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WTO in a Post-Covid World: The Crisis of the Rule-Based Trading System & WTO Reform

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ABSTRACT

With an outdated set of rules and dysfunctional working practices, the World Trade Organization (WTO) finds itself in a “whatever it takes” moment. Geopolitical tensions and the COVID-19 crisis have exacerbated its problems. WTO rules were designed to regulate trade between private firms that only pursue profits. But China’s firms have been prospering using a corporate governance model in which policy objectives are mingled with purely commercial interests, compounding suspicions about the consistency of China’s economic policies with the spirit (if not the letter) of WTO rules.

However, due to the COVID-19 crisis, Group of Seven (G7) governments — whose previous role in the economy was mostly that of ensuring the enforcement of contracts and the functioning of markets — now actively support the private sector with massive fiscal and monetary support. According to the International Monetary Fund, in 2020, rich countries’ fiscal support to the economy was, on average, about 24 percent of their GDP. On top of this, central banks’ massive monetary assistance has kept interest rates at record-low levels. In 2020, the Federal Reserve Bank’s balance sheet soared from 20 percent to 35 percent of the United States’ GDP, whereas the European Central Bank’s balance moved from 40 percent to 60 percent of the euro zone’s GDP. As a result, all governments (not just China’s) are actively involved in supporting private businesses. The WTO has a fortuitous opportunity to initiate discussions to update rules on state intervention in the economy. The most severe impact is seen at the global level where we are witnessing the trends in global trade which are way worse than the Great Depression of the 1930s and the Economic Crisis of 2008. At the macroeconomic level, the production and consumption patterns are on a downward spiral. A new paradigm shift is under process and there is a need to look at the defining aspects of globalisation and trade through the prism of COVID-19.

Thus, the present paper discusses the challenges facing the WTO in a post-Covid era wherein its influence as the only global multilateral trade body is dwindling and offers

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suggestions/solutions for WTO Reform so as to stay relevant in the post-Covid world which will require a multi-faceted approach.

Keywords: *Post-Covid world, Globalisation, WTO Reform*

I. THE COVID-19 PANDEMIC AND ITS IMPACT ON THE GLOBAL ECONOMY

On 31 December 2019, Wuhan Municipal Health Commission of China reported a cluster of cases of pneumonia in Wuhan, Hubei Province. A novel coronavirus was eventually identified. On 11 March 2020, the World Health Organization (WHO) made the assessment that COVID-19 could be characterized as a pandemic (WHO, 2020).² The pandemic hit Europe and Americas hardest, measured by the number of confirmed cases. The health crisis not only caused a tragically large number of human lives to be lost, but also dealt a heavy blow to market confidence and economic activity. The magnitude and speed of contraction in economic activity that followed was unlike anything experienced in our lifetime. Rising fears and a global economic shutdown caused financial markets to seize up and plummet. Globally, stock markets crashed from their record highs and reported their largest one-week declines since the 2008 global financial crisis (GFC). The UN's United Nations Conference on Trade and Development (UNCTAD), said the virus outbreak could cost the global economy up to \$2-trillion this year and

that the pandemic could cause a recession in some countries causing global economic growth to clock in below 2.5%³. Tourism and services which need face-to-face interactions are the most affected exports. China has registered a decline majorly on manufacturing goods in addition to its exports squarely intended for EAP (Eastern Partnership) countries, Europe, and the US⁴.

According to Sumner, Hoy, & Ortiz-Juarez (2020)⁵, even the slightest compression of per capita income due to Covid-19 could potentially result in income-based poverty. As a result, the world could easily lose its decade worth of progress in reducing poverty. Consequently, there would be an increase in the number of people living under poverty in the world as compared to the figures in 2018. All regions of the world could suffer from wage contractions, although the degree of its impacts will depend on their level of development.

Impact of COVID-19 on Transfer Pricing

COVID-19 has radically changed the businesses on an unprecedented scale, with an impact that varies between different businesses. This triggers the need to review and potentially amend transfer

² Who.int. 2021. Archived: WHO Timeline - COVID-19. [online] Available at: <<https://www.who.int/news/item/27-04-2020-who-timeline---covid-19>> [Accessed 5 September 2021].

³The Economic Times. 2021. Coronavirus outbreak could cost global economy up to USD 2 trillion: UNCTAD. [online] Available at: <<https://economictimes.indiatimes.com/news/international/business/coronavirus-outbreak-could-cost-global-economy-up-to-usd-2-trillion-unctad/articleshow/74560638.cms>> [Accessed 5 September 2021].

⁴ Maliszewska, M., Mattoo, A., & Van Der Mensbrugghe, D. (2020). The potential impact of COVID-19 on GDP and trade: A preliminary assessment, *World Bank Working Paper*, No.9211

⁵ Sumner, A., Hoy, C., Ortiz-Juarez, E. (2020). Estimates of the impact of COVID-19 on global poverty. *WIDER Working Paper*, No.2020/43.

pricing policies to reflect new economic conditions and ensure appropriate allocation of gains or losses, as transfer pricing is often designed assuming the overall earnings of the group and thus therefore, the impact of these economic changes can result in distortions, in the allocation of profits and losses between group companies⁶

II. CHALLENGES FACING WTO IN A POST-COVID WORLD

The WTO faces mounting challenges. These challenges surfaced almost immediately after its establishment in 1995 and followed the success of the Uruguay Round of negotiations – the eighth and last round under GATT – from 1986 to 1994. The Uruguay Round achieved significant success in WTO's establishment, in reaching the Multilateral Agreement on Trade in Goods, and the Multilateral Agreement on Trade in Services, in setting standards and mechanisms for protecting intellectual property rights, dispute settlement, and reviews of governments' trade policies.

However, the following round of negotiations, the Doha Round – which started in 2001 and never finished – failed and stalled over differences between developing countries and developed countries (and among themselves) on industrial tariffs, non-tariff barriers to trade, and agricultural subsidies.

The challenges to the WTO are intensifying lately, even before the Covid-19 pandemic. Governments have introduced trade restrictions covering a substantial amount of international trade, affecting \$747 billion in global imports in the past year alone. The dispute settlement system suffered a setback at the end of 2019, when member countries could not agree on intended reforms.⁷

THE WTO — CHALLENGED ACROSS ALL THREE PILLARS

The WTO stands on three pillars: the day-to-day work of monitoring compliance within existing rules; the negotiation of new and amended rules; and the formal adjudication of disputes. All three pillars are wobbly, and had been long before the Trump administration started taking a sledgehammer to them. Of the WTO's three pillars, transparency and monitoring have traditionally been viewed as working adequately; negotiations as hopelessly stalled; and the dispute resolution system as working well, the "jewel in the Organization's crown". The reality was always more complex. Inadequate transparency denies others the data required to challenge questionably compliant practices. Stalled negotiations leave ambiguities in the agreements, and entire areas of trade policy and modern international commerce loosely or entirely uncovered. Disputes are thus limited and the risk of panellists expanding laws from 'the

⁶ News.bloombergtax.com. 2021. INSIGHT: It's Different This Time—Pandemic-Induced Recession Drives Transfer Pricing Changes. [online] Available at: <<https://news.bloombergtax.com/transfer-pricing/insight-its-different-this-time-pandemic-induced-recession-drives-transfer-pricing-changes>> [Accessed 5

September 2021].

⁷ World Trade Organization, "The WTO's 25 years of achievement and challenges", January 1, 2020, https://www.wto.org/english/news_e/news20_e/dgra_01jan20_e.htm

bench' increases, undermining confidence in the Appellate Body that is supposed to strictly interpret the trade rules that countries agreed to, and nothing more. Much of the day-to-day work at the WTO concerns monitoring the compliance of Members with their obligations. Under the treaties that the Organization brings together, Members are obliged to observe certain limits on their spending and policymaking, share notifications outlining domestic policies and regulations, and attend committees where their compliance can be interrogated by other Members. The system relies on international peer pressure for the bulk of its enforcement, but also feeds into dispute settlement. Raising an issue in the relevant committee is the first step on the road to convening a panel, and Member notifications are a key piece of evidence in some disputes.⁸

III. RELATIONSHIP BETWEEN USA AND WTO

Longstanding bipartisan US concerns about the WTO will persist and the need for reform will be no less important under a Biden administration than a Trump one. While many in Geneva and elsewhere around the world are finally talking about WTO revitalization for the first time, philosophical differences between the US and key allies like the EU remain and have undermined serious progress.⁹

Displeasure with the Appellate Body is no new Trumpian phenomenon. The United States has long had issues with how it operates generally, and specifically with the frequent rulings against US measures to protect itself from what it sees as unfair foreign competition.

In refusing to consider candidates for the Appellate Body, the United States has pointed to a number of areas in which the Body is not performing in line with US expectations.¹⁰ Some of these are procedural, such as the Appellate Body almost always taking far longer than the prescribed 90 days to decide cases, or Body Members continuing to handle ongoing cases once their own terms have expired. Others are legalistic, focusing on what the United States sees as inappropriate reliance on precedent, consideration of issues not in the submission, and rulings on the substance of cases (not just the legalities).

The sympathy that other Members have for these US complaints varies, but many accept at least some of the issues as valid. Yet at the same time, Members strongly suspect an underlying aversion to binding international dispute settlement. Previously, under the GATT, the United States could leverage its tremendous market power in the negotiations to resolve any

⁸ Lowyinstitute.org. 2021. The World Trade Organization: An Optimistic Pre-mortem in Hopes of Resurrection. [online] Available at: <<https://www.lowyinstitute.org/publications/world-trade-organization-optimistic-pre-mortem-hopes-resurrection>> [Accessed 5 September 2021].

⁹ Wita.org. 2021. Revitalizing the WTO under a Biden administration. [online] Available at: <<https://www.wita.org/blogs/revitalizing-wto-under-biden/>>

[Accessed 5 September 2021].

¹⁰ Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, The Bad and the Ugly*, (Washington DC: Institute of International Economic Law Georgetown University Law Center, 2018), <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>

bilateral trade dispute. The introduction of an alternative

to negotiations, whereby questions are decided on the merits and the law by an international tribunal, somewhat levels that playing field. Some Members believe that US concerns about procedure and function are merely a smokescreen for opposition to the system in principle.

It is also important to recognize that US concerns go well beyond the Appellate Body and span all three major WTO functions. With respect to negotiations, policymakers in both political parties have bemoaned the system's inability to update the rules, including to address key Democratic priorities like the environment and labor as well as China's non-market practices. Republicans and Democrats alike have also expressed concern about the issue of "developing country status", which permits major emerging economies to escape the same level of commitment as established ones.

With respect to monitoring, there is broad concern about the disrespect many countries have shown for the most basic transparency rules. This plays a key role in undermining business certainty and the ability to effectively enforce the rules.

And finally, with respect to dispute settlement, the longstanding bipartisan US view is that the Appellate Body has strayed beyond acceptable

limits and often gotten it wrong when adjudicating cases involving trade remedies.¹¹

But these concerns go beyond the Appellate Body, and also include the system's lack of efficiency.

IV. PROBLEMS WITH WTO DISPUTE SETTLEMENT MECHANISM

An effective dispute settlement system is critical to the operation of the World Trade Organization. It would make little sense to spend years negotiating detailed rules in international trade agreements if those rules could be ignored. Therefore, a system of rule enforcement is necessary. In the WTO that function is performed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (usually called the "Dispute Settlement Understanding" or simply the "DSU"). As stated in Article 3.2 of the DSU, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". In the commercial world, such security and predictability are viewed as fundamental prerequisites to conducting business internationally.

The DSU is effectively an interpretation and elaboration of GATT Articles XXII and XXIII, which were not modified in the Uruguay Round¹². As noted above, these articles were the basis for dispute settlement in the GATT system, and since all of the agreements annexed to the

¹¹ Aditya Rathore and Ashutosh Bajpai, "The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?", *Jurist*, April 14, 2020, <https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/>

¹² Article 3.1 of the DSU provides: "Members affirm

their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

Marrakesh Agreement Establishing the World Trade Organization rely on GATT Articles XXII and XXIII or very similar provisions as a basis for dispute settlement, they are the basis for dispute in the WTO system as well¹³. There are essentially four phases in the WTO dispute settlement process: consultations, the panel process, the appellate process and surveillance of implementation.

The Highlighted Vulnerability and Incapacity of the Dispute Settlement Mechanism

The current impasse results from the unanimous consensus mechanism in the DSU. According to the DSU, '[t]he DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once'.¹⁴ However, '[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus'.¹⁵ Actually, the whole WTO system bases its function on consensus. According to the WTO Agreement, '[t]he WTO shall continue the practice of decision-making by consensus'.¹⁶

Due to this unanimous consensus requirement, the US has also previously blocked the appointment of American AB members, including Ms Merit Janow and Ms Jennifer Hillman. Both of them wrote dissenting opinions against US positions in cases involving the US.¹⁷ It remains unknown whether this led to the US blockage of their reappointment in the event of no concrete evidence. However, it is plausible that WTO Members may try to achieve their political goals by manipulating the AB member screening process.¹⁸

This consensus mechanism is regarded as a 'design flaw'.¹⁹ In fact, the negotiators of the WTO Agreement did not foresee that the Members would take advantage of this consensus mechanism as leverage. During the GATT time, a consensus was also needed to establish a panel, including the approval of the respondent party.²⁰ However, the respondents usually 'refrained from blocking consensus decisions and allowed disputes in which they were involved to proceed, even if this was to their short-term detriment', because 'they had a long-term systemic interest

¹³ See General Agreement on Trade in Services, arts. XXII, XXIII; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 64; Agreement on Agriculture, art. 19; Agreement on the Application of Sanitary and Phytosanitary Measures, art. 11; Agreement on Technical Barriers to Trade, art. 14; Agreement on Trade-Related Investment Measures, art. 8; Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement), art. 17; Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement), art. 19; Agreement on Preshipment Inspection, art. 8; Agreement on Rules of Origin, arts. 7-8; Agreement on Import Licensing Procedures, art. 6; Agreement on Subsidies and Countervailing Measures, art. 30. Agreement on Safeguards, art. 14. The DSU may also be applied by plurilateral agreements. See Agreement on Government Procurement,.

¹⁴ DSU, art 17(2)

¹⁵ DSU, art 2(4)

¹⁶ WTO Agreement, art IX(1)

¹⁷ Jeffrey L Dunoff and Mark A Pollack, 'The Judicial Trilemma' (2017) 111 American Journal of International Law 225

¹⁸ See, e.g., Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The Extensive (but Fragile) Authority of the WTO Appellate Body' (2016) 79 Law & Contemp Probs 237

¹⁹ James Bacchus, 'Might Unmakes Rights: The American Assault on the Rule of Law in World Trade' (2018) CIGI Papers No 173, 10 <<https://www.cigionline.org/sites/default/files/documents/Paper%20no.173.pdf>> accessed 16 June 2018

²⁰ WTO, *A Handbook on the WTO Dispute Settlement System* (CUP 2004) 13

and knew that excessive use of the veto right would result in a response in kind by the others.²¹ The same logic seemed to apply during the first several years of the function of the WTO. However, the recent practices show that the Members (in particular the US) do not intend to restrain themselves nor do they act consistently with the WTO rules.

The WTO's dispute-settlement function is not operating as originally intended by members, or as envisioned by the WTO's Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU). There are serious concerns about adjudicators overreaching by performing functions not assigned to them, adjudicators ignoring clear rules set by members, overreliance on WTO Secretariat staff, and the length of disputes. In certain instances, there are also concerns about the outcome, including an antipathy toward the use of trade remedy measures, which are legitimate instruments recognized by the WTO as a means of counteracting unfair trade practices

Interpreting Domestic Law: The Appellate Body has improperly interpreted the meaning of a member's own domestic law, suggesting it has more knowledge of a member's domestic legal system than that member itself. This is inconsistent with DSU Article 17.6, which limits the role of the Appellate Body to legal matters. In the context of the ongoing Informal Process on Matters Related to the Functioning of the Appellate Body (the "Walker Process"), the

facilitator reported convergence among members that "the 'meaning of municipal law' should be treated as a matter of fact and therefore is not subject to appeal."²²

The Appellate Body has disregarded WTO procedural rules or created new rules without the consent of WTO members. The Appellate Body routinely disregards the rule under DSU Article 17.5 that requires it to issue reports within ninety days of any appeal, regardless of whether the disputing members have agreed to an extension of the appeal.²³ The Appellate Body has adopted a rule that gives it the authority to allow persons whose terms as Appellate Body members have expired to participate in and rule on disputes, in breach of DSU Article 17.2.²⁴ The Appellate Body relies on its secretariat too much in the resolution of disputes. Appellate Body members often lack trade-remedy experience, trade-negotiation experience, and legal backgrounds. Further, Appellate Body membership is not a full-time job. This has resulted in an overreliance on the secretariat, which has contributed to a lack of independence in decision-making and an unwillingness to question past reports. It has also led to overly judicial and academic decisions that emphasize new rulemaking, while ignoring member-intended compromises and scope limitations. One mechanism utilized by the Appellate Body Secretariat to govern decision-making by Appellate Body members is the "issues paper," which often begins the process of pre-judging the dispute based on the views of the

²¹ WTO (n 78) 13-14

²² "Informal Process on Matters Related to the Functioning of the Appellate Body," World Trade Organization, May 7, 2019, paragraph 1.24, <https://ti>

nyurl.com/y25o985j.

²³ "The US President's 2018 Trade Policy Agenda," 24-25

²⁴ USTR Appellate Body Report, 32

secretariat, not the Appellate Body members themselves.²⁵ There has been particular criticism of Appellate Body decisions in trade-remedy cases, including insufficient deference granted to domestic authorities and lack of a practitioners' understanding of anti-dumping and countervailing duty rules.

Advisory Opinions: Adjudicators have provided advisory opinions on issues with the dispute at hand, essentially “making law,” despite their mandate to only make findings necessary to resolve the dispute. In *Argentina–Financial Services*, the Appellate Body reversed the panel’s findings on an issue, rendering all of the panel’s other findings moot, but still went on to set out interpretations of various General Agreement on Trade and Services (GATS) provisions that were no longer within the scope of the appeal.²⁶ In other disputes, adjudicators have made recommendations for compliance where the measure being litigated has expired, and by definition, the situation is resolved.²⁷ The Walker Process has identified advisory opinions as a problem.

Making Arguments for the Parties: The Appellate Body has raised legal issues on appeal that neither party itself raised, or made decisions based on legal arguments that neither party made. One example of this is *India–Agricultural Products*, a dispute in which the Appellate Body engaged in a lengthy, abstract discussion of a provision of the Agreement on the Application of

Sanitary and Phytosanitary Measures (SPS Agreement) without ever tying that discussion to an issue on appeal, and expressed “concerns” about panel findings that neither party raised.²⁸

V. CONCLUSION AND SUGGESTIONS

WTO will stay relevant in the world post covid-19 as the only global multilateral trade body but there is a need for reform of the WTO which requires a multifaceted approach.

How to revive the WTO?

The WTO, in its current state, is not suited to tackle the challenges facing international trade. There is a need to reconfigure the international organization to make it ready to respond more efficiently to the current health and economic crises resulting from the pandemic.

According to Alan Wm. Wolff, the Deputy Director-General of the WTO, the institution needs to tackle the following issues to survive and be more relevant to international trade:

- *Ensuring equality:* All WTO members have equal rights within the institution’s framework even though there is little equality among nations. In the WTO, the members’ capacity level differ, and the degree of uniformity among member countries depends on whether the members with greater capacity take on proportionally greater responsibilities for the success of the collective endeavor. The issue of greater responsibility by members with higher capacity needs to be stressed in WTO’s work to

²⁵ Joost Pauwelyn and Krzysztof Pelc, “Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement,” SSRN, September 26, 2019, <https://ssrn.com/abstract=3458872>

²⁶ See “Statement by the United States at the Meeting of the WTO Dispute Settlement Body,” paragraph 6.4

²⁷ USTR Appellate Body Report, 64

²⁸ “Statement by the United States at the Meeting of the WTO Dispute Settlement Body.”

maintain the gains from free international trade and to improve it further.

- *Focus on non-discrimination:* Non-discrimination under international trade and the rules of the WTO takes many forms: first, the WTO promotes the most favored nation (MFN) treatment, which requires a member country to provide any concession, privilege, or immunity to one nation in a trade agreement to all other WTO member countries. However, many bilateral and some regional trade arrangements are designed to offer better treatment to imports from their member countries than products from other countries. Second, the WTO promotes national treatment, a requirement of non-discrimination between domestic and foreign products for internal purposes, such as taxes. However, many member countries do not follow this principle and escalate trade wars under the pretense of national security and antidumping. Such practices need review and more robust rules for application to guarantee fair, free trade to WTO member countries.

- *Rethinking sovereignty:* Sovereignty is mainly related to member countries' ability to have a "policy space" when they commit themselves to the WTO rules. However, the use of policy space possibly can result in the action of one country having adverse consequences for others. A value of the WTO concerning the exercise by members of their national sovereignty is the space the WTO agreements leave for pursuing national objectives. However, the concept of sovereignty under the WTO needs to be clarified, as without constraints, an action by a country under the "policy space" concept,

could lead to reciprocity from other member countries that could undermine free international trade.

- *Focus on development:* The WTO must rethink its policies, facilities, and the technical assistance it provides for its developing member countries. The premise that trade and specialization will lead to efficiency gains is the foundation of international trade. However, the lack of market and political power for numerous developing countries often results in the perceived unfairness of the global trade system and its governing body, the WTO. A more realistic definition for member countries to qualify as developing countries is also required to guarantee fair treatment to member countries. This will also minimize the resistance and counter-measures from the developed countries who see loopholes in applying these advantages.

- *Enhancing transparency:* Even though the WTO rules and processes require information on national measures to be updated and comprehensive, many countries do not provide this degree of transparency. This aspect needs action as increasing transparency in trade practices, and policies would expand the benefits for all WTO members.

Reciprocity: In international trade negotiations under the WTO, the degree of flexibility, policy space, and a temporary limitation on sovereignty is often justified by obtaining reciprocal action by other members. That means concessions given are made against concessions received. However, this treatment is not always involved with decisions on trade policies, and WTO members should think of this within the matter of

fairness and the need to make a net positive contribution, i.e. giving more than they directly receive, as the positive externalities of more free and fair trade will benefit virtually all the member countries.

To conclude, this paper proposes establishing a new mega-plurilateral DSU within the WTO in which the original Members of the WTO may choose not to participate. This new mega-plurilateral system would resemble the original DSM with the only difference that this new mechanism does not apply to all the Members. This proposal largely preserves the function of the WTO as a multilateral trading system yet circumvents the current impasse faced by the DSM caused by the US' blockage of AB members' appointment. From a legal point of view, this proposal is well founded on the current WTO legal texts including the WTO Agreement and the DSU. But it is not the intention of this paper to provide a politically sound solution. The actual implementation of this proposal still depends on the negotiation of participating Members. And this solution might be combined with other approaches including modifying DSU rules. It is emphasized that every Member should make a compromise and there would not be a solution that may satisfy the needs of all parties. And it should be also noted the impasse needs to be addressed within a short a period of time and this paper highly advocates an immediate renegotiation .

Members may consider other possibilities. Bilaterally, parties to an existing dispute may agree not to appeal panel reports, seek arbitration under DSU Article 25, or agree to use arbitration

under Article 25 as a replacement not for the whole dispute settlement procedure but exclusively for the appeals stage. Although all of these options are possible after a dispute emerges, this may not help Members that wish to preserve the compulsory dispute settlement system rather than agreeing *ad hoc* to the enforceability of WTO obligations.

In order to preserve compulsory dispute settlement, Members should enter into an *ex ante* agreement that applies 'plurilaterally', i.e. only among its signatories. *Ex ante* agreements to not to appeal panel reports or to submit disputes directly to an arbitrator would be problematic under DSU rules, which aim to prevent Members from circumventing DSU procedures. On the other hand, an *ex ante* agreement to submit appeals to arbitration in case of a non-operational Appellate Body would seem to conform to both the letter and the objective of Article 25 OF DSU.

Avoid the "Consensus Problem": Through Different Negotiating Formats and More Frequent Political Intervention. A critical problem in reaching new agreements on the issues described above is the need for consensus by all WTO members. Creative thinking is required to get around this problem and make progress on the important issues outlined above.

Consider Alternative Paths to Removing Trade Barriers through Agreements Not Subject to Dispute Settlement: WTO members should consider exempting certain negotiated outcomes from dispute settlement, to enable certain countries that might otherwise block consensus to take on politically sensitive commitments as a first step toward more binding

commitments. While fully enforceable rules remain preferable, insisting on them in all circumstances might prevent agreement on best practices that could serve as building blocks for enforceable rules in the future. As one example, certain LDCs may not have the capacity to immediately undertake such binding commitments on non-tariff barriers, which are often more complicated than dealing with tariffs. These LDCs, however, may be willing to experiment. In those circumstances, the endorsement of, and commitment to, best practices may be a path forward to ultimately removing trade barriers through enforceable obligations. These best-practices agreements could incorporate a combination of capacity building and technical assistance, coupled with transition periods to determine when countries would return to the negotiating table to finalize negotiations

IMPLEMENTATION AND MONITORING:

Improve Compliance with Transparency Requirements. WTO members should adopt reforms to improve compliance with basic transparency requirements. In particular, WTO members should adopt penalties for any non-LDC member that consistently fails to follow transparency requirements. The United States and the EU, among others, have already been promoting a transparency proposal that would impose penalties on members that fail to fulfill notification requirements, including prohibiting them from chairing WTO bodies, imposing monetary penalties, treating them less favorably in certain WTO functions, and generally “naming and shaming” them. Moreover, WTO members

should supplement the penalties for non-LDC members with positive incentives for LDCs. For example, WTO members could provide targeted capacity building for LDCs that may legitimately need help meeting transparency requirements, but are willing to work hard to improve compliance over time. At the same time, such LDCs could be afforded transition periods before any negative incentives set in. This is important to prevent major emerging economies from hiding behind the legitimate needs of these countries as an excuse not to meet the requirements themselves.

Adopt Institutional Reform: WTO members should adopt institutional reforms to help ensure that any guidance about the role of the system makes a sustainable difference, and that the system does not redevelop today’s problems over time. To ensure that the Appellate Body remains transparent and responsive to the membership, WTO members should adopt new rules that require the Appellate Body to provide the parties with the opportunity to comment on draft reports before a final decision is rendered, consistent with the existing panel process; eliminate or curtail the Appellate Body’s ability to engage in factual reviews under DSU Article 11; establish a mechanism for regular dialogue between Appellate Body members and WTO members, such as annual meetings; clarify that Appellate Body members are not guaranteed to serve a second term, and allow for a full review of their performance after their first term; establish a mechanism under which WTO members can seek a review of any legal findings included in past decisions that have led to unintended

consequences, such as the dispute that inhibits the ability of WTO members to impose countervailing duties against subsidies provided by “public bodies”; and allow all WTO members to view all hearings and access all submissions to improve their institutional knowledge and eliminate the need for large numbers of third parties, which can slow down the process and force members to confront issues not central to the resolution of the dispute.

Improve Timeliness: WTO members should also seek reforms to speed up the process. WTO members originally intended for dispute settlement to be able to quickly counter unfair practices harming their workers and businesses. In particular, members sought to create a system that could reach an outcome on a similar timeframe to the one-year time period included in Section 301 of the 1974 Trade Act in the United States. Both WTO adjudicators and members themselves bear some blame for the decay in the situation; therefore, WTO members should consider disciplines on both. WTO members should do the following:

a) Place restrictions on the input of the litigating parties, such as page limits on submissions, numerical limits on exhibits, and time limits on opening statements at hearings. This will help prevent the system from becoming overburdened, and reduce the temptation of adjudicators to address issues not critical to resolving the dispute. As noted above, greater transparency that also reduces the need for large numbers of third parties can also reduce the burden on adjudicators and litigants.

b) Require panels to issue reports no later

than nine months from the date of establishment of the panel, unless the parties agree otherwise, consistent with the original intent of DSU Article 20.

c) Require the Appellate Body to issue reports no later than ninety days from initiation of the appeal, unless the parties agree otherwise, consistent with the original intent of DSU Articles 17.5 and 20.

VI. SUGGESTIONS

1. Address the Transparency Gap

As argued at greater length in work on WTO reform (Hoekman, 2019; Wolfe, 2018), improving transparency is necessary to support substantive deliberation in WTO committees and Councils. A first order of business must be to complement notification obligations by mandating the WTO Secretariat to compile information and undertake analysis of the cross-border effects of national policies. The need for this is illustrated by the EUI – Global Trade Alert – World Bank database on COVID-19 trade measures (Evenett et al., 2020). Before COVID-19, many WTO members were not living up to their notification obligations. This continued to be the case during COVID-19. Many trade measures implemented by countries in response to COVID-19 were not notified.

2. Support for Deliberation to Inform Cooperation

A second priority for reform is to create more space for the Secretariat to analyze the global economic effects of policies affecting competitive conditions on markets— including in areas where WTO rules are weak or missing

altogether. Analysis of the cross-border effects of national policies, including sector specific regulation, is needed to determine where policies cause spillovers that are systemic in nature and that should be priority areas for cooperation. At present the WTO Secretariat does not undertake such analysis as part of its regular activities. Doing so can involve collaboration with other international organizations that have greater analytical capacity and expertise.

3. A multilateral governance framework for plurilateral agreements

Plurilateral initiatives offer a way around the consensus constraint, but as mentioned, free riding concerns can block cooperation. The obvious solution to this problem is to restrict the benefits of cooperation to participants. Doing this in the WTO is virtually impossible, as the incorporation of new plurilateral agreements that are discriminatory in their application require all WTO members to agree to the inclusion of such agreements into the WTO. But this is less of an issue than it appears to be. Even if discriminatory plurilateral agreements were feasible, key policy areas that are giving rise to systemic trade tensions – notably subsidies – do not lend themselves to discriminatory solutions.

4. Resolving the Dispute Settlement Crisis

A final critical area for reform concerns a central dimension of the ‘value proposition’ offered by the WTO: independent, third-party adjudication of trade disputes reflected in the principle of depoliticized conflict resolution embodied in the negative consensus rule for adoption of dispute settlement findings (Hoekman and Mavroidis, 2020). An effective conflict resolution

mechanism is critical for existing WTO agreements to be meaningful, and for the negotiation of new (plurilateral) agreements with binding policy commitments. Absent effective enforcement, the incentives (feasibility) of concluding new agreements are likely to be reduced. Concerted action to address the institutional design weaknesses of the Dispute Settlement Understanding (DSU) is therefore a priority area of WTO reform.
