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A Deeper Look into the WTO MC12 Package: What is in it for Developing Countries and LDCs?

Kinda Mohamadieh, Ranja Sengupta,
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1 Introduction

THE 12th Ministerial Conference (MC12) of the World Trade Organization (WTO) was held close to five years after the 11th MC that was held in Buenos Aires, Argentina. The WTO MCs are the highest decision-making body of the WTO and are usually supposed to take place every two years.[1] The outcomes resulting from MC12 were heralded by the WTO Director-General (DG) as an 'unprecedented package of deliverables'[2] that reinvigorate and re-enforce the institution and prove that the WTO is still relevant. These general statements aim primarily at shaping the narrative based on which the WTO as an institution is perceived and discussed in the media and in public debates on multilateral governance. Such generalised statements may account for a possible metric of success, particularly in this case the success in gavelling a package that includes seven elements. Yet, such statements do not say much about the content of the outcome that has been gavelled, the process by which the outcome was achieved, and what it could potentially mean to the diverse WTO Membership of 164 countries,

[1] Article IV of the Marrakesh Agreement Establishing the WTO provides that "1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement'. The General Council is granted the authority to conduct the functions of the Ministerial Conference in the intervals between meetings pursuant to Article IV:2 of the WTO Agreement. https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

[2] Closing session, speech of DG at min 5 available at: https://www.wto.org/english/thewto_e/minist_e/mc12_e/webcasting_closing_e.htm

including for the long-standing positions and demands of developing and least-developed countries (LDCs).

The MC12 outcomes are not homogenous in terms of their legal nature and effect. The seven deliverables vary. Some incorporate decisions with an operational angle such as the Ministerial Decision on the TRIPS Agreement[3] and the Ministerial Decision on World Food Programme Food Purchases Exemption from Export Prohibitions or Restrictions.[4] Others are declarations of soft law nature such as the Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics[5] and the Ministerial Declaration on the Emergency Response to Food Insecurity as well as the Ministerial Outcome Document.[6] Under WTO rules, these declarations could operate as subsequent agreements, which could eventually influence the way existing rights and obligations are applied and interpreted. Certain outcomes embody new negotiation mandates, such as that on issues of WTO reform and another on continuing work on special and differential treatment issues, as incorporated under the Ministerial Outcome Document (more discussion of these mandates is included in this brief below).

In terms of process, MC12 kept with previous controversial experiences at the WTO.[7] Concerns pertaining to process at WTO ministerial meetings and during inter-ministerial periods have been long-standing systemic issues that developing countries and LDCs have repeatedly raised.[8] The current practice at the WTO particularly in the run-up towards MC12 and during MC12 took some of these problematic features, such as reliance on small-group

3 WT/MIN(22)/30
4 WT/MIN(22)/29
5 WT/MIN(22)/31
6 WT/MIN(22)/24
7 See for example 'No Legitimacy or Credibility in Seattle Process and Results: Third World Groups Denounce Undemocratic and Bullying Tactics at Seattle', at https://www.twn.my/title/bully-cn.htm; Martin Khor, 'How the WTO's Hong Kong Ministerial Adopted Its Declaration', at: https://www.twn.my/title2/twninfo336.htm; Chakravarthi Raghavan, 'Two winners, one loser at WTO Conference', https://www.twn.my/title/loser-cn.htm.
8 See for example submissions : WT/GC/W/471 ; TN/C/7 ; JOB/GC/158

configurations for conducting negotiations, to a new extreme. Consequently, it proved to be highly challenging for most developing countries and LDCs to effectively take part in the negotiations on key documents that would shape the future of the organisation and the multilateral trading system. Small-group configurations, or what is sometimes referred to as 'Green Rooms', dominated MC12 negotiation processes before and during the Ministerial meeting.[9] They were the privileged format in which all negotiations took place, including those on the ministerial outcome document (i.e. main Ministerial Declaration), on items on agriculture and food security, on fisheries subsidies, as well as those on the TRIPS Agreement decision and the e-commerce moratorium.

Process and substance issues are intertwined. Whilst developing countries could be extremely prepared in terms of substance, their views could be marginalised as a result of a problematic process. Indeed, the proliferation of small-group configurations in all areas of negotiations at MC12 influenced the level of sharing of information and how much delegations knew about what was happening, which in turn determined their ability to participate in the negotiations and their level of engagement in these negotiations. Whether a Member was part of a small-group configuration or not became a defining element of that country's experience and possibilities for effectively following and participating in the negotiations. Yet, even Members who were part of one or a few small-group configurations were kept out of others. Thus, they were also subject to a certain level of exclusion on certain elements being negotiated at MC12. The WTO DG acknowledged in her statements post MC12 that there were process issues that emerged in the context of the ministerial meeting and promised that '[they]will certainly

[9] According to the WTO website: 'The "Green Room" is a phrase taken from the informal name of the director-general's conference room. It is used to refer to meetings of 20-40 delegations, usually at the level of heads of delegations. These meetings can take place elsewhere, such as at Ministerial Conferences, and can be called by the minister chairing the conference as well as the director-general. Similar smaller group consultations can be organized by the chairs of committees negotiating individual subjects'. See: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm

look at what it is we need to do in order to make things work better next time'.[10] This report does not discuss process issues in depth, but more details could be found in the footnoted reference.[11]

This report delves into the details of some of the main elements in the MC12 outcomes package and discusses them from a prism that focuses on developing countries and their long-standing demands at the WTO. The report attempts to contrast the outcomes with the demands raised and positions taken by developing county Members during the process of negotiations in the run-up towards MC12. It commences with a look at the Ministerial Outcome Document with a focus on issues pertaining to the deliberations on WTO Reform. It then discusses the outcome pertaining to the WTO response to the pandemic and reviews the decision on TRIPS and issues pertaining to its implementation and use by Members. The report then delves into MC12 outcomes in the areas of agriculture and food security, followed by a discussion on the outcome pertaining to fisheries subsidies. The decision to extend the moratorium on customs duties on electronic transmissions and its potential implications are also briefly discussed.

[10] See for example : JOB/GC/314 JOB/TNC/104, paragraphs 10, 12, 13, 15 34.

[11] Kinda Mohamadieh, 'Exclusionary unrepresentative processes behind the celebrated MC12 "Package"', TWN, 20 June 2022. Available at: https://www.twn.my/title2/wto.info/2022/ti220625.htm

2 The MC12 Ministerial Outcome Document and the Work on WTO Reform

THE Ministerial Outcome Document (what is also referred to as Ministerial Declaration) embodies a political mandate adopted by the highest decision-making body of the WTO that provides guidance for the negotiations and the future work of the organisation. The latest Ministerial Declaration before MC12 was that delivered at the 10th Ministerial Conference held in Nairobi in 2015, given that MC11 in Buenos Aires in 2017 did not result in a Ministerial Declaration. The document resulting from MC12 replaces the Nairobi Ministerial Declaration in being the latest guidance by the Membership for the future work of the WTO.

The most striking features of the MC12 Ministerial Outcome Document

One of the most striking features of the MC12 Ministerial Outcome Document is the lack of any reference to the Doha mandate and its development agenda.[12] This is unlike the Nairobi Ministerial Declaration, which included several references to development and the Doha mandate. Since the Doha Ministerial Conference in 2001, subsequent Ministerial Declarations and General Council Decisions had reaffirmed the Doha mandate. In the run-up to the Nairobi Ministerial Conference, developing countries had taken a consistent position calling for the reaffirmation of the Doha Development Agenda. The Nairobi Declaration provided, for example, that 'there remains a strong commitment of all Members to advance negotiations on

[12] https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

the remaining Doha issues …' and that 'any decision to launch negotiations multilaterally on … [new] issues would need to be agreed by all Members'.[13]

Those who want to argue that the Doha mandate has lapsed might see in the lack of references to development and the Doha mandate in the MC12 Ministerial Outcome Document a point to support their arguments.[14] That would require the attention of developing countries, which would need to exert more political and negotiating effort to reconfirm the commitment of the WTO to issues and mandates of concern to them that stem from the 2001 Doha negotiations mandate.

Developing countries and least developed countries (LDCs) did however succeed in defending a paragraph in the MC12 Ministerial Outcome Document that reaffirms 'the provisions of special and differential treatment for developing country Members and LDCs as an integral part of the WTO and its agreements' and that captures wording from the Doha mandate that requires that 'special and differential treatment in WTO agreements should be precise, effective and operational'.[15]

Special and differential treatment (S&DT) is a fundamental pillar of the international trade rules and an integral part of all WTO agreements. It was central to the original bargain that enabled the establishment of the WTO. The COVID-19-induced crises further highlighted that S&DT is essential for developing countries if they are to retain policy space to develop key sectors and industries and deal with the current and future crises.

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13 https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm

14 See for example: Shawn Donnan (2015), 'Trade talks lead to "death of Doha and birth of new WTO"', *Financial Times*. Available at https://www.ft.com/content/97e8525e-a740-11e5-9700-2b669a5aeb83

15 See para 2 of MC12 Ministerial Outcome Document (WTO document WT/MIN(22)/24 – WT/L/1135), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/24.pdf&Open=True

Since 2001, developing countries have tried tirelessly to fulfil the Doha mandate pertaining to reviewing S&DT provisions to make them precise, effective and operational.[16] Organised in the Group of 90, which is comprised of the Organisation of African, Caribbean and Pacific States, the African Group and the group of LDCs, they had submitted and resubmitted their proposal to strengthen selected S&DT provisions in various WTO agreements, which include elements related to transfer of technology, trade-related investment measures, technical barriers to trade, sanitary and phytosanitary measures, customs valuation, subsidies and countervailing measures, and the accession of LDCs to the WTO. However, this process has been continually undermined by developed countries, either by not engaging in the negotiations or through watering down the proposed language to the point that it would be of no value and certainly would not fulfil the Doha mandate.

The MC12 Ministerial Outcome Document further rolls down any possible deliverables on this mandate. The agreed language 'instruct[s] officials to continue to work on improving the application of special and differential treatment in the CTD SS [WTO Committee on Trade and Development meeting in special session] and other relevant venues in the WTO, as agreed and report on progress to the General Council before MC13'.[17]

Paragraph 3 of the MC12 Ministerial Declaration on WTO reform

Paragraph 3 of the Ministerial Outcome Document sets a mandate to 'work towards necessary reform of the WTO … to improve all its functions'. It was agreed that '[t]he General Council and its subsidiary bodies will conduct the work, review progress, and consider decisions, as appropriate, to be submitted to the next Ministerial Conference'. It was also agreed that '[t]he work shall be Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues'.[18]

16 See para 44 of Doha Ministerial Declaration.
17 See para 2 of WT/MIN(22)/24.
18 See para 3 of WT/MIN(22)/24.

Paragraph 3 is complemented by another paragraph, under which Ministers 'commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024' (paragraph 4 of the Ministerial Outcome Document).

The negotiations on paragraph 3 were mainly held in a small-group configuration before and during the days of the Ministerial Conference. This meant that most of the WTO Members were not present and did not take part in these negotiations. The main contention in the negotiations was over where the WTO reform process was to be undertaken. In the run-up towards MC12, the way of handling this contentious paragraph was problematic, because the Chair of the General Council had presented his own formulation of this paragraph a few days before the conference, which sidelined propositions that several developing countries have been putting forward. Upon the objection of a number of developing countries, particularly India, the Chair adjusted his approach and raised to the Ministerial a paragraph that included two brackets (indicating lack of agreement) that read '[The General Council will oversee the work] [The General Council and its subsidiary bodies will conduct the work]'.

Developing countries were insisting that this process, important as it is, should be undertaken in the General Council, which would allow for a democratic and inclusive process in which each and every Member will have the chance to participate. Some developed countries suggested that the process should be undertaken in different configurations besides the General Council and its subsidiary bodies.

The paragraph that was eventually adopted emphasises the centrality of the General Council's role in conducting this mandate, by providing that '[t]he General Council and its subsidiary bodies will conduct the work, review progress, and consider decisions, as appropriate, to be submitted to the next

Ministerial Conference'.[19] However, the ways to operationalise this mandate are not yet clear. The post-MC12 period will be crucial in determining the procedural steps to handle this mandate, the direction in which the debate on WTO reform will unfold, and what it will potentially mean for the future of the WTO. The collective inputs from developing countries and LDCs in this regard will be crucial.

The safeguards mentioned in paragraph 3, including that the reform process should be Member-driven, open, transparent, inclusive, and must address the interests of all Members, ought to be further substantiated and clarified. The process ought to allow developing countries and LDCs the opportunity to keep a comprehensive understanding on how the different elements to be considered under 'WTO reform' will be evolving. Furthermore, the scope of the 'reforms' to be addressed ought to be clarified. Paragraph 3 of the Ministerial Outcome Document provides that WTO Members 'commit to work towards *necessary* reform of the WTO' (emphasis added), which requires Members to identify and agree to what reforms are necessary, thus filtering out those where there will not be consensus among all Members on their necessity.

The contention over 'WTO reform' and what it could mean for the future of the WTO

'WTO reform' was one of the most contentious issues in the run-up towards MC12 and remained so throughout the deliberations that were undertaken during the days of the ministerial meeting. It is contentious because of its systemic implications on the future of the WTO and because of the significant divergences between what developed-country Members are proposing and what developing countries understand reform should encompass.

[19] Para 3 of WT/MIN(22)/24. Para 3 also provides a footnote that reads as follows: 'For greater certainty, in this context, this does not prevent groupings of WTO Members from meeting to discuss relevant matters or making submissions for consideration by the General Council or its subsidiary bodies.'

Developed countries, among which the US and the EU are most vocal, have repeatedly pushed under the guise of 'WTO reform' new approaches on special and differential treatment that will eventually limit the availability of these flexibilities to developing countries and LDCs. They have also been pushing new approaches to decision-making pertaining to launching negotiations and accepting the outcomes of negotiations at the WTO; these approaches seek to normalise plurilateral negotiating arrangements (which involve only a subset of the Membership) rather than strengthen the WTO as a body for multilateral negotiations. They also seek to inject into the WTO agenda new issues, such as rules on industrial subsidies, that will further constrain the policy tools available to developing countries. Further, developed countries seek to extend the WTO monitoring mechanisms in a way that would put further pressure on developing countries in implementing their trade policies, and to open up more space for big business in the WTO under the umbrella of 'multi-stakeholderism'.

It is worth noting here that in the MC12 Ministerial Outcome Document, WTO Members 'recognize the importance of strengthened collaboration and cooperation with other intergovernmental organizations *and other relevant stakeholders* that have responsibilities related to those of the WTO, in accordance with the rules and principles of the WTO...' (paragraph 12 of Ministerial Outcome Document, emphasis added). The term 'relevant stakeholders' is new to WTO rules. It is not a term used in existing WTO agreements and so it is unclear what exactly it refers to. For example, Article V of the Marrakesh Agreement Establishing the WTO refers to cooperation with other 'intergovernmental organizations' and 'non-governmental organizations concerned with matters related to those of the WTO'. It is crucial that these new terms do not create an opening to increase the influence of big business on WTO processes and decision-making, which could eventually come to undermine the Member-driven nature of the WTO. For these reasons, it is important that developing countries and LDCs seek to clarify the boundaries of this terminology pertaining to 'stakeholders' and what it reflects, and to stress safeguards against conflicts of interest

that could emerge when businesses that have vested commercial interests in international trade come to deepen their influence on the WTO negotiations.

The WTO Secretariat released a brief note before MC12 stating that the general concerns covered under WTO reform are 'the challenges WTO members face in initiating, negotiating and concluding trade agreements, both for outstanding issues as well as for new issues', 'the need to strengthen the work of the WTO's regular bodies and committees as well as strengthen notification and transparency disciplines under existing agreements', 'the question of whether, and to what extent, the WTO's more advanced emerging economies should take on greater obligations under the WTO agreements, and whether existing special and differential treatment provisions for developing and least developed countries are sufficient or effective' and 'improvements in the functioning of the WTO's dispute settlement system and overcoming the four-year impasse on the appointment of new Appellate Body members'.[20] This summary seems inclined to capture the point of view of developed countries that are active in pushing a certain understanding of 'WTO reform' rather than being an objective summary that also captures the views of developing countries reiterated in multiple submissions to the WTO.

Developing countries have for long stressed that central to any reform agenda at the WTO is the need to review and rebalance existing WTO rules, in order to address the implementation challenges that developing countries and LDCs have been facing and to strengthen and improve operational special and differential treatment.[21] A number of developing countries articulated a collective stand on WTO reform in their submission entitled 'Strengthening the WTO to promote development and inclusivity'.[22] In this submission, they stressed the imbalances in the WTO rules that need to be corrected as part of WTO reform and stressed that '"WTO reform" does

[20] https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfwtoreform_e.htm

[21] See a collective submission by the group of African States at the WTO, India and Cuba (WT/GC/W/778/Rev.3) of December 2020.

[22] WT/GC/W/778/Rev.5, Communication from African Group, Cuba, India and Pakistan.

not mean accepting either inherited inequities or new proposals that would worsen imbalances'.

In regard to the negotiating function of the WTO, they stressed that WTO negotiations are 'negotiations concerning multilateral trade relations as decided by the Ministerial Conference' and are underpinned by 'the core principles of the Multilateral Trading System', 'the Special and Differential Treatment architecture' and 'the central role of development'. In regard to the crisis of the dispute settlement function of the WTO, the submission stressed that '[a]bandoning the AB [Appellate Body] will fragment the dispute settlement system and will have a negative impact on the balance of rights and obligations that have been carefully negotiated in the DSU [Dispute Settlement Understanding]'. The submission added that 'a two-stage dispute settlement system is essential to ensure security and predictability of the multilateral trading system, including prompt, efficient and effective resolution of disputes to the benefit of all Members' and that '[t]here is also a need to reflect on the structural imbalances underlying the dispute settlement system, and the challenges faced by developing countries in accessing the dispute settlement system'. In relation to the monitoring function of the WTO, the submission noted the importance of '[r]eaffirming existing commitments and not adding more obligations in the areas of transparency' and stressed that '[t]he WTO must also allow for different economic models rather than push for one form or another'.

Furthermore, a major group of developing countries including Members of the African Group, India, Pakistan and Sri Lanka released a ministerial statement during the days of MC12[23] in which they underlined 'institutional challenges that the WTO is facing, including the imbalances in the rules

[23] WT/MIN(22)/18 – WT/GC/250 (14 June 2022), Ministerial Statement on WTO Reform, circulated at the request of the African Group (Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Côte d'Ivoire, Djibouti, Egypt, Eswatini, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe), India, Pakistan and Sri Lanka.

that have impacted Members, particularly developing countries, including least developed countries, from effectively shaping rules, or influencing decision-making in the WTO'.[24] For this group of developing countries, 'the review shall consider measures to facilitate the effective, full, and inclusive participation of developing countries, including least developed countries, in the multilateral trading system and its decision-making processes, and rebalance the inequitable trade rules from the Uruguay Round. It shall also safeguard the necessary policy space needed for developing countries for their structural transformation, industrialization and economic recovery'.[25] The group also stressed that 'the review shall be consistent with the principles and objectives of [the Marrakesh Agreement Establishing the World Trade Organization] and its multilateral trade agreements'.[26]

The way forward in deciphering WTO reform

It is important to read what was agreed in MC12 in light of, and together with, the developments since the earlier two Ministerial Conferences held in Nairobi in 2015 and in Buenos Aires in 2017. Back then, the developed countries succeeded in pushing back on the existing negotiation mandates of interest to developing countries, although they did not succeed in fully killing the Doha Round. They also commenced an intensive push towards illegally expanding plurilateral approaches to defining issues of negotiations and to changing WTO rules. Some developed countries have attempted an assault on special and differential treatment, which is a central pillar of the multilateral trading system and a right for developing countries and LDCs. What could unfold in the context of pursuing 'WTO reform' could further serve these attempts.

In light of the above, MC12 could go down in the history of the WTO as the ministerial meeting that opened the door to reshaping the multilateral trade institution and its functions. The mandate that WTO Members accepted

[24] Para 1 of WT/MIN(22)/18 – WT/GC/250.
[25] Para 3 of WT/MIN(22)/18 – WT/GC/250.
[26] Para 4 of WT/MIN(22)/18 – WT/GC/250.

through signing off on paragraph 3 of the MC12 Ministerial Outcome Document could be the basis for such a fundamental change. In effect, what WTO Members did through paragraph 3 is to open the field for direct engagement over how the WTO will handle its functions in the future.

Developing countries and LDCs face the collective challenge of ensuring that this process does not circumscribe the fundamental rules of decision-making that the WTO was built around in order to remedy the major deficiencies that characterised the GATT (General Agreement on Tariffs and Trade) system that preceded it. Otherwise, this process of seeking 'WTO reform' could lead to reinventing the WTO as a power-based rather than rules-based organisation, the result of which will be to grab space away from developing countries and their development issues in order to facilitate a corporate power grab of the WTO.

3 MC12 and the WTO's Pandemic Response

ONE main element of the declared 'success' at MC12 pertains to the WTO response to the COVID-19 pandemic. MC12 resulted in the Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics,[27] as well as the Ministerial Decision on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[28]

The Ministerial Declaration is a soft-law instrument that tackles a multitude of issues including the role of the multilateral trading system in times of pandemics, stability and predictability of the trading environment, transparency and notification of 'trade-related measures with respect to COVID-19 and future pandemics', disciplines on 'any emergency trade measures designed to tackle COVID-19', the application of export restrictions on vaccines, therapeutics, diagnostics and other essential medical goods and their inputs, the importance of trade facilitation measures, regulatory cooperation and sharing of regulatory information on a voluntary basis, the role of services trade in regard to resilience during pandemics, along with issues pertaining to intellectual property and food security.

27 WTO document WT/MIN(22)/31
28 WT/MIN(22)/30

Background to the negotiations on the Declaration

In June 2021, the WTO General Council Chair unilaterally selected Ambassador David Walker of New Zealand to facilitate a series of negotiations supposedly focused on ensuring a WTO response to the COVID-19 pandemic. Consequently, this process came to be known as the 'Walker process'. Ambassador Walker's work, reflected in his reports to the WTO General Council, revolved around a premise that what is needed is more liberalisation, interventions that will further constrain regulatory space and policy tools available to WTO Members, and more reliance on the private sector.

From among the voices and proposals that Ambassador Walker had heard in his consultations, he chose to focus on pushing trade facilitation and regulatory coherence in a way that undermines developing countries' flexibilities under the existing rules, promoting services liberalisation as one of the answers to the pandemic, limiting the ability to use export restrictions, pushing an expansive notification and monitoring regime that will further put pressure on developing countries in implementing their trade policies, and opening the door wider for the private sector's influence on WTO processes. Many of these propositions were rooted in submissions by the Ottawa Group[29] on trade and health issues. Issues raised by developing countries such as food security, economic resilience and intellectual property barriers were sidelined by Ambassador Walker, who also repeatedly refused to cover the issues pertaining to the TRIPS waiver.

The process at that point was clearly leaving most WTO Members in the dark and did not involve proper consultations or proper opportunities for Members to meaningfully engage in the negotiations. Ambassador Walker conducted discussions with a small group of WTO Members and produced multiple draft texts with almost no brackets (in WTO negotiations, brackets

[29] The Ottawa Group consists of 14 WTO Members : Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, South Korea, Mexico, New Zealand, Norway, Singapore, Switzerland and the United Kingdom. See, for example, the submission by the Ottawa Group and other WTO Members entitled 'COVID-19 and Beyond: Trade and Health' (JOB/GC/251/Rev.3).

around text are meant to indicate there is still no agreement on that text) and proposed them as the basis for deliberations among a very small group of selected countries.

In October 2021, a group of developing countries including Pakistan, Egypt, Tunisia, South Africa, Sri Lanka, and Uganda came together and presented a submission (WTO document JOB/GC/278/Rev.1) that sought to capture a lot of the concerns of developing countries. The submission noted that developed countries can and have employed exceptional fiscal and monetary policies to manage the shock from the COVID-19 crisis and to cushion the economic and social impact in ways that developing countries and least developed countries (LDCs) could not. Developing countries and LDCs do not possess the tools that would allow them to respond and recover and maintain resilience to withstand a global crisis of such scale.

The submission also emphasised that the focus of the work under the 'WTO response to the pandemic' ought to shift from liberalisation and regulatory constraints to policy space and enablers of structural transformation and resilience building, including economic resilience and food security. It also stressed that any proposals considered under the WTO pandemic response should in no way constrain the policy tools and space that developing countries and LDCs need in order to respond to pandemics and similar crises, nor restrict tools and flexibilities available to them under the WTO agreements. The submission also emphasised that a waiver from certain provisions of the TRIPS Agreement is central to the WTO's response to the COVID-19 pandemic. It also added that Members shall not directly or indirectly prevent or discourage another Member(s) from fully utilising the flexibilities of the TRIPS Agreement or in any way limit such flexibilities.

This collective submission of a number of developing countries, along with cooperation among this group and other developing countries actively participating in the process, such as India, was crucial to ensuring that the voices of developing countries and LDCs would be better heard in these negotiations.

The content of the Declaration on the WTO response to the pandemic

The way the adopted Declaration is worded often gives more emphasis to elements of interest to developed countries (such as 'committing to' transparency and notifications in paragraph 5), while lighter language is used in regard to issues of interest to developing countries and LDCs (such as simply 'recognizing' food security challenges of developing countries and LDCs in paragraph 21).

Over the course of negotiating this Declaration in the run-up towards MC12 and during the preceding year of 2021, negotiators of developing countries and LDCs had succeeded in removing from the draft text several problematic elements that developed countries were asking for, such as language that could be restrictive of policy space or specifically burdensome on developing countries and LDCs in terms of implementation. Yet, the final Declaration does not offer much new of major value for developing countries and LDCs (such as in relation to addressing food security or intellectual-property-related barriers).

Developing countries had called for a recognition in the Declaration that trade rules should accommodate the policy space that is particularly important for developing countries and LDCs.[30] This is because the COVID-induced crisis shed new light on the special needs of developing countries and LDCs, and the special considerations that developing countries and LDCs require under trade rules to allow for a multilateral trading regime that enables rather than hinders economic resilience and developmental progress in these countries.

[30] See for example: submission JOB/GC/304 by the ACP Group and 278 co-sponsors; and submission JOB/GC/278/Rev.4, 'Trade rules that support resilience building, response and recovery to face domestic and global crises', communication from the Plurinational State of Bolivia, Egypt, Indonesia, Pakistan, South Africa, Sri Lanka, Tunisia, Uganda and the Republic of Venezuela.

Most elements that developing countries had sought to include in this Declaration in order to recognise the specific needs of developing countries and LDCs have either not been included or were covered in a very diluted manner. These include their request to address barriers emanating from the intellectual property regime and to address the difficulties faced by developing countries and LDCs in using flexibilities of the TRIPS Agreement to protect public health. Developing countries had also asked for addressing existing gaps in rules and flexibilities pertaining to the needs of developing countries in promoting structural transformation, industrialisation and resilient economies. They also sought recognition of solutions to tackle food security as particularly linked to strengthening local agricultural productivity and production, supporting efficient public stockholding for food security purposes, enhancing the livelihoods of farmers, and extending the needed specific consideration to net food-importing developing country (NFIDC) Members.

In the final Declaration, the paragraphs addressing food security (paragraphs 21 and 22) are a mere statement about the global food security crisis rather than a commitment to address issues of concern to developing countries, NFIDCs and LDCs. The paragraphs on intellectual property issues (paragraphs 12 and 13) recall existing agreements and instruments such as the 2001 Doha Declaration on the TRIPS Agreement and Public Health rather than committing to address intellectual-property-related barriers and acknowledging the difficulties faced by many WTO members in making use of the TRIPS Agreement flexibilities.

At the same time, the adopted Declaration still includes certain elements that could potentially impact the policy space of developing countries and LDCs and the discretion and flexibilities they have under existing WTO rules. For example, the Declaration includes language reflecting a political commitment ‘to exercise due restraint in the imposition of export restrictions on [COVID-19 vaccines, therapeutics, diagnostics and other essential medical goods], including their inputs’ (paragraph 8). This paragraph refers to all WTO Members without any special and differential

treatment, which could be taken to mean that LDCs and developing countries which have any supply of masks or COVID-19 vaccines or other products relevant to addressing the pandemic also intend to exercise due restraint in imposing export restrictions. This could make it politically more difficult for developing countries and LDCs to impose export restrictions on these products. It is well documented that many developing countries and LDCs needed to use export restrictions on COVID-19 medical products including masks and test kits in order to meet domestic needs.[31] Without export restrictions, those developing countries and LDCs would be required to sell them on the international market where developed countries can pay the highest price for such products.

The Declaration includes a recognition of 'the importance of ensuring that any emergency trade measures designed to tackle COVID-19, if deemed necessary, are targeted, proportionate, transparent, temporary, and do not create unnecessary barriers to trade or unnecessary disruptions in supply chains…' (paragraph 7). This commitment could expose the emergency COVID-19 trade response measures undertaken by Members (including, potentially, measures taken under TRIPS exceptions and flexibilities) to scrutiny based on the complex standards set here. This would in effect be in tension with the assumption that the Declaration is supposed to make it easier to respond to COVID-19 and future pandemics.

The Declaration also includes a commitment that 'notifications of trade-related measures with respect to COVID-19 and future pandemics are submitted in a timely and comprehensive manner in accordance with the WTO rules' (paragraph 5). This commitment does not provide for special and differential treatment (S&DT) to developing countries and LDCs. Although the wording recognises the constraints facing these countries and

[31] These include LDCs such as Bangladesh and Cambodia as well as many developing countries including Brazil, Colombia, Cote d'Ivoire, Ecuador, Egypt, India, Indonesia, Kazakhstan, Malaysia, Morocco, Oman, Pakistan, Sri Lanka, Thailand, Vietnam and Zimbabwe. See https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm

the importance of technical assistance and capacity-building, it does not imply any intention or commitment to address these constraints, or express any willingness by developed countries to contribute in this regard, nor does it link the requirement for developing countries and LDCs to implement additional notifications to their capacity to do so.

The above are a few examples of how the Declaration's impact on policy and regulatory space could manifest. Furthermore, the Declaration includes statements that give a false narrative about how trade rules operated during the pandemic, by referring for example to 'the importance of understanding how the WTO rules have supported Members during the COVID-19 pandemic' (paragraph 23). In fact, WTO rules, including those on intellectual property, clearly present challenges to Members and not only support. If WTO rules already supported Members in the pandemic, then a solution pertaining to the application of the TRIPS Agreement in relation to production of COVID-19 vaccines, therapeutics and diagnostics would not be needed.

The Declaration also includes terminology that tends to differentiate between developing countries, by using the qualifying term 'some' before 'developing countries' in multiple paragraphs. This could potentially feed into the attempts to normalise differentiation among developing countries and their access to special and differential treatment. This is also a step backwards from existing WTO rules that do not include such differentiations. The Declaration includes a paragraph providing that the 'declaration does not create sub-categories of developing country Members' (paragraph 29). This language, while being a useful clarification, does not eliminate the potential implications resulting from setting a political precedent that is likely to make it more difficult to resist ongoing attempts to differentiate amongst developing countries.

The Declaration can have an effect on existing rights, obligations and flexibilities, particularly when applied as a subsequent agreement or subsequent practice. WTO ministerial declarations could operate as subsequent agreements as opined by the WTO Appellate Body.[32] Subsequent agreements contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty (i.e., existing rights and obligations). This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty/existing rights and obligations accord to WTO Members.[33] The Declaration includes a paragraph providing that 'this declaration does not alter the rights and obligations of WTO Members' (paragraph 29). Yet, this language does not necessarily restrict the influence of this Declaration on the interpretation and application of existing rights and obligations.

The way forward

The Declaration integrates a mandate towards work to be undertaken post MC12 to 'analyze lessons that have been learned and challenges experienced during the COVID-19 pandemic', including in areas of 'balance of payments, development, export restrictions, food security, intellectual property, regulatory cooperation, services, tariff classification, technology

[32] The WTO Appellate Body (AB) (in the US – Clove Cigarettes case) has noted that a decision adopted by Members, other than a decision adopted pursuant to Article IX.2 of the WTO Agreement (i.e., authoritative interpretation), may constitute a 'subsequent agreement' on the interpretation of a provision of a covered agreement. Source: AB report US – Clove Cigarettes, paragraphs 256-260. See: https://www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm#I.3.9A

[33] In 2018, the International Law Commission (ILC) released the draft conclusions on 'subsequent agreements' and 'subsequent practice' (https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_11_2018.pdf). In this report, the ILC noted that: 'Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), … are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31', 'may take a variety of forms', and 'contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties…'.

transfer, trade facilitation, and transparency' (paragraphs 23 and 24).[34] This work is to be undertaken in the 'relevant WTO bodies', including the Council for Trade in Goods or its subsidiary bodies (such as the committees on trade facilitation, technical barriers to trade, sanitary and phytosanitary measures, market access, and agriculture), along with the Council for Trade in Services, Council for Trade-Related Aspects of Intellectual Property Rights, Committee on Trade and Development, Working Group on Trade and Technology Transfer, and Working Group on Trade, Debt and Finance.

This work might come to define the focus of attention in the work of multiple WTO bodies and committees. In the way forward, it is important to ensure that the issues of concern to developing countries and LDCs, which were not effectively addressed in the Declaration, be given priority attention. These include food security, protection of public health and the need for flexibilities in regard to intellectual property, and the need for policy space and tools to bolster economic resilience. These processes should be accompanied by proper safeguards to ensure meaningful and effective participation of developing countries and LDCs, taking into account the limited resources and institutional capacities available to them. Towards this end, the work ought to be organised in a way that allows Member state missions with limited resources to adequately participate and affords them enough time to consult their capitals. Furthermore, this work ought to remain Member-driven.

[34] See paragraphs 23 and 24 of WT/MIN(22)/31.

4 The TRIPS Decision

TRIPS Decision comes up short

THE MC12 Ministerial Decision on the TRIPS Agreement (WTO document WT/MIN(22)/30) gavelled in the wee hours of the morning of 17 June may perhaps best be described as a bittersweet outcome for developing countries. Bitter, for even after 20 months of intensive discussion and negotiation, the outcome falls severely short of the comprehensive TRIPS waiver proposed by India and South Africa in October 2020. That proposal sought a waiver of at least 35 articles of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) covering patents, protection of undisclosed information, copyright and industrial designs in relation to health products and technologies for the prevention, treatment and containment of COVID-19.

The proposal was motivated by the 'growing supply-demand gap' since the onset of the COVID-19 pandemic, arguing that '[t]he rapid scaling up of manufacturing globally is an obvious crucial solution to address the timely availability and affordability of medical products to all countries in need', and stressing the need for 'unhindered global sharing of technology and know-how in order that rapid responses for the handling of COVID-19 can be put in place on a real time basis'. At its core, the comprehensive TRIPS waiver proposal sought to create 'freedom to operate' to scale up and diversify global manufacturing to address the global inequity in access to all health products and technologies for the prevention, treatment and containment of COVID-19.

The proposal, which was co-sponsored by 65 WTO Members and supported by many other Members, received tremendous backing from various international organisations such as the World Health Organization (WHO) and UNITAID, civil society, intellectual property (IP) experts, parliamentarians, Nobel laureates and world leaders.[35]

However, persistent opposition and uncompromising positions of developed countries, especially the European Union (EU), the United States, the United Kingdom and Switzerland, amply supported by the WTO Secretariat's manoeuvring, ultimately resulted in a very limited and conditional TRIPS Ministerial Decision at MC12.

This outcome was inevitable once negotiations commenced on the basis of a narrow draft text communicated by the WTO Director-General (DG) to the WTO's TRIPS Council on 3 May. The DG's text (already publicly circulating following a leak in mid-March) was globally criticised for its 'TRIPS-plus' elements that went beyond TRIPS Agreement requirements and for its inadequacy in times of a global pandemic.[36] It reflected the obstructive positions of the EU, which could agree only to a decision framed in the context of a compulsory licence of patents, and the US' insistence that the decision should cover only COVID-19 vaccines (and not therapeutics and diagnostics) and set criteria limiting which Members can make use of the decision (in particular excluding China).

While the TRIPS Ministerial Decision that was eventually adopted does not deliver the desired comprehensive TRIPS waiver, it is nevertheless a marked improvement over the DG's text. It is worthy of note in view of the vicious hostility of developed countries that had been observed in the

35 https://www.twn.my/title2/intellectual_property/trips_waiver_proposal.htm

36 See 'Proposed TRIPS waiver outcome not yet agreed among the Quad' at https://www.twn.my/title2/intellectual_property/info.service/2022/ip220305.htm; and 'WTO DG's proposed solution unsuitable for global public health crisis' at https://www.twn.my/title2/intellectual_property/info.service/2022/ip220501.htm

course of the negotiations leading to its adoption. The UK and Switzerland in particular had relentlessly sought to narrow the scope and application of the Decision.[37]

Making sense of the Ministerial Decision

The TRIPS Decision is built on the existing compulsory licensing flexibility under Article 31 of the TRIPS Agreement, and waives the limit on quantities of vaccines that may be exported when produced under a compulsory licence issued to override potential and existing patent barriers for the manufacture of COVID-19 vaccines.

Article 31 of the TRIPS Agreement allows governments to issue a licence to authorise a third party to use and exploit a patented product/process without the consent of the patent holder. This important flexibility is often referred to as a non-voluntary licence or compulsory licence (CL); where a CL is issued for public non-commercial use, it is also commonly known as a 'government use' licence.

The use of a compulsory licence is subject to various conditions. Among these, Article 31(f) of the TRIPS Agreement states that CLs must be used predominantly for supplying the domestic market, thereby limiting the quantities of the licensed products that may be exported. Paragraph 3(b) of the TRIPS Ministerial Decision now waives this condition; with this waiver, most or all of the production may be exported. This is the only waiver contained in the TRIPS Decision.

Previously, a mechanism to waive the Article 31(f) condition was adopted on 30 August 2003, and in 2005 it was translated into a permanent amendment of the TRIPS Agreement as Article 31*bis*. But this mechanism

[37] 'UK & Switzerland attempt to limit scope of COVID-19 TRIPS Decision', available at https://www.twn.my/title2/intellectual_property/info.service/2022/ip220601.htm; 'Intense IP negotiations are underway, resolution on eligibility criteria outstanding', available at https://www.twn.my/title2/intellectual_property/info.service/2022/ip220608.htm

has mostly proven to be ineffective and unworkable due to the numerous rigid procedures attached to its use.[38] The MC12 TRIPS Decision offers a mini-version of that mechanism.

Another interesting element in the TRIPS Decision is paragraph 4, which relates to Article 39.3 of the TRIPS Agreement concerning protection of test data. Historically, developed countries and developing countries have held different interpretations of Article 39.3. Developed countries have typically argued that Article 39.3 requires the granting of exclusive rights for a specified time-frame over test data submitted by the originator pharmaceutical companies to regulatory authorities for purposes of obtaining marketing approval, thereby delaying the entry of generic and other follow-on manufacturers.[39] Developing countries maintain that such an interpretation is not supported by Article 39.3 and most developing countries do not implement such a requirement at the national level. However, often due to pressure exerted especially through free trade agreements, some developing countries have implemented data exclusivity at the national level. Evidence suggests that implementation of data exclusivity delays generic competition, enabling the originator company to charge monopoly prices with significant implications for public sector budgets and access to affordable medicines.[40]

Against this background, paragraph 4 of the TRIPS Decision confirms developing countries' interpretation of Article 39.3 that undisclosed test data submitted by originator companies to regulatory authorities may be relied

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38 'Neither Expeditious nor a Solution: The WTO August 30th Decision Is Unworkable', https://msfaccess.org/neither-expeditious-nor-solution-wto-august-30th-decision-unworkable. Also see paragraph 28-53 of WTO document IP/C/W/673 at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W673.pdf&Open=True

39 For example, see https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157937.pdf, in which it is reported that the 'EC [European Commission] reminded Turkey, as a member of the WTO, that Article 39 of the TRIPs Agreement provides data exclusivity for medicines'.

40 Malpani R (2009), 'All costs, no benefits: how the US-Jordan free trade agreement affects access to medicines', Journal of Generic Medicines, 6(3): 206-217, http://jgm.sagepub.com/content/6/3/206.short; Cortés Gamba M, Rossi Buenaventura F, Vásquez Serrano M (2012), 'Impacto de 10 Años de Proteccion de Datos en Medicamentos en Colombia', IFARMA and Fundación Misión Salud, Bogota, http://www.mision-salud.org/wp-content/

on and used for purposes of granting rapid regulatory approval. Article 39.3 also allows disclosure of data in certain circumstances. Paragraph 4 reinforces that flexibility in the context of 'timely availability of and access to COVID-19 vaccines'. Towards that end, paragraph 4 states that Article 39.3 does not prevent a Member from 'enabling the rapid approval for use of a COVID-19 vaccine', which also supports disclosure of undisclosed test data for the purpose of rapid approval for use of a COVID-19 vaccine produced under this Decision.

Paragraph 3(a) of the Decision reinforces the existing flexibility in Article 31(b) of the TRIPS Agreement that an eligible Member may grant a compulsory licence without first having to make attempts to get a voluntary licence from the patent holder.

Paragraph 3(d) of the Decision adds elements which may be considered when determining payment of adequate remuneration to the patent holder under Article 31(h) of the TRIPS Agreement. Payment of adequate remuneration is in any case subject to national discretion under the Agreement.

Use of the Decision is subject to several conditions that are not normally applicable when using the compulsory licensing flexibility under the TRIPS Agreement. Hence these can be said to be TRIPS-plus conditions:

- Paragraph 3(c) prevents re-exportation of products manufactured under the authorisation in accordance with the Decision that have been imported under the Decision, with exception made for situations of 'humanitarian and not-for-profit purposes' (footnote 3). In a public health emergency, there is no logic or basis for such a condition, and yet despite the opposition of most developing countries to the condition, the EU had insisted on maintaining this paragraph, only making leeway for the small exception in footnote 3. However, this condition is only applicable when both the manufacturing and importing countries are using the Decision.

- Paragraph 5 and footnote 5 of the Decision require notifications to the WTO's TRIPS Council. These notifications will be post facto, i.e., after adoption and implementation, as paragraph 5 refers to 'after the adoption of the measure' while footnote 5 refers to 'shall be notified as soon as possible after the information is available'. On several occasions during the negotiations, the UK had insisted on pre-shipment notification, which was in the end not agreed to by WTO Members.
- The eligibility criteria in footnote 1 of the Decision reflect the US' intent that China legally commit to opting out of using the Decision. The DG's text had reflected the US proposal that 'For the purpose of this Decision, developing country Members who exported more than 10 percent of world exports of COVID-19 vaccine doses in 2021 are not eligible Members'.

China was not agreeable to this formulation, which was clearly targeted at singling it out. A counter-proposal was reflected in the DG's text: 'For the purpose of this Decision, all developing country Members are eligible Members. Developing country Members with capacity to export vaccines are encouraged to opt out from this Decision.'

On 10 May China formally announced to the WTO General Council that it was opting out of using the Decision. However, the statement was insufficient for the US. Due to domestic anti-China sentiment, the US sought a binding commitment that would exclude China, although China had significant production capacity that could have greatly supported access in developing countries.

The final text of footnote 1 in the TRIPS Decision states: 'For the purpose of this Decision, all developing country Members are eligible Members. Developing country Members with existing capacity to manufacture COVID-19 vaccines are encouraged to make a binding commitment not to avail themselves of this Decision. Such binding commitments include statements made by eligible Members to the General Council, such as those made at the General Council meeting on 10 May 2022, and will be recorded

by the Council for TRIPS and will be compiled and published publicly on the WTO website.'

This final text was the outcome of a bilateral negotiation between the US and China; most WTO Members had not even seen the text of footnote 1 even as the TRIPS Decision was gavelled. While the stated objective of the Decision is 'production and supply of COVID-19 vaccines', footnote 1 discourages developing countries with manufacturing capacity from using the Decision, revealing the absurdity, irrational power politics and Big Pharma interests that influenced the textual negotiations.

In implementing the TRIPS Decision, paragraph 2 may be useful for it presents a simplified approach to implementation. It makes clear that the 'law of a Member' referred to in Article 31 of the TRIPS Agreement is not limited to legislative acts such as those laying down rules on compulsory licensing, but also includes other acts, such as executive orders, emergency decrees, and judicial or administrative orders.

Paragraph 6 of the TRIPS Decision provides that the duration of the Decision is for five years. The duration effectively applies to the waiver of Article 31(f) of the TRIPS Agreement contained in paragraph 3(b) of the Decision, as the other elements of the Decision are mere clarifications and reiterations of existing TRIPS Agreement flexibilities. Importantly, nothing in the Decision prevents any Member from issuing a compulsory licence for a period beyond five years.

Paragraph 7 safeguards against 'non-violation and situation' complaints for the duration of the TRIPS Decision. For the time being until MC13, there is a moratorium on non-violation complaints with respect to the TRIPS Agreement. The Decision does not however stop challenges under the usual WTO dispute settlement mechanism for failing to comply with the TRIPS Agreement pursuant to Article XXIII.1(a) of the General Agreement on Tariffs and Trade (GATT).

Paragraph 9 clarifies that except for the granted waiver lifting the restriction on export of vaccines, the Decision does not affect the rights and flexibilities of WTO Members provided by the TRIPS Agreement.

As noted above, the final outcome in the shape of the adopted TRIPS Decision is an improvement over the DG's text for several reasons, including:

- reference in the DG's text to 'patented subject matter' was changed to 'subject matter of a patent', ensuring consistency with Article 31 of the TRIPS Agreement and that the Decision is applicable not only in situations where the subject matter to be licensed is patented but also to subject matter at the application stage, i.e., pending patents;
- deletion of the requirement to list all patents to be covered by the CL, which if maintained would have been difficult to comply with, given the uncertainty over the patent landscape of a particular product and process;
- addition of an exception in footnote 3 to the re-export restriction in paragraph 3(c) of the Decision;
- amendment of paragraph 4 of the Decision;
- addition of a new paragraph 9.

What next for developing countries?

Footnote 1: Setting the record straight

On 22 June, the WTO Secretariat issued WTO document IP/C/W/690 titled 'Record in accordance with footnote 1 of the Ministerial Decision of 17 June 2022'. It states: 'This document provides a record of developing country Members that have made a binding commitment not to avail themselves of the Ministerial Decision on the TRIPS Agreement of 17 June 2022. This record will be updated as appropriate.' China's opt-out statement at the May General Council meeting is mentioned.

The Secretariat's approach of unilaterally creating such a record is inconsistent with the text in footnote 1, which lists a two-step process: 'will be recorded by the Council for TRIPS' 'and will be compiled and published publicly on the WTO website'. Footnote 1 requires that any intention to opt out of using the Decision should officially be communicated to the TRIPS Council by the Member concerned, for only then can it be recorded by the TRIPS Council. The Secretariat's role is to compile and publish it publicly once it has formally been recorded by the TRIPS Council. WTO Members should set the record straight with the Secretariat.

Therapeutics and diagnostics

WHO has said that 'it is simply not acceptable that in the worst pandemic in a century, treatments that can save lives are not reaching those that need them', calling the inequitable access a 'moral failing' and adding that 'We're playing with a fire that continues to burn us.'[41]

On 29 June, WHO Director-General Tedros Adhanom Ghebreyesus noted: 'On COVID-19, driven by BA.4 and BA.5 in many places, cases are on the rise in 110 countries, causing overall global cases to increase by 20% and deaths have risen in three … WHO regions.' He stressed that 'Now is the time for Ministries of Health to integrate tests and anti-virals into clinical care so that people that are sick can be treated quickly.'[42]

The crucial role of therapeutics and diagnostics in controlling COVID-19 is undisputed. They are recommended by WHO as well as by national strategies, increasingly as part of test-and-treat strategies. Yet timely, affordable access remains a challenge in most developing countries. According to Airfinity data as at February 2022: 'Current global outpatient treatment production is less than what is needed if 10% of the high-risk population contracts SARS-

41 htts://www.who.int/multi-media/details/who-press-conference-on-covid-19--ukraine-and-other-global-health-issues---4-may-2022

42 https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing---29-june-2022

CoV-2. Using estimates of the population with at least one co-morbidity for progression to severe COVID-19, a total of 1.7 billion people globally are at high-risk. If 50% of those at high-risk were infected, 872.8 million courses of outpatient treatment would be needed if there was equitable access to diagnostics and treatment. Current global production of outpatient treatment stands at 160 million courses which is currently less than the 174.6 million courses needed to treat 10% of the global high-risk population.'[43]

Most of the limited supply of COVID-19 therapeutics has been procured by wealthy countries that represent a mere 16% of the global population. Even when available, they are unaffordable to most developing countries. For some products, voluntary licences (VL) have been offered by originator companies to some developing-country manufacturers but these VLs are subject to various conditions that are often difficult for the developing-country manufacturers to comply with, such as that the latter have to be prequalified by WHO. The VLs also exclude supply to many developing countries. Supply constraints are thus expected to continue for most of 2022 even for products where VLs exist.[44]

Expanding supply options requires lifting the intellectual property barriers to the entry of generic manufacturers, especially as patent filings related to therapeutics considerably outnumber those on vaccines by some fourfold. Extending the scope of the TRIPS Decision beyond vaccines to cover therapeutics and diagnostics could secure the availability of compulsory licences to override the patent barrier to production and export. It is a no-brainer from a public health perspective and yet it was one of the most contentious aspects of the negotiations on the Decision.

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43 https://mcusercontent.com/2fe57162f164ecead64629b83/files/470fc4ab-ab44-5d47-4aff-7d9257ded369/Final_V1_Treatments_Report_20220225_Airfinity_WB_1_.pdf?utm_source=Airfinity&utm_campaign=f524e37c7a-EMAIL_CAMPAIGN_2022_01_28_09_46_COPY_01&utm_medium=email&utm_term=0_41a531e556-f524e37c7a-513654961

44 https://launchandscalefaster.org/covid-19/therapeutics

Paragraph 8 of the Decision states: 'No later than six months from the date of this Decision, Members will decide on its extension to cover the production and supply of COVID-19 diagnostics and therapeutics.' This two-track approach of 'vaccines first, therapeutics and diagnostics later' reflects the US' obstinate position during the negotiations. Even when the US concerns were addressed with the two-track approach, paragraph 8 was bitterly disputed till the end of the negotiations as the UK and Switzerland attempted (although unsuccessfully) to dilute the definitive commitment to address therapeutics and diagnostics, proposing 'whether to extend this decision' instead of 'on its extension'.

Clearly, the challenge for developing countries in the next six months will be to extend the Decision to therapeutics and diagnostics, without the addition of further conditions or narrowing of the Decision.

Implementing and using the Decision

Compulsory licensing is one of the most important tools that developing countries have to address patent barriers to production and access. The Decision motivates the use of compulsory licences for COVID-19 vaccines. The main beneficiaries of the Decision are developing countries manufacturing or planning to manufacture COVID-19 vaccines with the intent to export the majority or all of the vaccines and facing existing or potential patent barriers. Countries that are importing vaccines or exporting a non-predominant portion under a compulsory licence need not use the Decision. These countries may continue to import or export under Article 31 of the TRIPS Agreement.

Least developed countries (LDCs) enjoy full exemption from the TRIPS Agreement obligations at least until 1 July 2034 and should utilise this exemption to import, export or use any patented products.[45] They do not

[45] See 'Lessons from the pandemic for LDCs: Implementing intellectual property flexibilities' at https://twn.my/title2/briefing_papers/twn/LDC%20IP%20flexibilities%20TWNBP%20Mar%202022%20Shashikant.pdf

need to use compulsory licensing, including under the Decision, to address potential/existing patent or other IP barriers.

For other products (beyond COVID-19 vaccines), developing countries that wish to import and export may continue to use compulsory licences under Article 31 of the TRIPS Agreement to override any patent barriers. Article 31 limits neither the products that may be compulsory licensed nor the duration of the licence, which may be for the duration of the patent term. Apart from compulsory licensing under Article 31, developing countries may also use other TRIPS Agreement flexibilities to address patent or other IP barriers to access.

At the global level, the process that began in October 2020 has provided a platform for developing countries and the international community to highlight the challenge of timely and affordable access, exposing the hypocrisy of developed countries and their failure to deliver on promises of global solidarity and equitable access. Most notably, it has brought immense global visibility and awareness to the IP monopolies that underpin and enable highly concentrated supply chains that are unsuitable for addressing public health needs in developing countries especially during a public health emergency, and consequently the need for greater freedom to operate for local manufacturers to diversify production and expand supply options.

5 MC12 Outcomes on Agriculture and Food Security

AGRICULTURE has always been a critical component of any WTO Ministerial and MC12 was no exception. Critical issues such as the permanent solution on public stockholding (PSH), the special safeguard mechanism (SSM), and issues related to ensuring fair markets for cotton have been long pending. The importance of addressing agriculture-related issues was compounded by the cumulative food crisis triggered by the pandemic and followed by the Russia-Ukraine war in the Black Sea region. The explosive inflation in food prices, further reinforced by the price hikes in fuel and fertilisers, has created massive challenges for meeting food security, ensuring nutrition and eradicating hunger worldwide. For developing countries, in particular net food-importing developing countries (NFIDCs) and least developed countries (LDCs), this problem is particularly acute as many of them are net importers without adequate capacity to produce enough to meet domestic demand, and a volatile and explosive global market has also eroded their already fragile financial capacity to fund such imports.

The proposed Decision on Agriculture

MC12 saw three major initiatives gain traction in the area of agriculture and food security. The first was a Decision on Agriculture (tabled as WTO document JOB/AG/232) comprising a work programme covering a number of issues that have been discussed or raised in the WTO Committee on Agriculture.

Of these, the PSH issue has a clear mandate and had a deadline of 2017 that was already unmet. The SSM and cotton issues also have strong mandates. In addition, the Cairns Group of agriculture exporter countries had tabled a proposal for disciplining domestic agricultural support, a long-time demand of developing countries, but without recognising special and differential treatment (S&DT) for developing countries in their use of the Development Box (Article 6.2 of the WTO Agreement on Agriculture (AoA)) or the *de minimis* provisions (Article 6.4 of the AoA). Issues of newer origin such as disciplines on export restrictions and transparency, along with that of market access, were also included.

Interestingly, in spite of several constructive proposals submitted on the permanent solution on PSH in 2021 by the African Group (JOB/AG/204) and the G33 (JOB/AG/214), and then a combined proposal submitted on 31 May 2022 by the African, Caribbean and Pacific (ACP) Group, the African Group and the G33 (JOB/AG/229), the much-delayed outcome was outright refused even in MC12. In addition, there were attempts to bring in similar deadlines and mandates to 'agree and adopt by MC13' outcomes across all the issues being negotiated. This would have meant developing countries would have had to make commitments to agree and adopt expected adverse outcomes on issues such as market access, export restrictions and transparency if they wanted to secure outcomes for PSH, SSM and cotton.

Due to disagreements among Member States, this Decision on Agriculture was finally not adopted. While for PSH, SSM and cotton, it would have been useful to get strong timelines and modalities for outcomes, the past mandates to negotiate and reach outcomes still hold.

For PSH, even in the absence of new clear modalities, the earlier mandate given by the Bali Decision of 2013 and the modalities of the Nairobi Decision of 2015 will continue to hold and the mandate of negotiating a permanent solution continues to exist until the permanent solution is found, irrespective of the MC11 deadline. Paragraph 1 of the Bali Decision (WT/MIN(13)/38 – WT/L/913) of 2013 says: 'Members agree to put in place an

interim mechanism as set out below, and to negotiate on an agreement for a permanent solution, for the issue of public stockholding for food security purposes for adoption by the 11th Ministerial Conference.' The Nairobi Ministerial Decision (WT/MIN(15)/44 – WT/L/979) of 2015 says that Members 'shall engage constructively to negotiate and make all concerted efforts to agree and adopt a permanent solution on the issue of public stockholding for food security purposes. In order to achieve such permanent solution, the negotiations on this subject shall be held in the Committee on Agriculture in Special Session ("CoA SS"), in dedicated sessions and in an accelerated time-frame, distinct from the agriculture negotiations under the Doha Development Agenda ("DDA")'. Therefore, an outcome must be reached at the earliest. The outcomes on SSM and cotton must also be pursued to be delivered by MC13, and domestic support discussions must integrate effective and appropriate S&DT. Further, these outcomes must be delivered without being linked to other issues.

The Food Insecurity Declaration

The second agriculture-related initiative at MC12 resulted in the adoption of a 'Ministerial Declaration on the Emergency Response to Food Insecurity' (WT/MIN(22)/28 – WT/L/1139). The Declaration comprises soft law and directives on issues that aim to enable Member States to deal with critical food crisis situations. It however fails to provide any immediate new tools to developing countries, NFIDCs and LDCs to deal with issues related to food crises, more of which are expected to emerge in the future. The language consists largely of reaffirmations of existing commitments, such as those already agreed in the AoA, the Marrakesh Decision of 1994 on NFIDCs (paragraph 8) or the Nairobi Decision on Export Competition (paragraph 7) with special reference to international food aid.

Language on increasing production and productivity, much needed for developing countries, NFIDCs and LDCs, faced strong resistance and found some mention only after persistent demands by the latter. This is notwithstanding the fact that increasing production would immensely boost

efforts to stabilise a highly volatile and concentrated global market by diversifying and supplementing food supplies, and can strengthen the fight against food crises in the future. Boosting production and productivity is not inimical to the interests of a strong global trade regime but is so to the interests of global trade monopolies.

In contrast, paragraph 4 on export restrictions and paragraph 5 on emergency trade have been the key targets of developed countries and represent their major area of commercial interest in this Declaration. It is clear that one of the key reasons behind developed countries' push for the removal of export restrictions in developing countries is to access their raw materials, as also evident in the push to remove export taxes under bilateral free trade agreements.

While paragraph 4 purports to be a reaffirmation of existing commitments, along with the flexibilities to use export restrictions according to relevant WTO provisions, this para in fact urges Members not to use export restrictions. This is also an attempt to accelerate the currently ongoing push for negotiations on this issue under the Committee on Agriculture and to reach an outcome at the earliest.

The use of export restrictions is a complex issue. While there are adverse impacts on importing countries especially NFIDCs and LDCs if export restrictions are imposed, the domestic food security needs of the exporting country also have to be recognised, especially if it is a developing country, NFIDC or LDC. This is recognised by Article XI.2(a) of the General Agreement on Tariffs and Trade (GATT) and Article 12 (in particular 12.2) of the AoA.

Paragraph 5 of the Declaration is also problematic as it advances language earlier adopted by the G7 major developed countries to 'ensure that any emergency measures introduced to address food security concerns shall minimize trade distortions as far as possible; be temporary, targeted, transparent, and proportionate'.

Together, paragraphs 4 and 5 attempt to limit export restrictions and other emergency measures without any S&DT including for NFIDCs and LDCs, which are then in principle required to restrict their existing flexibilities. It is important to note that Article XI.2(a) of GATT provides exemption for 'export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party'. Therefore countries already need to pass tests related to length of the period of application, as well as shortage and essential nature of the product. Paragraph 5 provides additional tests currently not required by WTO rules for all Members including NFIDCs and LDCs. At a minimum, Paragraph 5 is a commitment that will make it politically more difficult for LDCs and developing countries to impose emergency measures to address food security.

These restrictions in paragraph 5 may lead to a subsequent agreement that affects the interpretation of and thus restrict existing flexibilities such as GATT Article XI.2(a). Even 'soft rules' related to export restrictions or emergency trade measures under paragraphs 4 and 5 should not prejudice future negotiations in the Committee on Agriculture and erode policy space provided by the current WTO Agreements.

Another issue to watch out for is the push for language related to 'sustainability' of agriculture and food systems. While such language comes from Sustainable Development Goal (SDG) 2, it can be used to push specific interpretations of such systems that are then used to bring in disciplines on environmental issues without there being a specific mandate to do so. It is to be noted that there is no internationally agreed definition, including at the UN Food and Agriculture Organization (FAO), of a sustainable food system. But there have been attempts by some developed countries to manipulate such definitions and use these in trade agreements to push certain disciplines related to environment and trade as well as set standards that would help their commercial interests. However, a sustainable agriculture and food system must be a system that balances the three pillars (i.e., economic, environmental and social) of sustainable development,

works for developing countries and LDCs, and gives them the necessary policy tools to support smallholder agriculture, enhance productivity and production and meet the targets of SDG 2.

The only substantial and positive contribution that this Declaration makes is to set up a 'dedicated work programme in the Committee on Agriculture to examine how this Decision [i.e., the 1994 Marrakesh Decision on NFIDCs] could be made more effective and operational pursuant to Article 16 of the Agreement on Agriculture and to consider concerns raised by Members in their current and future submissions. The work programme shall consider the needs of LDCs and NFIDCs to increase their resilience in responding to acute food instability including by considering the best possible use of flexibilities to bolster their agricultural production and enhance their domestic food security as needed in an emergency'. The 1994 NFIDC Decision places the onus on donor countries and international financial institutions (IFIs) to provide food aid and technical and financial support to NFIDCs and LDCs to help them cope with the adverse impacts of the reform programme under the AoA. However, this Decision has never been very well implemented. In the dedicated work programme, apart from exploring the implementation gaps, several tools could be suggested to ensure the implementation of the NFIDC Decision meets current challenges as a significant part of the special vulnerability of NFIDCs and LDCs arises from the impacts of AoA reform which has brought in unfair rules on subsidies and constrained the policy space of NFIDCs and LDCs to increase production and productivity.

Such tools can include:

- Setting up of a fund with contributions from donor countries and IFIs but to be managed and disbursed by NFIDCs and LDCs themselves.
- Support for building stocks under PSH programmes of key food products of which the country is a net importer. This may include price support to farmers and to consumers which may exceed currently prescribed WTO limits. In the case of price support subsidies, the principle of Article 18.4 of the AoA may be applied.

- Allowing long-term policy flexibility by adjusting WTO rules to give subsidies and grants to farmers to augment productivity and production in NFIDCs and LDCs, especially to small-scale farmers for food products of which the country is a net importer.
- The Nairobi Decision on Export Competition already gives a good framework and safeguards for aid. But aid itself has to be increased under a crisis situation, and certain safeguard conditions may be waived if requested specifically by the recipient NFIDC/LDC.
- The option of keeping supply and financial payment channels open for food exports to NFIDCs and LDCs during a period of food crisis, as a short-term measure.

The Decision on the World Food Programme (WFP)

A key outcome much touted as another of the great successes of the Ministerial was the 'Ministerial Decision on World Food Programme Food Purchases Exemptions from Export Prohibitions or Restrictions' (WT/MIN(22)/29 – WT/L/1140). This Decision includes a legal commitment that 'Members shall not impose export prohibitions or restrictions on foodstuffs purchased for non-commercial humanitarian purposes by the World Food Programme' (paragraph 1). However, the right of Members to ensure their domestic food security in accordance with the relevant provisions of the WTO agreements is recognised in paragraph 2. This Decision, though a positive initiative in principle, cannot be seen as a solution to the gigantic problem of assuring long-term food security to all, especially in developing countries, NFIDCs and LDCs. The WTO needs to provide more constructive solutions that address the structural causes of an inequitable global trading system. But in addition, there are some key issues that need to be kept in mind.

Since this Decision imposes a permanent commitment, a pertinent linkage arises with the permanent solution on PSH which was not delivered in MC12. PSH programmes remain an important policy instrument across developing countries and LDCs for ensuring domestic food security and dealing with situations of crises including but not limited to food crises as

witnessed during the COVID-19 pandemic. Since the WFP Decision is now agreed, the permanent solution is even more justified and must be agreed at the earliest.

There are also questions related to the obligations that are imposed on NFIDCs and LDCs, the possible impact on global markets, and whether this would lead to and also prejudge future obligations related to export restriction disciplines on agricultural or even non-agricultural products.[46]

Some strategy-related concerns in relation to agriculture and food security

Prior to MC12, a few strategies or approaches seemed to have been deployed by the developed countries as well as leading agricultural exporters of the Cairns Group, supported by the WTO Director-General (DG) and WTO Secretariat, to use both the pandemic and the food crisis to their advantage.

First, right from 2020 until MC12, the developed countries consistently recommended further trade liberalisation and keeping 'trade open' at all costs, primarily through the removal of, or imposing constraints on, export restrictions and the removal of import tariffs in order to address the adverse impacts of the pandemic and the food crisis. At the same time, there was an active discouragement of efforts to augment domestic productivity and production across developing countries and LDCs. There was a complete hijacking of the narrative and advancement of false solutions.

Second, the developed countries effectively used a dual strategy, though not unseen before, regarding proposals put forward in the WTO. On the one hand, they were the first to table proposals, and on the other hand, they persistently blocked any discussion or negotiations on developing-country

[46] For a more detailed analysis, see Ranja Sengupta (2022): 'Agriculture and Food Security Negotiations Text at WTO MC12: Implications for Developing Countries', TWN Briefing Paper, June, https://twn.my/title2/briefing_papers/MC12/briefings/Agriculture%20food%20security%20TWNBP%20MC12%20Sengupta.pdf

proposals, even when the issue was of key interest to developing countries. The perfect example of this was the initiative by the DG and the G7 to table the proposal on food security while refusing to even consider proposals from NFIDCs and LDCs. This forced other developing countries, NFIDCs and LDCs to be in a response mode and work on a base text which was already biased in favour of the commercial interests of the developed countries. On the issue of PSH, this combination of options was turned around by first blocking proposals submitted by the African Group (JOB/AG/204), the G33 (JOB/AG/214), and then a combined proposal submitted by the ACP Group, the African Group and the G33 (JOB/AG/229) and following it up with some counter-proposals such as that by Brazil.

The third strategy is the extensive use of exclusive 'Green Room' negotiations in the lead-up to and during MC12, justified this time in the name of the Russia-Ukraine conflict. The agriculture texts were negotiated completely in Green Rooms with very few Members present, and were not presented to the entire Membership until the beginning of June. This kept most developing countries and LDCs from participating effectively and promoting proposals of interest to them, and from resisting proposals and language inimical to their interests.

Another strategy is the use of issues that have a strong moral overtone across the WTO negotiations in general and in the context of MC12 in particular. These include issues such as gender, environment, human rights and sustainability, WFP and so on. It is difficult to resist discussion of these issues or question their framing as they are pitched on moral high ground. However, most often these issues are framed in such a manner as to set the stage for incrementally securing commercial advantage and market access for the proponents, rather than actually taking a comprehensive and balanced look at the issue. For example, 'environment and trade' discussions are pitched to set standards for developing countries, thereby constraining their export and domestic markets, undermining their productive capacity and production of certain goods and services. But there will never be any provision to assess, for example, the impact of foreign direct investment

from developed countries on resource grabs and environmental conservation efforts in the Global South. Developing countries need to be able to resist such imbalanced discussions without feeling defensive about it. These are areas where the developed countries already enjoy some advantages. If developed countries are truly committed to these causes, they should provide developing countries with the finance, technology and capacity-building tools to address these issues and must also uphold the principle of 'common but differentiated responsibilities' (CBDR) among developed and developing countries. However, there is always major resistance towards advancing such tools and towards operationalising CBDR.

Overall, the key mandates on agriculture and food security important for developing countries and LDCs still remain undelivered. It will require significant engagement and commitment from the Membership to meet these mandates and deliver critical policy tools. A lot of work remains ahead for developing countries and LDCs, including ensuring outcomes on the permanent solution on PSH, SSM, cotton, as well as disciplines on domestic support that integrate effective S&DT. In addition, they need to ensure that the dedicated work programme on NFIDCs and LDCs promised under paragraph 8 of the Food Insecurity Declaration to further expand and revitalise the implementation of the NFIDC Decision of 1994 actually delivers useful and additional policy tools for them.

6 The Fisheries Subsidies Agreement in MC12

THE WTO has been negotiating an agreement on fisheries subsidies from 2016 based on a mandate from Sustainable Development Goal (SDG) 14.6. The negotiations have been complex and difficult, with major conflicts over securing special and differential treatment (S&DT) for developing countries and least developed countries (LDCs) on the one hand and over developed countries with industrial fishing activities getting exemptions on the other.[47]

After significant last-minute negotiations, MC12 secured a partial, interim agreement with the objective to reach a comprehensive agreement in the near future. This partial agreement is to be ratified by Members based on Article X.3 of the WTO's foundational Marrakesh Agreement.

It is to be noted that paragraph 4 of the Ministerial Decision (WTO document WT/MIN(22)/33 – WT/L/1144) gives the mandate to negotiate the comprehensive agreement '*with a view to making recommendations to the Thirteenth WTO Ministerial Conference for additional provisions*'. The MC13 deadline is not very stringent and negotiations may continue beyond that deadline. However, according to Article 12 of the current agreement, the agreement will terminate by four years after its entry into force (unless otherwise decided by the WTO General Council) if the comprehensive agreement is not reached by then. Therefore, it seems there is an apparent

[47] For detailed analyses by the Third World Network of previous draft texts tabled in the fisheries subsidies negotiations, please read https://twn.my/title2/wto.info/2022/ti220613.htm and https://twn.my/title2/briefing_papers/MC12/briefings/Fisheries%20subsidies%20TWNBP%20MC12%20Sengupta.pdf

deadline of four years after entry into force of the current agreement to reach the comprehensive agreement. However, based on the mandate given by paragraph 4 of the Decision, there is nothing in principle to stop negotiations even if this four-year period is breached. But it may then have to deliver an entirely new agreement rather than simply the additional provisions that are mandated to be negotiated.

Below, some key features of the current agreement are summarised and some implications for further negotiations are explored.

- While developing countries and LDCs managed to extend S&DT (under Articles 3.8 and 4.4) to the Exclusive Economic Zone (EEZ) from the previous 12 nautical miles (NTM) under the provisions on illegal, unreported and unregulated (IUU) fishing (Article 3) and on overfished stocks (Article 4) in the current agreement, the entire S&DT ceases to be applicable after two years, after which even LDCs have to cut subsidies under these pillars.
- Under Article 4.3, the sustainability exemption which amounts to reverse S&DT for developed countries remains. In spite of counter-proposals by several developing countries and LDCs, this exemption to historically large subsidisers and industrial fishing nations has not been conditioned, qualified or narrowed in any manner over the last two years of the negotiations. There is still no recognition of the concept of common but differentiated responsibilities (CBDR) which would place higher responsibility on those historically responsible for overfishing and subsidising.
- The disciplines under Article 5 (on overcapacity and overfishing or OCOF) have been largely postponed and are to be agreed under the comprehensive agreement. But in the meantime, there is no S&DT in Article 5. LDCs, developing and developed countries all enjoy the same exemption up to the EEZ.
- Under Article 5.1, disciplines on distant water fishing will apply but government-to-government payments under access agreements are not

covered under the scope of this agreement (footnote 2), thereby largely exempting the EU's distant water fishing activities.

- Under a due restraint clause (Article 5.2), the issue of subsidies for flying under a different Member's flag has been settled by placing the onus on the Member who gives the subsidies.
- Another due restraint clause (Article 5.3) says: 'A Member shall take special care and exercise due restraint when granting subsidies to fishing or fishing related activities regarding stocks the status of which is unknown' (emphasis added). This is likely to affect developing countries and LDCs more as they do not always have the mechanisms to monitor the status of stocks. Due restraint clauses in other WTO agreements, such as in Article 13 of the Agreement on Agriculture, have been quite seriously adhered to. It is not clear how binding this due restraint clause is likely to be.
- The provision on non-specific fuel subsidies, which was earlier square-bracketed (indicating lack of agreement) under Article 1.2, is now completely deleted. It had been a persistent demand of India and many other developing countries to discipline these subsidies while integrating S&DT.
- Technical assistance and capacity building (Article 7) remains critically important for developing countries and LDCs even to put in place the necessary infrastructure to meet sustainability objectives. However, the funding mechanism continues to be voluntary and the initial pledges seem grossly inadequate compared with the needs.
- The notification conditions under Article 8 continue to be quite stringent and detailed compared with the capacities of many developing countries and LDCs. If this agreement gets enforced, these provisions are likely to continue and not be renegotiated at all. However, there is no mandatory requirement for additional notification for using S&DT provisions, unlike in earlier versions of the text (earlier Article 8.7).

As the agreement stands now, the SDG 14.6 mandate is unlikely to be met as those who subsidise most remain free to subsidise. For those Members who do not subsidise much but are dependent on the conservation of fish

stocks for meeting livelihood and food security needs, this will be an important consideration. However, many developing countries have large fisher populations, and therefore their subsidies need to be looked at in that context. While China, Japan, the US, Brazil, Canada and Indonesia are at the top in terms of total subsidies (2014-2016, OECD estimates), the picture is somewhat different when considering per-fisher subsidies. Denmark, Sweden, the Netherlands, New Zealand, Norway, Canada, Ireland, Germany, Australia and Japan are the top 10 subsidisers in terms of per-fisher subsidies, with amounts ranging from $75,000 to $7,729 per fisher. In comparison, China gives a subsidy of $485, Mexico $290, Indonesia $90 and India $15 per fisher.

In the way forward, several questions remain.

It may not be prudent to ratify the current agreement without knowing the substance of the comprehensive agreement. Developing countries and LDCs could at least adopt a wait-and-see policy for the next few months. There are several considerations here:

- The agreement has to be ratified by two-thirds of the Membership, according to Article X.3 of the Marrakesh Agreement. Those who do not ratify will not have obligations, so many Members may not ratify. There may be pressure on developing countries and LDCs to ratify first while developed countries do not take on these obligations;
- There is a lack of clarity from a legal perspective on several points, which need to be reviewed and addressed before the ratification process even begins;
- Any Member's ability to negotiate on the final and comprehensive agreement and ensure its interests are protected may be reduced if it ratifies the current agreement too early;
- If the comprehensive agreement does not get done but the current agreement gets extended (as allowed under Article 12 of the agreement), then Members may have to live with this incomplete and inequitable version;

- A lot of domestic work is involved in the ratification process but this may finally not lead to desired outcomes;
- One important point to note is that for two years after entry into force of this agreement, developing countries and LDCs will have to stop providing subsidies related to IUU fishing and overfished stocks, but then can start again if the comprehensive agreement is not agreed in another two years. At the minimum, S&DT should be extended till the comprehensive agreement is reached.

Finally, the interface between the current truncated agreement and the postponement of the final and comprehensive agreement poses complex challenges for developing countries and LDCs. In the comprehensive agreement, can developing countries and LDCs, firstly, ensure effective and appropriate S&DT, and avoid adopting a principle of differentiation of S&DT exemptions based on arbitrary thresholds? Secondly, how can they ensure stronger disciplines on those who subsidise most and are industrial fishing nations? Given the history of the negotiations thus far, whether the comprehensive agreement can deliver anything additional to developing countries is debatable. But in the absence of it, they may be stuck with the challenges posed by the current agreement. Further, there is significant lack of clarity on when each agreement and the processes around them are supposed to end.

Given this complex situation, each Member may have to undertake its own assessment on the ratification and the forthcoming negotiations depending on how it sees the costs and benefits of the current agreement and based on the realities of negotiating the comprehensive agreement.

7 Some Impacts of Renewing the Moratorium on Customs Duties on Electronic Transmissions

MINISTERS at MC12 agreed to renew the moratorium which prevents WTO Members from imposing tariffs on electronic transmissions (e.g. if their residents download movies from Netflix, or music from iTunes etc).[48] This ecommerce moratorium was renewed until MC13, (but if MC13 is delayed beyond 31/3/2024, this ecommerce moratorium will end on 31/3/2024 unless it is extended).

The ecommerce moratorium has been renewed at most past WTO MCs since 2001 in return for the renewal of the moratorium on TRIPS non-violation complaints (NVCs). This is because the US as a net intellectual property exporter[49] wants to be able to sue other WTO Members who use TRIPS flexibilities (such as compulsory licences on patented medicines, or education exceptions to copyright) via NVC, so it does not want that moratorium renewed,[50] but as an exporter of Hollywood movies etc., the US wants the moratorium on other WTO Members imposing tariffs on downloads of its Hollywood movies and music etc. (MC12 also renewed the moratorium on TRIPS NVC until MC13[51].)

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48 https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/32.pdf&Open=True

49 http://data.worldbank.org/indicator/BX.GSR.ROYL.CD and http://data.worldbank.org/indicator/BM.GSR.ROYL.CD/

50 E.g. see https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/M93A1.pdf&Open=True

51 https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/26.pdf&Open=True

This ecommerce moratorium (which was first imposed in 1998 based on a US proposal)[52] has caused a loss of tariff revenue for developing countries especially as consumers worldwide download more films, music and computer games instead of buying DVDs and CDs etc. An UNCTAD senior economist noted in June 2022 that because of this moratorium in 2020 developing countries are estimated to have lost US$14 billion in potential tariff revenue and least developed countries (LDCs) are estimated to have lost US$2.4 billion in potential tariff revenue.[53] A 2016 WTO paper noted that 92% of the lost tariff revenue due to this moratorium is experienced by developing countries, while only 8% of the tariff revenue lost due to this moratorium is borne by developed countries.[54]

Developing countries such as India, Indonesia and South Africa have been concerned about the impact of renewing this moratorium on their revenue and digital industrialisation for a number of years,[55] so with Pakistan and Sri Lanka they opposed its renewal at MC12[56]. During an MC12 Green Room, the US proposed an extension of this ecommerce moratorium for nine months (until March 2023) which Pakistan and South Africa seemed open to,[57] but eventually on the second last day of MC12[58] after apparent trade-offs with the fisheries subsidies text,[59] developing countries agreed to renew the moratorium until MC13 (or at the latest the end of March 2024, unless it is extended again).

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52 https://unctad.org/en/PublicationsLibrary/ser-rp-2020d6_en.pdf

53 https://www.southcentre.int/research-paper-157-3-june-2022/

54 https://unctad.org/en/PublicationsLibrary/ser-rp-2020d6_en.pdf

55 E.g. https://www.twn.my/title2/wto.info/2022/ti220612.htm, https://www.twn.my/title2/wto.info/2018/ti181120.htm

56 https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W9.pdf&Open=True and https://www.reuters.com/markets/commodities/wto-provisionally-agrees-extend-e-commerce-tariff-moratorium-sources-2022-06-16/

57 https://www.twn.my/title2/intellectual_property/info.service/2022/ip220609.htm

58 https://www.reuters.com/markets/commodities/wto-provisionally-agrees-extend-e-commerce-tariff-moratorium-sources-2022-06-16/

59 https://www.livemint.com/news/world/wto-strikes-deal-after-negotiations-go-down-to-the-wire-11655488331072.html

Some may claim that if this ecommerce moratorium is not renewed, there will be tariffs on Whatsapp and Skype etc., and this would break the Internet. However, quite a few countries are already imposing value added taxes (VAT)/goods and services taxes (GST) on electronic transmissions including Australia, the EU, Iceland, New Zealand, Norway, South Korea, Turkey and Switzerland, and these VAT-style taxes on electronic transmissions are collected by large platforms such as Amazon (who already add other local taxes before checkout) and then remitted to the governments imposing these VAT on electronic transmissions etc. This has been a successful source of revenue for governments such as Australia's and has not broken the Internet.

8 Conclusion

THE seven-element package celebrated at the MC12 closing ceremony allowed the WTO to posture as a relevant multilateral institution that can deliver. Yet, a closer look at the outcome tells another story. The declared success at MC12 is not necessarily a success for all the WTO's membership. In fact, many of the core demands that developing countries and LDCs have been seeking in the negotiations have not been delivered. Among them are those pertaining to the mandates on agriculture and food security, as well as the strengthening of special and differential treatment carried forward from previous ministerial meetings. These are threatened by complete sidelining. Also, MC12 did not deliver a meaningful TRIPS waiver that more than 65 WTO Members had sought, and that had received unprecedented global support from various stakeholders.

Thus, at the height of a public health crisis and a food crisis, the WTO negotiations failed to deliver meaningful solutions that would serve the populations most in need, whether patients in need of COVID-19 vaccines, therapeutics and diagnostics, or farmers and vulnerable communities seeking their right to food. Similarly, the celebrated outcome on fisheries subsidies misses some of the core elements central to fulfilling the original mandate, particularly that of ensuring adequate and effective disciplines on those industrial fishing nations who subsidise most and are thus the most impactful on fish stocks. Also, the outcome on fisheries subsidies lacks effective and appropriate special and differential treatment for developing countries and LDCs.

Besides, challenges with process issues hang heavy over the WTO and could eventually negatively impact the full and effective participation of Members in WTO processes, which in turn could eventually undermine the ability of the organisation to deliver meaningful outcomes. This last Ministerial Conference, as with previous ones, had made it clear that among the main issues that need to be addressed in the functioning of the WTO are the lack of meaningful transparency and the dominance of exclusive processes that end up keeping the overwhelming majority of the Membership outside the decision-making processes.

A DEEPER LOOK INTO THE WTO MC12 PACKAGE: WHAT IS IN IT FOR DEVELOPING COUNTRIES AND LDCS?

The World Trade Organization (WTO) has been lauded for overcoming long-standing negotiating deadlock to adopt a set of substantive decisions and agreements at its 12th Ministerial Conference (MC12) in June 2022. However, when viewed from the standpoint of the WTO's developing and least-developed member states, these outcomes deliver disappointingly little, this report maintains/argues. The authors examine the main elements of the MC12 package – encompassing such issues as WTO reform, a TRIPS decision, pandemic response, agriculture, fisheries subsidies and electronic commerce – and find that they largely fail to address core concerns of the developing and least-developed countries.

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