The Unfolding WTO reform with emphasis on Sino-U.S. disputes

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Introduction

The international discussion on the necessity to reform WTO has gradually reached consensus in the recent year, and G20 leaders endorsed the WTO reform at Argentina on 1 Dec. 2018:

- “We support the necessary reform of the WTO to improve its functioning. We will review progress at our next Summit (Osaka in late Jun. or early Jul. 2019)”.

Background and issues? Challenges for U.S. & China, implications for their relationship?
Background & Causes (1)

- Rapid evolution of the global economic environment has increasingly imposing pressures on the existing WTO rule.

  - Facilitated in part by the multilateral rules, rapid growth of China and other developing countries had reshaped global economic landscape.

  - Relative decline of the economic strength has led to disillusion and dissatisfaction on function of WTO rules by some members especially U.S.
To further promote globalization, it is necessary to create new rules in areas such as service, investment, IPR protection and other issues,

The issues are discussed in other international forums and dealt with through regional negotiations such as TPP (CPTPP), RCEP etc.

But WTO has been unable to address these issues effectively even though negotiation on new rules has been one WTO main mandate.
Policy changes by Trump administration make reform even more imperative:

- Withdraw from TPP signaled abandoning Obama's strategy to reform trading rules through setting up new trading blocs with new and high standard for economic transaction and terms of trade.

- Launch bilateral trade wars using domestic law such as sections of 232, 301 against trading partners, boycott of WTO appointment of Appeals Court judges, threatening to pull out from WTO, … creating pressures for the reform.

Trilateral MC statement at Paris on 31 May clarified major issues with regard to China’s economic system, and the U.S.-EU leaders communique in Jul. announced to push forward the reform asap.
EU and Canada published conceptual documents on WTO reform in Sept., and 12+1 countries held the first conference on WTO reform at Ottawa in Oct. 2+3 countries put forward the reform proposal on notification and transparency in Sept. 2018.

China announced the WTO reform document in 23 Nov. and put forward together with EU, India and other countries two proposals of the reform in late Nov. 2018. Finally, G20 leaders endorsed WTO reform at Argentina in 1 Dec. 2018.
6 Points of USTR
Asking for the WTO Reform (1)

Statement by Ambassador Robert Lighthizer on CM-11, (Dec. 2017 Argentina)

- Second, many are concerned that the WTO is losing its essential focus on negotiation and becoming a litigation-centered organization.
- Third, we need to clarify our understanding of development within the WTO. We cannot sustain a situation in which new rules can only apply to the few, and that others will be given a pass in the name of self-proclaimed development status.
Fourth, it is impossible to negotiate new rules when many of the current ones are not being followed.

Fifth, much can and should be done at the WTO to help make markets more efficient. We should focus on new challenges, such as chronic overcapacity and the influence of state-owned enterprises.
Major events of the reform

  - “We shared the view that severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state owned enterprises, forced technology transfer, and local content requirements and preferences are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy.
  - We, to address this critical concern, agreed to enhance trilateral cooperation in the WTO and in other forums, as appropriate, to eliminate these and other unfair market distorting and protectionist practices by third countries.
Joint Statement on Trilateral Meeting of the Trade Ministers (Paris, 31 May 18)

- The Ministers reiterated their concern with the non-market-oriented policies of third countries and discussed actions being taken and possible measures that could be undertaken in the near future.

- The Ministers confirmed their shared objective to address non market-oriented policies and practices that lead to severe overcapacity, create unfair competitive conditions for our workers and businesses, hinder the development and use of innovative technologies, and undermine the proper functioning of international trade, including where existing rules are not effective.
Joint U.S.-EU Statement following President Juncker's visit to the White House (DC. 25 July 2018)

- We will work closely together with like-minded partners to reform the WTO and to address unfair trading practices, including intellectual property theft, forced technology transfer, industrial subsidies, distortions created by state owned enterprises, and overcapacity.

- We decided to set up immediately an Executive Working Group of our closest advisors to carry this joint agenda forward.
WTO Modernization Proposal by EU (Sept. 20, 2018)

“Concept Paper: WTO Modernization: Introduction to future EU proposals”, “A first set of ideas to modernize the WTO to make international trade rules fit for the challenges of a global economy.” 3 key areas.

1) Rulemaking and development.

- To improve transparency and subsidy notifications; better capturing SOEs and the most trade-distortive types of subsidies; establishing new rules to address barriers to services and investment, including in the field of forced technology transfer; taking a new approach to special and differential treatment; and strengthening the procedural aspects of WTO rulemaking activities.
2) Monitoring.

- The EU proposes improvements in committee-level monitoring, notification compliance and sanctions for noncompliance, the trade policy review mechanism, and solving market access problems.

3) Dispute Settlement.

- The WTO trade dispute settlement function “is on the verge of being paralyzed” because more Appellate Body members are leaving office while new appointments are being blocked by the U.S. The paper proposes a number of steps to address U.S. concerns with the functioning of the Appellate Body.
Strengthening and modernizing the WTO (1) : Discussion paper from Canada (21 Sept. 2018)

- Theme 1: Improving the efficiency and effectiveness of the WTO monitoring function
  - 1、Improve notification and transparency of domestic measures
  - 2、Improve the capacity and opportunity for deliberation
  - 3、Improve the opportunities and mechanisms to address specific trade concerns

- Theme 2: Safeguarding and strengthening the dispute settlement system
  - 1、Diverting some disputes or issues from adjudication
  - 2、Streamline adjudicative proceedings
  - 3、Updating and ensuring appellate review
Theme 3: Modernizing the trade rules for 21 century

1. Identifying Priorities for Modernizing the Rules
   - outstanding from previous negotiations, including issues from the Doha Round such as agricultural support and development issues;
   - the rules for the modern economy and address the social dimensions of globalization, such as digital trade, inclusive trade, sustainable development,
   - more recent concerns about distortion of competitive conditions, for example through the market-distorting effects of SOEs, industrial subsidies, transfer of technology and trade secrets, and transparency.

- If a Member fails to provide a complete notification within one year of the deadline and that Member has not requested assistance from the Secretariat, the following administrative measures shall apply to that Member:

- (a) After one but less than two full years from a notification deadline:
  - (i) representatives of the Member cannot be nominated to preside over WTO bodies;
  - (ii) questions posed by the Member to another Member during a Trade Policy Review need not be answered; ……
Proposal on Transparency & Notification Requirements From Argentina, Costa Rica, EU, Japan, and U.S.

- (b) After two but less than three full years following a notification deadline:
  
  - (i) the Member will be designated as an Inactive Member;
  
  - (ii) representatives of the Member will be called upon in WTO formal meetings after all other Members have taken the floor, and before any observers; and
  
  - (iii) when the Inactive Member takes the floor in the General Council it will be identified as such.
Joint Communiqué of the Ottawa Ministerial on WTO Reform Canada, Oct. 24-25, 2018

- First, we underscore the dispute settlement system as a central pillar of the WTO.

- Second, we must reinvigorate the negotiating function of the WTO.
  - We need to conclude negotiations on fisheries subsidies in 2019 in line with the position from WTO Ministers at MC11.
  - Addressing modern economic and trade issues, and tackling pending and unfinished business is key to ensuring the relevance of the WTO.
  - We recognize the need to address market distortions caused by subsidies and other instruments.
Third, we should strengthen the monitoring and transparency of members’ trade.

We seek a fully operational WTO that benefits all. Our objectives outlined above will only be reached through sustained and meaningful political engagement and through dialogue with all WTO members.

The current situation at the WTO is no longer sustainable. Our resolve for change must be matched with action. We look forward to reviewing our progress when we meet again in January 2019.
China’s position on WTO reform

MC of China held a press conference and released “Documents on China’s position regarding the WTO reform” on 23 Nov. 2018. The documents put forward 3 basic principles and 5 points of opinions.

3 basic principles of the reform:

- should preserve the core values of the multilateral trading system, including non-discrimination and openness.
- The reform should safeguard the development interests of developing members.
- should follow the practice of decision-making by consensus. The decision-making process shall be inclusive and open to all members, especially the developing ones. The reform cannot be dictated by a few, nor decided by an exclusive small group of members.
China’s position on WTO reform
(23 Nov. 2018)

5 Opinions

- Firstly, the reform should uphold the primacy of the multilateral trading system.
- Secondly, the priority of the reform is to address the existing crisis or problems faced by the WTO.
- Thirdly, the reform should address the imbalance of trade rules and respond to the latest developments of our time.
- Fourthly, the reform should safeguard the special and differential treatment for developing members.
- Last, but not least, the reform should respect members’ development models.
WTO reform proposal on DSU by China, EU and other 10 countries (26 Nov. 2018)

The proposal focuses on 5 issues regarding “Transitional rules for outgoing Appellate Body members; The issue of 90 days limit for appeal process; The meaning of municipal law as an issue of fact; Findings unnecessary for the resolution of the dispute; The issue of precedent”.

The proposal called on all members to fill the gap for the position of the appeal body, revise related articles in DSU to allow outgoing judge to finish the cases that has been gone through the public hearing but not concluded in their term period.
The trilateral proposal focuses on issues regarding “Independence of Appellate Body members; Efficiency and capacity to deliver; Transitional rules for outgoing Appellate Body members; The launch of the Appellate Body selection process” etc.

- It is proposed to provide for one single but longer (6-8 years) term for Appellate Body members (replacing the current rule of 4-years term with possible second term. To increase the number of Appellate Body members from 7 to 9. To clarify “that the selection process to replace outgoing Appellate Body members shall be automatically launched no later than X [e.g. 6] months before the expiry of their term of office.
Implications of the WTO reform

- WTO crisis has put all its members’ interests at risk, the proposed reform represents the attempt to rescue the organization that has been once claimed as the most celebrated institution of global governance in the contemporary era.

- But the reform will be difficult and complicated since it involves complicated interests adjustment and realignment:
Implications of the WTO reform

- The relationship between developed and developing countries over the issue of development status,
- The U.S. versus almost all other WTO members in terms of launching trade war using its own domestic law, and her persistent boycott of appointment of WTO appeal judge, of course,
- China versus the U.S. and perhaps to large extent other major developed countries regarding how to reconcile the traditional economic practice and institution with the multilateral trading rules.
Difficult issues for the U.S.

The WTO reform is the topic carefully selected by the U.S. and her close allies of developed countries, but U.S. will also face challenges from the up-coming negotiation:

1) DSU reform, complaints from many members regarding boycott behavior with regard to appointment of arbitrator of appellate body.

2) Many developing countries will defend their rights to have the special and differential treatment in the traditional rules, being at odds with U.S. policy stance.
3) Relationship between the U.S. domestic trade act and the multilateral rules will be questioned.
   - Will in the future the recent practice by USTR to launch steel and aluminum tariff war on the Section 232, and the tariff war against China on the Section 301 be allowed by the new rule of WTO.

4) How to respond to wide concern that U.S. has not respected the multilateral trading and economic rules adequately......
Challenges for China

- China may face more demanding adjustments, and the pressing issues may be grouped into two categories:

- I) Vertical issues on policy adjustments in relatively independent areas or sectors:
  - Further reduction of tariff for goods trade
  - Further opening up service trade and foreign investment: Market excess and negative list;
  - Strengthening IPR protection: forced technology transfer, internet infringement for commercial secrets, regulation on transaction of technology license etc.
  - Labor standard, environmental protection;
  - Digital trade (Digital economy or E-commerce)
Challenges for China

I) Horizontal issues across various sectors and some of them touches on deep overhaul on the current economic system and legal arrangements:

- Competition neutrality on SOE, industrial policies;
- Strengthening the rules regulating subsidy
- Increasing transparency and more vigorous on notification;
- The special and differential treatment for developing countries and China’s status as a developing country (with implicit argument of fair and reciprocal principle);
- Market oriented condition for specific industry advocated by U.S. EU, Japan (variant of the concept of NMES) ;
Concluding remarks

- “WTO reform” may replace “trade war” as the key word in the international economic relationship this year. Focus of China-U.S. disputes may shift into the maneuver and bargaining of negotiation.

- The unfolding WTO reform may provide a new opportunity to deepen domestic reform in China, as well as to revise the multilateral rules in line with the need of the rapidly changing global economy.