of WTO members would be applied only to these members and the rest would be »free riders«<sup>26</sup>. The critical mass approach extends all the benefits on an MFN basis, including to non-participants, but the obligations only apply to the participants, as in the Information Technology Agreement (ITA). This approach may provide a temporary solution in areas of common interest to many but would not be fully inclusive as those members who are not parties would not be governed by such agreements. Moreover, those members who were not initially parties to any agreement could find difficulty in acceding to it due to their level of development and require flexibilities to upgrade their trade rules to meet the new rules and obligations.

### Open plurilateral negotiations for rule making

The opting for plurilateral negotiations by some members not only undermines multilateralism, it also does not address sensitive issues which had been included in the Doha Round and the obligations only extend to members of the negotiations. Adopting an open plurilateral agreement (OPAs) approach, which would be open to all WTO members during the negotiations and after entry into force, could present an inclusive option that reflects and represents different interests and diverse priorities, which in time could gain consensus and be consolidated into multilateral agreements. An example could be the current negotiations on e-commerce, where non-signatories to the initiative can participate in the negotiations to ensure their interests and challenges are noted should they want to accede to the agreement at a later stage.

### Dispute settlement – Appellate Body stalemate

The dispute settlement system has played and continues to play a pivotal role within the WTO. A key objective of many countries in acceding to the WTO (and accepting a significant expansion in the coverage of multilateral disciplines on trade policies, including services and requirements to protect intellectual property) was to reduce the prospects of confronting 'aggressive US unilateralism'<sup>27</sup>. The Canadian discussion paper on WTO reform indicated that a number of significant challenges need to be addressed to safeguard and strengthen the WTO dispute settlement system.<sup>28</sup>

<sup>26</sup> See G20 Policy Brief Reinvigorating the WTO as a negotiating forum. <https://t20japan.org/wp-content/uploads/2019/03/t20-japan-tf8-2-reinvigorating-wto-negotiating-forum.pdf>

<sup>27</sup> Ibid

<sup>28</sup> See WTO JOB/GC/201 – communication from Canada

The recent proposals relating to the reform of the dispute settlement system have emerged since the US adopted its position in 2016 on appointment of members of the Appellate Body. There is convergence towards ensuring a functioning, independent and effective dispute settlement system, indispensable for preserving the rights and obligations of all WTO members and for ensuring that the rules are enforced in a fair and even-handed manner<sup>29</sup>. Members want to resolve the impending crisis and some have proposed initiating a solution-focused process allowing for targeted discussions between interested members on dispute settlement issues, including the specific concerns expressed by some members<sup>30</sup>. Others propose developing guidelines on the future functioning of the Appellate Body to clarify certain DSU provisions to provide better, more clear-cut operational rules for the Appellate Body to follow.

The EU et al proposed<sup>31</sup> five issues aimed at improving the DSU and addressing the concerns that have been raised by the US. These include: (i) disregard for the 90-day deadline for appeals; (ii) continued service by persons who are no longer AB members; (iii) issuing advisory opinions on issues not necessary to resolve a dispute; (iv) Appellate Body review of facts and review of a member's domestic law *de novo*, and; (v) Appellate Body claims its reports are entitled to be treated as precedent. While the African Group is not in favour of any linkage between resolving the urgent crisis in the Appellate Body and the broader WTO reform agenda, the group submitted a proposal. But it also reaffirmed paragraph 47 of the Doha Ministerial Declaration which specifically excludes the DSU negotiations from the single undertaking.

The net effect of this response to the looming paralysis of the Appellate Body by December 2019 has resulted in members proposing amendments to the DSU. Proposals include agreeing to extend the 90 days rule unless parties agree otherwise; others are proposing in exceptional circumstance to extend the time limit up to 120 days. A pragmatic approach could be the development of guidelines<sup>32</sup> and allowing limited flexibility to increase the deadline as a short-term measure ahead of an overall reform of the DSU. However, any short-term solution should bear in mind the principle of predictability and the needs and challenges faced by developing countries due to lack of capacity. With regard to outgoing AB members, some proposals indicate that members should only serve beyond retirement for the resolution of any pending appeal in which a hearing has already taken place during their term. On findings unnecessary for the resolution of a dispute, some proposals suggest that the AB should address

each of the issues raised on appeal by the parties to the dispute to the extent necessary for the resolution of the dispute. The proposals also emphasised the need to preserve and reinforce the independence and impartiality of the Appellate Body and to initiate the appointment process of Appellate Body members without any further delay.<sup>33</sup>

While the proposals are responding to the impending paralysis, there is need to also maintain the overall DSU review through the 12 'thematic issues' for a more comprehensive and balanced reform of the WTO dispute settlement mechanism.

<sup>29</sup> See WT/GC/W/778 – communication from Plurinational State of Bolivia, Cuba, Ecuador, India, Malawi, South Africa, Tunisia, Uganda and Zimbabwe.

<sup>30</sup> See WT/GC/W/754/Rev.2 - communication, dated 11 December 2018, was circulated at the request of the delegations of Australia, Singapore, Costa Rica, Canada and Switzerland.

<sup>31</sup> See WT/GC/W/752/Rev.2 - communication, dated 10 December 2018, was circulated at the request of the delegations of the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro.

<sup>32</sup> See WTO. WT/GC/W/763/Rev.1

<sup>33</sup> See WTO. WT/GC/W/773



## 3

## AN INCREMENTAL BUT HOLISTIC APPROACH TOWARDS AN INCLUSIVE WTO

The first two chapters of this paper lead to a series of observations. One is already obvious: members' current proposals are tackling WTO core functions as separate islands and thus missing the point of departure, which is the need for a more inclusive, fair and efficient WTO. A holistic approach with participation and willingness from all members to resolve the challenges facing the WTO, including the reform agenda, is a long-term process to be undertaken in a phased manner. As WTO Director-General Roberto Azevêdo stated, »Don't pack for a short trip. The challenges we have before us will not be tackled overnight – or over a few months. We are in for a rather long journey.«<sup>34</sup>

### PROMOTING A HOLISTIC APPROACH TOWARDS AN INCLUSIVE OF VIEW OF THE WTO

Balancing the interests of members through the development of a larger package for negotiations that responds to both the demands of developing countries after the Uruguay Round and to the changed global landscape since the establishment of the WTO remains a critical success factor for an inclusive and effective WTO. Panitchpakdi (2000) indicated that if the future trade agenda of the WTO is to be sustainable and to command the support of the whole international community, then WTO members, both great and small, must be equal partners in its formulation and must be able to collectively claim ownership of it. The same sentiments still exist almost 20 years later, albeit in totally different economic conditions from those then dominated by a North-South agenda. The gap of economic development between developed and developing countries is still increasing, especially for those countries that are at the lowest levels of development. A majority of these countries continues to face supply-side constraints to build their capacity to produce and be competitive, which encompasses infrastructure, financial resources, appropriate trade policies and other supply-side capacities.

In the last two decades, the WTO has faced numerous challenges requiring it to respond and adapt to changing global developments. These include updating WTO rules in areas that didn't fully exist when the WTO was established and

tightening or expanding existing WTO rules to deal with trade-distorting practices in such areas as agricultural and industrial subsidies, state-owned enterprises (SOEs), transfer of technology and trade secrets, and transparency<sup>35</sup>. The current crisis and impasse in the WTO warrants creativity among members to ensure that the WTO remains relevant and responsive to old and new priorities and the interests of members. A phased approach moving from short-term, medium-term to long-term objectives would be required as outlined below:

### SHORT-TERM OBJECTIVES

Increasing unilateral measures, protectionism and abuse of national security exceptions (GATT Article XXI) are imminent and pressuring threats to the functioning of the WTO. Members must abide by their commitment to trade and to the rules-based international trading system and work together urgently to ease trade tensions and to improve and strengthen the WTO.<sup>36</sup> The forthcoming impasse in the AB requires immediate attention so as not to paralyse the DSU. An agreement between Canada and the EU to use the arbitration mechanism sets a good precedence that can be adopted by other members as a temporary solution. The blocking of the appointment of members to the AB by one member, the US, is another reflection of the challenge posed by veto powers when consensus is required for anything to proceed within the WTO. The position of the US could also be viewed as a negotiating mechanism to gain leverage in other areas of the negotiations. Apart from the impending impasse in the AB, members must focus on fisheries subsidies, where the expectation is to reach an outcome by December 2019, keeping in mind the clear SDG mandate on this issue. These short-term gains would provide momentum towards addressing the medium-term objectives as outlined below.

### MEDIUM-TERM OBJECTIVES

The lack of progress in achieving positive outcomes towards concluding the Doha Round, where many issues of interest to developing members remain unresolved, poses a challenge to the future of the WTO. As previously indicated,

<sup>34</sup> Statement of Director-General at Heads of Delegations meeting of 19 July 2019

<sup>35</sup> See EU concept paper on WTO modernisation.

<sup>36</sup> See WTO WT/TPR/OV/W/13

many developing-country members insist in ensuring that implementation issues are addressed, while other members want to engage in a new agenda. These differences have inhibited and continue to inhibit progress on a trade liberalisation agenda or on engaging in new issues that reflect the current global economy. The new issues being considered by some members which pose challenges to the trading system, include exploring issues of interest in digital trade, competition with state-owned enterprises (SOEs), global supply chains and the relationship between trade and environment.<sup>37</sup>

As noted earlier, the lack of progress in the WTO led to an increasing number of RTAs. In outlining a way forward to an inclusive WTO, the panel on the Future of Trade said that RTAs can be laboratories for deeper integration, allowing countries to move further and faster than is sometimes possible in the WTO. RTAs can also respond to particular regional imperatives, including those of a political nature, that are not catered for in a wider setting. However, it also cautioned that a non-discriminatory, more inclusive and vibrant multilateral trading system is preferable to a fractured and overlapping set of plurilateral and bilateral arrangements. Members must, therefore, explicitly explore ways in which RTAs, and the principles underlying them, can be consolidated within the multilateral system. The recommendations by the panel are still valid and some RTAs have engaged in negotiations that go beyond the mandate of the WTO in responding to the changing global economy. For example, the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP) includes disciplines on e-commerce policies and state-owned enterprises. But most RTAs do not deal with areas of policy that can generate global spill-over effects – such as the use of various types of subsidies.<sup>38</sup>

The consensus pillar has varying support among members; some see it as an impediment while others see it as a guarantee of rights and a means to promote inclusiveness in the decision-making process. Putting too much focus on reviewing the consensus issue is not a practical approach to achieving a positive outcome, given the current power dynamics and already struggling negotiations on issues that are of far more interest to Members whether developed or developing. Rather, it may lead to more deadlocks and halt all other attempts at or suggestions of reform. As the panel on the Future of Trade noted, the challenge of the WTO is how to prevent the process of attaining a consensus from being frustrated by vetoes. The current crisis in the appointment of the AB members is a case in point where one member continues to block the process. As noted earlier, some have concluded that the consensus pillar has made the WTO inefficient, especially as regards to concluding the Doha Round. But changing

the consensus rule requires consensus and with views so far apart at this stage, change is unlikely.

If members could resolve deadlocks in some outstanding negotiations, particularly on development and implementation issues, there could be the possibility of reforming the decision-making process by consensus. Secondly, strengthening the Secretariat to allow it to facilitate negotiations by providing substantive information and support to members could ease the lack of trust between members and lead to positive outcomes. A third option that members could explore could be to start using the WTO exception that allows for voting on not-so-sensitive issues as an experiment to see how effective voting could be. It could be tried especially in cases where just a few members cannot back consensus on specific negotiating issues.

Addressing implementation issues remains a critical objective for developing countries to address the persistent and increasing imbalances between developed and developing countries. Not reaching a positive outcome in areas of concern to developing countries and initiating new negotiating areas will result in continuous deadlock, which many have concluded is not sustainable and will make the WTO irrelevant. Development must remain at the centre; it is core to delivering on the long-promised development concerns left from the Uruguay Round, as outlined in the DDA. Some down payment is needed on S&DT issues for developing countries by making progress on proposals by the Group of 90. This would become easier if some of the large developing economies in a position to do so voluntarily opted out and indicated that they would not use some of the S&DT flexibilities.

Enhancing the role of the Secretariat to complement the member-driven nature of the WTO should be considered. For example, the Secretariat can provide valuable analysis and information on issues of interest to members. Toohey (2015) argued that the image of the Secretariat should change to portray it as a steward of the world trade system. The wider role would not extend into the negotiating pillar. But the Secretariat could provide inputs for members to improve their participation and the quality of negotiations, especially for smaller members with limited capacity and expertise. Toohey pointed out that the WTO is a comparatively lean international organisation and the potential gains to the multilateral trading system are large, offering a convincing cost-benefit analysis. Extending the mandate of the Secretariat would mean more staff, which would also imply increased contributions from members. A comprehensive cost-benefit analysis should be conducted covering the extended mandate and incorporating benefits that could accrue to smaller delegations in improving their participation and building negotiating capacity.

## LONG-TERM

Responding to market realities among and within developing countries by exploring differentiation options remain ones of the greatest challenges faced by the WTO. It is an issue that remains unresolved since the 1970s. However, due to the political sensitivity of this matter, there is a need for ensuring that equity is preserved when addressing the topic of

<sup>37</sup> CRS Report 2019 World Trade Organization: Overview and Future Direction <https://fas.org/sgp/crs/row/R45417.pdf>

<sup>38</sup> Ibid

differentiation; it cannot only be led by the major players in the system. The interests and obligations of all members must be protected so all members benefit. Balancing sovereign and political rights with the evolving trade realities that have exposed gaps in the current rule book and past commitments by members will play a critical role in an inclusive solution, while also granting policy space to the most vulnerable. Resolving the challenge of equity while also being able to balance the rights and obligations of members will be difficult to attain.

# WTO REFORM ... POSSIBLE WAY FORWARD

The reform debate is nearly as old as the WTO. Developing countries were the first to criticise the organisation's architecture, which was inspired by the GATT system designed back in 1947 by major developed countries. Those calls took shape when the DDA was adopted in 2001. Since then, changes in the global trade scene, in the configuration of powers and in the methods and fields of trading have outpaced what members could achieve under the WTO rule-based system, institutional structure and decision-making processes. As the years go by and as the deadlocks are repeated, the challenge of adapting becomes more and more complex on the one hand and the risks associated with a paralysed WTO increase on the other. The significant rise of unilateralism, economic nationalism and trade wars prove that the WTO is indispensable to managing rising trade interdependencies. The impending impasse in the AB means that paving a way forward for the WTO is urgent; all members' interests are at stake, whether developed or developing.

This study skimmed through what the various expert reports have prescribed for WTO institutional reform over the years and what countries themselves are now suggesting in proposals they have presented. It delved into the most-debated proposals for reform, for example, those related to consensus, development and AB reform. This wide-ranging overview, covering moderate to radical views, reveals that reforming the WTO will require changing countries' deep-rooted perspectives and views. This cannot happen if the process starts with the most politically sensitive and sacred issues, like the consensus rule and differentiation in S&DT. And it most certainly cannot take place under pressure from the risk of having a dysfunctional Appellate Body.

A pragmatic approach which starts dealing with the most imminent threats and releases some of the pressures the WTO is facing is crucial to get the institution to a safe zone. Ensuring the institution does not hit another deadlock in the next Ministerial Conference is necessary to enable a phased reform process that gradually addresses problematic issues and allows space for practical negotiations towards an inclusive and effective WTO.

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## WTO REFORM: OLD DEBATE ... NEW REALITIES

The WTO reform debates and proposals are not new. Developing countries were the first to criticize the institutional setting of the WTO in its early years in the late 1990s.

Their criticism at the time principally targeted the exclusive nature of the Green Room and called for reforms to allow levelling the playing field and enhance representation and transparency of the Organization. Moreover, developing countries have been raising implementation issues as a means of addressing perceived inadequacies and inequities in the WTO agreements following the Uruguay Round

The debate on WTO reform has been significantly intensifying since 2015, this time with a clearly broader extent of members' involvement in presenting and discussing proposals, especially developed countries.

This paper provides a historic perspective to the debate on reforming the WTO, while noting that developing countries were the initial proponents of the reform agenda. Focus is given to strategies that could be taken to promote a holistic approach towards an inclusive fair and efficient WTO.

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