GLOBE GLOBAL GOVERNANCE AND THE EUROPEAN UNION
Future Trends and Scenarios

REPORT

Case study on the World Trade Organization

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Introduction

The task description requires this deliverable to focus on two separate issues. On the one hand, the purpose of this deliverable is to conduct a case study on the historical development and impact of the World Trade Organization (WTO) as the main organization governing trade. The case study is meant to investigate whether the WTO is well equipped to deliver on its four main objectives, namely trade liberalisation, system maintenance, transparency and dispute settlement. In addition, this case study is meant to focus on the relations between the European Union (EU) and the WTO to determine the extent to which the EU's policy and the WTO's evolution are mutually reinforcing in the face of challenges such as the return of protectionist discourses, and in light of the growing contestation to the EU's normative approach to trade. On the other hand, the task description also calls for an analysis of Aid for Trade, which can help advance the United Nations' Sustainable Development Goals (SDGs). The case study is meant to investigate how the Aid for Trade approach, developed within the context of the WTO, relates to the SDGs. It seeks to delineate the historical development of this important but understudied policy approach and to determine the impact of Aid for Trade on the SDGs. Because these two aspects of the task description are distinct topics, we approach the topics through separate papers.

The first topic centers on the WTO's evolution and the relationship between the EU and the WTO within an increasingly contested multilateral trading system. The EU single market is the world's biggest trading bloc, and trade is seen as a primary driver of economic growth and contributor to employment within the EU. For many of the EU's trade partners, too, trade with the EU is crucial for sustaining and improving economic growth as the EU ranks as the leading trade partner to eighty countries[1]. Accordingly, EU trade policy seeks to leverage the might of the EU as a "trade power" in order to pursue various global governance goals. In fact, the EU is legally required[2] to conduct its trade policy in line with "the principles which have inspired its own creation,

[1] EU Commission Directorate-General for Trade, "EU Position in World Trade - Trade - European Commission," EU Commission, February 2019, https://ec.europa.eu/trade/policy/eu-position-in-world-trade/.
[2] The EU's trade policy, or "Common Commercial Policy" (CCP) falls under EU external action, and therefore Art. 12 of the TEU applies. Art. 205 & Art. 207, Consolidated Version of the Treaty on the Functioning of the European Union [2012] C 326/01.

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development and enlargement, and which it seeks to advance in the wider world"[3] and is thus required to pursue various goals through its trade policy. One of these goals is to "promote an international system based on stronger multilateral cooperation"[4] and the EU is a staunch defender of a multilateral approach to trade governance, and in particular the World Trade Organization as the leading international organization governing trade. Indeed, the EU has a unique stake in the organization – the WTO is one of the few formal intergovernmental organizations of which the EU is a full member, and the EU has long been a firm supporter of the WTO.

In recent years, the EU has reiterated this support for the WTO in light of the increasing pressure and mounting challenges the WTO[5]. Protectionist discourses from major players in world trade and growing contestation within the WTO pose serious obstacles for both the WTO in meeting its primary objectives and the EU in pursuing its global trade agenda. Of the challenges currently faced by the WTO, the breakdown of the WTO's dispute settlement mechanism, resulting from the United States' blockage of new Appellate Body appointments, is widely seen to be among the most detrimental to the multilateral trading system. The EU Commission describes this as a "a 20-year step backward in global economic governance"[6] as well as a major risk to both the EU and the global economic order.

This deliverable seeks to make sense of the changing dynamics and unprecedented recent developments in order to understand how the EU's policies can support and reinforce the WTO's primary objectives. To this end, the first part of the deliverable aims to do two things: first, it will provide a 'bird's-eye' view of the evolving state of play within global trade governance, situating the WTO within this context. Next it will take an in-depth look at the crisis of the WTO's dispute settlement mechanism. It approaches these two related but separate goals through two papers.

The first paper, "The Future of Global Economic Governance: The World Trade Organization, the European Union and the Crisis of Multilateralism" by Jan Wouters, Vineet Hedge and Akhil Raina, provides an up-to-date assessment of the recent

[3] Art. 21, Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[4] Ibid.
[5] European Commission, "WTO Modernisation: Introduction to Future EU Proposals," Concept Paper (Brussels: European Union, 2018), https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.
[6] European Commission, 1.

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developments in the WTO and the EU's engagement with the organization. In light of recent changes both within the organization and with respect to how trade is being conducted globally, it is necessary to re-evaluate how the EU's trade policy aligns with the WTO's administration of the global trade regime. The paper looks at three primary issues: first, recent developments in WTO dispute settlement, notably regarding the Appellate Body; second, evolution in the role of the WTO as a negotiating forum, including the Trade Facilitation Agreement and the Environmental Goods Agreement, but also challenges like the future of Special and Differential Treatment, Illegal, Unregulated and Unreported Fisheries Subsidies, and transparency issues; and third, non-WTO developments such as free trade agreements, unilateral concessions like the Generalized System of Preferences and recent non-multilateral approaches adopted by WTO Members. For each of these issues the article examines how the EU is contributing to the successes and challenges that the multilateral trading system faces today.

The second paper, 'Dispute Settlement and Multilateral Trade Governance: A Tale of Short-Term Paralysis and Systemic Frustrations', by Bart Kerremans, zooms in on the current crisis of the WTO dispute settlement mechanism and the position of the US therein which is singled out in the European Commission's concept paper[7] as one of the key challenges facing the WTO. The underlying claim of the paper is, that in global trade governance, the WTO remains an important potential area for trade negotiation, transparency, and enforcement. Because enforcement affects transparency and negotiations in a fundamental way, the paper strongly focuses on the operation of that enforcement through the WTO's dispute settlement mechanism. Understanding the root causes and longitudinal development of the crisis is of key importance to reflect on proposals for reform.

The second topic of the deliverable – on Aid for Trade – is covered in a third paper. In this paper, we turn to the topic of 'Aid for Trade', which is an initiative launched by the WTO and for which the EU is the largest provider. The analysis of 'Aid for Trade' aims to gain a better understanding of how the EU and other actors use trade to pursue sustainable development. This paper, "Aid for Trade", by Juliana Peixoto Batista,

[7] Ibid.

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provides a comprehensive overview of the Aid for Trade initiative, which seeks to support developing and emerging economies in their integration with the global trading system in order to promote economic growth and sustainable development in those countries. This paper investigates how the EU is promoting its normative approach to trade and the Sustainable Development Goals through its Aid for Trade strategy. The case study outlines the historical development of this important but understudied policy line and seek to determine the impact of Aid for Trade.

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Paper 1

The Future of Global Economic Governance: The World Trade Organization, the European Union and the Crisis of Multilateralism

Jan Wouters[1], Vineet Hegde[2] & Akhil Raina[3]

I. Introduction

The World Trade Organization (WTO), which celebrates its 25th anniversary this year, finds itself in a crisis.[4] While it has faced internal pressures and external dissent before,[5] there seems to be something unique in what is happening today. As Mavroidis explains, it is for the first time that one of the principal architects of the global trading system [the United States (US)] is threatening to not only disengage, but also to leave.[6] The US actions have been most notable within the context of its 'trade war' with China, including tariffs and counter-tariffs based on concerns about national security and intellectual property 'theft'. Inside the WTO – though this precedes the Trump Administration – the US has single-handedly asphyxiated the Appellate Body (AB) into dysfunction; and this has understandably raised questions about the future of international dispute settlement in trade matters. As the current center of the economic governance universe, fissures at the WTO have the potential to cause wide-ranging rippling effects. This is evidenced by the fact that recently, economists at the WTO

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[4] See: Amrita Narlikar, 'Trade Multilateralism in Crisis: Limitations of the Current Debates on Reforming the WTO, and Why a Game-Changer is Necessary' in Soobramanien et. al. (eds.) *WTO Reform: Reshaping Global Trade Governance for the 21st Century Challenges* (Commonwealth Secretariat, 2019) 21-31.
[5] On failed ministerial conferences, see: Rorden Wilkinson, *The WTO : Crisis and the Governance of Global Trade* (Routledge, 2006); on the organizations 'legitimacy' problem, see: Daniel C. Esty, 'The WTO's Legitimacy Crisis', (2002) 1(1) *World Trade Review* 7 – 22; Manfred Elsig, 'The WTO's Legitimacy Crisis: What Does the Beast Look Like?' (2007) 41(1) *Journal of World Trade* 75 – 98; on the need for procedural and substance-based reforms, see: James Thuo Gathii, 'Process and Substance in WTO Reforms' (2004) 56 Rutgers Law Review. For further reading, see: Richard Baldwin and Simon Evenett (eds.) *The Collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20* (VoxEU, 2009).
[6] See: Petros C. Mavroidis, Remarks at "Trade Under Trump", even organized by Columbia Business School (November 19, 2018); for a video-snippet, see: https://www.youtube.com/watch?v=QoWqRtzy9Zg&t=249s (accessed 17/06/2020).

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drastically lowered their forecasts for rise in world merchandise trade volumes for 2019-2020.[7] A recent study by Nicita, Olarreaga and Silva estimates that in a full-blown trade war, where all players engage in tit-for-tat tariff escalations, the import duty on the average exporter would increase by 32 percentage points.[8]

Commentators have previously written that the US dominance in trade affairs has to be replaced with coalitions.[9] This paper's main preoccupation is the question of where global economic governance is heading, and what role could (or should) the European Union (EU), as a "leader"[10] in such affairs, hold? This is particularly relevant since, as Busch and Reinhardt have observed - "the story of dispute settlement at the [WTO] is, in large part, the story of the transatlantic relationship between the United States (US) and European Community (EC)".[11] As such, the EU has steadfastly reiterated its commitment to multilateral solutions regarding problems of global trade,[12] notwithstanding a slight shift in policy (see also *infra,* IV.D).[13] This attitude stems from primary EU law itself: Article 21 of the Treaty on European Union (TEU) necessitates the EU's external action to be guided by the rule of law and respect for the principles of international law, and requires the EU to "promote multilateral solutions to common problems" and "promote an international system based on stronger multilateral cooperation and good global governance"[14] The EU has always attempted to promote its socio-economic values through trade agreements;[15] but can it continue to do so in

[7] See: WTO, *WTO lowers trade forecast as tensions unsettle global economy*, Press Release 840 (October 1, 2019).
[8] See Alessandro Nicita, Marcelo Olarreaga and Peri da Silva, *A trade war will increase average tariffs by 32 percentage points,* Vox CEPR Policy Portal (April 5, 2018), available at: https://voxeu.org/article/trade-war-will-increase-average-tariffs-32-percentage-points (accessed 17/06/2020).
[9] See Alan Beattie, *Can the World Economy Find a New Leader?,* Chatham House Research Paper (October 2019) 18 – 20.
[10] See generally: Jan Wouters and Akhil Raina, 'The European Union and Global Economic Governance: A Leader without a Roadmap?' in Julien Chaisse (ed.) *Sixty Years of European Integration and Global Power Shifts: Perceptions, Interactions and Lessons* (Hart Publishing, 2020) 193.
[11] Marc L. Busch and Eric Reinhardt, 'Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement' in Petersmann and Pollack (eds.) *Transatlantic Economic Disputes* (Oxford University Press, 2003) 465.
[12] See, for a recent example: Cecilia Malmström, *Saving the WTO,* Speech at German Marshall Fund (November 13, 2018), available at: https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157494.pdf (accessed 18/06/2020).
[13] See European Commission 'Reflection Paper on Harnessing Globalisation', COM(2017) 240, 10 May 2017; and European Commission 'A Balanced and Progressive Trade Policy to Harness Globalisation', COM (2017) 492, final, 13 September 2017.
[14] TEU Art. 21(1) and (2)(h). The ability of the EU to achieve this 'global governance through trade' has been studied in Jan Wouters, Axel Marx, Dylan Geraets and Brecht Natens (eds.), *Global Governance though Trade: EU Policies and Approaches* (Edward Elgar, 2015).
[15] See for example: Fabienne Zwagemakers, The EU's Conditionality Policy: A New Strategy to Achieve Compliance, IAI Working Paper 1203 (January 2012). For a contrary view, see: Alasdair Young, 'Liberalizing Trade, not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's 'new generation' Preferential Trade Agreements', (2019) 22 (9) *Journal of European Public Policy* 1253 – 1275.

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a time when multilateralism itself is in crisis and is even being contested? This is what we aim at exploring in the course of this paper.

As Bacchus and Lester observe, the saying goes "never let a crisis go to waste".[16] While the crisis at the WTO is caused largely by the US raising concerns regarding the inability of the organization to tame China, the situation also presents an opportunity to understand where else improvement is required. For now, it suffices to point out the *nature* of the WTO paradigm, which is rooted in the notion of 'regulatory convergence'. The pre-WTO system of the General Agreement on Tariffs and Trade (GATT) was almost entirely uni-purposed: large-scale reduction of tariffs was the main goal. However, during the Uruguay Round (1988-94), with the transatlantic push towards the creation of a more robust, thematically more encompassing organization, the agenda shifted towards policy coherence. For example, the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) agreements require WTO Members to base their technical and health regulations on internationally approved standards.[17] The Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) requires Members to grant certain minimum protection to patents, copyrights, and geographical indicators.[18] The EU has contributed to changing this outlook of the multilateral trading system from a uni-purposed mechanism into a multidimensional one encompassing various interlinked disciplines, like environment, human and animal health, intellectual property etc. However, according to Rodrik, this is exactly the problem: "[i]f the WTO has become dysfunctional, it is because our trade rules have over-reached. A fair world trade regime would recognise the value of diversity in economic models. It should seek a *modus vivendi* among these models, rather than tighter rules."[19] This has also been the persistent complaint of the developing world: that they were 'forced' into the system, and that they now find it hard to live up to those

[16] Jim Bacchus and Simon Lester, *Trade Justice Delayed is Trade Justice Denied,* Cato Free Trade Bulletin 75 (November 20, 2019), available at: https://www.cato.org/publications/free-trade-bulletin/trade-justice-delayed-trade-justice-denied. Originally attributable to M. F. Weiner in an article titled "Don't Waste a Crisis – Your Patient's or Your Own" in *Medical Economics* (1976).

[17] See, for example, TBT Arts. 2.4 – 2.9; and SPS Arts. 3 – 5.

[18] See generally: WTO, *Overview: The TRIPS Agreement,* available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (accessed 19/06/2020).

[19] Dani Rodrik, *The WTO has become dysfunctional,* Financial Times (August 5, 2018), available at: https://www.ft.com/content/c2beedfe-964d-11e8-95f8-8640db9060a7 (accessed 19/06/2020). How this 'problem' is worsening, curtsey of preferential trade agreements is explored in: Bernard Hoekman and Petros C. Mavroidis, *Regulatory Spillovers and the Trading System: From Coherence to Cooperation,* E15/ICTSD/WEF (2015), available at: https://cadmus.eui.eu/bitstream/handle/1814/35862/E15-Regulatory-OP-Hoekman-and-Mavroidis_2015.pdf?sequence=1&isAllowed=y (accessed 19/06/2020).

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obligations; add to this the disputes they face if they cannot comply.[20] The WTO is and has always been a deeply geopolitical organizations, and thus its woes must also be understood in this context.

A final point to be made here is that of narratives. Given that trade has become a major talking point, not just in the niche circles of trade lawyers, economists and policy-makers, Lamp has deconstructed the three narratives that have recently emerged - namely, the Trump narrative, the establishment narrative, and the critical narrative.[21] This is important, since it helps us to understand 'how [we should] think about the winners and losers from globalization', and also because the narratives differ in how they explain the processes that bring out the (ill) effects of trade agreements.[22] Thus, they are relevant in a time when the "redesign" of such agreements is being thoroughly discussed.[23]

While the initiation of the crisis has been with the US, we submit that the EU has the potential to further the goals of the rules-based system and protect the global economic order. To that end, the structure of this paper is as follows. In section II we look at developments in the field of dispute settlement (A) at the WTO (focusing on the AB crises), and (B) under FTAs, with a focus on the EU's role in influencing certain key adjudicatory rulings. Section III turns its attention to negotiations, where we address (A) significant developments, and (B) challenges at the WTO, and the EU's contributions to the successes and efforts to resolve the challenges. Then, in Section IV, we analyze developments in negotiation outside the WTO, where we examine (A) the scholarly debate and the EU's operationalization on the 'FTA-approach', and (B) the current FTA landscape. In this Section we also underscore the EU's leadership in the extent and depths of FTAs. After this, Section V charts out three emerging trends in global economic governance, and how the EU is pursuing to resolve the current challenges through a hybrid model. Section VI concludes.

[20] See generally: Asoke Mukerji, 'Developing Countries and the WTO: Issues of Implementation', (2000) 34(6) *Journal of World Trade* 33 – 74.
[21] See Nicolas Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements', Queen's University Legal Research Paper no. 102 (2018) [hereinafter "Lamp (2018)"].
[22] Lamp (2018) 36.
[23] Gregory Shaffer, 'Retooling Trade Agreement for Social Inclusion', (2019) 1 *University of Illinois Law Review* 1 – 43.

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II. Developments in Dispute Settlement

A. At the WTO

It is perhaps premature to say that the AB "was" the biggest internal issue of the WTO in the last two years.[24] The organ is still 'alive', in so far as DSU Article 17.1 states that "[a] standing Appellate Body *shall* be established…"[25], and there are no clear rules on its disbanding. At the same time, the inability of the WTO membership to overcome the US's persistent vetoing of the (re-)appointment procedures for AB members has functionally asphyxiated the body: the sole presence of Hong Zhao is below the three-member minimum required for the hearing of an appeal.[26] While WTO Members have "urge[d] continued engagement on resolving [AB] issues",[27] even after its paralysis, most of the concerns raised by the US (and some other Members as well) continue to persist. To understand the so-called "AB crisis"[28], we must understand the following considerations.

History, the AB, the 'Problem' of Precedent, and the influence of the EU

By the admission of an ex-AB member himself, the AB was not meant to hold the position of significance it does today.[29] In fact, Members did not expect a large number of cases being appealed.[30] Another ex-AB member opined that the organ's creation "came close to a miracle."[31] According to the DSU, the duty of the AB is simply ensuring legal correctness: its mandate is limited to "issues of law covered in the panel report

[24] For an overview, see: Pieter Jan Kuijper, 'The US Attack on the WTO Appellate Body', 44 *Amsterdam Law School Legal Studies Research Paper* (2017) 2 – 15; Bernard M. Hoekman and Petros C. Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis', RSCAS 56 EUI Working Papers (2019) 1 – 17; and Robert McDougall, 'Crisis in the WTO – Restoring the WTO Dispute Settlement Function' CIGI Papers No. 194, Centre for International Governance Innovation (2018) 1 – 19.
[25] DSU Art. 17.1.
[26] DSU Art. 17.1.
[27] WTO, 'Members urge continued engagement on resolving Appellate Body issues' (December 18, 2019), available at: https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm (accessed 20/06/2020).
[28] See for example: James Nedumpara and Prakhar Bhardwaj, *Crisis in the WTO Appellate Body,* Gateway House (June 20, 2019), available at: https://www.gatewayhouse.in/wto-appellate-body/ (accessed 20/06/2020); Colin B. Picker, 'The AB Crisis as Symptomatic of the WTO's Foundational Defects or: How I Learned to Stop Worrying and Love the AB', in Lo et. al. (eds) *The Appellate Body of the WTO and Its Reform* (2020) 53 - 65; and Matteo Fiorini, Bernard Hoekman and Petros C. Mavroidis, *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Member Preferences,* EUI Working Paper 95 (2019), available at: http://diana-n.iue.it:8080/handle/1814/65244 (accessed 20/06/2020).
[29] Peter Van den Bossche, *From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System,* Maastricht Working Papers 1 (2005), and specifically at 7 – 8 [hereinafter "Bossche (2005)"].
[30] Van den Bossche (2005) 24.
[31] Claus-Dieter Ehlermann, *Some Personal Experiences as Member of the Appellate Body of the WTO*, EUI Working Paper No 02/9 (2002) 44.

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and legal interpretations developed by the panel."[32] The concern over 'rouge' panel reports, in fact, pre-dates the creation of the AB (and the WTO). Porges recounts how "failed panel decisions" of the 1970s and 1980s necessitated the creation of the legal affairs division (LAD) in the GATT Secretariat.[33] Largely the same philosophy exists behind the AB too.

In this sense, the function of ensuring legal coherence slowly got appended to the AB. The basis of this is in the DSU itself: Article 3.2 famously provides that the WTO DSM is a "*central element* in providing *stability and predictability* to the multilateral trading system."(emphasis added)[34] This thinking has been approved in 2008 by the AB in *US – Stainless Steel (Mexico).*[35] In the same report, the AB gave its preferred *modus operandi* to achieve this result: panels were, "absent cogent reason", required to "resolve the same legal question in the same way in a subsequent case."[36] This is, legally, quite far from its earlier rulings; for example, 12 years earlier, in its 1996 report in *Japan – Alcoholic Beverages II,* the AB held that *panel* reports simply "create legitimate expectations among WTO Members, and therefore should be taken into account where they are relevant to any dispute", and furthermore, they are "not binding, except with respect to resolving the particular dispute between the parties to that dispute".[37]

The EU has played a major role in influencing the AB's decision in *US – Stainless Steel (Mexico)*. In fact, the terminology involved in creating a system of security and predictability was suggested by it. In its third party submissions, the EU had stated that there must be a rule whereby the panels follow the AB on legal questions, and can

[32] DSU Art. 17.6.
[33] See: Amelia Porges, 'The Legal Affairs Division and law in the GATT and the Uruguay Round' in Marceau (ed.) *A History of Law and Lawyers in the GATT/WTO* (WTO, 2015) 225 – 226.
[34] DSU Art. 3.2.
[35] 'The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes.', Appellate Body Report , *US – Final Anti-Dumping Measures on Stainless Steel From Mexico,* WT/DS344/AB/R para 161 [hereinafter "ABR, *US – Stainless Steel (Mexico)*"].
[36] ABR, *US – Stainless Steel (Mexico),* para 160. It is significant that only recently, for the first time, a panel found such cogent reason to depart from AB jurisprudence, see: Panel Report, *US – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber From Canada,* WT/DS534/R, para. 7.107, deviating from the AB ruling in *US – Washing Machines.*
[37] Appellate Body Report , *Japan – Taxes on Alcoholic Beverages,* WT/DS11/AB/R, 14.

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depart from the AB "where there are cogent reasons for doing so".[38] Based on its analysis of the case-law of national courts and tribunals and other international adjudicatory bodies it had submitted that

"[t]here must be cogent reasons for a lower court or tribunal to depart from the legal positions taken by hierarchically superior courts. If the lower court or tribunal deviates from what the higher court has considered as the correct legal position its decision runs the risk of being struck down. This will be especially the case when the higher court has, through a series of decisions, endeavoured to create a consistent body of jurisprudence on a particular issue. A lower body may express a reasoned disagreement on legal principles with the higher body, but this will ultimately be for the consideration of the higher body."[39]

The same terminology was cited by the AB in holding that the panels were bound by the rulings of the AB.[40]While the AB's dictum in *US – Stainless Steel (Mexico)* has received a lot of attention in academia and in the criticisms of particular governments (see below), it should be remembered that the AB, in a footnote to the dictum, provided a legal basis for making this claim. It cited the great international law jurist Lauterpacht, who pointed out that the adherence to (previous) decisions "is imperative if the law is to fulfil one of its primary functions, i.e. the maintenance of security and stability."[41] The AB also explained that "[c]onsistency of jurisprudence is valued also in dispute settlement in other international fora"[42] The EU has also had a role in directing the AB's attention to other adjudicatory bodies' decisions. The ICTY decision in *Prosecutor v. Aleksovski* highlighted the need for coherence in international law.[43] This was cited by the EU, and was also used by the AB in justifying its decision.[44] The EU also highlighted other rulings such as the International Court of Justice's ruling in *Peace Treaties* (Dissenting Opinion by Judge Zoricic)[45] and the European Court of Human Rights' ruling

[38] Third Participant Notification and Written Submission by the European Communities, DS344 United States - Final Anti-Dumping Measures on Stainless Steel from Mexico, para. 50, available at: https://trade.ec.europa.eu/doclib/docs/2008/june/tradoc_139369.pdf
[39] Third Party Submissions by the European Communities, DS344 United States - Final Anti-Dumping Measures on Stainless Steel from Mexico, para. 141, available at: https://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137716.pdf
[40] ABR, *US – Stainless Steel (Mexico)*, para. 51.
[41] Hersch Lauterpacht, *The so-called Anglo-American and Continental Schools of Thought in International Law* 12 British Yearbook of International Law (1931) 53.
[42] ABR, *US – Stainless Steel (Mexico),* footnote 313.
[43] ICTY Appeals Chamber Judgement Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, para. 113, Judgement 24 March 2000.
[44] ABR, *US – Stainless Steel (Mexico)*, footnote 313.
[45] Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, ICJ Rep 1950, p. 65 at p. 104, Judge Zoricic, Dissenting Opinion.

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in *Cossey*,[46] to highlight that the international community seeks coherence in the dispute settlement outcomes. Therefore, the EU's submissions were highly influential in the creation of a strict precedential system through the principle of *stare decisis*.While the EU has influenced the AB's approach on precedents in the *US – Stainless Steel (Mexico)* dispute, the US has taken the opposite view. It claims that that the system of precedent was not the original mandate of the WTO dispute settlement.[47] Moreover, during the US's process of ratification of the WTO Agreement, Professor John H. Jackson testified before the US Senate Committee on Foreign Relations that the principle of stare decisis does not exist in international law.[48] Such claims can be attributable to the US's internal outlook as well. The US's domestic legal system has deviated from the principle of *stare decisis*. One such example is the case of *Planned Parenthood*, where the US Supreme Court highlighted that this principle cannot be taken as an "inexorable command".[49]

While technically, there is no concept of '*stare decisis'* in WTO law,[50] the AB must promote a robust jurisprudential environment to enable the DSM to do its duty under DSU Article 3.2. Is the AB successful in walking this fine line? Miranda and Sánchez-Miranda do not think so, and have criticized the AB for taking a "super hardline" approach to creating law.[51] They point to three issues. First, compared to national jurisdictions, the AB has an undesirable "first strike" policy: as against, for example, Mexico, where only after five consecutive and uninterrupted interpretations, does a legal interpretation gain the status of "jurisprudence", the AB's "self-designed" case-

[46] European Court of Human Rights, Cossey Judgement of 27 September 1990, Series A, vol. 184, para. 35.
[47] *Episode 111: Trade Policy under Trump*, Trade Talks with Soumaya Keynes and Chad P. Bown (Podcast), 29:40 - 30:39 <https://www.tradetalkspodcast.com/podcast/111-trade-policy-under-trump/>
[48] JACKSON John H., Testimony Prepared for the US Senate Committee on Foreign Relations Hearing on the World Trade Organization and US Sovereignty, 14 June 1994, 6(5) World Trade and Arbitration Materials (1994), pp. 125-136.
[49] Planned Parenthood of Southeastern Pennsylvannia et al. v. Casey, 505 U.S. 833, 854 (1992)
[50] For an authoritative account on the subject, see: the Raj Bhala 'trilogy': *The Myth about Stare Decisis and International Trade Law (Part One),* 14 (1998) American University of International Law Review (1998) 847 - 956; *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two),* 9 *Journal of Transnational Law and Policy* (1999) 1 - 152; and, *Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three),* 33 (2001) *George Washington International Law Review* 875.
[51] Jorge Miranda and Manuel Sanchez-Miranda, *The Way the AB has Approached WTO Case Law Is Not Helping (Parts I, II and III),* Regulating for Globalization (November 5, 2019) available at: http://regulatingforglobalization.com/2019/11/05/the-way-the-ab-has-approached-wto-case-law-is-not-helping-part-i/ (accessed 20/06/2020) [hereinafter "Miranda and Sanchez-Miranda (2019)". For contrary views, see: Folkert Graafsma and Akhil Raina, *The AB's Seven Deadly Sins?: Frame-correction and some short Responses to Miranda & Sánchez-Miranda (Parts I and II)*, Regulating for Globalization (December 4, 2019) available at: http://regulatingforglobalization.com/2019/12/04/the-abs-seven-deadly-sins-frame-correction-and-some-short-responses-to-miranda-sanchez-miranda-part-i/?print=print#_ftn2 (accessed 20/06/2020) [hereinafter "Graafsma and Raina (2019)"].

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law confers this status on the first go, regardless of whether the AB was correct or not.[52] Second, unlike domestic jurisdictions (the authors give the example of the US), the AB has not overturned its own ruling/dicta or backtracked on an incorrect pronouncement.[53] Finally, compounding the earlier two problems: unlike domestic jurisdictions, there is no "political fix" *via* executive and/or legislative actions: the inability of the WTO to move forward on its consensus-based negotiations is fairly well-known.

Some WTO Members (predominantly, the US) have raised similar concerns.[54] The US is, in fact, right to point out that the "exclusive authority to adopt interpretations" of the WTO agreements rests, not with the AB (or the DSM for that matter), but with the Membership, through Marrakesh Agreement Article IX: 2.[55] However, so far, the times when the Membership has been able to agree upon something that could be called a "legal interpretation", have been few and far between.[56] In such a situation the AB's authority on interpretation becomes "unchallenged"[57] and "extensive", though it remains "fragile",[58] despite calls from some AB members for some kind of 'power sharing'.[59]

The origin of the problem is the "constructive ambiguity" of the negotiated Uruguay Round results. In essence, the WTO agreements allow for multiple "truths". However, according to some observers, the AB has been resistant to accepting this 'reality'.[60] In this situation, one may ask oneself if the AB also holds the position of 'legal loop-filling'?[61] Some have argued that the only duty of the DSM is that of 'clarification', and

[52] Miranda and Sanchez-Miranda (2019), Part III.
[53] For a contrary view, i.e. that the AB has indeed changed its view (albeit only implicitly), see the views of the ex-director of LAD at the GATT and WTO, Frieder Roessler, 'Changes in the jurisprudence of the WTO Appellate Body during the past twenty years', (2015) 14(3) Journal of International Trade Law and Policy 129-146.
[54] See: US Statement at the Dispute Settlement Body (December 18, 2018) [hereinafter "US DSB Statements (2018)"]
[55] US DSB Statements (2018) 10.
[56] What are the contours of such a "legal interpretation", i.e. what exactly could be called a "legal interpretation", is a pertinent question but is unfortunately beyond the scope of this paper.
[57] Arthur E. Appleton, 'Judging the Judges or Judging the Members? Pathways and Pitfalls in the Appellate Body Appointment Process', in Leïla Choukroune (ed.), *Judging the State in International Trade and Investment Law* (Springer, 2016) 12.
[58] Gregory Shaffer, Manfred Elsig & Sergio Puig, 'The Extensive (but Fragile) Authority of the WTO Appellate Body', (2016) 79(1) *Law and Contemporary Problems* 237-273.
[59] Letter to the Chairman of the DSB, http://worldtradelaw.typepad.com/files/abletter.pdf (accessed 20/06/2020).
[60] See: Terence P. Stewart, Patrik J. McDonough, Jennifer M. Smith, and Sandra K. Jorgensen, 'The Increasing Recognition of Problems with the WTO Appellate Body Decision-Making: Will the Message Be Heard?' (2013) 8(11/12) *Global Trade and Customs Journal* 399 – 412. [hereinafter "Stewart et. al. (2013)"].
[61] See Akhil Raina, 'Meditations in an Emergency: The Appellate Body Deadlock – What It Is, Why It Is a Problem, and What to Do About It', (2018) 13 (9) *Global Trade and Customs Journal* 380 [hereinafter "Raina (2018)"].

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that this is a limited role.[62] This is particularly so since the DSU stipulates that the AB cannot "add [to] or diminish [WTO] rights and obligations."[63] However, as one of us observed:

"It is hard to draw precise lines between these four concepts: clarification, interpretation, gap-filling, and law making. Once a legal issue is interpreted, it is ipso facto clarified. Does this automatically fill legal gaps? It may, and it may not, depending on the case. Interpreting the law (judicial function) and making the law (legislative function) are probably the most delineable concepts. One could argue that the AB is simply performing the former, leaving the latter to the Membership. On the other hand, critics want the AB not to develop theories when it is not required."[64]

The EU's influence, the US's concerns and the AB's operations highlighted above have led to the related issue of "judicial activism".

A Power Struggle: Who put the AB in the Driving Seat?

The US has been particularly upset by two recent AB rulings: *US – CVD (China),* from 2014, and *Argentina – Financial Services,* from 2016. With regard to the former, the US claimed that the AB disregarded the parties' arguments and acted as a prosecutor.[65] It opined that the AB, after "reject[ing] a party's appeal, … went on to reverse the Panel report and to find a breach on the basis of an argument and approach entirely of [its] creation".[66] While this criticism is fair, it should be remembered that deference to the disputing parties' legal position is a delicate matter.[67]

[62] Katherine Nolan, 'A Crumbling WTO at the Hands of the Appellate Body – How Appellate Body Overreaching Is Undermining the WTO System' 24 (Thesis), Georgetown University Law Centre (2016), 7 – 10 available at: https://www.researchgate.net/publication/321627778_A_Crumbling_WTO_at_the_Hands_of_the_Appellate_Body_-_How_Appellate_Body_Overreaching_is_Undermining_the_WTO_System (accessed 20/06/2020) [hereinafter "Nolan (2016)"].
[63] DSU Art. 3.2 and 19.2. In fact, Stewart et. al. (2013) cite negotiators of the WTO agreements who have said that the AB has over-reached in page 402, footnotes 80 and 81.
[64] Raina (2018) 380.
[65] See: Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva (23 May 2016) especially at 3–5 [hereinafter "US DSB Statements (2016)"]. The debate boils down to the question of whether the DSM is an 'inquisitorial' or an 'accusotorial' system, see Yasuhei Taniguchi, *The WTO Dispute Settlement System as Seen by a Proceduralist*, (2009) 42(1) *Cornell International Law Journal* 1 – 21.
[66] See: US DSB Statements (2016).
[67] For example, under WTO safeguard rules, parties have attempted to argue that simply because they classify a measure as a "safeguard measure", the panels (and presumably, the AB as well) should accept this as a-given, and allow for the application of the Safeguard Agreement (SGA): see Akhil Raina, 'What is a Safeguard Measure under WTO Law', (2019) 10(2) *Trade, Law and Development* 463 - 481 particularly section B(1) [hereinafter "Raina (2019)"].

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The problem with the latter case was with the US's understanding of the legal concept of '*obiter dicta*'. It went to great lengths to stress that two-third (46 out of 92 pages) of that report was of the nature of *obiter dicta.* This is true. After declaring that the panel erred in its finding on likeness (thereby rendering valueless the conclusions on less favorable treatment, the compliance-exception and the 'prudential carve-out'), the AB went on to discuss these rendered-moot concepts – and in quite some detail, too. This was the basis of the US blockade of reappointment of South Korean judge, Seung Wha Chang, in 2016.[68] The US caustically commented that:

'[t]he Appellate Body is not an academic body that may pursue issues simply because they are of interest to them or may be to certain Members in the abstract. Indeed, as the Appellate Body itself had said many years ago, it is not the role of panels or the Appellate Body to "make law" outside of the context of resolving a dispute—in effect, to use an appeal as an occasion to write a treatise on a W TO agreement.'[69]

However, in the report *itself,* the AB has provided sound justifications for this.[70] First, procedurally, it argued that the (declared moot) issues were validly raised by Panama on appeal, and therefore constituted "issues of law … and legal interpretations developed by the panel" under DSU Article 17.6, and therefore fell within their mandate.

On 'judicial restraint and/or economy' the US and the AB have disagreed too. In *US – Lead and Bismuth II,* the US had argued that the Panel was "required" to exercise judicial economy on matters that were not necessary to resolve the dispute at hand. However, the AB rejected this, stating that judicial economy was within the Panel's discretion, and that it was never "required" to exercise it.[71] And second, the AB said that Panama's appeal has "implications for the interpretation of provisions of the GATS". In other words, since AB reports have future implications, and since WTO litigation is expensive, the AB is clarifying the meaning of the law so that all Members, not just the disputing parties, may benefit from the report. This is particularly relevant since WTO Agreement Article XVI: 4 stipulates that each Member "shall ensure the

[68] See: US May 2016 Statement.
[69] Statement by the U.S. at the Meeting of the W TO Dispute Settlement Body 1 (May 23, 2016) [hereinafter "US May 2016 Statement"]
[70] See Raina (2018) 379 – 380.
[71] See WTO Analytical Index for the DSU, para. 644.

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conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".[72]

The AB's (Legal) Gospel Truth, and Other Problems

All this does not address the core question: was the AB (legally) right? There are many shades of this answer, and this is because the case-law to assess is truly mind-boggling, especially compared to other international dispute fora. The decisions (on both levels of adjudication) are extensive, and it is a matter of which means of measurement one prefers. The AB has been appreciated;[73] entire books have been written on its interpretations,[74] and specific decisions given by it have received both criticism and praise.[75]

Three issues remain, and need to be flagged. The first is whether the AB should consider the meaning of domestic law as 'law' or 'fact'. Only if it is the former can the AB provide meaning to it, otherwise it is to take the concerned Member's word for it. The US has strongly advocated the latter approach, and has raised particular concern with the way the AB approached the matter in *US – CVD/AD (China).*[76] Besides, on the other side of the Atlantic, the EU legal order has also recently seen concerns raised by the Court of Justice of the EU about the possibility of 'external' interpretations of domestic law.[77] The other two issues are procedural. One pertains to the interpretation of Rule 15 of the AB's working procedures, on term extensions for its members.[78] The other concerns the inability of the AB to complete appeals within the mandatory 90-day deadline set under DSU Article 17.5. However, it is important to note that this deadline has become increasingly impossible to meet, for many reasons which are outside the hands of the AB. For example, cases themselves have become more and more complex and technical;[79] the number of third-parties (and therefore their

[72] MA Art. XVI: 4.
[73] Valerie Hughes, 'Accomplishments of the WTO dispute settlement mechanism' in Taniguchi et. al. (ed.) *The WTO in the Twenty-first Century* (WTO, 2007) 185 - 211; Claus-Dieter Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as a Member of the Appellate Body of the WTO', (2002) 36(4) *Journal of World Trade* 605–639.
[74] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, 2010).
[75] See: Miranda and Sanchez-Miranda (2019), Parts I and II; and response in Graafsma and Raina (2019), Part I.
[76] US DSB Statements (2016) 5.
[77] See, on the *Achmea* ruling and subsequent Opinion 1/17 of the ECJ: Guillaume Croisant Opinion 1/17 (April 2019), available at: http://arbitrationblog.kluwerarbitration.com/2019/04/30/opinion-117-the-cjeu-confirms-that-cetas-investment-court-system-is-compatible-with-eu-law/ (accessed 20/06/2020)
[78] See for explanation: Raina (2018) 378 – 379.
[79] See in general: Joost Pauwelyn and Weiwei Zhang, 'Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload', 2018 21(3) *Journal of International Economic Law* 461–487.

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submissions) have exploded in number; and the sheer length of submissions made by parties has gone up sharply. Finally, time taken to translate the report into the three official languages of the WTO are also included within this deadline. To have a fair assessment of the AB's performance, one must select fair measuring sticks.

The Way Forward: Wait and Watch or the EU Way?

The AB crisis has raised concerns about the disappearing of not just the appellate review mechanism, but of binding dispute settlement as a whole.[80] The problem with not having an AB is the possibility of procedural abuse: before a panel report can be adopted by the DSB, disputing parties are allowed to appeal and the report cannot be adopted pending that appeal; the US has already used this in a case against it.[81]

At the time of writing, the *status quo* stands as follows: the AB is effectively defunct (as mentioned above, only one Member remains on it, while three is the minimum number required to sit on an appeal). However, attempts to revive it are ongoing.[82] Currently, the question of whether the AB will be restored or not seems to be beside the point. A former AB Member has indicated that the future appellate mechanism will look drastically different from how the AB was set up.[83] In this crisis situation, the EU has stepped up to resolve such conflicts in a multilateral manner. It has initiated and has sought positive responses from other Members to set up an interim mechanism through the use of arbitration procedures under the DSU.

The idea of using the arbitration procedures provided under DSU Article 25 as a work-around to a non-functional AB, initially prompted by Andersen et. al.,[84] caught some (albeit limited) speed initially, with the EU agreeing to this procedure with Canada[85]

[80] This view has been expressed in: Geraldo Vidigal, 'Living without the Appellate Body: Multilateral, Bilateral and Plurilateral Soltutions to the WTO Dispute Settlement Crisis', (2019) 20 (6) *Journal of World Investment and Trade* 862–890; Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect', (2019) 22(3) *Journal of International Economic Law* 297–321; and Jennifer Hillman, 'Three Approaches to Fixing the WTO's AB: The Good, The Bad, and the Ugly?', Institute of International Economic Law Working Paper (2018).
[81] See: Joint Communication from India and the US, *US – CVD Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WT/DS436/22 (January 16, 2020).
[82] See: Geraldo Vidigal, 'Addressing the Appellate Body Crisis: A Plurilateral Solution', 14 *Amsterdam Law School Legal Studies Research Paper* (2019).
[83] Thomas Graham, *The Rise (and Demise?) of the WTO Appellate Body*, John D. Greenwald Memorial Lecture, Georgetown Law International Trade Update 5 March 2020, 6, available at: https://worldtradelaw.typepad.com/files/t.graham.greenwaldlecture.final_.pdf. Thomas Graham stated that the AB "[i]s not coming back any time soon or in the form it had before".
[84] Scott Andersen, Todd Friedbacher, Christian Lau, Nicolas Lockhart, Jan Yves Remy, Iain Sanford, 'Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals', CTEI Working Paper 17 (2017).
[85] See: Interim Appeal Arbitration Pursuant to Article 25 of the DSU (July 25, 2019), available at: https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf accessed 20/06/2020)

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and Norway.[86] The agreement, now called the Multiparty Interim Appeal Arbitration Agreement (MPIA), has expanded to cover a total of 20 WTO Members[87] and has been notified to the WTO in April 2020.[88] This is significant, especially considering that these include frequent users of the DSM, like Brazil, Mexico, Korea, Colombia, and China. India and Japan are interesting omissions.

The MPIA, according to its promoters, is a strictly interim arrangement, in the absence of the AB, to carry on with appellate review of WTO disputes between MPIA signatories. It is a "stoppage measure".[89] It seeks to preserve the multilateralized dispute settlement rules, even without the support of key influential trade players like the US. The vision is not to create a separate appeal mechanism. But, while systemic concerns regarding the WTO DSM are addressed, in particular the appellate review, the MPIA would serve as a means to uphold security and predictability in the system by providing a temporary platform to resolve disputes. The review is limited to the issues of law that are covered in the panel reports. The mandate of the arbitrators is to uphold, modify or reverse the legal findings and conclusions of the panel.[90] In this respect, their mandate mirrors the one that the AB possessed, and also uses the same terminology provided under Article 17.13 of the DSU.

While keeping to the spirit of the AB in terms of adjudicatory procedures, the MPIA also includes reforms that address some of the concerns which led to the AB's demise in the first place. One such concern is that of judicial activism. To resolve this, the MPIA limits the authority of the arbitrators to address issues that are 'necessary' for that particular dispute. Arbitrators are also limited to address only those issues that have been raised by the parties.[91] Another issue that was raised against the AB was that it

[86] See: Interim Appeal Arbitration Pursuant to Article 25 of the DSU (October 21, 2019), available at: https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158394.pdf (accessed 20/06/2020).
[87] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, JOB/DSB/1/Add.14, 20 May 2020.
[88] Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, JOB/DSB/1/Add.12, 30 April 2020.
[89] European Commission, Interim appeal arrangement for WTO disputes becomes effective, 30 April 2020, available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143
[90] Art. 9, Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, the European Council, 7112/20 LIMITE WTO 61 available at: https://www.consilium.europa.eu/media/43334/st07112-en20.pdf [hereinafter "MPIA"].
[91] MPIA, Art. 10.

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"routinely violated" the time-frame within which it had to release its report.[92] Article 17.5 of the DSU restricts the time-period of the AB's rulings to 90 days. The MPIA now places the power of extending the time period to the parties to make that decision.[93] It further enables parties to 'streamline' the process by, *inter alia,* page and time limits.[94] Although these reforms do not address all the systemic concerns surrounding the WTO DSM, the MPIA is a significant step towards addressing problems that have plagued the AB for a long time.

The initiative of the EU to protect the rule of law through an independent adjudicatory mechanism (although temporary) is not the only proposal that it has made. It has also, in recent years, expressed its desire to "modernize" the functioning of the WTO, particularly across three fields: rule-making and development, regular work and transparency, and dispute settlement.[95] Therefore, it is fair to say that the EU's role in preserving the multilateral rules – while also updating them whenever necessary – has been critical.

While it is not certain what will happen next, potentially significant developments are taking place in dispute settlement on the non-multilateral track.

B. FTA Disputes –New Game in Town?

Traditionally, FTAs, though almost ubiquitous in modern times, have seen very little litigation. Vidigal posits that the WTO system was preferred by Members for its 'stick', in that enforcement through the threat of retaliation was effective, and that the same logic does not work for FTAs on account of the "absence of collective pressure".[96]

However, as the WTO's DSM continues to chart difficult waters, the EU's ideas of "flexible multilateralism" (through FTAs) and "open plurilateralism" (through plurilateral agreements, in and outside the WTO), have become more relevant.[97] While the

[92] The Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization' (2020), 5, available at: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf
[93] MPIA, Art. 12.
[94] *Id*.
[95] The European Commission, *WTO Modernisation: Introduction to Future EU Proposals*, 7 (2018) available at: https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (accessed 20/06/2020) [hereinafter "the EU Commission, 'Concept Paper on WTO Modernisation'"].
[96] See Geraldo Vidigal, 'Why Is There So Little Litigation under FTAs? Retaliation and Adjudication in International Dispute Settlement', (2018) 20 (4) *Journal of International Economic Law*, 928 [hereinafter "Vidigal (2018)"].
[97] See: Commission, 'Global Europe: Competing in the World – A Contribution to the EU ' s Growth and

content of these FTAs and plurilaterals will be discussed in Section III(C), it increasingly appears that the EU may be getting ready to 'jump ship' on dispute settlement. While the EU had several FTAs in place for quite a few years, it had never initiated disputes under them - or rather, thanks to the WTO, it never had to. However, the tides are changing. In 2019, and in quick succession, the EU challenged: Ukraine (over lumber restrictions)[98]; South Korea (over worker rights)[99] and Turkey (over measures relating to pharmaceuticals).[100] The US may be making movements in this direction as well: a decision by Colombia to prevent Uber from operating may end up as a claim under the FTA between the two countries.[101]

What to make of these developments, as yet, is not entirely clear. They could be a cause for concern for the WTO dispute settlement system, as perhaps it is no longer the 'only game in town'. So far, however, very few completed panel reports exist under FTAs, and they usually take a very long time to come to fruition.[102] It should also be remembered that the WTO settles disputes not just through its litigation procedures but also through 'conflict prevention' in its committee discussions.[103] Without the necessary arrangements for this purpose, this function cannot be replicated by FTAs.

III. Negotiations at the WTO

As dealt with in the previous section, there is a deadlock on the reform of the WTO's dispute settlement mechanism. However, this does not mean that the WTO has become an irrelevant organization. WTO Members have been highly active in the organization as a negotiating forum. However, here too, there are several substantive and institutional issues that attack the core functioning of the WTO. Some WTO

Jobs Strategy' COM (2006) 567 final, 4 October 2006, 10; and High Representative of the EU for Foreign Affairs and Security Policy, ' Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the EU ' s Foreign and Security Policy ' (2016). For further reading on this, see Joris Larik, ' Th e EU's Global Strategy in the Age of Brexit and 'America First', Leuven Centre for Global Governance Studies Working Papers (2017) 193.

[98] European Commission, 'EU asks for a panel with Ukraine on wood export ban' (June 21, 2019), available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2034 (accessed 20/06/2020).

[99] European Commission, 'EU moves ahead with dispute settlement over workers' rights in Republic of Korea' (July 5, 2019), available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2044 (accessed 20/06/2020).

[100] European Commission, 'EU requests WTO dispute settlement panel over Turkey's measures on pharmaceuticals (August 2, 2019), available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2055 (accessed 20/06/2020).

[101] See: Reuters, 'Uber to take exit ramp in Colombia after 'arbitrary' court ruling' (January 10, 2020), available at: https://www.reuters.com/article/us-uber-colombia/uber-to-take-exit-ramp-in-colombia-after-arbitrary-court-ruling-idUSKBN1Z921L (accessed 20/06/2020).

[102] Vidigal (2018) 928.

[103] See: Henrik Horn, Petros Mavroidis and Erik Wijkstorm, 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees', 47 (4) Journal of World Trade (2013).

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Members have contributed to these developments and have made efforts in addressing related concerns. In this area, too, the EU has emerged as a leader to uphold multilateralism in support of the WTO. This section analyses each of the abovementioned developments as well as the challenges so as to provide a holistic understanding of the *status quo* of the WTO as a negotiating forum. It also focuses on the EU's role in the success of negotiations and efforts to address the current challenges.

A. Significant Developments

The first success of WTO negotiations has to do with the gradual expansion of the organization's membership since its creation.[104] At the conclusion of the Uruguay Round negotiations, 123 parties signed the Agreement on 15 April 1994 to establish the WTO.[105] Since then, 41 countries – including China and Russia - have acceded to the WTO, making a total of 164 WTO Members.[106] 22 countries are currently in the process of accession, including Iran, Algeria and Libya.[107]

Still, in recent years, WTO Members have also made significant developments in *substantive* policy matters. 141 out of 164 Members have ratified the multilateral Trade Facilitation Agreement (TFA), which is designed to remove bottlenecks in the ease of trade.[108] Members have also initiated negotiations to reduce tariffs on environmental goods through the Environmental Goods Agreement (EGA).[109] Other accomplishments include export competition on agricultural goods,[110] amendments to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[111] and a recent

[104] Bernard Hoekman, 'Expanding WTO Membership and Heterogeneous Interests', (2005) *4 World Trade Review* 401-408, 401.
[105] The World Trade Organization, *Understanding the WTO*, 18, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap1_e.pdf (accessed 20/06/2020).
[106] The World Trade Organization, WTO Accessions, available at: https://www.wto.org/english/thewto_e/acc_e/acc_e.htm (accessed 20/06/2020).
[107] *Id*.
[108] The World Trade Organization, *WTO's Trade Facilitation Agreement Enters into Force,* 22 February 2017 available at: https://www.wto.org/english/thewto_e/acc_e/acc_e.htm (accessed 20/06/2020).
[109] The World Trade Organization, *Environmental Goods Agreement (EGA)*, available at: https://www.wto.org/english/tratop_e/envir_e/ega_e.htm [hereinafter "WTO, Environmental Goods Agreement"].
[110] *Export Competition, Ministerial Decision on 19 December 2015*, Ministerial Conference Tenth Session, Nairobi, 15-18 December 2015, WT/MIN(15)/45. [hereinafter "Nairobi Export Competition Ministerial Decision"].
[111] *TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter "TRIPS Agreement"]. Article 31bis was added to it through an amendment in January 2017.

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declaration on women empowerment in trade.[112] Some of the significant accomplishments are discussed in detail below.

Trade Facilitation Agreement

During the 2013 Ministerial Conference in Bali, WTO Members issued a declaration to negotiate on the TFA.[113] This was in conformity with Annex D of the Doha Working Programme.[114] The TFA is also the first multilateral agreement that Members agreed upon since the establishment of the WTO. This Agreement intends to reduce bottlenecks in global value chains (GVCs). It also ensures the simplification of technical and legal procedures so as to enable the smooth functioning of international trade.

Before the ratification of the TFA, economists estimated that the cost of international trade stood at more than $2 trillion per year.[115] These costs were largely due to "duplicative, unnecessary customs procedures, customs and border fees, and administrative requirements".[116] The Organization for Economic Co-operation and Development (OECD) in 2014 estimated that the cost of international trade would be reduced by 12.9% for upper-middle-income countries, 15.1% for lower-middle-income countries, and 14.1% by low-income countries,[117] when the WTO TFA would enter into force.

Along with the aim of reducing "less visible barriers produced by inefficient administration and organization of the trade transaction process",[118] the TFA also has a significant *developmental* angle. Section II of the TFA encompasses Special and Differential (S&D) provisions that allow less-developed countries some "novel

[112] *Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017* https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf (accessed 20/06/2020).
[113] *Agreement on Trade Facilitation*, Ministerial Conference Ninth Session Bali, 3-6 December 2013, WT/MIN(13)/36, WT/L/911.
[114] The World Trade Organization, *Doha Working Programme of 1 August 2004*, WT/L/579, Annex D, available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=42383,81935&CurrentCatalogueIdIndex=1&FullTextSearch=
[115] Pascal Lamy, F*ormer Director General of the WTO, Speech to the Chittagong Chamber of Commerce* (1 February 2013), available at: https://www.wto.org/english/news_e/sppl_e/sppl265_e.htm (accessed 20/06/2020).
[116] Antonia Eliason, 'The Trade Facilitation Agreement: A New Hope for the World Trade Organization', (2015) 14 *World Trade Review* 643, 644.
[117] The Organisation for Economic Co-operation and Development, *The WTO Trade Facilitation Agreement Potential Impact on Trade Costs*, OECD, February 2014, available at: http://www.oecd.org/trade/understanding-the-global-trading-system/making-trade-work-for-all/ (accessed 20/06/2020).
[118] Yukyun Shin, 'New Round and Trade Facilitation: Proposing a Tentative Draft Agreement on Trade Facilitation Measures', (2001)35(2) *Journal of World Trade* 229, 229.

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approach"[119] to implement the Agreement. Developed Members have agreed to assist developing and least-developed countries by way of capacity building, regional and sub-regional integration.

While some have applauded the ratification of the TFA as a new hope for the relevance of the WTO, others have criticized it by arguing that it neither provides a platform for reciprocal bargaining nor an operational mechanism for assistance within the WTO framework.[120] Critics have also highlighted that there are no mechanisms to implement the assistance programs provided by the developed Members to the least-developed Members.[121] Along with this, the TFA also goes against the broader WTO principle of "single undertaking".[122] The "single undertaking" principle mandates the Members must adopt the negotiating packages in totality if they do so, rather than selectively adopting individual rights and obligations.[123] While this is a broader principle that applies to all WTO agreements, the TFA operates as an exception. It allows the application of the Agreement only to Members who have ratified it. In spite of these concerns, the TFA can be considered as a significant stride in the negotiating forum as it is the first multilateral agreement within the WTO framework since 1995. Also, the reduction in the trading costs for exporters and businesses can be seen as a positive step towards improving trade logistics and enhancing global competitiveness.

In the discussion of a successful trade facilitation regime, the EU played a prominent role. Even before the TFA was entered into force, the EU's support for trade facilitation totaled up to €11 billion for the period 2013-2017.[124] To foster facilitation, the EU

[119] Maureen Irish, 'Development, Reciprocity and the WTO Trade Facilitation Agreement', (2017) 14. *Manchester Journal of International Economic Law* 50, 50. [hereinafter "Maureen Irish, Development, Reciprocity and the WTO TFA"]; Ben Czapnik, 'The Unique Features of the Trade Facilitation Agreement: A Revolutionary New Approach to Multilateral Negotiations or the Exception Which Proves the Rule?' (2005) 18(4) *Journal of International Economic Law* 773-794, 774.
[120] Joseph Michael Finger, 'The WTO Trade Facilitation Agreement: Form without Substance Again?', (2014) 48(6) *Journal of World Trade* 1279, 1284.
[121] *Id*.
[122] Maureen Irish, Development, Reciprocity and the WTO TFA, 60.
[123] The World Trade Organization, *How the Negotiations are Organized*, available at: https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm (accessed 20/06/2020); *Also see*, Patrick Low, 'WTO Decision-Making for the Future', (2011), World Trade Organization Economic Research and Statistics Division Staff World Paper ERSD-2011-05, 3-4.
[124] The European Commission, *European Commission Support for Trade Facilitation*, January 2017, available at: https://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155332.pdf (accessed 20/06/2020).

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adopted the "Aid for Trade" (AfT) agenda in 2007.[125] Through the AfT,[126] the EU aims to help developing countries in terms of technical assistance, trade-related infrastructure, build capacity, and support trade-related adjustments. It also aids in reducing the negative effects of border inefficiencies and enhancing the benefits of trade. The EU has pledged € 400 million in assistance and trade facilitation when the TFA entered into force.[127]

Environmental Goods Agreement

The EGA is an initiative by some WTO Members to eliminate tariffs on various environment-related goods, so as to achieve climate goals, such as clean and renewable energy, waste management, noise and air pollutions, etc. The current negotiations are structured on a plurilateral platform with 18 participants representing 46 WTO Members.[128] The EGA negotiations that started in 2014, stemmed out of the 2012 Asia-Pacific Economic Cooperation (APEC) Leaders' Declaration to cut tariffs on environmental goods.[129] The negotiating initiative is one of the prime examples of how WTO Members are addressing sustainable development concerns like the environment, where it intersects with trade.

The EGA has the potential to aid countries in meeting their climate goals. However, the last meeting was held in 2016 and the pace of negotiations has not picked up. The reason for the stalemate appears to be, first of all, a lack of commitment of the participants in eliminating tariff barriers on environmental goods. Negotiating Members have included goods that they have a comparative advantage over in the list, and have excluded goods with high tariffs.[130] If the objective was to reduce tariff barriers on environmental goods, then Members could have included all the goods that could

[125] The European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Towards an EU Aid for Trade Strategy - the Commission's Contribution,* COM(2007) 163 final, 04 April 2007.
[126] Bernard Hoekman, 'Strengthening the Global Trade Architecture for Development', World Bank Policy Research Working Paper No. 2757; Jean-Jacques Hallaert, 'The Aid for Trade Initiative: A WTO Attempt at Coherence' *Robert Schuman Centre for Advanced Studies Research Paper No. 2015/06* (2015); Jean-Jacques Hallaert, 'Revamping Aid for Trade for the Post-Bali WTO Agenda' in Simon J. Evenett and Alejandro Jara (eds.) *Building on Bali - A Work Programme for the WTO* (VoxEU eBook, 2013) 81-86.
[127] The European Commission, *EU Welcomes Entry into Force of the WTO Trade Facilitation Agreement*, Press Release, 22 February 2017, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_188 (accessed 20/06/2020).
[128] WTO, Environmental Goods Agreement.
[129] *2012 Leaders' Declaration*, Asia-Pacific Economic Cooperation, Vladivostok, Russia, 08 September 2012.
[130] Jaime de Melo & Jean-Marc Solleder, 'The role of an Environmental Goods Agreement in the quest to improve the regime complex for Climate Change', (2019) EUI Working Paper, RSCAS 2019/55, 5.

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potentially be considered "environmental goods", especially the ones with high tariffs. Second, developing countries other than China and Costa Rica have also not participated in these negotiations.[131] Mark Wu has highlighted the reasons for developing countries' non-participation. [132] He states that they have little to gain in the current structure of the negotiations. The slow pace of the negotiations, the lack of commitment, and non-participation of most of the developing countries, help to explain the current stalemate in the EGA negotiations.

The EU is one of the negotiating parties to the EGA. The European Commission's Directorate General (DG) of Trade has assessed the potential impact and trade growth through the EGA between seventeen negotiating participants. It concluded that there would be an increase of €21 billion or up to 1.1% in the value of global trade.[133] DG Trade has also assessed the potential social impact on human rights, and concluded that there can be positive effects on people's right to work, leisure, education and access to information.[134] While the negotiations are currently dormant, the EU has the potential of taking a leading role and encouraging other players in fulfilling the negotiating agenda.

Other significant developments

Other significant developments include the 2015 Nairobi Declaration on Export Competition on agricultural goods as well as the 2017 amendment to the TRIPS Agreement on public health. The Nairobi Declaration was lauded as the "most significant outcome on agriculture".[135] Among other things, the main focus of the Nairobi Declaration was the elimination of export subsidies on agriculture. Although this was an important achievement, it was done through a ministerial declaration, rather than a binding legal instrument, resulting in a weaker status.[136] With respect to the amendment to the TRIPS Agreement, Members intended to secure developing

[131] WTO, EGA.
[132] *See generally*, Mark Wu, 'Why Developing Countries Won't Negotiate: The case of the WTO Environmental Goods Agreement', (2014) 6 *Trade Law & Development* 93.
[133] The Directorate-General for Trade, 'Trade Sustainability Impact Assessment on the Environmental Goods Agreement – Final Report', (2016) The European Commission, 18, available at: http://trade.ec.europa.eu/doclib/docs/2016/august/tradoc_154867.pdf (accessed 20/06/2020).
[134] *Id*. at 6.
[135] *Ministerial Decision on Export Competition*, para. 6, WT/MIN(15)/45 WT/L/980, 21 December 2015.
[136] Rodrigo Bardoneschi, 'Accelerating the elimination of export subsidies in agriculture', *International Centre for Trade and Sustainable Development*, 30 October 2017, available at: https://www.ictsd.org/opinion/accelerating-the-elimination-of-export-subsidies-in-agriculture

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countries "a legal pathway to access affordable medicines".[137] In December 2005, WTO Members adopted a protocol to allow less-developed countries to use the multilateral trading system to the benefit of public health. After more than 11 years, in January 2017, the amendment - Article 31bis of the TRIPS Agreement - entered into force. Other accomplishments include negotiations and joint initiatives on an e-commerce moratorium;[138] investment facilitation; micro, small and medium enterprises; and domestic regulation on services trade.[139]

B. Challenges

Along with the aforementioned developments, WTO Members are facing challenges in achieving consensus on certain substantive policy issues. These issues include the North-South divide through the issue of Special and Differential (S&D) Treatment, that is increasing the divide in the economic integration between the developed and the developing world; and the regulation of illegal, unregulated, and unreported (IUU) fisheries subsidies. There are also issues that concern the institutional aspect of the WTO, such as the working practices and transparency in notification procedures. This sub-section aims to explore these challenges in more detail in order to provide a broader outlook of the *status quo* at the WTO.

Substantive policy issues

The North-South Divide

A systemic issue that the WTO currently faces is the increasing North-South / developed-developing country divide. The divide is the perception of non-inclusion that the developing Members have, in the norm making process at the WTO. This divide has existed since the GATT era.[140] Hudec traces the history to state that the UN Conference on Trade and Development (UNCTAD) was especially created by the

[137] The World Trade Organization, 'WTO IP Rules Amended to Ease Poor Countries' Access to Affordable Medicines', 23 January 2017, available at: https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm
[138] *TRIPS Non-violation and Situation Complaints Moratorium*, General Council Decision, 11 December 2019, WT/L/1080.
[139] The World Trade Organization, *Annual Report 2019,* 8, available at: https://www.wto.org/english/res_e/booksp_e/anrep19_e.pdf (accessed 20/06/2020) [hereinafter "WTO, *Annual Report 2019*"].
[140] Nicolas Lamp, 'How Some Countries Became 'Special': Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking,' (2015) 18(4) *Journal Of International Economic Law* 743-751.

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developing countries as an alternative to GATT.[141] The divide also spilled over after the the institutionalization of the multilateral trading system through the WTO. In 2001, Members intended to discuss development in the context of international trade through the Doha Ministerial Conference.[142] However, substantive differences between the North and South precluded any fruitful result. One of the main offensive interests of developing Members were the agricultural subsidies provided by developed Members to their farmers.[143] An agreement on resolving this issue failed, and the Doha Round lead to an impasse. Several other issues like non-agricultural market access, special safeguard mechanism, intellectual property rights etc. also contributed to this collapse.[144] However, S&D treatment to developing and least-developed Members, a contentious issue in the Doha Round, is still is one of the prominent issues that contributes to the increasing North-South divide in the WTO.

S&D treatment provides relaxation to the developing and least-developed Members in implementing WTO obligations,[145] on account of their inability to fulfill their WTO obligations. Their constraints can be attributable to a lack of capacity and resources in implementation of the obligations. As of today, the "developing country" status in the WTO can be achieved through self-declaration by any Member without any objective criteria. However, least-developed Members are objectively classified by the UN.[146]

Due to the ambiguity in adopting reciprocal commitments and lopsidedness in the level playing field, developed Members have stated that certain advanced-developing countries are taking advantage of the system by claiming relaxations through self-declaration of their developmental status. The US in particular has proposed objective criteria to exclude countries from S&D treatment that are (i) members of the OECD, (ii) G20 members, (iii) a "high-income" country as classified by the World Bank, or that (iv)

[141] Robert E. Hudec, *Developing Countries in the GATT Legal System* (Cambridge University Press, 2011) 51.
[142] *Doha WTO Ministerial 2001: Ministerial Declaration*, World Trade Organization Ministerial Conference Fourth Session, WT/MIN(01)/DEC/1, 20 November 2001, paras. 1, 2 & 4.
[143] Robert Wolfe, 'First Diagnose, Then Treat: What Ails the Doha Round', (2015) 14(1) *World Trade Review* 7-28, 10-11.
[144] *Id*. at 8.
[145] The World Trade Organization, *Special and Differential Treatment Provisions*, available at: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (accessed 21/06/2020).
[146] The World Trade Organization, *Least-developed countries*, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (accessed 21/06/2020); *See also*, the United Nations Committee for Development Policy, *List of Least Developed Countries (as of December 2018)**, available at: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf (accessed 21/06/2020).

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represent 0.5% percent or more of the global merchandise trade.[147] Developing Members like India and China have made proposals to protect S&D treatment as they consider this a "customary practice" under WTO law[148] and a treaty-embedded, non-negotiable right.[149] While S&D treatment was agreed to be an integral part of the DDA, the US has rejected it and termed the DDA as a "thing of the past".[150]

The WTO Secretariat has classified S&D provisions in the WTO Agreements into five headings, which are based on the intended purpose of those provisions and not on their legal status. These are: (a) provisions requiring WTO Members to safeguard the interests of developing countries; (b) provisions aimed at increasing trade opportunities through market access; (c) provisions allowing flexibility to developing countries in rules and disciplines governing trade measures; (d) provisions allowing longer transitional periods to developing countries; and (e) provisions for technical assistance.[151] However, the legality of these S&D provisions is uncertain. Scholars have noted that the S&D treatment fails to generate concrete legal rights and obligations.[152] This was also evidenced in the Doha Ministerial Declaration, where WTO Members called for "more precise, effective and operational"[153] use of S&D treatment. While developing countries attempted to make the S&D provisions in the WTO agreements a legally binding mechanism,[154] there has been no consensus from the developed Members.

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[147] *Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance*, WT/GC/W/757, 16 January 2019 (Communication from the United States).
[148] *The Continued Relevance of Special and Differential Treatment in favour of Developing Members to Promote Development and Ensure Inclusiveness*, WT/GC/W/765, 18 February 2019 (Communication from China, India et. al.).
[149] *Strengthening the WTO to Promote Development and Inclusivity*, WT/GC/W/778/Rev.2, 7 August 2019 (Communication from India et. al.).
[150] The Office of the United States Trade Representative, '2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program', 29 (2018), available at: https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF (accessed 21/06/2020).
[151] The World Trade Organization Committee on Trade and Development, 'Special and Differential Treatment in the WTO Agreements and Decision', *Note by the Secretariat*, para. 1.5, W/COMTD/W/239, 12 October 2018. To our knowledge, only one scholar, Edwini Kessie, has analysed the legal status of these headings: 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements', in George A Bermann & Petros C. Mavroidis (eds.) *WTO Law and Developing Countries* (Cambridge University Press, 2010) 23-34.
[152] Sungjoon Cho, 'The Demise of Development in the Doha Round Negotiations', (2010) 45 *Texas International Law Journal* 573-601, 594.
[153] *Ministerial Declaration of 14 November 2001*, The World Trade Organization, para. 44, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 753 (2002).
[154] *Communication from Cuba, India, et.al., Proposal for a Framework Agreement on Special and Differential Treatment*, General Council, para. 15, WT/GCW/442 (19 September 2001).

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The North-South divide has increasingly become problematic, as the WTO Members' positions on this issue are on diametrically opposite ends. The US has called for complete abolition, most likely to suppress certain rising powers like China. Developing Members on the other hand hold on to the rhetoric of the necessity of differential treatment, without sound legal basis. In comparison, the EU has adopted a moderate approach to this issue. It acknowledges that S&D treatment is an important principle for the purposes of development,[155] while also noting the importance of a level-playing field in the multilateral trading system. The EU has called for a needs-driven and an evidence-based approach.[156] Its aim is to make sure that the S&D treatment is provided on a targeted and case-by-case basis, rather than through an open-ended bloc mechanism. It advocates for a mechanism whereby Members who are in need of relaxation in commitments must demonstrate a need for differential treatment. This approach would ensure that the level playing field is balanced, while also considering the developmental needs of certain Members. It would contribute to bridging the North-South divide by providing S&D treatment for Members who demonstrate a genuine need. Recent scholarship has also endorsed this mechanism considering that the polarized stances between the US and the developing Members are stalling current negotiations on systemic issues.[157]

Other than being a part of the current negotiations, the EU has been involved in shaping key S&D rules in the past. More specifically, the EU has been involved in disputes whereby the WTO panels have clarified the degree of legality that many S&D provisions entail. These disputes concerned questions about how binding certain duties are and whether they can be enforceable, such as the obligation for developed Members to consider the needs and interests of developing Members while adopting certain measures. Article 10.1 of the Agreement on Sanitary and Phytosanitary Measures (SPS) is one such provision. It imposes a duty on the developed Members to consider developing Members' interests while adopting SPS measures. The WTO panel in *EC- Biotech* stated that this duty does not necessarily entail that the developed

[155] The European Commission, 'Concept Paper on WTO Modernisation', (2018), 6.
[156] *Id*. at 7.
[157] James Bacchus and Inu Manak, 'The Development Dimension: What to Do about Differential Treatment in Trade', Cato Institute, available at: https://www.cato.org/publications/policy-analysis/development-dimension-what-do-about-differential-treatment-trade?fbclid=IwAR0ifM5qUa1ywvbsivp6YODF0cW52_7NqcdST8GP3KcZTzQIxGyPRUYDXr4 (accessed 21/06/2020).

Member *must* give differential treatment.[158] It only means that the developmental needs are to be considered as a factor for adopting such measures. The omission to provide S&D treatment cannot be reprimanded under the WTO Agreements. A similar legal interpretation was given by WTO panels in earlier disputes like *EC – Bananas III*[159] and *EC – Bed Linen*.[160]

IUU Fisheries Subsidies

The negotiations on IUU fisheries subsidies were launched at the 2001 Doha Ministerial Conference. The mandate was to reform the existing WTO disciplines on subsidies for fishing and aquaculture sectors. Although the negotiations were slow-paced until 2017, they have accelerated after the 2017 Buenos Aires Ministerial Conference. Members agreed to reach an agreement on IUU fisheries subsidies by 2019.[161] The objective of the negotiations is to "reduce subsidies that lead to overfishing and to eliminate subsidies to illegal, unreported and unregulated fishing".[162] These negotiations are aimed at realizing UN Sustainable Development Goal (UN SDG) 14.6.[163]

The issue of IUU fisheries subsidies came into the limelight in the aftermath of the Food and Agriculture Organization's (FAO) data, according to which fish stocks that are within biologically sustainable levels has fallen from 90% in 1974 to 66.9% in 2015.[164] Also, $20-30 billion per year are estimated to have been spent for subsidies that concern fishing and aquaculture sectors.[165] Economists have identified that disciplines

[158] Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, 847, para. 7.1620.
[159] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, 1085, para. 7.272-7.273.
[160] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, 2077, para. 6.233.
[161] *Fisheries Subsidies Ministerial Decision of 13 December 2017*, Ministerial Conference Eleventh session Buenos Aires, WT/MIN(17)/64, 18 December 2017.
[162] UN General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development*, 23-24, 21 October 2015, A/RES/70/1.
[163] Target 14.6 of the UNSDG states, "*By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.*"
[164] The World Trade Organization, 'Introduction to Fisheries Subsidies in the WTO', available at: https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm (accessed 21/06/2020).
[165] Basak Bayramoglu et. al., 'Trade and negotiations on fisheries subsidies', VOX CEPR Policy Portalm 21 October 2019, available at: https://voxeu.org/article/trade-and-negotiations-fisheries-subsidies (accessed 21/06/2020). The

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on regulating subsidies improve the terms of trade of exporting countries. However, when it comes to fisheries, the effect of banning subsidization increases the global stock of fisheries, thereby driving the world prices down.[166] In short, this could affect the long-term effects of disciplines on fisheries subsidies. This could, in turn, worsen the terms-of-trade, which goes against disciplining subsidies in other areas like agriculture or industrial goods. Lee highlights the legal problem of negotiating this issue from a subsidies point of view, to state that the concern is not about subsidies, but the enforcement of regulations in national jurisdictions.[167] Therefore, there are substantial points of differences that have not yet been solved by the negotiators, who are rushing to fulfill their mandate of an agreement by the next Ministerial Conference.

While work on the issue has continued, as of yet, WTO Members have failed to reach an agreement. Negotiations have stumbled into 2020, and progress seems "quite modest" since July 2019 according to the Chair of the WTO Negotiating Group on Rules.[168]

The EU has also been active in its proposals at the WTO when it comes to IUU fisheries subsidies. Former EU Trade Commissioner Malmström had urged WTO Members to agree on a multilateral agreement that curbs harmful fisheries subsidies and foster the UN SDGs.[169] The Commissioner also urged the Members to expedite the negotiations and conclude an agreement before the 12th Ministerial Conference.[170] The EU has also tabled a proposal at the WTO to address overfishing and uphold the UN SDG on "conservation and sustainable use of oceans, seas and marine resources for sustainable development".[171] Nevertheless, a recent EU proposal has come under criticism after the European Parliament voted [in plenary] on the European Maritime

authors refer to the OECD estimate through the Fisheries Support Estimate database, for OECD members and some developing countries including China.

[166] Basak Bayramoglu et. al., 'Trade and Fisheries Subsidies', (2018) 112 *Journal of International Economics* 13, 24.

[167] Jaemin Lee, 'Subsidies for Illegal Activities?—Reframing IUU Fishing from the Law Enforcement Perspective', (2019) 22(3) *Journal of International Economic Law*, 417, 423-428.

[168] Emma Farge, 'Ditch long-held positions, WTO Chair Urges in Key Fisheries Talks', Reuters, 16 December 2019, available at: https://www.reuters.com/article/trade-wto-fish/ditch-long-held-positions-wto-chair-urges-in-key-fisheries-talks-idUSL8N28Q1EX (accessed 21/06/2020).

[169] The European Commission, 'The EU proposes to curb subsidies causing overfishing in WTO countries' (17 October 2016), available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1561

[170] *Id*.

[171] *Advancing Toward a Multilateral Outcome on Fisheries Subsidies in the WTO - European Union*, Negotiating Group on Rules, TN/RL/GEN/181 (2016).

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and Fisheries Fund (EMFF) for 2021-2027.[172] The EMFF allocation is for €6 billion of subsidies to fishing and aquaculture sectors. The EU's commitments under the EMFF could potentially contribute to overfishing.[173] This agenda backtracks the EU's commitments under the UN SDGs and the goal of WTO Members to reach an agreement on regulating IUU fisheries subsidies.

Procedural Issues

Other than substantive policy issues, there are some inherent procedural and institutional issues within the WTO. While the dispute settlement mechanism and negotiating forum attracts considerable attention, the day-to-day working practices of the WTO are also an integral part of its functioning.[174] One of such procedural functions is to encourage transparency through monitoring mechanisms. This issue has gained a spotlight and WTO Members have tabled concrete proposals to enhance transparency in the notification procedures.

Transparency

Making trade rules clear and public is an important prerequisite for predictability in the multilateral trading system.[175] Transparency in trade measures provides "certainty in international markets",[176] while also helping to prevent trade tensions from escalating into full-blown disputes. Members enhance predictability by disclosing their policies or by notifying to the WTO. The Trade Policy Review Mechanism (TPRM), a transparency mechanism, is set up within the WTO to surveil the trade measures of Members. However, the findings are not enforceable of WTO obligations.[177] Therefore, the TRPM monitoring mechanism functions as soft law, rather than enforceable hard law. [178]

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[172] *See generally*, The European Parliament, 'European Maritime and Fisheries Fund 2021-2027', http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625190/EPRS_BRI(2018)625190_EN.pdf (accessed 21/06/2020).
[173] Ignacio Fresco Vanzini, *The EU Must Bury the Debate on Harmful Fisheries Subsidies once and for all*, Euractiv, (27 March 2019) available at: https://www.euractiv.com/section/agriculture-food/opinion/the-eu-must-bury-the-debate-on-harmful-fisheries-subsidies-once-and-for-all/
[174] Bernard Hoekman, 'Urgent and Important: Improving WTO Performance by Revisiting Work Practices' (2019) 53(3) *Journal of World Trade* 373, 377.
[175] The World Trade Organization, 'Principles of Trading System', available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 21/06/2020).
[176] *Strengthening and Modernizing the WTO: Discussion Paper,* the World Trade Organization, JOB/GC/201 (2018), 2 (Communication from Canada).
[177] The World Trade Organization, 'Trade Policy Review Mechanism', available at: https://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm (accessed 21/06/2020).
[178] Mitsuo Matsushita, 'A View on Future Roles of The WTO: Should There be More Soft Law in The WTO?', (2014) 17(3) *Journal of International Economic Law* 701, 715.

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When it comes to notification procedures of measures that have a potential to cause trade distortion, there is a "chronic low level of compliance".[179] This comes at a time when Members have raised concerns regarding technical barriers to trade, as well as some new-age industrial subsidies from rising powers like China. In order to resolve the issue, the developed Members in April 2019 proposed to strengthen current notification procedures as well as to impose new ones.[180] The EU has been active on this front and is one of the Members to sponsor the reform proposal. The European Commission has also noted that the WTO monitoring system is "crippled by ineffective and repetitive committee procedures".[181] Specifically, it has proposed methods to improve disciplines on subsidies notification.[182] However, the developing Members have contested the April 2019 reform proposals, claiming that due to capacity constraints it is difficult to comply with current notification obligations, let alone assume new ones.[183] The EU's leadership in improving the monitoring system to ensure compliance can contribute towards a more transparent multilateral trading system. Its engagement on the working practices of the WTO could be a key factor in ensuring that the multilateral trading system operates to achieve security and predictability in a transparent manner.

Recent significant developments at the WTO such as the TFA and the Nairobi export competition decision have streamlined the multilateral trading system in a positive direction. These developments tie loose ends and regulate disciplines that negatively affect international trade. There are also challenges that attack the relevance of the WTO. While Members are actively engaged in the resolution of such issues, the EU has emerged as a pivotal Member in addressing them. However, the EU's attempts to uphold multilateralism through constant engagement at the WTO needs support of both the developed and the developing Members.

[179] *Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements*, para. 2, JOB/GC/204/Rev.1, 1 April 2019 (Communication from Argentina, the United States, et. al.) [hereinafter "Communication from the US, *Transparency Notification Requirements*"].
[180] *Id*.
[181] European Commission, 'Concept Paper on WTO Modernisation', 2.
[182] *Improving Disciplines on Subsidies Notification*, TN/RL/GEN/188, 29 May 2017 (Communication from the EU).
[183] *An Inclusive Approach to Transparency and Notification Requirements in the WTO*, JOB/GC/218/Rev.1, 11 July 2019 (Communication from Cuba, India, et. al.).

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IV. Negotiations outside the WTO Framework

As explained above, Members are involved in extensive negotiations within the WTO to regulate trade disciplines. Members also negotiate outside the WTO, through instruments such as FTAs. The reasons to move away from the "multilateral approach" may be several, depending on the political will of the Members. However, some reasons are prominent and may contribute in strengthening the "non-multilateral" approach, and the exponential rise in FTAs. First, it is difficult to achieve consensus[184] from all WTO Members regarding a specific issue of interest to one or a group of Members. This is also due to the varied political and economic spectra of 164 WTO Members. This could lead to a stalemate in negotiations on imminent concerns such as climate change, or IUU fisheries subsidies in particular. Second, the WTO framework may not allow the inclusion of cross-cutting issues like labor standards,[185] that have a strong interlinkage with international trade.

While there may be criticisms against the use of FTAs, it is undeniable that such instruments are here to stay. Members have been actively involved in FTA conclusions and negotiations. Compared to other WTO Members, the EU has assumed leadership in FTA negotiations, by sheer volume as well as content of those agreements. It has the highest number of active FTAs, as compared to other WTO Members.[186] Also, the EU FTAs are advanced in terms of content [called "new-generation FTAs" or "deep and comprehensive FTAs"], by incorporation of competition policies, human rights, UN SDGs etc. Therefore, this section analyses the "non-multilateral" approach of WTO Members through FTAs, with a focus on the EU's leadership in this area.[187]

A. The FTA-approach: Good or Bad? Does it matter?

It is pertinent to ascertain some of the key reasons for negotiating trade disciplines outside the WTO framework. Scholars have raised concerns over this "non-

[184] John H Jackson, 'WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited', (2001) 4(1) *Journal of International Economic Law*, 67-78, 71. [hereinafter "Jackson, *WTO "Constitution" and Proposed Reforms*"].
[185] In the 1996 Singapore Ministerial Conference, WTO Members undertook to uphold core labor standards, but also highlighted that they must not be adopted as a protectionist measure to restrict imports. However, Members have not worked to strengthen the interlinkage between trade and labor.
[186] See Section IV.B.
[187] Alasdair R Young, 'Liberalizing Trade, Not Exporting Rules: the Limits to Regulatory Co-ordination in the EU's 'New Generation' Preferential Trade Agreements', (2015) 22(9) *Journal of European Public Policy*, 1253-1275, 1253.

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multilateral" approach, arguing that certain issues such as subsidies and SoEs have international spillover effects that require a multilateral solution.[188] On the one hand, they argue that FTAs can potentially constitute a threat to the multilateral trading system.[189] The former WTO Director-General Pascal Lamy, in 2007, also raised concerns regarding an FTA approach to discipline international trade. He highlighted the importance of security and predictability in the international economic order and stated that "incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations"[190] could be of concern in this non-multilateral approach. Some others take the opposite position to state that the concerns are exaggerated, and there are solutions for reconciling the WTO and non-WTO negotiations, provided that the Members intend to do so.[191] While there are two sides to this debate, the forward march of FTAs continues to be unabated.

Some of the main reasons for the "FTA approach" include the difficulty in achieving consensus through the WTO's decision-making mechanism,[192] as well as flexibility in the negotiating terms of the FTAs. With respect to the WTO's decision-making mechanism, the principle of "consensus" highlights that all agreements must be adopted by all Members and through consensus.[193] It is difficult to gain the confidence of all 164 Members on an issue. The WTO Secretariat itself acknowledges this difficulty.[194] Also, due to the flexibility in negotiating the terms of the FTAs, Members can incorporate commitments such as "WTO plus" or "WTO extra" commitments that are intricately related to trade disciplines. "WTO plus" commitments build on areas such as tariff reduction, that the Members have already agreed to at the multilateral level. "WTO-extra" commitments deal with issues that go beyond the WTO framework,

[188] Christian Pluth & Bernard Hoekman, 'Revitalizing Multilateral Governance at the World Trade Organization Report of the High-Level Board of Experts on the Future of Global Trade Governance', Bertelsmann Stiftung, 11, available at: https://cadmus.eui.eu/bitstream/handle/1814/60580/MT_Report_Revitalizing_Multilateral_Governance_at_the_WTO.pdf?sequence=1&isAllowed=y (accessed 21/06/2020).
[189] *See generally*, Jagadish Bhagwati, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford University Press, 2008).
[190] *Proliferation of Regional Trade Agreements "Breeding Concern" — Lamy*, WTO News: Speeches – DG Pascal Lamy, 10 September 2007, available at: https://www.wto.org/english/news_e/sppl_e/sppl67_e.htm (accessed 21/06/2020).
[191] *See generally*, Richard Baldwin, 'Multilateralising Regionalism, Spaghetti Bows as building Blocks on the Path to Global Free Trade', (2006) 29 *World Economy* 1451-1458.
[192] Jackson, *WTO "Constitution" and Proposed Reforms*, at 71.
[193] *WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization*, footnote 1, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).
[194] *Whose WTO is it Anyway?*, the World Trade Organization, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (accessed 21/06/2020).

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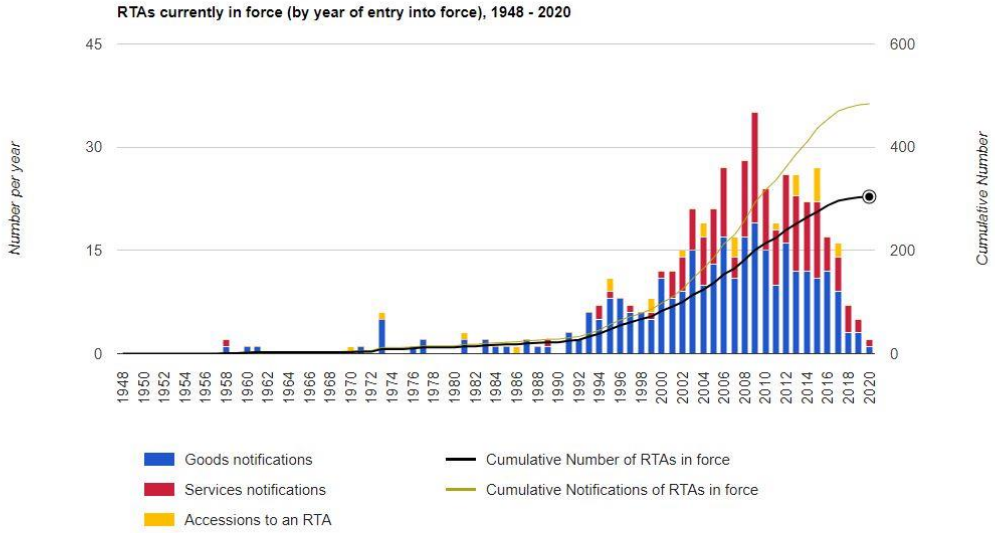
such as labor standards, cultural cooperation, education and training, money laundering etc.[195] Due to these reasons, it can be certain that WTO Members will not move away from the "FTA-approach" considering the flexibility in negotiations regarding the nature and substance of FTAs.

B. Current Trends and the EU's Leadership

In recent years, there has been an exponential increase in FTA ratifications. During the 1948-1994 GATT era, 124 FTAs were notified.[196] Out of the 124 FTAs, 50 were active during the establishment of the WTO in 1995.[197] Currently, based on the WTO data [see table I], there are 304 FTAs in force.

Table 1



Note: Notifications of RTAs: goods, services & accessions to an RTA are counted separately. The cumulative lines show the number of RTAs/notifications currently in force.

Source: WTO Secretariat - February 4, 2020

[195] Hendrik Horn, Petros Mavroidis & Andre Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements', (2010) *World Economy* 1565-1588, 1567.
[196] *Id*. at 1565.
[197] *Id*.

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WTO Members have been involved in extensive negotiations under the FTA approach. This is evidenced by the ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) by eleven signatories[198] and by the current "intensified engagement" on the Regional Comprehensive Economic Partnership (RCEP) by 15 Asian countries.[199] Most importantly, the US and the EU have been at the forefront of FTA negotiations. These Members are sometimes called the "regulators of the world"[200] and account for around 80% of the rules that regulate world markets.[201] According to the WTO database, the US has 14 FTAs in force, and is currently in the midst of 1 FTA negotiation.[202] In comparison, the EU has the highest number of trade agreements, totaling up to 43 FTAs notified to the WTO.[203] It has also announced that 12 FTAs are currently in the negotiating process.[204] Some recent prominent ones include FTAs with Canada,[205] Mexico,[206] Japan,[207] and the MERCUSOR countries.[208] The EU believes that the trade agreements "create opportunities for European businesses to grow and hire more people".[209] Other than FTA negotiations, the EU is also engaged with developed Members such as the US and Japan in addressing new-age disciplines that have a distorting effect on international trade.[210] Such disciplines include industrial subsidies and SoEs that have

[198] *What is CPTPP?*, The Government of Canada, available at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng (accessed 21/06/2020).
[199] *RCEP Overview*, The New Zealand Ministry of Foreign Affairs & Trade, available at: https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/regional-comprehensive-economic-partnership-rcep/rcep-overview/ (accessed 21/06/2020). The webpage mentions 16 countries. However, India has withdrawn from the RCEP negotiations, making it a total of 15 countries. *See*, Harsh Pant & Nandini Sarma, 'Modi was Right. India Isn't Ready for Free Trade', Foreign Policy, 19 November 2019, available at: https://foreignpolicy.com/2019/11/19/modi-pull-out-rcep-india-manufacturers-compete-china/
[200] Horn, Beyond the WTO? (2010) at 1566.
[201] *See generally*, Andre Sapir, 'Europe and the Global Economy', in Andre Sapir (ed.), *Fragmented Power: Europe and the Global Economy* (Bruegel, 2007).
[202] *United States*, WTO Regional Trade Agreements Database, available at: http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?membercode=840 (accessed 21/06/2020).
[203] *European Union,* WTO Regional Trade Agreements Database, available at: http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?membercode=918 (accessed 21/06/2020).
[204] *Id.*
[205] *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, OJ L 11, 14.1.2017, p. 23–1079.
[206] *EU-Mexico Global Agreement*, available at: https://ec.europa.eu/trade/policy/in-focus/eu-mexico-trade-agreement/. The parties have agreed to negotiate 'in principle' (accessed 21/06/2020).
[207] *EU-Japan Economic Partnership Agreement*, 1 February 2019, available at: https://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/ (accessed 21/06/2020).
[208] *EU-Mercusor Trade Agreement*, available at: https://ec.europa.eu/trade/policy/in-focus/eu-mercosur-association-agreement/ (accessed 21/06/2020).
[209] The European Commission, 'EU Trade Agreements: Delivering New Opportunities in Times of Global Economic Uncertainties', News Archive, 19 October 2019, available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2071
[210] The Office of the United States Trade Representative, 'Joint Statement by the United States, European Union, and Japan at MC11', 12 December 2017, Buenos Aires; See also USTR's joint statements of the trilateral meetings

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come under scrutiny, especially in light of China's economic model. Therefore, the EU has come emerged as a leader in addressing disciplines that face considerable challenges to the international trade order.

The EU has not only assumed leadership in FTA negotiations based on the numbers, but also on the content of the agreements. The EU's commitment in upholding trade concerns along with social and environmental concerns has transformed the interlinkages between trade and non-trade concerns. The US FTAs do not include international norms on environment after 1983.[211] The non-trade issues in US FTAs are domestically oriented and need not necessarily be in line with international commitments. On the other hand, the EU has made efforts to include the latest commitments such as the 2030 UN SDGs in its FTAs, for example in the EU-Canada Comprehensive Economic and Trade Agreement (CETA), to reflect the interlinkages between trade and non-trade issues.

New-Generation EU FTAs

The EU is mandated to "foster the sustainable economic, social, and environmental development of developing countries" under its founding Treaties.[212] The integration of trade and sustainable development (TSD) is also one of the guiding principles of the EU.[213] In this regard the negative impacts on social and environmental concerns are minimized through the incorporation of sustainable development chapters in the EU's FTAs.[214] Therefore, in pursuance of its mandate, the EU has incorporated non-trade issues like environmental concerns, labor concerns, human rights concerns etc. in its FTAs for such integration. This sub-section will address the EU's efforts in incorporating non-trade issues in its FTAs in more detail.

held in Paris (May 2019), Washington, DC (January 2019), New York (September 2018), Paris (May 2018). The latest trilateral was held in Washington on 14 January 2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf?utm_source=POLITICO.EU&utm_campaign=bb7f1be020-EMAIL_CAMPAIGN_2020_01_14_02_10&utm_medium=email&utm_term=0_10959edeb5-bb7f1be020-190305645

[211] The most recently negotiated KORUS ANNEX 20-A COVERED AGREEMENTS, mentions international environmental agreements between 1946-1983. It does not reflect the realities and cooperation of the international community in the 21st century.

[212] Art. 21(2)(d) Treaty on European Union; see also Articles 205 and 207(1) Treaty on the Functioning of the European Union. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C326/01, signed on 13 Dec. 2007.

[213] See Art. 3(3) and (5) Treaty on European Union and Art. 11 Treaty on the Functioning of the European Union.

[214] Kateřina Hradilová & Ondřej Svoboda, 'Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness', (2018) 52(6) *Journal of World Trade* 1019, 1021 [hereinafter "Hradilová, SD Chapters in EU FTAs"].

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Human Rights

The EU's founding Treaties mandate it to advance in the wider world, i.e. through its external policies, the principles of "democracy, the rule of law [and] the universality and indivisibility of human rights and fundamental freedoms".[215] Since the early 1990s, the EU began incorporating human rights clauses in its FTAs in pursuit of respect for human rights and democratic principles.[216] Particularly, in 1995, the EU Council adopted a formal policy to incorporate human rights in FTAs and negotiations.[217] More importantly, the EU has incorporated human rights clauses as an "essential element" of its FTAs.[218] The human rights aspect has also been included in the preferential tariff treatment through the EU's Generalized System of Preferences (GSP) mechanism. It is a prerequisite for countries that receive benefits under this mechanism to comply with indicated UN human rights standards.

Dedicated Sustainable Development Chapters

The first chapters on the objectives of TSD integration appeared in the EU's 2000 FTA with the African Caribbean and Pacific (ACP) countries [also known as the "Cotonou Agreement"].[219] The EU has increasingly incorporated TSD chapters in its FTAs. In the 2011 EU-Korea trade agreement, a dedicated chapter for TSD was incorporated. Also, after the UN SDGs were adopted, the EU has incorporated them in its new-generation FTAs to uphold commitments on non-trade concerns such as environment and labor issues.

Labor Standards

For labor standards, the EU has attempted to incorporate International Labor Organization (ILO) principles and standards, along with the UN 2030 Agenda. The labor chapters in EU FTAs correspond to the minimum labor standards laid in

[215] Art. 21(1) Treaty on European Union. See also Art. 21(2)(b) Treaty on European Union.
[216] Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', in Jan Wouters et. al. (eds.) *Global Governance Through Trade* (Edward Elgar Publishing 2015) 73.
[217] *Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries*, COM(95) 216; The EU Council Conclusions of 29 May 1995, EU BULLETIN 1995-5, points 1.2.3.
[218] *Trade Agreement between The European Union and its Members States, of the one part, and Colombia and Peru, of the other part*, Art. 1, 21 December 2012, OJ L 354, 3-2607.
[219] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 - Protocols - Final Act - Declarations OJ L 317, 15.12.2000, p. 3–353.

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fundamental ILO Conventions.[220] Parties are also encouraged to ratify other ILO Conventions. Specifically, these conventions include issues such as labor inspections, policies for employment or consultations. The topic of 'responsible supply chains' is also covered in EU FTAs.

While it can be perceived that labor protection in FTAs could aid in mitigating the problems, scholarly research has found that there is no clear indication that labor provisions in FTAs increase the protection of two core labor rights, i.e., freedom of association and collective bargaining.[221] However, it is unclear how labor protection would have fared if it had not been added to the FTAs. Moreover, these inclusions foster SDG 8, under which UN Member States have undertaken to promote employment and secure decent work for all.

Environmental Standards

The EU Council in its 2006 Renewed EU Sustainable Development Strategy encouraged the European Commission and Member States to increase the use of international trade to pursue genuine global sustainable development.[222] The EU has incorporated the environmental standards in its latest FTAs to reflect the latest commitments that it has undertaken. In general, standards that relate to climate change,[223] biological diversity,[224] waste management,[225] etc. have been incorporated. The EU has also undertaken to negotiate and ratify FTAs that include its latest commitments on sustainable development. For example, the EU-Canada CETA includes commitments undertaken by both parties under the Paris Agreement, as well as the UN's 2030 Agenda.

The EU has emerged as the leader in this area. As indicated, US FTAs include references to domestic regulations on environment rather than that they reflect international standards. In contrast, the enforcement of environmental violations under

[220] Hradilová & Svoboda, SD Chapters in EU FTAs at 1024.
[221] Axel Marx & Jadir Soares, 'Does Integrating Labour Provisions in Free Trade Agreements Make a Difference? An Exploratory Analysis of Freedom of Association and Collective Bargaining Rights in 13 EU Trade Partners', in Jan Wouters et. al. (eds.) *Global Governance Through Trade* (Edward Elgar Publishing 2015) 176.
[222] The Council of the European Union, 'Review of the EU Sustainable Development Strategy – renewed Strategy', Document 10117/06, 21.
[223] For example, the Paris Agreement, Kyoto Protocol, Montreal Protocol, and the UN Framework Convention on Climate Change.
[224] For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).
[225] For example, Basel Convention, Rotterdam Convention, Stockholm Convention.

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EU FTAs are considered weak in comparison to the US. This is because it uses a method of consultation, adopting a softer approach, rather than a genuine dispute resolution mechanism.[226]

Generalized System of Preferences

When it comes to the integration of trade and development, the EU has also been active in granting concessions to certain developing and least-developed countries in its trade policies. This is done through the GSP program, which eliminates tariffs on goods imported into the EU from developing countries.[227] Established in 1971, the EU GSP program is aimed at "inducing structural reforms on regarding human rights, sustainable development and good governance in third (developing) countries",[228] thereby upholding the EU's sustainable development commitments as well. This program is unique in the sense of a unilateral action from the EU, whereby grantee countries of preferences do not have a leverage for negotiation. It also combines the non-trade concerns of the EU's common commercial policy in order to encourage developing countries in enhancing their regulations on human rights, environmental and labor standards.

Emerging Trends in Global Economic Governance

Unilateralism

If we zoom out into history, we find that the problems of the WTO are not "new", in that the discontents that are today at the forefront have, in some sense, always existed. Take for example the concerns of developing countries, in the 1990s, regarding their capacity to comply with the newly created WTO. This was first officially recognized in the WTO system in 2001: the first agenda-item of the Doha Ministerial Declaration (i.e. para 12) is titled "implementation-related issues and concerns".[229] To date, these

[226] See for a more thorough examination with a number of policy proposals: Axel Marx, Franz Ebert, Nicolas Hachez and Jan Wouters, *Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements*, Study for the Dutch Ministry of Foreign Affairs, Leuven, Leuven Centre for Global Governance Studies, 2017, available at: https://ghum.kuleuven.be/ggs/publications/books/final-report-9-february-def.pdf (accessed 21/06/2020).
[227] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.
[228] Laura Beke & Nicolas Hachez, 'The EU GSP: A Preference For Human Rights and Good Governance? The Case of Myanmar', in in Jan Wouters et. al. (eds.) *Global Governance Through Trade* (Edward Elgar Publishing 2015) 185.
[229] See Doha Ministerial Declaration, Adopted November 14, 2001, WT/MIN(01)/DEC/1, para.

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concerns remain largely unaddressed and almost entirely unresolved.[230] Though "the organization's judges and bureaucracy … deftly managed simmering discontent for nearly two decades", these issues have now reached a "boiling point".[231]

A consequence of this built-up pressure has been the resurrection of the previously latent phenomenon of trade unilateralism. A core part of the 'WTO bargain' is the (multilateral) legal promise that countries will not unilaterally determine the legality of others' actions, and will not, in any case, act or react in a way that affects international trade, without WTO sanction. This is provided for in DSU Article 23. Titled "Strengthening of the Multilateral System", it provides that "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding"[232] (emphasis added), and that Members *shall not* "not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement …"[233] (emphasis added). This prohibitive requirement has recently been violated by several major WTO Members, in the context of the ongoing US-China trade war. First, the US imposed steel and aluminum tariffs on China, on the basis of a threat to 'national security'. It then imposed these tariffs on other countries (and several trade allies) as well (for example: the EU, Canada, Mexico, Turkey). For some of these countries temporary exemptions were agreed, which were also dubious in their WTO legality. Finally, while there was still confusion about whether these tariffs were simple custom duties or temporary safeguard measures,[234] the affected trade partners – without *first* approaching the WTO (though they did so *ex post*) – imposed retaliatory tariffs of their own. As Lee puts is, "[t]hree wrongs do not make a right."[235]

[230] See Zhang Xiangchen, Xu Qingjun and Wang Jinyong, 'Capacity Constraint: A Fundamental Perspective for the Development Issue at WTO', 53 (1) (2019) *Journal of World Trade* 1 – 37.
[231] Cosette D. Creamer, 'From the WTO's Crown Jewel to Its Crown of Thorns', (2019) 113 *American Journal of International Law Unbound* 51.
[232] DSU Art. 23.1.
[233] DSU Art. 23.2(a).
[234] See in general: Raina (2019).
[235] Yong-Shik Lee, 'Three Wrongs Do Not Make a Right: The Conundrum of the US Steel and Aluminium Tariffs", 18(3) (2019) *World Trade Review* 481 – 501.

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Adding fuel to the unilateral fire is the recent infatuation of the WTO membership with the 'national security' exception in GATT Article XXI.[236] An otherwise rarely invoked provision, it has shot into prominence with countries like the US[237] and Russia arguing that it is completely 'non-justiciable' and 'non-reviewable'. This thinking was recently rejected in a landmark ruling in *Russia – Traffic in Transit.*[238] However, despite this, 'national security exceptions', which would allow for a broad range of unilateral action, are still being raised in some ongoing cases like *United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights* (DS526).

In fact, what is even more troubling is the novel interpretation that the US is attempting to give to the very meaning of unilateralism. The ongoing *US – Tariff Measures on Certain Goods from China* dispute is a case in point. This dispute concerns a series of tariffs levied by the US, which had the express intention of inducing a change in certain intellectual property laws of China. The US, in its first written submission to the panel, has attempted to dislodge the WTO of jurisdiction by forwarding legal arguments that are innovative at best and dubious at worst.[239] In brief, the US is arguing that since the two countries have taken unilateral actions, they automatically become debarred from approaching multilateral adjudication under the WTO.[240] But the ability to use the WTO's DSM is a *right* under DSU Article 23 and cannot be easily derogated from. The US has also tried to argue that "solution" of the dispute can only be found bilaterally,

[236] See: Tania Voon, 'The Security Exception in WTO Law: Entering a New Era', (2019) *American Journal of International Law* 45 – 50.
[237] In fact, the US's argument was that global steel overcapacity threatened its national security, amd this has been the basis of several of its applications under Section 232 of the Trade Act. Scholars like Hillman (an ex-AB member herself) have questioned whether such conflation between 'national security' and 'economic security' can be allowed under the WTO rules, see: Jennifer Hillman, *Trump Tariffs Threaten National Security,* New York Times Opinion (June 1, 2018), at: https://www.nytimes.com/2018/06/01/opinion/trump-national-security-tariffs.html (accessed 21/06/2020).
[238] For explanation, see: William A. Reinsch and Jack Caporal, 'The WTO's First Ruling on National Security: What Does It Mean for the United States?', *CSIS Critical Questions* (April 5, 2019), available at: https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states (accessed 21/06/2020). See further: Dylan Geraets, 'WTO Issues Ruling in Russia – Traffic in Transit: Measures Justified on National Security Grounds Are Justiciable', Mayer Brown (April 8, 2019), available at: https://www.mayerbrown.com/en/perspectives-events/publications/2019/04/wto-issues-ruling-in-russia-traffic-in-transit-measures-justified-on-national-security-grounds-are-justiciable (accessed 21/06/2020).
[239] See: Akhil Raina and Mattijs Kempynck, 'US Narrative on Trade Unilateralism: Insights from DS543', *International Economic Law and Policy Blog*, 29 October 2019, available at: https://ielp.worldtradelaw.net/2019/10/guest-post-us-narrative-on-trade-unilateralism-insights-from-ds543.html (accessed 21/06/2020) [hereinafter "Raina and Kempynck (2019)"].
[240] See First Written Submission of the US, *US – Tariff Measures on Certain Goods from China* (DS543), August 27, 2019, paras 3 and 45 [hereinafter "USFWS (2019)"].

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and that therefore the WTO has "no role to play".[241] However, this is an incorrect interpretation of "solution" (as mentioned in DSU Articles 3.7 and 12.7), since the ongoing (and escalating) trade war cannot be understood to be a settlement.[242] At the time of writing, the two countries had reached a 'Phase 1 deal', *en route* to a complete halt in economic hostilities.[243] But even this temporary truce, given its 'managed trade' requirements, appears contrary to WTO rules.[244]

The possibility of a further spread of unilateral behavior (and of the EU's role in the trade war) is highlighted by two recent events. First, EU Trade Commissioner Hogan announced that the EU intends to review the WTO compatibility of the aforementioned 'Phase 1' trade deal between the US and China.[245] The EU will probably argue that such piecemeal trade deals cannot satisfy the "substantially all trade" requirement in GATT Article XXIV. At the same time, the EU is struggling to come up with a similar deal with the recently departed United Kingdom (UK). Second, at the Davos meeting in January 2020, President Trump announced that the US would impose auto tariffs on the EU if "we [the US] don't get something".[246] This came at the back of President Trump making a similar threat in response to France's recently announced 'digital tax'.[247] While, at the time of writing, France and the US announced the possibility of a conciliatory deal,[248] it seems that trade unilateralism is back in fashion.[249]

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[241] USFWS (2019), para 38.
[242] See Raina and Kempynck (2019).
[243] *Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China*, available at: https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf (accessed 21/06/2020).
[244] See: Simon Lester, 'Internationally Agreed Unilateralism', IELP Blog (February 27, 2019), available at: https://ielp.worldtradelaw.net/2019/02/internationalizing-unilateralism.html (accessed 21/06/2020); Simon Lester, 'So Many Questions About the US-China Trade Deal', IELP Blog (January 17, 2020), available at: https://ielp.worldtradelaw.net/2020/01/so-many-questions-about-the-us-china-trade-deal.html (accessed 21/06/2020).
[245] Euractiv, 'Europe to assess whether US-China deal is WTO compatible' (January 17, 2020), available at: https://www.euractiv.com/section/economy-jobs/news/europe-to-examine-if-us-china-deal-is-wto-compatible/ (accessed 21/06/2020).
[246] Reuters, 'Trump threatens big tariffs on car imports from EU' (January 22, 2020), available at: https://www.reuters.com/article/us-davos-meeting-trump-trade/trump-threatens-big-tariffs-on-car-imports-from-eu-idUSKBN1ZL1GK (accessed 21/06/2020).
[247] Forbes, 'U.S. Threatens New Tariffs On Cars In Response To France's Digital Tax' (January 22, 2020< available at: https://www.forbes.com/sites/sergeiklebnikov/2020/01/22/us-threatens-auto-tariffs-in-response-to-frances-digital-tax/#743fbec111a1 (accessed 21/06/2020).
[248] New York Times, 'France Says U.S. Talks Could Produce Agreement on Digital Taxes' (January 22, 2020), available at: https://www.nytimes.com/2020/01/22/business/france-us-digital-tax.html (accessed 21/06/2020).
[249] Some have argued that non-violation complaints are better suited to addressing unilateral behaviour. See, for example: Vinayak Panikkar, Prakhar Bhardwaj, and Akhil Raina, 'Taking Recourse to the DSU to Save Dispute Settlement at the WTO (Parts A and B)', IELP Blog (March 7, 2019), available at:

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Plurilaterals: A Better of Two Evils?

Plurilateral Agreements (PA) are agreements undertaken within the auspices of the WTO, between a certain number of relevant players regarding a specific issue, for example, the Government Procurement Agreement (GPA).[250] The idea behind them is that, since not all countries have a stake in every issue, only those wishing for further liberalization can come to the table and make progress; once enough 'critical mass' is reached, the deal can then be multilateralized. One can think of the Information Technology Agreement (ITA) as an analogy.

Hoekman and Mavroidis have strongly advocated for PAs as a way to move trade negotiations forward.[251] They argue that given the deadlocked Doha Development Round (DDR), it may be time to review the 'single undertaking' project. It may be recalled that the idea at the culmination of the Uruguay Round was that Members to the newly created WTO would have an all-or-nothing choice: they could either enter the WTO framework and take up *all* rules, or stay out. According to the authors, this 'one size fits all' model is perhaps not working any longer. However, they point to the interesting paradox evidenced by the strong proliferation of preferential trade agreements (PTA). Thus, they conclude, there is still appetite for further liberalization, but that it is simply impossible to make meaningful progress when a group of 164 Members have to be in agreement. They recommend PAs over PTAs since the latter are inherently discriminatory and the former, being monitored under the WTO mechanism, can be subject to some amount of transparency. Further, scholars like Bhagwati have referred to the problematic 'spaghetti bowl' that overlapping PTAs create. Such deals were also made during the GATT era, because the main agreement was too difficult to amend. The authors argue that the global community has a choice to make: either follow the WTO 'one size fits all' model and hope for the best, or switch the accepting the reality which is better addressed by PAs than PTAs. Regardless of mechanism, however, for the liberalization project to be successful, the bigger economies have to agree to participate. Thus, the idea of a plurilateral on subsidies

https://ielp.worldtradelaw.net/2019/03/guest-post-taking-recourse-to-the-dsu-to-save-dispute-settlement-at-the-wto-.html (accessed 21/06/2020).

[250] See WTO Agreement Art. II:3.

[251] See: Bernard M. Hoekman and Petros C. Mavroidis, 'WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements', (2015) 26(2) *European Journal of International Law* 319–343.

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cannot hold much steam since a main player, China, has not expressed any interest in agreeing to the plurilateral track. In the end, and for an objective view, it is necessary to point out that for a PA to become a part of WTO law, still, perfect consensus is required, and this may not always be easily available.

China's Belt and Road Initiative: A Hybrid Model of Governance

Another approach that is emerging is China's new model of governance – the Belt and Road Initiative (BRI). BRI uses a hub-and-spoke mechanism, although it is difficult to define the scope of BRI as "there is no clear and widely accepted statement of the BRI's scope".[252] However, Heng Wang has charted out the scope, character and sustainability of BRI. He explains that BRI is unconventional to the regular functioning of multilateralism and may "spawn a number of competing normative commitments".[253] The most important normative contrast of BRI is the US's unilateral approach. While the US model uses hard laws with binding and enforceable obligations in its negotiations, BRI uses a flexible, soft law approach. While hard binding treaties are also a part of BRI, China prefers the use of soft law through MoAs, MoUs, joint statements etc. to further the flexible model. This is a type of "global legal pluralism"[254] that may reshape the multilateral approach to the international economic order. However, the impact of a model like BRI is yet to be assessed.[255]

The EU: A Hybrid Multilateral, Plural and Domestic Focus

While the US has adopted a unilateral approach and China has undertaken to pursue a hub-and-spoke mechanism, the EU's approach has received relatively little attention. This is because it does not adhere to such radical models as those adopted by the US or China. However, the EU requires special consideration as it is operating with a hybrid approach. It uses multilateral, pluralistic (cooperation outside the WTO), as well

[252] Heng Wang, 'China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability', (2019) 22(1) *Journal of International Economic Law* 29, 31.
[253] *Id*. at 51.
[254] Paul Schiff Berman, 'Global Legal Pluralism as a Normative Project', (2018) 8 *UC Irvine Law Review* 149, 149 [hereinafter "Berman, *Global Legal Pluralism as a Normative Project*"].
[255] See for contributions on BRI's impact on global governance and on realities on the ground in various countries, Maria-Adèle Carrai, Jean-Christophe Defraigne and Jan Wouters (eds.), *The Belt and Road Initiative and Global Governance,* Cheltenham, Edward Elgar Publishing, 2020.

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as domestic mechanisms to work towards securing the resilience of the global economic order.

From the above, it may seem that the EU has sought to protect the multilateral approach of governing international trade through proposing reforms at the WTO. Admittedly, the EU has attempted to protect the WTO's Dispute Settlement Body by proposing an interim solution through the MPIA (*supra*). It is also trying to ensure that certain key negotiating agendas of the WTO do not fall into the cracks. However, in itself, this does not completely highlight the EU's approach in a broader normative context. The EU has also been pushing for a pluralistic approach through FTAs and cooperation outside the WTO.

Elsig states that the 'multilateralism-first' approach of the EU is rhetorical, as the latter is also strengthening its trade relations outside the WTO through FTAs.[256] The hierarchy between multilateralism and pluralism in the EU's vision has become blurred. Rolland and Trubek have delineated the recent trends of pluralism and its normative nature, mostly in the context of emerging powers like China and India.[257] However, if the EU's operations are analyzed, it is also pursuing pluralism, considering that many quintessential negotiations at the WTO are stalled.

Pluralism does not impose a "one size fits all" agenda. Legally, it means that "two or more legal systems coexist in the same social field".[258] Rolland and Trubek highlight as two distinct categories of pluralism regional pluralism and topical pluralism. [259] In regional pluralism, States pursue numerous objectives with only one or a group of States. This may happen through FTAs, that have a range of chapters that cover subject areas from investment to environment to gender equality. Under topical pluralism, stand-alone agreements are reached on specific topics that need to be disciplined, depending on the will of the States.

The EU has exhibited both types of pluralism in its approach. It has entered into FTAs highlighting a regionally plural approach to maximize its trade benefits. The recently

[256] Manfred Elsig, 'The EU's Choice of Regulatory Venues for Trade Negotiations: A Tale of Agency Power?', (2007) 45(4) *Journal of Common Market Studies* 927, 939.
[257] Sonia E. Rolland and David M. Trubek, *Emerging Powers in the International Economic Order* (Cambridge University Press, 2019) 187-212. [hereinafter "Rolland and Trubek, *Emerging Powers*"].
[258] Berman, *Global Legal Pluralism as a Normative Project*, 151.
[259] Rolland and Trubek, *Emerging Powers*, 199-208.

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(re)negotiated FTAs with Canada, Japan, Mexico and Vietnam are some of the examples for its approach on regional pluralism. The EU has also taken leadership in topical pluralism. While it disagrees with the US's approach to resolving the WTO crisis, the EU shares several of the latter's concerns, for example, the inability of the current WTO rules to adequately capture trade-distortive Chinese subsidies, given through state-owned enterprises (SOEs). To this end, recently, the EU, in its trilateral partnership with the US and Japan, released a joint statement regarding the need to push for new disciplines.[260] The usage of both types of pluralism highlights that the EU is attempting to protect the international economic order without letting the system reach the point of anarchy. The EU's leadership in negotiating the MPIA as an interim mechanism for trade-related dispute settlement (*supra*) is another example of topical pluralism. Moreover, this leadership comes at a time when the AB is dismantled and we are witnessing a move towards addressing the systemic concerns surrounding the WTO. Scholarship, while discussing the concept of global legal pluralism, has also opined that the EU balances the positions and efforts of both universalism and sovereigntist territorialism at the same time.[261]

Other than a pluralistic approach, the EU has also been strengthening its domestic institutions to take strong trade remedies and enforcement measures so as to protect its internal market from being affected by unfair and illegal trade practices. In 2017, the EU amended its trade defense instrument regarding antidumping practices through Regulation 2017/2321.[262] The amendment changed the calculation of dumping-margins for cases in which the investigations find significant trade distortions through the interference of a State. This seems to have been specifically directed against China and its (non-) market policies.[263] While in 2018, only one antidumping investigation was

[260] 'Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union', available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf (accessed 21/06/2020).
[261] Berman, *Global Legal Pluralism as a Normative Project*, 157. While analysing the concept of 'Global Legal Pluralism' as a normative project, Berman examines the mechanisms that have contributed towards a shared social space that has helped convert enemies into adversaries to diffuse the intensity of the conflict. In this regard, he states that the EU mechanism has helped in this objective to a high degree, and needs to be defended.
[262] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union OJ L 338, 19.12.2017, p. 1–7.
[263] European Commission, 'Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations', (2017) SWD(2017) 482 final/2. The Commission has also tightened its use of trade defense instruments against China. On 12 June 2020, it released a regulation on antidumping and countervailing duty measures on Glass Fibre Fabrics from Egypt whereby it included

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initiated against China,[264] there was an increase to five investigations against China in 2019.[265] This more rigorous application of trade remedy measures is also one of the key highlights of the EU's efforts in protecting its internal market.

The leadership of the European Commission changed on 1 December 2019, with Ursula von der Leyen taking the post of President of the Commission. In her mission letter to the new Trade Commissioner, Phil Hogan, she highlighted the need to make better use of the existing trade defence instruments in order to create a level playing field.[266] The Commission has also recently proposed an amendment to EU Regulation No 654/2014, in order to add "triggers" to the ability of the EU to act without WTO-sanction.[267] These include situations like a losing party misusing the AB dysfunction to appeal a case 'into the void', and other situations where "adjudication is not possible because [a] third country is not taking the steps that are necessary for a dispute settlement procedure to function".[268] In addition, the Trade Commissioner was asked by President Ursula von der Leyen to "upgrad[e] the EU's Enforcement Regulation to allow [it] to use sanctions when others adopt illegal measures and simultaneously block the WTO dispute settlement process" and to gear up for retaliation against the US (especially after the recent Boeing/Airbus retaliation rulings by the WTO).[269] The EU intends to ensure that its rights are enforceable through the use of sanctions if other States block the resolution of a trade dispute. Therefore, its usage of trade defence

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the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts to state that the subsidies received by the Egyptian producers were attributable to the Government of China. It did so in order to discipline Chinese transnational subsidies that could be potentially fall outside the scope of the WTO's Agreement on Subsidies and Countervailing Measures (SCM). SCM Agreement. This is a broad reading of Article 1 of the SCM: see Commission Implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt, OJ L 189/1-170, 15.6.2020. For a detailed analysis on this issue, see: Victor Crochet and Vineet Hegde, 'China's 'Going Global' Policy: Transnational Subsidies under the WTO SCM Agreement', Working Paper No. 220, Leuven Centre for Global Governance Studies (February 2020), available at: https://ghum.kuleuven.be/ggs/publications/working_papers/wp220-crochet-hegde.pdf (accessed on 23/06/2020).

[264] European Commission, 'Anti-dumping, Anti-subsidy, Safeguard, Statistics Covering 2018', (2018), 10, available at: https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157773.pdf.

[265] European Commission, 'Anti-dumping, Anti-subsidy, Safeguard, Statistics Covering 2019', (2019), 6, available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158564.pdf (accessed 21/06/2020).

[266] Ursula von der Leyen, 'President-elect of the European Commission, Mission Letter', 10 September 2019, available at: https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-phil-hogan-2019_en.pdf (accessed 21/06/2020) [hereinafter "Ursula von der Leyer 'Mission Letter' (2019)"].

[267] See: European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation EU No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules', COM(2019) 623 final [hereinafter "Commission (2019)".

[268] See Commission (2019) pgs. 9 – 10.

[269] Ursula von der Leyer 'Mission Letter' (2019), 5.

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mechanisms on a domestic level may be seen as a means to secure its interests in the ongoing trade war.

The above examples show that the EU, while acknowledging that the global trade order is in deep crisis, is pursuing all three available mechanisms to ensure that the system remains secure and predictable. It pushes a multilateral approach at the WTO to provide and secure multilateral concessions, a WTO-compliant pluralistic approach to maximize its trade gains, and a strong domestic approach to ensure that its domestic interests are not negatively affected by externalities. In contrast to the non-multilateral practices and approaches of WTO Members that have had an influence in the rule-making process in the past (the US, for example), the EU's non-multilateral approach is also aimed at strengthening the multilateral rules embedded in the WTO Agreements. The reasons for pluralistic and domestic mechanisms are not to assert the EU's dominance in the global economic order, but to aid and strengthen WTO rules and a multilateral approach to resolve systemic trade issues.

Conclusion

This chapter has taken a bird's eye view of the state of global economic governance, with a special focus on the WTO, as well as the actions of the EU, as a leading WTO Member, within the system. We have found that despite some achievements, problems and concerns remain. In this sense, the WTO crisis is nothing new. As mentioned in the introduction, the WTO as well as the GATT system before it, have almost always existed alongside serious discontent regarding its functioning. At the same time, what makes this crisis special is the long-lasting effects that some unilateral phenomena – like the shutting down of the AB and resort to unilateral tariffs – may have on the future of the system. Some therefore take the view that the multilateral trading system may have been irreparably damaged.[270] In such a situation the EU's idea of "open multilateralism" and its hybrid model in protecting the global economic order may gain traction.

At such a juncture, it is important to ask some honest, piercing questions regarding responsibility. We have already discussed the responsibilities of developed economies

[270] Rachel Brewster, 'WTO Dispute Settlement System: Can we go back again?', (2019) 113 *American Journal of International Law Unbound* 61.

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like the EU and the US. At the same time, developing countries like China, India and Brazil have the responsibility of engaging in good faith in trade negotiations, particularly since the level of commitments taken up the developing world is usually quite low. The global economy has to move beyond the debate of Special & Differentiated Treatment. This is particularly so given the rapid rise in economic growth in some developing countries. The WTO Secretariat itself bears some responsibility for improvement.[271]

While the practices of the US have been condemned, the EU has been actively engaging in resolving some of the fundamental issues and preserving or strengthening the rules-based international system. Its proposals range from: a) actively attempting to preserve the rule of law, by engaging in strengthening the dispute settlement mechanism and re-operationalizing the AB; b) adopting a moderate stance on the differential treatment concern; c) engaging in the EGA negotiations; and d) addressing the issue of transparency in the notification procedures and monitoring systems. However, these proposals also need multilateral support to muster confidence. The EU's record in upholding multilateralism and the rules-based order is not all positive, besides. The efforts to roll-back on the EU's UNSDG commitment to ban fisheries subsidies is an example thereof. As these issues are dynamic and constantly evolving, it will be interesting to witness whether the global order will move away from multilateralism, or WTO Members like the EU will attempt to steer back the discussions to a multilateral forum so that negative international spillover effects are addressed.

It is also pertinent to ask if the WTO is 'fit for the purpose'. Pauwelyn, Elsig and Hoekman discuss the main objectives of an international organization like the WTO: 1) to uphold the rule of law, and protect weaker States against power abuses; 2) to accommodate new powerful states like China, Brazil and India; 3) to work well in times of stress.[272] Previously scholars have debated whether there is a category of "politically salient" cases that ought *not* to be brought to the WTO's Dispute Settlement System;[273]

[271] Tomasso Soave, 'Who controls the WTO dispute settlement system? Reflections on the AB's crisis from a socio-professional perspective' *EJIL:Talk!* (January 13, 2020), available at https://www.ejiltalk.org/who-controls-wto-dispute-settlement-reflections-on-the-appellate-bodys-crisis-from-a-socio-professional-perspective/ (accessed 21/06/2020).

[272] Manfred Elsig, Bernard Hoekman and Joost Pauwelyn, 'Thinking About the Performance of the World Trade Organization A Discussion Across Disciplines' in Manfred Elsig, Bernard Hoekman and Joost Pauwelyn (eds.) *Assessing the World Trade Organization Fit for Purpose?* (Cambridge University Press, 2017) 15-16.

[273] The renounced trade scholar Robert Hudec called these "wrong cases"; recently they have been called "hard cases for compromise and remarkably hard cases for compliance". See: Sivan Shlomo Agon, *International Adjudication on Trial* (Oxford, 2019) 169.

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this question is worth considering further. We have detailed in this chapter that while the WTO is designed to protect the rule of law, powerful Members like the US have actively attempted to sabotage this functioning through its unilateral approach to resolving multilateral concerns The US has also threatened to pull out of the WTO in totality, if other countries do not abide by its norm-setting practices. This is also evidenced by the current on-going trade war between WTO Members. This highlights that the multilateral trading system is not utilized to reduce the stress. Therefore, the WTO crisis is imminent and a systemic issue in global governance. In such a crisis, it is highly relevant to examine the EU's role in furthering the multilateralized way of governing the international trading system, even if combined with non-multilateral approaches.

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Paper 2

Dispute Settlement and Multilateral Trade Governance: A Tale of Short-Term Paralysis and Systemic Frustrations

Bart Kerremans[1]

1. Introduction

The WTO is in crisis, or, as Peter Mandelson recently put it "it's on its knees" (Politico, June 18, 2020), and with it, the main pillar of multilateral trade governance. Two of the WTO's main functions are under pressure. Its transparency function – through its notification systems and its regular trade policy reviews of members – still seems to be in good shape. That is much less the case for its role as negotiating forum – where the picture is relatively mixed – and its dispute settlement mechanism. The latter currently faces a real crisis with the paralysis of its Appellate Body (AB). This paralysis may be temporary as it is to be expected that the incoming U.S. Biden Administration will open the door to the appointment of a range of new AB-members. That is less the case with the underlying factors that ultimately allowed and inspired the Trump Administration to paralyzing the AB. This paper focuses on these underlying factors and the path dependencies that have been generated by them in the U.S. attitude towards the WTO's dispute settlement system (DSS).

The underlying claim of the paper is thus, that in global trade governance, the WTO remains an important potential area for trade negotiation, transparency, and enforcement. Because enforcement affects transparency and negotiations in a fundamental way, the paper strongly focuses on the operation of that enforcement through the WTO's dispute settlement mechanism. As Brutger & Morse (2015) have rightly observed, the WTO's DSM can be considered as belonging to the strongest judicial mechanisms in international agreements/organizations. As we will see later, this is not by definition always an advantage. It comes at a political cost. But in terms of the enforcement of international commitments, it indeed, stands out. And this is not

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irrelevant for the WTO as a whole. As the representative of Saint Lucia put it succinctly in the WTO's Dispute settlement Body in June 2012 (DSB Minutes, June 27, 2012, p. 13):

> *"Without the dispute settlement system, multilateral rules would be reduced to a loosely held network of international norms and best practices at the mercy of the sovereign right of Members. In other words, without a dispute settlement system respected by all, the entire multilateral system would be put at risk."*

This paper is structured as follows. In the next section, a brief overview is provided of the problems that the WTO faces today with attention for its three main functions: providing a negotiating forum, providing trade policy transparency, and settling trade disputes, including through indirect enforcement. The paper proceeds then with a short presentation of the way in which the dispute settlement has been assessed in scholarly work. Has the DSS proved to be sufficiently useful to warrant attention for it in the context of multilateral trade governance? Following that, the paper's subsequent section expounds the factors that generated the issues that the U.S. has with the DSS and its operation, and the path dependencies entailed by them. It starts with attention for the trade-off that the U.S. saw in the creation of the WTO's DSS. It proceeds then, with several elements that frustrated the U.S. perception on the materialization of that trade-off as soon as the DSS started to operate and this until today: the problem of procrastination, the erosion of leeway to enact trade remedies, and the weakness of the DSS to deal with China. The conclusion of the paper will be that the U.S. and the DSS were strange bedfellows in the first place, but that a U.S. perception has been entrenched that they've become even stranger than originally expected. The cold distance between the two may have tempted the Trump Administration to cut the bed in two, even if Biden returns, the temperature between the sheets may be expected to remain low.

One last point is in order. This paper does not take a position on the question whether the U.S. is right or wrong in its criticism on the DSS and the way in which other WTO members have (ab)used it. On that point, the jury is still largely out, certainly in scholarly work on the DSS. The U.S. claim for instance, that DSS panels and the AB insufficiently paid attention to the rights of the parties to a dispute by too broadly

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interpreting the commitments made by them in the negotiations that resulted in the WTO's trade agreement, is contested by authors that stress that these bodies did act cautiously in this regard – particularly with respect to the defending (responding) parties to the disputes – out of concern for the legitimacy and the resulting institutional longevity of the DSS (Brutger & Morse, 1995). Bush and Pelc (2010) have added here that panels and the AB pay attention to third parties to the disputes with the intention of improving their ability to anticipate the reactions from these parties in future cases in which they could be defendants.

2. The Problems of the WTO Today

When the WTO was created, it was supposed to fulfil three functions: providing a forum for multilateral trade negotiations, providing transparency of its members' trade policies, and providing for the abiding by its members with the trade agreements covered by it. For the first, big rounds of MTNs provided the traditional format although separate from that, other negotiations could be conducted as well. For the second, apart from the notification requirement, a regular Trade Policy Review Mechanism (TPRM) was provided for in which, based on a WTO Secretariat report and a report from the concerned member itself, an assessment debate would take place among the WTO membership about that member's trade policies. For the biggest trading members more frequent reviews are conducted than for the smaller ones. The third function consists of dispute settlement. Through the Dispute Settlement Understanding, a dispute settlement mechanism has been established that tries to solve disputes among members about issues related to the alleged non-compliance with the WTO trade agreement provisions and the allegedly impaired trade benefits that stem from non-compliance for the complaining member. The objective is not to punish non-complying members but to re-establish compliance. As Susan Esserman, USTR General Counsel already succinctly stressed in 1997 (interview with *Inside U.S. Trade*, in: IT, June 11, 1997):

> *"[The] dispute settlement mechanism is an important way for WTO member countries to settle peacefully commercial disputes. (…) Bringing a case to the WTO or the prospect of bringing a case to the WTO provides a basis for discussing and resolving problems. That is particularly important because*

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settlement by negotiation between disputing parties maximizes the control of the parties over the outcome."

For that purpose, the mechanism always starts with consultations among the complaining and the responding member and only moves to third panel adjudication in case the consultations fail to produce an outcome sufficiently acceptable to both parties.

The Declining Significance of the WTO as a Multilateral Negotiating Forum

With regard to the WTO's function as a negotiating forum, multilateral negotiations at the organization have clearly been affected by its widening membership and the resulting increased divergence of preferences and interests of its members. In addition, new coalitions of members have emerged and with it, a change in the balance of power among members. What under the WTO precursor, the GATT, used to be a negotiating setting with the U.S. and the EU as leaders and later on with the Quad as the major player, evolved into a setting where no one really has that power anymore. The leadership role created a situation where agreements between the U.S. and the EU – and later within the Quad – largely determined the parameters of the negotiation and often the – sometimes detailed – content (cf. the market access deal of July 1993) of the politically most sensitive parts of the ultimate agreements, such as at the end of the Uruguay Negotiations in 1993 and 1994. Not that there were no other members that tried to weigh on the negotiations or effectively affected them – the Cairns Group, India, Mexico, Colombia during the Uruguay Round are cases in mind – but at the end of the day, their ability to do so was largely limited by what was agreed to among the U.S. and the EU, and/or within the Quad. As such, the Quad members were also the most important agenda-setters, specifically the U.S. and the EU. The entry of services, intellectual property rights, and trade-related investment measures into the GATT/WTO agenda was a direct consequence of this.

Even if these major players determined the WTO agenda and affected the substance of its agreements to a large extent, they not always agreed among themselves. Neither was it always possible to get the other members onboard. As a consequence, when the WTO was created through the Uruguay Round Agreements, a build-in negotiating agenda was provided for that contained issues that were not completely solved during

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the Uruguay Round, mainly services and agriculture. The proposal and demand for such an agenda came from the U.S., was first rejected at the G7 in Naples in July 1993, and then supported by the Quad in September 1994. The idea to expand this to a new round of multilateral trade negotiations came from Sir Leon Brittan, EU Commissioner for Trade at the time. Brittan's logic was straightforward: by integrating the difficult issue of agriculture in a wider agenda, trade-offs were easier to find. Exactly because of that both among some EU member states and in the U.S. skepticism about a new round – the Millennium Round – emerged. But there was also skepticism, even hostility, among several developing members of the WTO. They considered the developed ones to be the main beneficiaries of the Uruguay Round agreements and accepted a new round only on the condition that new negotiations would focus on their interests and treatment first.

Plenty has been written on the reasons that the effort to launch the Millennium Round at the WTO Ministerial in Seattle failed. Were it the large manifestations that were going on? Was it the ambivalent position of President Bill Clinton towards a new round, given that his vice-president was running for president in the U.S.? Or was it the fear of the developing members that the push for a labor and environmental agenda in the WTO would hurt them in the first place and counter the potential benefits to be derived from new flexibilities under the WTO's Special and Differential Treatment (SDT)? From several accounts of and studies on the failed Seattle Ministerial, it seems that the first two mattered most. But even then, the EU rapidly understood that for a new round to be launched, the WTO's developing members needed to get stronger assurances that the major developed players would take a development-driven agenda for the WTO seriously. The question got new urgency with the rapidly escalating conflict about the TRIPs-Agreement and international trade in generic medicines.

The increasing number of regional trade agreements often is also mentioned as a factor that undermines the multilateral trading system, particularly MTNs. The jury is still out whether that truly is the case as the debate goes in both directions: the claim that it damages such negotiations and the opposite claim that it may pave the way for deeper multilateral agreements in the future.

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A last factor that has acquired some currency – particularly in the U.S. – is that the existence of the dispute settlement system in the WTO has undermined the role of the WTO as a negotiating forum (cf. Lighthizer in WSJ, Aug. 21, 2020, p. A15). Why engage in negotiations where you have to make politically costly concessions when you can get it through WTO litigation? Although there may be some through in this claim, it only goes so far. Litigation may be – that is, may be – a resort to "correct" (seem from the litigator's point of view) a weakness or a flaw in an existing agreement provision in the WTO, it will not help such a litigator in multilaterally regulating new issues that need to be regulated.

The Challenge of Timely Notification and Transparency

The issue of notification and transparency may be a boring one. After all, it is about reporting and about the often cumbersome world of domestic measures and regulations. It is thus about long, very technical documents in which the WTO members report domestic measures and regulations relevant for international trade. Such reporting aims at facilitating the identification of possible technical and regulatory trade barriers and, in case it concerns such barriers, negotiations to undo the trade impeding effects of them. Consequently, members do not have to scrutinize the regulatory policies of the others, which certainly is a benefit for many of the developing ones. They just don't have the financial and human resources to do so.

As trade agreements have increasingly targeted behind-the-border and regulatory barriers to trade, the notification requirement under the WTO has become ever more complex, or rather, the reporting itself. It takes legal experts to decipher them. That has also increased the value of the Trade Policy Review Mechanism for the wider WTO membership. The WTO Secretariat's report on a members' trade policies is particularly important here as is the debate on that report among the wider WTO-membership and the concerned member's reply.

A particular challenge for the notification system has emerged as a consequence of China's accession to the WTO in December 2001. In preparation of that accession and in the years following it, the People's Republic engaged in widespread regulatory changes domestically and this at different jurisdictional levels. This not only entailed a deluge of notifications to the WTO but also complaints about the opaqueness of many

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of China's regulations, and gaps in its reporting, specifically from the U.S. As China's exports rose, so did the complaints. But China is not the only member that is allegedly falling short of its notification obligations. The EU and the U.S. are also regularly blamed for failing to do so, or to do so in a timely fashion.

The complaints about China have undermined trust in the notification system. The system was indeed reinforced with the creation of the WTO with the purpose of promoting trust among the WTO membership. It was "reinforced" with the WTO because under GATT, a comparable system existed except for the TPRM. Trust would be promoted because involuntary trade impeding effects from domestic regulations could be readily identified, remedied, and – as a last resort – contested through the WTO's Dispute Settlement Mechanism.

The Slow Demise of the Dispute Settlement Mechanism

As has been indicated above, the WTO's DSM can be considered as belonging to the strongest judicial mechanisms in international agreements/organizations. Some even have referred to it as the "crown jewel" (Johannesson & Mavroidis, 2016) or the "backbone of the multilateral trading system" (Chaudoin, Kucik & Pelc, 2016). But some vertebrae seem to be falling apart.

Yes, the DSM has been intensively used since its creation in 1995, especially by the largest trading countries and blocks (such as the EU). These large players targeted, and were targeted by other members on a broad range of their trade policies (and their implementation). And in most cases, the outcome of the DSM had an impact on the policies of these players. With it, attention for WTO-compliance when domestic legislation and/or regulations are adopted has increased as well.

The success of the DSM has partly contributed to its – albeit slow – demise, however. The rising number of cases and their complexity resulted in delays beyond the deadlines provided for in the Dispute Settlement understanding (DSU). At the same time, some members actively worked to lengthen the dispute settlement process whenever it concerned complaints the remedy of which would come at a huge domestic political cost. In a number of such cases, some members started to attack the DS-panels, and specifically the Appellate Body for exceeding their authority and for not

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sufficiently engaging in judicial economy. The point was here that rather than interpreting the existing WTO agreements, the DS-bodies were creating new rights and obligations for members, or that least that was the perception among some members. In addition, inconsistencies in the DSU were discovered. This was especially the case with the sequence of the steps to be followed when a complaining member believed that the responding member had failed to abide by the outcomes of a concluded DS-case between them. Could the complainant ask for an authorization to retaliate or did it have to wait for an assessment by the panel and (eventually) the Appellate Body before asking for retaliation authorization? One DSU-provision (art. 21.5) suggested the former, and another provision (art. 22) the latter. It quickly became an issue related to the deadlines. Some WTO-members did indeed believe that article 21.5 DSU was deliberately being used by some respondents for the purpose of postponing politically costly compliance. That was perceived as undermining the purpose of the DSM – and even the WTO – itself.

As we will see, the irritations with respect to the DSM and its operation are not new or recent, even if the case came to a head in December 2017. At that time, the number of vacancies in the Appellate Body was so high that the failure to appoint new members or re-appoint retiring ones, would make it impossible for the Body to reach its quorum and, therefore, to legally act on cases submitted to it. The panels could continue to operate but appeal through the Appellate Body not, thereby jeopardizing the rights of the WTO-members under the DSU. Even if, under the leadership of the EU and Canada, an alternative arbitrage system has been established, the Appellate Body's blockage represents a systemic crisis for the DSM, and for the WTO at large, as will be argued below.

3. Does the DSS Matter? A Theory of the Linkage between the DSS and Multilateral Trade Governance

The significance of the WTO's DSS for the multilateral trading system is not without controversy (Goldstein, 2017). Some scholars stress that the WTO's DSS does make a difference. Its compliance rate of 80% is very high (Beshkar, 2010), its pressure on parties to mutually solve their problem early in the process is visible (Ludema, 2001), and its ability to provide visibility to norm violations very significant (Goldstein, 2017),

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and its importance for export-competitive firms engaged in international trade great[2] (cf. Kim et al., 2019). Others have claimed, however, that the DSS's significance is widely exaggerated. Its impact on overall trade is limited (which implies that the DSS fails to fulfill its public good function), "serial" or endemic protectionists are not really deterred from continuing what they do (Chaudoin, Kucik & Pelc, 2016), and in case they are, the DSS encourages them to engage in foot-dragging, thereby generating a remedy gap (Brewster, 2011). In addition, instead of making norm violation more visible, the DSS is found to encourage governments to engaging in active norm violation obfuscation (cf. Gilligan et al., 2010; Kono, 2006).

Whatever the immediate impact of the DSS on international trade, statements by several WTO members and actions to preserve the system in response to the Trump Administration's paralysis of the AB indicate that for the wider WTO membership the DSS is important, and – probably – the U.S. commitment to it. Why would the EU otherwise have invested such an amount of political capital in providing for a temporary alternative to the blocked AB? As Phil Hogan, EU trade commissioner at the time stated upon the adoption of this initiative (launched by the EU, Canada, and Norway) by 17 WTO members, it was "highly important" for the WTO and its membership that "a two-step dispute settlement process in WTO trade matters was retained" (Agence Europe, Jan. 25, 2020). In addition, as one of the largest trading blocs in the world (together with the EU and China), non-participation of the U.S. is hugely problematic as if only because it is the WTO member that is mostly involved as party in DS-cases. One could argue however, that the paralysis of the AB only concerns the last step – or, paraphrasing Hogan, the "second step" – in a two-step (or rather multi-step) process. Isn't it then an exaggeration to provide an analysis of the U.S.'s growing concerns with the *whole* DSS while it undertook consequential action with regard to the AB – this last step – only? The answer should clearly be "no". As research on dispute settlement has shown, the binding nature of a dispute settlement system up until the last step matters for behavior from the first step on, and even for the extent to which the WTO's members anticipate the start of dispute settlement cases when they are about to take trade measures. As a comparison between the old GATT and the

[2] An interesting counterargument is here that if firms lobby in the context of dispute settlement cases, they tend to focus on support for the respondent (defendant) rather than the plaintiff. As such, they tend to act as "plaintiffs by proxy" (Ryu & Stone, 2018).

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current WTO has shown, the inability of WTO members to escape from the binding consequences of the final steps in drawn-out DS-cases under the WTO has incentivize the WTO's members to settle their disputes early in the process (Maggi & Staiger, 2018). So even if most DS-cases have been solved in the consultation stage of the DSS, the fact that ultimately, a binding outcome generated by the AB was possible, mattered and matters. It fits in what can be conceptualized as backward deduction in rational behavior and explains why the paralysis of the AB has created a systemic problem for the DSS and norm compliance in the WTO.

But given this problem with norm compliance, how to establish a link then between this undermining of norm compliance and the multilateral system of trade governance? Central is here the fact that it was the U.S. that decided to target the AB and that it did so on the basis of long-lasting irritations with the way in which the AB and the DSS more largely operated.

As has been indicated above, together with the EU and China, the U.S. belongs to the largest traders globally. It does indeed function as an important hub in the multilateral trading system. Figure 1 shows this. It displays the size of respectively the export and import flows – depicted as a percentage of respectively all exports and al imports in the world in 2017. The figure clearly exhibits the prominent position of the U.S., next to the EU and China, in the global trading system.

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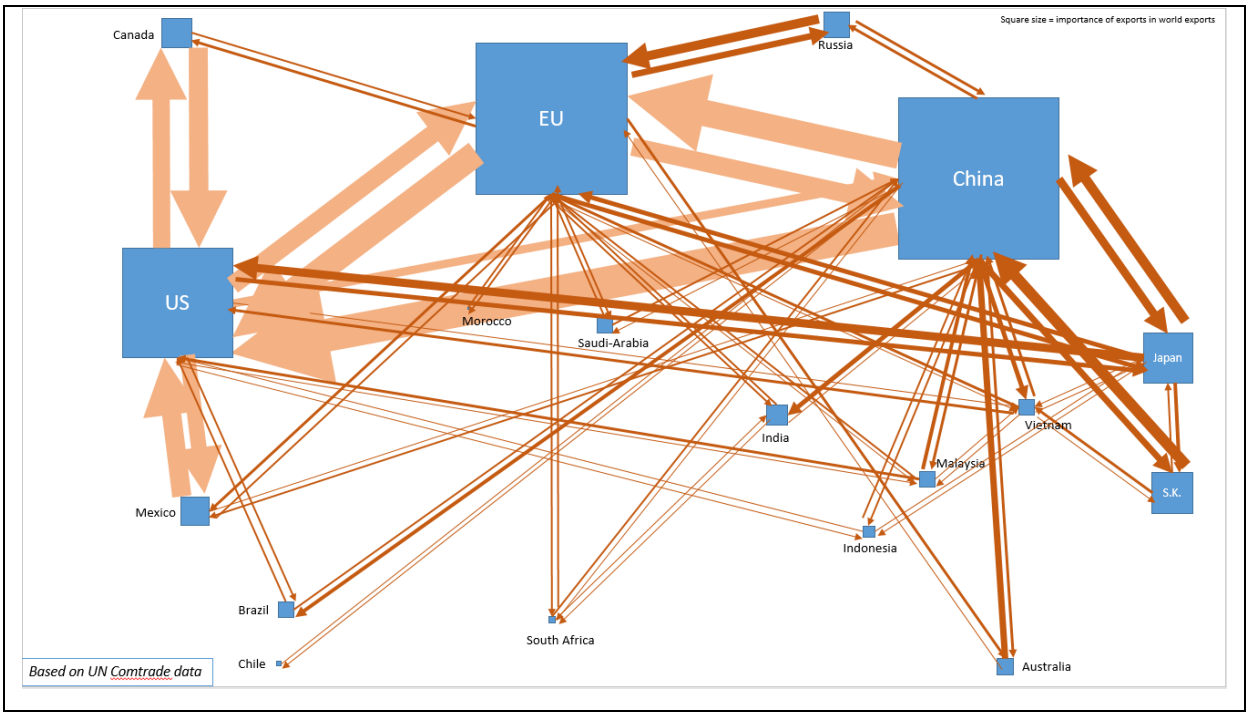

Figure 1: Export and Import Flows as Percentage of Global Exports and Imports (2017)

Interesting as this display may be, it misses one element that may be important from the angle of multilateral trade governance: the import and export dependencies among countries and trading blocs. Figure 2 below shows these. The dependencies have been operationalized by the share of a country's (or trading bloc) overall exports (resp. imports), the exports (resp. imports) to a particular country (or trading bloc) represents. The thicker the arrow, the higher that share and thus the higher that dependence.

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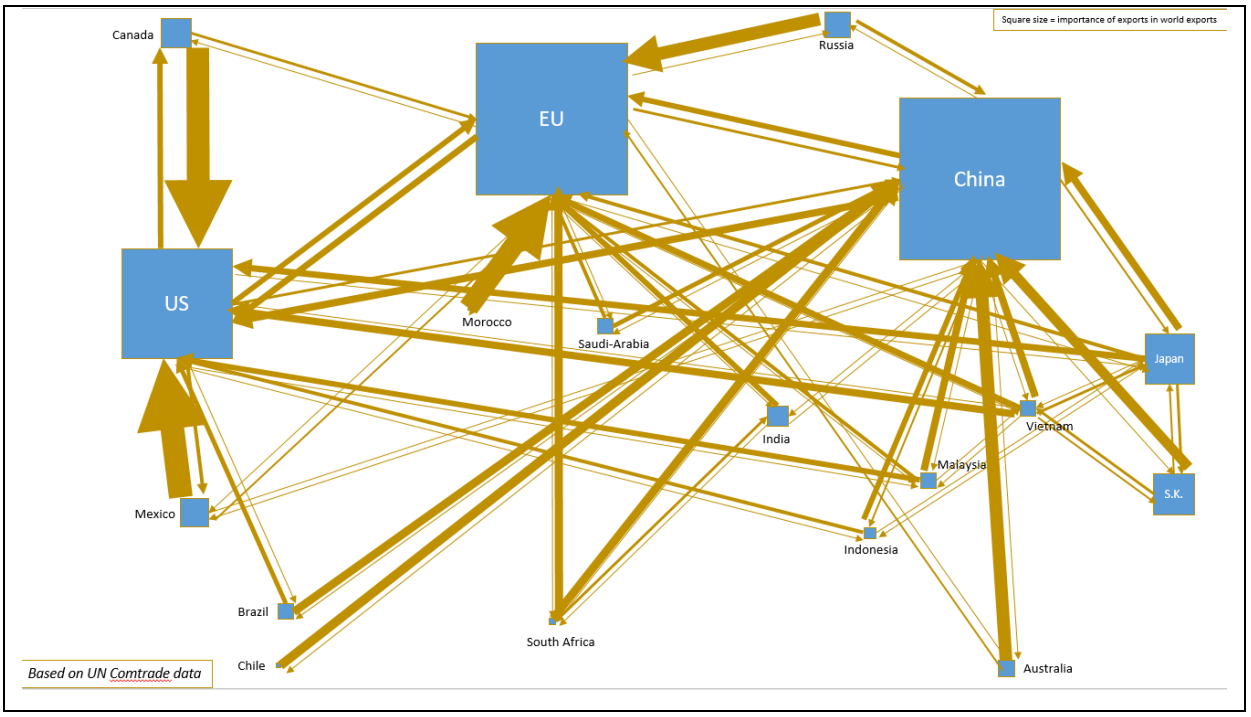

Figure 3: Export and Import Dependencies of Countries and the EU vis-à-vis Each Other (2017)

An interesting difference between figures 1 and 2 consists of the higher relative export dependence of countries vis-à-vis China than vis-à-vis (pre-Brexit) EU and the U.S. There are flaws in such a depiction as it only contains a small number of countries, neglects the sectors that generate these dependencies, doesn't indicate the role of global value chains (and thus re-exports) here, and ultimately, leaves open the distinction between trade generated by multilateral trade liberalization under the WTO, and trade generated by the expanding networks of preferential trade agreements. But the gist of the argument is clear. In the absence of a globally managed trading system, China may be the biggest winner and, among the biggest players, the U.S. the biggest loser. In-between stands the EU. And as Clark (2010) has argued, for the measurement of market power, the hub-role in a network of trade dependencies tells us much more than mere market size.

Going back to the argument about the AB and global trade governance, the fact that it is the U.S. that has been building up irritations and the resulting reservations about the DSS and decided to paralyze the AB, means that the country that had traditionally most to win from the global trading system decided to pull the trigger on one of its most significant components. And as has been indicated above, withdrawal from the

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multilateral trading system would especially be painful for it and the EU. The structure of international trade is currently not such that it would benefit China or leave it unharmed, far from that, but it may gradually evolve in that direction. Seen from that angle, the U.S. has a tremendous interest in staying in a trading system that fully functions, and the EU in keeping (or re-getting) it there. This is not so much because of trade with China itself but because of the growing number of countries that are facing a growing trade dependence on its market. The significance of this goes beyond trade governance. But as far as China itself is concerned, figure 2 may suggest that keeping China engaged in a system that continues to be promising in terms of widespread market access is key to keeping it from establishing its own relatively closed trading – including regulatory – systems (a kind of RCEP+) with the risk that at one point in time, countries in its neighborhood will face – when it comes to regulation – a so-called "race-to-the-hegemon-effect" where economies of scale determine regulatory alignment and compliance (Lazer, 2001). What is significant about the U.S.'s move vis-à-vis the AB and the fact that it is rooted in long simmering exasperation with it, is that the old winner in the economies of scale logic has left the field at a moment that leaving may disproportionately benefit the probable new winner of that game. But more important than that is the fact that U.S. decisions on the AB or the DSS overall, potentially have an impact on the global trading system and its governance. The signals that emerge here reach more than the DSS. To the extent that the other members of the WTO are sure that the U.S. will not fully accept the DSS anymore, commitments made by the U.S. in WTO negotiations cannot be backed anymore by a system that – if not fully achieves – at least stimulates norm compliance.

4. The Road to the DSM's Demise

Multilateral Dispute Settlement and National Sovereignty from the DSM's Inception

The road to the DSM's demise – and with it, the U.S. exasperation about it – has been long, very long. It would be wrong to see it exclusively as the consequence of escalating trade relations between the U.S. and China, or as exclusively related to U.S. trade policies under U.S. President Donald Trump, characterized as they were by Trump's conviction that "the U.S. had been cheated upon by every trade agreement that it had concluded since WWII" (Peterson, 2018; see also Duncombe & Dunne,

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2018). Escalating trade relations with China do matter as are the Trump Administration's WTO-policies, but the history of the DSM's operation shows that more has been going on. First, even if the U.S. has been a prominent critic of the way in which the DSM has operated, it was certainly not the only one that gradually undermined the DSM's credibility. The EU shares responsibility, certainly when it comes to the first two decades of the DSM. And even if some academic work on the DSM suggests that panel- and AB-members tend to act in a politically savvy way by taking into account the preferences and interests of the parties (Brutger & Morse, 2015), *perceptions* in the U.S. have increasingly been that the DSM operates in a way that exceeds its remit, specifically when it comes to the AB. And these complaints already exist since the early days of the DSM.

The fact that the U.S. has been most prominent in criticizing the DSM may come as a surprise to observers of the Uruguay Round negotiations that led to the DSM's creation through the DSU. After all, the DSM was rooted in the U.S. government's request to multilateralize its own international trade enforcement system, better known as Section 301 of the Trade Act of 1974. Such multilateralization resulted in deadlines in the DSM similar to the ones in Sec. 301. But the U.S. attitude vis-à-vis the DSM was paradoxical as at the same time, significant opposition against the DSM's creation emerged inside the U.S., particularly in the U.S. Congress. Republicans largely saw it as a mechanism that "compromised American sovereignty" (Hody, 1996: 164), but they were not alone. Indeed, as was observed at the time, the charge that the DSM "(….) threatens U.S. sovereignty on trade cuts across he [U.S.] political spectrum" (FT, May 25, 1994, p. 7). President Bill Clinton had to negotiate a deal therefore, with Senate Minority Leader Bob Dole on the creation of a commission that would review the DSM on a regular basis. For some, this meant that the U.S. had only partially agreed to a rules-based trading system, where rules would be the norm, but where "results-based compromises" would remain possible and were these results could reflect managed rather than free, fair trade (Hody, 1996, 165). It is interesting here, to point at Hody's warning about the possible sliding of managed trade policies into "a rationalization for protectionism or economic nationalism" (Hody, 1996: 168). In the days of Trump, this sounds almost prophetic.

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It is equally important to notice that Sec. 301 provided for an offensive trade instrument meant to dismantle trade barriers elsewhere (De Bièvre & Dür, 2004), or, as Destler (1994: 127) has put it, "export policies pursued by exceptionally aggressive means."[3] With the DSM, the system would become reciprocal as it not only allowed the U.S. to target illegal trade barriers – illegal under the WTO-agreements – elsewhere, but others to target such illegal U.S. barriers as well. In addition, the DSU provides for conditioned retaliation. Members cannot unilaterally retaliate against another member anymore. For retaliation, they need the permission of the Dispute Settlement Body who acts on the basis of a panel- or AB-ruling or of arbitration, that the responding party in a dispute has failed to implement the settlement's outcome. The permission from the DSB is automatic, given its rule of negative consensus, but not the assessment by a panel, the AB, or an arbitrator on implementation. Retaliation is thus, conditioned on such an assessment. But despite the fact that the U.S. pushed the DSU itself during the Uruguay Round, it found it increasingly difficult to live with this conditioned retaliation. That in itself may not be a surprise for a country skeptical about losing sovereignty to an international organization and basically not used in doing so. As Goldstein & Martin (2000: 630) already observed in 2000 (emphasis added):

> *"The legalization of the trade regime has (…) moved the nexus of both rule-making and adjudicating rule violations into the center of the [WTO] regime and away from the member states."*

Skepticism inside the U.S., even before the DSM Started to Operate

As indicated above, in the U.S. Congress, concerns existed with respect to the impact of the WTO's DSM on U.S. sovereignty. More concretely, these concerns emerged in the run-up to the U.S. ratification of the Uruguay Round Agreements and claimed that "the dispute settlement panels can hurt the ability of the U.S. industry to fight unfair trade practices." More importantly, in July 1992, during the negotiations on the DSU in the Uruguay Round, the U.S. Bush sr. Administration put forward a proposal in which it was stressed that the power of the dispute settlement panels would exclude the overturning of "reasonable national interpretations" of the multilateral trade agreements

[3] Note the EU's New Commercial Policy Instrument" (Council Regulation 264/84), created in 1984, in response to what was claimed to be "aggressive U.S. unilateralism" (NZZ, Nov. 6, 1993; Johnson, 1998: 12-13).

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under the GATT, particularly on antidumping, and "not substitute their own judgments on how the rules should be interpreted" (IT, Nov. 26, 1993), better known as the "standard of review" question.[4] In September 1993, the Clinton Administration indicated that it wanted to propose stricter limits on the panel's remit with regard to several issues (including trade remedies) but not others (like trade-related intellectual property rights, the so-called TRIPs).[5] In addition, for the U.S. it was important that the after the transition from GATT to WTO (at the time called MTO), no country would be bound by rules that it had not agreed to explicitly (IT, Oct. 29, 1993), a point that would become particularly important in the U.S. assessment of DS-outcomes from 1995 on and until today.[6] In negotiations with U.S. Congressional leaders on the approval of the Uruguay Round Implementation bill, the topic of the WTO's dispute settlement system and U.S. sovereignty was again on the table. Because of that, the Clinton Administration had to negotiate with the Republican minority reasons in both the House (Minority Whip Newt Gingrich) and the Senate (Minority Leader Bob Dole) in order to get the necessary sixty-vote support in the latter. The outcome largely reflected what New Gingrich had proposed but ultimately resulted from tough negotiations with Bob Dole.[7] In defense of that outcome and of the preservation of U.S. sovereignty under the WTO's dispute settlement system, the USTR Mickey Kantor wrote the following in a letter to Bob Dole (World Trade Online, Nov. 25, 1994):

"Sovereignty has been the central issue in the debate on the WTO throughout this year. When Members of Congress or other individuals or groups have come forward with concerns, we have worked hard, and effectively, to address them. Nevertheless, we recognize that concerns remain, in Congress and around the country, about our

[4] In Dec. 1993, the EU supported this U.S. position as part of a deal on agriculture and antidumping with the EU. In the deal, the U.S. accepted some EU changed to a previously negotiated agricultural deal – the infamous Blair House arrangement – in exchange for EU-openness on antidumping (IT, Dec. 10, 1993).

[5] A particularly important issues was here the "non-violation principle" were a DS-panel could not deal with issues were the trade benefits of a complaining party were impaired but where the defending party had not violated any WTO-provision. Whereas the U.S. and Canada wanted this for subsidies and antidumping cases, India strongly opposed this, particularly for TRIPs (IT, Nov. 19, 1993 & Nov. 26, 1993).

[6] The informal Lacarte Group, where the negotiations on the dispute settlement mechanism were conducted, didn't include these particular U.S. requests in its final draft to the Trade Negotiating Committee (TNC). The Group was named for its chair, Uruguayan ambassador Julio Lacarte-Muro, a trade diplomat with experience in the GATT that goes back to 1947 and which the FT called "the Father of GATT" (FT, Dec. 16, 1993).

[7] Note that these talks took largely place after the resounding victory – under Newt Gingrich's leadership – of the Republican Party in the November 1994 Congressional elections. Gingrich would soon become Speaker of the U.S. House of Representatives and Bob Dole Majority Leader in the U.S. Senate.

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sovereignty under the WTO, and particularly the impact of a dispute settlement system where 'blocking' of panel reports is no longer permitted. We believe that it is important to approve the Uruguay Round agreements with the broadest possible bipartisan support and public confidence. Consequently, the Administration wants to ensure that WTO dispute settlement decisions are fully consistent with the Uruguay Round agreements, by providing additional guarantees that WTO dispute settlement decisions will be vigorously monitored to ensure that U.S. sovereignty is not adversely affected."

With the latter's purpose in mind, the Clinton Administration promised to support legislation on the establishment in the U.S. of a WTO Dispute Settlement Review Commission. That Commission – composed of five U.S. federal appellate judges – would assess each adverse WTO Appellate Body (AB) report against the U.S. The assessment would *inter alia* determine whether the AB had failed to apply the standard of review as provided in article 17.6 DSU, and whether the AB "added to the obligations or diminished the right of the United States assumed under the pertinent Uruguay Round agreement" (Sec. 2(a)(6) of S.16, 104th Congress). In case in a period of five years, three such determinations would be made and the U.S. Congress would follow that determination for each of the three, it could – under an expedited procedure – decide to withdraw the U.S. from the WTO. It could also decide to direct the President to start negotiations in the WTO on a review of the DSU. In case he failed to open such a review or achieve a satisfactory outcome for the U.S. Congress, the U.S. would withdraw as well (Sec. 6(b)(1) of S.16, 104th Congress). Since such a decision would have to be made on the basis of a Joint Resolution, the President would have to sign it and possessed therefore a veto right ((Sec. 6(c)(2) of S.16, 104th Congress). The fact that such concession was made by the Administration to the Congress, showed how fundamentally significant Congressional skepticism on the sovereignty effects of the WTO's DSM really was, particularly with respect to the Appellate Body. As the history of the WTO's DSM shows us today, the skepticism has been amplified as the AB effectively became the arbiter in an increasing number of cases.

It is important to refer again to the relationship between Section 301 in U.S. trade law and the U.S.'s demand for a binding dispute settlement system in the WTO, despite concerns in U.S. Congress and in the U.S. more broadly about its possible adverse

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impact on U.S. sovereignty also because the DSM's scope would be much broader under the WTO – given the broader scope of the WTO Agreements – than under the GATT. But U.S. dissatisfaction with the GATT Dispute Settlement System was running high, very high. The straw that broke the camel's back was the U.S. conviction that the system permitted the EU to trick the Dispute Settlement – through exhausting obstruction – in the oilseeds dispute submitted to the GATT-DSM. As the Financial Times at the times observed (FT, Oct. 5, 1992, p. 14):

> "The U.S. position may be inconsistent (it too failed to comply with GATT panel rulings) but its conclusions are clear – unless there is a Uruguay Round agreement giving the GATT stronger powers to settle disputes, the U.S. will in the future use its strength unilaterally."

The combination of the DSU and the WTO Dispute Settlement Review Commission was thus the result of a balancing exercise. Through the DSM (and thus the DSU on which it is based) the U.S. would be able to more directly target the trade policies of other countries and trading blocks, but would make itself more vulnerable to other countries doing the same on U.S. trade policies. Under the condition of the WTO Dispute Settlement Review Commission it was a calculated risk worth taking, particularly it would enable to target European trade policies in the first place. As then Senate Majority leader phrased it in the U.S. Senate (Congressional Record, Jan. 5, 1995, p. S 177):

> *"An effective dispute settlement system was one of the major negotiating objectives for the United States. In the GATT talks [i.e. the Uruguay Round], the United States sought to have binding and automatic dispute settlement. Trade policies would be put to international panels and the defendant would be deprived of any means of blocking the result. The United States supported this idea out of frustration largely with our European friends who maintained agricultural policies that adversely affected every other agricultural export nation. All other nations agreed with our proposal, obviously from a variety of motivations. (…). They largely objected to our use of what they called 'unilateral measures' [i.e. Section 301]. (…) Make no mistake, the future of the world*

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trading system depends on this new dispute settlement process being used prudently and administered wisely."

"Being used prudently" and "administered wisely". Whereas the former fits into the U.S.'s contemporaneous criticism on the disturbed balance between negotiation and litigation, the latter does so for the way in which had allegedly trespassed the limits of the competences provided to it by the DSU.

Important for the WTO as a whole was however, another possibility adopted by Congress. Irrespective of adverse rulings through the DSM, the Congress – through a Joint Resolution (and in the absence of a presidential veto) – could direct the President to request negotiations in the WTO on a review of the DSU or specific provisions in it (Sec. 6(b)(1) of S.16, 104th Congress), in line with the WTO Ministerial Decision taken at Marrakesh to provide for such a review and to complete it by the first day of 1999.

The First Cases and the First Irritations about Delaying Tactics

As was expected by several trade analysts at the end of the Uruguay Round negotiations, the main trading nations and blocks started to open cases quite quickly under the WTO's DSM. Several of these cases could be solved through consultations. Some moved on to the panel and still others to the Appellate Body. The overarching majority of cases where Transatlantic in nature. As such, problems that were almost endemic to the trade relationship between the U.S. and the EU increasingly affected assessment of how the new DSM was operating and the picture was not always that good also because ongoing conflicts attract more attention than solved cases as does losing a case in comparison with winning one. This is equally so when winning a case doesn't seem to bring the anticipated benefits. The latter was particularly important to the U.S. as it had hoped that the cost of a binding dispute settlement for the U.S. would be outweighed the benefits to be reaped from the compliance with rulings by its trading partners, particularly the EU. The WTO's DSM had to provide better results for the U.S. than the GATT had done in the oilseed case, much better results. Among the cases submitted to the new DSM, there were some that showed that this promise could not be fully realized because of what the U.S. perceived as the continuation of pattern of EU obstruction. Prominent among these were the banana and the beef hormone cases. It is not the place here to present these cases in detail here. What matters is

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the perception of the parties on the functioning of the WTO Dispute Settlement Mechanism due to these cases.

The banana case with the U.S. was essentially about licensing. Even if the EU had been granted a waiver by the WTO to provide preferential treatment to bananas from the ACP-countries over those of other countries, according to the U.S., for the bananas not exported by the ACP-countries, the EU favored its own banana firms above those from the U.S. The result was that U.S. firms who had been involved in banana exports to the EU for a long time, lost a large part of their business with the EU. In 1994 a GATT-panel had ruled against the EU but given the GATT-DSM, the EU could block the panel reports approval by the GATT-membership. When the U.S., supported by a number of Latin American banana producing countries, opened a DS-case in the WTO, the hope was indeed that the DSM would yield a positive outcome for them. The U.S. even hoped that given the binding nature of the new DSM, the EU would be incentivized to work towards a negotiated solution. As USTR Mickey Kantor indicated in an internal USTR-Memo in the case, written right before the U.S. request for consultations in the WTO as part of the DSM: “The WTO is not a confrontational forum, but a means of resolving trade disputes” (IT, Feb. 7, 1996).

In May 1997, the Panel report was issued and in September 1997 the Appellate Body adopted its ruling.[8] It would take until December 2011 before a negotiated solution fully compatible with the EU’s WTO-obligations would be found after a long stretch of cases submitted on EU compliance with the ruling (so-called article 21.5 rulings) by both the Panel and the Appellate Body.[9] Already early in the case, widespread skepticism existed among the complaining countries that the EU would really fulfill the obligations resulting from the rulings. Referring to article 21.3 DSU on the Reasonable Period of Time (RPT) granted to the EU (called “Communities”), the Guatemalan member of the DSB, also speaking on behalf of the U.S., referred to the systemic importance of timely EU compliance for the WTO as a whole (DSB Minutes, Nov. 20, 1997, p. 3):

[8] See https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm (consulted on Aug. 21, 2020).
[9] In April 2001, a first range of agreements was reached resulting in the adoption of a new waiver for the EU. The enactment by the EU of a tariffs-only system for the import of its bananas triggered however a second wave of DS-rulings.

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> *"For the future of the WTO, it was important that a Member such as the Communities should make a clear statement at the present meeting concerning the intentions with respect of the DSB's recommendations pursuant to article 21.3 DSU."*

The request for a clear statement was due to the vague reference to the "EU's international obligations" made by the EU-representative at the meeting. At about the same time, the beef hormone dispute between the U.S. and the EU entered the WTO's Dispute Settlement Mechanism as well.

There are several reasons why these early Transatlantic cases were important for the U.S. attitude vis-à-vis the WTO-DSM. They first fed the U.S. conviction – certainly in the U.S. Congress – that the EU was abusing the DSM in order to delay implementation of DS rulings as long as possible. A resolution in the U.S. House of Representatives (Con. Res. 105-213) and a debate on it, clearly pointed in that direction. Referring to both the beef hormone and the banana case, Rep. Phil Crane, Chair of the House's Trade Subcommittee phrased it as follows (Congressional Record, Aug. 4, 1998, p. H7053):[10]

> *"Full implementation of these WTO decisions against the EU will show the world whether Europeans are committed to the credibility and long-term viability of the WTO dispute settlement system."*

A similar frustration was also expressed by the U.S. Administration, albeit in more cautious terms. Witness USTR Charlene Barchefsky's speech for the Federation of German Industries in October 1998 in Brussels (World Trade Online, Documents, Oct. 22, 1998):

> *"We have now concluded cases against the EU on the banana regime and the ban on beef from American cattle. In both, WTO dispute settlement panels and Appellate Bodies rules in favor of the United States. The EU has an obligation to respect these results and implement them – they have not. Failing to live by these panel results weakens support for the trading system, weakens its*

[10] Although adopted by a large majority in the House (420 against 4), the Concurrent Resolution got stuck in the Senate Finance Committee without being adopted.

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deterrent against protectionism, and weakens support for our bilateral relationship."

U.S. frustration about the EU in the DSM run high because the WTO's DSM was partly defended by the Clinton Administration in Congress as a way to counter the Europeans in that sense, given the experiences with the oilseeds dispute under the GATT (see above).

Second, and related to the first, the banana case brought to the forefront the sequencing issue in the DSM. From a legal point of view, could a complaining party ask for retaliation against a defending party in case of non-compliance by the latter or was it necessary to enable a DS-panel rule on compliance first, including with the possibility for appeal through the Appellate Body? The DSU seemed to suggest both with article 22.6 suggesting the former and article 21.5 suggesting the latter. Politically, the U.S. perceived the EU insistence on article 21.5 DSU as an example of the good old European strategy of procrastination on politically sensitive DSM-outcomes. This conviction was reinforced when the EU rejected the U.S. claim that the panel that originally had assessed the case should assess compliance too. In case the panel would rule that the responding party had not fully complied, the complaining party could request retaliation without further ado. The EU, however, claimed that also on compliance, article 21.5 meant that the whole procedure had to be done over in order to assess compliance, including, initial consultations and, as observed above, possible appeal.

EU procrastination became the prism through which the U.S. Congress, and to a certain extent the U.S. Administration, started to perceive EU actions in the DSM, specifically when it came to implementation. This Congressional frustration played a role in the Clinton Administration's decision to retaliate against the EU in the banana case and pressure to do the same in the beef hormone case, even if the USTR was reluctant to do so. With it, Section 301 was again on the table in the U.S. itself, specifically the question of its reinforcement. In addition, the U.S.'s retaliation – based on Sec. 301 – run into trouble in the WTO because of a complaint by…. the EU. In the DSB-meeting of December 15, 1998, the EU indicated that, it had to resort to article 21.5 DSU because first there was disagreement among the parties about EU

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implementation to be fully consistent with the WTO agreement covered by the case, and second because of "(…) the fact that one party had announced its intention to pursue a different unilateral track." As such, the EU claimed, "the only way this matter could be brought back to a correct multilateral forum was for the EC to invoke this procedure" (DSB Minutes, Dec. 15, 1998, p. 5). The U.S. saw it differently however. It claimed that it had legitimately resorted to article 22.6 DSU because the EU had failed to come in compliance in response to a DSM-case's conclusion, that it had been incurring damage since 1993 on bananas, but that the EU, and that "the EC's conduct had been aimed at delaying WTO procedures in prolonging its discriminatory banana regime" (DSB Minutes, Jan. 25, 28 & 29 and Feb. 1, 1999, p. 11). Even if the EU rejected that argument through reference to its attempt to engage in an accelerated procedure under article 25 DSU – that is, arbitration – rejected by the U.S., the notion that the EU was abusing the DSU for delaying purposes took root in the U.S.. In addition, for the U.S., the issue was a systemic one for the WTO (Ibid., p. 13):

> *"(…) the decision that the DSB had to take in the present meeting (Feb. 1, 1999) [and thus promptly] in accordance with article 22.6 would send a strong message to the world trading system that the WTO Agreement provided an effective mechanism to ensure compliance with WTO obligations, and that it did not encourage prolonged non-compliance or endless litigation."*

The notion was followed by several other countries, even if they avoided taking a position on the substance of the case. However was wrong or right, the U.S.-EU stalemate on bananas in the DSM, affected the credibility of the system as a whole, also because both players had a leadership role in the WTO (cf. the positions of Argentina, Australia, Brazil, Canada, Colombia, Mauritius, and S. Korea expressed at the same DSB-meeting).

We could go on and on with discussing this issue, but the gist of the matter is that the banana and the beef hormone cases triggered a perception inside the U.S. and beyond, that the DSM could easily fall prey to the delaying tactics of a losing defendant and that this would undermine the qualitative advantage of the WTO's DSM compared with the GATT-DSM. Given the political cost that the U.S. had paid for the binding system to be established, that was not a minor issue in developing American

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perceptions on the DSU, and this already early in its existence. This concern kept popping up among the WTO membership as not just the EU, but also others seemed to entertain this approach, not to the least the U.S. itself.

Maybe a final point. The above may leave the impression that the DSM is not working at all and that it has fallen prey to systematic implementation delays. That is not the case. Overall, in most cases, countries do engage in compliance expeditiously. But as the Congressional Research Service observed in 2009 (CRS Report, n° RS20088, p. 6):

> "Difficult cases have tested DSU implementation articles, highlighting deficiencies in the system and prompting suggestions for reform".

Perceptions of an Appellate Body Detrimental to U.S. (and other the Members') Sovereignty

Before 2001, no cases can be found on which the U.S. claimed that the Appellate Body had exceeded its remit as provided by the DSU. On the contrary, in several cases, the U.S. applauded the fact that the AB had corrected the panel reports on this matter. An example is the beef hormones case mentioned above (AB Report, n° AB-1997-4, p. 44). In 2001, that started to change. Several concerns emerged here and were increasingly stressed by the U.S. throughout the following years: the standard of review under the DSU, the fact that only WTO members, not the AB could engage in an interpretation of the WTO agreements.

Specifically with respect to anti-dumping (AD) cases, the U.S. showed a particular sensitivity towards the standard of review applied by the panels and, especially the Appellate Body. This was not just the case for disputes in which the U.S. itself was involved as a party, but also for other disputes. For instance, in the case between the EU (defendant) and India (complainant) on AD-duties on imported cotton-type linen from India (DS141), the U.S. expressed concern about AB's application of the standard of review, indicated to "monitoring the situation carefully, in particular since the standard of review was at the center of the dispute settlement system" (DSB Minutes, March 12, 2001, p. 16). That doesn't mean that on this standard, the U.S. disagreed with the panels and the AB in all cases. In several of them, it explicitly thanked the panel and the AB for applying the correct standard of review (cf. DSB Minutes, Aug. 8,

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2005, p. 5; DSB Minutes, Apr. 22, 2015, p. 16; DSB Minutes, Jan. 22, 2018, p. 13). Nonetheless, more recently, U.S. complaints on the standard of review question started to include the claim that different than is provided by the DSU, the AB was involving itself in the assessment of the facts of a case besides matters of law. In some cases, this had resulted in the AB reversing a panel's fact-finding. For the U.S., by doing so, the AB had invented a new authority for itself: "The invention of an authority to review panel fact-finding, contrary to the DSU, ha[s] added complexity, duplication, and delay to every WTO dispute" (DSB Minutes, Aug. 22, 2018, p. 10). The increased complexity was partly related to the fact that as the DSU didn't grant the AB that authority, it equally didn't provide for a standard of review for fact-checking at the appellate level.

With respect to the interpretation of WTO agreements, the U.S. representatives in the DSB indicated that they were carefully monitoring the AB. In May 2001 for instance, the U.S. complained that in a safeguard case with New Zealand and Australia on frozen lamb meat (DS177) in which the U.S. was the defendant, the AB's findings had "verged on an interpretation of a WTO agreement, even though such interpretations could be made only by Members under the procedures provided in Article IX:2 of the Marrakesh Agreement" (DSB Minutes, May 16, 2001, p. 9). With respect to the AB's remit, that stance popped up for the first time in the DSB in March 2000 and was indeed, taken by the U.S. (DSB Minutes, March 3, 2001, p. 11). Not that article IX.2 had not been dealt with before, but then with respect to submissions of parties in a case, not the AB's remit.

The question of interpretation and the AB was one with direct systemic consequences for the U.S. As its representative in the DSB indicated (DSB Minutes, Dec. 11, 2008, p. 4): "the WTO dispute settlement system provided security and predictability to the multilateral trading system when, and only when, it properly read the agreement that Members had negotiated." As such, it was not sufficient that the AB would just "merely take into account" the Members' interpretation of their rights and obligations as reflected in the text of the WTO agreements, as the AB had suggested. No, the AB had to operate on the basis of an understanding reflected by the negotiated agreements. Any authoritative interpretation could only come from the Members, either through the

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WTO's General Council or through the WTO Ministerial Conferences (DSB Minutes, Feb. 19, 2019, p. 20).

The question of interpretation increasingly devolved into one of the sovereignty of WTO Members and thus the U.S. As we have seen, sovereignty was an important concern when the U.S. was in the debate about the ratification of the Uruguay Round Agreements. The following statement from the U.S. representative in the WTO's DSB exemplifies this concern (DSB Minutes, March 8, 2020, p. 8):

> *"The greatest concern of the United States [is] the Appellate Body's growing habit of creating its own rules. The WTO Agreement was an agreement among sovereign states, which had undertaken certain commitments in exchange for other countries making equivalent commitments. The text of the WTO Agreement recorded those commitments. (…) The Appellate Body could not create new obligations, and rights, nor could it nullify those established in the covered agreements. To countenance such deviations, the Appellate Body would usurp the exclusive role of sovereign states that had created the WTO to decide what obligations would apply among themselves."*

One could wonder whether the U.S. positions really made a difference in the demise of the operation of the DSM due to U.S. opposition to the appointment of a sufficient number of AB-members. For that purpose, the graph below (Graph 1) puts the number of U.S. complaints on boundary-related issued in comparison of the other WTO Members that expressed themselves in that sense, and this between 1995 and 2019. The figures were generated on the basis of three consecutive searches through the (derestricted) minutes of all DSB-meetings since 1995. In these searches, the terms "sovereign", "authoritative interpretation", "Article IX:2", and "Article 3.2" were used. Whenever these terms showed up, the intervention of all WTO Members on the agenda item at issue were researched for the use of these terms as a way to criticize the Appellate Body for overstepping its legal boundaries in a way detrimental to the rights of the WTO-Members as exclusively interpreters of the WTO Agreements, and/or to the sovereignty of these Members. The focus was thus on the extent to which the WTO Members positioned themselves as critics of the AB. Reading all the interventions was necessary as the meaning of a reference can be different depending on the context of

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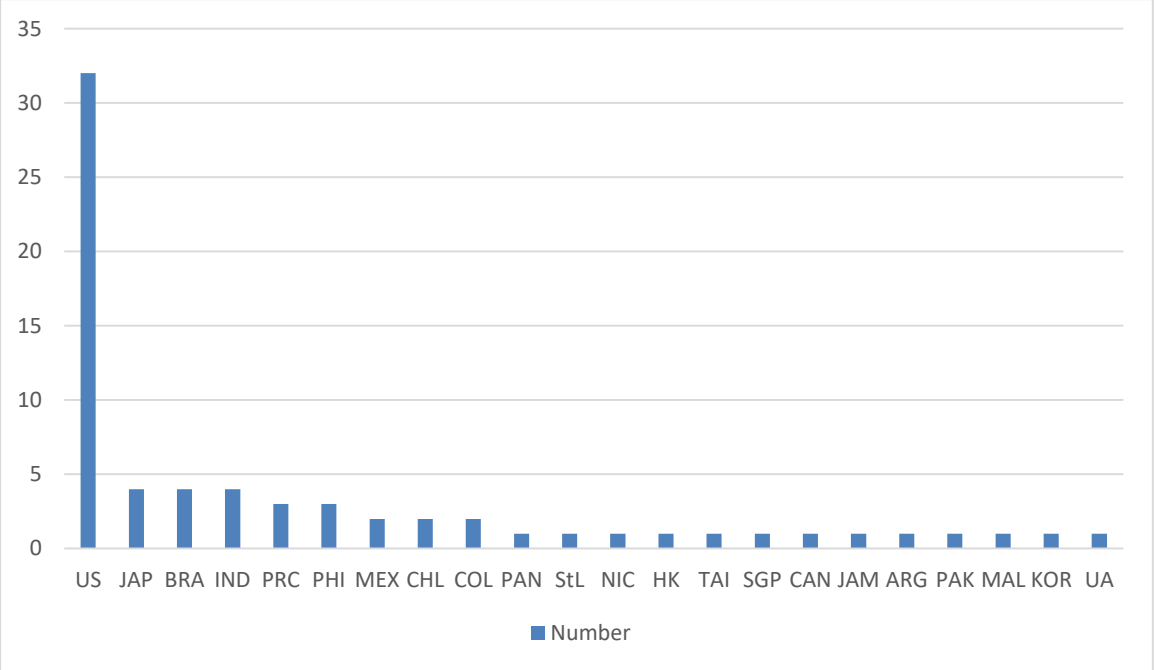
its expression. Article 3.2. DSU for instance, is often used to stress the contribution of the DSM to the consistency and predictability of the multilateral trading system. That is in itself, not a criticism against the AB. But references to article 3.2 DSU are also used to stress that the AB has crossed the line between the (legal) assessment of a case and the interpretation of the WTO Agreements, and the fact that the latter is an exclusive prerogative of the WTO Membership. The AB is not supposed to play a role here. Another example is the reference to “sovereignty” or “sovereign rights”. As a matter of fact, several countries – with Cuba on top – have made numerous references to this, but not in a way of protecting their sovereignty against an overreaching AB. Only when they did so, did they matter for our search.



Graph 1: Number of sovereignty-related interventions in the DSB against the AB (1995-2019)

The information to be drawn from graph 1 is pretty clear. First, whereas several – but a minority of – WTO members have uttered criticisms against the AB for exceeding its legal boundaries and thereby undermining the sovereign rights of the WTO membership, the number of such interventions by the U.S. far exceeds the others. Second, the European Union is the remarkable absentee here. This doesn’t mean that the EU never expressed disagreements with the AB in its DSB-interventions. It did. But

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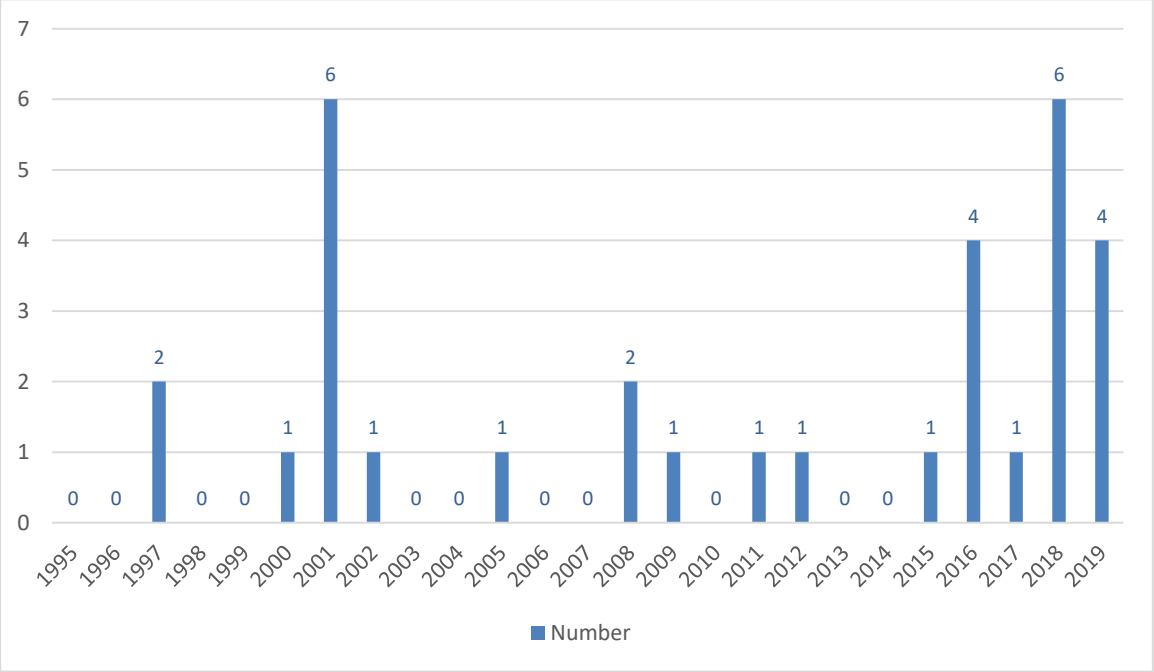
when it did, it was never a claim that the AB was exceeding its legal remit to the detriment of the sovereign rights of the WTO membership.

In graph 2, we take a closer look at the U.S. How did the U.S.'s sovereignty-related criticism on the AB evolve over time, that is, between 1995 and 2019?



Graph 2: Number of sovereignty-related interventions by the U.S. in the DSB against the AB, by Year (1995-2019)

Graph 2 indicates that there is no clear pattern over time in the criticism ushered by the U.S. against the AB for sovereignty-related reasons. To a certain extent, the graph could be misleading because of the low and zero values for a significant number of years. In addition, the graph does not allow us to claim that there is an upward trend in the sovereignty-related criticisms by the U.S. against the AB in the DSB. Neither does it indicate that the Trump Administration is having the monopoly of such criticisms against the AB. Previous U.S. Administrations have been vocal on this point as well, particularly the Bush Jr. Administration in 2001 and the Obama Administration in 2016. As a matter of fact, the debate on the (re)appointment of AB-members – and U.S. recalcitrance to (re)appoint such members – already started during Obama's term even if the issue culminated in the AB losing its quorum after Trump had become U.S. president. A final issue only indirectly visible in graph 2 is that in most interventions in the DSB, the U.S. doesn't criticize the AB on sovereignty-related issues. But that

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doesn't mean that the interventions in that sense were unimportant. At the end of the day, they did culminate in an appointment crisis, and thus a systemic crisis, in the WTO. The roots of that crisis, the graph shows, goes back a relatively long time in which patience with the AB has been tested and retested, this to no avail, at least from a U.S. perspective. Moreover, according to the U.S., the problems with AB started to infect the DSM as a whole, as – according to the U.S. – the AB's increasingly created a doctrine of precedent (stare decisis) that narrowed the leeway within which the DS-panels had to operate. Not surprisingly, this U.S. complaints mainly targeted DS-cases on zeroing methodology used by the U.S. Dept. of Commerce. Nonetheless the criticisms went further than zeroing itself. As the U.S. representative phrased it in case DS344 – final antidumping measures on stainless steel from Mexico – whereas the Appellate Body – in its initial rulings not long after the DSM has started to operate – had rightly ruled "about the status of prior adopted reports [that they] were not binding, except with respect to the particular dispute between the parties, but [that] they should be taken into account where they are relevant to any dispute." But in the case of DS344, according to the U.S., the AB ruled that for the sake of the "security and predictability of the dispute settlement system – a misstatement (…) as the text of the DS refers to the security and predictability of the multilateral trading system – Appellate Body reports should be treated as authoritative interpretations of covered agreements (…) to be followed by panels regardless of whether a panel in a particular dispute agreed with those prior reports." The meaning of this was far-reaching. As the U.S. representative stressed (DSB Minutes, May 20, 2008, p. 11):

> *"In other words, panels were simply to abdicate their responsibility to conduct an objective assessment of the matters before them and should simply follow prior Appellate Body reports. (…) This Appellate Body reports approach, including its references to a 'coherent and predictable body of jurisprudence', would appear to transform the WTO dispute settlement system into a common law system. But that was never agreed among Members."*

Shortly thereafter, in case DS350 (zeroing in administrative reviews), the U.S. observed that a panel had for the first time acted out of deference to the AB (Oct. 2008). In Feb. 2009, this was followed with the complaint that the AB had created a "deference standard", at least for antidumping cases. And this criticism would continue

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up until the U.S.'s blocking of the (re)appointment of AB-members in 2017-2018). Indeed, three subsequent U.S. presidencies had expressed this stare decisis panel deference criticism on the AB.

Trade Remedies Cases as Triggers of Systematic Criticism on the WTO's DSM

It is maybe not a coincidence that the last cases mentioned above each dealt with U.S. antidumping measures, more particularly, the methodology used to determine the dumping margins and therefore, the antidumping tariff duty levels. Antidumping measures represent an important part of the so-called trade remedies available to WTO Members. Safeguard measures, and to some extent countervailing measures, cover this concept as well. The meaning of such remedies is, however, somewhat ambivalent. Are they exclusively meant to enable countries or trading blocs to deal with unfair trade practices by others? Or are they also meant to provide countries or trading blocs with pressure relief valves in situations where domestic political pressures due to import competition need to be smoothened for a while? In case of the latter, the remedy is domestic political pressure management, rather than the undoing of the damaging effects of unfair foreign trade practices.

The ambivalence of trade remedies is perhaps most visible in the case of anti-dumping measures. Although WTO-arrangements on anti-dumping clearly point at measures taken in response to dumping, economists have largely dealt with anti-dumping measures as measures that were more meant to manage domestic pressure than to undo dumping. As such, anti-dumping measures have often been treated (and analyzed) as a form of hidden protectionism. Such protectionism was considered to be enabled by the gray areas left by anti-dumping provisions in trade agreements. Political economy scholars likewise looked at antidumping measures as "gray area" measures but stressed the political functionality of them being in the "gray area". In doing so, these scholars defined the role of such gray area as "escape measures" and the leeway left in trade agreements on them as "escape clauses". For them, the question was often one of optimal escape levels: levels that allowed countries to temporary manage domestic import competing pressures while preventing that such management would open the door to widespread and systematic protectionism. "Flexibility" is here the buzzword, or rather, optimal flexibility. When applied to anti-dumping measures, this

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means that such measures could be employed under two circumstances: (a) in the case of dumping by a trading partner; and (b) in the absence of such dumping but as a temporary relief measure against domestic pressure. In a legal sense, (b) would entail a violation of a trade agreement, whereas under (a) such violation would not be the issue. The issue here would be the political sustainability of such a trade agreement. Between the two, there clearly is a trade-off: the more leeway is enabled in the implementation of a trade agreement the higher the probability that such implementation will disturb the rights and obligations of all parties to the agreement and with it, the agreement itself. The less leeway however, the higher the probability that domestic pressures will make it impossible to the parties to the agreement to consciously implement it, and with it the sustainability of that agreement itself.

Within the wide range of WTO-agreements, there are two that explicitly provide for a general escape clause mechanism: the Safeguard Agreement (SCA)[11] and the Agreement on Agriculture. For the latter, it concerns the Special Agricultural Safeguard (SSG).[12] For developing countries, a Special Safeguard Mechanism (SSM) is under negotiation.

Different from the safeguard clause under the GATT 1947, where immediate retaliation was permitted, WTO-members can temporarily restrict the import of a without the right for the WTO-members disadvantaged by this to immediately retaliate.[13] Only after three full years, retaliation is allowed for and this through the withdrawal of concessions granted by these members to the WTO-member that applied the safeguard. That right only emerges when attempts to negotiate compensation with the applying WTO-

[11] The SCA itself is based on article XIX GATT.

[12] Whereas the general Safeguard under the SCA requires that a causal relationship is established between a sudden rise in imports – in absolute or relative terms of the domestic production of the enacting WTO-members – and the serious injury or the threat of such injury for domestically produced like or competitive industries or products, the SSG does not require such causality and injury. Likewise, different from the SCA, WTO-members can only apply the SSG for the products explicitly listed as such in their Schedule of Commitments. This means that the scope of the SSG for each individual members has been the subject of negotiations with the other members. All the products concerned also need to be subjected to tarification. Trade protection can only be based on bounded tariffs, not on quantitative restrictions with the exception of tariff rate quotas (TRQs). With such quota imports, the amount of imports (the quota)under a lower tariff (an in-quota tariff) is restricted. Every additional import beyond this quota is subjected to a (normally much) higher (often prohibitive) tariff.

[13] The so-called impairment of the benefits accrued by them as a consequence of the WTO-agreements.

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member have failed,[14] and only when the rise in imports that led to the safeguard was absolute, not just relative. In most cases however, safeguard measures have already been withdrawn by that time. In any event, safeguard measures can only be applied for a maximum of four years although extensions are possible when the domestic industry that was seriously injured is visibly adjusting. Safeguard measures are indeed supposed to be measures that buy time for the domestic industries so as to allow them to adjust to the new import-competitive situation. In political terms this means that the pressures due to rapidly rising import competition can be smoothed, at least for a while. The idea is that adjustment will reduce such pressures as companies adapt or disappear and workers get the time move to other sectors or other forms of employment, inter alia through retraining.

When it comes to the WTO dispute settlement mechanism, most disputes on safeguard measures question the claim that imports have suddenly increased, whether a causal relationship has been established between such a rise and the injury or threat of injury experienced by domestic producers of like or directly competitive products, whether such injury or threatened injury was serious (art. 2 SCA), and whether the safeguard measure was proportionate to such injury or threatened injury.

Different from safeguard measures, antidumping measures are not – form a legal point of view – supposed to be escape measures. They are not supposed to function as pressure relief valves in response to domestic political pressures triggered by rising import competition. Nonetheless, as indicated above, for a long time, they have been considered as such, and still are quite often. As the term itself suggests, anti-dumping measures are measures aimed at undoing the damage caused by unfair trade due to dumping. Dumping itself is the sale of a product below its “normal value”. Companies engage in dumping in order to destroy their competitors through fierce – but unfair – price competition. Quite often, companies can engage in dumping-through-exports because they are not blocked from engaging in uncompetitive practices at home. These can consist of the abuse of a domestic monopoly position or the creation of price cartels with domestic competitors in a context of lax antitrust enforcement or the

[14] Such talks have to be conducted immediately after the safeguard measures have been applied in case the applying WTO-members has not provided for compensation spontaneously or at a level equivalent to the impaired benefits suffered by the other WTO-members.

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absence of well-enforced competition policies.[15] Artificially higher prices at home may then cross-subsidize artificially low prices abroad. This makes the issue of non-market economies so sensitive when it comes to antidumping measures. By definition, such markets are not fully competitive. In addition, they raise problems with respect to price comparisons, a fundamental issue in the determination of possible dumping.

Dumping claims are based on the determination that products have been imported (or sold) under a price lower than their "normal value". This implies that one way or the other, that normal value has to be established. In a situation of competitive markets,[16] the approach is straightforward. Prices applied to imported products are compared with the prices of like products in the market from where the dumped products are exported. When the difference is negative, dumping has taken place and anti-dumping measures can be enacted proportionate to the extent of dumping – the so-called dumping margin – or even lower, to the extent of the caused injury (the so-called lesser duty principle). In case of a low volume of sales in the exporting country or "because of a particular market situation" in such country, prices will be compared with the domestic prices in third countries or, when such prices are not representative, with a value equal to the sum of the cost of production in the originating country and "a reasonable amount for administrative, selling and general costs, and for profits" (art. 2.2 Anti-dumping Agreement).

When it comes to the WTO dispute settlement mechanism, most disputes on anti-dumping measures question the way in which the import prices have been established by the importing country, the market with which these prices have been compared, the calculation of the prices in that market, and the equivalence between the anti-dumping measure and the dumping margin.[17] In addition, the causal relationship between the claimed dumping and injuries endured by domestic industries are also frequently disputed as an inference of such caused injury has to be established as well.

All these elements have been provided for in detail in the Anti-dumping Agreement of the WTO. Despite this, numerous disputes about their application keep popping-up.

[15] State aid has the same effect, but that is a practice that is dealt with under a separate agreement in the WTO.
[16] Article 2 of the Anti-dumping Agreement refers to "the ordinary course of trade."
[17] Measures can take the form of a price undertaking and an anti-dumping duty. In the former case, the extra revenue of the price rise goes to the company that dumped the good, in the latter case to the treasury of the importing country.

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Neither of the two is a coincidence. The perception that anti-dumping measures are not really anti-dumping in nature but hidden forms of protectionism, and therefore escape measures, is widespread. Subsequent negotiations on anti-dumping provisions under the GATT and the WTO have therefore often been difficult. The targeted countries wanted more discipline and less possible loopholes, whereas the users wanted to preserve some leeway. Meanwhile, the meaning of "targets" and "users" have shifted as well. More and more countries and trading blocs share both roles, and with it, the traditional cleavage between developed users and developing targets has disappeared. Indeed, several developing countries that used to be targets have become important users (e.g. India, Brazil, China) while several developed economies (e.g. EU, U.S.), while frequent users, increasingly became targets. Remarkable is however that the trade remedy measures taken by developing countries have been much less targeted than those of the EU, but especially the U.S., with China and South Korea being the exceptions. Graph 3 shows this. It contains the number of cases for which the country/trading block mentioned on the *x*-axis was the respondent, and the share of targeted trade remedy of that respondent. The graph shows that the U.S. is by far the economy where most DS-cases concern trade remedies: 63,19% of all cases in which it was respondent.[18] For all the other major economies, that percentage is significantly lower, ranging from 22,86% for China to 7,14% for Japan. As far as the EU is concerned, despite its relatively huge number of cases in which it was the respondent, only one in five of these cases concerned trade remedies. In addition, within the group of trade remedy cases against the U.S., antidumping cases (not separately visible in graph 3), stood out. A little more than half such cases concerned anti-dumping resulting in a share of 36,6% of all cases against the U.S.

[18] Cases where anti-dumping was combined with countervailing measures (the AD/CVD-cases) were counted as single trade remedy cases, not double ones. In addition, all cases have been consolidated, meaning that cases opened by several countries against a respondent on exactly the same issue were counted as one case. This was for instance so with respect to the steel safeguards taken by George W. Bush in 2002, the quantitative restriction cases (1997) and sugar/sugar cane cases (2019) against India, the raw material (2009 and again in 2016) and rare earth cases (2012) against China, the alcohol beverages cases (1995) against Japan, and the cases against Trump's steel and aluminum measures in 2018. We treated the latter cases not as trade remedy cases (safeguards) as the original measure was not treated as such by the Trump Administration. It was, indeed treated as a national security measure. As far as the EU is concerned, the number of cases is based on both cases where the EU (formerly EC) was the respondent, or where one or more of its member states were targeted. Evidently, countries that became EU members after the WTO was founded are only added in this calculation from the moment that they became such member.

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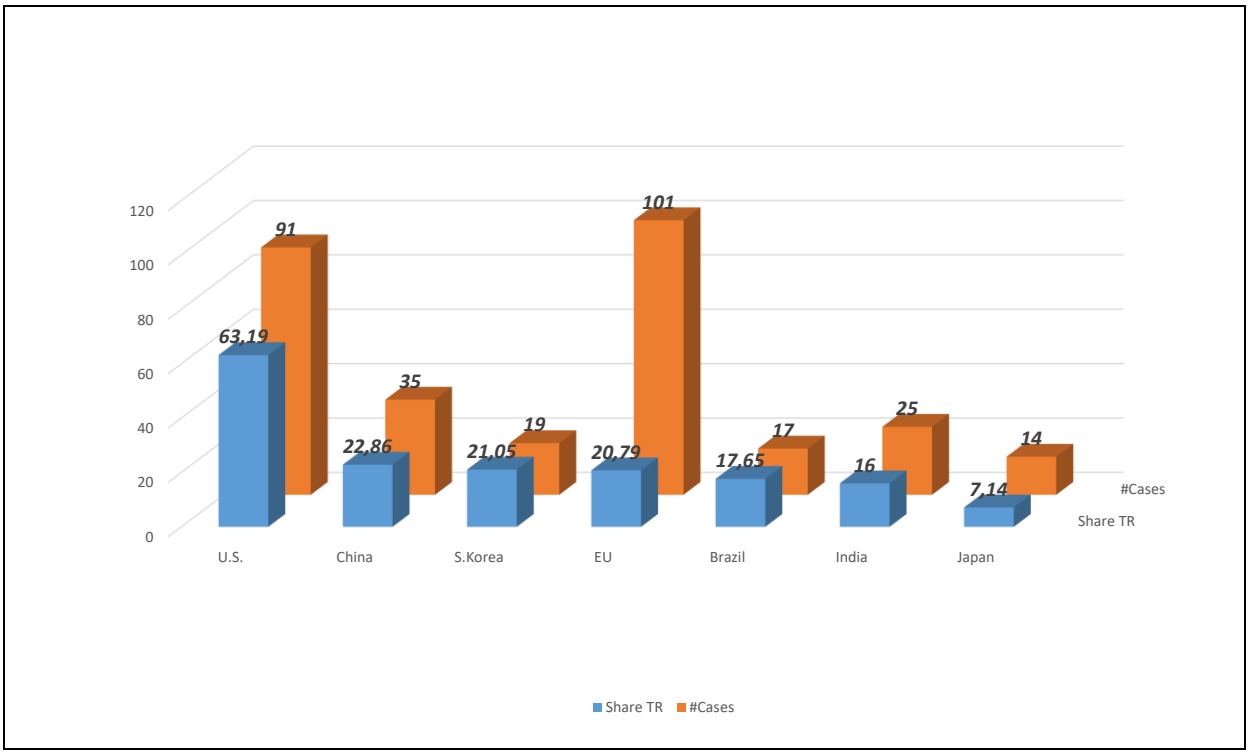

Graph 3: Number of cases and share of trade remedy cases, by respondent (1995-2020)

For the United States, anti-dumping is significantly sensitive, and this sensitivity exists within the import-competing industries, the Administration, and the Congress. Consequently, dispute settlement cases in the WTO on anti-dumping measures taken by the U.S. have gradually, but increasingly spilled over in cases that raised questions about the operation of the DSM itself. These was partly visible above, where the sovereignty sensitivity of the U.S. with regard to the DSM was discussed. Indeed, in growing U.S. skepticism about the WTO's DSM, escape clause cases – most prominently ones on anti-dumping – acted as escalators. China's increasing involvement in such cases ten years after it joined the WTO in December 2001, further compounded this. It is not surprising therefore, that China's status as non-market economy (NME) also became highly sensitive, both for China and the U.S. (as much as for the EU and others). On the one hand, such status provided the U.S. with a larger toolbox to enact anti-dumping measures against China. On the other hand, the fact that China was not operating as a market economy made it – according to the U.S. – really necessary to have such a toolbox. As was concluded on the basis of an AB-ruling between the EU and Argentina in 2016 (Biodiesel case, DS473), the status of

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market economy significantly narrowed down the leeway for anti-dumping measures in comparison with a non-market economy. It is interesting to quote the Argentinian reaction to the AB-ruling in the DSB (DSB Minutes, Oct. 26, 2016, p. 11):

> *"Argentina believed that (…) the entire WTO membership would benefit from a sound, accurate, and precise interpretation that would enhance the predictability of key provisions of the Anti-dumping Agreement in respect of the construction of normal value [specifically as] the [Biodiesel] Reports threw lights on certain systemic aspects that had not been addressed before."*

Such "sound, accurate, and precise interpretation" would certainly benefit the entire WTO membership. It also made, however, the granting of market economy status to China much less attractive as with such granting would come a (now even more) narrowing down of the leeway available in this kind of trade remedy cases. And for the U.S., such narrowing down had increasingly become part and parcel of AB-rulings on such cases.

The pattern that dispute settlement cases in the WTO on trade remedy measures – and in the first place those on anti-dumping – taken by the U.S. have gradually, but increasingly spilled over in cases that raised questions about the operation of the DSM itself, becomes visible when the comments of the U.S. representatives in the DSB on trade remedy cases brought against the U.S. are compared with those on other issues (but equally brought against the U.S.). Such comparison yields a number of observations.

First, systemic criticism on the DSM in non-trade remedy cases have been rare, apart from the exceeding of the 90-day limit by the AB, especially since 2005. A notable exception five year into the DSM's existence was the U.S.'s criticism (and warning) that the AB was engaging itself with the interpretation of the WTO-agreements, whereas only the WTO-members had the right to do so (see DS108, FSC case, DSB Minutes, March 20, 2000, p. 11). If systemic criticism shows up, it is almost always in the context of trade remedy rulings by the AB.

Second, not all trade remedy cases against the U.S. attracted systemic criticism from its representatives in the DSB even if the AB found the U.S. to be in violation of its WTO-obligations. Such criticisms started to show up from 2001 on, first somewhat

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reluctantly and increasingly virulently even if after 2000, not all trade remedy rulings against the U.S. were received that way.

Out of the 33 trade remedy cases against the U.S. that resulted in AB-reports, 14 were accompanied with systematic criticism from the U.S. in the DSB (note that at this moment, 11 such trade remedy cases are still pending). There is no clear pattern here between anti-dumping, countervailing, or safeguard cases. The most virulent U.S. attacks against the AB came however, all in AD-cases that dealt with zeroing. In these cases, the U.S. representative referred to the "deeply flawed, and failed reading of the Anti-Dumping Agreement" (DSB Minutes, May 20, 2008, p. 10), and the neglect by the AB of the key role that the acceptance of several, potentially "permissible" interpretations of anti-dumping methodology had played in reaching an agreement on anti-dumping in the Uruguay Round negotiations (DSB Minutes, Feb. 19, 2009, p. 20). The issue of zeroing can indeed, be seen as something that really poisoned an already difficult relationship of the U.S. with the AB, knowing that the difficulty in that relation was largely triggered by trade remedy rulings against the U.S. since 2001.

The China Factor

What about the role of China here? As is well known, both the U.S. and the EU criticize China for undermining fair competition through its state-owned enterprises, and related to that by illegally subsidizing some of its exporting firms, turns a blind eye at intellectual property theft by its companies, or even allows it firms to engage in forced technology transfers from Western companies with which they develop joint ventures or who get important government contracts. At the same time, since 2009, China has become an active user of the WTO's DSS as well. Already since 2004, it had become a target of such cases, both of the U.S. and the EU.

At this time, it cannot be proven however that China's entry into the WTO or China's involvement in the WTO's DSS had an impact on the systemic concerns of the U.S. with the AB or the DSS at large. In all cases targeted by China against the U.S. until 2019 (nine in total) – of which a number are still pending – none triggered any systemic complaints by the U.S. vis-à-vis the AB or the DSS. This was even not the case for those cases (four in total of which one is still pending) that concerned trade remedy measures taken by the U.S. It may be too early to draw any valid conclusions from this

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but at the same time, it doesn't allow a conclusion that the China Factor matters in the U.S.'s exasperation with the DSS in general or the AB in particular.

5. Conclusion

This paper tried to dig deeper into the causes of the systemic crisis that the WTO's dispute settlement system (DSS) currently goes through, caused as it is by the Trump Administration's paralyzing of the system's Appellate Body (AB).

It did so first by indicating why, as one of the current three pillars of the WTO, this systemic crisis may be relevant and important for the multilateral trade governance system. Second, it showed how precarious the U.S.'s support for the WTO DSS was, given the expectations derived from the tradeoff between the loss of unilateral trade enforcement tools and the expectation that this would force its trading partners – the EU most prominent among them – to comply with the commitments made through the WTO agreements. Third, the paper showed why U.S. hopes with this expected tradeoff started, slowly but steadily, to unravel and the role played here by procrastination, the narrowing down of the U.S.'s path to trade remedies by the AB, and the conviction that the AB was creating new obligations for, and reducing its rights under the WTO. Fourth and very preliminarily, the paper also indicated that the China factor, and thus the geopolitical competition that is increasingly affecting world politics, not really mattered (yet?) with regard to the DSS and its sustainability.

The paper did however, either implicitly or explicitly point at a number of risks with the current state of the DSS and the AB. First, its analysis subtly warns against any unrealistic expectations in the immediate post-Trump era. The incoming Biden Administration – so is to be expected – will probably unblock the AB's current paralysis. It would be wrong however to see this as tantamount to the dissipation of the underlying U.S. exasperation with how the DSS operates and the elements that matter in this exasperation such as procrastination, reduced trade remedying, and disturbed rights and obligations.

Second, it also tried to point at the importance for the EU to play a prominent role in remedying the system. Given China's trading networks, and the market power and geopolitical impact to be derived from it, getting the U.S. fully back onboard of the DSS may become – to the extent that it already isn't – a fundamental interest of the EU and

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its member states, and as such, an important component of what Meunier and Nicolaidis (2019) have called, the “geopoliticization of European trade policy.”

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References

Beshkar, M. (2010), “Trade Skirmishes Safeguards: A Theory of the WTO Dispute Settlement Process”, in: *Journal of International Economics*, Vol. 82, n° 1, pp. 35-48.

Brewster, R. (2011), “The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement”, in: *George Washington Law Review*, Vol. 80, n° 1, pp. 102-158.

Brutger, R., Morse, J.C. (2015), “Balancing Law and Politics: Judicial Incentives in WTO Dispute Settlement”, in: *The Review of International Organization*, Vol. 10, pp. 179-205.

Busch, M., Pelc, K. (2010), “The Politics of Judicial Economy at the WTO”, in: *International Organization*, Vol. 64, n° 2, pp. 257-279.

Chaudoin, S., Kucik, J., Pelc, K. (2016), “Do WTO Disputes Actually Increase Trade?”, in: *International Studies Quarterly*, Vol. 60, n° 2, pp. 294-306.

Clark, R. (2010), “World-System Mobility and Economic Growth, 1980-2000”, in: *Social Forces*, Vol. 88, n° 3, pp. 1123-1151.

De Bièvre, D., Dür, A. (2005), “Constituency Interests and Delegation in European and American Trade Policy”, in: *Comparative Political Studies*, Vol. 38, n° 10, pp. 1271-1296.

Destler, I.M. (1995), *American Trade Politics*, Washington DC, Institute for International Economics, 1995, Third Edition.

Duncombe, C., Dunne, T. (2018), “After Liberal World Order”, in: *International Affairs*, Vol. 94, n° 1, pp. 25-42.

Gilligan, M.J., Johns, L., Rosendorff, B.P. (2010), “Strengthening International Courts and the Early Settlement of Disputes”, in: *Journal of Conflict Resolution*, Vol. 54, n° 1, pp. 5-38.

Goldstein, J., Martin, L.L. (2000), “Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note”, in: *International Organization*, Vol. 54, n° 3, pp. 603-632.

Goldstein, J. (2017), “Trading in the Twenty-First Century: Is There a Role for the World Trade Organization”, in: *Annual Review of Political Science*, Vol. 20, pp. 545-564.

Hody, C.A. (1996), *The Politics of Trade: American Political development and Foreign Economic Policy*, Hanover, University Press of New England, 1996.

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Johannesson, L., Mavroidis, P.C. (2016), “The WTO Dispute Settlement System 1995-2016: a Data Set and its Descriptive Statistics”, in: *EUI Working Papers*, n° RSCAS 2016/72.

Johnson, M. (1998), *European Community Trade Policy and the Article 113 Committee*, London, The Royal Institute of International Affairs.

Kim, I.S., Milner, H.V., Bernauer, T., Osgood, I., Spilker, G., Tingley, D. (2019), “Firms and Global Value Chains: Identifying Firms’ Multidimensional Trade Preferences”, in: *International Studies Quarterly*, Vol. 63, n°1, pp. 153-167.

Kono, D.Y. (2006), “Optimal Obfuscation: Democracy and Trade Policy Transparency”, in: *American Political Science Review*, Vol. 100, n° 3, pp. 369-384.

Lazer, D. (2001), “Regulatory Independence and International Governance”, in: *Journal of European Public Policy*, Vol. 8, n° 3, pp. 474-492.

Ludema, R.D. (2001), “Optimal International Trade Agreements and Dispute Settlement Procedures”, in: *Journal of Political Economy*, Vol. 2, pp. 355-376.

Maggi, G., Staiger, R.W. (2018), “Trade Disputes and Settlement”, in: *International Economic Review*, Vol. 59, n° 1, pp. 19-50.

Meunier, S., Nicolaidis, K. (2019), “The Geopoliticization of European Trade and Investment Policy”, in: *Journal of Common Market Studies*, Vol. 57, annual review, pp. 103-113.

Peterson, J. (2018), “Structure, Agency, and Transatlantic Relations in the Trump Era”, in: *Journal of European Integration*, Vol. 40, n° 5, pp. 637-652.

Ryu, J., Stone, R.W. (2018), “Plaintiffs by Proxy: A Firm-Level Approach to WTO Dispute Resolution”, in: *Review of International Organization*, Vol. 13, pp. 273-308.

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Paper 3

Aid for Trade: An Overview

Juliana Peixoto Batista[1] [2]

1. Introduction

Aid for Trade (AfT) is a World Trade Organization (WTO)-led initiative to provide support to developing countries to help them develop their capacity to trade through official development assistance (ODA) and other official funds. The objectives are for countries to reduce trade costs, improve rules and administrative procedures, build infrastructure and enhance the productivity of their companies (Alonso, 2016).

Although the boundaries of what should be considered AfT or not are shady (OECD, 2006), AfT is focused on improving trade capacity to help shaping countries' competitiveness and comprises a wide range of measures, from providing technical assistance in order to enhance trade negotiating capabilities, building supply-side capacity and mitigating adjustment costs of trade agreements. However, positions diverge between developed and developing countries, more particularly between donors and recipients.

As further detailed below in this paper, the idea of AfT emerged in the early days of the multilateral trading system under the name of "Trade-Related Technical Assistance and Capacity Building (TRTA/CB)". More recently, in the World Trade Organization, the "Aid for Trade Initiative" was launched at the Hong Kong Ministerial Conference in December 2005. From then on, the visibility of the AfT Initiative has increased in the global agenda, due to several reasons such as the convergence of interests between donors and the WTO and the need for showing concrete progress on the Doha Agenda, among others.

Despite the fact that AfT is led by the WTO as a global initiative, it was originally intended as a cooperative effort and it is now carried out in a coordinated fashion

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together with other fifteen multilateral and regional agencies, particularly with the OECD, with which the WTO carries out several joint initiatives. AfT is also included in work programmes of several UN agencies, development banks and financial institutions, as well as private and nongovernmental institutions. Broadly speaking, global efforts towards systematizing and comparing information, methods, and results are led by OECD and WTO while UN System is more focused on links between AfT and Sustainable Development Goals (SDGs), as well as the improving participation of Least Developed Countries in the total share of aid.

AfT is directly linked to SDG 8 (Decent Work and Economic Growth), and can be used to achieve several other SDGs considering the important role it plays in infrastructure, market access, poverty reduction, rural production and exports among others. Nonetheless, the AfT initiative is not free of challenges and criticisms, starting with the scope of the concept itself. What should be considered “Aid for Trade” and what should not, is not clear. Monitoring and evaluation efforts are also a big challenge: different donors manage different frameworks; there are challenges in the time frame; confounding influences and attribution problems can be observed. Related to this point, AfT has also a limited impact in public policies and this is directly related to the challenge of mainstreaming trade into national development strategies, mostly in LDCs. Another challenge is the limited participation of LDCs in AfT flows since most of AfT funds go to middle-income countries. Last but not least, AfT always faces the risk of self-interest of developed countries. In fact, this is reflected, for example, in the exporters in donor countries being beneficiaries of increased trade with recipient developing countries.

This paper summarizes the main aspects of the AfT: its origins, its linkages with the 2030 Agenda, main aspects of its implementation, monitoring, and evaluation, main criticism towards the topic and also main challenges. It comprises five sections. It first details the concept and origins of AfT and how it was launched in the WTO. The second section explains how AfT is linked to the Sustainable Development Goals and how it can contribute to achieving them. The third section identifies the main channels through which the concept is implemented The fourth section focuses on achievements so far, and the fifth details major criticisms and challenges for the way ahead. Final remarks highlight key ideas and the path forward for AfT.

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2. Origins of the Aid for Trade Concept and Its launching in the World Trade Organization

The idea of Aid for Trade is as old as the General Agreement on Tariffs and Trade (GATT) itself. Developing countries have placed the issue of aid, articulated as 'Trade-Related Technical Assistance and Capacity Building' (TRTA/CB), on the agenda of the multilateral trading system since the earliest days of the GATT. The need for increased aid to assist developing countries to help boost their production and exports was early recognised by the Contracting Parties through the revised Article XVIII of GATT in 1955 and the 1961 Declaration of the Contracting Parties.[3]

In 1961 the GATT adopted the Declaration on the Promotion of Trade of Less Developed Countries, which called for preferences in market access for developing countries that were not covered by preferential tariff systems, such as those of the Commonwealth. In 1964, Part IV of the GATT—entitled "Trade and Development" was adopted—providing a specific legal framework for developing countries. This Part IV includes three new articles. Article XXXVI established that parties should provide "in the largest possible measure more favourable and acceptable market access conditions for products of export interest to developing countries" (particularly primary products and processed goods), while stipulating at the same time that developing countries should not be expected to make contributions inconsistent with their level of development. In addition, Articles XXXVII and XXXVIII called for improved market access for products of export interest to developing countries (Tussie & Quiliconi, 2013).

As a concept, AfT is related to the broader discussion on trade and development and it is rightly and necessarily linked to Special and Differential Treatment (S&DT) provisions.[4] In fact, technical assistance was included in those early GATT revisions

[3]Whilst there is a more general reference to this need in the revised Article XVIII of GATT in 1955, the 1961 Declaration of the Contracting Parties makes specific reference to the need for technical assistance programmes to assist developing countries with production and marketing (FES, 2007:85)

[4] The S&DT is born as a result of the coordination of political efforts by developing countries in order to correct what they felt were inequalities in the post-Second World War system, understood as preferential treatment in favor of developing countries, in every aspect of their international economic relations (UNCTAD, 2000).

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as part of the S&DT offers made by developed countries to facilitate the integration of developing countries into the multilateral trading system.

Furthermore, between 1966 and 1971, the Generalized System of Preferences (GSP) and the protocol on trade-related negotiations among 16 developing countries was introduced in GATT, as waivers to article I, which established equal treatment among all member countries through the principle of most favoured nation (MFN). In the Tokyo Round, which began in 1973, the efforts of developing countries to consolidate favourable treatment in their favour resulted in the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", known as the "Enabling Clause". The Enabling Clause comprises: a) the Generalized System of Preferences; b) Non-tariff measures in GATT instruments; c) Global or regional arrangements among developing countries, and d) Special treatment to LDCs (Peixoto Batista, 2010:169).

However, at that time, developing countries started to perceive that the positive discrimination they received under S&DT was being overshadowed by the increasing negative discrimination against their trade exports (idem)[5]. Moreover, positive provisions in favour of developing countries included in the GATT Framework during the period 1955 to 1979 were accompanied by a steady increase in the protection and support for temperate zone agricultural products in industrialised countries (Ismail, 2007). In addition, positive measures in favour of developing countries were largely in good nature in the sense that they did not impose mandatory obligations on developed countries. As a result, developing countries claim that the provisions have been without practical value.[6]

After that, the 1982 GATT Ministerial Conference again recognized the need to strengthen developed countries' technical assistance programmes. However, it was only in the Uruguay Round - when developing countries were required to become part of all the multilateral agreements of the GATT through the concept of the single

[5] Negative discrimination against developing countries was particularly apparent in relation to: voluntary restraint arrangements adopted directly against their most competitive exports; extension of free-trade agreements and custom unions among developed countries; increasing restrictions on textiles under the Multifiber Agreement; higher tariffs on products of exporting interest to developing countries in comparison with those of interest to developed countries; increasing application of anti-dumping and countervailing measures; and the use of the GSP as a pressure tool by developed countries, which — in the absence of more specific provisions — unilaterally "graded" the countries that would no longer receive GSP benefits (UNCTAD, 2000:27; Kessie, 2000:9).
[6] Source: https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, April 23, 2020.

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undertaking-, that more specific provisions on TRTA were added to individual Uruguay Round agreements to assist developing countries to implement these new obligations. In fact, developing countries complained of the difficulties they experienced in their attempts to implement the Uruguay Round agreements (Ismail, 2007:86).

The costs of implementation were estimated to be very onerous for many developing countries and the impact of the Marrakech package on the development strategies -such as industrial policies, subsidies, textiles, agriculture- was not adequately weighted (Finger, 2002; Finger & Schuler, 20 00; LATN, 2005; Tussie & Quiliconi, 2013). The outcome of the Uruguay Round was markedly uneven in favour of developed countries, while the focus of positive provision was then shifted towards least developed countries (LDCs), as already contemplated in the general framework of the multilateral system, Article XI:2 of the WTO Agreement. The scope of the provisions in favour of developing countries was restricted as a reflection of the poor willingness on the part of developed countries to continue granting special treatment, particularly to middle-income countries (Peixoto Batista, 2010:171). Dissatisfaction grew due to the poor results of the Uruguay Round for developing countries' strategies while the USA needed to give a positive signal to the world after the attacks of 11 September 2001. In this context, the Doha Development Round was launched in December 2001 at the Doha Ministerial Conference, with the promise to finally mainstream the development topic in the WTO.

Whilst the issue of "aid *per se"* or "Aid for Trade" is not a specific negotiating issue in the WTO Doha agenda that is linked to the single undertaking, the commitment by members to address the need for increased AfT-related capacity building is part of the overall Doha Development Agenda.[7] In particular, the Ministerial Declaration[8] gives a very broad scope to the issue of technical cooperation and capacity building (TCCB). In fact, commitments to TCCB appear in 12 paragraphs and the document emphasizes the important role of sustainably financed technical assistance and capacity-building programmes.

In paragraphs 39, 40, and 41, for example, the Ministerial Declaration states that TCCB is a core element of the development dimension of the multilateral trading system. It

[7]Indeed, there are several areas of the Doha Work Programme where this commitment is linked to specific areas of the Doha negotiations, including trade facilitation, cotton, S&DT and LDCs. Thus the Doha Development Agenda (DDA) has been challenged to address both trade and aid (FES, 2007: 83-84).
[8]Doc. WT/MIN(01)/DEC/1.

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also welcomes and endorses the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration that shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, although priority shall be accorded to small, vulnerable, and transition economies, as well as to members and observers without representation in Geneva.[9] It also underscores the urgent necessity for the effective coordinated delivery of technical assistance with bilateral donors, in the OECD Development Assistance Committee and relevant international and regional intergovernmental institutions. In this path, the document recognizes the need for identifying ways of enhancing the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries and the Joint Integrated Technical Assistance Programme (JITAP). The Declaration also recognizes that there is a need for technical assistance to benefit from secure and predictable funding.

The goal was to arrive at the Cancun Ministerial Conference with specific recommendations to the General Council to be included in the text of the Ministerial Declaration. However, this goal was never achieved. The main issues that led to the disagreements leading up to Cancun included S&DT provisions and the mandatory or non-mandatory nature of technical assistance.

After Cancun, efforts were resumed to reach a minimum level of agreement, and the July 2004 package[10] is the subsequent decision adopted by the General Council in this regard. According to it:

"… the General Council recognizes the progress that has been made since the Doha Ministerial Conference in expanding Trade-Related Technical Assistance (TRTA) to developing countries and low-income countries in transition. In furthering this effort, the Council affirms that such countries, and in particular least-developed countries, should be provided with enhanced TRTA and capacity building, to increase their effective participation in the negotiations, to facilitate their implementation of WTO rules, and to enable them to adjust and diversify their economies. In this context the Council welcomes and further encourages the improved coordination with other

[9]For achieving this goal, the declaration reaffirms the support for the work of the International Trade Centre.
[10] Doc. WT/L/579.

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agencies, including under the Integrated Framework for TRTA for the LDCs (IF) and the Joint Integrated Technical Assistance Programme (JITAP)."

In addition, Annex D of the July Package expanded on Technical Assistance needs and provisions, particularly in the context of Trade Facilitation negotiations. Annex D lists the International Monetary Fund (IMF), Organisation for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), World Customs Organization (WCO) and the World Bank as agencies that, together with the WTO, will undertake a collaborative effort toward these ends. This is the direct precedent of the Aid for Trade Initiative, which was officially launched at the Hong Kong Ministerial Conference in December 2005.

In the Hong Kong Ministerial Declaration[11], "Aid for Trade" was included as a topic in the WTO for the first time. Paragraph 57 states that[12]:

"We welcome the discussions of Finance and Development Ministers in various fora, including the Development Committee of the World Bank and IMF, that have taken place this year on expanding Aid for Trade. Aid for Trade should aim to help developing countries, particularly LDCs, to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade. Aid for Trade cannot be a substitute for the development benefits that will result from a successful conclusion to the DDA (Doha Development Agenda), particularly on market access. However, it can be a valuable complement to the DDA. We invite the Director-General to create a task force that shall provide recommendations on how to operationalize Aid for Trade. The Task Force will provide recommendations to the General Council by July 2006 on how Aid for Trade might contribute most effectively to the development dimension of the DDA. We also invite the Director-General to consult with Members as well as with the IMF and World Bank, relevant international organisations and the regional development banks with a view to reporting to the General Council on appropriate mechanisms to secure additional financial resources for Aid for Trade, where appropriate through grants and concessional loans."

[11]Doc. WT/MIN(05)/DEC
[12] Related topics were also included in paragraphs 47 (LDCs), 48-51 (Integrated Framework) and 52-54 (Technical Cooperation).

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3. Linkages between Aid for Trade and the Sustainable Development Goals: How Can Aid for Trade Contribute to Achieving the SDGs?

Aid For Trade (AfT) is an initiative directly linked to Sustainable Development Goals (SDGs)[13] through SDG 8 "Decent work and economic growth", that calls governments to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. AfT is included as a target in SDG 8, more precisely the 8.A target, that calls for increasing "Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries".[14]

AfT was already included in the previous Millennium Development Goals (MDGs).[15] Initially, the MDGs were comprised of topics related to poverty, primary education, gender, maternal and infant mortality, Aids and environment. Since economic topics were not originally part of the MDGs, and considering the complaints from developing countries for the need to provide answers to improve global markets and financial institutions social responsibility, it was added to the MDG 8 (including AfT in targets and indicators). The MDG 8 calls governments to carry out a global partnership for development.

[13]The Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030. SDGs are comprised by 17 objectives and 169 goals. Source: UN Development Program (UNDP), www.undp.org

[14] Source: UN Department of Economic and Social Affairs, https://sdgs.un.org/goals (last access, 12 May, 2020)

[15] MDGs are eight international development goals established during the Millennium Summit of the United Nations in 2000 to be achieved by the year 2015. The SDGs replaced the MDGs in 2016, and while the MDGs were mostly oriented to social goals, the SDGs comprise new topics such as climate change, economic inequality, innovation, sustainable consumption, peace and justice, among other issues related to the sustainable development as a whole.

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FIGURE 1 – SUSTAINABLE DEVELOPMENT GOAL 8, TARGET AND INDICATOR[16]

The High-level Political Forum on sustainable development[17] was created as a United Nations central platform for follow-up and review of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals. Progress in this regard is presented in periodic reviews. The 2019 High-level Political Forum called “Empowering people and ensuring inclusiveness and equality”, under the auspices of the Economic and Social Council (ECOSOC), carried out an in depth assessment of goal 8 and showed that in 2017, AfT commitments increased to $58 billion, and that the increase was highest in the agriculture sector ($1.7 billion), the industry sector ($1.0 billion) and in banking and financial services ($1.0 billion).[18]

Although AfT is directly mentioned in SDG 8, the projects and programmes of this initiative can have an impact on many other SDGs, since trade is a fundamental component of the 2030 Agenda, included as means of implementation in the SDGs document. Trade is also an important ingredient for economic growth and global

[16] Illustration: Tina Malina, @tinadesignestampa
[17] See: https://sustainabledevelopment.un.org/hlpf/2019 (last access, 12 May, 2020)

[18] See: https://sustainabledevelopment.un.org/sdg8 (last access, 12 May 2020)

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integration. Increased market access opportunities can help create jobs, improve incomes and attract investments. The importance of trade lies not only on trade per se, but on its link to other sectors. If trade policies and mechanisms are mainstreamed into national development strategies, trade can be an important tool in achieving poverty reduction (SDG1) for example (WTO, 2018).

Building infrastructure has been the area that has received the most financial flows. This is because infrastructure is usually the easiest way to start and has a good cost efficiency ratio. The improvement of roads and railways play a key role in connecting rural producers to markets. Energy production, like electricity, is also a fundamental resource which can affect production costs and reduce export competitiveness (Lammersen & Hynes, 2016). In addition, technology and innovation, for example through e-commerce, play a bigger part in trade these days. Therefore, AfT projects related to these topics can have an important impact on SDG 9, which is to “build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation”.

Agriculture remains a key economic activity for developing countries and a sector that can help accomplish SDG 2, achieve food security and promote sustainable agriculture. Building productive capacities in this area can help double agricultural productivity by 2030. Aid for agricultural development improves productivity through investments that foster increasing returns to land, labour, and capital. With increasing tradability of agriculture products, productivity gains in agriculture will be transmitted less via lower food prices, and more through higher employment and wages (Lammersen& Hynes, 2016).

SDG target 16.8 aims to broaden and strengthen the participation of developing countries in the institutions of global governance. AfT policy and regulation includes support to ministries and departments responsible for trade policy, trade-related legislation and regulatory reforms, policy analysis and implementation of multilateral trade agreements, *e.g.* technical barriers to trade and sanitary and phytosanitary measures. AfT facilitation covers support provided for the simplification and harmonisation of import and export procedures (*e.g.* customs valuation, licensing

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procedures, payments and insurance), customs departments and tariff reforms (Lammersen & Hynes, 2016).

Finally, target 17.11 of goal number 17 calls to: "*significantly increase the exports of developing countries, in particular with a view to doubling the least developed countries share of global exports by 2020*". According to the WTO (2018) the share of exports of developing countries has increased, however their annual growth rate has remained stable. Increasing exports from developing countries is one of the AfT Initiative's main objectives and therefore, a closer look should be paid to the design and implementation of the projects to improve this point. LDCs' share of exports has even decreased (WTO, 2018), which is something the initiative should pay close attention to. The objective of increasing LDCs exports is also included in the Istanbul Programme of Action, which will be reviewed in the next section.

Finally, it is worth to mention perspectives on both donors and partners in looking at the relations between AfT and the SDGs (see Figure II below). It is interesting to note that they have different views on the correlations between the two. This mismatch will be observed in other topics such as AfT achievements, as mentioned later in this paper.

FIGURE 2 – Partner and Donor Perspectives on Aid for Trade and the 2030 Agenda

		M&E Responses from Partner countries (88)		M&E Responses from Donors (36)	
	Which Sustainable Development Goal(s) can Aid for Trade can help to achieve?	*Number of times identified*	*percentage share*	*Number of times identified*	*percentage share*
1	No poverty	60	68%	31	89%
2	Zero hunger	50	57%	18	51%
3	Good health and well-being	38	43%	4	11%
4	Quality education	44	50%	7	20%
5	Gender equality	55	63%	29	83%
6	Clean water and sanitation	29	33%	5	14%
7	Affordable and clean energy	44	50%	14	40%
8	Decent work and economic growth	73	83%	31	89%
9	Industry, innovation and infrastructure	80	91%	30	86%
10	Reduce inequalities	53	60%	26	74%
11	Sustainable cities and communities	22	25%	7	20%
12	Responsible consumption and production	49	56%	16	46%
13	Climate action	27	31%	12	34%
14	Life below water	26	30%	7	20%
15	Life on land	22	25%	6	17%
16	Peace, justice and strong institutions	36	41%	6	17%
17	Partnership for the goals	43	49%	25	71%

Source: OECD/WTO AfT M&E exercise (2019)

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3.1 The Istanbul Programme of Action

LDCs have limited productive capacities to tackle multidimensional poverty; they also have limited opportunities available for enhancing social services for disadvantaged groups. Agriculture plays a critical role in almost all LDCs, particularly from the perspective of providing employment and ensuring food security. Lack of adequate investment in infrastructure for agriculture, research and development, technology transfer and agricultural extension services is common in LDCs. Agricultural development has been, and is likely to be, adversely affected by the impact of climate change in a number of LDCs. In this regard, LDCs are prioritized in the Agenda 2030, which has many synergies with the IPoA. The SDGs could help realign the significance of mitigating risks and obstacles facing the LDCs, at a national development level and that of development partners (Rahman et al, 2016). Therefore, the two global commitments could be mutually beneficial.

A number of SDG goal areas include crosscutting targets and correspond to multiple IPoA priority areas. These are SDG 1 on poverty (with IPoA 5 and 6), SDG 2 on hunger (with IPoA 2, 3, 4 and 5), SDG 8 on decent work and growth (with IPoA 3 and 5), SDG 10 on inequalities (with IPoA 3 and 7), SDG 11 on cities and communities (with IPoA 1, 5 and 6), SDG 12 on consumption and production (with IPoA 2 and 6), and SDG 17 on global partnerships (with IPoA 1, 3 and 7). SDG 3 on health, SDG 4 on education, SDG 5 on gender equality, SDG 6 on water and sanitation, SDG 7 on energy, SDG 9 on industry, technology and innovation, SDG 13 on climate action and SDG 16 on governance are similar to only one particular IPoA priority area each (see Figure III below).

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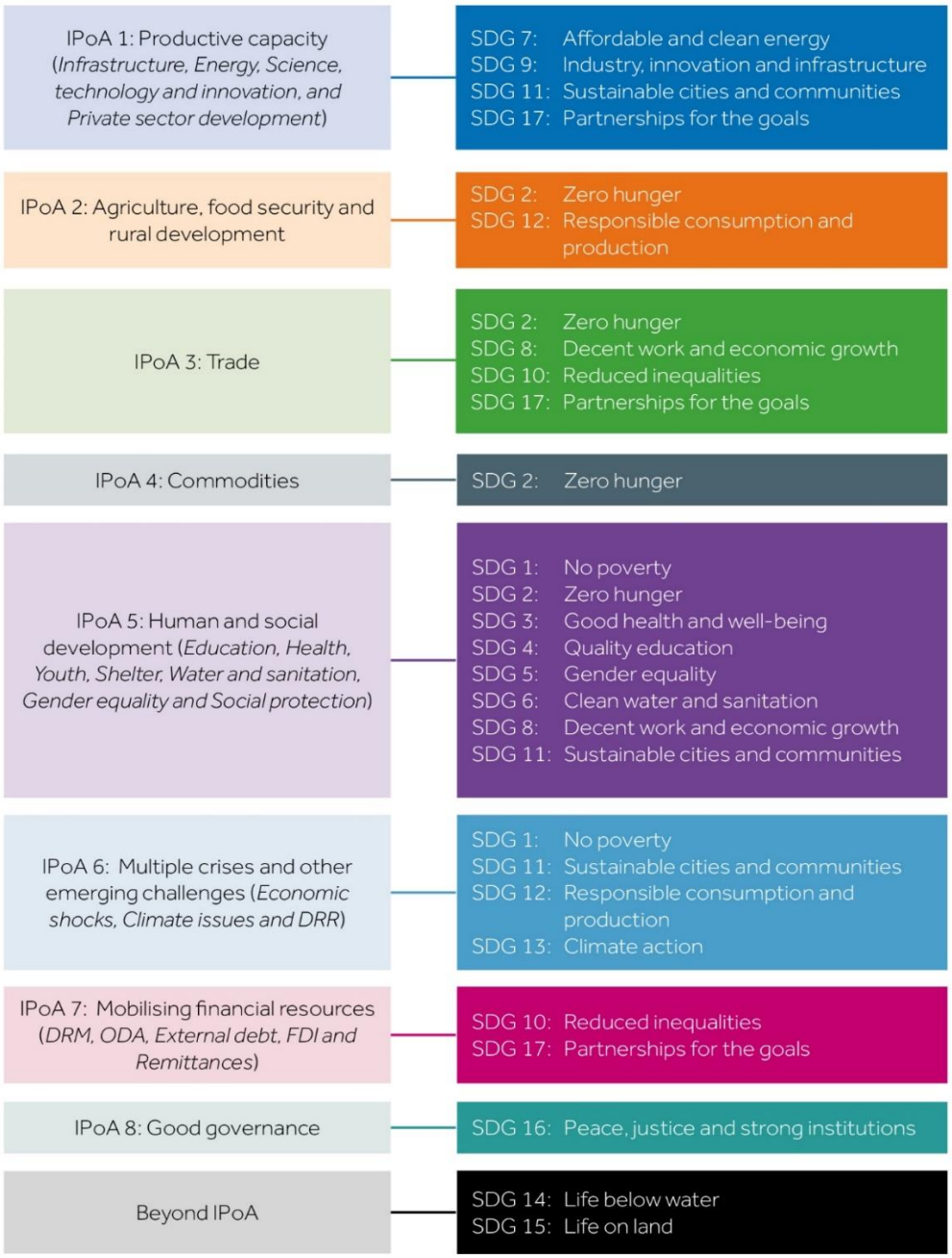
FIGURE 3 – Synergies between the IPoA and SDGs



Source: LDC IV Monitor (Rahman et al, 2016)

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4. The Implementation, Monitoring and Evaluation of the Aid for Trade Initiative

The Aid for Trade Initiative is implemented through several joint initiatives. Among these, the most important are those involving the OECD and WTO efforts. They also provide the tools for its monitoring and evaluation. AFT is further implemented through other initiatives mainly focused on Least developed countries such as the Enhanced Integrated Framework and the work carried out in the UN Conference on Least Developed Countries, particularly the Istanbul Programme of Action. In addition, there are also efforts within the south-south cooperation framework. Finally the contribution of the European Union, which is the biggest provider of AfT funds, is also analysed.[19]

4.1 The WTO

After the launching of the Aid for Trade Initiative in the Hong Kong Ministerial Conference in 2005, the WTO established a Task Force[20] in February 2006, with the aim of "operationalizing" the initiative. From then on, and after a year of intense debates on the topic[21], the AfT gained momentum as a trade topic in the WTO.[22]

The Task Force recommended in July 2006 that AfT should focus on identifying the needs within recipient countries, responding to donors and acting as a bridge between donors and developing countries. It also recommended the establishment of a monitoring body in the WTO, which would undertake a periodic global review based on reports from a variety of stakeholders.[23]

[19] There are other initiatives not analysed in this section that can be listed such as the International Trade Centre (ITC) which is a joint Initiative of the UN and the WTO or the UNCTAD contribution to the field. The ITC focuses on implementing and delivering practical trade related technical assistance. Its areas of expertise are: the integration of the business sector of developing countries into the global economy; improving the performance of trade and investment support institutions for the benefit of SMEs and improving the international competitiveness of SMEs. The ITC is the only international organization focused solely on trade development for developing economies. For more information see: http://www.intracen.org/

[20] The establishment of a Task Force was provided for in paragraphs 49 and 50 of Hong Kong Declaration.

[21] For a detailed narrative on the Aid for Trade Initiative background, see FES, 2007: 89-92.

[22] According to the WTO, Aid for Trade "helps developing countries, and particularly least developed countries, trade (…) The WTO-led Aid for Trade initiative encourages developing country governments and donors to recognize the role that trade can play in development. In particular, the initiative seeks to mobilize resources to address the trade-related constraints identified by developing and least-developed countries. Source https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm (last access April 30, 2020).

[23] Source https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm (last access April 30, 2020).

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Several reasons explain its emergence as an autonomous topic in the trade negotiations agenda. First, the WTO and donors had converging interests: the WTO needed to mobilize financial resources to alleviate developing countries' concerns about the possible implications of a Doha Round agreement; donors needed to scale up aid to meet the Millennium Development Goals and were ready to supplement their traditional activities with projects promoting trade as an engine of growth and poverty reduction (Hallaert, 2013). Second and third: the pre-existent needs of developing countries and LDCs related to implementation and adjustment costs of trade agreements (Ismail, 2007) led to progress in the 'trade facilitation' agenda which implies, among other measures, tangible improvements on infrastructure in order to simplify and harmonize trade procedures (including customs and procedures of transport). Those measures needed money in the form of predictable grant-based assistance, distributed through a credible international mechanism (Phillips, Page & te Velde, 2005). Fourth, the restriction of the S&DT scope and universe of beneficiaries, progressively applied since the Uruguay Round, reflected the poor willingness on the part of developed countries to continue granting special treatment to the large group of developing countries, especially middle-income ones (Peixoto Batista, 2010). As a consequence, disagreements on how to mainstream development in the Doha agenda became more and more evident, while the possibility of reaching broad and binding commitments started to seem unrealistic. The need to show concrete, although more limited progress increased. Tangible measures towards LDCs, including aid provisions, were the "perfect match" for this context.

The Aid for Trade Initiative is carried out by the WTO through a biennial Work Programme, focused on promoting coherence among partners through the initiative and on showing results. Work Programme's results are reported in the Global Reviews. According to the WTO, Global Reviews aim at strengthening the monitoring and evaluation of AfT to provide a strong incentive to both donors and recipients for advancing the AfT agenda. Alongside each Global Review event, the work on global monitoring of overall AfT flows, based on work carried out by the OECD, is also presented in a joint flagship report called "Aid for Trade at a Glance".[24]

[24] See more on: https://www.oecd-ilibrary.org/development/aid-for-trade-at-a-glance_22234411 (last access April 30, 2020).

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From 2007 to 2020, eight Work Programmes were carried out and seven Global Reviews were launched. The latest Work Programme (2020-2022), called "Empowering Connected, Sustainable Trade"[25] focus on the opportunities that digital connectivity and sustainability offer for economic and export diversification – and how AfT can help empower different economic actors to realize these opportunities. Efforts carried out during the 2020-2022 period will be reported in the 2022 Global Review, the eighth such Review since 2007.

In addition, since the launching of the Aid for Trade Initiative, the WTO held several events with related topics, including transforming and promoting the rural economy; MSMEs and access to finance; women in digital trade; Aid-For-Trade monitoring and evaluation; sustainable development and the green economy; connectivity and digital skills development; and industrialization, economic diversification and structural transformation.

Despite the fact that Aid for Trade Initiative is led by the WTO, as a global enterprise it was always intended to be a cooperative effort and it is now currently carried out in a coordinated fashion together with several multilateral and regional agencies. Key players include the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, International Monetary Fund (IMF), Inter-American Development Bank (IDB), Islamic Development Bank, International Trade Centre (ITC), Organization for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme (UNDP), United Nations Economic Commission for Africa (UNECA), United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), United Nations Industrial Development Organization (UNIDO), World Bank, World Customs Organization (WCO), the Enhanced Integrated Framework, and the Standards and Trade Development Facility (STDF). Some of the initiatives carried out by these partners will be detailed below.

[25] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/AFTW81R1.pdf&Open=True, (last access November 27, 2020).

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4.2 The OECD and the WTO joint efforts

As mentioned before, the Aft initiative is led by the WTO, however it is strongly supported by the OECD. Not only is the Aft flagship monitoring publication issued jointly by both organizations, but the OECD also offers a great deal of analysis, mainly a series called *The development dimension*, where they focus on the monitoring, evaluation and accountability effort. Furthermore, the OECDs Creditor Reporting System (CRS) database of aid flows is extensively used as the basis for quantitative analysis of the Aft initiative. These wide array of publications also contribute to deepening understanding of important AfT issues, and exploring subjects at the frontier of AfT design, implementation, and evaluation from the standpoint of an agency that is not directly involved in those activities "on the ground".

The OECD has noticed rather early on that great attention should be paid to the monitoring and evaluation effort. The rather urgent call from the initiative task force to scale up aid, has caused donors to start funding projects and programmes without paying much attention to this aspect. In order to draw attention to this issue, the OECD released a publication in 2006, called *Aid for Trade: Making it effective*, which provided guidelines to donors on how to implement AfT projects and programmes. These included *inter alia:* the importance of ensuring political commitment from local governments as well as developing a dialogue with key local stakeholders (government, private sector and civil society) in order to achieve the mainstreaming of trade in national development strategies. The recipient's political economy reality had to be taken into account and therefore, help should be provided to recipients in order to develop a trade policy framework in order to understand the weaknesses and strengths of their economies as well as other particular local challenges.

Looking back at past experiences, public sectors have shown that complex assistance programmes have had the potential to consume large amounts of administrative resources and have frequently tended to the needs of the donors and providers instead of the recipients. As an answer to this issue, the development community advanced a set of best practices and principles for delivering aid effectively. These were agreed upon on in the Paris Declaration on Aid Effectiveness (see Figure IV below).

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FIGURE 4 – Principles of Paris Declaration on Aid Effectiveness

Source: Own elaboration based on OECD (2006).

It is important to note that the principles of the Paris Declaration were agreed upon the High Level Forum on Aid effectiveness. It was the second one out of four so far (Rome, Paris, Accra and Busan in 2003, 2005, 2008 and 2011 respectively). These high-level events have rooted the formulation of principles towards effective aid that led in 2011 to the Busan Partnership Agreement endorsed to date by over 100 countries as the

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blueprint for maximising the impact of aid. The formulation of these principles grew out of a need to understand why aid was not producing the development results everyone wanted to see as well as to step up efforts to meet the ambitious targets set by the MDGs.

In the monitoring and evaluation (M&E) effort every donor had its own method and approach, some used quantitative while others preferred qualitative methods, which complicated the ability to draw conclusions. After the financial crisis, under the risk of losing funding, the importance of evaluating the effectiveness of the initiative became more pressing. Therefore, in 2010, the WTO together with the OECD summoned the different stakeholders to submit case studies of their AfT projects in order to see the impact of the initiative (the report was later called “Showing results”). The call produced 269 stories 146 self-assessments submitted by donor countries, agencies, and regional economic communities, among others. Although the case studies were not meant to be a scientific approach to evaluation (since the sample is unlikely to be representative because of selection bias, omitted variables and attribution problems), it provided useful information on what was being done, what was working and what was not[26]. Although rich in project details, the review of case studies also showed large gaps in emphasis and a lack of quantitative indicators. According to Cadot & De Melo (2017), only three out of 269 case studies reported on AfT adjustment, and few reported on investments in infrastructure, even though 80% of AFT in low income countries is assigned to infrastructure development. These evaluations also showed that projects evaluators often lacked the baseline data to measure progress.

Following the findings of the global reviews, the OECD focused on the importance of evaluation in their subsequent publication (*Strengthening accountability in aid for trade)* and presented a wide variety of existing evaluation approaches, methods and processes that could be used. The OECD itself created a database with an inventory of evaluations of trade related activities called DAC Evaluation Resource Centre (DEReC). It allowed users to access and learn from a wide array of key evaluation publications, including those related to trade and infrastructure. They also developed a menu of trade related indicators.

[26] On more information see: https://www.wto.org/english/res_e/publications_e/aid4trade11_e.pdf (last access, May 15, 2020).

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At the Fourth High-Level Forum on id Effectiveness that took place in Busan, Korea in 2011, the international community realized that there was still a long way to go to put the principles of the Paris Declaration into practice. The final Declaration, called the *Busan Partnership for Effective Development Cooperation*[27], stressed the need to adopt common results based on agreed frameworks to assess aid performance, based on a manageable number of output and outcome indicators drawn from the development priorities and goals of the developing country. Very few national development plans or poverty reduction strategies contained actually categorized trade-related objectives and/or performance indicators. Correspondingly, few donor-supported programmes were linked to partner countries 'development strategies, nor were they assessed against country-owned objectives or indicators. Donors themselves were not always effective at ensuring a results-based management of their own programmes (OECD, 2011).

Two years later, the OECD published *Evaluating aid for trade. A Management Framework* in 2013, which developed a logical framework for results-based management of AfT. It identifies objectives for AfT projects and lists several indicators to measure performance. The suggested indicators were designed to capture most dimensions of AfT. It distinguished three levels of objectives and possible outcomes: direct, intermediate and final. Trade is treated as an intermediate objective, serving as a transmission mechanism, with an increase in the value for trade (measured in terms of jobs, income, socio-economic upgrading, etc.) as the final objective. The framework was helpful since it provided, for given activities, a likely chain of events; conversely, for a given desired outcome or impact, it suggested a number of activities likely to contribute to that outcome or impact. It provided guidance both to donors and recipients in designing their trade and development strategies. The framework also helped identify, among other issues, overlaps, synergies, and gaps (OECD, 2013). This framework should be seen as an evolving tool: partners could add new activities and targets to the existing menu. The framework could play the role of a repertory of ideas for AfT project management.

[27]Available at: https://www.oecd.org/development/effectiveness/busanpartnership.htm (last access May 18,2020).

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Despite the great amount of recommendations provided by the OECD and the WTO on monitoring and evaluating and developing a results-based framework, another problem emerged. According to the results of the 2011 Aid for Trade Case Study exercise, 65% of respondents mentioned having difficulties in designing financeable projects in order to access AfT funds. This issue remained valid years after, as evidenced by a survey conducted by UNESCAP in 2014. For this purpose, UNECA together with the other four regional commissions of the UN (Economic and Social Commission for Asia and the Pacific, Economic and Social Commission for Western Asia, Economic Commission for Europe Economic Commission for Latin America and the Caribbean) published a document called "*Formulating bankable aid for trade projects in Africa*", in order to provide guidelines for local stakeholders to develop programmes and projects which might be appealing for donors to fund.[28]

4.3 Least developed countries

4.3.1 The Enhanced Integrated framework

The Enhanced Integrated Framework (EIF) is one key global structure that also takes a coordinated approach to AfT interventions, focusing on the LDCs. Its main efforts are directed towards the completion of Diagnostic Trade Integration Studies (DTISs) for eligible countries. The DTISs seek to align trade policy issues with national development priorities in partner countries and to mainstream trade into the national development framework.

The Integrated framework (IF) was created in 1997 at the High-level Meeting on LDCs Trade Development. It was a multi-donor global partnership composed of six core agencies (WTO, IMF, ITC, UNCTAD, UNDP and the World Bank)[29], with the objective of integrating LDCs into the international trade system. However, after certain shortcomings in terms of organization (recipient countries were confused about which organization to go to for training and technical assistance), coordination between

[28] Among its recommendations, the document mentioned including cross cutting issues such as gender and environment to the project identification, design, implementation and monitoring and evaluation. For some donors, such as Finland and Denmark for example, the inclusion of environmental considerations in their projects is very important. It is also important to include trade related objectives to the projects that have the potential to have an impact on trade, such as infrastructure projects.

[29] See more at: https://www.enhancedif.org/ (last access May 21, 2020).

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agencies and funding (ICTSD, 2000), the programme was relaunched in 2006 under the name 'Enhanced Integrated Framework'. The EIF is the only global programme dedicated to assisting LDCs in using trade as an engine of growth, sustainable development, and poverty reduction. It offers institutional help to LDCs to build their capacity to trade, as well as to create a policy, regulatory and strategic institutional structure which underpins the national trade agenda and it provides support in implementing prioritized projects aimed at addressing constraints in the trade-related productive sectors that hinder LDCs in increasing their share of global trade. Country ownership is at the core of the EIF, which encourages LDCs to assume ownership and determine and implement trade-related interventions. The EIF supports 51 countries, including all 33 LDCs in Africa (Adhikari & Edwin, 2017). In short, the EIF helps countries make trade a key component of their national development plans. The technical assistance provided by donors can be delivered through the elaboration of DTISs, the drafting of trade policies and helps in preparing medium term plans. The analysis conducted through the DTIS helps countries identify priorities to guide their trade agendas, reveal constraints to trade integration and advises on key action areas. The preparation of the DTIS is the cornerstone of the EIF programme in terms of mainstreaming and integrating trade into an EIF country's national development plan. The DTIS and its priorities for trade-related support, elaborated in an Action Matrix, are the basis for all subsequent EIF projects and donor financing on trade and are, therefore, fundamental components of the programme. The Action Matrix plays a role in prioritizing recommendations from the DTIS, which local governments ultimately approve before implementation (Brenton & Gillson, 2014).

A broad trade agenda has posed great challenges to the capacity-constrained ministries in LDCs, which have been unable to achieve effective coordination across ministries. The DTIS have provided high quality information and analytical input, however they have provided little input on regional integration, which is thought to be key for LDCs achieving their trade potential. Instead, it has been too country focused, losing out on cross-country synergies (Brenton & Gillson, 2014). Another important issue that is very present in LDCs is informal trade. This usually does not appear in DTISs, therefore not recognizing its importance in these countries. As many of informal

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traders are women, an important opportunity to include them in the DTISs has been ignored.

4.3.2 *The* UN Conference on Least Developed Countries (*Istanbul Programme of Action)*

The Istanbul Programme of Action (IPoA), created at the Fourth UN Conference on Least Developed Countries in 2011, tried to create action from the international community to help LDCs graduate from this category by 2020[30]. The IPoA is the successor of the Brussels Programme of Action, which was characterized by a weak monitoring of its implementation and strategy (Bhattacharya, 2016). The IPoA, in contrast, urges an effective monitoring process and wider scope for stakeholder involvement in the process (Bhattacharya & Khan, 2014). The Programme contains eight key areas of action - among them trade - and each key area includes commitments, specific goals and targets. For the trade priority area, there are two key goals: to increase LDCs' exports significantly and to make efforts to conclude the Doha Round with an outcome beneficial to LDCs. In short, LDCs should mainstream trade into their national development strategies, improve competitiveness and diversify their production base and exports. Development partners, on the other hand, should support LDCs through the Aid for Trade initiative and technical assistance to help them engage more effectively in trade negotiations, improve their capacity to trade and implement their obligations in the areas of sanitary and phytosanitary measures (Ancharaz et al, 2014). "Aid for Trade" is actually mentioned explicitly in paragraph 66.3 of the IPoA:

(e) Implement effective trade-related technical assistance and capacity building to least developed countries on a priority basis, including by enhancing the share of assistance to least developed countries for Aid for Trade and support for the Enhanced Integrated Framework, as appropriate, and strengthening their capacity to access available resources, in support of the needs and demands of least developed countries expressed through their national development strategies.

[30]In 1971 the international community recognized as the Least Developed Countries a category of countries distinguished not only by widespread poverty, but also by the structural weakness of those countries' economic, institutional and human resources, often compounded by geographical handicaps. The UN General Assembly convened the First United Nations Conference on the Least Developed Countries in Paris in 1981 to respond to the special needs of the LDCs.

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Whilst Aid for trade does represent a good opportunity for structural transformation in the LDCs, it is important to notice that the technical assistance and capacity building categories have traditionally accounted for the smallest part of AfT. Infrastructure projects tend to have a bigger impact and are key projects specially for LDCs (Ancharaz et al, 2014).

4.4 South-South Cooperation

Latin America has generally had limited access to AfT funds, since it is a diverse region with high middle income and low middle income, but no least developed countries. The lack of large aid flows drove developing countries to seek political, technical and financial assistance from other developing countries instead of developed ones. Developing countries usually do not have additional funds to make large donations or investments in aid projects, so in order to seek cooperation was mainly through knowledge sharing. This form of cooperation offered an alternative to development projects to specific problems at a reasonable cost (SEGIB, 2018). Both south-south and triangular cooperation have grown impressively during the past two past decades. The Aid for Trade initiative eventually included south-south cooperation and developed a specific survey in the biannual self-assessment exercise conducted by the WTO and OECD. However, the impact of this form of cooperation is hard to measure, since many countries do not belong to the OECD system and therefore there is only limited information available in the OECDs credit reporting system. In the High-level Forum that took place in Busan, countries agreed that south-south cooperation is not an alternative to north-south cooperation, but rather a complement. In this sense, the obligation to implement the principles of the Paris declaration on aid effectiveness remained optional for this kind of cooperation (Ojeda Medina et al, 2019).

It is important to look at China at this point, because although it is considered one of the new world powers, China continues to classify itself as a developing country in many instances China has attached great importance to AfT from its very inception. It was among the thirteen WTO members of the Task Force on AfT and also made several financial contributions to the WTOs' Doha Development Agenda Global Trust Fund to help other developing members, LDCs in particular, better integrate into the global economy and benefit from the multilateral trading system. They have also made a contribution of US $400,000 to the WTO to set up a new aid program to help LDCs

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participate more effectively in the WTO meetings and assist those who are not yet members to negotiate membership.

Since 2013, China has been growing into a major donor country, focusing more on the sharing of development ideas, experiences, and values rather than material aid. With the promotion of the Belt and Road Initiative, as well as the establishment of the Asian Infrastructure Investment Bank and New Development Bank, Chinas' foreign aid has got more institutional support (Haibing, 2017). In addition, recent moves to gradually internationalise the renminbi and use it in regional transactions, represent a further step in this direction.

Despite the fact that South-South cooperation is based on the concept of solidarity, it could also offer great trade opportunities. According to Bailey Klinger (2009) trading between developing countries provides better opportunities to diversify trade and export growth. Developing countries, especially LDCs, mainly export very few commodities, raw materials or low intensive manufactures to developed countries in the North. Exports to other developing countries offer an opportunity for higher labour-intensive exports. There is a latent potential there that can be exploited, especially on an interregional basis.

Trade within the region can be even more important than trade with developed countries for many developing countries. For landlocked countries, regional markets offer an outlet for their exports and a chance to connect to the rest of the world through proper regional infrastructure. It can also reduce member countries' dependence on traditional trading partners increasing their global competitiveness and also raise their resilience against external shocks. In addition, it can help maintain peace and security between neighbours. Emerging partners can provide alternative sources of finance, already there has been an increase in the transfer of technology from other developing countries (Ancharaz et al, 2014). This can be beneficial for LDCs as well as developing countries from the emerging south. Furthermore, trade is also increasingly shaped by global and regional value chains. The possibility to integrate them offers complementary opportunities to developing countries.

Finally, it is worth mentioning that in the 2nd High-level United Nations Conference on South-South Cooperation (BAPA +40) that took place in Buenos Aires in 2019, the

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Global System of Trade Preferences[31] among Developing Countries was reaffirmed. The GSTP aims at promoting trade among developing countries. There are 42 country members, including 7 LDCs. The GSTP recognizes the special needs of LDCs and calls for concrete preferential measures in their favour. LDCs are not required to make reciprocal concessions. The third round of trade negotiations concluded in December 2010 but is not effective yet, due to slow progress on ratification, possibly given by changing economic circumstances and policy priorities (UNCTAD, 2019). In the last conference it was agreed that this platform should be revitalized to stimulate south-south trade for economic growth.

4.5 The EU and Aid for Trade

The European Union (EU) has been a pioneer in using development and trade relationships (Grilli 1993). For a long time, it had a series of trade preferences with various developing regions, specifically with the Africa, Caribbean and Pacific (ACP) states. It also offered a General System of Preferences scheme for all developing countries. The EU used the term 'trade-related assistance' (TRA) when referring to aid and trade issues. This denoted technical assistance/capacity building for reform of trade policy and involvement in trade negotiations, and trade development as well as other technical assistance (Holden, 2014).

After the launch of the Aid for Trade initiative the EU published the "Aid for Trade strategy" in 2007, where they outlined their role and commitments towards the initiative. Their focus would be at a regional level, reaffirming their interest in supporting regional integration and its new ambitious inter-regional integration schemes for the ACP (Holden, 2014). The strategy document also committed to focus this form of EU aid more on poverty reduction. The highest profile element of this strategy was a specific commitment to increasing funding (from the EU aid funds as well as member states), however it should be noted that this commitment was made with regards to TRA, not AfT as a whole. In addition, the strategy reemphasised the EU's role in monitoring and supporting developing countries' participation in the global review (Holden, 2014).

[31]For more information see: https://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=4905 (last access May 21, 2020).

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In 2017, leading up to the 10-year anniversary of their joint strategy, the EU launched the updated "Aid for Trade strategy"[32]. This new version aimed to strengthen and modernise EU support to partner countries. The new strategy set out ways to improve and better target AfT. They were also trying to focus on LDCs. The most important points of the strategy, according to the EU´s *Aid for Trade Progress Report* were:

1. Better combine and coordinate tools for development finance of AfT, both at European and national level. –
2. Improve synergies with other instruments, such as EU trade agreements, trade schemes or the EU's innovative External Investment Plan, which will support investments for sustainable development. One of the aims is to support local small and medium-sized enterprises (SMEs) in benefitting more. –
3. Strengthen social and environmental sustainability, together with inclusive economic growth. This will be done for example through increased stakeholder-engagement such as structured dialogue with the private sector, civil society and local authorities. –
4. Better target least developed and fragile countries, as well as tailoring approaches to individual countries' specificities.

Regarding the last point, the AfT strategy underlines the need to optimise preference utilisation (such as through the 'Everything but Arms' scheme[33]) by fragile states and LDCs. The EU intends to increase the share of EU AfT allocated to LDCs to help them double their share of global exports. The proportion of EU and Member States' AfT channelled towards LDCs was 19% in 2017, approaching the 25% target of total EU AfT by 2030. To reach this goal, the EU seeks to capitalise on innovative tools such as the EU External Investment Plan[34], existing trade agreements and unilateral trade preferential schemes. Furthermore, the EU and Member States are major contributors

[32] See press release statement: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_4488 (last access September 15, 2020).
[33] The ´Everything But Arms´ scheme grants full duty free and quota free access to the EU Single Market for all products (except arms and armaments).
[34] For more detail on the plan see: https://ec.europa.eu/eu-external-investment-plan/home_en (last access September 15, 2020).

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to the EIF and implements trade-related projects at macro-, meso- and micro- levels (EC, 2019).

One important point to keep in mind, is that the EU and the EU Member states are the leading donors to Aft. In 2017, their AfT commitments amounted to EUR 14.5bn, an increase of 7.8% compared to 2016. They provide for 31% of global AfT. In 2017, more than 79% of EU AfT collective commitments were provided by three donors: the EU, Germany and France (EC, 2019).

However, according to Patrick Holden (2014), there is a gap between discourse and actions coming from the EU, the most important being the promise of a 'poverty reduction' development policy, which in reality is dominated by free trade, export-led growth and regional integration considerations. When it comes to the question of its actual pro-poor focus, there is no evidence that EU AfT has led to a decreased focus on the poor and neither is there evidence of EU discourse on pro-poor AfT being translated into actual policy and achievements (Holden, 2014). Nonetheless, after the launch of the new Aft strategy in 2017, a stronger commitment towards LDCs has now been made and the latest trends show an increase in the percentage of LDCs in total EU Aft flows[35].

Regarding the evaluation aspect, it is significant that the European Commission, which carries several official aid evaluations per year, has not ordered a general evaluation of its AfT. It has carried out evaluations on specific forms of AfT, notably TRA, private sector development, infrastructure support and regional integration, but there have been none on AfT as a whole for one country (Holden, 2014). The reluctance to evaluate AfT as a whole is contradictory given the EU's claims as to the importance of this aid and its use as encouragement to developing countries to sign trade agreements with it (Holden, 2014).

Given the weight of the EUs contribution to the initiative, a stronger leadership would be expected, however as mentioned above, the focus of the EU's remains very strongly on regional AfT, which is intrinsically linked to its broader trade agenda, notably its efforts to reach inter-regional Economic Partnership Agreements (EPAs).

[35] In the last Progress Report released by the EC in 2020, % of LDCs in total Aft flows was 22%

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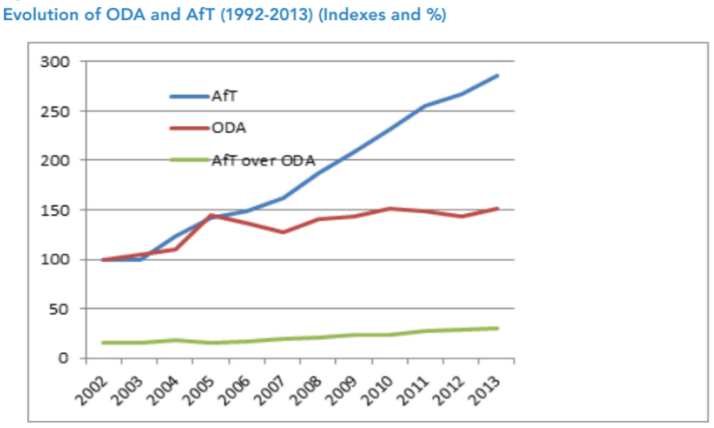
5. Results of the Aid for Trade Initiative So Far

Since the Uruguay Round, flows from the broader AfT agenda represented around 24% of ODA (OECD 2006). In 2006/2008 this share increased to 28% (23 billion dollars) reaching an impressive 35% (41 billion dollars) by 2013 (Hynes & Lammersen, 2017) (see Figure V below).

Figure 5 – Evolution of ODA and Aid for Trade (1992-2013)



Source: Alonso (2016)

According to the 2019 joint OECD-WTO Aid-for-Trade M&E exercise, US 410 billion dollars have been disbursed for AfT projects from 2006 to 2017. Funds have been increasing steadily since 2006, and despite the economic crisis of 2008-2009 continue to increase. Asia has been the region that has received the most funds so far with 154.9 billion dollars, followed closely by Africa with 146.2 billion. In third place, Latin America.

Support for programmes related to infrastructure in developing countries received the most funds – USD 160.7 billion - through 2016, while programmes targeted at building production facilities took USD 137.6 billion. AfT, in its narrowest sense of support for trade policy and regulation, attracted a total of USD 9.8 billion and USD 200 million was spent on easing trade-related adjustment costs; one of the original arguments for the Aid for Trade Initiative (see Figure VI below).

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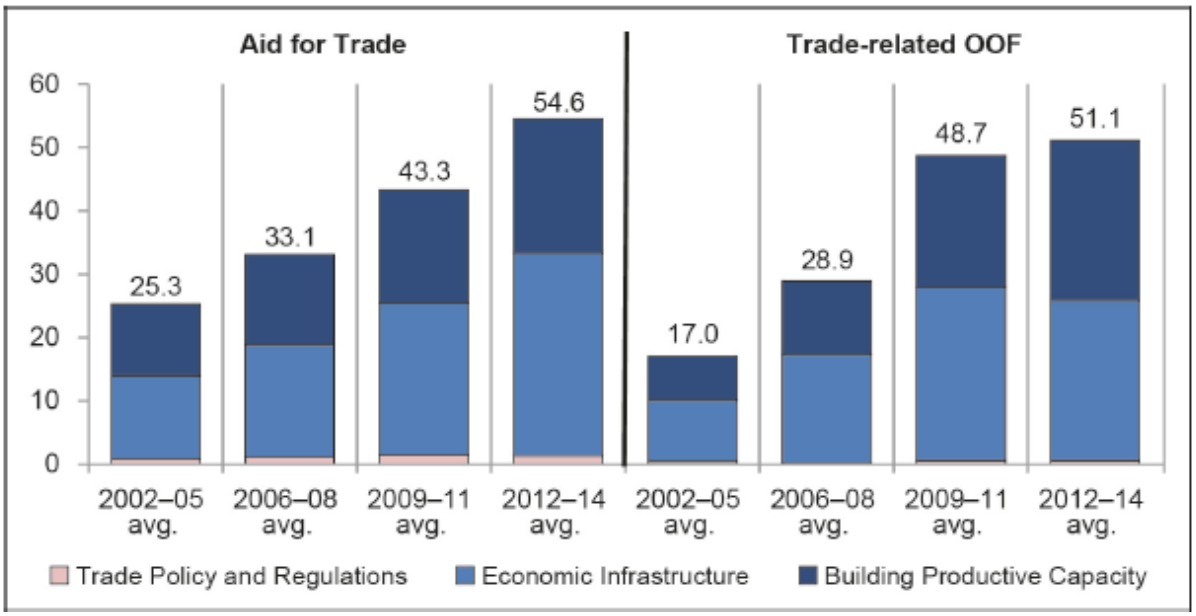
Figure 6 – ODA and OOF Trade Related Commitments /2002-2014 Sector Distribution



OOF = Other Official Flows; Source: Hynes & Lammersen (2017)

In addition, the 2019 OECD/WTO report highlights the continued centrality of economic diversification as a trade and development policy objective. Encouraging progress in diversification was reported at the 2019 Global Review, with M&E respondents citing particular advances in agricultural export diversification (see Figure VII below).[36] Moreover, 53% of developing countries have reported progress in economic diversification. In 2017, AfT commitments have increased by 12% and reached 57 billion, almost two and a half times the commitments of 2002-2006. This amount is supplemented by 9 billion from south-south providers (OECD/WTO, 2019).

[36] Source: WTO Aid for Trade Work Programme 2020-2022, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/AFTW81R1.pdf&Open=True , last access 27th November 2020.

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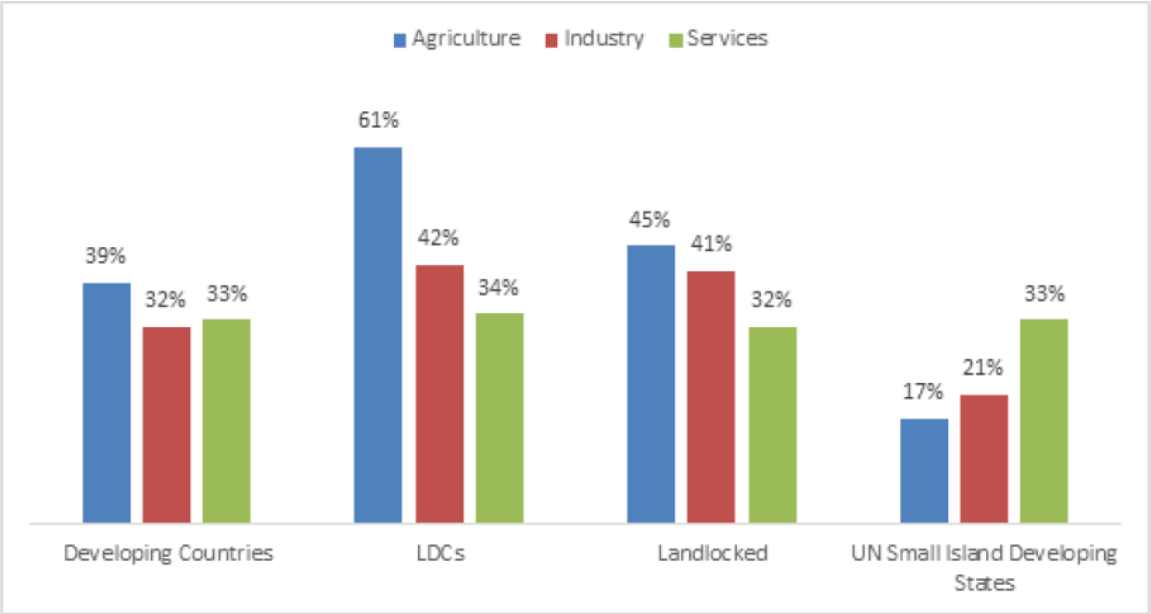
FIGURE 7 – Sectors where respondents reported most progress



Source: OECD/WTO AfT M&E exercise (2019)

Finally, responses to the M&E exercise received from partners' countries and donors also reported AfT supporting economic diversification outcomes. Trade facilitation was identified by partner country respondents as the main category of AfT in which support received was impactful for economic diversification. Donors also scored trade facilitation highly and placed special emphasis on economic diversification in the agriculture sector. The 2019 M&E exercise also highlighted that economic diversification offers a pathway for empowerment of women, youth and micro, small and medium enterprises (MSMEs) – and that AfT can support this process. One action foreseen in the new work programme is building on these insights further through a workshop examining "Maximizing the economic diversification impact of AfT"[37] (see Figure VIII below).

[37] Source: WTO Aid for Trade Work Programme 2020-2022, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/AFTW81R1.pdf&Open=True , last access 27th November 2020.

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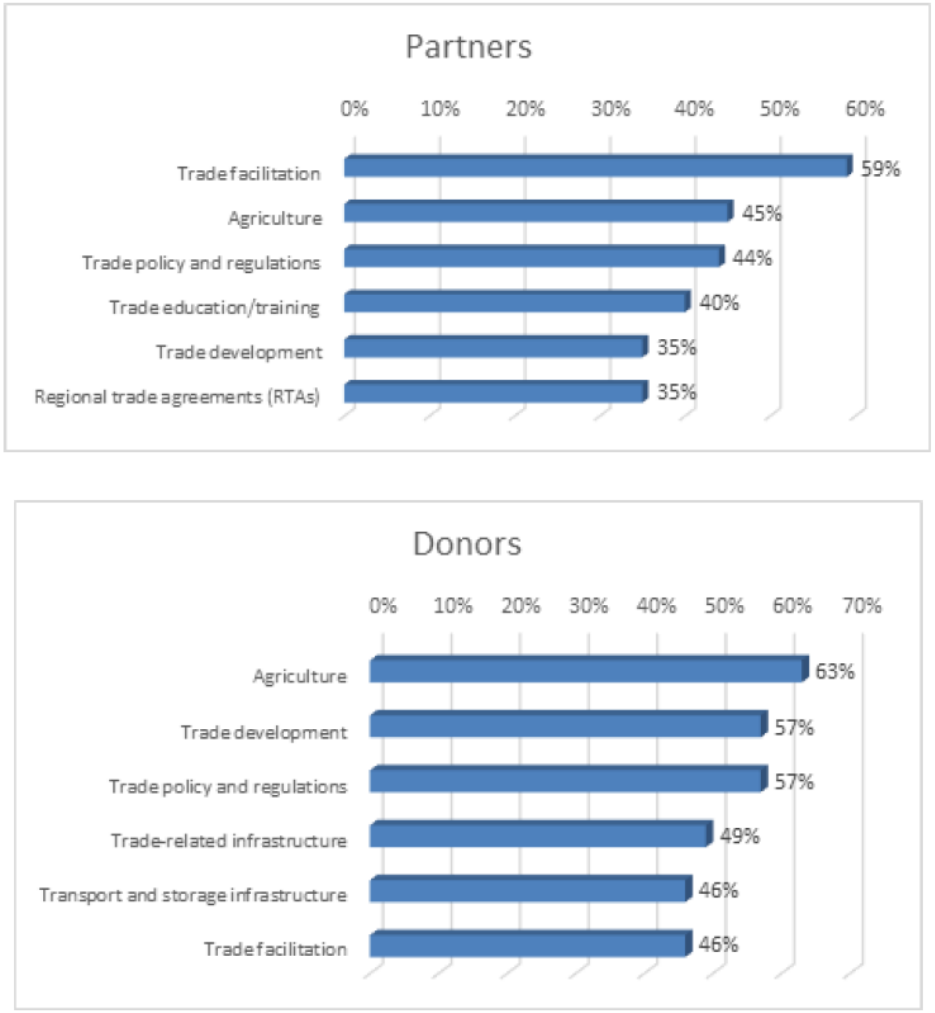
FIGURE 8 – Top five most impactful forms of Aid for Trade support for economic diversification: partner and donor perspective



Source: OECD/WTO AfT M&E exercise (2019)

a. Least Developed Countries

Least developed countries are a key group for the Aid for Trade Initiative. Given their weak position they are given special attention and tailor made programmes are developed for them. It is therefore important to see what impact has there been so far, have they succeeded in fostering growth in these countries?

According to an impact analysis of the initiative on Africa conducted by Sommer et al (2017), many key recipients of AfT are non-LDCs. Since 2010, Egypt, Ethiopia, Kenya, Morocco, and Tanzania have attracted the largest disbursement flows. Together, these

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five countries have on average accounted for over 35 percent of the annual AfT disbursements to Africa. Morocco and Egypt alone have accounted for over 8 percent annually. Regarding the direction of the flows, a majority has been directed towards projects related to economic infrastructure and productive capacity building. Given the significant infrastructure needs of the continent, this makes sense.

An important finding in an evaluation conducted by UNCTAD (2015)[38] in African LDCs, was the difficulty to mainstream trade into national policies. This is one of the key aspects for long -lasting growth through trade. Aft seeks that countries take advantage of trade opportunities and obtain benefits from integration into the world economy. However, the sole inclusion of trade and trade-related issues in national documents or frameworks does not guarantee success in mainstreaming trade into national development strategies. It is only a first step that must be complemented with effective implementation of action plans to ensure that expected outcomes will be achieved. In the assessment, they also found a lack of continuity in the way trade and trade-related issues are addressed in national documents. Success in mainstreaming trade into national development strategies requires policy coherence in the design and implementation of economic and social policies. In order to achieve this, there should be proper coordination across and within governmental departments. Governments have leadership roles in this process, but they also need valuable input from other stakeholders, such as donors, private sector and civil society. Mainstreaming requires enormous human resources and unfortunately, African LDCs have very limited capacity to formulate and implement trade and development policies and this presents a serious challenge to reaping the gains from trade (UNCTAD, 2015).

Regarding the Enhanced Integrated Framework, there is a low level of implementation of the recommendations provided by the Diagnostic Trade Integration Studies. In Malawi it was found that only eight actions out of 67 recommendations in the 2003 DTIS Action Matrix were fully implemented. In Uganda, a review of the implementation of 156 measures concluded that 57 measures had been fully implemented and a further 37 partially implemented, with an overall scaled implementation ratio of 50% (Brenton & Gillson, 2014).

[38] See: “Integrating Trade into National Development Strategies and Plans: The experience of African LDCs”

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According to Sommer et al. (2017) more AfT funds could have be channelled through this framework. The first phase (2008-2015) of the EIF programme provided almost US$204 million in support to LDC beneficiary countries. The recently launched second phase of the programme (2016-2022) has secured US$70 million from contribution agreements so far but would benefit from more commitments in the future. Almost three quarters of EIF funds are disbursed in Africa, in key areas to inclusive trade – agricultural businesses, trade facilitation, plant and post-harvest protection, and pest control and fishery development. The EIF could, however, be better targeted on transformative regional projects, including support to corridor management institutes, regional economic communities (RECs), and the African Union Commission's (AUC) programmes. Part of the problem is that EIF has a country focus, mirroring the AfT Initiative. Increasing the share of regional projects should be a priority for both AfT and the EIF (Sommer et al, 2017).

The targeting of AfT is generally poor in the area of trade facilitation, a crucial area for trade policy support and one of the priorities of the BIAT Initiative. According to Sommer et al (2017), disbursements in this area are largely directed at countries closest to the WTO's Trade Facilitation Agreement targets, as captured by the OECD Trade Facilitation Indicators. The TFA contains several provisions that aim to ensure that developing and LDC Members receive the assistance they need to acquire the capacity to implement the measures, however according to an assessment performed by UNCTAD by February 2019 the rate of implementation commitments for LDCs had only reached 22%[39]. In addition, a large amount of trade remains informal, unable to benefit from this agreement, preventing the full development potential of trade in Africa.

b. What has been achieved?

Fifteen years since the beginning of the Aid for Trade Initiative, it is important to consider what has been accomplished, what has not and what obstacles remain to achieving main objectives. There is no doubt that the initiative has increased donors'

[39] For more information see: https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1998#:~:text=The%20TFA%20aims%20to%20expedite,upper%2Dmiddle%2Dincome%20countries. (last access September 15, 2020).

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and developing countries' awareness of the role trade can play in development. It has also contributed to increasing aid related to building trade capacities (Hallaert, 2013). Another accomplishment has been the mobilisation of resources. This was a main objective and was specifically mentioned in the Hong Kong Declaration in order to facilitate the Doha Round negotiations. In this aspect, there is an overall consensus that more funds have been channelled towards AfT (Hallaert (2013), Hynes & Lammersen (2017), Cadot & Melo (2014))

The OECD estimates that development aid commitments were, in real terms, almost 60% larger in 2009 than before the launch of the Initiative and that disbursements grew by more than 10% each year. In fact, part of the increase is due to an improvement in the monitoring of the AfT flows (Hallaert, 2013). However, flows were affected by the budgetary constraints faced by donors in the 2008 economic crisis. This was a challenge that faced all development assistance, and in 2011 ODA from DAC members fell for the first time (excluding debt relief) since 1997. AfT flows declined in 2011, but recovered strongly in 2012 (Hynes & Lammersen, 2017). Despite the many failures of donors to meet their pledges on, for example, the Gleneagles commitment, according to the Aid for Trade at a Glance 2009, the Hong Kong pledges made by the European Union, Japan and the United States have been met. This achievement is all the more striking given that some donors, including the United States, had said that additional AfT was conditional on a good result in the Doha negotiations (Hynes & Holden, 2016).

The issue of how to deliver these additional funds was discussed from the beginning of the initiative and continues to be discussed today. Some authors, like Stiglitz and Charlton (2006), advocated for the creation of a specific mechanism for this task. They suggested a Global Trade Facility, with specific binding commitments, administered by the World Bank[40]. Their proposal was supported by African countries and LDCs. There were other proposals as well, such as those from Zedillo et al (2005), which proposed a temporary dedicated AfT fund, and from Puri (2005), who proposed the creation of a USD 1 billion fund for financing infrastructure, competitiveness and adjustment related projects in LDCs. In the end, these proposals were rejected by the World Bank and the IMF, arguing that a new and unproven mechanism would risk skewing priorities to

[40] On a later publication (2013) they suggested the GTF to be conducted by UNCTAD.

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areas where external funding is available (Nielson, 2006). Similarly, some main bilateral donors expressed resistance to creating a new fund (Marti and Rampa, 2007). AfT would have to be directly negotiated by partner countries with donors, who are also the providers of regular ODA.

Although dedicated funds have some advantages, they work best when channelled towards specific needs or on topics that can be easily de-linked from the broader national development strategies. In this respect, according to Hynes & Holden (2016), AfT represents too large a proportion of ODA to be managed independently from overall aid strategies, and it is neither possible nor desirable to separate the trade related agenda from the economic growth agenda. In addition, prioritisation of capacity gaps and needs can better be done effectively and efficiently at the local level when trade is mainstreamed into national development strategies. Risks associated with significant additional aid resources, such as losing export competitiveness through 'Dutch disease'[41], further support the strategy of mainstreaming aid into the broader development assistance system (OECD, 2006).

The Aid for Trade Initiative has also made strides in terms of the monitoring and evaluation of aid. It has never been easy measuring aid, nor its effects (due to cofounding influences, lack of references, specific indicators and timeframe among others)[42]. In this respect, one of the innovations which has been brought about by the initiative was the Global Review conducted by OECD/WTO, aforementioned The Global Review is underpinned by the Aid for Trade Monitoring and Evaluation Exercise. Though based on self-assessment, it has proven useful. The questionnaires became increasingly detailed and probed a range of AfT issues more extensively. The survey is now well established and has proved to be an essential tool in gathering information on objectives, strategies, plans, implementation and emerging results. It also provides details on how donors, providers of south–south cooperation and regional economic communities are responding to an evolving trade and development environment. The Global Reviews have led to active engagement, improved statistics and the interchange of ideas (Hynes & Holden, 2016). The discussion of a specific topic in

[41] The scaling-up of aid could potentially create a real appreciation of the aid recipient's currency – the "Dutch disease" effect – and thereby dampen the export competitiveness of a country.
[42] This will be further analyzed in the next section

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every Global Review has helped delve into specific issues that affect developing countries. If one accepts that the main objective of the Reviews is political, rather than technical (to profile what is happening and promote actions from all stakeholders), then the process can be considered a qualified success. In addition, case study exercises do provide some insights on the implementation of the initiative and can be useful when comparing donors vs. recipients' opinions. Although Byiers (2013) argues that Reviews remain 'very donor-oriented', given that a central objective is to rally finance, participation from the Global South did increase.

The contribution of AfT in infrastructure upgrades is another issue that is worth mentioning. The significant amounts of ODA and OOF spent on supporting developing countries to upgrade their infrastructure, invigorate the private sector and streamline trade policies should show results. Empirical findings confirm that AfT, in general, is effective at both the micro and macro level (Calì & te Velde, 2011). The impacts, however, may vary considerably depending on the type of AfT intervention, the income level, the sector at which the support is directed and the geographic region of the recipient country. For example, Vijil and Wagner (2012) show that the quality of infrastructure is significantly positively correlated with aid to infrastructure. Ferro et al. (2012) find that a 10% increase in aid to transportation, information, communication and technology, energy, and banking services is associated with increases of 2.0%, 0.3%, 6.8% and 4.7% respectively in the exports of manufactured goods from the recipient countries.

In this respect, trade facilitation projects in particular have demonstrated considerable benefits. Trade facilitation covers a range of behind the border actions including institutional and regulatory reform, infrastructure and customs and port efficiency. AfT aimed to facilitate the cross-border trading operations is likely to yield a high return on the investment and enhance overall competitiveness of the economies (Laurent & Edwin, 2011). For example, Helble et al (2011) suggest that aid directed toward trade facilitation has a significant relation to greater trade flows. A 1% increase in aid can be associated with about 291 million of additional exports for aid-receiving countries. This means that US$ 1 of AfT can be associated with US$ 1.33 of additional exports for recipient countries. If one only considers AfT policy reform and regulatory reform, this would mean a 1% increase in exports of aid recipients of about US$347 million.

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Busse et al. (2012), using panel data for 99 developing countries for the period 2004–09, showed that AfT is closely associated with lowering trade costs and therefore may play an important role in helping developing countries benefit from trade. Aid spent on trade policies, regulations and especially on trade facilitation, have a leverage effect on trade. Cali & te Velde (2011) found that AfT facilitation and to some extent AfT policy and regulations help reduce the cost of trading (in terms of exports and imports). An increase in US$ 390.000 is associated with a US$82 reduction in the costs of importing a 20- foot container of goods. Similar results apply to the costs of exporting as well as to the time taken to process imports. They also found that aid to economic infrastructure increases exports while aid to capacity building appears to have no significant impact on exports.

Finally, an analysis by Vijil (2014) assesses whether AfT effectiveness in terms of trade performance increases when there is economic integration between partners. Results suggested that AfT effectiveness in terms of increased bilateral trade is increased when countries share a certain degree of economic integration, resulting in, on average, seven dollars in additional intra-members' trade for every dollar invested. Estimates also suggested that, within AFT, assistance to trade-related institutions display the highest impact. On average, 1 US$ in institutional assistance translates into 72 US$ in additional intra-members´ trade. Thus, combining EIAs with trade-related assistance seems a promising development strategy to foster developing countries´ trade. They suggest that the design of trade intervention projects and programmes with a regional approach should be encouraged. Their findings also lend support to pursuing integration agreements in which trade negotiations and aid packages go hand-by-hand.

Some of these results show that mainstreaming trade in the strategies of developing countries and donor agencies is another crucial topic to the Aid for Trade Initiative (Hynes & Lammersen, 2017). Brenton & Gillson (2014) find that while progress has been observed in prioritised trade in the strategies of developing countries, capacities among them remain rather uneven. The high number of developing countries that have actively participated in successive monitoring exercises that underpin the biennial Global Reviews of AfT, as well as a recent review of the DTIS undertaken by the Executive Secretariat of the EIF, suggest that progress in this area continues.

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6. Major Criticisms of the Aid for Trade Initiative and Challenges Ahead

One of the major challenges underlying almost every AfT topic of discussion is the scope of the concept itself. Boundaries of what should be considered AfT and what should not are not clear. In this respect, some interpretations argue that AfT is necessarily linked to the development debate, and as a consequence, it is an essential element of the broader development discussion (Ismail, 2007; Cadot & Melo, 2014; UNCTAD, 2015). In this vein, Hallaert (2013) argues that in the Doha Round, a broad definition of AfT was needed to address all the various forms of financial and technical support expressed in the Doha agenda, which also had the advantage of making the Initiative appealing to the largest possible number of donors (each with its own priorities and activities). Thus, it increased the chances of a large and rapid mobilization of financial resources. In fact, according to this definition, AfT can cover anything a developing country is prepared to say is AfT as long as it does not relate to market access issues, which were left to the Doha Round negotiations (Hallaert, 2013). After the Doha Round failed, the broad definition of the initiative helped include other topics within trade-related development, such as gender equality and green growth. This has also helped the initiative to contribute to the achievement of a broader set of SDGs, not only SDG 8.

However, there is no consensus on this point of view. For instance, the OECD (2006) argues – and this reflects to some extent the donors' perspective – that the AfT agenda includes TRTA/CB and infrastructure. In addition, it argues that there is less agreement on whether support to address supply-side constraints should remain confined to reducing trading costs (e.g. trade facilitation) or, in addition, should include support to increase the productive and competitive capacity of the private sector. Finally, it argues that there is even less agreement on whether adjustment costs should be part of the agenda, given the fact that most of the activities necessary to address adjustment, such as support to export diversification or fiscal reform, are already included in the AfT categories, while other adjustment-related expenditure – such as social safety nets, balance of payments support or compensation for potential costs from multilateral liberalisation (e.g. preference erosion or a reduction in government revenue) – should not be included.

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Another challenge the initiative faces is related to the difficulty in measuring results. Although some empirical studies have been conducted based on traditional econometric analysis, the wide spectrum of results reveals the difficulty of drawing robust policy conclusions because of cofounding influences. Another issue is the timeframe. The evaluations often lack an adequate or realistic timeframe for measuring the results of projects and programmes, whilst the impact can take years to come into effect. Following DAC guidelines, most evaluations were assessed, regardless of whether the project deadlines were met or budgets were respected, or the overall operations were relevant, efficient and sustainable. In this sense, medium- to long-term impacts were never properly measured. AfT covers a very diverse area of interventions, making it impossible for a common evaluation framework or a single impact evaluation (Hallaert, 2013). Evaluations of broad, development-related concepts, such as gender or poverty reduction would be performed, but without clearly defining these terms. This tendency to favour generic concepts over precise terms often means that the evaluations are vague. Finally, the causality chain in AfT projects is usually longer than many other development projects, since many other factors are involved in their success or failure, which further complicates the impact of measuring efforts (Cadot & Melo, 2014). As a way to compensate for this obstacle, the WTO and OECD introduced the global review evaluations, as mentioned in the previous section. However, these reviews are based on self-assessment, which gives no incentive to reporting failures or problems. In addition, some recipient countries may feel afraid of reporting shortcomings, since this could lead to a reallocation of resources. On a final note, the taxonomy applied by the DAC in the Credit Reporting System does not offer proper identification of the trade-related components of ODA. Even the narrower concept of trade-related assistance, with a subset of activities more clearly connected with trade purposes, is not free of ambiguity (Alonso, 2016).

The lack of a clear definition of what is AfT adds confusion to the monitoring and evaluation effort. If anything even remotely related to trade can be considered AfT, the distinction between ODA and AfT gets blurred, opening a possibility for donors to inflate AfT figures (Adhikari, 2011). In addition, there is a lack of ‘AfT awareness’ in many country offices, which causes concerns about discrepancies between what is reported as AfT by the OECD database and what countries perceive to have received as AfT

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(Basnett et al, 2010). As reported by Awasthi (2011), for example, ministry officials in Nepal were not aware of where the money registered as AfT by the OECD was going; this also seems to be the case for other recipients, particularly LDCs and other low income countries. This issue is also reflected in the results of the OECD questionnaire in which many developing countries stated difficulties in designing bankable projects in order to access trade related funds. At the same time donors seem to have their own areas of focus, therefore pushing for funds to go a certain way.

Another shortcoming seems to be the fact that most of AfT funds go to middle-income countries (close to two-thirds of ODA and more than 95% of other official flows) (Alonso, 2016). A study by Hühne et al. (2014) found that AfT appears to promote exports of middle income countries over LDCs and that it seems more effective in promoting the exports of open economies and countries in east Asia and Latin America than exports of closed economies and countries in sub-Saharan Africa. Since the most funds were disbursed in Africa and Asia, we would expect to see better results for the least developed countries.

Regarding the EIF, which is particularly oriented to LDCs, Brenton & Gillson (2014) highlighted a number of weaknesses. First, the DTIS is often seen as an obligation undertaken to access EIF funds rather than as a guide to policy. Most importantly, it rarely has a strong ownership because it is seen as a trade ministry document even though its important policy recommendations typically span multiple (and more powerful) ministries. DTIS-executing agencies have tried to improve this through small-scale initiatives such as hiring local consultants as contributors, but with limited success, especially in sub-Saharan Africa where the involvement of local consultants sometimes has more to do with rent-seeking more than anything else. DTISs have also suffered from a visibility and implementation gap. Donor awareness of DTISs is sometimes limited and the Action Matrix take up has not proceeded as desired. Mainstreaming trade in national development strategies, in donor assistance strategies as well, has been met with limited success. Moreover, implementation remains largely un-monitored and even less evaluated. They also highlight two issues that have reduced the effectiveness of DTISs. One is the issue of scope, as the first generation typically spanned many issues leading to recommendations across a wide range of areas such as energy, infrastructure, or regulatory reform whereby donor-government

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dialogue was already ongoing and there was little scope for developing new ideas. The other issue is that DTISs have been largely country-level exercises with limited emphasis on regional integration. Overall, there is a consensus that the EIF would have a bigger impact if it would target regional projects, including through support to local institutes and regional economic communities, especially in the African continent.

The biggest challenge going forward is how AFT can leverage other capital flows, so developing countries can increasingly rely less on aid and more on other capital flows to build up their trade capacity (te Velde, 2013). There is a need to move from aid to trade towards investment for trade, which allows a country to make use of a combination of investment flows. Experts are used to examining the impact of aid flows in isolation, but with AfT now a part of a new agenda that includes the leveraging of other flows, there is a need to examine how the leveraged investments can help build trade capacity and a need to determine how effective AfT is in leveraging other flows.

Finally, there is a twofold criticism related to asymmetries in the international system. On the one hand, it has been argued that AfT always faces the risk of being traversed by the self-interest of the developed countries. In fact, exporters from donor countries may foster their own commercial interests and be among the main beneficiaries of increased trade with developing countries (Martinez-Zarzoso et al, 2010).[43] On the other hand, some authors argue that AfT - or even special and differential treatment provisions - is not sufficient to balance inequities in the trading system, where developed countries have continued to distort global trade, protect their markets and stifle the development prospects of developing countries (Singh, 2005; Ismail, 2007).[44]

In this respect, Stiglitz & Charlton (2013) proposed that WTO members adopt a right to trade and a right to development. The right to development would limit the applicability of WTO obligations when the enforcement of such obligations would have a significant adverse effect on development. It is a right not to be harmed by the imposition of trade rules. Ismail (2007) has also suggested such a right for LDCs. The

[43] A study conducted by Martinez-Zarzoso et al (2010) found that the average return, in terms of an increase in the donor's level of goods exports, is approximately $ 2.15 US for every aid dollar spent on bilateral aid.

[44] Neither are S&DT and AfT sufficient enough to compensate for unbalanced multilateral trade rules, and the costs of implementation which have been far higher than the benefits achieved by developing countries. The lack of capacity of many developing countries to participate in the trading system is compounded by the lack of responsibility of developed countries for the negative development impact of unfair trade rules (e.g. cotton subsidies) and the relatively high cost of adjustment experienced by many developing countries (e.g. through preference erosion) (Singh, 2005; Ismail, 2007).

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right to trade would complement the right to development, by giving developing countries the ability to bring action against any advanced country when three conditions are satisfied: 1) a specific group of poor people within a developing country can be identified as being significantly and directly affected by a specific trade or trade related policy of an advanced country, 2) the effect of the policy act to materially impede the economic development of those poor people and 3) the impediment operates by restricting the ability of people to trade or gain the benefits of trade.

7. Final Remarks

The results of the Aid for Trade initiative have been mixed. From a resource mobilization point of view, there is a general consensus that it has been a success. However, the empirical results of this scale up of aid flows is difficult to prove. Some studies have been conducted, but none of them are conclusive and they suffer attribution problems. It seems that trade facilitation projects are easier to measure and that they have yielded positive results, but here it is also difficult to rule attribution issues out. Overall, it seems that most of the funds go towards middle income countries (countries with which donors already trade more), leaving LDCs aside. LDCs are the countries in most need of this aid and where it could have a bigger impact. The EIF, which works in mainstreaming trade in national policies of the LDCs, has made some progress, but there are still many issues to tackle ahead. Aspects like regional trade and integration as well as inclusion in global value chains are options that should be better exploited and explored for LDCs and for the south-south cooperation dynamic.

It is also accepted that AfT can make a key contribution to achieving the SDGs. Although it is directly linked to target 8.A of SDG 8 (Decent work and economic growth), a broad definition of AfT could actually help achieve many other SDGs. Improving export capacity and infrastructure has had a clear impact in further SDGs such as SDG 1 and 9. The Aid for Trade Initiative also plays an important role in the Istanbul Programme of Action, which is an initiative that also works towards the development of LDCs and is closely related to the SDGs.

Despite the fact that the AfT idea is not new, it was only with the stalling of the Doha Round that an independent initiative to tackle trade asymmetries was implemented. So, it was only reasonable that discussions about its definition and coverage would

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arise. Its broad conceptualization has made practically any trade- or infrastructure-related project an AfT project, which in turn has made evaluation efforts even more difficult. The WTO and the OECD brought it upon themselves to try to provide guidelines and important monitoring and evaluation frameworks, since every donor and organization had previously followed different evaluation methods and approaches. In this respect, the AfT initiative has great potential but improvements in monitoring and evaluation are still needed, and questions as to whether the AfT definition remain broad or whether additional resources should be included to improve measuring capabilities need to be addressed. Going forward, the question remains: "how to transition from aid to investment?". Since trade continues to evolve, it is important that initiatives like Aft remain up to date and available for all developing countries.

Finally, it is important to raise awareness about the development dimension in AfT. In this sense, AfT has definitely helped give trade a bigger role in development. Nonetheless, trade for trade's sake is not and should not be the goal: trade is rather a path to improving economic and human wellbeing. This approach implies, for example, that the focus shifts toward development-led trade instead of trade-led development. Different countries will have different needs, resources and aspirations, and therefore national, regional and international/global policy frameworks need to be flexible enough to respond appropriately to each country's individual or regional context.

References

Adhikari, R. (2011), *Evaluating Aid for Trade Effectiveness on the Ground: A Methodological Framework*, Aid for Trade Series, Issue Paper No. 20, ICTSD, Geneva.

Adhikari, R.; Edwin, J. (2017), *How is the Enhanced Integrated Framework Supporting LDCs to Unleash their Trade Potential?*, Bridges Africa 6 (8), ICTSD, https://www.ictsd.org/bridges-news/bridges-africa/news/how-is-the-enhanced-integrated-framework-supporting-ldcs-to-unleash.

Alonso, J. A. (2016), *Aid for Trade: Building Productive and Trade Capacities in LDCs*, CDP Policy Review Series, CDP Policy Review, No. 1.

Ancharaz, V.; Bellmann, C.; Pfister, A.; Ghisu, P. (2014), "Harnessing Trade for Structural Transformation in LDCs", in *Istanbul Programme of Action for the LDCs (2011-2020)*,

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654

LDC IV Monitor, Commonwealth Secretariat, London.

Awasthi, G. (2011), *Assistance disappers! (in Nepali)*, Kantipur Daily, February 1.

Basnett, Y.; Engel, J.; Kennan, J.; Kingombe, C.; Massa, I.; te Velde, D.W.(2012), *Increasing the Effectiveness of Aid for Trade: The circumstances under which it works best*, Working Paper, No. 353, Overseas Development Institute, London.

Bhattacharya, D.; Khan T. I. (2014), "The Challenges of Structural Transformation and Progress towards the MDG´s in LDC´s", in *Istanbul Programme of Action for the LDCs (2011-2020)*, LDC IV Monitor, Commonwealth Secretariat, London.

Brenton, P.; Gillson, I. (2014),"Diagnostic Trade Integration Studies and their Updates under the Enhanced Integrated Framework- A restrospective", in Cadot, O.; Melo, J. de (eds.) *Aid for Trade: What Have We Learnt? Which Way Ahead?*, FERDI; CEPR Press, London.

Busse, M.; Hoekstra, R.; Königer, J. (2012), "The Impact of Aid for Trade Facilitation on the Costs of Trading", *Kyklos*, 65(2), 143–163.

Byiers, B. (2013), *The Aid for Trade 4th Global Review-Aid for Productive Employment*, ECDPM European Center for Development Policy Management, available at: https://ecdpm.org/talking-points/the-aid-for-trade-4th-global-review-aid-for-productive-employment/.

Cadot, O.; Melo, J. de (2014), "Aid for Trade. Looking ahead", in Cadot, O.; Melo, J. de (eds.) *Aid for Trade: What Have We Learnt? Which Way Ahead?*, FERDI; CEPR Press, London.

Calì, M.; te Velde, D. W. (2011), "Does Aid for Trade Really Improve Trade Performance?", *World Development*, 39(5), 725–740, https://doi.org/10.1016/j.worlddev.2010.09.018.

European Comission (2019), *EU Aid for Trade. Progress Report*, Publications Office of the European Union, Luxemburg, 2019

Finger, J. M. (2002),*The Doha Agenda and Development: A View from the Uruguay Round*, ERD Working Paper Series, No. 21.

Finger, J. M.; Schuler, P. (2000), "Implementation of Uruguay Round Commitments: The development challenge,*The World Economy*, 23(4), 511–524.

Grilli, E. (1993), T*he European community and developing countries*, Cambridge University Press, Cambridge.

Hallaert, J. J. (2013),"The Future of Aid for Trade: Challenges and options", *World Trade*

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654

Review, 12 (4), 653–668, available at: https://doi.org/10.1017/S1474745612000730.

Helble, M.; Mann, C.; Wilson, J. (2011), "Aid-for-Trade Facilitation", *Review of World Economics*, 148 (2), 357–376, https://doi.org/10.1007/sl0290-01.

Holden, P. (2014), "Tensions in the discourse and practice of the European Union´s Aid for Trade", *Contemporary Politics*, 20 (1), 90-102, http://dx.doi.org/10.1080/13569775.2014.881607

Hühne, P.; Meyer, B.; Nunnenkamp, P. (2014), "Who Benefits from Aid for Trade? Comparing the effects on recipient versus donor exports", *Journal of Development Studies*, 50 (9), 1275–1288, https://doi.org/10.1080/00220388.2014.903246.

Hynes, W. ; Lammersen, F. (2017), *Facilitate Trade for Development: Aid for Trade*, ADBI Working Paper, No. 670 , Asian Development Bank Institute, Tokyo, https://doi.org/10.1007/978-1-349-67278-3_116.

Hynes, W.; Holden, P. (2016), "What Future for the Global Aid for Trade Initiative? Towards an assessment of its achievements and limitations", *Development Policy Review*, 34 (4), 593–619, https://doi.org/10.1111/dpr.12165.

ICTSD (2000), "WTO LDC Meeting Addresses Shortcomings of Integrated Framework", *Bridges*, 4 (47), http://www.ictsd.org/bridges-news/bridges/news/wto-ldc-meeting-addresses-shortcomings-of-integrated-framework.

Ismail, F. (2007), *Mainstreaming Development in the WTO: Developing countries in the Doha Round*, FES; CUTS International, Jaipur.

Kessie, E. (2000), *Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements*, in WTO Seminar on Special and Differential Treatment for Developing Countries, Geneva , 7 March.

Klinger, B. (2009), I*s South-South Trade a Testing Ground for Structural Transformation?*, Policy Issues in International Trade and Commodities Study Series, No. 40, United Nations, New York and Geneva.

Lammersen, F.; Hynes. W. (2016), *Aid for Trade and the Sustainable Development Agenda : Strengthening Synergies*, OECD Development Policy Papers, No. 5, OECD Publishing.

Laurent, E. Razzaque, M. A.(2011), *Assessing the Effectiveness of Aid for Trade*, Trade Hot Topics, No. 86.

Martí, D.; Rampa, F. (2007), *Aid for Trade: Twenty lessons from existing aid schemes*, European Centre for Development Policy Management and South Centre, Maastricht and

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654

Geneva

Martinez-Zarzoso, I.; Nowak-Lehman, F.; Klasen, S. (2010), *The economic benefits of giving aid in terms of donors exports*, Ibero-America Institute for Economic Research, Discussion Paper Nr. 202, Goettingen

Nielson, J. (2006), “Aid for Trade”, in Newfarmer R. (ed.), *Trade, Doha and Development: A Window into the Issues*, The World Bank, Washington.

OECD; WTO (2011), *Aid for Trade at a Glance: Showing results*, WTO; OECD Publishing, Geneva and Paris.

OECD; WTO (2019), *Aid for Trade at a Glance 2019: Economic diversification and empowerment*, Pocket Edition, WTO; OECD Publishing, Geneva and Paris.

OECD (2006), *Aid for Trade: Making it effective*, The Development Dimension, OECD Publishing, Paris.

OECD(2011), *Strengthening Accountability in Aid for Trade*, The Development Dimension, OECD Publishing, Paris.

OECD (2013), *Aid for Trade and Development Results: A management framework,*The Development Dimension, OECD Publishing, Paris.

Ojeda Medina, T. (2019), "Introducción. La cooperación Sur Sur en América Latina y el Caribe: Balance de una década (2008-2018)", in Ojeda Medina T.; Echart Muñoz, E. (comps.), *La cooperación Sur-Sur en América Latina y el Caribe. Balance de una década (2008-2018)*, Colección Grupos de Trabajo, CLACSO, Buenos Aires.

Peixoto Batista, J. (2010), *Flexibilities For Developing Countries In The Doha Round As À La Carte Special And Differential Treatment: Retracing the Uruguay steps?*, Brazilian Journal of Latin American Studies, 9 (16), 164–191.

Phillips, L., Page, S. & te Velde, W. D. (2005), *Aid for Trade: What does it mean? Why should aid be part of WTO negotiations? And how much might it cost?*, Overseas Development Institute, ODI Opinions 61, available at: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/742.pdf

Puri, L. (2005), *Towards a New Trade “Marshall Plan” for the Least Developed Countries. How to Deliver on the Doha Development Promise and Help Realize the UN Millennium Development Goals?,* Trade, Poverty and Cross-Cutting Development Issues, Study Series No 1, United Nations, New York and Geneva.

Rahman, M.; Khan, T. I.; Sadique, Z. (2016), "Implication of the 2030 Agenda for the Istanbul

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654

Programme of Action", in *Achieving the Istanbul Programme of Action by 2020*, LDC IV Monitor, Commonwealth Secretariat, London.

SEGIB (2018), *Una década de Cooperación Sur-Sur en Iberoamérica, Secretaría General Iberoamericana*, Madrid.

Singh, A. (2005), "Special and differential treatment: the multilateral trading system and economicdevelopment in the twenty-first century", in: Gallagher K. P. (ed.) *Putting development first: the importance of policy space in the WTO and IFIs*, London and New York, Zed Books.

Sommer, L.; Suominen, H.; Luke, D. (2017), *Aid for Trade in Africa: What are the strategic priorities?*, Bridges Africa, 6 (5), ICTSD. Available at: https://www.ictsd.org/bridges-news/bridges-africa/news/aid-for-trade-in-africa-what-are-the-strategic-priorities

Stiglitz, J.; Charlton, A. (2006), *Aid for Trade. A report for the Commonwealth Secretariat*, Commonwealth Secretariat, London

Stiglitz, J.; Charlton, A. (2013), "The Right to Trade: Rethinking the Aid for Trade agenda", in Razzaque, M.A.; te Velde, D.W., *Assessing Aid for Trade: Effectiveness, current issues and future directions*, Commonwealth Secretariat, London.

te Velde, D. W. (2013), "Towards a new generation of Aid for Trade", *International Trade Forum*, 1 October.

Tussie, D.; Quiliconi, C. (2013), *The World Trade Organization and Development*, https://doi.org/10.1093/acprof:oso/9780199671656.003.0049.

UNCTAD (2000), UNCTAD. Training Tools for Multilateral Trade Negotiations: Special & Differential Treatment. Commercial Diplomacy Programme, Document UNCTAD/DITC/Misc.35. Geneva.

UNCTAD (2015), *Integrating Trade into National Development Strategies and Plans: The experience of African LDCs*, Trade and Poverty Paper Series, No. 3.

UNCTAD (2019), *Energizing South-South Trade: The global system of trade preferences among developing countries*, Policy Brief, No. 74

UNECA (2017), F*ormulating Bankable Aid for Trade Projects in Africa*, Publications Section, Economic Comission for Africa, Addis Ababa.

Vijil, M. (2014), "Aid for Trade Effectiveness: Complementarities with economic integration", *World Economy*, 37 (4), 555–566, https://doi.org/10.1111/twec.12140.

Vijil, M.; Wagner, L. (2012), "Does Aid for Trade Enhance Export Performance? Investigating

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654

the infrastructure channel", *World Economy*, 35 (7), 838–868, https://doi.org/10.1111/j.1467-9701.2012.01437.x.

WTO; BID; OECD (2011), *Relatos de experiencias concretas en América Latina y el Caribe: Visión general de la ayuda para el comercio sobre el terreno*, Geneva, Washington, D.C. and Paris.

WTO (2018), M*ainstreaming Trade to Attain the Sustainable Development Goals*, Geneva, https://doi.org/10.30875/9c96f135-en.

Zedillo, E., Messerlin, P. and Neilson, J. (2005), *Trade for Development. UN Millennium Project Task Force on Trade,* London.

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654