Outcome of the 2022 WTO ministerial conference: Is the glass half-empty or half-full?

From 12 to 17 June 2022, the World Trade Organization (WTO) held an extended 12th ministerial conference (MC12), after it had been postponed twice owing to the pandemic. Although the outcome of the MC12 was the result of hard-won compromises, it covers a wide range of key agenda items and may be said to provide new momentum for the WTO, which critics have often portrayed as moribund. The WTO has proved its centrality for crafting multilateral solutions for global challenges, notably against the backdrop of rising geopolitical tensions.

Background

For many years, the strictly consensus-based WTO of 164 members has struggled with major challenges in the three pillars of its mandate: the negotiating, monitoring and adjudication functions. Since its creation in 1995, negotiations at the WTO have resulted in only very few multilateral agreements – the most recent being the 2013 Trade Facilitation Agreement – while some major plurilateral talks, such as those on the trade in services agreement (TiSA) and the environmental goods agreement (EGA), have become gridlocked. MC12 was therefore a litmus test for the WTO's relevance when it comes to delivering on a broad range of issues, including health, food security, an e-commerce moratorium, fisheries subsidies and WTO reform.

A partial waiver of patent protection under WTO law to increase vaccine equity

Despite multilateral efforts, including the COVAX initiative, to make COVID-19 vaccines more widely available in developing countries, the vaccination rate gap between industrial and developing countries has remained significant and vaccine equity is still far off. India and South Africa submitted a proposal to the WTO in 2020 and 2021 for a temporary waiver of intellectual property (IP) rights for vaccines, medicines, diagnostics, therapeutics, personal protective equipment, and health technologies under the agreement on trade-related aspects of intellectual property rights (TRIPS). After the Biden administration in 2021 reversed long-standing United States (US) opposition to the weakening of IP rights and supported temporary TRIPS flexibilities, the EU aligned its position, and engaged with all three countries on a ‘Quad’ proposal, excluding from the waiver developing countries that exported more than 10% of world vaccine doses in 2021. The provision was modified in the final decision on the partial TRIPS waiver with a view to making declarations by countries not availing themselves of the waiver (e.g. China) legally binding. The scope of the waiver, which is valid for five years, is limited to patents, so excludes trade secrets, copyrights and industrial designs. It authorises eligible countries to issue compulsory licences under domestic law regarding the subject matter of patents without the consent of the patent holder, including through executive action, without this being considered as a violation of the TRIPS agreement. The final decision authorises countries to waive the TRIPS requirement to use compulsory licences predominantly for the domestic market, and thus enables exports. To the disappointment of advocacy groups, the agreement postpones a decision on the waiver's extension to therapeutics and diagnostics until 6 months after MC12. Pharmaceutical companies by contrast have opposed the waiver in the light of its alleged implications for the innovation and investment in research and development that will be essential in fighting COVID-19.

Few substantive rules agreed on export restrictions to ease rising food insecurity

Since Russia's unprovoked invasion of Ukraine, a string of countries have imposed export restrictions, affecting over 16% of global agricultural trade on a kilocalorie basis. Russia and Ukraine account for 12% of global agricultural exports. Tackling export restrictions and public stockholding for food security were controversial items on the MC12 agenda. The MC12 statement on the emergency response to food insecurity reflects an agreement on the exercise of restraint in introducing export restrictions, but does not ban them. It encourages members to release surplus stock to international markets, but a decision on a
permanent solution for public stockholding programmes was deferred to MC13, scheduled for December 2023. India, a large user of public stockholding programmes had requested that in general they be permanently exempted from WTO rules on trade distorting farm subsidies. The MC12 decided that World Food Programme humanitarian purchases should be exempt from export restrictions, but did not agree on a roadmap for future agricultural negotiations, including on disciplines on trade-distorting subsidies.

Another extension of the e-commerce moratorium to boost digital trade
Since 1998, WTO members have agreed not to impose customs duties on electronic transmissions. Some developing countries, including India and South Africa, are opposed to the moratorium, which, they argue, limits their policy space to generate income from customs duties on electronic transmissions. Nonetheless, at MC12, WTO members once again agreed to extend the moratorium until MC13, a vital outcome for the digital economy, for small and medium-sized enterprises (SMEs) and start-ups. WTO members also agreed to pursue their work under the work programme on e-commerce.

A watered-down fisheries subsidies deal, with gaps to be filled at MC13
After more than 20 years of WTO negotiations, MC12 reached a partial multilateral agreement on harmful fisheries subsidies in support of UN Sustainable Development Goal 14.6. The deal, however, leaves important issues unaddressed. Its Article 3 includes a prohibition on subsidies contributing to illegal, unregulated and unreported (IUU) fishing as well as related transparency provisions. Article 4 contains a prohibition on subsidies for overfished stocks except for ‘rebuilding the stock to a biologically sustainable level’. Both articles provide for a 2-year transition period, during which subsidies granted or maintained by developing countries, including least developed countries (LDCs), up to and within the exclusive economic zone (EEZ) are exempt from these prohibitions and from dispute settlement. The final text of Article 5 is less ambitious than originally expected, as it is devoid of disciplines on subsidies contributing to overcapacity and overfishing. WTO members proved unable to agree on three related, highly controversial, special and differential treatment (SDT) provisions for developing countries, that require further negotiations at MC13: a transition period, a de minimis exemption for those whose global marine capture share is under 0.8%, and a carve-out for artisanal and subsistence fishing within a certain distance from a country’s coast. Article 5 now merely contains a prohibition on subsidies for fishing on the unregulated high seas, i.e. the most vulnerable areas that lack an established and coordinated fisheries management regime.

Commitments to WTO reform, including an Appellate Body revival by 2024
In the MC12 outcome document, rather than in a binding decision, WTO members agreed to ‘commit to work towards necessary reform of the WTO ... to improve all its functions’. Reflecting a greater sense of urgency regarding the paralysed Appellate Body, they committed ‘to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024’. Members reaffirmed SDT provisions for developing country members and LDCs as an integral part of the WTO and its agreements, noting, however, that SDT in WTO agreements should be precise, effective and operational.

International reactions
US Trade Representative Katherine Tai issued topic-specific press releases, one highlighting the importance of the disciplines enshrined in the WTO fisheries subsidies deal for sustainability and for the fight against forced labour on fishing vessels. Executive Vice-President of the Commission and Commissioner for Trade, Valdis Dombrovskis, emphasised the global significance of the deals struck despite unprecedented challenges. Indian Commerce Minister Piyush Goyal focused on India’s achievements at the MC12 and its new role as WTO deal broker rather than deal taker, stating that India had ‘shifted the negotiation tide from complete failure, doom, and gloom to optimism, enthusiasm, and consensus-based decision-making’.

In its 2021 resolution, the European Parliament recognised that ‘trade facilitation and disciplines on export restrictions, the expansion of production, including through pledges by vaccine producers and developers, and the facilitation of TRIPS Agreement flexibilities relating to compulsory licences all play a role in increasing global vaccination’. It expressed its position on WTO reform in resolutions adopted in 2018, 2019 and 2021. At the start of the MC12, a delegation from Parliament’s international trade committee (INTA) took part in the Steering Committee of the Parliamentary Conference on the WTO, which issued a statement of hopes for the outcome. In his press release, INTA chair Bernd Lange (S&D, Germany) stated that the MC12 deals proved that ‘multilateralism is still alive’. 

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