PAPER

An Agenda for Reforming the World Trade Organisation

A New Wind Blowing

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An Agenda for Reforming the World Trade Organisation: A New Wind Blowing

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Abbreviations

AB	Appellate Body
CTD	Committee on Trade and Development
CTG	Council for Trade in Goods
DDA	Doha Development Agenda
DSU	Dispute Settlement Understanding
EC	European Commission
EU	European Union
MSMEs	Micro Small Medium Enterprises
S&D	Special and Differential Treatment
US	United States
WTO	World Trade Organisation

Executive Summary

There have been calls by developed countries to reform the World Trade Organisation (WTO), with the European Union and Canada in 2018 putting on paper definite ideas on how they wished to see the reform done. The proposed reform is shaped around three areas: i) safeguarding and strengthening the dispute settlement system; ii) the WTO regular work and transparency, including improving the efficiency and effectiveness of the WTO monitoring function; ii) rulemaking in the WTO, modernizing the trade rules for the twenty-first century, including the approach to the development question. The catalyst for the calls for reform is the continued blockage by the US of the appointment of Appellate Body members.

But has a case for reform been made? The case for reforming the WTO dispute settlement system is no stronger now than it has always been. The reason members will go along with reforming the WTO dispute settlement mechanism is simply because not doing so would mean that there will be no functional WTO dispute settlement system soon. The case for reforming the WTO regular work and transparency looks more like a call for reinvigorating the regular work, and can be accommodated within existing mandates and the WTO mechanisms already in place. On these two issues every Member is therefore bound to have both offensive and defensive interests in the agenda being proposed. However, an agenda for rulemaking in the WTO and the so-called modernizing is a harder case to sell. The current understanding amongst the WTO membership is that those Members who are willing to pursue issues on which there is no multilateral consensus can do so in plurilateral arrangements. That understanding is unlikely to change.

On the two issues of dispute settlement and WTO regular work it would be in the interest of all Members to get involved in shaping the form and content of the proposed reform agenda. Every WTO Member should certainly have an interest in seeing the dispute settlement mechanism working optimally, and the WTO regular work invigorated.

It is interesting that it is the action of a developed country, the US, which has given rise to calls for reforming the WTO. Developing countries have repeatedly stated in the past that the WTO is not delivering for them. So there is now a new wind blowing. But on the other side of this wind lies another floundering reform agenda, the DDA. Lessons abound from that experience. Even limited outcomes based on the proposed reform agenda would be welcome for a WTO that could be consigned to irrelevance through failure once again.

Background

A number of developed countries made increased calls in 2018 to reform the World Trade Organisation (WTO), with the European Union and Canada putting on paper definite ideas about how they wished to see the reform done.

In July 2018 the European Commission drafted a background note for the attention of the EU Trade Policy Committee presenting the Commission's proposals on the "modernisation" of the WTO.[1] The EC in that note proposed reforming i) the WTO regular work and transparency; ii) rulemaking in the WTO including the approach to the development question and iii) the WTO dispute settlement system. The reasons given by the EU for suggesting this kind of reform were, the need to make the WTO more relevant, adaptive, and effective in a changing world in the face of threats of the adoption of unilateral measures by some WTO Members, and the paralysing of the WTO dispute settlement mechanism. This is, of course, a reference to the United States of America (US) which adopted unilateral trade measures against some Members of the WTO and its blockage of the appointment of WTO Appellate Body[2] (AB) members, a move set to paralyse the WTO dispute settlement system.

In September 2018, Canada tabled a discussion paper in the WTO[3], almost mirroring the EU note in detail and approach, in which Canada suggested ways of strengthening and "modernising" the WTO through i) improving the efficiency and effectiveness of the WTO monitoring function; ii) safeguarding and strengthening the dispute settlement system; and iii) modernizing the trade rules for the twenty-first century. The reasons cited by Canada to justify such a reform include challenges facing the multilateral trading system and the resultant insecurity and inequality leading to growing concern that the benefits of trade have not been shared fairly, and that the existing rules no longer reflect a fair balance of rights and obligations. Canada observed that the disruption and paralysis had begun to erode respect for rules-based trade and that, at the same time, the monitoring of existing commitments appears unable to contain escalating trade tensions.

From the similarity of titles and content of the EU and Canada ideas on reform, one could be forgiven for thinking there is a complementary, synchronistic element to the two papers. The only noticeable difference between the two is that while the EU foresees modernising the whole WTO, Canada foresees modernizing only the trade rules for the twenty-first century. (And of course the EU writes "modernisation" with an "s" while Canada writes the same word with a "z"!) The connotation in 'modernization' appears to be that simply because the WTO is now (in 2018) 23 years old, it is old and out of touch, and therefore needs modernizing. In fact, the EU states that since 1995, the world has changed and the WTO has not. This is a rather debatable assertion. The situation of impasse in the WTO negotiations has nothing to do with the organisation's age, but with

[1] European Commission background note on the modernisation of the WTO (WK 8329/2018) available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf

[2] This is a standing body established in terms of Article 17 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes to hear appeals from WTO panel cases. It is composed of seven persons, three of whom shall serve on any one case. The WTO Dispute Settlement Body appoints persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once.

[3] *Strengthening and Modernising the WTO: Discussion Paper*; Communication from Canada: JOB/GC/201, dated 24 September 2018

the fact that Members simply cannot find ways to reach agreement on the issues under negotiation. As far as international organisations go, the WTO, born in 1995, is still relatively young. In any case, 'old' should not be equated with irrelevance and difficulty to perform. Well, as far as organizations go anyway.

In July 2018 Honduras tabled a paper in the WTO [4] suggesting solutions to unlock the US blockage of the appointment of AB members and to ensure the proper functioning of the WTO dispute settlement system.

The catalyst for the calls for reform is certainly the continued blockage by the US of the appointment of AB members. The US first explained that its blockage of the appointments was due to the (then) ongoing transition in the US political leadership [5]. It then expanded its reasons to include, disregard by the AB of the 90-day deadline for appeals; the continued handling of cases by AB members even after their retirement; the issuing of advisory opinions on issues not necessary to resolve a dispute; the review of facts (as opposed to only law) by the AB and the review of a Member's domestic law *de novo*; claims by the AB that its reports set precedent (as opposed to being binding only between the parties to a dispute) and generally, the AB's tendency to add and diminish the rights and obligations of Members.

The EU makes specific reference in its note to the paralysing of the WTO dispute settlement system by the US blockage of AB appointments and the need for "swift action" to resolve the issue. In its discussion paper Canada also makes reference to the same issue, and notes that the impasse over the appointment of AB members threatens to bring the whole dispute settlement system to a halt, and that resolving this issue requires acknowledging and addressing the concerns raised and a willingness to work with "those members" to find mutually agreed solutions. In its "non-paper" Honduras makes a proposal to deal specifically with the US concern about the continued handling of cases by AB members even after their retirement.

From the ideas put forward so far by the EU, Canada, and Honduras and the concerns raised by the US, the structure of the envisaged reform is taking shape around the following three areas: i) safeguarding and strengthening the dispute settlement system; ii) the WTO regular work and transparency, including improving the efficiency and effectiveness of the WTO monitoring function; ii) rulemaking in the WTO, modernizing the trade rules for the twenty-first century, including the approach to the development question. Of course, one cannot rule out the expansion of this agenda as other WTO Members develop their thinking on the issue. It is reported[6] that the EU and the US are holding bilateral talks, as well as trilateral talks with Japan on WTO reform. One can expect that once such discussions mature, the outcomes may start filtering into the WTO. In fact, this has already begun to happen. In the context of the WTO regular work and transparency the EU, Japan and the US tabled a communication[7] at the meeting of the Council of Trade in Goods (CTG) on 12 November 2018 in which they suggested that the General Council reaffirm existing notification obligations across a list of agreements, proposed sanctions for non-compliant members and offered technical assistance to developing countries. (This

[4] *Fostering a Discussion on the Functioning of the Appellate Body*, JOB/DSB/1, dated 20 July 2018

[5] US statement in the DSB meeting on 19 June 2017

[6] "EU, US Officials Reconvene in Washington to Advance Bilateral Trade Agenda" Bridges; https://www.ictsd.org/bridges-news/bridges/news/eu-us-officials-reconvene-in-washington-to-advance-bilateral-trade-agenda

[7] *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements* submitted for discussion in the Council for Trade in Goods on 12 November 2018

communication is discussed in more detail in (3) hereunder.)

Although the action by the US to block the appointment of AB members and the US administration's adoption, and threat to adopt, unilateral trade measures seems to have given impetus to the calls for reform, the seeds for a WTO reform agenda were sown by the developed countries at the 10th WTO Ministerial Conference in Nairobi in 2015. In what was an unprecedented move, WTO Members agreed in the Ministerial Declaration [8] to register their disagreement on how to proceed in the ongoing DDA negotiations. Ordinarily such a ministerial declaration captures only Members' agreement but, in two parts, the Nairobi Ministerial Declaration records the Members' disagreements. It is noted in the ministerial declaration that many Members want to carry out work on the basis of the Doha structure, while some want to explore new architectures[9] and that while officials should prioritize work where results had not yet been achieved, some wished to identify and discuss other issues for negotiation, while others do not.[10] For those that might have been wondering in the three years after Nairobi what the "new architectures", or the "other issues for negotiation" were, they need wonder no more; the answer is in the proposed WTO reforms.

So an idea for the reform of the WTO that can be traced back to developed countries' insistence at the 10th WTO Ministerial Conference in Nairobi in 2015 to try out new architectures, seems to be catching on among some developing country members of the WTO. The Honduras proposal is a case in point. In addition, four developing countries, Brazil, Kenya, Mexico and Singapore were invited to attend a 'mini-ministerial' meeting organised by Canada [11] and signed the Joint Communique[12] in which they agreed to engage in discussions to advance ideas on safeguarding and strengthening the dispute settlement system; to examine and develop concrete options for engagement to reinvigorate the WTO negotiation function, and to strengthen the monitoring and transparency of members' trade policies. The countries participating in the Ottawa meeting also made a political commitment to move forward urgently on transparency, dispute settlement and 21st century trade rules at the WTO.

The African, Caribbean and Pacific (ACP) Group, a large[13] developing country coalition in the WTO, has adopted the position that it will need both to identify and advance its core interests in any reform process that may unfold, and to respond to proposals already being advanced.

The idea of reforming aspects of the WTO is not new. Developing countries called for reform in the early years of the WTO. In fact, it could be argued that the biggest reform agenda agreed to by all WTO Members was the Doha Development Agenda (DDA) launched in 2001. The 52 paragraph Doha Ministerial Declaration and the accompanying Decisions had several specific mandates, which included a mandate instructing that all special and differential treatment provisions in favour of developing countries be reviewed with a view to strengthening them and making them more precise, effective and operational.[14] Developed countries have blocked any progress in the current negotiations pursuant to this mandate, insisting that there must be a differentiation between developing countries since, in their view, not all developing countries

[8] Paragraphs 32-34; Nairobi Ministerial Declaration, WT/MIN (15)/DEC dated 21 December 2015.

[9] Paragraph 32

[10] Paragraph 34

[11] In Ottawa, on 25 October 2018. Also present were Australia, EU, Canada, Japan, New Zealand, Norway and Switzerland.

[12] Available at https://www.wto.org/english/news_e/news18_e/dgra_26oct18_e.pdf

[13] Comprising 62 of the 168 WTO Members

[14] Paragraph 44; Doha Ministerial Declaration; WT/MIN(01)/DEC/1 dated 20 November 2001

should benefit from special and differential treatment.

In the same Doha Ministerial Declaration, Members agreed to negotiations on improvements and clarifications of the Dispute Settlement Understanding[15], pursuant to which a number of developing countries, including the African Group in the WTO, tabled proposals[16] to reform the WTO dispute settlement system. To date, there has been no agreement on these proposals which have, ironically, been blocked by some of the developed countries now calling for the reform of the WTO dispute settlement system. The original mandate for DSU review was part of the built-in agenda through a Ministerial Decision in Marrakech in 1994 which mandated a review within four years of the establishment of the WTO. The review started as per this Decision but there was little progress up to the launch of the DDA. Moreover, while the Doha Ministerial Declaration paragraph 30 provides the "new" mandate, it also states that the work is to be based on the work already done, and sets a different timeframe for an outcome than for the DDA. In fact, DSU review was not part of the DDA Single Undertaking.

It would be reasonable to expect that some developing countries will be sceptical of the proposed reform agenda, more so because the reform agenda is now being pushed by developed countries which have come out in the current negotiations as unsympathetic to the needs of developing countries. There has been no agreement reached in the DDA negotiations, 17 years after Doha, which means many of the concerns of developing countries remain unaddressed. In Nairobi developed countries walked away from the DDA 'architecture' to seemingly now replace it with a new agenda to reform the WTO. So it would be justified for developing countries to ask why they should hitch onto another agenda when developed countries have shown before that they can simply walk away from agreed mandates, and agreed architectures. Many other developing countries are yet to express themselves clearly on the proposed agenda for reform, but it can be expected that it will not be long before more views are made known.

[15] Paragraph 30; Doha Ministerial Declaration; WT/MIN(01)/DEC/1 dated 20 November 2001

[16] Text for the African Group Proposals on Dispute Settlement Understanding Negotiations; TN/DS/W/92, dated 5 March 2008

SECTION 1

The Content and Form of the Suggested Reforms

As things stand, the shape of the suggested reform revolves around: i) safeguarding and strengthening the dispute settlement system: ii) the WTO regular work and transparency, including improving the efficiency and effectiveness of the WTO monitoring function; and iii) rulemaking in the WTO, modernizing the trade rules for the twenty-first century, including the approach to the development question.

1.1 Safeguarding and strengthening the dispute settlement system

As earlier noted, the catalyst to the proposed reform of the WTO appears to be the continued blockage by the US of the appointment of AB members. This seems to have the EU most worried as it openly stated in its note that the paralysing of the dispute settlement mechanism constitutes a major risk for the EU, politically and economically. It might not be a coincidence that the US is paralysing the WTO dispute settlement mechanism at the same time that it is taking unilateral measures against some countries. These countries, most of which are used to having recourse to the WTO dispute settlement mechanism, appear to have nowhere to turn if the AB stops functioning as it should, which could happen if the number of AB members goes below three.[17]

The EU stated that it seeks to address the concerns raised by the US where this may improve the functioning of the system, while preserving and further strengthening the main features and principles of the WTO dispute settlement system. According to the EU the first stage is to unblock the appointment of AB members, and aim at improving the efficiency of procedures. The second stage would be to address substantive issues concerning the application of WTO rules used by the AB.

In the first stage to address the US concern regarding the disregard of the 90-day deadline for appeal in terms of Article 17.5 of the DSU, the EU suggests to amend that article to provide that in no case shall the proceedings exceed 90 days, unless the parties otherwise agree. Regarding the concern on the continued service by persons who are no longer members of the AB in terms of Rule 15 of the Appellate Body Working Procedures, the EU suggests getting the WTO membership to agree that an outgoing AB member shall dispose of a pending appeal in which a hearing has already taken place during the member's term. Honduras suggests that no AB member shall be assigned to a new appeal later than 60days before retirement. On the issuing of advisory opinions or *obiter dicta* by the AB on issues not necessary to resolve a dispute, the EU suggests

[17] According to Article 17 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, at least three of the 7 AB members should serve on any one case. As of November 2018, only 3 AB members remained.

addressing this by getting the AB to limit advisory opinions only to the extent necessary for the resolution of the dispute. Canada also suggests narrowing the scope of advisory opinions and for the AB to focus its appellate review only on legal issues.

The EU proposes provision for regular exchanges between the AB and WTO members, and to provide for one single but longer (6-8) year term of an AB member ostensibly to ensure their independence and to avoid worrying about what effect their performance would have on their re-election. The EU also proposes that in this first stage members should not pursue other matters such as those being pursued in the context of the DSU review negotiations, or those known to be controversial.

To put all this into effect, if agreed, the EU further suggests that the amendments could be made pursuant to the amendment procedure in Article X of the WTO Agreement[18] according to which amendments to the DSU can be decided by the Ministerial Conference, on a proposal by a member. According to the EU, once AB appointments have been unblocked, Members can then move on to the second stage and tackle issues of overreach and others, and make the modifications effective through use of authoritative interpretations.[19]

To safeguard and strengthen the dispute settlement system, Canada suggests broad ranging solutions such as diverting some disputes or issues from adjudication, and a renewed commitment by Members to self-restraint in bringing disputes. It also suggests the improvement and use of alternative measures such as mediation to settle disputes, which the DSU already encourages[20], or to exclude certain issues from the jurisdiction of adjudication. Canada envisages also solutions through streamlining adjudicative proceedings and developing alternative procedures tailored to specific kinds of disputes, including supplementary procedures for specific features of existing proceedings.

1.2 The WTO regular work and transparency, including improving the efficiency and effectiveness of the WTO monitoring function

The EU cites the need to ensure the WTO remains credible against the background of the impasse in

[18] Article X: I of the Agreement Establishing the WTO provides, in part, that any Member of the WTO may initiate a proposal to amend the provisions of this Agreement by submitting such proposal to the Ministerial Conference. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance.

[19] According to Article IX of the WTO Agreement, the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

[20] Articles 4 and 5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes

the negotiations and the challenge to its dispute settlement system as the reasons to reinvigorate the WTO's regular work in the Committees and Councils, and to make that regular work respond more effectively and efficiently to the real interests of stakeholders. It therefore foresees enabling the WTO to achieve more concrete results through ensuring the transparency of Members' trade measures; solving specific trade concerns before they get to the litigation stage and incrementally adjust the WTO rule book, where necessary.

The EU decries the fact that some Members do not comply sufficiently with their notification obligations, making it impossible for other members to monitor compliance with WTO rules and seek their enforcement. For improved transparency and notifications the EU suggests more effective committee-level monitoring, including requiring members to explain reasons for delays and to provide substantive replies to comments, and subjecting repeated non-compliant members to stronger criticism. Canada foresees improving the monitoring function through making the regular bodies of the WTO more efficient and effective, and transparency of information sharing and deliberation to mitigate Members' temptation to take trade-distorting measures.

The EU further suggests other new ways such as counter-notifications to be made by other members on behalf of another, a view Canada also shares. Both the EU and Canada see room for improved technical assistance for members with resource constraints, and reviewing the notification requirements to ensure that they are not unnecessarily complex and burdensome.

To solve market access issues, the EU proposes developing rules that oblige members to give substantive replies within specific timeframes and to strengthen cross-committee coordination on market access by making sure measures criticised in one committee are followed up in the other committees. Both Canada and the EU suggest a strengthened role for the WTO Secretariat in all this, including enhanced information gathering by the Secretariat.

The EU further suggests advancing WTO rules to adjust the rule book through the tabling of proposals, agreement by agreement, on topics which are part of the DDA negotiations or new issues, reflecting the interests of stakeholders. Canada suggests action in three areas centred on the improvement of the notification and transparency of domestic measures; more timely and relevant deliberation on thematic issues, and improvement in the opportunities and mechanisms to address specific trade concerns through discussion in regular bodies.

1.3 Rulemaking in the WTO, modernizing the trade rules for the twenty-first century, including the approach to the development question

The EU stated intention is to address issues of market access by broadening the negotiating agenda and establishing new rules to address barriers to services and investment, as well as tackling discriminatory treatment of foreign investors and behind the border distortions in all sectors of the economy, including digital trade and forced technology transfer. The EU sets out in detail how it intends to create rules that rebalance the system and "level the playing field" through disciplining the use of industrial subsidies and the activities of state-owned enterprises, and improving transparency and subsidies

notifications. The EU expresses a commitment to continue to pursue the issues that form part of the existing Doha mandate.

On its part, Canada also sees the inclusion of those issues outstanding from previous negotiations, including issues from the Doha round, such as agriculture and development. It states that "the ageing trade rules" need to be updated urgently to respond to the needs of the modern global economy. Canada buttresses the EU position by stating that there is a need for rules to address recent concerns by some WTO Members about the distortion of competitive conditions, and to deal with state trading enterprises, industrial subsidies, transfer of technology, as well as trade secrets and transparency. Canada states that there is need for rules for the "modern economy" to address the social dimensions of globalization such as digital trade, sustainable development, Micro Small Medium-sized Enterprises, investment and services domestic regulation.

Both Canada and the EU propose to deal with the intractable issue of special and differential treatment for developing countries. The EU proposes to address what it calls "lack of nuance" with a view to ensuring that special and differential treatment is available to those members who actually need it. Canada acknowledges the disagreement between developed and developing countries on special and differential treatment and states that a new approach is required which would recognize flexibility for development purposes while acknowledging that not all countries need, or should benefit, from the same level of flexibility. It cites as a precedent and possible blueprint the special and differential treatment regime in the WTO Trade Facilitation Agreement which links the implementation of onerous obligations by Members to the acquisition of capacity. Canada suggests the development of categories of need, differentiated obligation by obligation, country by country and by length of transition required, to be applied on the basis of evidence of need and subject to negotiation.

Based on the current impasse in the WTO negotiations, the EU further suggests addressing procedural aspects of the WTO's rule making activities to make them more flexible such that members interested in pursuing a certain issue not ready for 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 an MFN basis, what the EU calls "flexible multilateralism". The EU would maintain support for full multilateral negotiations and outcomes, where this is possible. But in areas where multilateral consensus is not attainable, the EU would actively support and pursue plurilateral negotiations, whose results would be applied on an MFN basis and which would remain open to all members to join. Canada terms these "alternative approaches" to cooperation and rule-making to reflect the realities of a WTO membership with increasingly diverse needs, levels of development and capacity. It shares the EU view that the binding initiatives, which can take several forms both inside and outside the WTO legal framework, should be open on an MFN basis and provide for accession by other members, including their eventual multilateralization.

Both the EU and Canada propose a strengthened supporting role for the WTO Secretariat, while the EU sees, in addition, a need to build greater political support and engagement in the WTO.

SECTION 2

Is There a Case for Reform?

Based on the content and form of a WTO reform agenda as outlined by the EU and Canada, the question is has a case for reform been made? There is something enticing in the choice of words used to frame the agenda for reforming the WTO. Hardly any Member would be against reforming or modernizing anything, with the connotation those two words carry of making things better. But is there justification for such a broad reform agenda covering safeguarding and strengthening the dispute settlement system; WTO regular work and transparency, and rulemaking in the WTO and modernizing? To answer that question, one needs to take a closer look at each of the three issues in turn.

The motivation for an agenda to safeguard and strengthen the WTO dispute settlement is, of course, the continued blockage by the US of the appointment of AB members. The suggested solutions by the EU, Canada and Honduras appear designed to simply appease the US and unblock the appointment of AB members because nowhere is it recorded that these countries have ever before voiced similar concerns about the functioning of the AB. In fact, the EU is suggesting ways of addressing the concerns raised by the US without, in its own words, prejudice to the EU position on whether or not the US positon is justified. So the EU will not pronounce itself on the merits of the concerns raised by the US, but is still willing to find a solution to those concerns. That can only mean that the US has the EU, and the rest of the WTO membership, up against a wall. For, should it not be for the US, which must know best the kind of solutions it wants to address the concerns it has raised, to come up with proposals to resolve those concerns? That is how things are normally done in the WTO. Canada, unlike the EU and Honduras, hardly offers any specific suggestions to address the specific concerns raised by the US choosing instead to focus on broader systemic issues even as it notes that resolving these issues requires acknowledging and addressing concerns raised, and a willingness to work with the US to find mutually agreed solutions. This might mean Canada is not convinced by the merits of the US concerns, but will still participate in addressing them. Still, the solution to the blockage of the appointment of AB members might not lie in the hands of the Members making these proposals, but squarely in the hands of the US. With the US holding the whole membership to ransom on this issue, what is not being said is what will happen if all the suggested solutions are not to the satisfaction of the US.

The approach taken by the US has little precedence in the WTO where Members normally table proposals if they wish to change things in any area, without seeking first to paralyse the system. In fact, still on the table are a number of proposals tabled by developing countries suggesting improvements to the dispute settlement understanding, tabled after Doha and in pursuit of a specific mandate. [21] These members did not choose to first paralyse the system. The US concerns come across as narrow and self-centred, as some relate to specific cases that the US lost before the AB. The blockage, coming at the same time that the US is pursuing

[21] Paragraph 30; Doha Ministerial Declaration; WT/MIN(01)/DEC/1 dated 20 November 2001

a policy of unilateral measures, raises the suspicion that this is a well calculated move on the part of the US. Indeed, the speed with which the US will agree or not to the suggested solutions and unblock the appointment of AB members will answer the question whether or not this is all a coincidence or a clever design to ensure that those Members that the US hits with unilateral trade measures have nowhere to turn.

A point to note is that Members might, by these suggested amendments, be limiting the effectiveness of the AB and even undermining its independence, the very independence that would benefit all and should be strenuously promoted. The AB is tasked with adjudicating issues of law in disputes between members, based on the agreements that Members themselves have negotiated. But anyone familiar with WTO Agreements will be aware that their provisions are not always clear, the very reason many disputes arise in the first place. In negotiating these agreements Members at times deliberately agree to ambiguous language in order to reach consensus on the provisions. The AB then has the task of making sense of it all. Members should therefore proceed with caution on this issue and ensure that they do not end up tying the hands of the AB members.

The case for reforming the WTO dispute settlement system is no stronger now than it has always been. Members have just been quickened into it by the US blockage. The reason members will go along with reforming the WTO dispute settlement mechanism is simply because not doing so would mean that they would have no functional WTO dispute settlement system.[22] In any case, reforming the WTO dispute settlement system has already been multilaterally agreed upon, with a specific mandate in place.

The case for reforming the WTO regular work and transparency looks more like a call for reinvigorating the regular work. And one would tend to agree with the EU's observation that the WTO's Councils and Committees are generally underutilised. At the 8th WTO Ministerial Conference Ministers called[23] for focussed work in the Committee on Trade and Development (CTD) pursuant to which a group of developing countries tabled a proposal[24] requesting the WTO General Council to instruct the CTD, as the focal point for development in the WTO, to report on development-related activities and issues in other WTO bodies and make recommendations on achieving better coordination on development issues within the WTO as part of the WTO regular work. In fact, some developing country groups such as the ACP Group already participate actively and prepare in advance for the meetings of the Sanitary and Phytosanitary Measures (SPS), and Technical Barriers to Trade (TBT) Committees, including participation in these Committees and in the preparatory meetings by their capital-based officials. More could always be done. So there is scope for the WTO to make its regular work respond more effectively and efficiently to the real interests of stakeholders.

The structures for monitoring, review and notifications already exist within the Councils and Committees, and Members already have certain obligations in that regard. In a communication from the EU, Japan and the US[25] these countries underline the point that transparency and notification requirements constitute fundamental elements of many WTO agreements and thus

[22] The AB cannot sit with less than three members

[23] Paragraph 1, page 2, *Elements of Political Guidance;* WT/MIN(11(/W/2, dated 1 December 2011

[24] *Committee of Trade and Development Mandate: Focal Point for Consideration and Coordination of Work on Development in the WTO*; Proposal from Belize, China, Cuba, Ecuador, India and the African Group: WT/COMTD/W/208 dated 23 January 2015, paragraph 2.

[25] *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements* submitted for discussion in the Council for Trade in Goods on 12 November 2018

Members' obligations. Attached to that communication was a Draft General Council Decision to reaffirm existing notification obligations across a long list of agreements, calling upon the supervisory bodies to take appropriate steps to reinforce compliance, and proposing concrete steps such as specific dates by which meetings must be held, as well as the review and updating of specific notification requirements. Also proposed were counter-notification measures, sanctions for non-compliant members and offers of technical assistance to developing countries. This confirms that even without a reform agenda in place, Members can pursue WTO regular work under the existing mechanisms. What this also confirms is that even if some Members were to oppose the idea of the reform of the WTO regular work, there is nothing to stop those Members wishing to do so to proceed with improving the efficiency and effectiveness of the WTO transparency and monitoring function, as they do not need Member's agreement anew to do that.

Developing countries continue to face capacity constraints in engaging effectively in the work of the Councils and the Committees, and in complying with their transparency and notification obligations. One would imagine that before the developing countries can consider some of the suggested enhanced, stricter monitoring and transparency or even counter-notifications, they would want to be assured of improved technical assistance from the developed countries. Both Canada and the EU appear alive to that fact, with Canada suggesting a review of notification requirements to ensure that they are not unnecessarily complex and burdensome, and the provision of technical assistance to countries that fall behind. This will be crucial if the expectation is that developing countries will go along with any new ideas such as stricter limitation of the rights of repeat-offenders and preventing them from participating in the work of the WTO.

An agenda for rulemaking in the WTO and the so-called modernizing is a harder case to sell. The current understanding amongst the WTO membership is that those Members who are willing to pursue issues on which there is no multilateral consensus can do so in plurilateral arrangements. At the 11th WTO Ministerial Conference in Argentina in 2017, a number of WTO Members, including some developing countries, which signed joint initiatives on electronic commerce, MSMEs, and investment facilitation, have continued to hold discussions amongst themselves outside of the usual WTO multilateral setting. Most developing countries have, however, indicated that they will not participate in initiatives on issues that will produce binding rules that their economies are not yet ready to accommodate. Such issues include services domestic regulation and electronic commerce, two issues the EU proposes be dealt with under the proposed new rulemaking.

The EU makes it clear that its intention in broadening the negotiating agenda to include rule-making is to address issues of market access through establishing new rules to address barriers to services and investment, as well as tackle discriminatory treatment of foreign investors and behind the border distortions in all sectors of the economy, including digital trade. Canada supports the EU view and adds that the ageing trade rules need to be updated urgently to respond to the needs of the modern global economy, and deal with the issue of forced technology transfer.[26] So this is obviously an agenda to increase

[26] A reference to China's practice of demanding that foreign companies share their technology in return for access to the country's vast market

developed countries' access into the markets of developing countries.

Many developing countries have before made it clear in the WTO that the playing field is not yet level to allow their local producers to compete against producers from developed countries. It is rather ironic, therefore, that the EU would state that its intention in creating these new rules is to rebalance the system and "level the playing field" in favour of its companies. The few developing countries that think it beneficial to their economies to have rules on new issues have already joined the initiatives. It is unlikely there will be more takers even as the EU and Canada hang a carrot in front of developing countries by expressing a commitment to continue to pursue the issues that form part of the existing Doha mandate, including the issues of agriculture and special and differential treatment. Considering that these issues are already being negotiated in the context of the DDA, there appears to be little incentive for developing countries to jump for the carrot and engage in new rule-making.

In the ongoing negotiations on special and differential treatment developing countries have already rejected the approaches suggested by the EU and Canada of differentiating between developing countries upfront, even before there is any agreement on the proposals on the table, and the suggested case-by-case approach which envisages the development of categories of need, differentiated obligation by obligation, country by country and by length of transition required, to be applied on the basis of evidence of need and subject to negotiation. It is clear that under whatever new configuration the developed countries may propose, the issue of S&D would run into the same head-winds as it is currently facing in the Doha mandate negotiations.

There is, therefore, no convincing case made for a reform agenda on rulemaking and modernizing. This is an area unlikely to see any amount of traction in the reform agenda, taking into account established differences in intention and approach between developed and developing countries. The plurilateral approach is the only practical way in this area, without any hope of a multilateral approach anytime soon. In fact, Canada admits as much by noting that new binding multilateral agreements or significant institutional changes to the WTO are unlikely in the near term. The compromise can only be that suggested by Canada, which is that while no WTO Member should be expected to take on obligations to which it did not consent, likewise no Member should expect to be able to prevent others from moving forward in various configurations, such as plurilateral initiatives, in areas in which they are willing to make greater commitments.

While one can foresee Members engaging in an agenda for reform in the areas of WTO dispute settlement and the WTO regular work, there seems little hope for any such multilateral agenda being agreed upon in the area of new rule-making and the so-called modernising of the WTO.

SECTION 3

Developing an Inclusive Agenda for Reform

The reason why the WTO membership should have no difficulty playing a part in the reform agenda on safeguarding and strengthening the dispute settlement system and the WTO regular work and transparency, including improving the efficiency and effectiveness of the WTO monitoring function, is that the agenda on these two issues can be accommodated within the existing agreed multilateral structure and mechanisms of the WTO. On these issues every Member is therefore bound to have both offensive and defensive interests in the agenda being proposed.

The reason why not every WTO member will get involved in rule-making and modernising the WTO is that Members don't have to do so, and can afford not to participate without any immediate consequences. The reform agenda in this area seeks to introduce new rules which most developing countries have no present interest in. Canada states that there is consensus that modernization of the trade rules is essential and that the only divergence there is, is about the priorities. This is not true. There might be consensus among the developed countries, but certainly not amongst the whole WTO Membership. It makes little difference that developed countries obviously seek to entice developing countries to join this part of the agenda for reform by promising to deal with the intractable issue of S&D. But this issue is already being negotiated under the relevant Doha mandate, so there is nothing new there, especially taking into consideration the developed countries approach of seeking to differentiate between developing countries, and to adopt a case-by-case approach. Developing countries have spoken against these approaches already.

The WTO Director-General said at the Ottawa mini-ministerial in October 2018 that it was essential that all WTO Members' views be taken into account as this discussion moves forward.[27] This is true. Without the involvement and agreement of every WTO Member, this reform agenda could never leave the paper it is written on. Every Member certainly has an interest in seeing the dispute settlement mechanism working optimally, and the WTO regular work invigorated. So logically, every WTO Member must be allowed to contribute as they see fit to the shaping of this agenda.

The unblocking of the appointment of Appellate Body members is the priority, for obvious reasons. The EU, Canada and Honduras have already shared some ideas on how to address the US concerns. The US should be urged to table a concrete proposal on how it wants to see those concerns addressed. All other Members who have thoughts on how to make the dispute settlement mechanism work better for the benefit of all should also table proposals at the same time so that a holistic approach can be taken on the issue.

[27] As recorded at https://www.wto.org/english/news_e/news18_e/dgra_26oct18_e.htm

There is no reason why the reform should be done in stages. One amendment that seems to be crying out to be made, and which Honduras suggests, is one that makes it impossible for any one Member to veto the appointment of AB members, or in any way to paralyse the dispute settlement system. An amendment to introduce reverse consensus[28] in the appointment of AB members as suggested by Honduras, seems a practical way out.

One overriding theme in any proposed amendment should be the preservation of the independence and professional nature of the AB. Former Members of the AB could be invited to pronounce themselves on the suggested amendments as Members proposing these might not have a full appreciation of the practical effects of their proposed amendments will have on the work of the AB, or why the AB might have adopted some of the approaches Members frown upon.

Forming an agenda for reform around the WTO regular work could breathe some life into Members' engagement at the WTO taking into account the current impasse in the negotiations. Developing countries must, of course, pursue vigorously the offers of enhanced technical assistance to enhance their participation in the reinvigorated work of the Councils and Committees, and to ameliorate any extra burdens that their transparency and notification obligations might entail.

Under the WTO regular work, Members might also consider ways to relook at some issues that have been on the agenda since the late 90s on which no agreement has been reached so far, and unlikely to be reached in the current WTO configuration. . A way should be found to retire such issues in the various Councils and Committees. This will be helpful in streamlining and focussing the regular work and making progress.

It is understandable that some developing countries will be sceptical about a reform agenda around even these two issues that seem likely to garner consensus. Developed countries have come across in the DDA negotiations as insensitive to the needs of developing countries, and politically unwilling to reach agreement on issues of interest to developing countries. However, this might be an opportunity once again for developing countries to shape an agenda in their favour by contributing to and controlling the form and content, especially where the current WTO multilateral framework already accommodates such an agenda.

[28] This is the principle, currently used in the WTO Dispute Settlement Body in the adoption of the Panel and AB Reports, which states that there has to be consensus amongst the Members not to take action; in this case, not to approve the appointment of AB members.

SECTION 4

Concluding Thoughts

A new wind is blowing. And it is blowing at probably a significant time – at a time when there is no movement in the DDA negotiations. The reason some of the ideas forming the reform agenda will catch on is because it is a natural thing for people stuck on something and floundering, as is the case with current negotiations, to be attracted by any kind of movement that may offer a way out. In any case, most of what is being suggested can be accommodated in the existing agreed WTO multilateral structure. It can be expected therefore that Members will again sit at the table and try to do work that could be beneficial to all and revitalise the multilateral trading system.

But on the other side of this wind lies another floundering reform agenda, the DDA. Some of the issues proposed to be tackled in the reform, Members have seen before in the DDA context. Lessons abound from previous experience, and Members should know what to expect moving forward. Developed countries certainly need to show more political will on issues of interest to developing countries, and a willingness to have a WTO that really works for every Member. It is interesting that it is the action of a developed country, the US, that has caused the other developed countries sit up and see what can happen if a multilateral system works only for a few. Developing countries have repeatedly stated that the WTO is not delivering for them. So maybe with this new wind blowing developed countries will appropriately adjust their sails to carry all Members together to the promised new land of a reformed and 'modernized' WTO. But one thing is certain - there will be the usual waves to climb over and troughs to navigate along the way. One hopes that after almost 18 years of largely failed and floundering negotiations, all Members will have some experience of what failure to agree can entail and will be truly committed this time around to work for the greater good of the whole system. Even limited outcomes would be welcome. Failure would confirm that the WTO cannot do what members thought it could do when they committed to multilateralism, and could consign it to irrelevance.

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