Chapter 5

WTO Reform Proposals: Implications for Developing Countries

*Lorand Bartels**

5.1 Introduction

There is currently a great deal of activity at the WTO focused on reforms to the organisation's functioning. This reform agenda has a complicated background. In part, it is a response to the failure of the Doha Development Round, for which different WTO members have different explanations, and hence different solutions. In part, it stems from a concern among developed countries that existing WTO rules do not adequately cover state capitalism (see USA et al., 2017, 2018), which, in the case of the USA, is exacerbated by what it sees as misinterpretations of WTO law by the WTO Appellate Body (US Trade Representative, 2019). This, in turn, is connected with wider concerns expressed by the USA, and at times other WTO members, about the functioning of the WTO dispute settlement system. And then there is the special and urgent problem that, for various reasons, including but not limited to these, the USA has blocked the filling of Appellate Body vacancies since 2017, jeopardising the functioning of the WTO dispute settlement system as a whole.[1] This has led other WTO members to seek to reform the dispute settlement system in a way that will assuage US concerns, but also some of their own.

Against this background, this chapter describes and evaluates the various reform proposals that WTO members have advanced, especially their implications for developing countries. These fall into three main categories: the self-designation of WTO members as developing countries; sanctions for failing to meet notification obligations; and reforms to the functioning of the Appellate Body.

5.2 Definition of developing countries

Several developed WTO members have taken issue with the longstanding practice of WTO members declaring themselves to be developing countries, which is seen as one of the causes of blockage in Doha negotiations, as well as being unfair in its own right. On 18 September 2018, the European Commission presented a Concept Paper that argued that an overly broad categorisation of developing countries represents 'an obstacle to the progress of negotiations' because 'the demand for blanket flexibilities

* Lorand Bartels is Reader in International Law and Fellow of Trinity Hall at the University of Cambridge. The views expressed in this essay are those of the author and do not necessarily represent those of the Commonwealth Secretariat.

for two thirds of the WTO membership dilutes the call from those countries that have evident needs for development assistance, leads to much weaker ambition in negotiations and is used as a tool to block progress in, or even at the beginning of, negotiations'. The EU had little difficulty finding common ground on these points with other developed countries. One week later, on 25 September 2018, the trade ministers of the EU, Japan and the USA had issued a Joint Statement including the following paragraph:

> Overly broad classifications of development, combined with self-designation of development status, inhibits the WTO's ability to negotiate new, trade-expanding agreements and undermines their effectiveness. The Ministers called on advanced WTO Members claiming developing country status to undertake full commitments in ongoing and future WTO negotiations (USA et al., 2018).

Others agree that something needs to change in the way development is handled at the WTO, albeit in softer and more ambiguous terms. The Ottawa Group ministers – comprising Australia, Brazil, Canada, Chile, the EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland – issued the following communiqué one month after this, on 25 October 2018:

> Development must remain an integral part of our work. We need to explore how the development dimension, including special and differential treatment, can be best pursued in rule-making efforts. Our officials will examine and develop concrete options for engagement to reinvigorate the negotiating function.

What this means for developing countries is a highly charged issue. In its Concept Paper, the European Commission proposed that WTO members be encouraged to voluntarily 'graduate' from developing country status, and that 'flexibilities available to other Members should move away from open-ended block exemptions toward a needs-driven and evidence-based approach that will ensure that SDT [special and differential treatment] will be as targeted as possible'. The Commission also suggested the following principles for agreeing new SDT provisions:

- The agreement in question will eventually be universally implemented, so that the core rights and obligations will apply to everyone and any exceptions will be time-bound.
- In-built flexibility in the form of additional commitments going beyond a core set of provisions should cater for differences among members.
- The flexibilities available in any agreement should be proportional to the number of members participating and the ambition of the agreement.

Some of these themes moved to the WTO, spearheaded by the USA. In a January 2019 Communication (WT/GC/W/757), the USA argued against a binary distinction between 'developed' and 'developing' countries.[2] It asserted, as did the above Concept Paper, that several WTO members were claiming developing country status that, on certain metrics, should be considered developed countries.[3] Again like the European Commission, the USA also argued that an overly broad categorisation of 'developing country' impeded trade negotiations, because those members claiming developing

country status used that claim to argue for exemptions from newly negotiated disciplines. Several examples were mentioned, including the exemption of developing countries from the new tariff rate quota administration disciplines agreed at the 2013 Bali Ministerial Conference,[4] and a new proposal by China and India to eliminate all agricultural domestic support for developed countries as a prerequisite to developing country WTO members making any reforms of their own.[5]

The US Communication sparked a negative reaction. On 4 February 2019, the African Group responded that '[t]he proposals for graduation and differentiation are… divisive and unlikely to yield results [and] [t]rying to change the principle of self-declaration is also impractical'. It continued:

> A more productive approach would acknowledge that S&DT principles are sufficiently flexible to address differences in the actual negotiating process and to not worsen imbalances. For all their shortcomings, the agricultural and NAMA texts under the Doha agenda were replete with examples of differentiation and flexibility to accommodate real differences in the actual circumstances of Members. Notably, in the fisheries subsidies negotiations, flexibility and S&DT is required to address our capacity constraints and to build our fishing industry capabilities in the future. The African Group will not agree to any proposals disadvantaging any of its Members through a change to the negotiating mandate or by using irrelevant criteria.

The USA followed this up with another communication (WT/GC/W/764), on 15 February 2019, which proposed a draft General Council Decision establishing the following objective criteria for a WTO member to be able to claim developing country status:

> To facilitate the full implementation of future WTO agreements and to ensure that the maximum benefits of trade accrue to those Members with the greatest difficulty integrating into the multilateral trading system, the following categories of Members will not avail themselves of special and differential treatment in current and future WTO negotiations:
>
> i. A WTO Member that is a Member of the Organization for Economic Cooperation and Development (OECD), or a WTO Member that has begun the accession process to the OECD;
>
> ii. A WTO Member that is a member of the Group of 20 (G20);
>
> iii. A WTO Member that is classified as a 'high income' country by the World Bank; or
>
> iv. A WTO Member that accounts for no less than 0.5 per cent of global merchandise trade (imports and exports).
>
> Nothing in this Decision precludes reaching agreement that in sector-specific negotiations other Members are also ineligible for special and differential treatment.

The two US Communications sparked negative reactions from developing countries. A Communication (WT/GC/W/765) was issued on 18 February 2019 by China,

India, South Africa and Venezuela[6] that took issue with the US argument that the developed/developing country distinction was insufficiently differentiated. This Communication focused on different figures, such as per capita income, overall capacity constraints shared by developing countries, dependence on low value-added agriculture and low company efficiencies, while adding that in certain respects the WTO had even accepted 'reverse' SDT for developed countries.

The matter was then debated at the General Council meeting of 28 February 2019. India [7]rejected the US Communications as 'arbitrary', 'divisive' and 'profoundly insidious', and described its suggested criteria for developing country status as 'a strategy to ultimately terminate special & differential treatment at the WTO'. India added that:

> [M]ost SDT provisions in the WTO covered agreements are imprecise, unenforceable and in the form of 'best endeavour clauses' and therefore the assertion that onerous SDT obligations are making the WTO irrelevant is untenable. It is also important to note that though Members can declare themselves as developing, their specific rights and obligations are still subject to negotiations.

India argued that the real reason for the deadlock in Doha negotiations was 'the inability of the developed Members to abide by the agreed negotiating mandates of the Doha Round and the progress made thereunder'. China added that WT/GC/W/757 'selectively picks indicators which exaggerate the level of development of some developing Members, and uses them to challenge the practice of self-declared development status at the WTO' and that the USA's proposed redefinition of developing country status in WT/GC/W/764, based on a 'flawed' analytical paper, 'can only be a groundless "hanging garden" floating in the air'. For its part, the USA issued a document in which it alleged several factual and analytical errors in the developing countries' document WT/GC/W/765 and reiterated that 'using purchasing power parity (a proxy for spending power) on a per capita basis, the six wealthiest economies in the world – Qatar, Macao China, Singapore, Brunei Darussalam, Kuwait, and the United Arab Emirates – are self-declared developing Members of the WTO'.

Evaluation: It does not seem that this discussion will disappear any time soon, and it is worthy of detailed consideration. First, it is notable that all WTO members participating in this debate seem to have abandoned the notion of issue linkage as a way of equalising benefits, and to be resorting to a pre-Uruguay Round modality of issue-by-issue reciprocity and (for some) non-reciprocity (Rolland, 2010). This may be the inevitable outcome of the Doha failure.

On this basis, then, it may be observed that the debate on *a priori* criteria for developing country status is likely to remain sterile. There are simply too many variables and interests at stake (Cui, 2008). But it is also not likely to matter. The claim that trade negotiations are hampered by self-designation must be seen in light of the fact that, as India has pointed out, rights and obligations attaching to developing country status are themselves negotiated during trade negotiations. From this perspective, developing country status is no more than a shorthand description of a negotiating

position, and its validity will rise or fall with the strength of that position (Cui, 2008; Lamp, 2015).

It might also be commented that the importance of developing country status is not new. Article XXXVI:8 of the General Agreement on Tariffs and Trade (GATT) 1994, introduced in 1966, states that '[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties'. Importantly, the Interpretative Note to this provision continues:

> It is understood that the phrase 'do not expect reciprocity' means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

This approach differs from the present discussion about *a priori* developing country status by instead looking at what developing country status means on an issue-by-issue basis. But it can also show how to escape what seems to be turning into a negative and probably fruitless debate about *a priori* status. Given that, in practice, self-designation is probably here to stay, it might be suggested that the negotiating efforts of all WTO members be redirected towards an understanding of what the 'development, financial and trade needs' of developing countries might be in different circumstances. This would have the added advantage of establishing objective criteria for the operation of Generalised System of Preferences programmes, which are required to be a positive response to such 'needs', and which are also forbidden from discriminating between developing countries that have similar 'needs' (Appellate Body, 2004).

Second, negotiating effort could also be spent on defining the 'contributions' developing countries can be expected to make, given their particular 'needs'. A useful model for such considerations in practice is the Trade Facilitation Agreement, which conditions developing country obligations on their capacity to perform those obligations, which in turn depends on developed countries helping build that capacity.[8]

It is in this light that the European Commission's further proposals in its Concept Paper on the outcome of negotiation need to be appraised. To recap, the EU suggests that core rights and obligations eventually apply to all WTO members; that additional commitments can go beyond the core provisions; and that the flexibilities available in any agreement should be proportional to the number of members participating and the ambition of the agreement. Insofar as this proposal distinguishes between 'core' and 'additional' obligations, there is not much to be gainsaid, except that there may be some agreements that do not permit any 'core' provisions at all, and that the designation of such 'core' provisions will be of key importance. More important, perhaps, is the notion that this question should depend on the scope of the agreement at issue. This appears to be a rather arbitrary formula, based not on the capacity of parties to implement the agreement at issue but on criteria that, all things considered,

appear to be rather arbitrary. This third limb of the Commission's proposal is deserving of greater scrutiny.

5.3 Notifications

A second topic under discussion with important implications for developing countries is whether WTO members that breach their regular (i.e. not *ad hoc*) notification obligations should be subject to any sanctions.[9] Again, this is a topic that has obtained a degree of consensus among developed countries. It seems first to have been raised in a communication by the USA on 30 October 2017 (JOB/GC/148), which proposed certain sanctions for what were termed 'delinquent Members'. After discussion (Council for Trade in Goods, 2017), the USA issued a revised communication (JOB/GC/148/Rev.1) on 12 March 2018, which removed the word 'delinquent' and changed some of the proposed sanctions.

The USA's revised proposal gained traction after being included in the Joint Trilateral Meeting of US, Japan and EU Trade Ministers in September 2018 (USA et al., 2018), and at the Ottawa meeting in October 2018 (Australia et al., 2018a,b). On 1 November 2018, a further revision was resubmitted (JOB/GC/204), which by 4 December 2018 had gained Argentina, Australia, Chinese Taipei, Costa Rica, the EU and Japan as co-sponsors. The sanctions currently proposed, described as 'administrative measures', are as follows:

12. (a) After one but less than two full years from a notification deadline, the following measures shall be applied to the Member at the beginning of the second year:
    (i) representatives of the Member cannot be nominated to preside over WTO bodies;
    (ii) questions posed by the Member to another Member during a Trade Policy Review need not be answered;
    (iii) the Member will be assessed a supplement of [x][5] percent on its normal assessed contribution to the WTO budget, to be effective in the following biennial budget cycle;
    (iv) the Secretariat will report annually to the Council for Trade in Goods on the status of the Member's notifications; and
    (v) the Member will be subject to specific reporting at the General Council meetings.
  (b) After two but less than three full years following a notification deadline, the following measures shall be applied to the Member at the beginning of the third year, in addition to the measures in subparagraph (a):
    (i) the Member will be designated as an Inactive Member;
    (ii) representatives of the Member will be called upon in WTO formal meetings after all other Members have taken the floor, and before any observers; and
    (iii) when the Inactive Member takes the floor in the General Council it will be identified as such.

There is an important exception in paragraph 12(c), which states that '[t]he administrative measures identified in paragraph 12(a) and 12(b) shall not apply to Members that have submitted information on the assistance and support for capacity building that the Member requires, as set out in paragraph 10.' In turn, paragraph 10 states:

> Each developing country Member is encouraged to submit to the relevant committee and to the Working Group by [x date] and by [x date] of each subsequent year information on those notifications … that it has not submitted due to a lack of capacity, including information on the assistance and support for capacity building that the Member requires in order to submit complete notifications.

The Communication also contains another important innovation. It proposes that '[a]t any time, Members are encouraged to provide a counter notification of another Member concerning notification obligations under the agreements listed in paragraph 1' (paragraph 7). Mechanisms for counter-notifications exist in several WTO agreements, including GATT 1994, the General Agreement on Trade in Services and the Agriculture Agreement. But this proposal would extend this mechanism to other WTO agreements. This suggestion has proved controversial, as discussed below.

Evaluation

WTO members generally agree that regular notification obligations are important, but in practice there are few who do not fail to meet these obligations. Developing countries argue that, for them, these obligations are particularly onerous for reasons of capacity constraints. For example, on 14 November 2018, the African Group argued in the Council for Trade in Goods that 'the heart of the problem is the lack of institutional capacity to comply with notification requirements on technically complex matters' and that the burden is placed 'disproportionately on developing and least developed countries' (Third World Network, 2018).

This may very well be true. However, it is to be noted that the revised proposal takes into account capacity constraints, insofar as paragraph 12(c) removes sanctions mechanism for developing country WTO members that have notified their capacity constraints to the WTO Secretariat. The South Centre has issued a research paper on the US proposal in which it criticises the proposal for unduly burdening developing countries. However, interestingly, this paper does not mention paragraph 12(c). Rather, it focuses on the introduction to paragraph 12, which states that the administrative measures set out in paragraph 12(a) and (b) will apply 'if a Member fails to provide a complete notification within one year of the deadline set out in paragraph 8(a) or (b) and that Member has not requested assistance from the Secretariat identified in paragraph 9 or if such assistance is requested but the Member has not cooperated with the Secretariat' (Kwa and Lunenborg, 2019: 21). The research paper argues that this would improperly involve the Secretariat in what are, in reality, sensitive political issues (ibid.: 21–22). This may be a valid criticism, but it is also somewhat beside the point, when paragraph 12(c) requires mere notification of capacity constraints to avoid the administrative measures that would otherwise apply.

It would appear that the introduction to paragraph 12 is therefore targeted primarily at developed countries and also at any developing countries that have not notified any capacity constraints. One might of course argue that even an obligation of this type is onerous, but in fact this is far less onerous than the existing obligation to notify measures themselves (although at present this existing obligation is essentially unenforceable). A judgement call will therefore be needed on whether it is plausible to claim that an enforceable obligation to notify capacity constraints is a step too far.

The encouragement of counter-notifications raises more significant issues. As noted, the possibility of submitting counter-notifications is not new, but a counter-notification will generally require a response. This may be a challenge for developing countries with limited resources, and at a minimum any such proposal should be entertained only on the basis of a Trade Facilitation Modality by which an obligation is conditioned on capacity and relevant technical assistance.

Also, at a minimum, to avoid any unnecessary misunderstandings, a counter-notification mechanism should require prior bilateral consultations (Kwa and Lunenborg, 2019: 17). However, even more may be at stake. In its September 2018 Concept Paper, the European Commission suggested that any subsidy that had been counter-notified should be presumed to cause serious prejudice and thus be actionable.[10] This suggestion would amount to a radical change in the burden of proof for subsidising countries and should be carefully reviewed on its own merits. It also indicates that extending the counter-notifications mechanism may have serious implications beyond those that are now easy to envisage. Overall, these are suggestions that need to be considered with some care.

5.4 Dispute settlement

A third area where reform is being discussed is WTO dispute settlement. As mentioned above, there is a special background to these discussions – namely, the US blocking of new Appellate Body appointments. The reform proposals therefore come specifically in response to US concerns.

90-day deadline for Appellate Body reports

Article 17.5 of the WTO Dispute Settlement Understanding (DSU) requires the Appellate Body to issue a report 60 days after a notice of appeal, or, provided it notifies the Dispute Settlement Body of the reasons for a delay, 90 days.[11] In practice, between 1995 and 2010, the Appellate Body exceeded the 90-day limit in 5 per cent of disputes. From 2010 to the present, it has exceeded this period in over 80 per cent of cases.

There are two main reasons for the increase in delays. First, the workload of the Appellate Body has increased over time, as panel reports have become longer and more detailed and more issues have come to appeal. The Appellate Body is also under an obligation, under Article 17.12 of the DSU, to address 'each of the issues' before it. Second, the US blocking of new Appellate Body nominations has itself exacerbated the problem. The Appellate Body recently explained that it would not

be able to issue a report within the 90-day period in part because 'in view of the backlog of appeals pending with the Appellate Body at present, the overlap in the composition of all divisions resulting in part from the reduced number of Appellate Body Members, together with the shortage of staff in the Appellate Body Secretariat, Division Members can currently spend only very little time preparing for this appeal' (Appellate Body, 2018).

There have been several responses to these delays. Some have focused on resources. A Joint Communication from the EU, China, India and Montenegro (WT/GC/W/753) on 29 May 2018 proposed increasing the number of Appellate Body members from seven to nine,[12] to make membership permanent rather than, as it is at present, part time,[13] and to expand the resources of the Appellate Body Secretariat. These proposals originate in the earlier European Commission Concept Paper, which added the further suggestion that three divisions of three members might hear an appeal at any time, with no overlaps with regard to the membership of these divisions, and a longer six to eight year term for Appellate Body members.

Other proposals have focused on reducing the workload. A Joint Communication from the EU, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro (WT/GC/W/752) suggests that:

> [T]he Appellate Body could propose to the parties to voluntarily focus the scope of the appeal, set an indicative page limit on the parties' submissions or it could take appropriate measures to reduce the length of its report. This could also include the publication of the report in the language of the appeal only, for the purposes of meeting the 90-day timeframe (the translation to the other WTO languages and formal circulation and adoption would come later).

A different approach has been suggested by Chinese Taipei (WT/GC/W/763), based on the different predicate that the Appellate Body was originally meant to be a comparatively rare failsafe for errant panel reports, and that from this perspective the high rate of appeals on virtually all matters is a distortion of that intention. Chinese Taipei puts it this way:

> From this perspective, the very tight timeframe set out in Article 17.5 of the DSU may not be interpreted simply as an outdated or bad piece of legislation. Instead, it might be viewed as another element laid down deliberately by the negotiators in order to circumscribe the Appellate Body's function.

Accordingly, Chinese Taipei proposes that 'Members immediately enter into discussions for the purpose of developing guidelines on the future functioning of the Appellate Body' with a view, among other things, to 'clarify[ing] certain DSU provisions so as to provide better, more clear-cut operational rules for the Appellate Body to follow'. It suggests that this might lead to an authoritative interpretation under Article IX:2 of the WTO Agreement. Though without specific reference to the Appellate Body, this suggestion is echoed in a Communication from Australia, Singapore, Costa Rica, Canada and Switzerland proposing that it may be possible to identify 'options for binding or non-binding guidance to be provided to adjudicative

bodies on specific issues, such as through the development of a clear pathway for the potential negotiation and adoption of "authoritative interpretations"'.

Canada has also suggested '[d]iverting certain disputes or issues from adjudication… through a renewed commitment to self-restraint, the improvement and use of alternative mechanisms such as mediation to settle disputes or at least narrow their scope, and possibly even formal exclusion of certain types of disputes or certain issues from the jurisdiction of adjudication' (Canada, 2018: 3). This reflects an interest in rebalancing what some have seen as an overreliance on dispute settlement to resolve issues that could be resolved in negotiations (McDougall, 2018).

Evaluation: In general, these proposed reforms are uncontroversial. Possible issues affecting developing countries would be limits on the use of official languages in dispute settlement, if this incurs translation or other costs for certain developing country members. It will also be important to ensure that any increase in the costs of the Appellate Body system is borne equitably. As to the notion that the function of the Appellate Body should be reconsidered, and further guidance provided, the central question is whether appeals benefit or harm WTO members. On the one hand, appeals increase costs; on the other, they improve the quality of WTO law. WTO members will most likely have a range of opinions on this point. It may also be difficult for WTO members to agree on any meaningful interpretations, so, even if this appears to be a sensible suggestion, it is probably unworkable in practice. As to Canada's suggestion that certain matters be removed from adjudication, suffice it to observe that smaller actors generally benefit from the rule of law.

Excess of Appellate Body powers

A related US concern is that the Appellate Body has exceeded the 90-day limit in a non-transparent manner. In particular, since 2011, the Appellate Body has not obtained the agreement of disputing parties prior to delaying a report beyond the 90-day limit just discussed, and it has failed to give proper reasons to the Dispute Settlement Body for any delays. For example, and somewhat counterintuitively, the Appellate Body has omitted to mention that the parties have agreed that it may exceed the 90-day limit.[14]

In response to these criticisms, Joint Communication WT/GC/W/752 Revision 2 proposes requiring the Appellate Body to obtain the agreement of the parties to a dispute in the event of any delay, and, if it cannot, to 'take appropriate organizational measures… with a view to enabling the Appellate Body to submit its report within that period'.[15] Canada has also supported the idea of 'developing guidance related to consultations with parties when the Appellate Body is unable to meet its deadline' (Canada, 2018), although without making further concrete proposals.

Evaluation: These are fairly technical issues of little significance from a developing country perspective.

Transitional rules for outgoing Appellate Body members

Rule 15 of the Appellate Body Working Procedures states that, if the term of an Appellate Body member expires during an appeal, the Appellate Body may 'deem'

that person to be an Appellate Body member for the purposes of completing the appeal (Appellate Body, 2017). The USA has objected that this exceeds the Appellate Body's authority.

One response to this objection is to limit the situations in which an Appellate Body member continues to hear an already commenced appeal after the expiry of his or her term. Honduras suggested in JOB/DSB/2 of 23 July 2018 that Appellate Body members should be able to continue when oral argument has commenced. It also suggests that no new appeals be assigned to an Appellate Body member whose term will expire within 60 days. Joint Communication WT/GC/W/752 Revision 2 suggests a narrower continuation when the oral hearing has been completed rather than commenced. Joint Communication WT/GC/W/753 proposes a more radical solution – namely, that '[i]n order to ensure an orderly transition between the outgoing and new Appellate Body members, the outgoing Appellate Body members should continue discharging their duties until their places have been filled but not longer than for a period of two years following the expiry of the term of office'. This is evidently intended to push out the deadline for the cliff-edge currently facing the Appellate Body, perhaps past the current US presidential term.

Another question is whether the transition should take place automatically, as assumed by Joint Communication WT/GC/W/752, or by a decision, and, if so, by whom. Honduras has suggested a range of options for a decision: first, that the Appellate Body could decide, and notify the Dispute Settlement Body; alternatively, the Dispute Settlement Body could decide, either by negative consensus (so one WTO member alone cannot issue a veto) or by positive consensus but minus the parties to the dispute. At the Dispute Settlement Body meeting on 29 October 2018, the USA welcomed Honduras' communication but insisted that the Dispute Settlement Body should have the power to decide on any such issue.[16]

Evaluation: Considering that dispute settlement is proportionately more important for smaller than for larger WTO members, any proposals protecting the dispute settlement system are to be welcomed. There are no obvious budgetary or other considerations warranting special attention.

Jurisprudential issues

The USA has made a series of complaints about the Appellate Body's approach to its decision-making that are properly considered jurisprudential. One US objection is that the Appellate Body makes legal pronouncements that are not necessary to decide the dispute (*obiter dicta*). Joint Communication WT/GC/W/752 essentially agrees with the US view by suggesting an amendment of Article 17.12 of the DSU to provide that '[t]he Appellate Body shall address issues raised on appeal to the extent this is necessary for the resolution of the dispute'.

Another US objection is that the Appellate Body wrongly treats its earlier reports as precedents. In fact, the Appellate Body stated in 'US – Stainless Steel' that it would expect panels to follow Appellate Body reports in the absence of 'cogent reasons' to the contrary (Appellate Body, 2008). The response of Joint Communication WT/GC/W/752 is to propose a system of annual meetings between the Appellate Body

and WTO members in which members could voice their views on general matters. Canada has in this context made the stronger suggestion that 'mechanisms might be developed that allow Members more opportunity to provide binding and non-binding guidance to adjudicative bodies on specific issues', which has been supported by Joint Communication WT/GC/W/754 in paragraph 1.6. Honduras has also produced an interesting paper making various suggestions about precedent, seemingly based on its civil law system (Honduras, 2019). It is not clear that these lessons are easily transposable to the WTO.

A third US objection relates to the Appellate Body's treatment of municipal (i.e. national) law. The issue is whether, given that the Appellate Body only has a legal jurisdiction, it is able to make any rulings on a panel's factual findings about a given WTO member's national law. As a point of jurisprudence, it is widely accepted that the Appellate Body has made an error. Several communications agree.[17]

Evaluation: These issues are of only tangential relevance to developing countries. At most, one could imagine that those practices of the Appellate Body that seek to clarify the law beyond that which is strictly necessary to resolve the dispute at issue (e.g. *obiter dicta* and precedent) might benefit non-litigants who thereby indirectly obtain clarity in the law. On the other hand, the more the Appellate Body seeks to cover, the more burdensome litigation can be. There are no especially compelling arguments in either direction.

5.5 Conclusions

Of the three main institutional reforms being discussed at present, clearly those relating to the status of developing countries and sanctions for non-compliance with notification obligations are of most pressing interest to developing countries.

As to the question of developing country status, developing countries can contribute much that is constructive to the reform discussion. At present, it appears that various WTO members are engaged in a tit-for-tat debate on the very notion of development. This does not appear to be a profitable discussion. It would make more sense to seek to breathe life into the existing rules on non-reciprocity in trade negotiations, which have not been addressed for many years. The time is ripe in particular for a discussion of what is meant by the 'trade, financial and development needs' of developing countries, and the extent to which developing countries can be expected to make obligations in light of these 'needs'.

When it comes to proposals for sanctioning non-compliance with notification obligations, developing countries should ensure their interests are protected. It is certainly true that any such rules are likely to affect developing countries disproportionately. However, again, rather than simply resisting efforts to bring greater enforceability to these obligations, it may be more constructive, and in the interests of all WTO members, to propose an agreement on the model of the TFA – that is, developing countries will undertake new obligations in this area provided that they have the capacity to perform these obligations, and that

developed countries will undertake to ensure they assist them in obtaining this capacity.

Finally, there are a great many proposals on the WTO Appellate Body, largely in response to the USA's particular concerns about the functioning and rulings of this part of the WTO dispute settlement system. Few of these proposals have any direct implications for developing countries. At most, it might be reiterated that smaller actors generally benefit from the rule of law, and to that extent it benefits such actors to have a functioning dispute settlement system that is able to clarify the law even for non-litigants, that is able to take into account the special status of developing countries both within the WTO and beyond, and that more generally has the authority to apply the law in order to protect the weak from the strong.

Endnotes

1 This has implications beyond the unavailability of an appeals mechanism. Because WTO members have the right to an appeal before a panel report is adopted, a respondent WTO member can legally block the adoption of an adverse panel report indefinitely. Absent a workaround, the entire dispute settlement system is therefore at risk.
2 See also WT/GC/W/757/Rev.1.
3 Ibid. The Communication highlighted the high rankings of WTO members such as Hong Kong, Israel, Korea and Singapore on the Human Development Index, and China's high rankings on lists of total exports, high technology trade, intellectual property royalties, foreign direct investment, corporate size, supercomputers, space and defence spending. Certain other self-declared developing countries, such as Korea, and to some extent Brazil and India, also feature, though less consistently. The Communication also pointed to the relative development gains made by almost all developing countries other than those in sub-Saharan Africa over the past 20 years.
4 Understanding on tariff rate quota administration provisions of agricultural products, as defined in Article 2 of the Agreement on Agriculture — Ministerial Decision of 7 December 2013, WT/MIN(13)/39, WT/L/914, 11 December 2013, Annex A, para. 4, noted as 'the first time that Members agreed to use developing status to exempt all self-declared developing Members from a new commitment rather than take a smaller cut or a longer time to implement' (WT/GC/W/757 of 16 January 2019, paragraph 4.4).
5 WT/GC/W/757 of 16 January 2019, paragraph 4.6.
6 Co-sponsors include: Bolivia, Central African Republic, Cuba, Kenya, Laos and Pakistan. See WT/GC/W/765/Rev.2, 4 March 2019 for a full list of co-sponsors.
7 See India's Statements at the General Council meeting held on 28th February 2019 at: https://www.pmindiaun.gov.in/pdf/India's_upStatements_GC_28%20Feb%202019.pdf
8 The TFA is also cited as a precedent in Canada (2018).
9 This topic is addressed in detail in Kwa and Lunenborg (2019).
10 This followed an earlier proposal to deem non-notified subsidies to be actionable. See EU (2017: paragraphs 8 and 9).
11 In theory, it is supposed to be legally impossible to issue a report after 90 days have elapsed. Indeed, the USA has questioned whether late Appellate Body reports can even be considered valid.
12 This would require a change to Article 17.1 of the DSU.
13 This would require a change to a Dispute Settlement Body Decision – namely, Establishment of the Appellate Body, 19 June 1995, Decision of 10 February 1995, WT/DSB/1.
14 See the compilation of WTO member comments in Stewart (2018).
15 This would require an amendment to Article 17.5 of the DSU.
16 Statements by the United States at the Meeting of the WTO Dispute Settlement Body.
17 Including Joint Communication WT/GC/W/752, Annex, and Canada (2018: 3).

References

African Group (2019) 'African Group Statement – Informal WTO Ministerial Gathering'. WEF, Davos, 25 January, WT/L/1058, 4 February.

Appellate Body (2004) 'EC – Tariff Preferences'. Report, WT/DS246/AB/R, adopted 20 April.

Appellate Body (2008) 'United States – Stainless Steel'. Report, WT/DS344/AB/R, adopted 20 May.

Appellate Body (2017) 'Rule 15 of the Working Procedures for Appellate Body Review'. Communication, JOB/AB/3, 24 November.

Appellate Body (2018) 'European Union and Its Member States – Certain Measures Relating to the Energy Sector'. Communication, WT/DS476/8, 21 November.

Argentina, Costa Rica, the European Union, Japan, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the United States (2018) 'Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements'. Joint Communication to the General Council, JOB/GC/204/Add.2, 4 December.

Australia, Brazil, Canada, Chile, EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland (2018a) 'Joint Communiqué of the Ottawa Ministerial on WTO Reform'. 25 October 2018. At https://www.canada.ca/en/global-affairs/news/2018/10/joint-communique-of-the-ottawa-ministerial-on-wto-reform.html (accessed 9 March 2019).

Australia, Singapore, Costa Rica, Canada and Switzerland (2018b) 'Communication to the General Council'. General Council, Adjudicative Bodies: Adding to or Diminishing Rights or Obligations under the WTO Agreement, WT/GC/W/754/Rev.2, 11 December.

Canada (2018) 'Strengthening and Modernizing the WTO'. Discussion Paper Communication, JOB/GC/201, 21 September. At https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=248327&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (accessed 9 March 2019).

China, India, South Africa and the Bolivarian Republic of Venezuela (2019) 'The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness'. General Council Communication, WT/GC/W/765, 18 February.

China, India, South Africa and the Bolivarian Republic of Venezuela (2019) 'The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness'. General Council Communication, WT/GC/W/765/Rev.2, 4 March.

Council for Trade in Goods (2018) 'Minutes of the Meeting on 10 November 2017'. G/C/M/130, 22 March.

Cui, F. (2008) 'Who Are the Developing Countries in the WTO?' *Law and Development Review* 121.

EU (2017) 'Negotiating Group on Rules, Improving Disciplines on Subsidies Notification'. Communication, 29 May, TN/RL/GEN/188, 30 May.

EU, China, India and Montenegro (2018) 'Communication to the General Council'. 10 December 2018, WT/GC/W/753/Rev.1, 11 December.

EU, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro (2018) 'Communication to the General Council'. WT/GC/W/752/Rev.2, 11 December.

European Commission (2018) 'WTO Modernisation: Introduction to Future EU Proposals'. Concept Paper. At http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (accessed 7 March 2019).

Honduras (2018) 'Fostering a Discussion on the Functioning of the Appellate Body', JOB/DSB/2, 23 July.

Honduras (2019) 'Fostering a Discussion on the Functioning of the Appellate Body – Addressing the Issue of Precedent'. Communication from Honduras, 1 February 2019, WT/GC/W/761, 4 February.

Kwa, A. and P. Lunenborg (2019) 'Notification and Transparency Issues in the WTO and the US' November 2018 Communication'. Research Paper 92. Geneva: South Centre.

Lamp, N. (2015) 'How Some Countries Became "Special": Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking'. *Journal of International Economic Law* 18(4): 743–771.

McDougall, R. (2018) *Revitalizing the WTO: Settling Trade Disputes in a Turbulent Multipolar World* Gütersloh: Bertelsmannstiftung.

Permanent Mission of the People's Republic of China to the World Trade Organization (2018) 'Statement by H.E. Ambassador Zhang Xiangchen of China'. General Council Meeting on Communications of Development, 28 February. At http://wto2.mofcom.gov.cn/article/chinaviewpoins/201903/20190302839144.shtml (accessed 19 March 2019).

Rolland, S. (2010) 'Redesigning the Negotiation Process at the WTO'. *Journal of International Economic Law* 1(1): 65–110.

Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (2019) 'Communication to the General Council'. Guideline Development Discussion, WT/GC/W/763, 13 February.

Stewart, T. (2018) 'Can the WTO Be Saved from Itself? Not Without a Major Crisis, and Possibly Not Even Then'. Washington, DC: WITA.

Third World Network (2018) 'South Countries Strongly Oppose Joint Proposal on WTO Notifications'. SUNS #8796, 15 November. At https://www.twn.my/title2/wto.info/2018/ti181112.htm (accessed 19 March 2019).

USA (2017) 'Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements'. General Council Communication, JOB/GC/148, 30 October.

USA (2018) 'Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements'. General Council Communication, Revision, JOB/GC/148/Rev.1, 12 March.

USA (2018) 'Statements by the United States at the Meeting of the WTO Dispute Settlement Body', 29 October 2018. At https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf (accessed 19 March 2019).

USA (2019) 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance'. General Council Communication, WT/GC/W/757, 16 January.

USA (2019) 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance'. General Council Communication, WT/GC/W/757/Rev.1, 14 February.

USA (2019) 'Procedures to Strengthen the Negotiating Function of the WTO'. General Council Communication, WT/GC/W/764, 15 February.

USA (2019) 'Examples of Errors and Misleading Inferences in WT/GC/W/765 – Communication from China, India, South Africa, and the Bolivarian Republic of Venezuela'. Room Document Provided by the United States, General Council Meeting, 28 February. At https://geneva.usmission.gov/wp-content/uploads/sites/290/190228-GC-Room-Document-Provided-by-the-U.S.-Re-WT-GC-W-765.pdf (accessed 19 March 2019).

USA, EU and Japan (2017) 'Joint Statement'. MC11, 12 December. At https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states (accessed 19 March 2019).

USA, EU and Japan (2018) 'Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union'. 9 September. At https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-trilateral (accessed 19 March 2019).

US Trade Representative (2019) 'Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program'. Washington, DC: US Trade Representative.