COVID-19

Questions to the Panel

What is WTO’s opinion regarding COVID-19? How COVID-19 would affect the WTO?

Appleton: The WTO has devoted a website to the COVID crisis and has begun to produce some important documents: [https://www.wto.org/english/tratop_e/COVID19_e/COVID19_e.htm](https://www.wto.org/english/tratop_e/COVID19_e/COVID19_e.htm). The WTO has postponed its scheduled Ministerial Meeting and much of Member and Secretariat activity has moved online. Geneva had a very high per capita rate of infection, which is now being brought under control. Nevertheless, the work of the WTO Members and the Secretariat will take time to return to normal.

Will COVID-19 also impact the use of NTMs?

Appleton: There are several possible scenarios. For example: 1) COVID-19 may result in the reduction of tariff and non-tariff measures for medical equipment, and 2) COVID-19 may result in additional sanitary measures to the extent that the virus is found to survive on goods in international trade. Perhaps a more interesting question would be the effect of COVID-19 on the service sector – it is likely a considerable amount of service trade, to the extent feasible, will move online (Mode 1), while other service trade will diminish (Modes 2-4).

Linscott: The short-term consequences of the COVID 19 pandemic will be huge. In April this year the WTO estimated that world merchandise trade in 2020 will fall by between 13 and 32 percent, depending on the assumptions made. WTO economists believe that the decline will exceed the trade slump caused by the 2008-09 financial crisis. Other important points made in the WTO forecast are:

- Trade is likely to fall more steeply in sectors with complex value chains, in particular electronic and automotive products, and for products that may be deemed non-essential by national authorities during lockdowns.
- Services trade – especially tourism - may be the component most affected by the pandemic as a result of travel restrictions and the closure of retail and hospitality establishments. More services will be delivered online.
- Trade is likely to recover in 2021, but the extent of the recovery will depend on the duration of the outbreak and the effectiveness of the policy response.
- The long-term impact of the pandemic is of course harder to predict. Countries will aim to be less dependent on foreign sources for medical supplies. Some countries are considering relaxing their requirements for issuing compulsory licenses for pharmaceutical products. Supply-chain operations are likely to change significantly. These operations always involve a balance between risk and economic efficiency, and the balance will shift towards reducing risk and making the operations more resilient. “Just-in-time” will become “enough time”, and enterprises will ensure that they have several sources for critical components. There may be a tendency to “reshore” key operations, although expectations of that should be tempered by practical considerations that no country can be fully self-sufficient (e.g., in critical medical supplies) and by WTO obligations on restricting trade.

Questions to Individual Panellists
Macrory: Regarding how far COVID-19 has affected the Trade relations between Countries throughout the world. Will the Trade Relations be as smooth as before COVID-19?

I see no reason to think that after the world economy has recovered from the pandemic (to the extent it does recover), trade relations will not return to the state they were in before, though I would not describe them as “smooth”, particularly given the difficult relationship between the United States and China.

Macrory: What are your views on Trade Negotiation and Dispute Settlement with China amidst COVID 19?

As we discussed, the prospects for a new multilateral trade negotiating round in the near or even medium-term future are very dim, and the pandemic has not changed this. Efforts will continue to negotiate various plurilateral agreements, such as the Environmental Goods Agreement and the E-Commerce Agreement. Likewise, the pandemic has not changed the situation with respect to dispute settlement, which remains paralyzed by the lack of a quorum on the Appellate Body.

Appleton: International trade is taking a big hit during the COVID 19 pandemic and the fallout from the virus is likely to accelerate some trends like shifts in global value chains and changes to services and intangibles trade. In this backdrop, how will trade change, not just overall, but in the details? What do you anticipate the future of Global Value Chains will look like given that we are already seeing a globally expansive network of GVCs consolidating in response to geopolitical and market risk concerns?

Countries with the ability to do so will seek to onshore production of sensitive medical products. Alternatively, they will seek to shorten supply chains – for example the United States might increasingly rely on producers in Mexico and Canada. Terms in production contracts may also become stricter as a means for importers to compel rapid performance.

Rajput: I came across various articles and opinion pieces where authors claim that post-COVID-19, the international trade arena will be significantly different. Many have even called it a failure of globalization and capitalism. How far do you think this is going to change the very nature of international trade as we know it today?

There can be no denial of the fact that the impact is going to be severe and it would take some time before international trade resumes to normal. Measure would be undertaken by States to protect domestic industries and the larger economies would try to reduce their dependence on international markets. Additionally, the way the geopolitical scenario unfolds would have its own influence, which at the moment does not appear to be very encouraging. Globalization has undergone curves of upwards and downward trends throughout history, we certainly do not appear to be in the upward trend but that may not last very long.

Linscott: As I understand, the Ministerial Conference of the WTO which was to take place in Kazakhstan has now been postponed. Will the issues to be addressed now relate to resolving past trade issues or would it focus more on the problems caused by the Pandemic?

I expect a bit of both. Ironically, this is a silver lining of the COVID-19 crisis. I am sure that had the Ministerial Conference taken place as scheduled, it would have been a colossal failure. It appeared unlikely that there would have been significant new agreements and ugly showdowns were likely, such as on the extension of the e-commerce duty moratorium. With more time, going into 2021, the Members may be able to come together on fisheries subsidies, some modest outcomes on agriculture, and several plurilateral initiatives. I also think it is likely that there will be some decisions related to trade restrictions associated with the pandemic and perhaps a new plurilateral initiative on eliminating duties on critical medical supplies.
DISPUTE SETTLEMENT

Questions to the Panel

• Learning from the instance wherein the appointment of judges to the dispute settlement body is being hindered, can we foresee a change in regulation for the appointment of judges in the long run? As I understand one of the main reasons why consensus is chosen is to maintain transparency. However, since its leading to ineffectiveness and untimely delivery of judgments, should a regulation change be made?

• Do you think that the appellate body taking more than 90 days to decide a dispute is because of this body being overburdened? Is there a need to increase the number of appellate body members from 7 to any higher number?

• As you said that US is blocking appointments and the reason was the trade war with China, so my question is how Section 301 of US Trade Act in violation with WTO can be addressed? How in the future will the WTO address this issue and liberalize negotiations and Dispute Settlement?

• Whether MPIA carved out under Article 25 of DSU can survive the hierarchical nature of dispute redressal under DSS till the time appellate body is again brought into action?

• Do you think that ad-hoc dispute settlement clauses under FTAs or Mega FTAs as Dr Rajput put it, are the future of International Trade Dispute Settlement? Or rather would it be solved by multilateral courts?

• Can the panel shed some light if they have any ideas/suggestions to make the Appellate Body functional again?

• How badly does the panellist think, the frequent missing of the timelines by WTO Panels affects the overall efficiency of the WTO as a body?

• How legally viable is the proposal of amendment brought by EU in its Parliament with respect to imposition of countermeasure in case of appeal into void and absence of an agreement under Art. 25 for which they have relied upon the Draft Articles of UN ILC?

• Why it is always about U.S. selecting or not-selecting judges/any such authority. WTO is an International body so what’s the point of supremacy of a country in selection process?

Answers

As we discussed, the WTO dispute settlement system has been paralyzed by the refusal of the United States to agree to the appointment of new members to the Appellate Body. The Dispute Settlement Understanding (DSU) provides for seven AB members, who are to sit in divisions of three. They are appointed for four-year terms and can be reappointed for a second four-year term. The WTO operates on the consensus principle which allows the United States to veto appointments. Since December 2019 the AB has had only one member so it is unable to function. While the panels can continue to operate, a party who disagrees with a panel decision can simply file an appeal that will remain in limbo until the AB is reinstated.

How will the situation be resolved? As we discussed, the United States is blocking appointments because it disagrees with a number of ways in which the AB has been operating, in particular what the United States claims is the creation of rights and obligations under the WTO Agreements, which the DSU states the AB is not allowed to do. However, the United States has not suggested how its concerns might be met, nor has it
engaged with any of the other Members who have presented ideas for reform. So it seems unlikely that the problem will be solved during the life of the current U.S. administration.

However, we think that the situation is likely to change if Joe Biden wins the Presidential election later this year. Biden is an internationalist, and we believe that he would engage with the WTO by allowing AB appointments to go forward, while entering into negotiations for reform.

Sixteen countries, including the EU, China and Canada have proposed a system under which appeals from WTO panel decisions would be handled by arbitration, as authorized by Article 25 of the Dispute Settlement Understanding. The parties to the system agree to be bound by the arbitral decisions, but it appears to be contemplated that the case would revert to the WTO for enforcement. This system would allow completion of cases where both parties had agreed to be bound by the system. But unless more countries sign up to the system, it would only apply to a small proportion of cases. And roughly half the total number of DS cases involve the United States, either as Complainant or Respondent, and it of course will not join the arbitration system.

One of the U.S. concerns is the length of time the Appellate Body has been taking to issue its decisions. The DSU directs the AB to complete its task within 90 days. Although in the early years of the WTO the Appellate Body usually met the deadline, in recent years it has fallen a long way short. It has been suggested that the Uruguay Round negotiators did not foresee how many cases would be filed (or appealed) as turned out to be the case, nor did they appreciate how complex some of the cases would be. In one of the most complex cases, involving subsidies given to Airbus, the Panel Report was nearly 1,200 pages long and the Appellate Body Report over 600 pages. And thousands of pages of written submissions were filed by the parties. There is no way that cases of this magnitude can be decided within 90 days. One solution that has been suggested would be to extend the period beyond the 90-day limit by agreement of the parties. Adding two members to the Appellate Body would take some pressure off by allowing three divisions to operate at the same time. But changes like this would require consensus, and it seems very unlikely that the United States would agree.

A question was raised about the relationship between dispute settlement under FTAs and the WTO. To give a typical lawyer’s answer, “it depends”. Some dispute settlement systems under some FTAs work quite well, others do not. Only three cases have been filed during the twenty-odd years of NAFTA, because there is no effective means of appointing panelists where the parties do not agree (which is usually the case). And the FTA between Australia and New Zealand has no dispute settlement mechanism other than a requirement to consult, so that trade disputes between them (involving WTO issues) can only be adjudicated in the WTO.

In answer to the question about Section 301, the United States used this provision, which empowers the President to impose trade sanctions against countries that act in a way that burdens U.S. commerce, as authorization for the tariffs it has placed on imports from China. However, it is clear that imposition of tariffs that breach tariff bindings (as these clearly do) without authorization by the Dispute Settlement Body after a finding of a breach of the WTO rules, is itself a violation. China has challenged the 301 tariffs.

Questions to Individual Panellists

**Appleton:** My question is if the WTO AB has tried to maintain uniformity with its past decisions, isn't it against the DSU?

Consistent decisions on identical or very similar questions should be expected from a standing Appellate Body composed of trade professionals. While international law does not follow stare decisis, the legitimacy of tribunals, and the ability of business to plan accordingly is furthered by consistency.
Appleton: While there might be disagreement on US’ criticism of DSF, but there are few comments that I would like to make along with my question. Despite having time frames set in the agreement, when we look at the number of cases which are still in "consultation" stage dating back even from the very time when WTO was established, does it to some point raise question as to the intention of member states to actually wanting to resolve a dispute? Also, will it be right to conclude that by not incorporating rule of precedent, the agreement somewhere tried to trade predictability for punctuality, but ultimately achieved none?

1) A large number of older disputes that are listed as still being in consultations have been resolved, one way or the other, between the parties. They should not necessarily be viewed as alive.

2) I do not see the relationship between stare decisis and punctuality. If anything, consistency with prior decisions speeds up the decision-making process – less reasoning, research and thought is required to address a question that has already been addressed.

Linscott: My question is on the point of AB’s existential crisis. How far do you think using articles XXII and XXIII of GATT, which were previously used to resolve disputes between parties, can come to rescue of states in absence of AB?

(I generally defer to Arthur on this.) For now, certain WTO Members are taking matters into their own hands by getting creative and invoking Article 25 of the DSU. A group of these Members, led by the European Union, have established an interim system for hearing appeals of cases between individual Members in this group. I expect the number of WTO Members signed up to this interim arrangement will grow over time, assuming the crisis for the AB continues. It appears that for cases involving the United States, the default for now will be that panel reports are not appealed and not adopted by the DSB. This is similar to the situation that existed in the GATT before the creation of the WTO, and perhaps that is the longer-term goal of the current Trump Administration.

Appleton: I agree with Mark. I would only add that the international trade community would lose greatly if we returned to the pre-WTO system where the losing party could block adoption of a panel report.

GSP

Question to the Panel

How does the factum of U.S.A and many other countries excluding India from 'Developing country list' affect India in its pending Appeals and also the waivers and privileges granted to Developing country in future?

ANSWERS

It is important to understand that the recent U.S. withdrawal of GSP benefits from India does not affect India’s entitlement to the favourable treatment given to developing countries under the WTO rules. The GSP programme is authorised by the GATT/WTO “Enabling Clause” which allows (but does not require) developed country Members to grant tariff preferences (that would otherwise be contrary to the Most Favoured Nation principle) to developing countries. Members are given a good deal of flexibility in their operation of GSP, and the United States denies benefits to countries for a variety of reasons. The United States withdrew benefits from India because of” its failure to provide the United States with assurances that it will provide equitable and reasonable access to its markets in numerous sectors”.

The status of WTO Members as developed or developing countries with respect to the WTO Agreements is determined exclusively by the Member itself, and not by other Members, singly or as a whole. There is no
provision for “graduating” Members from developing to developed, with the result that countries like South Korea are still technically classified as “developing”.

Questions to Individual Panellists

**Linscott:** My question is to Mr. Mark Linscott: United States Trade Representative (US TR) has come out with a determination that India will no longer be considered as a developing country, and accordingly the de minimums level for Indian exports is reduced from 2% to 1% ad valorem. The parameters for deciding the developing or developed status of a country has been devised by USA on purely their own prerogative. What do you have to say? Won’t it be difficult or rather futile for India to defend such actions knowing that they are fully dependent on discretion of the USA?

First, I just want to clarify that this action related to countervailing duty cases is different from determinations under the U.S. GSP program, although they might be viewed as indirectly related. In U.S. law, each has separate statutory authority. There should be no doubt that India is a developing country. The larger question that the United States seems to be addressing is regarding the self-selection approach for developing country status in the WTO, which frankly is a problem, at least in theory. That said, India has not yielded its right to secure its benefits through WTO dispute settlement, setting aside the current situation with respect to the non-operational status of the AB.

**Linscott:** You mention “GSP review” and the US-India bilateral negotiations pursuant to that. It was interesting that U.S. denial of India’s “beneficiary developing country” status under GSP, was not because India was not a developing country, but because India did not offer the U.S. “reciprocal market access”. Does the U.S. simply want market access in the sectors of interest to it, to restore India’s GSP status?

It is an interesting question. There is a set of criteria in the U.S. GSP statute for designating beneficiary countries, and one of those relates to equitable and reasonable market access for U.S. exports of goods. There may be questions of whether this is a valid criterion under a WTO Member’s GSP program, but this would have to be decided through dispute settlement on whether the U.S. program is non-discriminatory. It should be noted that the United States could change its GSP program to alter the criterion for developing country status to include share of world trade. Canada did this several years ago and graduated India from its GSP program. I remain hopeful, however, that a bilateral agreement will soon be struck between the United States and India, and it will include restoration of India’s GSP benefits.

**Linscott:** Mr. Mark mentioned that the approach to new issues has to change from ‘developed Vs developing’ narrative. India’s positions on a number of issues like Investment Facilitation, fisheries, e-commerce has been rooted (to some extent) in this Developed v Developing narrative. Could you tell us a bit more on how you think this approach should change in the interest of achieving progress on these issues.

Funny enough, neither India nor the United States are part of the negotiations on investment facilitation. Frankly, a better approach to negotiating new multilateral agreements is the one adopted in the Trade Facilitation Agreement (TFA). That agreement allows plenty of flexibility for individual developing countries to delay implementation of provisions and also to receive capacity building assistance for eventually implementing them. This approach is customized to the individual needs of each developing country. Another approach is through plurilateral negotiations. Here an individual developing country can choose whether or not it wants to participate. There may be negotiated provisions in these eventual agreements to meet developing country needs, but again the TFA approach is the best one. There are a number of developing countries participating in the plurilateral negotiations on E-commerce, and I think it is unfortunate that India excluded itself from that negotiation.
Linscott: Hypothetically, how successful can quid-pro-quo means such as a consortium of G20 and OPEC nations (e.g. Mexico, Indonesia, Turkey et. al.) voluntarily giving up their S&DT benefits in getting US to the table to reconsider its stance on the AB? (The pretext here is that 1) the US has time and again expressed concerns about economies unduly getting such benefits. 2) Countries such as Brazil and South Korea have given up some of their S&DT benefits in 2019). Can more of such voluntary acts serve as an incentive for the US to reconsider the AB stance as a political bargain?

My view is that the most likely reform to S&DT in the WTO will combine voluntary decisions of individual Members to graduate themselves and approaches in future negotiations similar to what was done in the TFA, which involved customized treatment to meet the specific needs of individual developing countries. However, I think it is an interesting proposition that the current Trump Administration might consider some trade-off between reform in the AB and in S&DT. I would not be shocked if that could be the case, although I have heard no rumours of that.

FOREIGN INVESTMENT

There has been an FDI policy change in India to address the possibility of China have an increased amount of control over the stocks in the economy. Is there a possibility of WTO to intervene with the conflict of interest between China and India due to this change in policy? Can WTO interfere with the economic responsibility claim made by India towards China at ICJ?

Rajput: The WTO would not be intervening on its own volition; it would depend on if China decides to commence proceedings against India for potential violations of the TRIMs Agreement. It would be a challenge to prove those breaches and furthermore India would have defence of General Exceptions under GATT Article XX. There is no way that China can take India to the ICJ because there is no basis to claim jurisdiction of the ICJ.

In the last few years, there has been a trend towards increased scrutiny of foreign investment primarily focused on addressing national security concerns. However, it now seems that some countries are using foreign investment screening to protect wider economic and social concerns triggered by COVID-19. At first, this approach seemed to be limited to Europe as it was the epicentre of the global pandemic. However, as the virus continues to spread, other countries such as Australia, are beginning to take similar measures. Last week India tweaked its FDI policy to make it mandatory for all investments from China, and six other countries with which India shares a land border, to be routed through the government channel. Beijing has reacted strongly saying that such barriers directed only at a few nations violates WTO’s principle of non-discrimination. Can we consider this as a potential turn towards a more protectionist approach to FDI or is this trend temporary?

Rajput: FDI is a tool and not an outcome. The outcome is mutual cooperation and development of the countries, especially the recipients of FDI. FDI Policy is always based on a costs-benefits analysis. In an emergency situation like it is only natural for States to undertake measures to protect domestic industries. Added to the fact is the security concern arising from the fact that most of the Chinese companies have government involvement. One could expect protectionist measures to continue or rather expedited due to COVID 19.

I have a follow up question: You said that a problem with ad-hoc arbitrations under FTAs is absence of consistency in cases. Going by the common understanding of legal status of cases as a source in international law, why the emphasis on consistency?

Rajput: No adjudicative process can afford to be inconsistent. The users of international adjudication want consistency. One of the criticisms of investor State arbitration is that the jurisprudence is not consistent.
That is one of the reasons for mooting the idea of a multilateral court on investment protection by the EU. Nobody wants a situation where every tribunal decides as per its whims and renders inconsistent decisions.

GENERAL

Questions to the Panel

Your view on block chain technology and more specifically on cryptocurrencies on WTO.

ANSWERS

Appleton: I do not see this as a WTO matter at the moment.

As you see in India, we do not have any specific law on trade secrets so how you look upon that?

Rajput: I am not really an expert on the law of trade secrets. All I can say is that all depends on how the domestic industry persuades a government to have such a legislation. That would in turn depend on the share of the Indian industries that finds such a law beneficial.

As I understand, the Ministerial Conference of the WTO which was to take place in Kazakhstan has now been postponed. Will the issues to be addressed now relate to resolving past trade issues or would it focus more on the problems caused by the Pandemic.

Linscott: This has been answered above.

It's important to find common areas of interest - services is an obvious one, and frankly, e-commerce more specifically should be as well. This doesn’t mean that there should not be specific provisions or phase-ins for developing countries based on need. The Trade Facilitation Agreement is an excellent example of that.

The TFA is the first multilateral trade agreement (1) to allow developing country Members to decide their own timetables for compliance with the various obligations, and (2) to condition compliance on the receipt of adequate technical assistance. Future multilateral agreements might well follow the same approach, though as we have said, the likelihood of a multilateral agreement in the foreseeable future is remote.

Why are many countries are going towards bilateralism or tri-literalism for trade rather than Multilateralism, how does it affect an organization like WTO?

Many countries have moved towards regional trade agreements as the result of the inability of the WTO (Doha) to produce a multilateral agreement, on the theory that some trade liberalization is better than none. Also, RTAs allow their members to liberalize trade among themselves faster and more broadly than the multilateral (WTO) system. Article XXIV of the GATT, which sets out the conditions that govern regional trade agreements, requires that tariffs be removed on “substantially all” trade, usually within ten years. Also, FTAs often cover a wider range of activity than multilateral trade agreements, such as investment, labour rights, and environmental issues.

Questions to Individual Panellists

Rajput: Many observers have attributed the inability of WTO members to collectively reach compromise over new rules and trade liberalization due to differing priorities for reforms and market opening among developed countries and emerging markets. The question is to what extent are emerging markets such as Brazil, China, India, and Russia,
with significant economic clout, willing to take on greater leadership at WTO? How should they advance the global trade agenda, and facilitate compromise among competing interests?

The BRICS countries appear to be seeking to have common positions on various fora, sometimes effectively and sometimes not so effectively. In their joint declarations BRICS leaders have emphasized the need for making progress. They can promote agenda provided they have common positions on issues. At the moment, there is no specificity in their common agenda except suggestions to pursue multilateral negotiations. They are yet to propose anything noteworthy.

Rajput: How is Indian trade affected by US sanctions on Russia and Iran and how WTO monitors such sanctions?

India is out of the sanctions regime, so it has a lot to benefit. It could have done more, especially looking at the extent to which China has engaged with them after being kept out of the sanctions like India. The sanctions regime is not really for the WTO, it is a political tool adopted by individual States. Nevertheless, they have to be justified within the WTO framework if challenged by another State. Sanctions, by their very nature may amount to breach of MFN, NT, quantitative restrictions etc. Unless, the State imposing sanctions can justify its measures based on national security exception under GATT XXI, which is not a self-judging clause as recently interpreted in the Ukraine-Russia Panel Report.

Rajput: One point of TWAIL scholarship, which has always been critical about the functioning of WTO calling it a neo-imperial instrument safeguarding the right of global north, can we say in the current course of time, the tables have turned as most of the developing countries have started asserting themselves and benefitted more from this institution compared to the developed countries. The very existence of WTO has assured that the comparative advantage that these developing countries have are put to maximum use. Does this render the entire TWAIL critique of the WTO system irrelevant?

Yes, it makes the TWAIL critique irrelevant. Times have changed now.

Linscott: Hypothetically, how successful can quid-pro-quo means such as a consortium of G20 and OPEC nations (E.g. Mexico, Indonesia, Turkey et. al.) voluntarily giving up their S&DT benefits in getting US to the table to reconsider its stance on the AB? (The pretext here is that 1) the US has time and again expressed concerns about economies unduly getting such benefits. 2) Countries such as Brazil and South Korea have given up some of their S&DT benefits in 2019). Can more of such voluntary acts serve as an incentive for the US to reconsider the AB stance as a political bargain?

This has been answered above.

Macrory: What are some of the specific reforms which can be undertaken to strengthen the monitoring function of the WTO to promote transparency, accountability and predictability?

There is a good deal of concern at present about the failure of some WTO Members to comply with their obligations to notify the WTO of certain measures, such as quantitative restrictions and certain types of subsidy. This is particularly a problem with developing countries, some of which lack the resources to carry out their notification obligations. It has been suggested that delinquent Members should be denied certain rights, such as the right to file cases but this would never pass muster under the consensus principle. Some of the WTO agreements, such as the SCM Agreement, provide for “reverse notification”, i.e. a Member can notify the WTO of a subsidy granted by another Member. The United States recently notified the WTO of a subsidy allegedly provided by India. We may see more of this in the future.

Linscott: There have been several examples of reverse notifications – I think China under the SCM and India under the Agriculture Agreement for domestic support programs.