

Can WTO's two-tier dispute settlement system be safeguarded?

While many members at the World Trade Organization have called for a robust dispute settlement system to reinforce the WTO's enforcement function, the prospects for such a system appear to be bleak due to alleged opposition from the United States, which is seeking amongst others a weakened appeal/review mechanism that excludes discussion of issues concerning national security during the adjudication of trade disputes.

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Published by Third World Network
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Can South safeguard two-tier dispute settlement system at WTO?

The prospects for a robust dispute settlement system to reinforce the enforcement pillar at the World Trade Organization appear to be grim due to alleged opposition from the United States.

By D. Ravi Kanth

GENEVA: Despite many members having called for a robust dispute settlement system to undergird a strong enforcement pillar at the World Trade Organization, the prospects appear to be grim due to the alleged opposition from the United States that seemingly wants strong sunset provisions and a weakened appeal/review mechanism that excludes issues concerning national security interests during the adjudication of trade disputes, said people familiar with the development.

The facilitator overseeing the informal discussions on dispute settlement reform, Mr Marcos Molina, the deputy trade envoy of Guatemala, was to present his report to members at a meeting of the WTO's Dispute Settlement Body (DSB) on 28 July (see separate story).

He is likely to provide a state of play on several issues contained in the so-called Yellow Box, which implies more refined issues for further discussions.

Members are expected to get an assessment of where things stand on several issues including (1) alternative dispute resolution mechanisms; (2) streamlining the panel process; (3) accessibility; (4) accountability; (5) focus on what is necessary to resolve the dispute(s); (6) transparency; (7) panel composition and expertise; (8) no expansion of rights and obligations; (9) appeal/review mechanism and consistency; (10) Secretariat support; and (11) compliance.

Surprisingly, as the informal discussions are underway, the US, which apparently objected to the transparency of the ongoing informal discussions, as is evident from its criticism of this publication for stating its proposals at one of the meetings convened by the facilitator, chose to issue its "objectives" for a reformed dispute settlement system on 5 July, opposing discussion on issues pertaining to national security interests

during the adjudication of trade disputes.

The US proposal

As reported in SUNS #9818 dated 10 July 2023, the US proposal of "objectives" appears to be a move to "weaponize" trade-restrictive measures/sanctions against countries with whom Washington seems to be having rather "frosty" trade and political relations, said people familiar with the negotiations.

Surprisingly, the US "objectives" remain silent on preserving the existing two-tier dispute settlement system, with the Appellate Body as the final adjudicating arm of the WTO's enforcement function.

Recently, the US apparently faced "rough weather" over its ideas/proposals for the reform of the WTO's dispute settlement system, as many members rebuffed Washington's ideas/proposals on appellate review and sunset provisions amongst others in the ongoing informal discussions being conducted by the facilitator.

Against this backdrop, the US says that it intends "to lead in all areas where we can contribute, including on dispute settlement reform, but achieving fundamental reform can only happen through a collective, Member-driven process."

Washington says that it is "determined to pursue an interest-based, inclusive process that brings in all WTO Members as we work towards fundamental reform."

The US says that it will "work towards producing a system that reinforces the principles of fairness, equity, and sovereignty that underlie support for the multilateral trading system."

While remaining somewhat silent on the central role accorded to a two-tier dispute settlement system to oversee the enforcement function of the WTO,

the US says that "the dispute settlement system should preserve the policy space in WTO rules for Members to address their critical societal interests and support rather than undermine the WTO's role as a forum for discussion and negotiation to help Members address new challenges."

MC12 mandate

The reform of the WTO's dispute settlement system was mandated by trade ministers at the WTO's 12th ministerial conference (MC12) last June.

In paragraph four of the Outcome Document (WT/MIN(22)/24) issued at MC12, trade ministers acknowledged "the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."

Yet, the battle over the reform of the WTO's dispute settlement system seems to be increasingly becoming one between the US on the one side, and the rest of the membership, on the other, said several negotiators familiar with the ongoing informal discussions.

The US says that the "success of dispute settlement reform efforts depends on understanding each other's interests in dispute settlement", instead of adjudicating on disputes as set out in the existing Dispute Settlement Understanding (DSU), said negotiators.

Although the US acknowledges the "contributions of all Members" in driving these discussions with the assistance of a capable facilitator, it says that "no Member dictates the terms of reform."

Washington says that it has "shared a number of ideas on dispute settlement reform in the informal discussions, with an open mind to different ways of achieving the interests that we and other Members have identified."

However, the ideas shared by the US on dispute settlement reform seem to have been opposed by many members during the informal discussions, said negotiators familiar with the discussions.

The US maintains that it will "support the work of the facilitator (Mr Marcos Molina, the deputy trade envoy of Guatemala) and will not disclose information that may undermine the

constructive nature of the discussions so far."

According to the US in its proposal of "objectives", "a well functioning dispute settlement system supports all WTO Members in the resolution of their disputes in an efficient and transparent manner, and in doing so limits the needless complexity and interpretive overreach that has characterized dispute settlement in recent years."

Facilitator's confidential report

Against this backdrop, Mr Molina has issued a confidential report on all the eleven issues stated above.

The matrix format of proposals, options, and observations as contained in the Yellow Box on 8 July provides the direction and state of play in the discussions.

The proposals contained in the Yellow Box refer to supposedly more refined provisions for further discussions.

However, what is not clear and remains uncertain is the final structure of the two-stage dispute settlement system with the Appellate Body being the final adjudicating arm, said several people who asked not to be quoted.

Nevertheless, a cursory glance at some of the key issues in the Yellow Box of proposals issued on 8 July, seen by the SUNS, suggests that there is a division among members on issues like (a) accountability, (b) focus on what is necessary to resolve the dispute, (c) no expansion of rights and obligations, (d) appeal/review mechanism and consistency, (e) Secretariat support, and (f) compliance.

On accountability, the controversial proposal is on "Sunset provisions in which the adjudicative provisions of the dispute settlement mechanism would sunset after "X" years, unless members agreed to extend by consensus (negative consensus principle)."

The facilitator seems to have made several observations concerning the sunset provision, including:

* The purpose is to provide Members the ability to undertake a meaningful check on the system adherence to the agreed rules and fundamental reforms.

* Strong reservations were expressed about the negative impact of such a sunset mechanism on the system, including but not limited to (a) Abuse of this provision

by any Member or one Member should be able to sunset adjudicative provisions for all Members, and (b) Impact on the predictability and security of the rules-based system to be considered.

* Members felt a holistic approach would be to look at the proposal above for mechanisms to ensure a meaningful check on the system.

* To consider the scope of "adjudicative provisions" to which the sunset would apply.

* To consider whether the extension would be by negative consensus (that is currently the rule) or by reference to another threshold.

* To consider whether transitional provisions are required to apply in the event that the sunset provision is exercised.

Here again, there are fundamental differences among members, according to the facilitator's Yellow Box.

For example, on the proposal on "adjudicators to address only what is necessary to resolve the dispute, including by exercising judicial economy," several options are indicated in red colour and struck off lines.

The facilitator's observations include: (a) Delegations may want to consider whether to require adjudicators to address only what is necessary to resolve the dispute, including by exercising judicial economy, or to focus on what is necessary to resolve the dispute, including by exercising judicial economy, (b) delegations may want to consider implications on appeals and/or implementation.

As regards another proposal, namely, "clarify that adjudicators should not issue "advisory opinions/ interpretations", the options include: (1) explicit prohibition of "advisory opinions/interpretations", (2) clarify that adjudicators "to make findings only on those claims necessary for the resolution of the dispute", which is indicated in red colour.

In his observations, Mr Molina says, "delegations recognize that the proposal to address only what is necessary to resolve the dispute also addresses advisory opinions/interpretations, and "to consider that both ideas are linked when drafting legal texts" (in red colour implying there is no consensus)."

Concerning the issue of access to the mechanism, the facilitator has suggested two options, namely, (1) at the request of any disputing party, and (2) by

agreement of the disputing parties (to be decided if bilaterally, plurilaterally, and multilaterally), and the timing.

The facilitator says that option 1 features currently in the DSU and has broad support, while option 2 considers the implications of eliminating the right of Members to an appeal on interests expressed by Members.

Surprisingly, the facilitator did not make any observations on the selection of adjudicators though he mentioned two options.

The options proposed by the facilitator include an amendment to Article 17.2 of the DSU to expedite appointments to the Appellate Body.

(Article 17.2 of the DSU states that "the DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven

persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term".)

It is important to note that the US has repeatedly blocked the selection process for the appointment of members to the Appellate Body since December 2019, thus making the Appellate Body dysfunctional.

The second proposal made by the facilitator is on a "mechanism agreed by the parties".

Significantly, there are sharp differences on the scope of the appeal/review mechanism.

Though the facilitator mentioned several options, he did not provide

any observations, which suggest that the differences remain somewhat unresolvable, said a person, who asked not to be quoted.

Finally, on both the issues of Secretariat support and compliance, the facilitator's Yellow Box suggests that the differences remain difficult to resolve at this juncture.

In conclusion, dispute settlement reform at the WTO seems to be headed towards "atrophy" the current provisions in the Dispute Settlement Understanding, thereby undermining the enforcement function of the WTO.

Further, a weakened dispute settlement system could lead to some form of so-called "kangaroo courts" and a "trampled" WTO that appears to be most harmful to the interests of the developing countries, said several trade envoys, who asked not to be quoted. (SUNS 9832)

Facilitator issues "ambiguous" report on dispute settlement reform discussions

The facilitator overseeing the informal discussions on the reform of the World Trade Organization's dispute settlement system on 28 July issued a rather "ambiguous" report on the state-of-play in the discussions.

by D. Ravi Kanth

GENEVA: The facilitator overseeing the informal discussions concerning reform of the World Trade Organization's dispute settlement system says that there are "highly sensitive issues for which Members still hold different conceptual views about how to tackle them," without explaining what these "conceptual views" are and who has raised them, said people familiar with the development.

Earlier, the African Group had tabled a proposal calling for enhanced transparency and inclusiveness in the

WTO's dispute settlement (DS) reform discussions.

Though several members with the necessary negotiating resources in the informal discussions like the United States, the European Union, China, Japan, Canada, Norway, Australia, New Zealand, India, and a few other countries may be aware of the "highly sensitive issues" and the "conceptual views" surrounding them, as mentioned by the facilitator, Mr Marco Molina, deputy trade envoy of Guatemala, in his report to members

on 28 July, a large majority of members with limited or no negotiating resources are allegedly being kept in the dark, said several members, who preferred not to be quoted.

The facilitator, who is being praised for his efforts by the US and other industrialized as well as some developing countries, seems to be adopting a "stealthy" approach that could further reinforce serious doubts as to whom he is working for, said a regular participant in the DS reform discussions, who preferred not to be quoted.

Apparently, the US is in favour of informal discussions rather than in a formal mode at the Dispute Settlement Body (DSB), the participant said.

The facilitator's one-page report appears to be "ambiguous and unhelpful" for those countries that are unable to participate in the informal discussions, particularly those from Africa, as they are being forced to spread thin their negotiating resources in other areas of work that are simultaneously taking place at the WTO, said several participants, who preferred not to be quoted.

Context

The reform of the WTO's dispute

settlement system was mandated by trade ministers at the WTO's 12th ministerial conference (MC12) held in Geneva last June.

The need for DS reform arose because the two-tier system, with the Appellate Body at the helm of adjudicating trade disputes, was made dysfunctional by the United States in December 2019.

As reported in SUNS #9833 dated 1 August 2023, for the 67th time, on allegedly unilateral grounds, the US blocked a request from 130 WTO members at a meeting of the DSB on 28 July for expeditiously filling the vacancies on the Appellate Body, according to people familiar with the development.

To overcome the continued paralysis in the two-tier dispute settlement system, trade ministers at MC12 mandated their respective representatives at the WTO to "commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."

Unsurprisingly, many members at last week's WTO General Council meeting echoed their concerns about the paralyzed dispute settlement system and demanded the full restoration of the Appellate Body.

However, the manner in which the informal discussions started with the appointment of Mr Molina as the facilitator five months ago was never clearly explained to members, said one member, suggesting that it seemed like a "surreptitious" process.

Nevertheless, the facilitator went about conducting the process in an informal mode and on an expeditious footing, by trying to narrow down differences on several issues, said another member, who preferred not to be quoted.

The facilitator has issued confidential reports at different stages during the last five months, with the latest being the one he circulated on 8 July.

It is not clear yet whether he has issued another report as everything about the process remains somewhat mysterious, the member said.

Facilitator's report

On 28 July, the facilitator issued a one-page report at the DSB meeting.

In his report, seen by the SUNS, the facilitator said, "As in previous occasions, I would like to note that I am making this statement in my personal capacity

and under my own responsibility, as the convenor of the informal process on dispute settlement reform."

He said that since his last report on 30 May 2023, "delegates, experts on dispute settlement, have continued to actively participate in the intense programme of meetings."

"We have had substance-based and highly technical discussions with a view to finding practical solutions to the concerns and interests identified by Members," he claimed.

He added: "We have reached an understanding on 80% of the issues under consideration, which are now ripe to move to the drafting process. Let me be clear, this did not happen overnight. This is the result of five months of tireless and constructive engagement by all delegates, who through conversations and mutual understanding have explored ways to reconcile the different interests and concerns identified during this process. This process belongs to everyone and delegates participating in the informal process should be recognized and commended for their efforts and dedication."

Further, Mr Molina said that "during the last five months, delegates have had plenty of opportunities to express their ideas, interests, and concerns; and to make as many observations as they deemed appropriate."

"We have proceeded with flexibility and, when necessary, we have returned to review our understandings to ensure that we have taken into account everybody's interests and concerns," he maintained.

"In my assessment," according to the facilitator, "half of the issues in the remaining 20% are close to reaching the level of maturity needed for the drafting process."

"The other half of that 20% refers to the highly sensitive issues for which Members still hold different conceptual views about how to tackle them."

He suggested that "after the summer break, I will continue consulting with delegates with a view to reaching a common understanding of potential solutions to these issues by the end of September."

Mr Molina remained rather upbeat and confident by saying that "I am convinced that despite our conceptual differences, we can find a solution at the technical level that can reconcile our interests and concerns."

"It is time to unlock our full creative potential," the facilitator said, adding, "I am confident that we will succeed in this undertaking."

According to the facilitator, "in addition to the conversations on the remaining issues, the drafting process will start right after the summer break. The texts will be drafted by delegates through a process that I will organize and facilitate."

In the next phase of the informal process, the facilitator asserted, "the same principles will continue to apply, namely, a process that is multilateral, because all Members will be invited to participate; transparent, because everyone will have access to all documents and information; and inclusive, because it will continue to facilitate the participation of small delegations and take into account the interests and concerns of all Members."

Mr Molina said that he plans to circulate a tentative calendar of meetings, adding that "this calendar of meetings seeks to avoid, as much as possible, clashes with other important meetings."

The deputy trade envoy from Guatemala acknowledged that, "In this regard, I am trying to prevent scheduling conflicts with meetings that have been identified by some small delegations as also important to them, such as those of the fisheries negotiations, the TNC, the General Council, WTO reform retreats, the Senior Officials, and the DSB."

The facilitator said that he anticipates "a very intense process," suggesting that, "Time is of the essence and circumstances oblige. Members have identified the reform of the dispute settlement system as the top priority and an expected outcome of the 13th Ministerial Conference."

He maintained that, "Before being considered by the Ministerial Conference, any outcome of this informal process should be introduced to a WTO body, most likely the DSB."

"Considering that Members should have enough time to analyze the outcome of the informal process, that gives us only 3 to 4 months to conclude our work as part of the informal process," he said.

Mr Molina acknowledged that "we are in the final stretch and there is still a lot of work to do."

The facilitator emphasized that, "To strike the right balance between the intensity needed to achieve the objective of delivering by the Ministerial Conference; and the need to ensure meaningful

participation of all, particularly, of small delegations, I will continue to take every possible measure to ensure that all delegates have plenty of opportunities to participate, express their views and see those reflected in the final outcome."

Doubts persist

Despite the facilitator's seemingly reassuring words about the informal

process, doubts continue to persist over the process and how a text is likely to be cobbled together informally.

There are also alleged fears that a text agreed informally could be foisted onto members at an appropriate stage as a "take-it-or-leave-it" text, said a former trade negotiator, who is well versed in the negotiating "pyrotechnics" of the earlier ministerial conferences, including MC12, at which several African members said

that they were excluded from the "green room" processes.

However, the WTO Director-General, Ms Ngozi Okonjo-Iweala, pushed back against the complaints over alleged lack of transparency and non-inclusion in "green room" meetings, saying that everything at MC12 was open, a statement that allegedly failed to convince most members. (SUNS 9837)

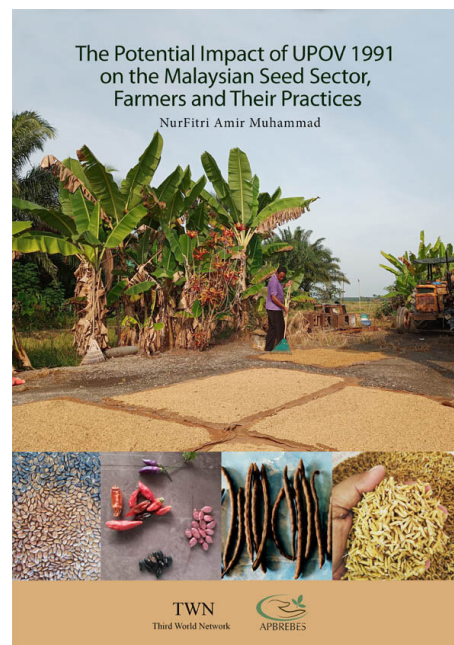
The Potential Impact of UPOV 1991 on the Malaysian Seed Sector, Farmers and Their Practices

NurFitri Amir Muhammad

Malaysia has a unique and functional system in place for protecting intellectual property on plant varieties. Its Protection of New Plant Varieties Act 2004 provides for the granting of rights to plant breeders while also recognizing farmers' innovations and safeguarding exceptions for their rights to save, use, exchange and sell seeds.

This delicate balance could however be upended if Malaysia signs on to the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 1991). Designed to further the interests of commercial breeders in developed countries, the UPOV 1991 regime will severely restrict the age-old farming practice of seed saving and promote corporate seed monopolies in its stead, thereby undermining farming livelihoods, food security and agricultural biodiversity.

Drawing on rigorous research and interactions on the ground with domestic food farmers, this report sounds a clarion call to resist pressures for Malaysia to join UPOV 1991, and makes the case for a plant variety protection framework that is more attuned to the needs of the country's agricultural system.



Available at <https://twm.my/title2/books/pdf/Potential%20Impact%20UPOV%20Malaysia.pdf>

African Group highlights key principles on institutional reform of WTO

The African Group has tabled a comprehensive proposal at the World Trade Organization outlining a development perspective on institutional reforms of the WTO.

by D. Ravi Kanth

GENEVA: The African Group has expressed its sharpest concerns over the attempts to legitimize so-called "reform by doing" by saying that it "should not mask or be a euphemism for institutional changes that would otherwise have wide-reaching implications or alter the balance of rights and obligations of Members" at the World Trade Organization, as the WTO General Council chair held a discussion on this issue on 24 July, said people familiar with the development.

In a seemingly "path-breaking" proposal (WT/GC/W/895), titled, "A Development Perspective on Institutional Reforms of the World Trade Organization" and circulated on 13 July, the African Group pointed somewhat bluntly to several controversial happenings, particularly in regard to "reform by doing" and numerous other issues concerning the manner in which private sector/stakeholders are apparently being inducted into the informal as well as formal negotiating processes at the WTO over the past several months.

Without naming the WTO Director-General and a group of industrialized countries with the alleged assistance of the current General Council (GC) chair, Ambassador Athaliah Lesiba Molokomme of Botswana, who are apparently pushing so-called "reform by doing", the African Group said that "a clear typography of the different strands of institutional reforms will be necessary, including and tied thereto the level of authority that is accorded to respective committees to formally adopt these reforms."

"Although there may be some proposals that would ultimately imply or lead to changes in the balance of rights and/

or obligations of members, the majority of proposals in the main have, among others, focussed on possible improvements in the conduct of meetings, introducing uniform practices or exporting/ extending so-called "best practices" across committees, "enhancing" transparency, and the adoption or mainstreaming of information technology tools to exploit their prowess in the management and dissemination of information and data," the African Group said.

It added: "Whilst the use of informal modes of meetings, or other such processes outside formal WTO bodies have been adopted to consider incremental reforms or so-called "reform by doing" of regular bodies of the WTO, the African Group believes it is necessary and important that the rights of all members to a meaningful opportunity to have their views considered and in decision-making in formal and properly constituted bodies with no predetermined or a priori outcomes be respected and upheld."

More importantly, it said "the peculiarities of WTO Agreements and Committees, including the Trade Policy Review Mechanism (TPRM) and the functioning of the Trade Policy Review Body (TPRB), should inform what is fit-for-purpose and what sorts of incremental reforms (i.e. "reform by doing") or substantive reforms are necessary within each WTO committee. This includes, but is not limited to, any suggestions for the updating of rules of procedure governing the operations of committees, or the conduct of their meetings. There should be no one-size-fits-all default approach."

It expressed the sharpest concern that "more than often, issues of development

and of particular interest to developing countries, including LDCs are relegated to an afterthought in the work of WTO bodies, and where these arise, they tend to focus on the narrowest scope of special and differential treatment confined to technical assistance and capacity building."

Earlier on 2 June, the GC chair had issued a restricted 23-page document titled "WTO Reform - State of Play in WTO Councils, Committees, and Negotiating Bodies - "Reform by Doing".

The document, seen by the SUNS, contains many tables in a matrix format "to facilitate Members' discussions during the Informal Meeting on WTO Reform Focused on the Deliberative Function and Institutional Matters."

Though the GC chair said that "the document is without prejudice to any Member's position, nor to any approach or approaches that individual Councils, Committees or Negotiating Bodies may choose to implement," it is a well known fact that the proposal on "WTO Reform Focused on the Deliberative Function and Institutional Matters" is primarily a European Union initiative.

Unsurprisingly, the EU's trade envoy to the WTO, Ambassador Joao Aguiar Machado, said at a formal Trade Negotiations Committee (TNC) meeting on 20 July that: "We place strong importance on an outcome on reinforced deliberation on trade and industrial policy, trade and environment and trade and inclusiveness."

African Group perspective

It is against this backdrop that the African Group, in its proposal, expressed apparent anguish that "the inventory list of the development agenda as captured in the DDA (Doha Development Agenda) remains unfulfilled".

The WTO reform was mandated by trade ministers at the WTO's 12th ministerial conference (MC12) in Geneva last June.

Paragraph three of the Outcome Document (WT/MIN(22)/24) issued at MC12 states: "We acknowledge the need to take advantage of available opportunities, address the challenges that the WTO is facing, and ensure the WTO's proper functioning. We commit to work towards

necessary reform of the WTO. While reaffirming the foundational principles of the WTO, we envision reforms to improve all its functions. The work shall be Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues. The 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."

In response to this mandate, the African Group said, "the principles entailed in the Marrakesh Agreement (which is the foundational agreement for the existence of the WTO) should continue to underpin the work of the WTO."

It added, "the foregoing principles must not only permeate the work towards reforms of the WTO, but must also be inherent in the outcomes of such processes."

It said that institutional reforms have consumed the activities of various WTO bodies and committees since MC12.

The African Group argued that "the parlance of "reform-by doing" has gained currency as synonymous to elementary "incremental reforms" in the name of improving the efficiency of various WTO committees, standardising practices across committees or improving synergies and coordination between them."

Currently, it said, the WTO is "at a pivotal juncture demanding immediate attention" and the member-driven, inter-governmental organization "faced enormous challenges across all three pillars of its mandate."

These pillars "encompass providing a robust negotiation forum to facilitate trade liberalization and the establishment of new rules, diligently monitoring trade policies to ensure transparency and fairness, and effectively resolving disputes among its 164 members."

Principles

In its proposal, the African Group called for and reaffirmed that the following principles be upheld in the course of institutional reforms of WTO bodies:

- * Reforms must be premised on the principles of inclusivity, transparency

and development. Inclusivity would require, at a minimum, preserving consensus decision-making in the WTO.

- * Any reforms that change the rights and obligations of Members should be discussed in the General Council.
- * The discussions on reform of WTO bodies must take into account the capacity constraints of developing countries. In terms of process, this means overlaps of key meetings should be avoided at all times as this is central to inclusivity.
- * Reforms must not translate to outcomes that increase the burden on already overstretched and limited capacities of developing countries, including LDCs. On the contrary, efforts should be channelled towards alleviating the current burden and complexities.
- * The institutional reforms should preserve the Member-driven nature of the WTO.
- * Reforms must take into account the specific mandates of WTO bodies.
- * Reforms at the institutional level require consensus and cooperation among members. Regular consultations, negotiations, and discussions should be conducted to build consensus on proposed reforms and ensure their successful implementation.
- * Reforms shall safeguard and strengthen the Special and Differential Treatment (S&DT) provisions which recognise the development needs and challenges faced by developing countries.

The African Group believes that "the reform of WTO regular bodies must at the core enhance effective and meaningful participation of small and resource-constrained delegations in all deliberations and decisions, particularly developing countries, including LDCs."

"The efforts to address issues of overlapping meetings, improvement of meeting agendas and post-meeting reporting, and other initiatives to empower delegates to be effectively and productively engaged in activities of WTO bodies are, therefore, in principle welcomed."

On institutional reforms, the views of the African Group as relates the

functioning of the WTO bodies, are summarized as follows:

- * Early circulation of documents for formal meetings (e.g. at least [X] days prior) to allow delegations to prepare and consult capitals.
- * Circulation of a summary of key outcomes and action items immediately after meetings for the benefit of delegates who are unable to attend, and to ensure delegations fulfil any requirements flowing from action items agreed at meetings. We support the suggestions that these summary reports should be chairs' reports on their responsibility, pending circulation of formal minutes.
- * On a case-by-case basis, and to the extent practicable, there should be a streamlining and standardisation of reporting formats, agendas and documentation across WTO bodies. This will enhance transparency and facilitate easier access to information for delegates and stakeholders.
- * Timely circulation of the agenda and minutes of meetings, and hence clear time-lines must be defined (e.g. at least [X] days after meeting; or at least [X] days prior to next meeting). The idea to introduce automatic reminders is also welcomed.
- * Annotated agendas for all WTO bodies will assist in facilitating focused discussions. This should be a neutral document that reflects issues to be discussed, and were applicable, expected outcomes.
- * Ensure that each WTO body has a clear and well-defined mandate, outlining its specific responsibilities, objectives, and scope of work. This clarity helps guide discussions and ensures that the body's work aligns with Members' priorities.
- * Where there have been mandates or outcomes agreed by Ministerial Conferences, these should be incorporated as standing items in the agendas of relevant committees to ensure proper monitoring and oversight of progress.
- * Streamline decision-making processes within WTO bodies to avoid unnecessary delays. Encourage efficient discussions and seek consensus, while respecting

the principles of inclusivity and transparency.

- * Enhanced coordination and communication between different WTO bodies, including exchange of experiences to ensure cohesive reforms across bodies. The most efficient formats of interaction between bodies would need to be devised and agreed.
- * Circulation at the end of each year, of an indicative yearly schedule of meetings for each of the WTO bodies for the following year.
- * Embrace of digital tools and technology across WTO bodies would greatly improve efficiency and effectiveness of committee work and efforts of delegates. Harmonisation and streamlining of such systems across WTO bodies must, to the extent practicable, be explored, e.g. the Integrated Information Management System (IIMS). Transitioning to digital tools should be gradual and not too abrupt, in order to preserve maximum inclusivity and ensure no members are left behind, particularly constrained developing countries.
- * Use of e-tools, including e-Agenda beyond just STCs agenda item, and to also permit electronic submission of statements by Members with prepared statements, including notifications and automatic e-reminders.
- * Virtual participation in meetings of all WTO bodies. This will improve inclusivity, and enhance equitable participation of capital-based officials, especially those of developing countries, including LDCs that have resource constraints.
- * Making available access to recorded sessions of meetings on a controlled basis.
- * Continuous structured training at regular intervals for capital and Geneva-based delegates on the operations of committees, including the use of e-tools.

Working Group

Further, "to ensure the necessary horizontal progress and oversight of institutional reforms," the African Group has proposed "the establishment of a working group that would report to the

General Council focusing on matters of institutional reforms within the WTO."

It said, "the working group would accordingly bring together representatives from different WTO bodies and its key tasks shall be to, among others, conduct a comprehensive review of the functioning and effectiveness of various WTO bodies, identify best practices across WTO bodies, identifying areas of improvement, streamlining procedures, enhancing inclusivity, and recommending appropriate institutional reforms."

At a more substantive level, the African Group's views are highlighted as follows:

- * Development must be at the centre of WTO [institutional] reforms. Agenda-setting within the different WTO bodies should, therefore, be responsive to and address issues of interest to developing countries, including prioritizing and delivering on longstanding mandates, including reversing the setbacks on progress towards attainment of the United Nations Sustainable Development Goals (UN SDGs).
- * WTO bodies must respect and operate within their mandated issues and boundaries, and any changes to such mandates can only be effected through consensus-based decisions and through an inclusive, member-driven process.
- * Existing procedures for the reporting and addressing of specific trade concerns (STCs) as currently provided for in applicable agreements must be retained without their duplication or extension across all WTO bodies. New approaches that suggest more onerous obligations or burdens on limited human and institutional capacities of developing countries, including LDCs must be avoided.
- * Regarding the TPRB and the TPRM process, the African Group proposes that it be rationalized and its scope be limited to core trade policies of a Member under review, and not macro-economic or other aspects unrelated to the work of the WTO and its agreements. The trade policy reviews should take into account the challenges and capacity constraints of developing countries. Members

should also consider the possibility of limits to the number of questions posed to ensure that the process is qualitatively meaningful and serves its primary purpose rather than a scrutiny of all policies of members, especially those outside of the WTO mandate.

According to the African Group, "the basic principles and procedures of this Member-driven organization need to be respected and upheld to the letter both during Ministerial Conferences (MCs) and the negotiations or processes preceding them."

It said that all meetings in the ministerial conferences (which seem to be somewhat opaque), "should be open to all Members without restricting the decision-making process to smaller Green Rooms."

Last year, immediately after MC12, several African countries voiced their sharpest concerns that they were excluded from the Green Rooms. Though the WTO Director-General, Ms Ngozi Okonjo-Iweala, tried hard to convince the African countries that all meetings were open and that every member could attend, there were apparently few takers for her statement, said an African trade envoy, who asked not to be quoted.

Therefore, in the build-up to the WTO's 13th ministerial conference (MC13), to be held in Abu Dhabi February next year, the African Group wants the following elements to guide the preparatory process, including:

- * All consultations should be transparent and open-ended.
- * The preparatory process should be conducted under the close supervision of the General Council and chaired by the Chairperson of the General Council.
- * Any negotiating procedure to be adopted should be approved by consensus of Members at formal meetings.
- * There should be sufficient time to consider documents and for consultations with capitals, including consultations within groups.
- * The chairs of negotiating groups or sessions must at all times be impartial, objective, transparent, and inclusive in the conduct of negotiations and consultations with Members.

- * Consultations should be transparent and represent all configurations, include the main protagonists, including coordinators/representatives of regional groupings.
- * The Secretariat should remain impartial in their conduct during the consideration of possible Ministerial declarations, decisions, or outcome documents.
- * Ministerial declarations, decisions, or outcome documents must be the outcome of consensus. Where there are divergences, these should be clearly reflected in the texts.

According to the African Group, the following elements must guide the conduct of activities during MCs:

- * The scheduling of negotiating meetings should avoid parallel sessions and take into account the capacity and resource constraints of smaller delegations.
- * Consultations should be open, transparent and inclusive.
- * There must be sufficient time allocated for Members to consider any new draft texts, and for transparency, any Members proposing texts must be identifiable.
- * There should be open, effective, efficient, timely and consistent communication channels throughout the duration of MCs to notify Members of key changes to meeting schedules or substantive information pertinent to unfolding negotiations. In addition to traditional means, the use of digital tools (e.g. online portals) must in this regard, be considered.
- * There should be regular HODs (heads of delegation) or Committee of the Whole (COW) meetings to receive periodic updates and substantive reports from chairs/facilitators.

Further, to ensure the efficiency of the TNC (Trade Negotiations Committee), the African Group said, "It is important that its primary focus is on the issues within its mandate to enable structured discussions which is fundamentally about providing oversight on multilaterally mandated negotiations taking place within delegated negotiating bodies/special sessions."

It criticized "the joint convening of

TNC and HoDs in one seating", as was done on 20 July, as it "distracts attention away from the core function of the TNC and leads to minimal oversight and monitoring of progress on matters within the mandate of the TNC."

Contrary to the current practice of holding informal HoD meetings prior to the TNC meeting, the African Group said, "the HoDs can be held immediately after the TNC to address issues the DG and other Members may want to raise if having the two meetings on the same day is deemed feasible by Members."

As the global economy "continues to grapple with the COVID-19 pandemic, food insecurity and slow economic growth," the African Group said that various factors "continue to hamper global economic recovery, including ongoing geopolitical instability and other shocks such as rocketing inflation, the food and energy crises, supply-chain disruptions, increasing debt distress, escalating scale of destruction due to climate change, increasing market concentration, increasing rent extraction resulting in "winner takes most markets" characterized by super-profits, and balance of payment challenges. Some of these global challenges and developments are reflective of the lack of delivery on longstanding development mandates which should necessarily be prioritized in the interests of developing countries".

"As was evidenced and experienced with Covid-19, the WTO has also been found wanting and unresponsive to challenges as they arise and has not evinced the required foresight to develop agile policy tools available to Members, especially developing countries, including LDCs when confronted with a variety of crises. Development being a cross-cutting issue, it is important that each WTO body be held accountable for the development agenda within its purview, with the role of the CTD [Committee on Trade and Development] as focal point on development enhanced to ensure coherence and coordination, and the General Council playing an active oversight and monitoring role," the African Group said.

The African Group said "the role of WTO rules in facilitating the structural transformation, diversification and industrialisation of developing economies,

including LDCs and ultimately economic development requires deliberate and continuous examination", including the "so-called novel issues."

The African Group said that it is important that WTO bodies, within their mandates, apply themselves to interrogating the efficacy of their respective agreements to development aspirations as contained in the preamble to the Marrakesh Agreement, and urgently translating in practice the recognition of "... the need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".

While welcoming the convening of retreats by the WTO DG and the GC chair, the African Group said that they should facilitate "a discussion on the trade and industrial policy nexus."

Also, such retreats "should be followed up with targeted engagements aimed at making concrete proposals for MC13."

Emphasizing that "the WTO is a Member-driven organization," the African Group argued that "the role and presence of other stakeholders, intergovernmental or International Organizations in the WTO must be limited to preserve the Member-driven nature of work and with due respect to their competences, mandates and limitations."

It also emphasized that "legally, the WTO is a forum of engagement and contracting among and between sovereign states/governments, monitoring the implementation of those contracts/agreements, and resolving disputes as they arise in the implementation of these rules."

The African Group warned against "the direct access and participation of external stakeholder in negotiations at a multilateral level," saying that they are "misplaced, as sovereigns have varying frameworks of interaction with stakeholders in their national policy formulation processes."

It said that "the current models of participation of intergovernmental or International Organizations are sufficient (e.g. observer status), save for improvements that can be considered as

opposed wholesale changes."

"The same applies with regards the participation of the private sector and other stakeholders which is undertaken through avenues like the WTO Public Forum, informal meetings or thematic sessions organised by the WTO and its bodies," the African Group said, adding that the "participation of non-governmental entities must not undermine the Member-driven character of the WTO, including in decision-making, and must be free of undue sectoral influence."

Last but not least, it said that "the participation of external stakeholders in such forums must, importantly, allow for a plurality and multiplicity of voices and perspectives to ensure balanced and fair engagements."

"It is equally important that the experiences and views of developing countries, including LDCs are genuinely

accorded equitable space, and for conscious efforts towards these ends, such as virtual participation, to be regularized," the African Group said.

"The proliferation of informal modes of engagements such as thematic sessions, informal working groups or informal meetings must, nevertheless be moderated to preserve maximum inclusivity," the African Group said, cautioning about "informal processes", as they "often put an extra burden on developing countries with limited capacities."

"The capacities of resource-constrained delegations should, therefore, be taken into account to ensure they are not placed at a disadvantage when decisions on the functioning of committees or implementation matters are considered and adopted, including negotiation processes," the African Group said, insisting that "the scheduling of such informal meetings

or processes, meeting requirements as well as technical assistance and capacity building programs must be tailored to respond to these capacity constraints and ensure effective and meaningful engagement of developing countries in WTO committees' activities."

In conclusion, the African Group said that the "Chairpersons have an obligation to maintain impartiality in accordance with the rules of procedures governing the respective WTO bodies they preside over in line with the Member-driven nature of the WTO. This is also applicable to the WTO Secretariat who are required in terms of Article VI of the Marrakesh Agreement and read together with the Staff Regulations and Rules under the Standards of Conduct to maintain their international character and remain neutral. Their roles cannot be increased from their current mandates and functions." (SUNS 9828)

WTO members show little convergence on WTO reforms

A formal meeting of the World Trade Organization's General Council on 24 July saw members showing little or no convergence on a number of issues, including WTO reforms.

by D. Ravi Kanth

GENEVA: At the end of the first half of 2023, members of the World Trade Organization on 24 July apparently showed little or no convergence on several issues, including WTO reforms, as they seemed to be stuck in their repeated positions and proposals, said people familiar with the discussions.

According to customary practice under Rule 12 of the Rules of Procedure for Sessions of the Ministerial Conference (WT/L/161), it is well established that: "During the course of each regular session a Chairperson and three Vice-Chairpersons shall be elected from among the Members. They shall hold office from the end of that session until the end of the

next regular session."

The customary practice has been that the Minister of the Government hosting a Ministerial Conference is elected as Chairperson, while three Vice-Chairpersons are selected from the other broad groupings of Members.

Thus, based on past practice, the WTO General Council, at a formal meeting on 24 July, apparently elected Dr Thani bin Ahmed Al Zeyoudi, Minister of State for Foreign Trade of the United Arab Emirates, as the Chairperson of the Thirteenth Session of the Ministerial Conference (MC13), to be held in Abu Dhabi from 26 to 29 February 2024.

However, it seems somewhat

intriguing that Dr Zeyoudi is a minister from the UAE and not Abu Dhabi, said a member, who asked not to be quoted.

The General Council chair, Ambassador Athaliah Lesiba Molokomme of Botswana, also informed members (in her restricted document Job/GC/348 issued last week) that she would invite the coordinators of the African Group, the Group of Latin America and the Caribbean (GRULAC) and the developed countries to consult with regard to the respective nominations for Vice-Chairpersons of MC13 so that the General Council can revert to it at its next meeting.

GC meeting "confounded"

At the General Council (GC) meeting, which seems somewhat like the proverbial "dog's breakfast" with various conflicting proposals on WTO reforms on the table, the minister from the UAE assured members that his country is "fully committed to working closely with all member states and ensuring the success of MC13."

He apparently said with less than six months to forge consensus on a range of complex topics ahead of MC13, members must "ensure that our ministerial

deliberations are both decisive and efficient."

"It has become clear that trade policy extends far beyond the scope of trade itself," the minister apparently said, adding that, "It is about shaping our common future that takes into account the environment, global health, and poverty."

Though the minister mentioned that "it is our collective responsibility to contribute to a predictable, rules-based and open trade and investment environment that creates prosperity for all," he seems to have already created a controversy by mentioning an "open trade and investment environment", which is not part of the mandated issues at this juncture, said a participant who asked not to be quoted.

The General Council chair, Ambassador Molokomme from Botswana, praised the UAE's Minister Al Zeyoudi, saying that the remarks he delivered "are a clear sign of your country's commitment towards the Organization and our shared objective of a successful MC13."

"We very much look forward to working with you as we prepare for the Ministerial Conference, and at the Conference itself," she added.

WTO Director-General Ms Ngozi Okonjo-Iweala said the General Council chair, the Deputy Directors-General and herself would be working closely with the UAE minister and the forthcoming MC13 vice-chairpersons.

"We all look forward to this very fruitful collaboration and successful delivery," she told members.

Earlier in the day, Ms Okonjo-Iweala and Minister Al Zeyoudi signed the 13th Ministerial Conference host Agreement.

The Agreement between the Government of the UAE and the WTO defines the roles and responsibilities involved in organizing the Ministerial Conference.

They also discussed various aspects of preparations for MC13 and reiterated the importance of a successful outcome for all WTO members, the UAE, and the wider region.

State of play on WTO reforms

In her report on "State of Play - In WTO Councils, Committees, and Negotiating Bodies - "Reform by Doing," the GC chair said members held on 16 June an Informal Meeting on WTO Reform,

which was focused on the deliberative function and institutional matters.

Even though the African Group had expressed the sharpest concerns on the so-called "reform by doing", the GC chair proposed that Members take note of the "reform by doing" work that had been undertaken and continue to advance and implement necessary measures to facilitate Members' participation in WTO bodies without altering Members' rights and obligations in the WTO.

The GC chair noted that "this would be with the understanding that work was evolving, and Members would continue to make suggestions on measures which could be modified or updated in the respective bodies, as necessary. In this regard and recognizing the differences in the nature and function of WTO bodies, practices and/or measures applicable to each WTO body could differ in light of respective mandates, terms of reference, and functioning."

She also noted that "the General Council would continue to monitor progress and coordinate with WTO bodies as work advanced. In this regard, in addition to the reports by respective chairpersons of WTO Bodies, the Secretariat would continue updating the table in JOB/GC/345 ahead of every regular session of the General Council at least until MC13."

Dispute settlement reform

While many industrialized countries, particularly the European Union, supported the facilitator, Mr Marcos Molina, the deputy trade envoy of Guatemala, who is overseeing the informal discussions on dispute settlement reform, several developing countries, including the African Group complained about issues concerning transparency and the difficulties encountered by missions with a small staff in attending these meetings.

Incidentally, Mr Molina is expected to discuss with the Geneva-based Advisory Center on WTO Law (ACWL), which is funded by various European governments, on issues concerning access even though he is the vice-chair of the ACWL, said a trade official, suggesting that there are clear conflict of interests issues.

At the GC meeting, on the African Group's proposal on dispute settlement reform, China's trade envoy Ambassador Li Chenggang said: "We always believe

that developing member's participation is important."

"At the end of the day, as we always believe, a good DS (dispute settlement) mechanism means "small ones can win cases against big ones", he said, suggesting that "to bring the DS back to the normal function, ensuring all members can exercise equal opportunity in protecting their rights should be our priority."

"We fully understand the restraint of small delegations," the Chinese envoy said, adding that: "Sometimes, it could also be a challenge to big delegations. In the coming months up to MC13, a clash of meetings would happen more frequently."

"Therefore, we encourage chairs and facilitators to have meetings well planned as far as possible," China said.

On procedural issues, China suggested giving the "GC chair and the Secretariat leeway to work on procedural issues."

China said that it "welcomes the list on horizontal measures recommended by the GC chair," adding that "it is well-noted that some measures have already been applied by WTO councils and committees, including GC itself."

As regards the ministerial conference, China said it has co-sponsored the proposal on "Maximizing the Value of WTO Ministerial Conferences".

China said, "We should de-dramatize MC (Ministerial Conferences), at the same time, continue to preserve and enhance its decision-making function."

On Brazil's proposal to convene annual ministerial conferences, which is apparently being supported by a North American country, China said: "For the annual MC, we believe, when Ministers come to the meeting, they are expecting meaningful discussions and deliverables Otherwise, they may lose interest in it."

As regards the EU's proposal on reinforcing the deliberative function of the WTO to discuss some of the major issues in the global trading system, China said that it is "open to having discussions on trade-related emerging issues."

However, said China, "For some controversial issues, like state intervention, before we decide to establish a dedicated discussion in the WTO, there needs [to be] a kind of basic education exercise through seminars, workshops and other informal formats to build common understanding on the issue we are going

to discuss."

Further, "such kind of informal exercise will also help us identify the appropriate approach for further work," China argued.

"All in all, when we are going to launch discussions on controversial issues, we have to ensure they will be pragmatic, constructive, and result-oriented, rather than antagonistic," China emphasized.

On controversial WTO reform topics, China said that revitalizing the WTO negotiation function has always been an important part of the WTO reform.

China said that "at the beginning of this month, here, in this CR (Conference Room), we successfully concluded the text negotiation on Investment Facilitation for Development," adding that it counts over 110 participating WTO members, with more than two-thirds of WTO members, including more than 70 developing members, with 20 LDCs.

China said, "as an inclusive and pro-multilateral initiative, outreach will continue to be our next priority."

"In the meantime, we will start discussions on the legal incorporation of this Agreement into the WTO legal architecture," China said, adding that "in this process, we need intensive technical discussions."

Stakeholder participation

Meanwhile, in a growing attempt to push the WTO into the realm of increased stakeholder participation under the alleged specious plea of addressing global challenges, a group of countries including Colombia, Guatemala, Israel, New Zealand, Peru, the Philippines, Chinese Taipei, Thailand and the United States on 24 July tabled a proposal (WT/GC/W/871/Rev.3), saying that "the WTO was established in part to provide a forum for Members to engage with each other to improve our understanding of how trade relations can support these broader economic and social objectives in pursuit of sustainable development."

"Recent global challenges bring to the forefront the need to consider the broadest range of viewpoints to ensure that multilateral policy discussions and deliberations capture the complexity of cross-cutting issues and the differential impacts on diverse sets of stakeholders and interested persons," these countries insisted.

The co-sponsors said they "believe it

may be appropriate for Members to reflect on the adequacy of our current practices of engagement with stakeholders who are likewise confronting these same global challenges and are impacted by our actions at the WTO."

According to the co-sponsors, "Our reflections may draw on practices and Members' experiences with inclusive external engagement in other international organizations that may be relevant to consider in the context of improving our work in the WTO."

The proposal cited the following example:

* The United Nations Sustainable Development Goals (SDGs) are frequently referenced in discussions among WTO Members. The SDGs reflect an interconnectedness and shared responsibility for action across many aspects of our societies with cooperation and coordination required from governments, non-governmental organizations, businesses, and civil society. SDG 17 is explicit in incorporating diverse cross-sectoral stakeholders in policy dialogues. Most United Nations organizations have incorporated and internalized multi-stakeholder engagement as part of their everyday work. WTO Members may want to examine the policies and practices of the United Nations system and identify for further discussion any practices they find relevant.

* Most of the world's development assistance organizations, both bilateral and multilateral, have likewise developed innovative and sustainable multi-stakeholder engagement mechanisms to improve the delivery of development assistance and to ensure that outcomes can be comprehensively evaluated and that they achieve multi-faceted objectives.

* The WTO's Public Forum and Aid for Trade Initiative are two examples of broad external engagement mechanisms used by WTO Members to gain wider perspectives on issues of interest across Members. Most WTO Committees benefit from the perspectives shared by the International and Regional Organizations granted Observer status. Committees also hold thematic sessions or Members organize individually sponsored events

which enrich the Memberships' understanding on current global issues. However, these mechanisms may not be sufficient. Multi-stakeholder events that discuss issues at the heart of the WTO's mandate increasingly take place outside the WTO, and those voices are heard by only a small subset of Members, if at all.

Contrary to the African Group proposal, which cautioned about the inclusion of private and non-governmental stakeholders in a member-driven, rules-based, inter-governmental organization, the co-sponsors, led by the US, said: "Despite success in some areas, opportunities for sustained multi-stakeholder engagement at the WTO and within WTO Committees appear to significantly lag global best practice as established by other international organizations, international financial institutions, and development assistance providers."

The co-sponsors said that they "are interested in reviewing and evaluating how Members may better use the WTO as a convening forum for engagement with diverse stakeholders and interested persons impacted by global trade challenges."

According to the co-sponsors, "We are interested in hearing from Members what their experience has been with regard to external engagement in the conduct of committee and body work, with multi-stakeholder dialogues, and other opportunities they have had to solicit and incorporate diverse stakeholder interests and perspectives. We seek to understand what they perceive works, and what approaches are less effective. We intend to initiate an informal, Member-driven dialogue as a first step to solicit the interests and perspectives of other Members on multi-stakeholder engagement and to identify overlapping interests in search for common ground in order to strengthen the Organization's relevance. We look forward to engaging with all Members in this dialogue."

In short, MC13 seems to be gradually inching towards "hollowing out" the WTO instead of bringing developmental reforms to reflect the priorities and concerns of the large majority of its members, who hitherto remained marginalized in the previous ministerial meetings, said people, who asked not to be quoted. (SUNS 9829)

WTO GC chair to convene meeting on industrialization in September

The chair of the World Trade Organization's General Council is convening an informal meeting on 26 September to discuss the two different forms of industrialization policies as proposed by the European Union, on the one hand, and the African Group, on the other.

by D. Ravi Kanth

GENEVA: As industrialized countries, particularly the United States and the European Union, are spending hundreds of billions of dollars in subsidies to pursue their industrialization policies allegedly in violation of the WTO rules, the African Group has called for "policy space for industrial development", making a strong case for "re-balancing" the trade rules to promote industrialization and to address emerging challenges such as climate change, the concentration of production and digital industrialization, said people familiar with the development.

At the request of the European Union and the African Group, the chair of the WTO's General Council, Ambassador Athaliah Lesiba Molokomme of Botswana, has apparently decided to convene an informal meeting on 26 September to discuss the two different forms of industrialization policies as proposed by the EU, on the one hand, and the African Group, on the other.

Although the EU is yet to spell out the contours of its proposed industrial policies aimed at the "green" and semiconductor industries, the African Group has already circulated a proposal (WT/GC/W/880) in which it argued comprehensively that "subsidies are a critical instrument in the toolbox that national governments use to address market failures and achieve a variety of policy goals."

Many developing countries, including Indonesia, strongly supported the African Group's proposal.

Commenting on the African Group's proposal, Indonesia highlighted several elements in the proposal that "strikes a chord with us, as a fellow developing country."

First, the role and importance of the transfer of technology to address the technology gap and the need for the WTO to facilitate and improve technology transfer to developing countries.

Second, the role of local content requirements to boost domestic production, particularly to a weakened or infant industry base, as developing countries historically have been forced to engage in low value-added activities and consume much of the higher valued products that are derived from raw materials.

Therefore, said Indonesia, "a true leveling playing field can only be achievable if developing countries and LDCs are given the opportunity to shift into the creation of a local production platform focussing on higher value-added products in the domestic level."

According to the African Group's proposal, while the WTO's Agreement on Subsidies and Countervailing Measures (ASCM) sets out multilateral rules to discipline the type and scope of allowable subsidies or limits within which subsidies may be provided by a Member, it also "regulates the actions that members can take to counter the effects of subsidies which can be enforced either through the WTO dispute settlement mechanism or through the imposition of countervailing duties or measures."

Citing Article 27 of the ASCM, which recognizes that subsidies may play a role in economic development of developing country Members and agreed on provisions on Special and Differential Treatment of Developing Country Members, it said "some of these flexibilities had transitional periods and

have since expired."

At a time when "the world economy is confronted with compounding global challenges today, including the on-going effects of the COVID-19 pandemic, climate crisis and economic consequences of geopolitical tensions, global food and energy crises, causing the cost-of-living crisis and rising debt burdens in many countries," the African Group said it "is important to consider how flexibilities, not only in the context of S&D [special and differential treatment] as provided for in Article 27, can be availed to developing countries to provide them with the requisite tools to respond to the polycrisis."

The African Group argued persuasively that "subsidies in developing countries aimed at achieving "legitimate development goals", including support for regional growth, technology research and development, production diversification, and development and implementation of environmentally sound methods of production should not have to face countervailing measures or other actions from other governments."

Sadly, as the African Group pointed out, "developing countries have been the main targets of countervailing measures by developed economies."

Therefore, it called "for flexibilities to be granted to developing countries so as to provide requisite flexibilities to developing countries to respond to the polycrisis and to drive their structural transformation, industrial development and diversification."

"The ASCM disciplines need to be recalibrated and re-balanced to infuse certainty and equity in the multilateral trading system."

The African Group provided "a non-exhaustive list of issues that can be considered by Members to re-balance trade rules to enable industrialization within the framework of the ASCM to enable sustainable economic transformation in developing countries and in particular Africa."

According to the African Group, "the scale of the polycrisis confronting the global economy, inequality and disparities in levels of development of countries and regions, highly concentrated patterns of production, and the lack of sufficiently diversified economies in developing

countries calls for urgent action at a multilateral level to devise rules that are fit for purpose."

In the context of this "polycrisis", said the African Group, "Governments, most notably in developed economies are implementing industrial policies as a viable option for accelerating sustainable economic growth as a means of advancing national economic priorities, including the de-risking of supply chains."

For the African Group, according to its proposal, "Industrialisation is an indispensable factor in the development process and is critical in the process of the enhancement and expansion of productive capacities to achieve economic diversification. Many developing countries struggle to diversify their economies and it is important to explore how WTO rules can facilitate the industrialisation efforts of Members."

It said that "Africa's growth trajectory is limited by its dependence on production and exports of agricultural and extractive primary commodities which leaves it vulnerable to global shocks."

The African countries "seeking to develop their economies from a relatively much lower base are also contending with ambitious carbon reduction and mitigation targets, in line with their nationally determined contributions (NDCs) as negotiated under the Paris Agreement."

Further, "the increasing adoption of decarbonization targets with extraterritorial application imposed through trade measures by their main export markets also underscores the urgency to diversify their economies and integrate into environmentally-friendly and high-value manufacturing value chains as key producers and suppliers of products in the green economy, e.g. electric vehicles and their components such as energy storage systems, domestic solar and wind energy products, etc," the African Group said in its proposal.

The African Group quoted the United Nations Conference on Trade and Development's 2023 Technology and Innovation Report, which says that "Developing countries now have opportunities to catch up, reduce poverty, and at the same time help tackle climate

change and set the world on a more sustainable course".

Significantly, the UNCTAD report highlights and acknowledges "the critical role of WTO trade rules towards this ideal, such as the disciplines under the ASCM, including local content requirements and public procurement and the need for their review to bring them in sync with the Paris Agreement."

Given the critical role played by research and development (R&D) in industrialisation, including promoting green mobility and, with that, renewable energy solutions, as well as structural transformation into new, or more sustainable industrial activities, the African Group said the "importance of public-private cooperation in R&D to enhance research activities and translate research outcomes into a production plan for commercial use is well-documented."

Against the backdrop of poor funding by private companies in the African countries, the proposal said that "the constraints imposed by disciplines in the ASCM can hamper public sector support for R&D purposes that is necessary for developing countries to develop their nascent industries, keep up with the pace of technological advances at competitive levels, and undermine efforts to harness or benefit their natural resources to move up production value chains or decarbonize existing and future production capacities."

Also, it said "the expiry of the carve-outs contained in Article 8 of the ASCM which allowed for non-actionable subsidies of up to 75 percent of industrial research or no more than 20 percent of costs of adaptation to new environmental requirements or regulations, unfortunately, stifles this ambition to industrialize, whilst also placing existing exports at risk of non-compliance with increasingly stringent sustainability standards."

The African Group said, "the prohibitions contained in Article 3 of the ASCM on local content requirements presents a further constraint to the ability of developing countries to structurally transform and diversify their productive sectors."

"Even with the flexibilities provided

for in Article 27.3 of the ASCM which have since lapsed on 31 December 1999 and 31 December 2002, the uncertainties with respect to this provision in view of the restriction in the Agreement on Trade-Related Investment Measures (TRIMS) on the domestic content requirement created ambiguity and uncertainty on its practical applicability," the African Group argued.

The African Group identified the following issues to pursue:

- * The criteria of determining prohibition of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 shall be revised with a view to, among others:
 - i. Updating the threshold of GNP per capita of \$1,000 per annum, and ensuring the re-inclusion of a Member when its GNP per capita falls back below the agreed threshold;
 - ii. Incorporating additional objective criteria to expand the reach of the provision such as the level of export diversification, the global share of exports, etc.; and
 - iii. Taking account of regional investment needs to promote regional integration and achieve desired economies of scale.
- * The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members and least developed country Members provided the use of domestic goods does not exceed the threshold to be agreed by Members.

In the case of actionable subsidies, the African Group said "the threshold for the termination of countervailing duty investigation of products originating in a developing country Member shall be increased to x percent of its value calculated on a per unit basis; The standard for negligibility should also be revised to be based on a market penetration test, rather than on imports as a percentage of total imports test, i.e. if exports from an individual developing country is less than x% of the market where goods are being exported to, there should be no cumulation with imports from other countries." (SUNS 9830)