



General Discussion on the Challenges and Direction of WTO Reform

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General Discussion on the Challenges and Direction of WTO Reform

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Summary

Since 2018, a number of recommendations concerning WTO reform have emerged from like-minded countries, meeting bodies, and individual countries. These recommendations can largely be categorized into those related to revamping the WTO's rules and those related to improving the WTO's organization and processes. Many recommendations share the same views, but at the same time many more contain opposing views depending on the recommendation. Furthermore, most emerging countries such as India and Brazil have not published their recommendations on WTO reforms. It appears more time will be needed before discussions on WTO reform converge and are settled by the WTO General Council.

Section 1 - Introduction

Momentum for WTO reform has been increasing gradually. The WTO's function as a negotiating body for trade liberalization and rulemaking has been paralyzed for some time. At the end of 2019, the Appellate Body for resolving disputes between Members stopped functioning altogether. As the crisis at the WTO grows, major developed countries and other like-minded countries have released recommendations toward WTO reform, and discussions are now underway on these recommendations. This chapter will examine the crisis at the WTO at the heart of calls for WTO reform, and then look back on the recommendations made on WTO reform as well as discussions that have taken place on these recommendations. Next, it will organize the main points of discussion and the stance of each country. Finally, it will consider future developments of WTO reform.

Section 2 - The WTO's Crisis Underpinning Discussions

The reason for growing momentum toward WTO reform is the crisis faced by multilateral free trade system under WTO rules.

The WTO was established in 1995 as a cornerstone of a multilateral free trade system replacing the General Agreement on Tariffs and Trade (GATT). The WTO agreements stipulated rules on broad reaching trade liberalization covering not only the trade in goods, but also services and intellectual property rights. Whether Members abide by the rules or not is monitored through committees or councils in charge of these rules. Countries asserting the nullification or impairment of benefits from trade liberalization due to rules violations can request rectification by using the WTO's dispute settlement procedure. Therefore, the panel process, considered the first instance, and the Appellate Body procedure, considered the second instance, were established. Multilateral trade negotiations involving all Members is supposed to be held for further trade liberalization and rulemaking. Furthermore, a Trade Policy Review Mechanism was established to regularly review the trade policies of Members (not just whether they conform to the WTO agreements).

Several elements for building a multilateral free trade system based on the WTO's rules are no longer functioning.

First, the Doha Development Agenda that commenced in 2001 faced difficulties, and nearly no accomplishments can be cited, with the exception of the Trade Facilitation Agreement of 2013 and the agreement to eliminate agricultural export subsidies of 2015. Developed countries have proposed the start of new negotiations, saying the Doha Development Agenda ended in failure, but developing countries have opposed these proposals, asserting that they will not allow new negotiations to begin as long as some agreement is not in place regarding the issues remaining from the Doha Development Agenda. Therefore, an agreement of Members has yet to be obtained regarding the start of new multilateral trade negotiations.

Second, since June 2017, using various forms of criticism toward the activities of the dispute settlement Appellate Body as a basis, the United States has blocked the appointment of successors once the term of office of Appellate Body members ended (refer to Chapter 6 of this report). As a result, six of the seven seats on the Appellate Body remain unfilled in December 2019. The Appellate Body process cannot function because it takes three members to review a case

Third, since 2018, the Trump administration has implemented unilateral increases in tariffs, including additional tariffs on steel and aluminum products based on Article 232 of the 1962 Trade Expansion Act, and sanctions on China based on Article 301 of the 1974 Trade Act. These measures, while based on WTO rules in form,¹ attempt to resolve a problem through self-remedy in place of resolving the problem through the WTO and its dispute settlement procedure. This is a deviation from WTO rules that is causing the hallowing out of the WTO dispute settlement procedure.

Fourth, the mechanism for monitoring fulfilment of WTO agreements by Members is not fully functioning. For example, Article 25 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) requires Members to notify subsidies, but some Members are not fully following this notification obligation. As a result, the transparency of Members' subsidies has not been guaranteed. In particular, China's subsidies to its steel industry have created surplus capacity in the steel industry, which has led to growing criticism by developed countries and other steel producing countries.² China is, however, not fulfilling its notification obligation regarding subsidies to the steel industry.

Among the areas of the WTO's paralysis pointed out above, some have been continuing for more than 10 years, such as the difficulty of the Doha Development Agenda and failure of the monitoring mechanism on fulfilment of WTO agreements. In contrast, the crisis of the Appellate Body and the unilateral tariff increases by the Trump administration are developments that have occurred in the past two to three years. There is growing awareness that these have combined together in recent years to cause a crisis for the WTO, increasing momentum for WTO reform.

Section 3 - Main Proposals for WTO Reform

Momentum for WTO reform has grown since the end of 2017. There have been a number of countries and groups that have published proposals for WTO reform. Below, this paper will examine the proposals of major like-minded countries.

1. Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union

(1) Background

The first to take action toward WTO reform was the world's major developed countries. At the 11th WTO Ministerial Conference held from December 11 to 13, 2017, a consensus was not reached among Members regarding the Doha Development Agenda and other main topics of discussion, as the conference ended without the adoption of a ministerial level statement. However, on December 12 during the session, the trade ministers of Japan, the EU and the United States met and agreed to work together to take action for securing the harmonization of global competitive conditions, releasing a joint statement.³ In addition, the trade ministers shared their views on the WTO, and agreed to continue dialogue at trilateral meetings in the future. These meetings would be held on several more occasions thereafter to gradually crystallize recommendations for WTO reform.

(2) Second Meeting

The second meeting was held in Brussels on March 10, 2018. The Joint Readout of Discussion⁴ stated the following actions will be taken to respond to the problem of market distortion or excessive capacity by a third country (although the country was not stated, it points to China). First, define a foundation for strengthening rules on industrial subsidies; second, enforce existing rules by handling ongoing and new disputes jointly at the WTO; and third, cooperate in related WTO committees in order to improve the effectiveness and efficiency of the WTO's monitoring mechanism, including

strengthening the notification obligation. The joint summary readout of discussion reaffirmed the commitment to the Joint Statement⁵ on E-commerce at the 11th WTO Ministerial Conference, in order to strengthen the WTO's rulemaking function.

(3) Third Meeting

The third trilateral meeting of trade ministers was held in Paris on May 31, 2018. The Joint Statement⁶ for the meeting adopted three annexes. Annex one is a scoping paper concerning subsidies. This paper states a shared view of clarifying the rules for improvement in order to ensure developing countries are unable to skirt the application of existing WTO rules concerning industrial subsidies. In addition, in future negotiations, it says efforts will be made to (i) improve transparency; (ii) take a more positive response to the problems of public bodies and SOEs; and (iii) achieve more effective rules on subsidies. Annex two is a joint statement on technology transfer policy and practices. It takes up the practice of forced technology transfers of companies doing business in China, which is viewed as problematic by the United States. In order to find an effective method to stop harmful forced technology transfer policy and practices, the annex agrees on joint actions, including entrusting them to the WTO's dispute settlement procedure, in case it is appropriate. Annex three is a joint statement on market-oriented conditions. It presents seven indicators for defining the concept of "market-oriented," which is a benchmark for domestic price setting in trade remedy actions (anti-dumping countervailing duties).

(4) Fourth Meeting

The trilateral meeting of trade ministers was held for the fourth time in New York on September 25, 2018. The Joint Statement⁷ contained the Statement on Concerns with Non-Market-Oriented Policies and Practices of Third Countries, Statement on Industrial Subsidies and State Owned Enterprises, and Statement on Concerns with Forced Technology Transfer Policies and Practices of Third Countries, and Statement on Digital Trade and E-commerce, in addition to the Statement on Discussions on WTO Reform. A

summary of the statements on WTO reform is presented below.

1. WTO monitoring and surveillance mechanisms

An agreement was reached for a joint proposal to be submitted to the WTO Council for Trade in Goods (CTG) regarding transparency and notification.

2. Promotion of strengthened committee activities

Administrators were requested to engage in discussions on the possibility of a joint proposal focused on promoting best practices and increasing efficiency.

3. Definition of developing countries

It pointed out the problem that the status of developing country is self-reported and the scope of definition of developing country is excessively broad. It pressed advanced WTO Members claiming developing country status to undertake full commitments in ongoing and future WTO negotiations

(5) Joint Proposal on Notification and Transparency

The joint proposal to the WTO CTG mentioned in the above statement was made by Japan, the United States, European Union, Argentina and Costa Rica on November 1, 2018. A summary of this joint proposal⁸ called “Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements” is presented below (numbers correspond to paragraph).

1. WTO agreements related to trade in goods that require regular annual reports

It confirms that the following agreements contain a notification obligation.

Agriculture Agreement; AD Agreement; Agreement on Subsidies and Countervailing Measures; Safeguard Agreement; Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994; Import Licensing Agreement; Rules of Origin Agreement; Agreement on Preshipment Inspection; Decision on Notification Procedures for Quantitative Restrictions (G/L/59/Rev.1); Agreement on Trade Related Investment Measures; SPS Agreement; TBT Agreement

2. Evaluation of fulfillment of notification requirement

It asks the Working Group on Notification Obligation and Procedure of the CTG to evaluate compliance of notification for agreements under 1, report annually, implement ways of increasing compliance, and request recommendations for increasing compliance.

3. Recommendation for improving compliance of notification obligation

It requests the Working Group on Notification Obligation and Procedure of the CTG to compile a report of recommendations on improving compliance.

4. Notification obligation for agricultural agreements

It requests the Agriculture Committee to update and review the notification obligation of agricultural agreements and documents.

5. Technical cooperation concerning notification

It instructs the Working Group on Notification Obligation and Procedure of the CTG to update the handbook on notification in cooperation with the secretariat and submit it to the CTG.

6. Review and reporting of trade policy

It requests the Trade Policy Review Body to include reports of compliance status of notification obligation for various agreements referred to in 1 above in the trade policy review report.

7. Counter notification

It recommends that Members engage in counter notification for notifications of various agreements of 1.

8. Procedures for postponing notification requirement

Regarding agricultural agreements, it calls for explanation of the reason for postponement within two years from the postponement along with planned notifications in the future and notification to every extent possible.

For other agreements, it calls for explanation in the subsequent year after the postponement and notification to every extent possible.

9. Developing country with difficulty of fulfilling notification obligation

It recommends developing countries with difficulty fulfilling notification obligation request assistance from the secretariat.

10. Reporting of failure to fulfill notification requirement

It calls on developing countries that cannot provide notification before the deadline of 8 to report their failure to fulfill obligation to the relevant committee and the Working Group on Notification Obligation and Procedure of the CTG, and report on necessary capacity building.

11. Notification by secretariat

Developing countries that cannot provide notification before the deadline of 8 can seek capacity building from the secretariat and if the country agrees, the secretariat can make notification in its place.

12. Sanctions in case of failure to fulfill notification obligation

(a) In case of failure to fulfill for more than one year but less than 2 years from the deadline of 8

- (i) Unable to be appointed as chairperson to WTO institutions
- (ii) Counterparty will not have to respond to questions by the country under the trade policy review mechanism
- (iii) Additional 5% contribution to the WTO budget
- (iv) Secretariat will report annually to the CTG about the status of the country's notifications
- (v) Subject to reporting at the meeting of the General Council

(b) In case of failure to fulfill for more than two years but less than 3 years from the deadline of 8

- (i) Designated as Inactive Member
- (ii) During official meetings of the WTO, will be convened after members but before observers
- (iii) Called⁹ Inactive Member when participating in the meeting of the General Council

13. Notification of sanctions

The Secretary-General will notify countries subject to sanctions at the start of every year. The sanctions will be lifted in case the country fulfills its notification obligation.

14. Notification of fisheries subsidies

It orders a review of strengthened notification mechanisms for fisheries subsidies for rules negotiating groups (of the Doha Development Agenda).

(6) Fifth Meeting

The fifth trilateral meeting of the Trade Ministers of the United States, Japan, and the European Union was held in Washington, D.C. on January 9, 2019. The Joint Statement¹⁰ contained statements about non-market-oriented policies and measures by third countries (joint work for increasing information sharing and maintaining effectiveness of existing WTO rulebook), industrial subsidies (ordered administrators to complete work on three fronts in written form by spring), forced technology transfers (cooperate in terms of enforcement, new rules establishment, and investment and export control for national security, and take stock of cooperation by spring), E-commerce (confirmed support toward start of WTO negotiations in a timely manner related to trade aspects of E-commerce), in addition to a statement on WTO reform. A summary is presented below.

1. Increase involvement of other trade partner countries in the proposal on notification and transparency submitted to the WTO CTG in November 2018.
2. Confirm agreement on work aimed at strengthening activities of committees.
3. Once again call on advanced WTO Members claiming status as developing country to accept complete responsibility in current and future WTO negotiations.

(7) Joint Proposal on Notification and Transparency (Revised Version)

On April 1, 2019, Japan, the United States and the European Union submitted a revised version of the Joint Statement on Notification and Transparency¹¹ submitted the previous year in November to the CTG.¹² Members that participated in the proposal increased by five compared to the previous version at nine countries and regions. The

main changes in the revised version include more detailed mention concerning the capacity building assistance of the secretariat for countries with difficulty of notification and postponing notification, and slightly eased penalties for postponement of notification. Specifically, if a country fails to fulfill its obligation more than two years from the notification deadline, the joint proposal calls such a country “an inactive Member,” but the revised version refers to it as “a Member with notification delay.” Table 1 is a comparison of the joint proposal and the revised proposal (numbers in the table correspond to paragraph number).

Table 1 Comparison Table of Joint Proposal on Notifications and Transparency and Revised Version

Joint proposal		Revised version	
1	Subject agreements	1	Subject agreements
2	Evaluation of notification		
3	Recommendation of notification improvement: talks on technical assistance	2	Recommendation of notification improvement: talks on technical assistance
4	Deliberation and recommendation on notification status of agricultural agreements	7	Special provisions on notification deadline of agricultural agreements
5	Technical cooperation handbook for notification	3	Technical cooperation handbook for notification
6	Indicate notification status in TPR	4	Indicate notification status in TPR
7	Counter notification	5	Counter notification
8	Notification deadline	7	Notification deadline for agricultural agreements
9	Request of capacity building for countries with difficulty for notification	10	Request of capacity building for countries with difficulty for notification
10	Reporting of notification postponement	8	Reporting of notification postponement
11	Capacity building provided by secretariat for countries postponing notification	9	Capacity building provided by secretariat for countries postponing notification
12	Penalties	6, 11	Penalties
13	Reporting of penalties by Director-General	12	Notification of penalties by Director-General
14	Review of notification of fisheries subsidies		

(Source: Prepared by the author)

(8) Sixth Meeting

The sixth trilateral meeting of the Trade Ministers of the United States, Japan, and the European Union was held in Paris on May 23, 2019. The Joint Statement¹³ stated concerns and responses to the State Owned Enterprises (SOEs) policy of third countries (sharing of concerns about orders whereby SOEs are developed into national champions that distort market-oriented trade, and SOEs seek to control global markets, sharing of concerns about non-market benefits of SOEs and their non-market domestic activities, effective methods for dealing with these concerns, and commitment to deepen discussions on creating enforcement and rules for tackling these problems), in addition to the conventional non-market-oriented policies and practices of third countries (stock taking of increasing information sharing, identification of additional standards for showing the presence of market-oriented conditions, and reaffirmation that market-oriented conditions are the basis of the fair and mutually beneficial international trade system, and that people and corporate activities take place under market-oriented conditions, and confirmation of commitment to jointly move ahead with work for maintaining the effectiveness of existing WTO rulebook).

In addition, regarding industrial subsidies, the parties welcomed improving transparency, identification of harmful subsidies subject to stricter discipline, and progress in discussions on a text basis from before securing usable and appropriate benchmarks. In order to begin negotiations on strengthening rules on SOEs and industrial subsidies, administrators were ordered to complete work of the three parties on a text basis regarding discussions on these and others. As for forced technology transfers, confirmation was made of cooperation in enforcement, new rules establishment, and investment control and export control for national security, and stock was taken of cooperative actions implemented to date. The joint statement also mentioned WTO reform. A summary is presented below.

1. Lobbying of other WTO members will be stepped up to obtain early agreement on the revised version¹⁴ of the Joint Statement on Notification and Transparency submitted in April.

2. Confirm efforts will be made aimed at strengthening activities of general committees.
3. Welcome current WTO discussions on special and differential treatment in current and future negotiations.
4. Reaffirm request to advanced WTO Members claiming status as developing country to accept complete responsibility in current and future WTO negotiations.

(9) Seventh Meeting

The seventh trilateral meeting of trade ministers was held in Washington D.C. on January 14, 2020. The joint statement contained an agreement on measures for strengthening the existing WTO rulebook on industrial subsidies. A summary of this agreement is presented below.

1. Add the following to the list of prohibited subsidies in Article 3.1 of the ASCM
 - a. unlimited guarantees;
 - b. subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan;
 - c. subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity;
 - d. certain direct forgiveness of debt.

2. Reversal of burden of proof for “serious prejudice” (Article 5 and Article 6 of the ASCM) against subsidies below excluding those in 1
 - a. Excessively large subsidies
 - b. Subsidies that prop up uncompetitive firms and prevent their exit from the market
 - c. Subsidies creating massive manufacturing capacity, without private commercial participation
 - d. Subsidies that lower input prices domestically in comparison to prices of the same goods when destined for export

The above are examples and the agreement is not necessarily limited to such. In case the

presence of these subsidies is acknowledged and it cannot be proven that there are no serious negative effects, the subsidizing member must immediately remove the subsidy.

3. An additional case that distorts supply capacity should be therefore added to “serious prejudice” described in Article 6.3 of ASCM. Further, work will continue on a provision defining the threat of serious prejudice.
4. A new strong incentive to notify subsidies properly should be added to Article 25 of ASCM
5. Appropriate benchmarks should be described in case of domestic market distortion in the subsidizing member
6. Continue working on a definition of "public body" on this basis that many subsidies are provided through SOEs (Article 1.1 [a] of ASCM).

On forced technology transfers, the joint statement reaffirmed that when one country engages in forced technology transfer, it deprives other countries of the opportunity to benefit from the fair, voluntary and market-based flow of technology and innovation. There was also a discussion on possible elements of core disciplines that aim to prevent forced technology transfer practices of third countries, and their commitment to effective means to stop harmful forced technology transfer policies and practices, including through export controls, investment review for national security purposes, their respective enforcement tools, and the development of new rules.

Regarding WTO reform, the joint statement strongly recommended increasing WTO Member compliance with existing WTO notification obligations and pressing advanced WTO Members claiming developing country status to undertake full commitments in ongoing and future WTO negotiations.

2. G20

(1) 13th G20 Meeting in Buenos Aires: Leaders' Declaration

The 13th meeting of the Group of 20 (G20) held in Buenos Aires mentioned WTO reform

in Section 27 of the Leaders' Declaration¹⁵ issued on December 1, 2018. It stated the following: *International trade and investment are important engines of growth, productivity, innovation, job creation and development. We recognize the contribution that the multilateral trading system has made to that end. The system is currently falling short of its objectives and there is room for improvement. We therefore support the necessary reform of the WTO to improve its functioning. We will review progress at our next Summit.*

(2) 14th G20 Meeting in Osaka: Leaders' Declaration

The 14th meeting of the G20 held in Osaka mentioned in the Leaders' Declaration¹⁶ of June 29, 2019: We reaffirm our support for the necessary reform of the World Trade Organization (WTO) to improve its functions. We will work constructively with other WTO members, including in the lead up to the 12th WTO Ministerial Conference to be held in June, 2020.

3. EU

(1) Speech by French President Macron (May 30, 2018)

French President Emmanuel Macron mentioned WTO reform during his speech¹⁷ to open the OECD's Annual Ministerial Council Meeting on May 30, 2018 in Paris. President Macron mentioned the WTO as a platform for multilateralism in trade, and pointed out the need for a complete overhaul of today's WTO. He noted combatting unfair trade practices or theft of intellectual property rights in various fields through trade wars in violation of the WTO rules (it refers to the United States) is not the best solution. These should be addressed using the WTO's framework based on the rules. For this reason, WTO reform is needed, he argued.

As specific reform, President Macron first cited the dispute settlement procedure, and in particular improving the Appellate Body procedure, criticizing the United States for blocking the appointment of the Appellate Body members.

As a realistic approach to reform, he advocated that first the United States, EU, China and Japan must reach an agreement, followed by the G20, and furthermore OECD members. Therefore, first, he proposed summarizing the points of improvement by the G20 meeting in Buenos Aires in December 2018. As items that should be updated in the rules, President Macron cited the following themes: market-distorting subsidies, intellectual properties, social rights, and climate protection. Regarding climate protection, he advocated that WTO rules should be updated with a focus on making the environment and sustainability central to trade discipline.

(2) European Commission Concept Paper (September 18, 2018)

The European Commission released a concept paper on WTO modernization on September 18, 2018.¹⁸ The concept paper consists of three sections on rulemaking, WTO notification work and transparency, and dispute settlement procedure. It discusses WTO reform systematically.

First, the proposal concerning rulemaking consists of (1) Proposals for future rulemaking activities in the WTO; (2) Proposals for a new approach to flexibilities in the context of development objectives; and (3) Proposals to strengthen the procedural aspects of the WTO's rulemaking activities. The details are summarized in Table 2.

Table 2 Proposal on Rulemaking of European Commission Concept Paper

1. Subject to future rulemaking
A. Creating rules that rebalance the system and level the playing field
Improve transparency and subsidy notifications
Better capture SOEs
Capture more effectively the most trade-distortive types of subsidies
B. Establishing new rules to address barriers to services and investment, including in the field of forced technology transfer
Need to address market access barriers, discriminatory treatment of foreign investors and behind the border distortions, including as they relate to forced technology transfer and other trade distortive policies
Need to address barriers to digital trade
C. Addressing the sustainability objectives of the global community
Specification and increased mention of matters relevant to the Sustainable Development Goals (SDGs)
2. Proposals for a new approach to flexibilities in the context of development objectives
Graduation
Special and Differential Treatment (SDT) in future agreements
Additional SDT in existing agreements:
3. Proposals to strengthen the procedural aspects of the WTO's rulemaking activities
Multilateral negotiations
Plurilateral negotiations on a MFN basis open for late entry
Increase role of the Secretariat in rulemaking, fulfillment, and monitoring

(Source: Prepared by the author)

The proposal of the European Commission concept paper on WTO notification and transparency consists of four pillars including (1) transparency and notification; (2) increase response obligation; (3) strengthen improvement of rules by committees and councils; and (4) restructuring of committees. The most pages were dedicated to (1) and it includes increase monitoring at the committee level, provide incentives to fulfill notification obligation, penalties for intentionally and repetitively failing to comply,

counter notification and Trade Policy Review Mechanism (TPRM). The details roughly match the joint proposal¹⁹ submitted to the WTO CTG from the aforementioned trilateral meeting of trade ministers.

The proposal of the European Commission concept paper on dispute settlement summarizes the responses following the problems²⁰ submitted in the Trade Policy Agenda March 2018 by the United States. This point is covered in Fukunaga's report (Chapter 6). For this reason, this paper will not examine it further.

(3) Dispute settlement procedure Reform Proposal by the EU and 11 Like-Minded Countries (November 26, 2018)

The EU submitted to the WTO's General Council a proposal on reforms to the dispute settlement procedure on November 26, 2018 together with 11 like-minded countries²¹. The proposal²² is covered in this report in Chapter 6. As such, only a summary of the proposal will be provided here.

1. Handling of cases by outgoing committee members

Revise Article 17.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), adding the outgoing person shall complete the disposition of an appeal in which the oral hearing has already been held during that member's term.

2. Submission deadline of reporting to Appellate Body

Revise Article 17.5 of the DSU, and if a report cannot be submitted by the 60-day deadline from the appeal notice, talks shall be held with the country on the submission date of the report.

3. Interpretation of domestic laws is an issue of fact

Add a footnote to Article 17.7 of the DSU, reaffirming that the interpretation of domestic laws of the disputing country is an issue of fact, and that it is beyond the scope of the decision by the Appellate Body.

4. Unnecessary certification for dispute settlement

Revise Article 17.6 and Article 17.12 of the DSU so the Appellate Body can only review issues of law necessary for the dispute settlement and review the legal interpretation of the panel.

5. The issue of precedent

Add Article 17.15 to the DSU, and create procedures for regular talks between the Appellate Body and WTO members concerning Appellate Body reports.

(4) Proposal on Dispute settlement procedure Reform by the EU, China and India

(November 26, 2018)

The EU submitted an additional proposal on dispute settlement procedure reform together with China and India at the same time as (3) above to the WTO General Council. This was a proposal on the ²³ Appellate Body members and the Appellate Body's secretariat, and contained additional content added on to (3) above. A summary is presented below.

1. The term of office of Appellate Body members shall be increased from six to eighty years. Reappointment shall not be permitted (revision to Article 17.2 of DSU).
2. The number of Appellate Body members will be increased to nine (revision to Article 17.1 of DSU).
3. Appellate Body members shall serve full-time²⁴ (revision to Article 17.3 of the DSU).
4. Staff of the Appellate Body secretariat will be increased²⁵.
5. Appellate Body members will be in charge of cases they were responsible for within two years of their leaving office (revision to Article 17.2 of the DSU).
6. The selection process for the next committee member will begin six to nine months prior to the end of the term of office of an Appellate Body member (revision to Article 17.2 of the DSU).

(5) Joint Proposal on Revisions to WTO Committee Process by the EU and Nine Like-minded Countries (July 8, 2019)

The EU together with nine²⁶ likeminded countries submitted to the WTO General Council a joint proposal on process guidelines for WTO councils and committees handling trade concerns on July 4, 2019. The proposal consists of five items: (1) meeting administration, (2) review of trade concerns at councils and committees, (3) settlement of trade concerns using unofficial meetings, (4) support to developing countries that have presented trade concerns, and (5) scope of applicable councils and committees. It sets out in detail processes for handling trade concerns by the council responsible (TRIPS Council and Council for Trade in Services) and committees (committees established under Article 4 of the WTO Agreement and the Committee of Participants on the Expansion of IT Products).

Regarding trade concerns, the Committee on Sanitary and Phytosanitary Measures (SPS)²⁷ and Committee on Technical Barriers to Trade (TBT)²⁸ have deliberated on multiple cases of specific trade concerns and their achievements in settling disputes are well known. If trade concerns are taken up by a council or committee, it will increase transparency concerning domestic implementation of the WTO agreement by Members and can settle a case prior to escalation to the WTO dispute settlement procedure. The proposal aims to expand this procedure cited as an achievement of the SPS and TBT committees to other councils and committees.

4. Ottawa Ministerial on WTO Reform

(1) Canada's Discussion Paper on Strengthening and Modernizing the WTO (September 21, 2018)

Canada submitted a discussion paper²⁹ on strengthening and modernizing the WTO to the WTO General Council on September 21, 2018. Citing issues with the WTO's three main functions (monitoring, dispute settlement procedure, and modernizing trade rules), the paper proposed comprehensive improvements. Below, a summary of these proposals

is presented.

1. Improve the WTO's monitoring functions

Here, the report cited three areas: (1) improve notification of domestic measures and transparency of domestic measures; (2) enhance deliberations at councils and committees, and strengthen functions of the secretariat supporting them; and (3) improve and strengthen process for specific trade concerns.

2. Strengthen dispute settlement procedure

Here, three items were cited: (1) reduce burden of dispute settlement procedure by applying either self-restraint of rules violation or process outside of dispute settlement procedure (for example, mediation procedure); (2) supplemental dispute settlement procedure based on type of dispute, and facilitation of dispute settlement procedure by introducing remand to promote interaction of panels and Appellate Body; (3) improvement of Appellate Body procedure.

Under (3), the concerns of certain Members (indicating the United States) will have to be acknowledged and solutions thought up that can be agreed upon mutually. First, regarding concerns that the Appellate Body could increase the rights and obligations of Members, the proposal calls for the opportunity for deliberation by Members to issue binding and non-binding guidance to the Appellate Body on specific issues, and the opportunity for adoption of authoritative interpretation of the WTO agreements by consensus by Members.

Second, it proposes, in response to concerns of Appellate Body institutional and procedural practices, to narrow the scope of advisory opinions by the Appellate Body, clarify the standard of review of the Appellate Body and exclude factual reviews and members' domestic laws from the scope of review, explicit acknowledgement of minority opinions in panel and Appellate Body reports and confirm that the interpretation of panels and Appellate Body apply only to the applicable case, and the Appellate Body will discuss with the disputing country in case deliberation exceed the deadline, and establish guidelines for such cases.

3. Updating trade rules for the 21st century

The discussion paper says trade rules must be revamped for the 21st century. At the same time, it reveals this cannot be possible with a single undertaking practice, which requires a format of rulemaking to replace it. As a result, it proposes the three items of (1) determine priority order of rules updating; (2) propose methods for updating rules; and (3) consideration for developing countries.

Under (1), first themes suited for establishment as multilateral trade agreement and themes suited for establishment as plurilateral trade agreement need to be sorted out. The following three categories are believed to be the themes for multilateral trade agreement. First, themes carried over from past negotiations including the Doha Development Agenda (agricultural subsidies, development, especially problem of least developed countries). Second, themes necessary for the 21st century economy and themes related to social aspects of globalization (digital trade, inclusive trade, sustainable development, small, medium and micro enterprises, investment and domestic regulations, etc.). Third, themes addressing concerns about distortion of competitive conditions (market distortion effects of SOEs, industrial subsidies, technical transfers and trade secrets, and transparency).

Under (2), discussion is made on the possibility of plurilateral agreements binding only members who participate and agree to negotiations instead of multilateral trade agreements binding to all members. It also cites three options for plurilateral agreements. First, those applied to members comprising a critical mass agree and then applied to all members pursuant to the MFN principle (Information Technology Agreement, etc.). Second, those applied only to members that agreed (Agreement on Government Procurement). Third, those negotiated outside the WTO's framework and applied only to members that agreed (Trade in Services Agreement [TiSA]).

The discussion paper's Annex further amplifies plurilateral instruments, and as an option it cites: (1) political statements; (2) legally binding plurilateral agreements; (3) non-binding plurilateral codes of conduct; and (4) plurilateral procedural

agreements (for example, instruments of the Dispute Settlement Body on mechanisms for practices and procedures concerning the preparation and sharing of instruments in WTO disputes)³⁰. The Annex cites as options for multilateral instruments: (1) non-binding instruments (specifying instruments that do not affect interpretation of existing obligations; (2) formal decisions of the General Council and Dispute Settlement Body (for example, the formal decision on export competition adopted at the 10th WTO Ministerial Conference in Nairobi); and (3) authoritative interpretation based on Article 9.2 of the WTO Agreement.

Under (3), it says a new approach is needed that considers developing countries. It cites as a good precedent the format of Trade Facilitation Agreement, as a way of ensuring developing countries are not all handled uniformly in terms of undertaking obligations and flexibility, while giving full consideration to developing countries. In other words, this refers to the three points of (1) a transitional period will be allowed for some developing countries, but the ultimate goal is for all members to completely fulfill their obligations; (2) depending on the proof for needs, differences in obligations will be allowed based on negotiations; and (3) least developed countries at the very least should have support and links from advanced members on fulfillment of most important obligations.

(2) Joint Communique of the Ottawa Ministerial on WTO Reform (October 25, 2018)

Canada and 12³¹ like-minded countries held the Ottawa Ministerial on October 25, 2018, and released a Joint Communique³². The Joint Communique was issued in the names of Japan and the EU as well. The Joint Communique cited the three areas of (1) dispute settlement procedure, (2) reactivation of negotiating functions, (3) monitoring of trade policy of Members and strengthening transparency, as areas requiring urgent review.

Regarding the dispute settlement procedure of (1), it stated concerns about the appointment of Appellate Body members being blocked and emphasized the need to quickly remove this blockade. At the same time, it stated discussions should be held

toward resolving issues in response to concerns of certain Members (indicating the United States) over the function of the dispute settlement mechanism.

In terms of the reactivation of negotiation functions under (2), it acknowledges the need for it and the requirement to reach a settlement on fisheries subsidy negotiations following the instructions of the 11th Ministerial Conference of 2018, and revamp rules reflecting the reality of the 21st century, such as the Sustainable Development Goals (SDGs). Therefore, it points out adopting a flexible and open negotiating format, welcomes work based on the Joint Statement Initiative (investment facilitation, etc.) announced at the 11th Ministerial Conference, the need to combat market distortions caused by subsidies, and review of specific measures on handling of development in rulemaking.

Regarding strengthening of monitoring and transparency of Members' trade policies in (3), it states concerns about the failure of notification obligations under WTO agreements, citing an urgent need to improve transparency and reporting. At the same time, improving the notification obligations can be achieved in a relatively short period, and it calls for the review of specific proposals aimed at achieving this.

(3) Joint Communique of the Ottawa Ministerial on WTO Reform in Davos (January 24, 2019)

Canada and 12 like-minded countries released a Joint Communique³³ following the Ottawa Ministerial on WTO Reform held in Davos on January 24, 2019. The Joint Communique mentions the Joint Communique of October 25, 2018, and it requests self-restraint from all members considering the increasing trade restrictive measures being implemented thereafter. On top of this, the Joint Communique covered the five themes of (1) dispute settlement procedure, (2) strengthening transparency and notification obligations, (3) processes for resolving trade concerns, (4) fisheries subsidy negotiations, and (5) reactivation of negotiation functions.

In terms of dispute settlement procedure of (1), the Joint Communique mentioned the

joint proposal³⁴ submitted by the EU and like-minded countries in November 2018, and stated its support of the negotiation process for rebuilding Appellate Body procedures by the chair of the General Council. Regarding strengthening transparency and notification obligations of (2), the Joint Communique calls for increased transparency and supports the review work for the proposal being conducted to strengthen the notification obligation under WTO Agreement. Regarding the trade concern settlement process of (3), the Joint Communique urges the submission of a joint proposal³⁵ with all Members interested in this theme. As for fisheries subsidy negotiations of (4), the joint proposal requests all members to make efforts to quickly conclude negotiations. In terms of reactivation of negotiation functions of (5), the joint proposal requests all Members to address market distortions caused by subsidies.

5. Proposals by Specific Countries

The above are proposals on WTO reform by multiple like-minded countries or meeting bodies (G20). In addition, there are proposals on WTO reform made by individual countries. This chapter will look at proposals from the United States and China.

(1) Proposal of the United States on the Graduation of Developing Countries (February 15, 2019)

The United States submitted a proposal³⁶ on the process of strengthening the WTO's negotiating functions to the General Council on February 15, 2019. In contrast to this subject, the content of the proposal called for the establishment of standards for the graduation of developing country status in WTO negotiations. Specifically, it cites the four standards of (1) countries that began OECD or WTO Member negotiations (for example, Mexico and South Korea), (2) G20 members (for example, China and Argentina), (3) high income countries defined by the World Bank (for example, Chile and Uruguay), and (4) countries with a worldwide share of export/import value of at least 0.5% (for example, China). Either of the above countries shall not receive special and different treatment as developing country at current and future WTO negotiations.

(2) China's Position Paper on WTO Reform (May 13, 2019)

China submitted a detailed position paper³⁷ on WTO reform on May 13, 2019. The position paper mentioned in the introduction that the multilateral trading system has played a role in the growth of the world economy through trade liberalization and the economic development of developing countries. It also says the multilateral trading system is in danger. It repeats China's basic principle on WTO reform revealed in the document submitted to the General Council in November 2018. In other words, the three principles of (1) uphold the organization's core values of non-discrimination and opening, (2) protect development interests of developing members and address their difficulties in integrating into economic globalization, and (3) follow the mechanism of decision-making by consensus.

The position paper then states the necessary themes for WTO reform and the direction of reform. These themes are largely broken down into four: (1) urgent response related to the WTO's survival; (2) improving relevance of WTO in world economic governance; (3) improving the efficiency of WTO activities, and (4) strengthening inclusiveness of multilateral trade system.

As (1), the position paper cites the three points of breakthrough in the blockade on the Appellate Body member appointment process, stronger discipline against national security exceptions, and stronger discipline of unilateral measures in violation of WTO rules. Next as (2), it cites the following viewpoints.

1. Rectification of unequal rules on agriculture; especially the step-by-step abolishment of Aggregate Measurement of Support (AMS) allowed by developed countries
2. Improvement of rules on trade remedies (anti-dumping and countervailing duties)
3. Acceleration of negotiations on fisheries subsidies
4. Promotion of open and inclusive negotiation processes based on the joint statement on digital trade and E-commerce
5. Promotion of open and inclusive discussions on new problems, such as investment facilitation and small, medium and micro enterprises

As (3), the position paper cites improvement in compliance with notification obligations (including increased support and technical assistance for developing countries) and improvement in efficiency of the WTO's supporting bodies.

As (4), the position paper cites respect for special and different treatment of developing countries and the principle of fair competition in trade and investment. In regard to the latter, it cites opposition to discriminatory discipline of SOEs under the name of WTO reform, that deliberations on foreign investments based on national security be conducted neutrally, discussions be based on the principle of fairness and due process, and indiscriminate treatment of investment for different ownership structures.

Section 4 - Main Discussion Points of WTO Reform and Stance of Like-Minded Countries, Meetings Bodies and Countries

The proposals on WTO reform of various like-minded countries, meetings bodies, and individual countries introduced in Section 3 were organized following the main points of discussions. The proposals are categorized into the two groups of (1) revamping of WTO rules and (2) improving the WTO's functions and procedures.

1. Revamping of the WTO's rules

Proposals on the revamping of the WTO's rules are categorized into the two areas of (1) proposals to strengthen discipline for failure to comply with existing WTO rules and burying lacunae of rules and (2) proposals of rules in new areas that do not exist in WTO rules.

Proposals on industrial subsidies, SOEs, and rules on forced technical transfers are categorized under (1). In the context of US-China trade frictions, this attempts to extend discipline of WTO rules on China by the United States for industrial subsidies, subsidies by SOEs, and practice of forced technology transfer. This includes (1) areas covered by WTO rules, but where compliance is not being fully carried out (some industrial

subsidies and subsidies by SOEs) and (2) areas where rules need to be strengthened or expanded since they are not fully covered by the WTO (some industrial subsidies and subsidies by SOEs, along with forced technology transfer).

Rules on digital trade and e-commerce are categorized under (2). This was part of the joint statement on work for beginning negotiations submitted by like-minded countries at the 11th WTO Ministerial Conference in December 2018. Many proposals³⁸ touch upon this and have called for work to be advanced toward this end. In addition, some proposals also mentioned investment barriers, service trade barriers, and fisheries subsidies.

2. Improving the WTO's functions and procedures.

Many proposals mention improvement of the WTO's functions and procedures. Specifically, some proposals discuss (1) improving transparency and strengthening notification obligations of WTO agreements; (2) expanding and strengthening procedures for strengthening activities of WTO councils and committees (especially, on trade concerns), (3) reforms of dispute settlement procedure, especially the Appellate Body procedure, (4) introduction of developing country standards and graduation requirements, along with reform of flexibility and special and differential (S&D) treatment, (5) reactivation of negotiating functions, and (6) monitoring of trade policies. Table 3 summarizes the like-minded countries, meeting bodies and individual countries that have made proposals on the aforementioned points.

**Table 3 Like-Minded Countries, Meeting Bodies and Individual Countries that
Proposed Discussion of WTO Reform**

		Trilateral	EU	Ottawa Ministerial	USA	China
Revamping of WTO rules	Industrial subsidies	✓	✓	✓		
	SOEs	✓	✓			✓
	Forced technical transfers	✓	✓			
	Digital trade and e-commerce	✓	✓			✓
	Investment barriers		✓			
	Service barriers		✓			
	Fisheries subsidies	✓		✓		✓
	Improvement of rules on trade remedies					✓
	Rules on agriculture					✓
	Discipline for unilateral measures					✓
	Discipline for national security exceptions					✓
Improving functions and procedures	Transparency and notification obligation	✓	✓	✓		
	Strengthening of activities of councils and committees	✓	✓	✓		
	Dispute settlement procedure (Appellate Body procedure)		✓	✓		✓
	Reactivation of negotiation functions		✓	✓		
	Monitoring of trade policy			✓		
	Definition of developing country and graduation, flexibility, and S&D	✓	✓	✓	✓	✓

(Source: Prepared by the author)

Section 5 - Issues and Direction of WTO Reform

This chapter explores the recommendations of like-minded countries, meeting bodies, and individual Members on WTO reform, analyzing the content of each and also analyzing the type of recommendations made for all themes. As seen in Section 2, the reason for more active discussions on WTO reform in recent years can be traced to the crisis faced by the multilateral free trade system based on WTO rules. In some cases, the paralysis of the WTO's functions has lasted for more than a decade, such as the difficulties of the Doha Development Agenda and dysfunction of mechanisms for monitoring compliance with WTO agreements (notification mechanism and trade concern mechanism required under most WTO agreements). In contrast, the crisis of the

Appellate Body and the Trump administration's unilateral tariff hikes are developments that have occurred over the past two to three years. The view has spread that the combination of these factors has caused the serious crisis facing the WTO in recent years, increasing momentum behind WTO reform. The recognition that the WTO requires reform is shared among many WTO Members. As seen in Section 3, like-minded countries, meeting bodies and individual countries have released a number of recommendations on WTO reform from 2018 to 2019.

Nevertheless, as summarized in Section 4, the contents of recommendations on WTO reform vary depending on the like-minded countries, meeting bodies and individual countries, and discussions have yet to be narrowed. For example, many recommendations mention the crisis facing the Appellate Body, and the United States, which boycotted the appointment of Appellate Body members, has not stated its view on how to settle this problem. In addition, regarding the problems of industrial subsidies and SOEs covered in the trilateral meeting of the trade ministers and Ottawa Ministerial, China, which is named implicitly therein, has stated in its recommendation opposition to stricter discipline. Over developing country status and special and different treatment, too, China's recommendation opposes that of the trilateral meeting of trade ministers and the United States. The area where views align relatively is strengthening transparency and notification obligation, but when examining the recommendations in greater detail, the views therein diverge.

These recommendations on WTO reform are in the stage of having been submitted to the WTO General Council. Many WTO Members have yet to publish their recommendations. For example, a majority of developing countries including India and Brazil have not had their names tied to any recommendation. It appears more time will be needed before the WTO General Council deliberates WTO reform so that discussions converge and matters are settled based on these various views.

1 The United States claims that additional tariffs under Article 232 of the 1962 Trade Expansion Act are exceptions for national security under Article 21 of the 1994 GATT. Similarly, it justifies sanctions on China based on Article 301 of the 1974 Trade Act as combative measures against violations of WTO agreements, such as infringement of intellectual property rights by China.

2 See WTO, WTO News, Concerns grow in slippage about subsidy notifications. 25 April 2017.

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- 3 <<https://www.meti.go.jp/press/2017/12/20171213001/20171213001.html>>
- 4 <<https://www.meti.go.jp/press/2017/03/20180311001/20180311001.html>>
- 5 WTO, Ministerial Conference, 11th Session, Joint Statement on Electronic Commerce, 13 December 2017.
- 6 <<https://www.meti.go.jp/press/2018/06/20180604002/20180604002.html>>
- 7 <<https://www.meti.go.jp/press/2018/09/20180925004/20180925004.html>>
- 8 WTO, General Council/Council for Trade in Goods, “Procedures to enhance transparency and strengthen notification requirements under WTIO agreements”, Communication from Argentina, Costa Rica, the European Union, Japan, and the United States, 1 November 2018. JOB/GC/204, JOB/CTC/14.
- 9 The above sanctions will not be applied to the countries failing to fulfill its obligation that reported necessary assistance stipulated in Section 10. See Section 12 (c).
- 10 <<https://www.meti.go.jp/press/2018/01/20190110003/20190110003.html>>
- 11 See supra Section 1.1.(5).
- 12 WTO, General Council/Council for Trade in Goods, “Procedures to enhance transparency and strengthen notification requirements under WTIO agreements”, Communication from Argentina, Australia, Canada, Costa Rica, the European Union, Japan, New Zealand, Taiwan, and the United States, 1 April 2019. JOB/GC/204/Rev.1, JOB/CTC/14/Rev.1.
- 13 <<https://www.meti.go.jp/press/2019/05/20190523005/20190523005-1.pdf>>
- 14 See supra Section 1.1(7).
- 15 See “G20 Buenos Aires Summit” of the Ministry of Foreign Affairs:
<https://www.mofa.go.jp/mofaj/ecm/ec/page6_000231.html>
- 16 See “G20 Osaka Summit” of the Ministry of Foreign Affairs:
<https://www.mofa.go.jp/mofaj/ecm/ec/page22_003217.html>
- 17 <<https://www.elysee.fr/emmanuel-macron/2018/05/30/speech-by-the-president-of-the-french-republic-to-open-the-oecd-annual-ministerial-council-meeting.en>>
- 18 EU, Concept paper on WTO modernization. 18 September 2018.
<trade.ec.europa.eu/doclib/html/157331.htm>
- 19 See supra Section 1.1(7).
- 20 USTR, 2018 Trade Policy Agenda and 2017 Annual Report, pp.22-26. Available at
<<https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017>>
- 21 The 11 Members of the joint proposal are Australia, Canada, China, Iceland, India, South Korea, Mexico, New Zealand, Norway, Singapore, and Switzerland.
- 22 Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, 26 November 2018. WT/GC/W/752.
- 23 Communication from the European Union, China and India to the General Council, 26 November 2018. WT/GC/W/753.
- 24 Currently, Appellate Body members are considered non-full time positions. See WTO, Recommendation by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1, 19 June 1995, paras.10-12.
- 25 See Article 17.7 of Understanding on Rules and Procedures Governing the Settlement of Disputes: “The Appellate Body shall be provided with appropriate administrative and legal support as it requires.”
- 26 The 9 Members of the joint proposal are Australia, Hong Kong, South Korea, New Zealand, Norway,

Panama, Singapore, Switzerland and Turkey.

- 27 See WTO, Sanitary and Phytosanitary Information Management System.
<<http://spsims.wto.org/>>
- 28 See WTO, Technical Barriers to Trade Information Management System.
<<http://tbtdims.wto.org/en/SpecificTradeConcerns/Search>>
- 29 WTO, Strengthening and Modernizing the WTO: Discussion Paper, Communication from Canada, 24 September 2018. JOB/GC/201.
- 30 JOB/DSB/1.
- 31 Like-minded countries are Australia, Brazil, Chile, EU, Japan, Kenya, South Korea, Mexico, New Zealand, Norway, Singapore and Switzerland.
- 32 Joint Communique of the Ottawa Ministerial on WTO Reform. 25 October 2018.
<<https://www.canada.ca/en/global-affairs/news/2018/10/joint-communique-of-the-ottawa-ministerial-on-wto-reform.html>>
- 33 Joint Communique of the Ottawa Ministerial on WTO Reform group meeting in Davos. 24 January 2019.
<https://international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/2019-01-24-davos.aspx?lang=eng>
- 34 See supra Section 1.3(3) and (4).
- 35 See supra Section 1.3(5).
- 36 Draft General Council Decision, Procedures to Strengthen the Negotiating Function of the WTO, 15 February 2019. WT/GC/W/764.
<https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDdocuments/251580/q/WT/GC/W764.pdf>
- 37 China's proposal on WTO Reform, Communication from China, 13 May 2019, WT/GC/773.
- 38 Supra Section 3.

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