

# The Other Elements of WTO Institutional Reform

Beyond Dispute Settlement



Felix Maonera

# The Other Elements of WTO Institutional Reform: Beyond Dispute Settlement

---

Authored by:

Felix Maonera

Published by:



**CUTS INTERNATIONAL, GENEVA**

Rue de Vermont 37-39

1202 Geneva, Switzerland

[www.cuts-geneva.org](http://www.cuts-geneva.org)

Also at: Jaipur, New Delhi, Chittorgarh, Kolkata, Hanoi,  
Nairobi, Lusaka, Accra, Washington DC

This paper was undertaken by Felix Maonera. It is published under CUTS International Geneva's project "Geneva Trade and Business Connection: Mainstreaming the private sector into the WTO and its 12th Ministerial Conference preparatory phase", undertaken with funding support from Australian Aid.

**Citation:** MAONERA, F. (2020). *The Other Elements of WTO Institutional Reform: Beyond Dispute Settlement*. Geneva: CUTS International, Geneva.

**Disclaimer:** The views expressed in this publication represent the opinions of the author, and do not necessarily reflect the views of CUTS or its funders.

**Cover Photo:** WTO

© 2020. CUTS International, Geneva

The material in this publication may be reproduced in whole or in part and in any form for education or non-profit uses, without special permission from the copyright holders, provided acknowledgment of the source is made. The publishers would appreciate receiving a copy of any publication, which uses this publication as a source. No use of this publication may be made for resale or other commercial purposes without prior written permission of the copyright holders.

# Table of Contents

---

Abbreviations .....	4
Executive Summary.....	5
1. Background .....	6
2. Transparency in Rule-making .....	8
3. Strengthening and Enhancing the Effectiveness of WTO Mechanisms .	10
4. Enhanced role of the WTO Secretariat and the Director General .....	13
5. Improved Public and Civil Society Participation .....	14
6. Fulfilment of WTO Ministerial Mandates.....	16
7. Possible Developing-country Interests .....	17
References.....	18

# Abbreviations

---

AB	Appellate Body
ACP Group	African, Caribbean and Pacific Group
DDA	Doha Development Agenda
DG	Director General
DSU	Dispute Settlement Understanding
EU	European Union
G90	Group of 90 developing countries
GATT	General Agreement on Tariffs and Trade
LDCs	Least-developed countries
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TNC	Trade Negotiations Committee
TRIPs	Trade-related Intellectual Property Rights
WTO	World Trade Organisation

## Executive Summary

Experience seems to show that whenever there is lack of movement or clear direction in the WTO negotiations internal and external calls for the reform of the organization's institutional framework grow in resonance. The current impasse in the DDA negotiations has given rise to a reform agenda in the name of the WTO's legitimacy, order, dynamism and the need to make it more effective.

Reports were commissioned in the past by some WTO Directors General which made recommendations to address key institutional challenges. Reasons advanced to support the current WTO reform agenda include that the world has changed in ways that could scarcely have been imagined; the main actors in the global economy are now different; the bulk of the WTO rule book dates back to the Uruguay Round; the WTO needs to adapt; evolution and reinvention have always been part of the multilateral trading system; the need to unlock the DDA negotiating impasse; the WTO membership has grown in number necessitating structural changes; and the need to avoid the growing number of regional and bilateral free trade arrangements, customs unions, common markets, plurilaterals and joint initiatives. Certainly, there is no shortage of reasons to justify and support a WTO reform agenda.

The emerging framework for the reform agenda is to address issues in the WTO dispute settlement system, including the

impasse in appointments to the Appellate Body; strengthening the work of the WTO's regular bodies; and improving the WTO's negotiating work. This paper will not deal with the first aspect, as this issue has been extensively explored in earlier papers. The scope will instead be strengthening the work of the WTO's regular bodies and improving the WTO's negotiating function. The following elements readily fall within that scope; transparency in decision-making; strengthening the effectiveness of WTO committee mechanisms; enhanced role of the WTO Secretariat and of the Director General; enhanced civil society participation; creation of a parliamentary dimension, and the fulfilment of WTO Ministerial Mandates. Some of these elements were raised in the recommendations of the commissioned reports, while others are already subject of proposals tabled in the WTO by both developed and developing countries.

The guiding principle for developing countries in deciding which issues to pursue should be the potential contribution of an issue to making the WTO work better for all, and its contribution to the development of developing countries. However, the reality is that whatever reason a WTO member may choose to come up with to support or oppose the reform agenda, every member will find itself in a position of having to defend or pursue its interest in relation to the issues, and the approaches adopted. Whatever a member's strategy, some action on its part is required.

# 1. Background

It seems whenever there is lack of movement or clear direction in the World Trade Organisation (WTO) negotiations (and even during the time of GATT earlier), calls for the reform of the organization's institutional framework grow in resonance - both from amongst the WTO Members, as well as from others outside the WTO. In 1983 during the GATT era, to break the log-jam in launching the Uruguay Round, Director General Arthur Dunkel commissioned the 'Leutwiler' Report<sup>1</sup> entitled "*Trade Policies for a Better Future.*" Released in 1985, the report detailed what were seen as the problems facing the multilateral trading system then. In 2003, as WTO Members faced headwinds in the negotiations towards the 3<sup>rd</sup> WTO Ministerial Conference in Cancun, Mexico, WTO Director General Supachai Panitchpakdi commissioned the 'Sutherland' Report<sup>2</sup> "*The Future of the WTO; Addressing Institutional Challenges in the New Millennium,*" released in 2005. And in 2007 the 'Warwick Commission' Report<sup>3</sup> "*The Multilateral Trade Regime – Which Way Forward*" was commissioned around the time when WTO members were working to put together the ill-fated 2008 July Package.<sup>4</sup> In 2012, the then WTO DG Pascal Lamy established a Panel to examine and analyse challenges to global trade opening in the 21st century, which issued its Report "*The Future of Trade: The Challenges of Convergence*" on 24 April 2013.<sup>5</sup> All these reports identified what were considered to be key institutional challenges that needed addressing in

the name of the WTO's legitimacy, order, dynamism and the need to make it more effective.

Now in 2020 WTO members find themselves in a similar situation of growing calls for the reform of the WTO, attributed in large part to the fact that the WTO DDA negotiations are floundering, with members unable to find ways to bridge the technical and political gaps that separate them as they head for the 12<sup>th</sup> WTO Ministerial Conference in June 2020.<sup>6</sup> While other WTO Directors General commissioned reports to explore the case for WTO reform, the current WTO Director General, Mr. Roberto Azevedo, is convinced that such reform is necessary.

At the conclusion of the meeting of the World Economic Forum in Davos, Switzerland, in January 2020, the WTO Director General had this to say:

"Reform is essential for the WTO. This view is widely shared by members... WTO reform is — and should continue to be — an ongoing process of adapting to economic conditions and responding to members' concerns... Sitting on our hands in Geneva means an ever-widening gap between WTO disciplines and business realities... We must be pragmatic, not theological, about finding solutions."

Speaking at the Washington International Trade Association Conference in February 2020, the

---

<sup>1</sup> Mr. Fritz Leutwiler chaired a group seven eminent persons to study the problems facing the international trading system

<sup>2</sup> The Consultative Board was chaired by Mr. Peter Sutherland former Director-General of GATT and then the WTO

<sup>3</sup> Published by the University of Warwick, the commission was chaired by Pierre Pettigrew who was a minister in successive governments of Canada

<sup>4</sup> This was an across the board comprehensive set of texts on the DDA negotiating areas. The July 2008 package was considered a stepping stone on the way to concluding the Doha Round. The main task before WTO Members was to settle a range of questions that would shape the final agreement of the

Doha Development Agenda. Consultations took place among a group of ministers representing various interests in the negotiations in a series of meetings held in Geneva from 21 to 30 July.

([https://www.wto.org/english/tratop\\_e/dda\\_e/meet08\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/meet08_e.htm)) Admittedly, this was the closest WTO Members ever came to reaching agreement in the DDA negotiations.

<sup>5</sup>

[https://www.wto.org/english/res\\_e/publications\\_e/future\\_of\\_trade\\_e.htm](https://www.wto.org/english/res_e/publications_e/future_of_trade_e.htm)

<sup>6</sup> In fact, these calls had started in earnest at least since 2018 and have been growing since then.

WTO Director General was even more expansive, in saying:<sup>7</sup>

“So the multilateral trading system is worth keeping. But that does not mean keeping it as it is. There are areas where it could improve — where it must improve... And the world has changed in ways that could scarcely have been imagined. Look around: the main actors in the global economy are different. They have different economic models... The bulk of the WTO rule book dates back to the Uruguay Round. These negotiations were concluded in Marrakesh back in April 1994... What this means for the WTO is that to endure as an effective entity in the years ahead, it will need to adapt...

“In fact, some of the unconventional policies and bilateral arrangements we see today might never have arisen had we done more to update the system... Evolution and reinvention have been part of the multilateral trading system since its creation in the 1940s. It has incorporated new members and new issues... Of course, the real question is not whether we need changes at the WTO. Just about everyone agrees on that. It is whether we can make the changes we need... The fact is that change in multilateral institutions is hard... Looking ahead, I am sure that WTO members are ready for change. They want to improve the system we have — not throw it away and attempt to start from scratch. We have a solid foundation, one that has fostered growth, development, and increased purchasing power for decades. But a few coats of paint won't be enough. We need structural changes... To modernize the WTO, we will need vision and determination...”

It has been necessary to extensively quote the WTO Director General above because he captures in one statement almost all the reasons that have

been put forward justifying the WTO reform agenda. These are: the world has changed in ways that could scarcely have been imagined; the main actors in the global economy are now different; they have different economic models; the bulk of the WTO rule book dates back to the Uruguay Round; the need to adapt; evolution and reinvention have been part of the multilateral trading system; improve the system but not throwing it away and attempting to start from scratch; we need structural changes... to modernize the WTO.

To add to this list are other reasons, such as that the institution's working mechanisms need reinforcing and equipping taking into account current institutional challenges, and to possibly unlock the current DDA negotiating impasse; the WTO membership has grown to 164; conflicting internal and external pressures, and expectations; and the growing number of regional and bilateral free trade arrangements, customs unions, common markets, plurilaterals and joint initiatives. Reforming the institution to make it work better, it is believed, will obviate the need for some WTO members to resort to less-than fully-multilateral approaches. As can be seen, there is no shortage of reasons to justify and support a WTO reform agenda.

At a WTO General Council meeting in July 2019, the WTO Director General also said:<sup>8</sup>

"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

---

<sup>7</sup> On 4 February 2020, available at [https://www.wto.org/english/news\\_e/spra\\_e/spra301\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra301_e.htm)

<sup>8</sup> [https://www.wto.org/english/news\\_e/news19\\_e/tnc\\_19jul19\\_e.htm](https://www.wto.org/english/news_e/news19_e/tnc_19jul19_e.htm)



you set out to achieve, and what you actually manage to deliver. No area of our work is perfect. All of it can be improved. And we will always need to be alert to how the system can better respond to members' concerns and adapt to economic conditions.

Indeed, the reform agenda is not being discussed in any one specific WTO Council of Committee, but in several at the same time. What this means is that while some WTO members, unconvinced of the desirability of such a reform may be watching and pondering, the reform agenda is on its way and will, more likely than not, gather pace and even balloon.

The four reports earlier cited commissioned to review the working of the multilateral trading system and the WTO institutional framework put together comprehensive findings and recommendations, some of which have already generated discussion among the members, and some of which could now be picked up by some members and advanced under the current reform agenda.

The framework of the reform agenda can be outlined as, addressing issues in the dispute settlement system, including the impasse in appointments to the Appellate Body; strengthening the work of the WTO's regular bodies; and improving the WTO's negotiating work.<sup>9</sup> This paper will not deal with the first aspect, as this issue has been explored in another paper.<sup>10</sup> It will focus rather on the other two aspects regarding strengthening the work of the WTO's regular bodies, and improving the WTO's

negotiating function. The following elements fall within the scope of these two aspects: transparency in decision-making; strengthening the effectiveness of WTO committee mechanisms; enhanced role of the WTO Secretariat and of the Director General; enhanced civil society participation; creation of a parliamentary dimension, and the fulfilment of WTO Ministerial mandates.

The reality is that whatever reason a WTO member may come up with to support or oppose the reform agenda, every member will find itself in a position of having to defend or pursue its interest in relation to the issues, and the approaches adopted. Whatever a member's strategy, some action on its part will be required. Interestingly, although the current reform agenda was set in motion by developed countries<sup>11</sup> a number of the reform proposals have been tabled jointly by developed and developing countries.<sup>12</sup>

## 2. Transparency in Rule-making

Developing countries have always advocated for transparency in the WTO decision-making processes, particularly in rule-making. At several WTO ministerial conferences, developing countries pushed for inclusion into the declaration language calling on all members to ensure that WTO meetings and consultations were representative and accountable. Admittedly, WTO processes are much more transparent today, unlike in the days of the 'green room' meetings of

---

<sup>9</sup>As Outlined by the WTO DG at a General Council meeting in July 2019  
[https://www.wto.org/english/news\\_e/news19\\_e/tnc\\_19jul19\\_e.htm](https://www.wto.org/english/news_e/news19_e/tnc_19jul19_e.htm)

<sup>10</sup> MAONERA, F. (2018). *An Agenda for Reforming the World Trade Organisation: A New Wind Blowing*. Geneva: CUTS International, Geneva.

<sup>11</sup> *Strengthening and Modernising the WTO: Discussion Paper*, Communication from Canada: JOB/GC/201, dated 24 September 2018; 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](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)

<sup>12</sup> The proposal on Procedural Guidelines for WTO Councils and Committees Addressing Trade Concerns - Draft General Council Decision; WT/GC/W/777/Rev.4 dated 21 October 2019 and the Proposal Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements - JOB/GC/204/Rev.2, 27 June 2019. Appearing side by side in these proposals are names of developed and developing countries together.



a few select members. Developing-country members currently participate actively in various formats of WTO meetings, either individually or through groupings such as the ACP Group, the African Group, the LDCs Group and the G90.

Decisions among WTO members are taken by consensus<sup>13</sup> which means that when a matter is put to the membership for final decision, no member objects to the taking of that decision. So even if a member may not be entirely in favour of a certain decision, if that member holds its silence when the matter is put for decision, then consensus has been achieved. It is believed that consensus guarantees, to a degree, that WTO decisions will be respected and implemented by the whole membership, in the spirit of a multilateral trading system.

A view has been advanced that members might consider taking a relook at consensus decision-making<sup>14</sup> which in some cases has led to lack of movement in WTO negotiations. Consensus gives every member the opportunity to block agreement, even in situations where the majority of the membership is in favour. The 'Sutherland' Report recommended that members give serious further study to the problems associated with consensus, including that any member seeking to block consensus on a measure which the broad membership supports should declare its reasons in writing, stating that the matter is of vital national interest to it.<sup>15</sup> The same report also observed that the insistence on consensus not only blocks progress but encourages members to pursue other tracks for trade liberalisation, such as plurilaterals and other regional and bilateral arrangements. The current joint initiatives being

pursued by some WTO members<sup>16</sup> are considered by some to be a result of, in part, the consensus rule that has led to lack of movement in the negotiations.

No doubt, consensus decision-making can lead to an impasse in negotiations. However, experience in the WTO negotiations reveals that members do not block consensus lightly since consensus can work in favour of a member on one issue, and against that member on another. Developed countries have used the consensus rule to block decisions that would have been in favour of developing countries, such as developing-country proposals on making special and differential treatment more precise, effective and operational.<sup>17</sup> However, the sense one gets is that it is believed to be unjustified for small developing countries whose share of world trade is minuscule to refuse to join consensus on issues of interest to big economies.

Generally accepted in the 'Sutherland Report' is that overriding the interest of some members simply because they might be poor or of small and weak economies would go against the WTO ethos as a forum for negotiations among its Members to achieve greater coherence in global economic policy-making.<sup>18</sup> The WTO is central to the multilateral trading system and that system can only function well if all parties, big and small economies alike, take part in the decision-making processes. Arriving at consensus decisions with the full participation of 164 Members cannot be easy, one thing the current impasse in the negotiations has demonstrated. However, adding more hoops to consensus decision-making, such as a requirement to give written and reasoned

---

<sup>13</sup> It should be noted, however, that the WTO Agreement in Article IX:1 does make provision for voting.

<sup>14</sup> 'Sutherland' Report *"The Future of the WTO; Addressing Institutional Challenges in the New Millennium"* Chapter VII, "A results-oriented institution – decision-making and variable geometry."

<sup>15</sup> 'Sutherland' Report *"The Future of the WTO; Addressing Institutional Challenges in the New Millennium"* Chapter VII, "A results-oriented institution – decision-making and variable geometry" para 289.

<sup>16</sup> At the 2017 11<sup>th</sup> WTO Ministerial Conference groups of a mix of developed and developing country WTO Members announced joint initiatives in the areas of electronic commerce, investment facilitation and micro, small and medium size enterprises (MSMEs).

<sup>17</sup> In the context of paragraph 44 of the Doha Ministerial Declaration.

<sup>18</sup> Article III of the WTO Agreement

explanations as to why a member cannot join consensus, could complicate matters further. In the Doha Ministerial declaration members tweaked the consensus rule to somewhat strengthen it by agreeing that negotiations on certain issues would proceed only on the basis of 'explicit' consensus.<sup>19</sup>

Any other decision-making mechanism or process that excludes consensus cannot be in the interests of smaller developing countries. What may be useful though would be to explore ways in which consensus-building among members can be facilitated, for example timelines and possibly informal guidelines that maintain the balance between equal participation in decision making by Members, big or small, and efficiency.

### 3. Strengthening and Enhancing the Effectiveness of WTO Mechanisms

#### Improving transparency and notification requirements under the WTO Agreements

A group of a mix of developed and developing countries proposed to reform the way the WTO mechanisms function when a member fails to provide a required notification within the deadline referenced in the relevant Agreement or Understanding.<sup>20</sup> Reasons put forward in support of this proposal include that transparency and notification requirements constitute fundamental elements of many WTO agreements and a properly functioning WTO system, and thus of members' obligations; the chronic low level of

compliance with existing notification requirements under many WTO agreements; and the desire to strengthen and enhance transparency and improve the operation and effectiveness of notification requirements. The fact that the proposal is by both developed and developing country members might mean that all members are at one time or the other, in respect of one agreement or another, affected by the lack of proper and timely notifications by other members.

It is proposed, as part of the solution, that recommendations be developed on improving members' compliance with their notification obligations; that the Technical Cooperation Handbook on Notification Requirements for each of the agreements and understandings be updated; and that from an agreed date all trade policy reviews include a specific, standardized focus on the member's compliance with notification obligations.

A member that defaults in providing a notification will be required to submit to the relevant committee within six months after the relevant deadline, and every six months thereafter, an explanation for the delay, the anticipated time-frame for its notification, and any elements of a partial notification that a member can produce to limit any delay in transparency. The member in default<sup>21</sup> may request the WTO Secretariat to provide assistance in researching the matter. Developing-country members facing difficulties in fulfilling their notification obligations are encouraged to request assistance and support for capacity building from the WTO Secretariat, either in the form of WTO trade-related technical assistance or as *ad hoc* assistance for a particular notification. Such developing countries are also

---

<sup>19</sup> Paras 20, 23, 26. and 27

<sup>20</sup> Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements - JOB/GC/204/Rev.2, 27 June 2019

<sup>21</sup> Note should be taken that this assistance from the WTO Secretariat would, without distinction, apply to all WTO members – developed, developing, LDCs alike.

encouraged within six months after the deadline for the receipt of the notification, and every six months thereafter, to provide information on those notifications that have not been submitted due to a lack of capacity, including information on the assistance and support for capacity building that is required.

Also proposed is a procedure that would allow other WTO members to bring to the attention of the relevant committee information they consider has not been notified by another member.

Administrative measures are proposed to sanction a member that would have failed to comply with its notification obligations within the set deadline. These measures would include designation of the member as one with a notification delay; relegation of representatives of the member to the back of the speaking queue in WTO formal meetings; labelling of the member as one with a delayed notification when they take the floor in the General Council; annual reporting by the WTO Secretariat to the Council for Trade in Goods on the status of the member's notifications; and non-nomination of representatives of the member to preside over WTO bodies. Additional sanctions measures would be applied if after one year of the initial administrative measures, the member still has failed to submit the relevant notification. These additional measures would include, subjecting the member to specific reporting at the General Council meetings; the possible ignoring of that member's questions posed to another member during a Trade Policy Review; and imposition by the WTO Secretariat of a financial penalty on the member.

While the proposal accurately frames the problem – the non-compliance by members with their notification obligations – it makes no attempt whatsoever to explain why this is so. As such, the framing is incomplete without such reasons being proffered, taking into account the obtrusive administrative measures proposed. Despite the fact that some developing countries have put their

names to this proposal, one senses that the proposal is targeted at mostly developing countries that have failed to honour their notification obligations. This fact has not been lost on some of the developing countries which have spoken against the proposal. While not contesting their notification and transparency obligations, the developing countries argue that their non-compliance is due to human and financial resource constraints. This explanation has been met with a degree of scepticism by some developed countries that have pointed out that not all of the reporting obligations require a huge commitment of financial resources or personnel to undertake. Since there is no agreement on the issue of the causes of non-compliance, perhaps a discussion could be held to determine the causes of non-compliance in respect of specific WTO Agreements.

The proposed administrative measures for non-compliance are punitive in nature, in a manner never before seen in the WTO. One could even consider these measures DSU-plus in the sense that members whose measures are determined by a WTO Panel or the Appellate Body to be in violation of an agreement are only required to bring that measure into compliance, or have the complaining party retaliate against them. Having a member's right to participate in the work of the WTO curtailed for non-compliance with its reporting obligations, including financial penalties, is casting things too wide, disproportionate to the 'offence.' It seems the measures would apply regardless of whether a member is non-compliant in terms of one or many agreements, and whether or not harm has been caused to another member by such non-compliance.

The obvious point is that there is no benefit to developing countries in agreeing to a proposal that limits their right to participate in the work of the WTO. The technical assistance special and differential treatment for developing countries in-built into the proposal in no way makes the

situation better for developing countries, taking into account some developed countries' generally negative approach to special and differential treatment in the WTO, and the fact that the proposed technical assistance is, in any case, already available to developing countries upon request.

A preferred approach therefore should have three elements: identifying the causes of non-compliance; providing mandatory support to smaller developing countries to overcome their capacity constraints; and avoiding a punitive approach.

## **Strengthening the regular WTO councils and committees' ability for the effective resolution of Members' concerns**

Another group of developed and developing countries has proposed<sup>22</sup> reforming the work of WTO Councils and Committees to enable them to more effectively resolve members' trade concerns. The proposal recognizes that regular WTO Council and Committee meetings offer members the possibility to discuss and resolve concerns regarding trade-related measures of other members. The intention is to strengthen and facilitate the ability of these Councils and Committees to effectively resolve such concerns by equipping them with horizontal procedural guidelines so as to encourage members to resolve trade concerns through dialogue.

As part of the guidelines, it is proposed that all documents to be considered at a formal meeting of a WTO body, including convening notices and minutes of the previous meeting, be made available within a set number of days. Convening

notices shall carry details such as which trade concerns are being raised for the first time and which have been previously raised. Members requesting the inclusion of a trade concern on the agenda of a formal meeting for the first time are to inform the member complained against, and the WTO Secretariat, within a set period and provide a substantive description of the concern. The member complained against is then expected to endeavour to address the substance of the concerns raised at the first meeting where the concern is included on the agenda. The members raising and responding to a trade concern are encouraged to consult with each other between formal meetings.

In a bid to promote the coherent handling of a concern, it is proposed that if concerns over the same measure are raised in different WTO bodies, then an overview of the relevant discussions in those bodies as well as a factual summary of the substance should be given. If a trade concern has remained on the agenda for three or more consecutive meetings without resolution, the member raising or responding to a trade concern may request an informal meeting with the objective of finding a way forward. A developing country member encountering difficulties to respond to a trade concern or to implement the proposed procedural guidelines is encouraged to request assistance from the WTO Secretariat. The WTO Secretariat is to establish a database, with a search facility, on trade concerns, in which all documents relevant to the concern are recorded.

It is not clear what the problem the proposal seeks to address is, and why the current working methods of the Councils and Committees are not adequate to address trade concerns. Experience has shown that discussions in WTO Committees and Councils can lead to the withdrawal by members of the offending trade measures. One

---

<sup>22</sup> Procedural Guidelines for WTO Councils and Committees Addressing Trade Concerns - Draft General Council Decision; WT/GC/W/777/Rev.4 dated 21 October 2019

imagines that Committees that would be of special interest to developing countries to address their trade concerns would be the Sanitary and Phytosanitary Measures (SPS) Committee and the Committee on Technical Barriers to Trade (TBT) since developing countries have traditionally argued that SPS and TBT measures are often used by developed countries to bar imports from developing countries. However, what is proposed are simply procedural guidelines that still rely heavily on members' willingness to find amicable solutions to the concerns raised. If members show unwillingness to cooperate, the fall-back position would be resort by the complaining member to the WTO dispute settlement mechanism. The expectation placed on members to provide full details relating to the trade concern carries with it the assumption that members will spend some time and resources in putting that information together. Developing countries could face the same difficulties and constraints that they face in relation to their transparency and notification obligations.

Any proposal that encourages the amicable resolution of disputes through dialogue is of benefit to developing countries as it is bound to be less costly than the WTO dispute settlement mechanism. Further discussion on this therefore can examine the experience of the SPS and TBT Committees that currently have mechanisms to address Specific Trade Concerns (STCs) by members, particularly the participation of smaller developing countries in these discussions as well as the results so far, and identify the ways in which smaller developing countries can make better use of such procedures.

## 4. Enhanced role of the WTO Secretariat and the Director General

There have been recommendations to grant to the WTO Secretariat and the Director General an enhanced role in the work of the WTO.<sup>23</sup> The responsibilities of the WTO Director-General and of the staff of the Secretariat are considered international in character, meaning that they shall not seek or accept instructions from any government or any other authority external to the WTO, and shall refrain from any action which might adversely reflect on their position as international officials.<sup>24</sup> The Members of the WTO are to respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat, and shall not seek to influence them in the discharge of their duties.<sup>25</sup>

It has been observed that WTO members seem to disregard the potential role of the Secretariat which possesses vast technical expertise in a staff made up of lawyers, economists, and other trade experts capable of analytical work that could give direction to the system,<sup>26</sup> and possibly take members out of a negotiating impasse such as the current one. In any case, it is argued, the WTO Secretariat is the guardian of the treaties, possessing vast institutional memory.

One cannot argue against the international character of the WTO Secretariat and its possession of quality expertise, based on the Secretariat's proven ability to provide top-notch technical assistance upon members' request. However, experience has shown that WTO negotiations are more political than technical. The current negotiating impasse cannot be attributed in the least to the lack of expertise amongst the

---

<sup>23</sup> 'Sutherland' Report "The Role of the Director-General and Secretariat," Chapter IX

<sup>24</sup> Article VI:4 of the WTO Agreement

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*



negotiators, or an inability on their part to find technical solutions to bridge the gaps that exist between them. In fact, most of the negotiators possess expertise and negotiating skills that match that of the Secretariat. There is therefore no justification for giving the Secretariat any role greater than the current. The duty to ensure that the WTO delivers on its mandate rests with the membership that represents governments, to which the membership is accountable.

The WTO Director General is already the *de facto* international spokesperson for the organization, as the quotes at the beginning of this paper from the current Director General demonstrate. In fact, past Directors General have assumed that same role. In the absence of the clear setting out of the DG's powers and duties,<sup>27</sup> there is an inherent danger in that the DG might frame WTO discussions to the wider world in a way that not all WTO members agree with. In fact, developing countries could take up the suggestion<sup>28</sup> to fulfil the General Council mandate to define the Director General's powers and duties to highlight the need for neutrality on the part of the Director General, for example, in framing to the wider world the state of play of the WTO negotiations. Suggestions to give the Director General an expanded role beyond chairing the Trade Negotiations Committee (TNC) to chair also other Committees and Councils,<sup>29</sup> including the General Council, will be contrary to the contractual nature of the WTO where only Members are bound by their obligations and hence have the right to set the direction for, and determine, those obligations. The fact remains that the WTO is inter-governmental in character.

## 5. Improved Public and Civil Society Participation

On account of the already expanding civil society role in international policy and decision-making and its ability to influence governments on policy issues, sentiment has been expressed calling on the WTO to consider providing space in its work for an expanded civil society role.<sup>30</sup> Civil society played a notably useful role in the negotiations to amend the WTO TRIPs Agreement to relax the rules on the issuance of compulsory licences in order to make medicines more affordable for poorer nations.<sup>31</sup> A number of NGOs such as Third World Network, Oxfam, Quakers and others, including some individual activists, were highly influential in publicising the issue, in 'naming and shaming' and in providing platforms for developing countries to canvass the issue. No doubt state and non-state actors can collaborate effectively in tackling global problems.

The WTO Agreement provides scope for cooperation arrangements between the WTO and civil society.<sup>32</sup> In 1996 the WTO General Council put in place guidelines for consultation and cooperation between the organisation and civil society.<sup>33</sup> In deciding on these guidelines WTO members recognized the role NGOs can play to increase the awareness of the public in respect of WTO activities, and agreed therefore to improve transparency and develop communication with NGOs<sup>34</sup>. To achieve greater transparency, members also agreed to ensure availability to the public of more information about WTO activities through prompt derestriction of documents. Consequently, in 2002 the WTO members

---

<sup>27</sup> The Ministerial Conference is supposed to appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office; Article VI, WTO Agreement.

<sup>28</sup> 'Sutherland' Report, para 342, page 74

<sup>29</sup> 'Sutherland Report', para 351, page 75

<sup>30</sup> 'Sutherland' Report; Chapter V "*Transparency and dialogue with civil society.*"

<sup>31</sup> Amendment of the TRIPs Agreement, WT/T/L 641, 8 December 2005

<sup>32</sup> Article V of the WTO Agreement

<sup>33</sup> "Guidelines for arrangements on relations with non-governmental organizations", Decision adopted by the General Council on 18 July 1996, WT/L/162, dated 23 July 1996

<sup>34</sup> *Ibid*, para 2

decided to allow the speedier availability to the public of WTO official documents, including those documents relating to on-going negotiations, emphasising the importance of greater transparency in the functioning of the WTO.<sup>35</sup> Currently, most of these documents can be accessed on the WTO website. Civil society organisations can also apply to attend WTO Ministerial Conferences.

The issue of civil society participation was topical in the early days of the WTO in connection with its participation in the organization's dispute settlement system. The WTO dispute settlement system envisages participation in Panel or Appellate Body proceedings as a matter of legal right only by parties and third parties to a dispute<sup>36</sup> which can only be members of the WTO. There is a distinction between, on the one hand, parties and third parties to a dispute, which have a legal right to participate in Panel and Appellate Body proceedings and, on the other hand, private individuals and organizations, which are not members of the WTO, and which therefore do not have the legal right to participate in the dispute settlement proceedings.<sup>37</sup> The participation by private individuals and organizations is dependent upon the Panel and Appellate Body permitting such participation if it finds it useful to do so<sup>38</sup> through acceptance of *amicus curiae*, or 'friends of the court' briefs.<sup>39</sup>

One can consider settled the issue of civil society participation in the work of the WTO. In putting together the guidelines for arrangements on relations with non-governmental organizations, WTO members pointed to the special character of

the WTO as being both a legally binding intergovernmental treaty of rights and obligations among its members and a forum for negotiations. In that context, the broadly held view was that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.<sup>40</sup>

But taking into account inherent tensions that exist between states and non-state actors and in the context of the floundering negotiations, one cannot entirely dismiss the prospect of renewed calls for greater civil society involvement, perhaps in different packaging. An expanded civil society role, beyond what currently obtains, would be adding unnecessary tiers and rungs to an already complicated process involving 164 members. As has been pointed out, excessive transparency could open up too many fronts and parallel tracks<sup>41</sup> that would burden already resource-constrained developing-country small delegations.

Closely associated to civil society participation in the work of the WTO, and for the same reasons of transparency, have been suggestions for the creation of a WTO parliamentary dimension. Some WTO members such as the EU have expressed support for the idea.<sup>42</sup> The reasons that do not favour an expanded civil society role in the work of the WTO also apply against the idea of a parliamentary dimension, particularly that the creation of an additional track in an already complicated WTO negotiating process would be another hoop for developing countries to jump through. As WTO members have acknowledged, closer consultation and cooperation with NGOs (and parliamentarians too) can be met

---

<sup>35</sup> "Procedures for the circulation and derestriction of WTO documents", Decision of 14 May 2002, WT/L/452, dated 16 May 2002

<sup>36</sup> Article 13 of the WTO Dispute Settlement Understanding  
<sup>37</sup> Maonera Felix (2006) "Quick Guide to the World Trade Organization Dispute Settlement Jurisprudence" TRALAC Working Paper

<sup>38</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, 27 March 1998; *EC – Measures*

*Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998

<sup>39</sup> These are written submissions made by interested persons (other than parties or third parties to the dispute) to present their views on a matter subject of the dispute. The Latin term *amicus curiae* means 'friend of the court'.

<sup>40</sup> Para 6, "Guidelines for arrangements on relations with non-governmental organizations", Decision adopted by the General Council on 18 July 1996, WT/L/162, dated 23 July 1996

<sup>41</sup> 'Sutherland' Report, Chapter V, 'Transparency and dialogue with civil society.'

<sup>42</sup> *Ibid*, para 202



constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.<sup>43</sup>

However, taking into account the benefit to the multilateral trading system of enhanced transparency for non-state actors, but without changing the fundamental intergovernmental nature of the WTO, further discussion on this issue could explore the possibility of the convening by the WTO DG of periodic civil society and parliamentary forums to share their views and perspectives on specific issues.

## 6. Fulfilment of WTO Ministerial Mandates

Over the years, WTO Members have adopted mandates<sup>44</sup> at Ministerial Conferences, or in the General Council, most with clear deadlines for their discharge. However, such deadlines commonly come and go, or are at best repeatedly renewed but seldom met. The WTO negotiating landscape is littered with unfulfilled mandates, with some having been completely ignored or allowed to lapse and yet others lying idle. Due to changed economic and political circumstances, some WTO members might indeed find themselves in a position of being unable to fulfil a given mandate. Sometimes the very process of negotiation causes members to more clearly understand what is at stake, and what it is they can, or cannot, do under the mandate.

In Nairobi at the 10<sup>th</sup> WTO Ministerial Conference in 2015, part of the WTO membership decided to

walk away from the Doha mandates by simply refusing to reaffirm those mandates, believing that new approaches were necessary to achieve meaningful outcomes in the multilateral negotiations.<sup>45</sup> This cannot be considered the right way to treat with ministerial mandates. For what would a mandate be worth if it is that easy to walk away from, in spite of the many months and years of proposals and position papers that it takes to put those mandates together?

Members could consider adopting procedures for the fulfilment of WTO mandates. Since it takes specific proposals and discussion among all members to give birth to a mandate, it seems logical that the abandonment of a mandate by any member(s) should equally be accompanied by proper motivation by that member(s), with clear reasons why it is felt the mandate cannot be fulfilled, and why its abandonment is considered a reasonable course of action to take.

Consideration should be given to including in future mandates a stipulation as to when and how the mandate shall be considered to have been discharged, and the course of action to be taken when no agreement can be reached pursuant to that mandate. Such an approach would assure all members that mandates they spend time and effort putting together by consensus are given due respect by all. The integrity of the WTO depends in part on the members' respect of the mandates given. It is the responsibility of all members to discharge a specific mandate, not just the responsibility of the proponents. The 2015 Nairobi Ministerial Conference experience of the abandonment of not one, not two, but many Doha mandates, without any cogent reason proffered, should not be repeated.

---

<sup>43</sup> <sup>43</sup> Para 6, "Guidelines for arrangements on relations with non-governmental organizations", Decision adopted by the General Council on 18 July 1996, WT/L/162, dated 23 July 1996

<sup>44</sup>In the form of Declarations and Decisions

<sup>45</sup>Nairobi Ministerial Declaration, para 30: "Other Members do not reaffirm the Doha mandates, as they believe new

approaches are necessary to achieve meaningful outcomes in multilateral negotiations..." WT/MIN (15)/DEC, dated 21 December 2015

## 7. Possible Developing-country Interests

The guiding principle regarding which issue on the reform agenda should be of interest to developing countries is the ability of that issue to make the WTO work better for all, particularly to promote the development of developing and least-developed countries. As pointed out elsewhere in this paper, the question is not whether all developing countries agree with the reform agenda – that decision has been taken out of their hands as the discussions are already taking place, with some specific proposals on the table. Rather, the question is which issues should developing countries be pursuing, and which ones should they be defending against?

Smaller developing countries should not compromise on consensus decision-making in the WTO. This is the only way that their voices can be heard, and taken into account. Like all other members, developing countries' economies are at stake. They therefore have a right to play a part at every stage of a process that may take decisions that could negatively affect their economies. Consensus, if it is accepted, will work in favour of developing countries on some issues, and work against their interests on others. But this is just how the WTO works.

The strengthening of the regular WTO councils and committees' ability to effectively resolve members' concerns through dialogue should be of interest to developing countries. It could avert what would otherwise be costly WTO dispute settlement procedures. However, developing countries should be prepared to commit a fair amount of resources in putting together the detailed questions or answers foreseen in terms of the proposed procedure.

It is not disputed that WTO members have notification obligations under the various WTO

Agreements, and that all developing countries may not have always honoured those obligations. There is no reason, however, that developing countries should support proposals that would impose upon them punitive administrative measures that would limit their participation in the work of the WTO.

A case has not been made justifying an expanded role for the WTO Secretariat and the Director General. The WTO negotiation process is a political process that should remain the prerogative of members, who can enlist the support of the Secretariat by request. However, developing countries could consider fulfilling the mandate to define the duties and responsibilities of the WTO Director General as per the General Council mandate. There is also no need to change the current arrangements for civil society participation to create greater space for their involvement in the work of the WTO, or to create a parliamentary dimension. What can be envisaged are periodic forums to be convened by the WTO DG for civil society and parliamentarians on specific issues.

It is in the interest of developing countries to hold the whole membership to account regarding the fulfilment of WTO mandates by proposing that all members agree on how mandates are to be considered fulfilled.

Developing countries are going to need to continuously fully apprise themselves of the agenda for reform, including on the proposals already tabled. The context requires that developing countries also consider tabling proposals on issues of interest to them. No doubt the discussions are bound to be taxing and will demand some skill on the part of developing countries to navigate. In the words of the current WTO Director General, "All ... have a role to play."<sup>46</sup>

---

<sup>46</sup> [https://www.wto.org/english/news\\_e/spra\\_e/spra301\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra301_e.htm)

# References

---

'Leutwiler' Report Trade Policies for a Better Future

'Sutherland' Report The Future of the WTO; Addressing Institutional Challenges in the New Millennium

'Warwick Commission' Report The Multilateral Trade Regime – Which Way Forward

Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/AB/R, 27 March 1998

Canada – Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, 2 August 1999

EC – Measures Concerning Meat and Meat Products, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998

European Commission background note on the modernisation of the WTO (WK 8329/2018)

Guidelines for arrangements on relations with non-governmental organizations, Decision adopted by the General Council on 18 July 1996, WT/L/162, dated 23 July 1996

[https://www.wto.org/english/news\\_e/news19\\_e/tnc\\_19jul19\\_e.htm](https://www.wto.org/english/news_e/news19_e/tnc_19jul19_e.htm)

[https://www.wto.org/english/news\\_e/spra\\_e/spra301\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra301_e.htm)

KAO, M. (2019) WTO Reform. Old Debate New Realities. Geneva: CUTS International, Geneva and Friedrich-Ebert-Stiftung (FES) Geneva

MAONERA, F. (2006). Quick Guide to the World Trade Organization Dispute Settlement Jurisprudence. Cape Town: TRALAC Working Paper

MAONERA, F. (2018). An Agenda for Reforming the World Trade Organisation: A New Wind Blowing. Geneva: CUTS International, Geneva.

MAONERA, F. (2018). The Review, Improvement and Clarification of the WTO Dispute Settlement Understanding. Geneva: CUTS International, Geneva.

Nairobi Ministerial Declaration, WT/MIN (15)/DEC dated 21 December 2015.

Procedural Guidelines for WTO Councils and Committees Addressing Trade Concerns - Draft General Council Decision; WT/GC/W/777/Rev.4 dated 21 October 2019

Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements - JOB/GC/204/Rev.2, 27 June 2019

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

The WTO 2008 'July Package'

WTO Understanding on Rules and Procedures Governing the Settlement of Disputes

