ANALYSIS OF THE IMPLICATIONS OF THE ISSUES IN THE WTO 12th MINISTERIAL CONFERENCE OUTCOMES PAPER

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BRIEF BACKGROUND

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

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

ANALYSIS OF THE IMPLICATIONS OF THE OUTCOMES DOCUMENT

It acknowledges that the challenges that the WTO is facing must be addressed to ensure "the WTO's proper functioning". The following were agreed upon:

1. The provisions of Special and Differential Treatment for Developing Country Members and Least-Developed Countries (LDCs) are reaffirmed, for developing as an integral part of the WTO and its agreements, noting, however, that SDT in WTO agreements should be precise, effective and operational; as is the decision of the Tenth Ministerial Conference in Nairobi on the implementation of preferential treatment in favour of services and service suppliers of LDCs and increasing LDC participation in services trade.
   The Members also reaffirmed their decision taken at the Ninth Ministerial Conference in Bali on Duty-Free Quota-Free Market Access for LDCs.

2. In respect of the WTO Dispute Settlement system; In the MC12 'outcome document', rather than in a binding decision, WTO members agreed to 'commit to work towards necessary reform of the WTO ... to improve all its functions'. Reflecting a greater sense of urgency regarding the paralyzed Appellate Body, they committed 'to conduct discussions with the view to having

a fully and wellfunctioning dispute settlement system accessible to all Members by 2024'.

3. The Trade Facilitation Committee was instructed to hold a Dedicated Session on Transit Issues Annually until the next review of the Trade Facilitation Agreement is completed. These dedicated sessions will highlight the importance of transit and reserve time for the Committee to discuss best practices, as well as the constraints and challenges faced by all landlocked WTO Members, including landlocked developing countries and LDCs

4. On the position of women, the Outcome Document only records recognition of "women's economic empowerment and the contribution of MSMEs to inclusive and sustainable economic growth, acknowledge their different context, challenges and capabilities in countries at different stages of development".

5. Global environmental challenges are recognized, while noting the contribution of the multilateral trading system to promote the UN 2030 Agenda and its Sustainable Development Goals in so far as they relate to WTO mandates. The WTO Committee on Trade and Environment is mentioned as a standing forum dedicated to dialogue among Members on the relationship between trade and environmental measures.

6. The Moratorium on Duties on E-commerce and Digital Trade. Since 1998, WTO members have agreed not to impose customs duties on electronic transmissions. Some developing countries, including India and South Africa, are opposed to the moratorium, which, they argue, limits their policy space to generate income from customs duties on electronic transmissions. Nonetheless, at MC12, WTO members once again agreed to extend the moratorium until MC13, a vital outcome for the digital economy, for small and medium-sized enterprises (SMEs) and start-ups.

   WTO members also agreed to pursue their work under the work programme on e-commerce. The relevant decision extends the status quo for another two years in relation to the imposition of duties on digital transactions. This is good news for consumers and LDCs like Uganda. This preserves the enabling environment the WTO provides to the global digital economy and the millions of businesses and jobs that depend on it.

   If the moratorium would not have been extended, it would have implied the possibility that duties and trade barriers to trade would have increased. This is contrary to the spirit of the WTO, which aims to work to eliminate or reduce the legal and institutional impediments to trade amongst its members.

   That would have been a lethal blow to the WTO and the trade rules base system, particularly as the institution is already failing to deliver in its other significant constituent pillar: upholding trade rules. The US's blockage to appointments to the Appellate Body (another example of how trade policy in the Trump Administration has been extended to the Biden Administration) meant that the WTO is currently not fulfilling its significant role in relation to the resolution of trade disputes amongst members.

7. After 20 years of negotiations, a partial multilateral Agreement on Fisheries Subsidies in support of UN Sustainable Development Goal 14.6. It will help curb the depletion of fish stocks. It is the second multilateral WTO agreement concluded since the WTO came into existence in 1995.It is the very first WTO agreement with environment sustainability at its core. The Agreement imposes new and binding disciplines on Members by prohibiting (i) subsidies contributing to illegal, unreported, and unregulated fishing; (ii) subsidies regarding overfished stocks; and (iii) subsidies for fishing in under-regulated high seas. Its transparency/notification requirements will generate better data to target action as more rigorous obligations will be negotiated in future. It also addresses the needs of developing countries and the least developed by creating a funding mechanism to help them implement their obligations and undertake fisheries management regimes to develop their industries sustainably.

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

8. In response to the public health crisis, a Decision concerning intellectual Property Rights and a Declaration concerning trade aspects, such as export restrictions, regulatory cooperation, and trade facilitation. The Ministerial Decision on the TRIPS Agreement can be described as a tailored and targeted outcome that will help Members build up and diversify vaccine production capacity, providing a streamlined avenue to export to countries in need. It provides concrete flexibilities and guidance on the practical steps governments can take to diversify vaccine production and export. It is a real win for global health and the world's most vulnerable. It excludes, in a legally binding manner, those developing countries that have opted out because they already are able to manufacture competitively.

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

The Ministerial Declaration on the response to the pandemic and preparedness for future pandemics reflects and builds on the lessons learned by the WTO Members and the Secretariat during the pandemic.

This decision will make access to medical supplies and components more predictable in this pandemic – and in the next one. The TRIPS waiver compromise will contribute to ongoing efforts to deconcentrate and diversify vaccine manufacturing capacity, so that a crisis in one region does not leave others cut off.

Nevertheless, to the disappointment of advocacy groups, the agreement postpones a decision on the waiver's extension to therapeutics and diagnostics until 6 months after MC12. Pharmaceutical companies by contrast have opposed the waiver in the light of its alleged implications for the innovation and investment in research and development that will be essential in fighting COVID19. But the biggest disappointment is perhaps that this or a wider waiver may not lead to a significant change in the availability of vaccines. These are constrained more acutely by production capabilities in most of the WTO members.

So, this decision and any other that simultaneously fails to address the fundamental issue of production is certainly ineffective, although it scores well in terms of its popularity amongst the public.

9. Whilst there is a general prohibition of quantitative restrictions to trade under the GATT, Art XI: 2(a) allows restrictions that are applied temporarily to prevent or relieve critical shortages of foodstuff or other products essential to the exporting member. Since Russia's unprovoked invasion of Ukraine, a string of countries have imposed export restrictions, affecting over 16 % of global agricultural trade on a kilocalorie basis. Russia and Ukraine account for 12 % of global agricultural exports. India and other members have been restricting exports of food products as a response to the rise in international prices generated by the Russian invasion to Ukraine that disrupted supply in two of the largest exporters.
   To address the critical issue of food crisis, WTO Members adopted a Declaration on the Emergency Response to Food Insecurity, which reaffirms the importance of not imposing WTO-inconsistent export prohibitions or restrictions. It highlights the importance of promptly sharing information about policies that may affect trade and markets. In addition, the Members agreed not to impose export prohibitions or restrictions on foodstuffs purchased for non-commercial humanitarian purposes by the World Food Programme (WFP).

Tackling export restrictions and public stockholding for food security were controversial items on the MC12 agenda. The MC12 Statement on the emergency response to food insecurity reflects an agreement on the exercise of restraint in introducing export restrictions, but does not ban them. It encourages members to release surplus stock to international markets, but a decision on a permanent solution for public stockholding programmes was deferred to MC13, scheduled for December 2023. India, a large user of public stockholding programmes had requested that in general they be permanently exempted from WTO rules on trade distorting farm subsidies.

The MC12 decided that World Food Programme humanitarian purchases should be exempt from export restrictions but did not agree on a roadmap for future agricultural negotiations, including on disciplines on trade-distorting subsidies.

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