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The Stranglehold Continues at the WTO

By: D. Ravi Kanth

The World Trade Organization may have given up on its ambitious trade agendas of the 1990s, but its decisions on individual issues continue to be controlled by the US and the EU. Despite public claims, India is now content to go along with the majors as it did in the June ministerial conference.

“Whose Trade Organization” is it? That is what the protestors against globalisation asked at the 1999 Seattle ministerial conference of the World Trade Organization (WTO).

The outcome of the WTO’s 12th ministerial conference (MC) held in Geneva in June 2022 answered yet again the cry of the Seattle protestors more than 20 years earlier.

The European Union (EU) and the United States (US), solidly supported by WTO Director-General Ngozi Okonjo-Iweala, seem to have managed decisions and outcomes that have largely benefited them. It is little wonder that though the two transatlantic giants were battered badly during the Covid-19 pandemic and by Russia’s war against Ukraine, they continue to have a stranglehold over the 164-member body.

The days of the ambitious WTO “rounds” driven by the US and EU may have gone but consider two major decisions of the 12th ministerial—on patent waivers and the taxation of e-commerce—and the continued chipping away at the organisation.

Lopsided decisions at the 12th ministerial

First, the decision on waivers to the Agreement on Trade-related Intellectual Property Rights (TRIPS) that was concluded at the 12th MC.

For over one-and-a-half years, around 65 countries waged a battle to suspend four provisions of the TRIPS Agreement to help deal with Covid-19. The suspension of these provisions — on copyrights, industrial designs, patents, and undisclosed information (trade secrets) — would have enabled countries worldwide to manufacture diagnostics, therapeutics, and vaccines on a war footing to combat the pandemic.

This proposal was endorsed by more than 120 leaders, lawmakers, and Nobel laureates, as well as over 100 civil society groups across the world. However, the US, the EU, Switzerland, the United Kingdom, Canada, and Japan opposed the proposal. The WTO director-general stymied the talks with a controversial “third way” proposal, which would have involved working closely with Big Pharma led by Pfizer.

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Then, in mid-2021, the EU introduced its counterproposal, which made cosmetic changes to the compulsory licensing provisions. The EU’s proposal did not address issues such as industrial designs (technology know-how and transfer of technology), copyrights (specialised information from Covid-19 research that is inaccessible to many countries), and, last but not least, trade secrets (undisclosed information), knowledge of which is vital for the manufacturing process.

The US, under the pretext of addressing vaccine inequity and providing flexibilities in the TRIPS agreement, proposed limiting the IPR issue to vaccines, without covering Covid-19 therapeutics and diagnostics.

The WTO secretariat played its part to advance the EU-US agenda by holding ‘quadrilateral talks’ involving the US, the EU, India, and South Africa. With a threat to India and South Africa that “you will not get what you want,” the four countries, after sustained non-transparent talks for almost five months, reached an agreement that essentially incorporated the EU proposal with trivial changes.

Under a controversial eligibility criterion, the four countries also wanted to exclude China from availing of the draft decision's limited flexibilities. This exclusion, engineered by the US, was made on the ground that China already met more than 10% of the global supply of Covid-19 vaccines. The new global trading power of Asia then threatened to block the agreement unless the eligibility criteria were removed, though it assured the four countries it would not use the limited TRIPS decision to its advantage.

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A final decision on removing the eligibility criterion was reached only at the eleventh hour of the 12th MC, demonstrating the power of China to block proposals if they were primarily aimed at her.

Thus, the WTO's singular contribution to dealing with the worst pandemic witnessed in the past 100 years has been to bring some cosmetic changes to TRIPS for the issue of compulsory licences for production of Covid-19 vaccines.

India and South Africa deserve substantial criticism for the WTO adopting the TRIPS waiver proposal in its final form. They knew fully well that it would not address the changes they sought in their revised negotiating proposal circulated in May 2021.

E-commerce moratorium

The story was the same with respect to taxation of e-commerce, on which the 12th MC concluded with an extension of a two-decade-old moratorium.

At the second ministerial meeting in 1998, when e-commerce was at an incipient stage, the WTO adopted a moratorium on taxation of cross-border internet sales of goods and services to encourage electronic transactions. But the moratorium has continued despite the tremendous growth of e-commerce over the past 20 years.

With developing countries importing a growing value of e-goods and services (including films), the United Nations Conference on Trade and Development has estimated that these countries have suffered revenue losses running into tens of billions of dollars by not levying customs duties. Yet, until now, the scope and definition of what would constitute e-commerce transmissions has not been defined. The moratorium has been of great benefit to the GAFA firms (Google (now Alphabet), Amazon, Facebook (now Meta), and Apple) as well as Microsoft, and Ali Baba.

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So, when the US and the EU with other countries came to the 12th MC, their major goal was to continue with a moratorium at least for two more years. Yet, instead of remaining firm against the extension, India and South Africa quietly surrendered and allowed it to continue.

A week after the 12th ministerial, leaders from the Group of Seven (G-7) industrialised countries called for making the moratorium permanent. The G-7 leaders' call vindicated how important the moratorium is to e-commerce behemoths.

The watering down of the TRIPS waiver proposal on Covid-19 vaccines, therapeutics and diagnostics, and the extension of the moratorium on e-commerce shows how the US and the EU continue to successfully push their agenda at the WTO.

Weak Indian positions at the 12th Ministerial

India's role at the WTO ministerial meetings, particularly since 2015 under the Narendra Modi government, has been anything but beneficial to either India or the developing countries. For example, India remained silent when the Doha Development Agenda was almost buried at the Nairobi ministerial meeting in December 2015.

India's performance at the latest MC touched a nadir. The commerce minister claimed at Geneva that India refused to come under any pressure, notwithstanding that it meekly nodded to everything the EU and the US proposed as final solutions.

Sadly, in the run-up to WTO ministerial meetings, Indian trade officials take bold stands even if they often find themselves isolated because of their pro-developing country and pro-India positions. However, these positions are almost buried by their political masters at the ministerial meetings.

Food security programmes

Consider the longstanding need for a permanent solution for public stockholding programmes for food security purposes. India's public distribution system (PDS) and food stock programmes have been questioned at the WTO. This is a mandated issue that should have been resolved at the Buenos Aires ministerial meeting in December 2017. The US chose to block a permanent solution at the time because its farm lobbies were dead opposed, as a solution would enable all developing countries to breach their “de minimis” subsidy commitments in agriculture.

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Under the de minimis subsidy norms set out in the WTO's Agreement on Agriculture, developing countries like India can provide a subsidy of up to 10% of the value of agricultural production, while the developed countries can offer de minimis support up to 5%,

Against this backdrop, at the WTO's 9th ministerial meeting in Bali in December 2013, members agreed on an “interim peace clause” to allow developing countries to manage their food security programmes even if they crossed the 10% limit. Subsequently, the clause was referred to as the “perpetual peace clause,” which was mandated to be made a permanent decision at the 10th ministerial meeting of the WTO in Nairobi in 2015. However, this was deferred to the 11th meeting and then again to the 12th meeting.

Meanwhile, during the last three years, India has breached the 10% limit for rice. It notified this breach to the WTO under the perpetual peace clause. The US, Australia, Brazil, Canada, and the EU opposed the Indian notification fiercely. It is believed that the US farm lobbies want a trade dispute to be launched against India soon.

By not fighting at the recent ministerial meeting for a permanent solution for the issue of the public stockholding programmes, India has undermined its own farmers, who have been demanding a guaranteed minimum support price (MSP). Under pressure from the US and other farm exporting countries, the Narendra Modi government may well convey to its farmers that it cannot guarantee an MSP because of a fear of more breaches.

Which way now?

Two-and-a-half decades after Seattle 1999, a larger process has been set in motion to change certain fundamental features of the WTO.

The US has embarked on chipping away at the organisation since it has become apparent that its own measures on trade are incompatible with WTO rules.

Washington wants to do away with the consensus principle for decision-making at the WTO. The Marrakesh Agreement of 1994, which paved the way for creating the WTO in 1995, states unambiguously that a decision can be adopted “if no member, present at the meeting when the decision is taken, formally objects to the proposed decision”. In short, even one member can block a decision at the WTO. Though the rules permit voting, it is rarely used as it would open the flood gates for taking decisions at the WTO.

For the US, the consensus principle has become a major hurdle to advancing its interests in specific sectoral issues, including the controversial plurilateral (a group of countries) initiatives. These are the initiatives on digital trade, investment facilitation, and disciplines (rules) for micro, small, and medium enterprises (MSMEs), which are opposed by several developing countries. These initiatives, which have been pursued since 2017, are believed to be inconsistent with the provisions in the 1994 Marrakesh Agreement. Removal of the consensus-based principle of decision-making would therefore allow the US to push forward on trade liberalisation issues of interest to it.

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There is then the US decision in 2019 to refuse approving appointments to the Appellate Body, the organisation's highest body for adjudicating trade disputes. The Appellate Body is empowered to issue rulings against countries that have violated the rules in any of the WTO agreements.

Washington has pressured countries to implement the rulings of the Appellate Body in trade disputes where it has scored significant victories. However, when it came to implementing rulings in which it has lost, the US record has been anything but consistent. Currently, there are around eight major decisions of the Appellate Body that the US has simply refused to adopt.

There are several motives attributed to the US's decision to bring the dispute adjudication function to a halt. The US, under the Obama and the Trump administrations, looked like signalling that it had decided to do away with the Appellate Body and return to the pre-WTO days on dispute settlement. During the earlier GATT phase, members could simply block rules unfavourable to their trading interests. By paralysing the Appellate Body, the US also appears to be preparing the ground to introduce a transactional framework to the working of the WTO.

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The US, for example, wants to differentiate the use of Special and Differential Treatment (S&DT) by self-designated developing countries. It has proposed that around 30 developing countries, including India, should not be eligible for the S&DT provisions because they are part of the G-20 and/or seek membership of the Paris-based Organization for Economic Cooperation and Development, a rich country think tank. The US wants to do away with the S&DT provisions even though they are part of the GATT/WTO rule book.

The absence of agriculture in the 12th MC decisions and declarations has sent out a signal that issues raised by developing countries in agriculture are unlikely to be addressed anytime soon. Such a blackout indicates that those who control the WTO do not want reforms in agriculture, though reform of farm subsidies in the EU and US was put on the Doha agenda way back in 2001. The US, in particular, does not want to make any changes in the WTO's Agreement on Agriculture, which with asymmetrical provisions, is heavily tilted against the interests of developing countries,

The EU is pursuing its own agenda. Since becoming the director-general of the WTO, Okonjo-Iweala has invested considerable capital in developing a special relationship with the EU. In fact, the common refrain in Geneva is that Okonjo-Iweala's statements on the 12th MC deliverables in the run-up to the meeting subtly reflected the EU's priorities. Indeed, the EU played a major role in chiselling the ministerial outcomes.

If there were expectations that China's entry into the WTO in 2001 would aid the developing country bloc, these expectations have been belied. Despite the raging US-China bilateral trade war, China's positions on a range of issues are largely aligned with the developed countries at the WTO. China has benefited hugely by becoming a member of the WTO in 2001, but its support for specific issues raised by developing countries is lukewarm. China tends to side with the developed countries on the environment, digital trade, investment facilitation, trade facilitation, and even the controversial non-mandated plurilateral issues. China tends to project itself as a pro-multilateral and pro-globalisation country and at the 12th MC China reiterated its position in support of globalisation by calling for a strengthening of multilateralism at the WTO.

In short, the future of the WTO is expected to undergo substantial changes in which developing countries will be reduced to eternal givers for the reforms being sought by the developed countries. India can take credit for its weak-kneed positions post 2015 that have only benefited the US and the EU.

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