

WTO Reform

Context, Main Issues and Possible Way Forward for Developing Countries



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Abbreviations

AMS	Aggregate Measurement of Support
DDA	Doha Development Agenda
DSU	Dispute Settlement Understanding
EU	European Union
LDC	Least-developed country
MC12	12th WTO Ministerial Conference
OECD	Organization for Economic Cooperation and Development
PSH	Public Stock-holding
S&D	Special and Differential Treatment
SSM	Special Safeguard Mechanism
US	United States
WTO	World Trade Organisation

Executive Summary

The current debate on WTO reform could be considered to have been set in motion by developed countries in 2018. However, calls by developing countries to reform the functioning of the WTO in an effort to address asymmetries and bring balance to the WTO rules, as well as to create more policy space for themselves to pursue development, are almost as old as the organisation itself. The architecture of the WTO Agreement has an in-built reform mechanism based on the underlying acknowledgement by WTO Members that there was scope for reform and improvement through the work of the WTO councils and committees. It is not surprising therefore that no WTO Member is on record as having spoken against the emerging WTO reform agenda.

While developed-country WTO Members' calls for reform seemingly targeted developing countries for perceived non-compliance with their notification and transparency obligations and to differentiate between developing countries, developing countries' response has been to frame their proposals wider so as to bring into the reform purview issues of particular interest to them, and shine a light on the multilateral trading system inequities and asymmetries developing countries argue are aligned in favour of developed countries. Special and differential treatment, developing countries have reaffirmed, is a non-negotiable treaty right.

The following six areas form the contours of the emerging reform agenda, based on proposals so far tabled: resolving crucial and urgent issues threatening the existence of the WTO; strengthening the deliberative, negotiating and rule-making function of the WTO; strengthening the WTO's monitoring

and transparency function; reforming WTO council and committee procedures; increasing the WTO's relevance in global economic governance, and principles to guide the reform. The focus of developed-country proposals is on strengthening the deliberative, negotiating and rule-making function of the WTO; strengthening the WTO's monitoring and transparency function; and reforming WTO council and committee procedures, while the developing countries' broader approach includes resolving crucial and urgent issues threatening the existence of the WTO; increasing the WTO's relevance in global economic governance, and principles to guide the reform debate.

In the proposals so far on the table WTO Members congregate in agreement on the need to reform the WTO's notification and transparency procedures, as well as the procedures of WTO councils and committees. No other area of the proposed reform seems to lend itself to the possibility of agreement amongst Members. While the Members are seemingly agreed that the deliberative, negotiating and rule-making function of the WTO needs to be reformed to enhance the inclusiveness of the multilateral trading system, they hold diametrically opposed views on the issue of special and differential treatment for developing countries, an issue central to the reform debate. Developing countries' focus in the area of increasing the WTO's relevance in global economic governance, on curbing unilateralist and arbitrary measures as well as the imposition of economic sanctions on other countries without authorization from the United Nations, seems likely to take away the appetite for discussion and search for

agreement from those Members guilty of such practices.

The reform discussions are already underway, but all over the place in the WTO councils and committees. Going towards MC12, it would be beneficial to the reform process for WTO Members to agree on a structured dialogue, including the scope, objectives and principles of the reform.

SECTION 1

The Past History and Context

The current debate on WTO reform could be considered to have been set in motion by the European Union¹ and Canada² in 2018, and the blockage by the United States of the appointment of members of the WTO Appellate Body.³ However, calls to improve the functioning of the WTO are almost as old as the organisation itself. It has been pointed out⁴ that developing-country WTO Members in 1996 called for certain reforms in an effort to address asymmetries and bring balance to the WTO rules, as well as to create more policy space for themselves to pursue development. The 52 paragraph Doha Ministerial Declaration⁵ and the accompanying Decisions are in large part a response by WTO Members to the calls for reform by developing countries. Members committed themselves at Doha to place the needs and interests of developing countries at the heart of the work programme, and to continue to make positive efforts to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.

In-built into the architecture of the WTO Agreement is an underlying acknowledgement by WTO Members that there was always scope for reform and improvement through the WTO's negotiating function⁶ in the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights. In addition, a number of reports Commissioned by successive WTO Directors General made a case for WTO reform. A Report⁷ on "*The Future of the WTO; Addressing Institutional Challenges in the New Millennium*," was released in 2005; a Report⁸ on "*The Multilateral Trade Regime – Which Way Forward*" was released in 2007, and a Report on "*The Future of Trade: The Challenges of Convergence*" was released on 24 April 2013.⁹ These reports were commissioned to identify key institutional challenges that needed to be addressed to enhance the WTO's legitimacy, order and dynamism, and the need to make it more effective. Against this background, it should perhaps come as no surprise that no WTO Member has spoken against the need for reform in the current debate.

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

³ In its statement in a meeting of the Dispute Settlement Body on 19 June 2017, the US explained that its blockage of the appointments was due to the (then) ongoing transition in the US political leadership. It later expanded its reasons to include some procedural 'misdemeanours' by the Appellate Body.

⁴ *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the Plurinational State of Bolivia, Cuba, Ecuador, India and

Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019.

⁵ Doha Ministerial Declaration; WT/MIN(01)/DEC/1 dated 20 November 2001.

⁶ Article III.2: Agreement Establishing the World Trade Organisation.

⁷ The Consultative Board was chaired by Mr. Peter Sutherland former Director-General of GATT and then the WTO.

⁸ Published by the University of Warwick, the commission was chaired by Pierre Pettigrew who was a minister in successive governments of Canada

⁹ https://www.wto.org/english/res_e/publications_e/future_of_trade_e.htm

The emerging contours of the reform, based on proposals so far on the table, are resolving crucial and urgent issues threatening the existence of the WTO; strengthening the deliberative, negotiating and rule-making function of the WTO; strengthening the WTO's monitoring and transparency function; reforming WTO council and committee procedures; increasing the WTO's relevance in global economic governance, and principles to guide the reform.

The cumulative reasons put forward to support WTO reform include that: the world has changed in ways that could scarcely have been imagined when the WTO was set up; the main actors in the global economy are different, with different economic models; the bulk of the WTO rule book dates back to the Uruguay Round and needs updating; evolution and reinvention have been part of the multilateral trading system since its creation in the 1940s; the WTO membership has grown over the years to its current 164 Members thereby increasing both internal and external pressures, as well as expectations; the growing number of regional and bilateral free-trade arrangements, customs unions, common markets, plurilaterals and joint initiatives may be a sign of the failure by the WTO to meet the expectations of its membership; the WTO is losing relevance; and the need to balance inequities in the multilateral trading system.

Developing and least-developing country WTO Members have at the outset highlighted that

the reform discussion should be based on a set of principles such as the recognition of some members' capacity constraints to engage effectively; inclusivity and consensus decision-making; effective technical assistance; reservation and improvement of gains granted to LDCs;¹⁰ the need to keep development at the core through delivering on the long-promised development concerns, and addressing asymmetries in WTO Agreements; strengthening the multilateral character of the WTO; continuation of the on-going multilaterally mandated negotiations; and reaffirmation of the principle of S&D.¹¹

While developed-country Members' calls for reform seemingly targeted developing countries' perceived non-compliance with their notification and transparency obligations and the need to differentiate between developing countries, developing countries' have in their proposals cast the debate parameters wider so as to bring into the reform purview issues of particular interest to them, and shine the light on the multilateral trading system inequities and asymmetries that they believe favour developed countries. The African Group *et al*¹² have noted that while some Members have suggested a broad range of reforms including a slate of new rules even though existing mandates from the DDA remain unaddressed, 'WTO reform' does not mean accepting either inherited inequities or new proposals that would worsen imbalances.

One can, with a degree of certainty, predict that by the time WTO Members are done

¹⁰ LDC Views on WTO Reform Discussions and Proposals - Communication from Chad on behalf of the LDC Group, JOB/GC/223 dated 6 December 2019.

¹¹ *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the Plurinational State of Bolivia, Cuba, Ecuador, India and

Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019.

¹² *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the Plurinational State of Bolivia, Cuba, Ecuador, India and Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019.

putting their proposals on the table, the WTO reform agenda is set to be the most packed agenda ever, perhaps more packed and larger than the DDA itself. For, it seems, anything and everything WTO-related, old and new, is game in the current reform discussion.

SECTION 2

The Current Proposals and Issues

Of the six reform areas so far identified, developed-country proposals' focus is on strengthening the deliberative, negotiating and rule-making function of the WTO; strengthening the WTO's monitoring and transparency function; and reforming WTO council and committee procedures. In their proposals developing countries have widened the parameters to include in addition, resolving crucial and urgent issues threatening the existence of the WTO; increasing the WTO's relevance in global economic governance, and principles to guide the reform debate.

1.1 Main Elements of Developed country Proposals

Reforming the deliberative, negotiating and rule-making function of the WTO

Canada has expressed the view that 'the ageing trade rules' need to be updated urgently to respond to the needs of the modern global economy, and that alternative approaches to cooperation and rule-making may be required to reflect the realities of a

WTO Membership with increasingly diverse needs, levels of development and capacity.¹³ The alternative approaches might involve allowing for differentiated participation in negotiations, and for accommodating differentiated levels of development.¹⁴ In Canada's view the way forward involves exploring plurilateral participation of Members, identifying priorities for modernizing WTO rules, and dealing with the development dimension.

The United States of America (US) has observed that despite the great development strides made in the years since the WTO's inception, the WTO remains stuck in a simplistic and 'clearly outdated' construct of North-South division, developed and developing countries, each being a seemingly static set, which does not reflect current economic, social, trade, and other realities.¹⁵ In a draft WTO General Council decision,¹⁶ the US makes several proposals aimed at strengthening the negotiating function of the WTO to produce reciprocal and mutually advantageous arrangements for the reduction of tariffs and other barriers to trade, and for the elimination of discriminatory treatment in international trade relations. The US believes that there should be recognition that reserving flexibilities for those WTO Members with the greatest difficulty integrating into the multilateral trading system can open new

¹³*Strengthening and Modernizing the WTO: Discussion Paper* Communication from Canada JOB/GC/201 24 September 2018

¹⁴ *Ibid*

¹⁵ *An Undifferentiated WTO: Self-declared Development Status Risks Institutional Irrelevance* - Communication

from the United States, Document WT/GC/W/757/Rev.1, dated 14 February 2019

¹⁶*Draft General Council Decision Procedures to Strengthen the Negotiating Function of the WTO* - Document WTO WT/GC/W/764/Rev.1, dated 25 November 2019.

export opportunities for such countries, and proposes categories¹⁷ of WTO Members that will not avail themselves of special and differential treatment in current or future WTO negotiations, or in the WTO agreements that result from such negotiations.¹⁸

Norway *et al*¹⁹ have expressed the view that S&D is an important tool for enabling development and the greater participation of developing countries in the multilateral trading system and stated that aiming at consensus on a negotiated set of criteria for when a developing Member should have access to S&D is neither realistic nor necessarily useful. Norway *et al* have highlighted that while S&D as a principle is well established, S&D is not a single, clearly defined and operational modality and that to focus on the status of Members in binary terms – as either developed or developing – complicates the search for an appropriate balance of rights and obligations.²⁰ The question should rather be how S&D could be designed to address the development challenges Members are facing, it being the negotiated result that matters.²¹ In the view of

Norway *et al*, tools already exist for a creative and effective approach to flexibilities that respond to the development needs of Members.²² As Members shape and manage their policies in compliance with their WTO obligations, there is no imperative to adopt identical approaches as alternative pathways can lead to common objectives, while comparable outcomes can be achieved through distinct approaches.²³

Reforming the notification and transparency function of the WTO

Canada has expressed the view that monitoring the implementation, administration and operation of existing agreements is central to a well-functioning rules-based trading system, and that transparent information-sharing and deliberation helps Members learn about each other's measures.²⁴ Canada foresees action in the three areas of information sharing on Members domestic measures and their

¹⁷A WTO Member that is a Member of the Organization for Economic Cooperation and Development (OECD), or a WTO Member that has begun the accession process to the OECD; ii. A WTO Member that is a member of the Group of 20 (G20); iii. A WTO Member that the World Bank has classified as a "high income" country for the three consecutive years immediately prior to the date of this decision or classifies as a "high income" country for a third consecutive year or any three consecutive years thereafter; or iv. A WTO Member that accounts for no less than 0.5 per cent of global merchandise trade (imports and exports) for the three consecutive calendar years immediately prior to the date of this decision or for a third consecutive year or any three consecutive years thereafter.

¹⁸ Draft General Council Decision Procedures to Strengthen the Negotiating Function of the WTO WT/GC/W/764/Rev.1, dated 25 November 2019.

¹⁹ *Pursuing the Development Dimension in WTO Rule-making Efforts* - Communication from Norway; Canada; Hong Kong, China; Iceland; Mexico; New Zealand; Singapore and Switzerland, Document WT/GC/W/770/Rev.3, dated 8 May 2019.

²⁰ *Ibid*

²¹ *Ibid*

²² Norway *et al* believe these creative ways can be reflected in scheduled commitments, time-bound departures from mainstream provisions and through the provision of technical assistance and capacity building.

Sometimes it will be possible to attain enabling objectives and provide the necessary flexibility to Members at different levels of development with no explicit reference to S&D. One expression of S&D-related flexibility can be through the establishment of minimum baseline approaches to setting and managing standards. An important innovation in the application of S&D was introduced in the Trade Facilitation Agreement (TFA). Based on each developing Member's assessment of its own capacity to implement the agreement's obligations, each developing Member scheduled its commitments using three categories. In various WTO agreements, phase-in periods are an important element of S&D. In other cases, thresholds must be triggered before commitments kick in. Time-bound and threshold provisions are useful flexibility mechanisms that clearly imply a commitment towards increased engagement in the multilateral trading system. Technical assistance and capacity-building are vital components of an enabling approach to balancing the rights and obligations of Members. To be effective, it needs to be well designed and implemented in order to meet real needs. This means that it should be demand-driven, and both provided and utilized as a positive incentive in recognition of a common interest.

²³ *Ibid*

²⁴ *Strengthening and Modernizing the WTO: Discussion Paper Communication from Canada* JOB/GC/201 24 September 2018.

impacts; an evaluation by each WTO Council of its information needs to allow it to achieve its objectives; and a request by Members to the WTO Secretariat to conduct factual information gathering.²⁵

The European Union (EU) together with a mix of developed and developing countries,²⁶ has observed that transparency and notification requirements constitute fundamental elements of many WTO agreements and a properly functioning WTO system, and noted 'the chronic low level' of compliance by Members with existing notification requirements. With a view to strengthening and enhancing transparency and improving the operation and effectiveness of notification requirements, the EU proposed in a draft decision to instruct the Working Group on Notification Obligations and Procedures to develop recommendations on improving Member compliance with their notification obligations, and the Trade Policy Review Body to ensure that all trade policy reviews include a specific, standardized focus on the Member's compliance with notification obligations.

The EU outlines detailed measures relating to a Member that fails to provide a required notification within the set deadline,²⁷ and

proposes a set of administrative measures to be applied to a Member that continues to be in default of its notification obligations.²⁸ A developing country Member encountering difficulties to fulfil its notification obligations is encouraged to request assistance and support for capacity building from the WTO Secretariat.

Reforming WTO council and committee procedures

Canada has observed that improving the capacity and opportunity for deliberation and policy dialogue in the WTO's regular bodies is the foundation of successful trade cooperation and avenue to diffuse potential 'trade irritants',²⁹ and that the organization of the work of the regular bodies needed to be streamlined, strengthened and reoriented to allow for more effective information sharing, deliberation and dialogue.³⁰

To address specific trade concerns, Canada proposes an organization-wide effort to improve the relevant mechanisms and opportunities at the level of Committees, with the aim of improving trade cooperation and reducing the demand for the formal dispute settlement system.³¹

²⁵ *Ibid*

²⁶ *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements* - Communication from 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, Draft General Council Decision, JOB/GC/204/Rev.2 JOB/CTG/14/Rev.2 dated 27 June 2019.

²⁷ Such as encouragement to submit an explanation for the delay, as well as to request the Secretariat to provide assistance in researching the matter.

²⁸ These include having to take the floor last, or not at all; inability of representatives from that Member to preside over WTO bodies; possibility of other Members ignoring the Member's questions posed in the context of Trade Policy Review; and having that Member pay a fine as a percentage of its normal assessed contribution to the WTO budget.

²⁹ *Strengthening the Deliberative Function of the WTO Discussion Paper* - Communication from Canada. JOB/GC/211, dated 14 December 2018

³⁰ Relevant actions could include reviewing and adjusting the frequency and timing of meetings to ensure that deliberations are timely, relevant and responsive to the needs and circumstances of given policy areas, coordination among different WTO bodies to facilitate information sharing on substantive issues; establishment of joint working groups to engage in thematic, cross-cutting issues discussions; use of different meeting formats and configurations, including both formal and informal modes, as well as more thematic or information-sharing sessions; and requesting the help of the WTO Secretariat for the preparation of background material for thematic discussions, including factual analysis of the effects on trade of certain kinds of measures.

³¹ The actions might include, strengthening the procedures through more detailed and robust mechanisms for raising

The European Union, together with another mix of developed and developing countries including China³², has in a draft General Council decision recognized that regular WTO council and committee meetings offer Members the possibility to discuss and resolve concerns with trade-related measures of other Members, and proposed equipping the councils and committees with horizontal procedural guidelines.³³

1.2 Main Elements of Developing Country Proposals

Resolving the crucial and urgent issues threatening the existence of the WTO

In addition to the need to resolve the impasse on the appointment of Members of the Appellate Body (not dealt with in this paper) recognized by most WTO Members as an

existential threat, China notes³⁴ that a 'certain Member' has imposed unwarranted tariffs on steel and aluminium products and threatened to raise tariffs on auto and auto parts to protect its domestic industries, using national security as a pretext, in apparent reference to recent US actions against China. China further notes that this 'certain member' has also improperly extended the coverage of export control measures and administered such measures in a non-transparent or unjust manner, and that these actions have disturbed the international trade order and international market, impeded normal technological exchanges and applications, impaired the interests of Members concerned, and undermined the relevant rules of the WTO.³⁵

As a solution, China proposes³⁶ to tighten disciplines to curb the abuse of the national security exception to ensure that WTO Members act in good faith and exercise restraint in invoking the provision. China adds that it is necessary to enhance the notification requirements on measures such as imposing import tariffs on the ground of national security exceptions, and carry out multilateral

specific trade concerns; the encouragement of meetings between the parties prior to an item being placed on the formal meeting agenda of the relevant WTO body; clear procedures for the involvement, when appropriate, of third parties, including using the "good offices" of chairpersons or referral to confidential third-party mediation or conciliation; information sharing between different WTO bodies about experiences with different specific trade concerns; mediation mechanisms, and sharing of information on individual specific trade concerns between relevant bodies.

³² *Procedural Guidelines for WTO Councils and Committees addressing Trade Concerns*; Draft General Council Decision: Communication from Albania; Australia; European Union; Hong Kong, China; Iceland; Republic of Korea; Republic of Moldova; New Zealand; North Macedonia; Norway; Panama; Qatar; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; Turkey; and Ukraine

³³ Part of these guidelines would require that all documents to be considered at a formal meeting of a WTO body be made available to Members at least 15 calendar days before the meeting; convening notices are to indicate which trade concerns are raised for the first time and which have been previously raised; and the minutes of a meeting are to be circulated within three weeks after the meeting; members requesting the inclusion of a trade concern on the agenda of a formal meeting for the first

time should inform the respondent Member(s) concerned and the Secretariat at least 20 calendar days prior to the meeting; members raising a trade concern are encouraged to submit written questions or concerns to the respondent Member(s); the Secretariat will establish and manage a database on trade concerns; overview to be given of concerns if the same measures are raised in different WTO bodies; and encouragement of consultations between members raising and responding to a trade concern. The informal resolution of trade concerns which have remained on the agenda for three or more consecutive meetings without resolution is encouraged, with members encouraged to ensure the participation of capital-based experts at any such informal meeting as necessary and may request the Secretariat to facilitate their participation. The chairperson is to orally report on the outcome of the informal meeting at the next formal meeting, and shall include a factual summary of views expressed and any way forward agreed by the Members concerned in that report. A developing-country Member encountering difficulty to respond to a trade concern or to implement the proposed procedural guidelines is encouraged to request assistance from the WTO Secretariat.

³⁴ *China's Proposal on WTO Reform* - Communication from China. WTO Document WT/GC/W/773 13 May 2019

³⁵ *Ibid*

³⁶ *China's Proposal on WTO Reform* - Communication from China. WTO Document WT/GC/W/773 13 May 2019

reviews of such measures. WTO Members whose interests have been affected should be entitled to take prompt and effective remedies, so as to maintain the balance of their rights and obligations under the WTO.³⁷

China has stated also that it is necessary to effectively curb unilateralist measures, reinvigorate the efficiency and authority of the WTO, safeguard the rules-based multilateral trading system and protect the legitimate rights of the WTO Members.³⁸ Apparently in continued reference to the US, China states that this 'certain Member' has imposed economic sanctions on other countries and extended secondary sanctions to overseas business activities of third-country nationals or companies, without authorization from the United Nations or legal basis under international treaties.³⁹ Although unilateralist actions have severely violated international commitments and the WTO rules and have caused serious consequences, the current WTO rules offer no timely or effective discipline and remedy China has observed.⁴⁰

The African Group *et al*⁴¹ shares the concern regarding recent actions by some WTO Members (also in apparent reference to the US) which in their view indicate a weakening of commitment to the multilateral trading system. The Group proposed that in order to

preserve and strengthen the WTO, the laws and regulations of WTO Members which mandate unilateral action on trade issues that are inconsistent with WTO rules, need to be amended to ensure that WTO Members are not perpetually under threat of unilateral action on trade issues by some Members.⁴²

Reforming the deliberative, negotiating and rule-making function of the WTO

The African Group *et al*⁴³ have expressed the view that S&D is an unconditional, treaty-embedded and non-negotiable right for all developing WTO Members, which allows them to make their own assessment about their development status. Any unilateral action depriving developing Members, including LDCs, of treaty-embedded rights, the African Group *et al* believe, would be inconsistent with Members' obligations, and would in fact erode the foundation of the multilateral trading system.⁴⁴ The African Group *et al* have stressed that S&D provisions in both current and future WTO agreements should be preserved and strengthened.

China *et al* have pointed out that despite impressive progress achieved by developing Members since the creation of the WTO, old

³⁷ *Ibid*

³⁸ China's Proposal on WTO Reform - Communication from China. WTO Document WT/GC/W/773 13 May 2019.

³⁹ *Ibid*

⁴⁰ *Ibid*. China proposes to constrain such unilateralist measures through, *inter alia*, enhancing the multilateral review mechanism; authorizing the Members affected to take prompt and effective provisional remedies in cases of urgency; and accelerating relevant dispute settlement proceedings.

⁴¹ *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the Plurinational State of Bolivia, Cuba, Ecuador, India and Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019.

⁴² *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the

Plurinational State of Bolivia, Cuba, Ecuador, India and Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019.

⁴³ *Statement on Special and Differential Treatment to Promote Development* - co-sponsored by the African Group, the Plurinational State of Bolivia, Cambodia, China, Cuba, India, Lao People's Democratic Republic, Oman, Pakistan and The Bolivarian Republic of Venezuela. WTO Document WT/GC/202/Rev.1, dated 14 October 2019.

⁴⁴ The African Group *et al* believes that developing countries' unconditional rights to S&D in WTO rules and negotiations must continue; developing countries must be allowed to make their own assessments regarding their own developing country status; and existing S&D provisions must be upheld.

divides have not been substantially bridged and have even widened in some areas.⁴⁵ Against this background, attempts by some Members to selectively employ economic and trade data to deny the persistence of the divide between developing and developed Members are profoundly disingenuous.⁴⁶ China *et al* have noted that in 1986, developing Members agreed to launch the Uruguay Round with S&D being an integral part of the negotiations and that, therefore, the current S&D provisions in the WTO agreements were established through negotiations and compromise, and were not gifts granted by developed Members.⁴⁷

In addition, China has stated that the principle of fair competition needs to be upheld to ensure that enterprises of different ownerships operate in an environment of fair competition.⁴⁸

Reforming the notification and transparency function of the WTO

China has made a number of proposals⁴⁹ aimed at improving WTO Members'

compliance with their notification obligations, and urged that developed Members should lead by example in submitting comprehensive, timely and accurate notifications. The African Group *et al*⁵⁰ has stated that developing countries face challenges in complying with all their notification obligations due to human resource and institutional capacity constraints, and not due to willful non-compliance. The ability to fulfill all notification obligations inevitably depends on capacities that are commensurate with a Member's level of development and resources available.⁵¹ The African Group *et al* have expressed their outright disagreement with additional transparency obligations, and said that any work in this area must be in the provision of capacity building to developing countries, and reiterated China's call on developed Members to lead by example by submitting comprehensive, timely and accurate notifications.⁵² The African Group *et al* added that if the discussion on transparency were to go beyond addressing capacity issues, then transparency must permeate the entire functioning of the WTO.⁵³

⁴⁵ *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness* - Communication from China, India, South Africa, The Bolivarian Republic of Venezuela, Lao People's Democratic Republic, Plurinational State of Bolivia, Kenya, Cuba, Central African Republic and Pakistan, WTO Document WT/GC/W/765/Rev.2 4 March 2019.

⁴⁶ *Ibid*

⁴⁷ *Ibid*. For the continued preservation of the rights of developing countries, China *et al* have proposed enhancement of the implementation and monitoring of existing S&D provisions; provision of more targeted and concrete technical assistance to ensure the integration of developing Members into the multilateral trading system and global value chains; advancement of the negotiations on S&D provisions in accordance with the Doha Ministerial Declaration; and encouragement of developing Members to actively assume obligations commensurate with their level of development and economic capability.

⁴⁸ Specifically, (kindly check if it is only China or the proposal by China and some other developing countries) China proposes that during discussions on subsidy disciplines, no special or discriminatory disciplines should be instituted on state owned enterprises in the name of WTO reform, and that foreign investment security reviews

shall be conducted in an impartial manner and follow such principles as transparency and due process. Non-discriminatory treatment shall be given to like investment by enterprises with different ownership structures.

⁴⁹ *China's Proposal on WTO Reform* - Communication from China. WTO Document WT/GC/W/773 13 May 2019. The proposals include that Members should improve the quality of their counter-notifications; Members should increase the exchange of their experiences on notifications; the WTO Secretariat needs to update the *Technical Cooperation Handbook on Notifications*; and that developing Members should also endeavour to improve their compliance with notification obligations. Technical assistance and capacity building should be provided to developing Members, in particular LDCs, if they are unable to fulfil notification obligations on time, China has also proposed

⁵⁰ *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the Plurinational State of Bolivia, Cuba, Ecuador, India and Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019.

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ With the first step being to tackle the undermining of WTO commitments through regular notification of entry-

While acknowledging that effective transparency and notification requirements are important, and that all the WTO Members, including developed Members, need to improve their implementation of these requirements, the LDC Group⁵⁴ has also called on developed-country Members to be prepared to lead by example in this area. Similar to the stance taken by the African Group *et al*, the LDC Group has made it clear that it does not support the imposition of additional/new notification and transparency obligations on LDC Members, taking into account their capacity constraints.⁵⁵ Neither does the LDC Group support the imposition of punitive measures for non-compliance.

Reforming WTO council and committee procedures

China believes that the potential of the WTO subsidiary bodies has not been fully tapped,⁵⁶ and that options should be explored to improve their operational efficiency.⁵⁷ The LDC Group⁵⁸ has expressed the view that there were potential benefits of improving the functioning of the WTO councils and committees through better and more

structured meeting procedures,⁵⁹ and that there was scope in proposals on the handling of trade concerns.⁶⁰ For the LDC Group, however, proposals for procedural reform in WTO councils and committees should contribute to strengthening the monitoring and implementation of all decisions taken in favor of the LDCs.

Increasing the WTO's relevance in global economic governance

China has stated that there is need to increase the WTO's relevance in global economic governance by rectifying what China says is an inequity in current rules on agriculture; improving trade remedy rules; accelerating negotiations on fisheries subsidies; advancing the Joint Initiative on Trade-related Aspects of E-commerce; and promoting discussions on new issues.⁶¹

China's view is that significant inequity, imbalance and unfairness persists in current rules on agriculture, in particular the provisions regarding the Aggregate Measurement of Support (AMS), and has proposed that the AMS entitlements of

related measures affecting existing Mode 4 commitments of Members; more transparency by developed countries regarding their legal obligation in the area of technology transfer to LDCs in Article 66.2 of the TRIPS Agreement; disclosure of origin of traditional knowledge and genetic resources in patent applications; and transparency in tariffs such that non-*ad valorem* tariffs are notified in *ad valorem* terms or converted to *ad valorem* tariffs.

⁵⁴ *LDC views on WTO Reform Discussions and Proposals* - Communication from Chad on behalf of the LDC Group Document JOB/GC/223, dated 6 December 2019.

⁵⁵ *Ibid*

⁵⁶ *China's Proposal on WTO Reform* - Communication from China. WTO Document WT/GC/W/773 13 May 2019

⁵⁷ Such as improving the rules of procedures of the subsidiary bodies; adjusting the frequency of regular meetings in light of the specific situation of each of the bodies; encouraging the WTO Secretariat to conduct more research on important economic and trade issues; enhanced cooperation with other international organizations; helping developing Members address and resolve specific trade concerns at regular meetings; and improving the representation of developing Members in the

WTO Secretariat and steadily increasing their share in the staff complement.

⁵⁸ *LDC views on WTO Reform Discussions and Proposals* - Communication from Chad on behalf of the LDC Group Document JOB/GC/223, dated 6 December 2019.

⁵⁹ But the LDC Group does not support tightened deadlines, the structured written exchange between Members of information on trade-related measures, and related Chair consultative processes, when these would impose a disproportionately greater burden on the LDC Members. The Group supports proposals that would improve transparency through avoiding scheduling conflicts between various councils and committees; avoiding the proliferation of open-ended meetings with no written records; requiring that annotated agendas be circulated prior to meetings; and the maintenance of full translation and interpretation services.

⁶⁰ The Group however proposes to clarify in advance the definition and scope of the notion of "trade concerns" that may be brought by one Member to the attention of another.

⁶¹ *China's Proposal on WTO Reform* - Communication from China. WTO Document WT/GC/W/773 13 May 2019

developed Members should be eliminated.⁶² Also related to agriculture, China has expressed the view that Members should reach an agreement on the permanent solution for public stock-holding for food security purposes. At present, China has observed⁶³, there are a number of gaps and ambiguities in existing multilateral trade remedy rules allowing misuse, and the abusive application, of trade remedy measures, and proposed to rectify this.⁶⁴ In China's view⁶⁵, the negotiations on fisheries subsidies are among the areas where the WTO could help achieve the Sustainable Development Goals of the United Nations 2030 Agenda and, in that regard, China has called for the swift conclusion of the negotiations in a pragmatic and consensus-seeking manner, ensuring transparency and inclusiveness in the consultations.

China also believes that e-commerce has created unprecedented opportunities for international trade and economic growth even as the digital divide still needs to be bridged, and noted that developing countries have their own challenges in developing e-commerce. In reference to China and 75 other WTO Members' joint statement on e-commerce confirming their intention to commence

negotiations, China proposes conducting the rule-making process in an open, transparent, inclusive and flexible manner, and welcoming the participation of all Members.⁶⁶ China also foresees continued in-depth discussions in relevant WTO bodies pursuant to the *Work Programme on Electronic Commerce* established in 1998.

China proposes⁶⁷ that continued efforts should be made to bring the discussions on relevant new issues into a new phase, its focus being on investment facilitation, an area in which it proposes that a dedicated mechanism be established to enable Members to carry out efficient policy coordination and explore the establishment of a multilateral framework. China believes that while investment facilitation measures play an increasingly important role in improving the business environment, cross-border investment by businesses is still hindered by opaque policies and government inefficiencies.⁶⁸

In the context of increasing the relevance of the WTO in global economic governance, the African Group *et al*⁶⁹ has stated that the 'long-awaited outstanding' development issues from the Doha Round continue to be paramount and need to be resolved.⁷⁰ In

⁶² *Ibid*

⁶³ *Ibid*

⁶⁴ To remedy the situation China has, among other things, proposed that the provisions on non-actionable subsidies should be reinstated and their coverage expanded; efforts be made to clarify and improve relevant rules relating to price comparison in anti-dumping proceedings and explore the possibility of harmonizing the rules on anti-circumvention; transparency and due process of anti-dumping and countervailing investigations be improved; and more consideration be given to the special situations of developing Members and SMEs as well as public interests.

⁶⁵ *Ibid*

⁶⁶ *Ibid*. In the relevant discussions, China further proposes upholding the development dimension, formulating provisions on development cooperation so as to strengthen technical assistance and capacity building for developing Members, respecting Members' right to regulate, accommodating specific concerns of developing Members, and striking a balance between technological advances and legitimate public policy objectives.

⁶⁷ *China's Proposal on WTO Reform* - Communication from China. WTO Document WT/GC/W/773 13 May 2019.

⁶⁸ *Ibid*

⁶⁹ *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the Plurinational State of Bolivia, Cuba, Ecuador, India and Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019

⁷⁰ These include, among others, implementation issues aimed at rebalancing the imbalanced rules from the Uruguay Round such as in the areas of agriculture and others; strengthening and making effective and operational the S&D provisions in WTO Agreements, in accordance with paragraph 44 of the Doha Declaration; finding a solution to the cotton issue, an area in which the imbalances in agriculture domestic support due to AMS beyond *de minimis* leading to subsidized exports by some are clear; finding and adopting a permanent solution on public stock-holding; pursuit of negotiations on a Special Safeguard Mechanism for developing country Members in line with Ministers mandate in Nairobi (MC10, 2015); an outcome in the fisheries subsidies negotiations;

addition, the African Group *et al*/ believe that the rules of the multilateral trading system must support developing countries in building their technological capacities, and their access to affordable medicines and medical technologies.⁷¹

Principles to guide the WTO reform discussions

Most of the developing countries have laid out a set of principles on the basis of which they believe the reform discussions should be conducted. The LDC Group⁷² has proposed that WTO reform should take full account of the widespread capacity constraints of LDC Members, in the levels of obligations and implementation expected of them; the need to ensure that inclusive negotiating processes and consensus-based decision-making are constantly used, and that whatever the negotiating format, all WTO Members have the right to access promptly all negotiating documents; the need to ensure that proposed reform measures, including those related to the provision of technical assistance to LDCs, can help them to effectively and sustainably address their structural capacity constraints in order to enable them to meet their commitments; the need to guarantee the preservation and improvement of the gains granted to LDCs in terms of the legal and procedural flexibilities contained in WTO agreements and decisions; and the need to consider the capacity limitations of the graduated LDCs.

China has proposed that the reform should preserve such core values of the multilateral trading system as non-discrimination and openness, with a view to creating a stable and predictable environment for international trade; safeguard the development interests of developing Members and particularly eliminate the development deficit in the existing WTO rules, resolve the difficulties encountered by developing Members in their integration into economic globalization and help attain the Sustainable Development Goals of United Nations 2030 Agenda; follow the practice of decision-making by consensus, and that the specific issues subject to reform, work agenda and final results should be agreed upon after extensive consultations, on the basis of mutual respect, broad participation and dialogues on an equal footing.⁷³

In addition to stating that reform must be premised on the principles of inclusivity and development and respond to the underlying causes of the current backlash against trade and the difficulties that developing Members continue to face *vis-à-vis* their industrialization challenges, the African Group *et al*/ has added that the reform must also keep development at its core through delivering on the long-promised development concerns, in particular the outstanding development issues of the DDA; address the asymmetries in WTO Agreements; strengthen the multilateral character of the WTO, especially preservation of consensus decision-making; continue with the on-going multilaterally mandated negotiations; reaffirm the principle of S&D;

discussions under the 1998 E-Commerce Work Programme in the relevant WTO bodies; and addressing the alleged theft of traditional knowledge that is held, preserved and developed by traditional communities/indigenous people.

⁷¹ *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the Plurinational State of Bolivia, Cuba, Ecuador, India and

Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019

⁷² *LDC views on WTO Reform Discussions and Proposals* - Communication from Chad on behalf of the LDC Group Document JOB/GC/223, dated 6 December 2019

⁷³ *China's Proposal on WTO Reform* - Communication from China. WTO Document WT/GC/W/773 13 May 2019.

and promote inclusive growth, widening spaces for states to pursue national development strategies.⁷⁴

1.3 Areas of convergence and divergence in the proposals

In the proposals so far on the table, WTO Members congregate in agreement on the need to reform the *WTO's notification and transparency procedures*, as well as the *procedures of WTO councils and committees*, although there is disagreement regarding the focus areas and the shape of a possible outcome. It is clear that the main aim of the developed countries' proposals in this area is to ensure that especially developing-country members meet their obligations, with the EU having decried 'the chronic low level' of compliance. However, developing countries have, on their part, been quick to point out that all WTO Members are guilty of non-compliance with their obligations in this area and urged developed Members to lead by example by submitting comprehensive, timely and accurate notifications. While not against the proposed reform, some developing countries such as the African Group *et al* have underlined that developing countries face challenges in complying with all their notification obligations due to human resource and institutional capacity constraints, and not due to wilful non-compliance. The ability to fulfil notification obligations inevitably depends on capacities that are commensurate with a Member's level of development and resources available, the developing countries have argued, and expressed their outright disagreement with additional/new notification

and transparency obligations, emphasising rather that work in this area must be in the provision of technical assistance and capacity building.

So although understandably the initial debate will be characterized by Members' desire to influence the areas of focus and, in that manner, the shape of the final outcome, there is scope for Members to embark on work in the area of transparency and on how to handle specific trade concerns since there is overall agreement that monitoring the implementation, administration and operation of existing agreements is central to a well-functioning rules-based trading system, and that transparent information-sharing and deliberation would help Members resolve trade concerns and avoid formal dispute settlement. The African Group *et al* have, however, suggested to widen the scope of transparency reform to permeate the entire functioning of the WTO, if the discussion were to go beyond addressing capacity issues.

It seems logical that Members should agree on *a set of principles on the basis of which the reform discussions should be undertaken*. In any case, most of the principles outlined by developing and least-developed countries are already multilaterally agreed, or recognized. For that reason, developed countries, which have not addressed this aspect in their proposals, should have no reason not to agree to the elaboration of principles.

While WTO Members are seemingly agreed that the *deliberative, negotiating and rule-making function of the WTO* needs to be reformed to enhance the inclusiveness of the multilateral trading system, they hold diametrically opposed views on an issue that

⁷⁴ *Strengthening the WTO to Promote Development and Inclusivity* - Communication from the African Group, the Plurinational State of Bolivia, Cuba, Ecuador, India and

Oman. Document WT/GC/W/778/Rev.2, dated 7 August 2019.

would be central to such a reform discussion; the issue of S&D. One cannot possibly see a way to reconcile the African Group *et al* view that S&D is an unconditional, non-negotiable and treaty-embedded right, and the US view seeking to deprive some developing countries of S&D through the setting of categories of WTO Members that would not avail themselves of this right. Developed and developing countries cannot even agree on whether or not the gap between them has narrowed or widened since the establishment of the WTO. The 'alternative' approach proposed by Norway *et al* of exploring how S&D could be designed to address development challenges instead of aiming at consensus on a negotiated set of criteria for when a developing Member should have access to S&D, does not appear to have bridged the gap between the two entrenched positions. A two-track approach may therefore

be more pragmatic. Members may pursue other elements to reform the deliberative, negotiating and rule-making function of the WTO while continuing to explore possible ways forward on S&D.

Increasing the *WTO's relevance in global economic governance* would seem to be an area that would be of interest to all WTO Members. However, the proposals by China and the African Group *et al* that focus on curbing unilateralist and arbitrary measures that raise trade barriers and impose import tariffs, as well as on the imposition of economic sanctions on other countries without authorization from the United Nations, are unlikely to gain traction since the Members accused of these actions would understandably be unwilling to engage in such a discussion.

SECTION 3

The Future including towards MC12

The reality is that WTO reform is already happening. Speaking in July 2019 at a meeting of the WTO General Council, the then WTO Director General, Mr. Roberto Azevedo said:⁷⁵

"I've been getting questions inside and outside these walls about what WTO reform will entail. I think there are two basic misconceptions here. The first is talking about reform as if it's in the future. Reform is already happening. The second misconception is assuming that we can define it all now. I think members must define as they go. This process is for members to shape. What a reformed WTO may look like will depend on what you set out to achieve, and what you actually manage to deliver."

It is a fact that the reform debate is all over the place, in the WTO councils and committees mandated to deal with the various issues raised in the proposals. Going towards MC12, it would be beneficial to the process if WTO Members agree to embark on a dialogue to structure the discussion, and to possibly agree on the scope, principles and the objectives of the reform. There is no running away from the fact that any agreement on any aspect of the reform will in the end have to be by consensus. This therefore calls for some kind of agreement right from the start on what needs to be done, why it needs to be done and in what way. There seems little point in precipitating other Members into a reform discussion whose final results they can always

block by refusing to join consensus. The developed countries that kicked-off the current reform debate in 2018 seem to have set-off buoyed by their own conviction of the need for reform, without paying much attention to whether or not developing country Members were ready for such an agenda. Luckily for them, developing countries have on their part also tabled proposals, instead of flatly refusing to engage since it is not so long ago that developed countries themselves had walked away⁷⁶ from the Doha Development Round agreed mandates many of which were perceived to be in favour of developing countries.

Since the proposals so far on the table offer scope for convergence towards possible negotiations in the area of the reform of the WTO transparency and notification procedures, and possibly on principles to guide institutional reform negotiations, Members could agree to make these the priority areas for reform in the run-up to MC12. This envisages possible outcome on transparency and notification issue at MC12, as well as agreement on the objectives and principles of the WTO reform that would form the basis for discussions/negotiations after MC12. Such a step-wise and pragmatic approach is needed to deal with WTO reform agenda given its breadth and conflicting positions of WTO Members.

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https://www.wto.org/english/news_e/news19_e/tnc_19jul19_e.htm

⁷⁶ Paragraphs 32-34; Nairobi Ministerial Declaration, WT/MIN (15)/DEC dated 21 December 2015. WTO Members agreed in the Ministerial Declaration to capture their disagreement on how to proceed in the DDA

negotiations, noting that while many Members wanted to carry out work on the basis of the Doha structure, some wanted to explore new architectures 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 did not.

Moreover, as members settle into the reform debate beyond the initial ‘suspicions’ and jostling to shape the outcome, they could consider using their negotiating experience gathered over the years to hold informal discussions ‘across the aisle’ to identify and confirm possible landing zones, leading to beneficial engagement. This would contribute towards the building of trust amongst the membership. The same informal discussions could carve out areas on which stark differences exist and which would require more time to deal with.

The work of the WTO has always been helped greatly by technical assistance activities of Geneva-based think-tanks and other institutions that provide technical analysis and platforms for engagement, especially for developing countries. These technical assistance activities could be designed to advance the reform debate through activities such as seminars and workshops to allow WTO Members to engage in exchanges on some of the proposals on the table away from the constraints of WTO negotiations and with the support of objective technical analysis.

Finally, the Covid-19 pandemic has framed WTO reform in a new light. Not only has the pandemic affected the pace of the WTO negotiations and Members’ ability to participate smoothly in those negotiations, but it has also sparked growth in the number of export prohibitions and restrictions by Members. This threatens the functioning of the multilateral trading system, and increases the importance of transparency and notifications, for example, as well as of the need for constructive and robust multilateral exchanges to avoid recourse to unliteral and “beggar thy neighbour” actions that will hurt all. In that context, WTO Members have an opportunity through reform, and while finding solutions to the unique challenges posed by

the pandemic to, at MC12 and for the future, assert the relevance of the WTO in global economic governance.

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