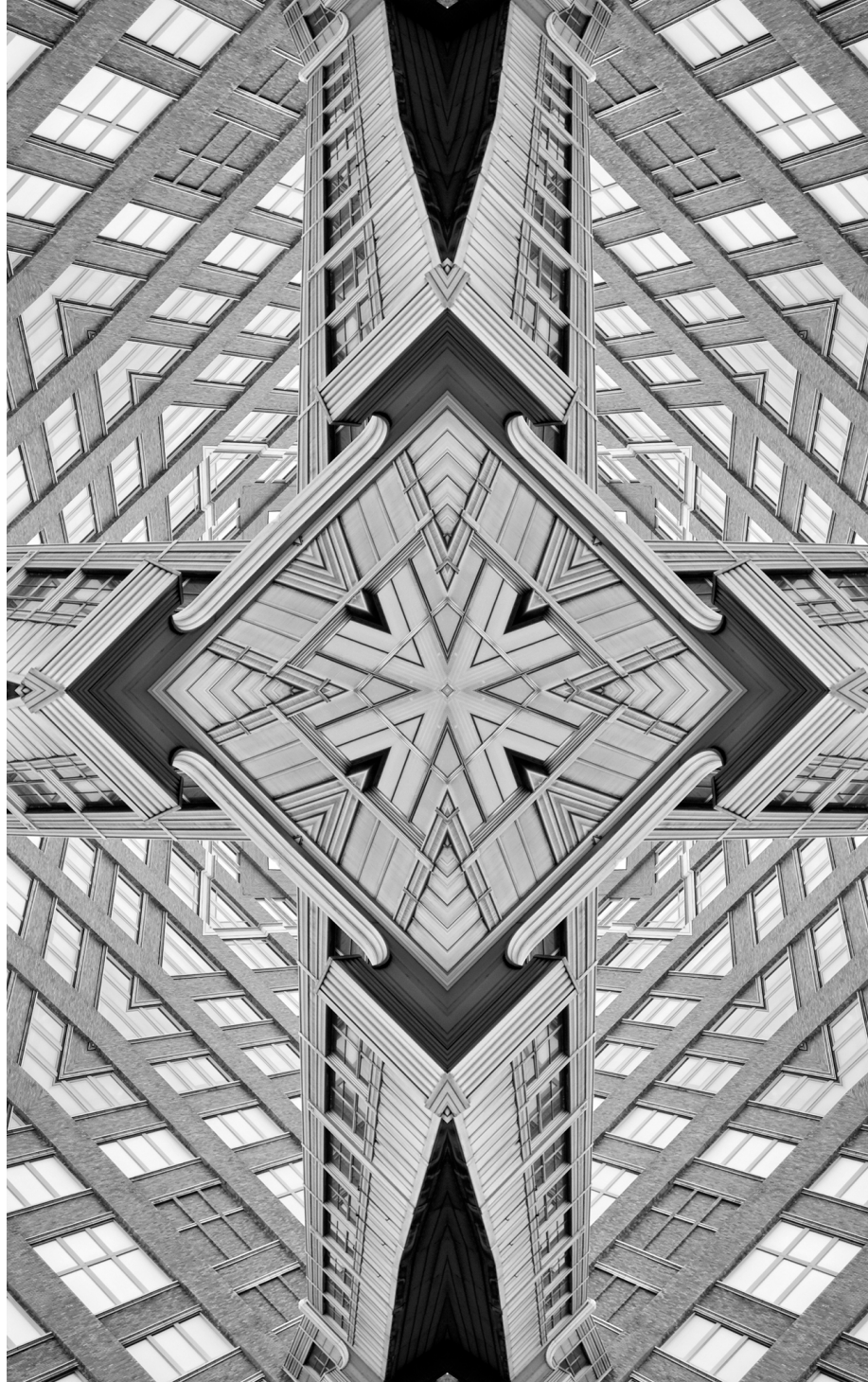


Issue

Brief

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Reforms at the WTO: Beyond Archaic Binaries

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Abstract

For some years now, the trading system based on the World Trade Organization (WTO) has been showing signs of strain. The old binaries that informed the debates and decisions at the WTO are being challenged as the global economic landscape is changing. This brief discusses some of the most persistent issues around the WTO: among them, the ‘developing country’ status that countries self-declare; the dispute resolution system; and the understanding of ‘market access’. It analyses the implications of these challenges on India, and deliberates the country’s options amidst calls for reforms at the WTO.

The year 2016 saw the United Kingdom break a 40-year-old relationship with the European Union,¹ and the election of an isolationist to the White House² for the first time since the Second World War. Indeed, 2016 was when the world experienced the worst symptoms of a lingering condition variously described as a cultural reaction to immigration;³ a response to the changing structure of the job market owing to automation;⁴ a counter to years of liberal leadership's neglect of the politically less vocal;⁵ and a heightening of the credibility crisis for the white-collar elite that began with the 2008 financial crisis.⁶

Despite Joe Biden's narrow victory in 2020,^a the phenomena underlying the events of 2016 are still in play. The Biden government will continue to be bound by the same domestic and global fissures that characterised his predecessor's era.

Amongst the most crucial disruptions are related to multilateral trading arrangements. Existing trading rules govern some of the most strategically consequential trading arrangements for the world, including for India.⁷ Therefore, the World Trade Organization (WTO) – the chief arbiter of these trade rules – is of significant consequence. The Biden Administration will have to work to resolve the many systemic weaknesses in the WTO that are being exposed in the recent years.

The four years of the Trump administration have virtually dismantled the entire global trading architecture that the WTO stood to defend, as well as the organisation's own administrative apparatus which it employed for this purpose.⁸ Countries are freely erecting tariff barriers, while the Dispute Settlement Board has become a court without judges.⁹ Quick, predictable enforcement of international agreements – a cornerstone of the WTO's functioning and what sets it apart from other international organisations – has all but disappeared.¹⁰

a Donald Trump not only increased his vote share compared with 2016, he has also lost the electoral college in a manner very similar to how he had won it in 2016 – suggesting a similar division of voting patterns.

Contentious Definitions and Undeserved Concessions

The cleavages in the current trading regime are most clearly reflected in the debates around its most fundamental precepts: negotiation and accommodation. The General Agreement on Tariffs and Trade (GATT) and, subsequently the WTO, ensured a balance between wealthy, industrialised nations and developing countries by providing accommodations in enforcement and compliance with established rules. WTO institutionalised this mechanism by providing for “Developing Country” and “Least Developed Country” designations that determine a spectrum of relaxations and support to certain countries—these cover, among others, individual decisions and agreements, and market access.¹¹ This approach ensured that contentious items on the WTO agenda could be implemented by disaggregating opposition and the end result of open markets could be achieved, albeit at a slower pace.

A “Least Developed Country” designation is contingent on a statistical methodology implemented competently by the United Nations Conference on Trade and Development (UNCTAD); for its part, a “Developing Country” status is self-declared.¹² The flexibility in the latter definition has allowed numerous meritless claims. However, institutions like the World Bank do regularly publish income estimates¹³ that have been used by WTO members to object to certain demands for ‘developing country’ status by high-income countries.¹⁴ For instance, in ongoing negotiations on non-agricultural market access, the US has used the WB’s income estimates and objected to demands for developing-country relaxations from India, China and Brazil.¹⁵

The WTO does not have an exact count of how many of its members are ‘developing countries’ and receive associated benefits; its estimate is two-thirds of total membership.¹⁶ However, not every claimant is a deserving candidate. For instance, South Korea, the 7th richest nation in the world based on per-capita income,¹⁷ claimed – and benefitted from – developing country status at the WTO until February 2020.¹⁸ South Korea’s per-capita income was US\$31,847 in 2019; Bangladesh’s, for instance, was US\$1,856 in the same year—and both are ‘developing countries’.¹⁹ When the Trump administration decided to question the WTO’s self-declaration policy for designation of ‘developing countries’, it was voicing such a grievance.²⁰

Contentious Definitions and Undeserved Concessions

It can be reasonably expected that the Biden administration will carry forward the same issues that the predecessor government did, though it may be more willing to negotiate on the final contours of the change. While these negotiations present a challenge to India, they also provide an opportunity for the country to gain important concessions at the WTO. However, a comprehensive agreement that provides India with a reasonably good deal can only be achieved if New Delhi is willing to demonstrate foresight in prioritising its long-term ambitions over short-term interests. When the Trump Administration imposed tariffs on a host of countries including its allies in the European Union (EU) and in North America, it missed the chance to create genuine consensus for WTO reforms on issues that otherwise carried merit. Consequently, alliance issues that are of core interest to India as well, could not be achieved – chief among them, China’s dumping activities and its state-owned model’s ability to circumvent WTO subsidy caps. It is pertinent that the US continues to treat China as a non-market economy, and thereby uses relatively more punishing standards in calculating anti-dumping duties and thresholds.²¹ However, despite these safeguards against opaque economic systems built into the WTO regime, grievances against China’s predatory exports continue across the world.²²

When the next round of negotiations begin, India will finally have an opportunity to raise its own issues as well. Based on the concerns of the Trump Administration and establishment Republicans, the new discussions will centre around three key issues:²³

1. The designation of countries as “Developing Countries” and the benefits associated with such categorisation;
2. The structure of the Dispute Resolution System of the WTO and its capacity to provide quick and effective remedies; and,
3. Expansion of the understanding of “market access” to encompass structural and extra-legal barriers to entry such as intellectual property (IP) theft, unwritten norms on compulsory domestic partnership requirements, and governmental vendetta.

Contentious Definitions and Undeserved Concessions

India, too, will need to bring its own issues to the table. This brief argues that India's negotiators should advocate assiduously on the following points.

1. Market Access and a path to rules parity between trade in services and merchandise trade;
2. Finding mechanisms to treat commercial agriculture done at scale differently from small-scale and subsistence farming, when calculating amber box subsidies; and,
3. Ensuring that any definition of a “developing country” status, if devised, is not prejudicial to India's interests and is sufficiently protected from tinkering by individual countries.^b

Of these, India has a particular interest in preserving its Developing Country status; this will be contested by the western bloc. The following paragraphs analyse the interplay of other demands, from India and elsewhere, on how the “developing country” designation debate is likely to play out.

‘Developing Country’ Status

The WTO does not have an independent monitoring standard – let alone a mechanism – to provide a uniform extrinsic marker for the designation of a member as ‘developing country’; it is self-assigned.²⁴ However, the Least Developed Countries (LDCs) are categorised based on UN definitions.²⁵ Of the 47 countries on the UN list of LDCs, 36 are members of the WTO. A key benefit of the ‘developing country’ status is that it allows countries to avail of the WTO's Special & Differential Treatment (S&DT) regime. Many believe the S&DT to be the underlying reason for the WTO's relative success compared to other institutions like the World Bank and the IMF. It allows countries claiming to be developing countries to receive relaxations in implementation timelines for proposed trade liberalisation; gain waivers from certain onerous WTO rules; and receive non-reciprocal preferential treatment for trade in goods under the Enabling Clause (officially known as the Decision on Differential and

^b The Trump Administration had revoked its treatment of India and China as developing countries for the purpose of its own trade related legislations. However, the effect of this move was unclear because no sanctions were brought into effect.

Contentious Definitions and Undeserved Concessions

More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT 1979”).²⁶ Moreover, LDCs receive technical assistance, favourable terms on market access, and further assistance to mainstream trade into their economies through programmes run by sister organisations like the International Monetary Fund (IMF), United Nations Conference on Trade and Development (UNCTAD), and World Bank.²⁷ The heightened scale of benefits can partly explain the difference between the methodology for declaration of either an LDC or a Developing Country.

S&DT was a political bargain between developing and developed countries and is grounded in the underlying philosophy of WTO’s functioning: consensus-based decision-making.²⁸ Since each country has a single vote, S&DT is a compromise that allows the numerically smaller group of developed countries and a significantly larger group of developing countries to align their interests. Altering the basic precepts of S&DT would cause a breakdown in the governance structures of the WTO itself. This brief argues that the discussion around ‘developing country’ status is an indirect means of curtailing the scope of S&DT provisions by reducing the pool of WTO members who can avail of these concessions. Former WTO Director Pascal Lamy, discussing the underlying cause for the breakdown in WTO’s ability to take important decisions, said:

“[I]ndustrialised, rich countries and emerging countries are not agreeing on what the rule of the game is for emerging countries. We know the rule of the game for rich countries, we know the rule of the game for poor countries. But WTO members have not made up their mind whether China is a rich country with many poor, or a poor country with many rich. Depending on how you answer this question, your trade regime will be different.”²⁹

“The WTO does not have an independent monitoring standard or mechanism to provide a uniform marker for designating a member as ‘developing country’.”

Contentious Definitions and Undeserved Concessions

This highlights the fundamental dichotomy that presents itself when another WTO member contests the ‘developing country’ status of countries like China, India, or Brazil. In aggregates, these countries may be considered rich – China and India are the world’s largest and third largest economies (in PPP terms), respectively.³⁰ However, these countries rank in the middle to low end of the per-capita income brackets, and are home to some of the most acute poverty in the world.³¹ Therefore, deciding on their treatment in the WTO system is often contentious.

Given that the Developing Country self-declaration is open to challenge, this should have provided a proper resolution against misuse through discussions, debates and negotiations, but for the informal and undefined process around such challenges. Until recently, there had been no instance of a formal challenge to a country’s self-designation. Even the recent challenge to the existing WTO regime for developing countries concerns only the US unilaterally disputing the status claimed by India and China through a memorandum.³² However, given that the challenge is unilateral, the WTO-wide consequences for India following such a challenge are unclear.

It is thus important to consider the motivating factors for the US’s concerns with the WTO system and outline a potential anticipated framework which the US may use when it pushes WTO reform in a meaningful manner. For instance, the 2019 Trump White House memorandum to the US Trade Representative seeks a set of criteria around GDP per capita calculated on a PPP basis.³³ On this basis, the memo notes, Brunei, Hong Kong, Kuwait, Macao, Qatar, Singapore, and the United Arab Emirates – seven of the 10 wealthiest countries on this measure – can claim ‘developing country’ status.³⁴ At the same time, however, the Trump Administration sought to justify its grievance by pointing to certain countries’ membership in economic groupings. It noted, for example, that Mexico, South Korea and Turkey are undeserving candidates for developing-country status because they share the table at the Group of Twenty (G20) and the Organization of Economic Cooperation and Development (OECD).³⁵

“Until recently, there had been no instance of a formal challenge to a country’s ‘developing country’ self-designation.”

Changing the ‘Developing Country’ Definition: Consequences for India

The ambivalence on who should be categorised as ‘developing country’ does little to clarify a constructive path for reform. Importantly, though, it also leaves the Biden Administration with the option to provide a radically different framework. For India, it could be concerning. For a while now, India has struggled to justify the dichotomy between its poorly concealed ambitions to global power status and the persistence of poverty among its people. This was visible during the negotiations in 2014-15 on the WTO’s Trade Facilitation Agreement, when India fought to get an initial firm commitment on continuation of food subsidies.³⁶ While the concession was eventually granted, India potentially conceded on the inclusion of the Doha Round issues in the Nairobi Declaration – an important concession that has since obviated discussions on developmental imperatives for India.³⁷

India also suffers from the paradox of aggregates. On various metrics, its rankings on the global stage may appear remarkable because of its sheer population size; however, it faces deep-seated and herculean challenges. India has the world’s 3rd largest GDP on a PPP basis, yet ranks 122nd when the same is calculated per capita.³⁸ It boasts the 2nd largest internet subscriber base in the world, just behind China,³⁹ yet has only 29-percent internet penetration compared with, for example, China’s 54 percent.⁴⁰

Some countries can point to these high aggregates to demand concessions that others on a similar scale of development tend to escape. The climate negotiations are a good example. Due to its high aggregate emissions, India can no longer afford to rely on the support of G77 for the positions it advocates, since this grouping is composed primarily of island States that are worst hit by the climate crisis. For this reason, the hedging capacity that India had used to stand against the diplomatic heft of both the West and China during the 2008 negotiations in Mexico, were scarcely visible at the Paris talks in 2016.⁴¹ This capacity will only recede further as Indian and Chinese interests are further divorced from those of low-income countries.

The Biden Administration will seek to more proactively reform the WTO – not abandon it in frustration like its predecessor.⁴² It will therefore present an opportunity to do something which is not one of India’s strengths – pick a side. The conundrum is dictated by an important strategic consideration strictly from a trade perspective. Assuming that China makes a crucial concession and enters into a “hybrid developing country” status at the WTO, thereby ceding

Changing the ‘Developing Country’ Definition: Consequences for India

most of the concessions it currently enjoys, in return for some face-savers for the Chinese Communist Party. In many ways, this has already started to take place over numerous issues. China’s interest no longer aligns with those of developing countries such as India, Brazil, and Argentina. This was evident in the discussions around Non-Agriculture Market Access (NAMA), where China is directly competing with its purported peers for market access.⁴³

Any WTO negotiation from hereon would take place amidst an altered balance of power since India will no longer be able to count China on its side as the West demands greater concessions from developing countries. India would find its influence substantially reduced in the absence of a global power like China – which even in the worst of times has advocated positions similar to those of India.

In aligning with the West and stripping China of its advantage, India would gain some reprieve in the form of Chinese export dumping on its shores. However, it could open a Pandora’s box for the future. India will be assuming the role of the most powerful developing country in that grouping, which was previously fulfilled by China; but India will have less influence. Worse still, because in such a situation China’s ability to retain its trade advantage would hinge on reducing concessions of developing countries, it would find it more profitable to throw its weight behind the West.

“India suffers from the paradox of aggregates: on certain metrics, its global rankings may be remarkable for its sheer size, but it continues to face herculean challenges.”

There are positions that India can take in future negotiations. First, to recall the mechanics of negotiations at the WTO: The conduct of negotiations since the Doha Round has involved, first, the creation of a broad, ambitious agenda— which is then broken down into piecemeal subjects over several annual summits. For each subject, negotiations around the scope of relaxations for developing countries and LDCs are treated as part of the same package.⁴⁴ Politically, this made sense, as concessions on implementation could be traded as chips for securing consent to the agreement itself. Consider the Trade Facilitation Agreement:⁴⁵ When negotiations were held in 2013, the principal questions for the agreement were threefold—defining a base year for calculation of subsidies; defining what qualified as a producer subsidy and therefore was to be eliminated; and providing for implementation timelines, including accommodations for developing countries and LDCs – a question led by India.⁴⁶

Despite having signed the agreement, India forced a re-negotiation in 2014. It realised that the relaxation accorded to developing countries filing disputes under the agreement until 2019 would not be sufficient.⁴⁷ The renegotiated terms now remove the upper cap and pass the buck onto a future round of negotiations.⁴⁸ None of the three topics concern the central question that agricultural trade has existing distortions that ought to be removed. They also do not discuss the quantum of such distortions and there is largely no debate around the necessity for producer subsidies in the long term – even from countries that may deservedly need such subsidies.⁴⁹ After all, India will not likely be able to eliminate the abject poverty of its agricultural producers, or improve the quality of its agricultural infrastructure,⁵⁰ in any conceivable timeframe and ideally should have advocated for certain subsidies to be built-in (and not seen as distortionary) until such time.

In effect, the debates and negotiations at the WTO are operational, and not on the underlying principles of how trade should be organised. The debate is not that developing countries and LDCs have structural inhibitions which are mitigated by certain subsidies and therefore, all producer subsidies⁵¹ may not be distortionary but may actually be necessary for a level playing field. Now, regardless of the inherent value of this argument, the reality is that the participating countries of the WTO have collectively moved away from it for various reasons. Operating in this framework presents an advantage to India as it bolsters its ability to provide a logical and efficient way of safeguarding its interests in the developing-country status debate, while still conceding to the demand for the WTO's reform.

India's argument should be that GATT and WTO rules are prescriptions of general principles of free trade and in the first instance, should apply on every WTO member universally, once negotiated. These prescriptions should thereafter be tempered for deserving countries through sectorial accommodations, which themselves act on a spectrum rather than as binaries. Contrast this with the current system where every agreement defines a watertight distinction between developed, developing, and LDCs and provides staggered timelines and concessions for each category.⁵²

This brief proposes that each agreement identify deserving candidates for concessions separately, based on the nature of activity it governs (e.g., agriculture, services, medicinal IP). Accommodations made for such deserving candidates should further be staggered based on the prevailing circumstances in each country. For instance, in an agreement for IT services, Bangladesh deserves more support than India and the two countries should not be weighed equally—although they may be both “developing countries”. On agriculture, meanwhile, both India and Bangladesh may require equivalent levels of support; in climate action, a country like Australia would require a different type of support despite being a developed country. While this may seem contradictory to the Single Undertaking Principle, it is in fact an extension and eases the application of the principle. By tailoring each exception specifically to the most deserving candidates as recognised through negotiations at the WTO level, any mistrust pertaining to self-designations can be obviated. Such a scenario is more conducive to agreements.

In effect, India would have achieved its aim of securing critical protections as a developing country, while conceding little in terms of the structure of negotiations. Furthermore, the granularity of designations will provide for more bespoke coalitions to emerge in the WTO, making it difficult for developed nations to exercise their levers of influence as a monolith each time.

This argument is also premised on the fact that two principal factual assumptions made under the GATT 1947 (and continued through the 1994 Agreement), no longer hold true. First, there is no longer a binary between developed and developing countries; rather, there is a spectrum. The ambivalence of the Trump White House's memo discussed earlier on the subject of a definition and India's paradox of aggregates, are only two significant symptoms of the folly in assuming a binary. The complexities of economic systems mean that countries can display radically different levels of

development across sectors. For instance, India competes exceptionally well with the US on services trade, despite being orders of magnitude smaller than the latter as an economy.⁵³ Yet, it pales in comparison to Bangladesh's textile output, despite similar environmental and labour force characteristics.⁵⁴ This is no longer a question of comparative advantages; it is a manifestation of processes that have generated transformative changes in economies, but at a highly localised scale.^c It is important to recognise these infirmities in the international systems, if they are to retain a veneer of fairness and objectivity.

A second view that no longer holds is that “developed” countries are providers of wealth and abundance, and therefore ought to be singularly taxed to subsidise the developmental needs of the rest of the world. This is partially linked to the first assumption but differs in the key aspect that it sees the West as a disproportionate marketplace for goods and a source of innovation. As development has taken hold in the rest of the world, the centre of global consumption has shifted to Asia. The US might still be the hub of global innovation, but Asia is fast catching up. Indeed, for much of the last decade, China and Japan have led the US (and the rest of the West) in patent filings.⁵⁵ Therefore, a monolithic view of Asia, and of the West, no longer holds true and any economic concession to the former on this basis is not only unfair but economically wasteful. As the US's memo notes, the WTO continues to adopt an outmoded “construct of a “North-South” division”.⁵⁶ India was among the few countries that made submissions countering the underlying logic of the US's position.⁵⁷

The solution offered in this brief may not be perfect. For one, it fails to fully account for the impact of inter-sectoral linkages on a country's relative standing. It is possible for a country to do poorly on farm production and yet excel at farm processing. Trade-related adjustments in such cases have the potential to cause disruptions as well. Further, it is too radical a change to come even close to complete adoption. However, it is the best available option for reconciling the grave infirmities that have arisen in the current system.

This proposed model provides an important benefit. By opening space for recognition of candidates at an agreement level, it opens the door for more effective negotiations. It allows India to advocate for stricter rules concerning China, without having to compromise its own position.

c One line of argument in relation to Bangladesh's recent success attributes the same to its LDC status at WTO and the intensive investment from South Korea.

Globally, the “developing country” status has been used by countries to claim various advantages. For instance, during the Agreement on Agriculture of January 1995, South Korea invoked its status as a developing country to seek longer implementation periods, and reduction in quantum of commitments, on export subsidies.⁵⁸ The use of special and differential treatment (S&DT) clauses by a country with one of the largest per-capita incomes in the world, was made possible because of WTO’s self-declaration provisions. This is clearly an act of protectionism. While South Korea has since decided to no longer claim developing-country status,⁵⁹ the action was enough to provide the US ammunition to decry the entire process of designation of developing countries.⁶⁰

Since 2018, there has been a strong impetus to reform WTO and unfortunately, India has been missing in action. The US, EU and Japan have issued scoping papers on strengthening WTO disciplines on industrial subsidies and state-owned enterprises—initiatives aimed at reining in China.⁶¹ Phil Hogan, EU trade commissioner, said they were “an important step towards addressing some of the fundamental issues distorting global trade.”⁶² The EU “has been arguing consistently that multilateral solutions can be effective in solving these problems,” he said.⁶³ The US, EU, and Japan have also begun trilateral negotiations on new trade and investment rules to better address non-market practices. On 25 September 2020, the US, EU and Japan issued a joint statement calling for reporting and monitoring reforms and updated rules governing self-classification of developing country status.⁶⁴ In a thinly veiled attack on China, the statement also reprimanded coercive technology transfers, industrial subsidies and state-owned enterprises, and other “non-market-oriented policies and practices of third countries.”⁶⁵

India has not participated in any of these exercises – despite having a fundamental stake in the WTO’s rules around dumping and production subsidies in China.⁶⁶ The Trump Administration’s approach to alliances was unable to leverage cooperation from Europe, Japan, and Australia to strategically counter China’s heft. However, this is unlikely the case with a Biden government.⁶⁷ Many analysts estimate that the present situation is like a holding pattern – with the world waiting to take a cue from Joe Biden’s White House.⁶⁸

India has additional problems. Instead of making common cause with other developing countries currently in economic trouble, it has been actively stoking conflict when challenges can be resolved through discussions. It proceeded to act against Brazil on fisheries subsidies.⁶⁹ Granted, India ranks second in global fish production and therefore there may be strong pressure on the government;⁷⁰ however, its contribution to India's GDP is a meagre one percent.⁷¹ In contrast, the IT-Business Process Management industry, a small part of the total IT-enabled services sector, contributes around 8 percent to GDP.⁷² Precluding amicable resolution of fisheries subsidies from a country which is not a significant competitor in the fishing space either,⁷³ is contrary to interests.

Such missteps have not gone unnoticed. Gustavo Rojas, Researcher at the Center of Analysis and Dissemination of the Paraguayan Economy (CADEP) said, "India's recent veto against Brazil over the ongoing negotiation in the WTO on subsidies in the fisheries sector is a first sign of the discomfort growing among emerging countries. Particularly among BRICS member nations, after Brazil officially expressing its intention to open up special and differential treatment in future negotiations in the WTO."⁷⁴ These actions become even more inexplicable when India then decides to show unity in the cause of developing countries by releasing joint statements with China (a clear rival) and Venezuela (a country at the periphery of global politics), while actively antagonising nations like Brazil which could help make its case.⁷⁵


“Since 2018, there has been a strong impetus to reform the WTO; unfortunately, India has been missing in action.”

Conclusion

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It is expected that the US under Biden will work within the WTO to further its interests. Countries and trading blocs like Japan and the European Union are hoping that American participation will help resolve some of the key issues. The scenario presents India with a historic opportunity to leverage its economic prowess and geopolitical position to make progress on some of the key issues that affect not only India's interests, but also those of other players in the WTO.

The changing global economic scenario is influencing the proceedings at the WTO. Binaries based on aggregates that formed the basis of many economic assumptions now appear to be misleading. It is in India's interests to be a serious stakeholder in finding a resolution to these conundrums, as the rules that will be set therein could potentially govern the international trading legal regime at a time when India hopes to increasingly play a larger role in the world economy.

India must actively work with countries with converging interests, including the United States, to seek an equitable and fair playing field at the WTO. New Delhi must strive to create a rules-based WTO that recognises the contributions of countries like India that are not accurately represented within the traditional 'North-South' or 'developed-developing' binaries, while also allowing accommodations that are required for meeting the challenges to their domestic economies.^d 

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