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CONFRONTING DEGLOBALISATION IN THE MULTILATERAL TRADING SYSTEM[#]

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The first two decades of this millennium were marked by major political, economic, and geopolitical disruptions. The terrorist attacks of September 11, 2001, the global financial crisis (GFC), and the COVID-19 pandemic, illustrate just some of the developments that sparked the rise of populism and a backlash against globalisation in the world economy. The policy responses have in some cases hindered the process of international economic integration by interposing trade protectionism, discriminatory investment policies, and technological confrontations, among other challenges. This has led many analysts to predict that the world economy is entering a phase of 'deglobalisation' — that is, a retreat from the globalisation process.

In view of the interest for a wider public, this study elaborates on the Think 20 (T20) Report finalised by the 'Primo Braga Group of Experts' and discusses in greater detail how to address deglobalisation by making the multilateral trading system and the World Trade Organization (WTO) regime work more effectively. It focuses on the main challenges faced by the multilateral trade system and the lessons that can be derived from the new

[#] Task Force 3 on Trade, Investment, and Growth (Co-Lead Prof. Pier Carlo Padoan) of T20 Italy has tasked a group of international trade experts, chaired by Carlos A. Primo Braga, with the finalization of a report on World Trade Organization [WTO] Reform agenda. This article largely elaborates on this endeavour.

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generation of regional trade agreements (RTAs). The basic message is that investing in the improvement of the rules-based multilateral trading system is essential to prevent misconceptions about globalisation. The report concludes by proffering key recommendations to indicate steps that can be taken in the reform process by WTO members.

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I. IS IT 'DEGLOBALISATION' OR 'RESHAPED GLOBALISATION'?

There is no consensus on the definition of 'deglobalisation'. It is clear, however, that the process of international economic integration, a major driver of the globalisation process and of economic growth, has been slowing down since the GFC. The last decade has witnessed a decline in the growth of international trade in merchandise, a slow-down in the dynamics of Global Value Chains (GVCs), and significant decline in international capital flows in some years. The fast integration of China and other emerging (and developing) economies into global production networks and the impact of technology on jobs, fuelled additional criticisms of globalisation in some advanced economies. As a result, increased 'politicization of trade policy' surfaced in many Group of Twenty (G20) economies.

On the other hand, some aspects of the globalisation process continued to evolve in a dynamic fashion. International immigration numbers and data flows via digital channels provide two examples. Some dimensions of trade were reshaped as trade was virtualised owing to technological developments. A substantial share of world trade continues to be conducted under globally agreed rules, such as, under most-favoured nation (MFN) terms, even as further stepwise liberalisation has advanced

at the WTO (e.g., the Trade Facilitation Agreement,[1] and expansion of Information Technology Agreement as ITA-II)[2] and via RTAs.

The Covid-19 pandemic, however, compounded the problems for international economic integration. This is particularly with respect to international travel, the adoption of restrictive policies for trade in medical inputs and vaccines, and distortions in the flow of GVCs. Concurrently, the pandemic also fostered cross-border flow of services (via e-commerce), once again underscoring many facets of the globalisation process.

Hence, it could be argued that rather than deglobalisation, we are witnessing a new phase in the process of globalisation.[3]

A. The Need for WTO Reform in New Era of Globalisation

It is recognised that unless the main stakeholders invest in the effective functioning of the multilateral trading system and its main institutional anchor, the WTO — given the erosion with respect to its three central functions: negotiation, monitoring, and enforcement — the period ahead may be characterised by further trade tensions, magnifying the danger of 'deglobalisation', and WTO's powerlessness.

More specifically, the core tasks facing WTO are twofold. First, achieving proper and effective implementation of the agreed rules of the system by all the contracting parties (i.e., mitigating the crisis in the dispute settlement system (DSS)). Second, updating the existing rule book to bring new disciplines in areas where frictions have emerged (e.g., on subsidies and state support, state-trading enterprises, investment regulations, digital trade, and older issues like agriculture and services) and to cover the gaps between the multilateral system and the RTAs in this context.

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[1] General Council, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, WT/L/940 (Nov. 28, 2014), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/940.pdf&Open=True.

[2] WTO, Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15)/DEC, Briefing Notes (2015).

[3] The Ukraine-Russia conflict in 2022 added to the challenges to the globalisation process and, in particular, to the WTO as illustrated by the fact that several countries considered the suspension of Russia's MFN treatment. See Communication from Albania et al., *Joint Statement on Aggression by the Russian Federation Against Ukraine with the Support of Belarus*, WTO Doc. WT/GC/244 (Mar. 15, 2022).

The next part describes some of the main challenges to the multilateral trade order and priorities for institutional reform while national trade policies are increasingly politicised amid the globalisation debate. This is followed by a discussion of what can be learnt from the revealed preference of many G20 countries to opt for RTAs. In this context trade-related lessons derived from the China-European Union (EU) Comprehensive Agreement on Investment (CAI),[4] the role of WTO disciplines with respect to state-owned enterprises (SOEs), and alternative mechanisms to advance multilateral negotiations are addressed along with a debate on how to repair the enforcement mechanism (i.e., DSS). The last part of this brief puts forward recommendations based on the inferences in the earlier parts.

II. CHALLENGES TO THE MULTILATERAL TRADING ORDER

Following the initial shock of the pandemic, a trade recovery has gotten underway demonstrating resilience in the system.[5] But sustaining the recovery and restoring lost dynamism in the global economy will require substantial reforms.

Many of the tensions in the multilateral system and the WTO have their origin in two cross-cutting systemic problems: development preferences and regulatory divergence. First, the WTO rules make a distinction between developed and developing countries in terms of their rights and obligations, providing allowances for less advanced economies. However, the point at which emerging economies should graduate to assume the full responsibilities of an advanced economy is not

[4] EU-China Comprehensive Agreement on Investment, Eur. Union-China, Jan. 22, 2021, Eur. Commission, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237 [hereinafter CAI].

[5] The WTO secretariat stated in a press release that prospects for a quick recovery in world trade had improved as merchandise trade expanded more rapidly than expected in the second half of 2020; *see* Press Release, WTO, World Trade Primed for Strong but Uneven Recovery after COVID-19 Pandemic Shock, WTO Press Release 876 (Mar. 31, 2021), https://www.wto.org/english/news_e/pres21_e/pr876_e.htm. On October 4, 2021, the WTO secretariat revised their merchandise trade volume estimates upwards to reach 10.8% annual growth in 2021 and 4.7% for 2022, following a 5.3% decline in 2020; *see* Press Release, WTO, Global Trade Rebound Beats Expectations but Marked by Regional Divergences, WTO Press Release 889 (Oct. 4, 2021), https://www.wto.org/english/news_e/pres21_e/pr889_e.htm. This trend has been confirmed by readings of its composite indexes for trade in goods and services, *see Goods Trade Barometer*, WTO (Aug. 18, 2021), https://www.wto.org/english/news_e/news21_e/wtoi_18aug21_e.pdf; and *Services Trade Barometer*, WTO (Sept. 23, 2021), https://www.wto.org/english/news_e/news21_e/wtoi_23sep21_e.pdf.

clear.[6] Second, WTO disciplines are not all encompassing due to different interpretations and national regulatory regimes vary in areas that affect their ability to trade (e.g., subsidies, state owned enterprises, labour and environmental standards). Hence, a level playing field is not guaranteed.[7]

The confrontational stance among some major trading partners and the growing resort to protectionist measures have done little to address such systemic concerns. Moreover, in some instances, national trade policy has been transformed from being an instrument to promote growth to one directed mainly towards achieving domestic political objectives. Unilateral trade restrictions, sanctions, and countermeasures often in disregard of commitments undertaken within the WTO have arisen, hampering trade.

Such developments have deeply affected the functioning of the WTO and Members appear to broadly agree on the need to seek its reform.[8] The WTO cannot go back to be what it was. Several proposals for reform have been made by WTO Members and groups of members. In taking up her office as the newly elected WTO Director General (DG), Dr. Ngozi Okonjo-Iweala, also provided a useful stocktaking of her assessment of the priorities of the member countries (see Table 1 in the Appendix).[9] The twelfth WTO Ministerial Conference (MC12) had been expected to provide a venue for delivering on some of these priorities, advancing on others, and moving to launch an agenda for those not yet adequately addressed. However, pandemic conditions necessitated postponement of the event and MC12 convened in June 2022. WTO delegations at the end produced a

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[6] *See* P. Draper et al., *Rethinking Special and Differential Treatment in the World Trade Organization* (Inst. Int'l Trade, Univ. Adelaide, Working Paper No. 5, Oct. 2021). *See also* Committee on Trade & Development, *Note by the Secretariat: Special and Differential Treatment Provisions in WTO Agreements in Decisions*, WTO Doc. WT/COMTD/W/239 (Oct. 12, 2018); Committee on Trade & Development, *Note by the Secretariat: Special and Differential Treatment Provisions in WTO Agreements in Decisions*, WTO Doc. WT/COMTD/W/239/Corr.1 (Dec. 20, 2019); A. Ukpe & S. Khorana, *Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development,* 20(2) J. INT'L TRADE L. & POL'Y 83 (2021).

[7] *See* M. Sait Akman et.al., *The Need for WTO Reform: Where to Start in Governing World Trade*, T20 SAUDI ARABIA 2020: POLICY BRIEF 6 (2020), https://www.g20-insights.org/wp-content/uploads/2020/11/T20_TF1_PB1.pdf.

[8] *See* Jack Caporal, *WTO Reform: The Beginning of the End or the End of the Beginning?*, CTR. STRATEGIC & INT'L STUD. (Oct. 23, 2018), https://www.csis.org/analysis/wto-reform-beginning-end-or-end-beginning.

[9] WTO Conference Series, *WTO Press Conference by Dr Ngozi Okonjo-Iweala*, YOUTUBE (Feb. 15, 2021) [hereinafter WTO Conference Series]; *see also*, General Council, *Appointment of the Next Director General: Statement of the Director-General Elect Dr. Ngozi Okonjo-Iweala to the Special Session of the WTO General Council*, WTO Doc. No. JOB/GC/250 (Feb. 16, 2021) [hereinafter General Council, Appointment of Next DG].

"Geneva Package" which contained "unprecedented" decisions as claimed by the DG[10]. However, WTO's future depends on a root-and-branch reform.

Fortunately, the WTO reform efforts are not starting from scratch as existing trade agreements outside of the WTO act as a useful reference material. For instance, RTAs have developed new or improved disciplines on issues not covered adequately by WTO agreements.

A. Areas for Action

In assessing the wide-ranging concerns and the prospects for future steps at the WTO, four broad areas for action can be identified:

First, it may not be possible to bring many trade-related issues into the WTO agenda readily, though new disciplines are necessary for the smoother functioning of global trade and GVCs. Many RTAs address WTO-plus issues (e.g., services, agriculture, IPRs, digital trade, and regulatory areas). The next step could be to internalise best practices in such RTAs, by using plurilateral approaches to multi-lateralise them.[11]

Second, a major concern is the restoration of the functioning of the DSS and the Appellate Body (AB), in particular, to ensure clarity and predictability in the meaning and application of the WTO rules. The complaints that centre around questions of overreach and 'judicial activism' should be addressed to sustain a legalised way to solve disputes. This would need to be done based on a political understanding about the functioning of the AB and without prejudice to other necessary reforms of the DSS. Members should be more active in managing the DSS, using their prerogatives, such as, recourse to binding interpretations under Article XI of the Marrakesh Agreement,[12] of provisions whose import is perceived as uncertain or contentious.

The third area of concern is the application of national trade restrictive measures and countermeasures without appropriate regard to WTO commitments and rules.

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[10] *WTO members secure unprecedented package of trade outcomes,* WTO (June, 17, 2022) https://www.wto.org/english/news_e/news22_e/mc12_17jun22_e.htm

[11] Kati Suominen, *Enhancing Coherence and Inclusiveness in the Global Trading System in the Era of Regionalism*, INT'L CTR. TRADE & SUSTAINABLE DEV. & WORLD ECON. F. (Jan., 2016), https://www3.weforum.org/docs/E15/WEF_Regional%20trade%20Agreements_2015_1401.pdf.

[12] *See* WTO Analytical Index, *Article XI of the Marrakesh Agreement Establishing The World Trade Organization*, Dec. 2020, https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_art11_oth.pdf.

Unilateral restrictive measures destabilise GVCs and put at risk the main positive results of trade liberalisation, stability, and predictability of the trade regime for all. Rightly or wrongly, the perceived breach of WTO obligations by members on matters concerning intellectual property rights (IPRs), forced transfer of technology, subsidisation by central or local governments (including in relation to SOEs), and restrictions with respect to foreign investments, has triggered the application of such protectionist measures in a number of cases. National security and public morals have been used and abused as an excuse for the application of protectionist measures. As a first step, members should commit to a credible standstill of new trade restrictive measures, including trade-distorting subsidies.

The fourth concern is the quest for the world's leadership, which, in its current manifestation, is threatening to split the global economy and the multilateral trading system into competing blocks. Finding a means to better manage trade relations between market and non-market economies is a major challenge in this context.

In what follows, pathways to address some of these issues are discussed by taking into consideration the experiences in RTAs.

III. STEPS TO SUPPORT THE FUNCTIONING OF THE WTO AND ITS REFORM

This part considers prospects for WTO reform concerning several major issues:

- The emergence of mega-RTAs and possible lessons for WTO reform;
- The case of the China-EU CAI as an illustration of means to bridge the gap between leading members of the WTO;
- The case of SOEs and the WTO as an illustration to address a current and sensitive topic at the heart of some members' drive for reform;
- The importance of re-establishing a functioning DSS;
- Configuration of the WTO as a club of clubs, to enable progress in reform efforts while promoting convergence across an organisation with a diverse membership.

A. Building Multilaterally with Mega-Regional Bricks

Many WTO members have turned to large-scale *regional* trade liberalisation efforts as a more expeditious means to address various trade challenges. Three major mega-regional accords have advanced to successful conclusion over the past three years: Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in the Pacific Basin, Regional Comprehensive Economic Partnership (RCEP) in Asia and the Pacific, and United States–Mexico–Canada Agreement

(USMCA) in North America.[13] Although the EU is not a party to these accords, its bilateral Economic Partnership Agreement with Japan is of a comparable scale.[14] The EU has used a strategic approach to build up the largest web of bilateral preferential trade accords in the world, with forty-five in effect as of March, 2021.[15] Globally, the WTO has recorded 354 regional/preferential trade agreements as being notified and in force as of mid-April 2021.[16] WTO members have accumulated a wealth of experience from such accords. Might this experience play a role in the next steps for the multilateral system?

1. Regionalism: Going Multilateral?

A founding objective of the WTO was to promote open, global, and non-discriminatory trading arrangements, continuing the General Agreement on Tariffs and Trade (GATT) tradition.[17] Such an approach could help minimise trade distortions and improve the prospects for a market-driven economic integration, with stakeholders broadly benefitting from the operation of a comparative advantage. Economists generally support free trade to improve productive efficiency and maximise consumer choice, delivering welfare gains that exceed labour market adjustment costs.[18] The emphasis of many WTO members on *preferential* trading arrangements may at first appear at odds with this approach.

Regionalism and preferential agreements, however, may help to avoid the complex and time-consuming need to achieve a global consensus at the WTO. Using the RTA route, like-minded countries may be able to advance more quickly as a group

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[13] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018 ATNIA 1 [hereinafter CPTPP]; Regional Comprehensive Economic Partnership Agreement, Jan. 1, 2022, ASSOCIATION OF SOUTHEAST ASIAN NATIONS [ASEAN] SECRETARIAT, https://rcepsec.org/wp-content/uploads/2020/11/All-Chapters.pdf [hereinafter RCEP]; Agreement between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., Nov. 30, 2018, PUB. L. 116–113 [hereinafter USMCA].

[14] European Commission Press Release IP/19/785, EU-Japan Trade Agreement Enters into Force (Jan. 31, 2019).

[15] For the EU's strategy on its preferential trade agreements, see Stephen Woolcock, *EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation towards Commercial Aims*, 20(6) EUR. L. J. 718 (2014).

[16] *Regional Trade Agreements: Database*, WTO, https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

[17] The GATT Years: From Havana to Marrakesh, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm#:~:text=The%20WTO's%20creation%20on%201,create%20an%20International%20Trade%20Organization.

[18] *See, e.g.*, *Free Trade*, CHICAGO BOOTH: THE INITIATIVE ON GLOBAL MARKETS, (Mar. 13, 2012), https://www.igmchicago.org/surveys/free-trade/.

to deliver greater liberalisation than might be feasible via the WTO. The Organisation for Economic Co-operation and Development (OECD) identified nine issue areas where WTO-plus commitments had already been undertaken by regional partners.[19] Baldwin summarised the political economy for regional trade liberalisation and its eventual multi-lateralisation. Where RTA liberalisation delivers benefits, it can attract new members or efforts to replicate such arrangements. The discriminatory impacts on non-participants may then fuel calls to make the terms of these arrangements universal.[20]

2. Regional Lessons for WTO Reform

Economically, the greatest contribution of RTAs may come in devising means to tackle non-tariff impediments to trade. These are commercially important matters and weigh on trade, especially in value chain production. The economic costs of such distortions can be much greater than the costs of tariffs.[21] Many of these issues prove to be difficult to address in an institution as diverse as the WTO. This is because the regulatory matters covered — like standards and domestic regulations — may affect not only the trade at the border but also the trade within sensitive parts of the domestic market such as health, safety, education, and cultural matters. Trade partners with similar views on specific policy areas may be able to move more rapidly (not necessarily smoothly) on such issues than a consensus-based global institution such as the WTO. This enables regional accords to provide a sort of testing ground for improved rules-based market access provisions.

Topics often covered in current regional deals include, among others: transparency in implementation; equivalence or improved alignment in standards and regulations; matters not yet in scope in WTO accords (e.g., roaming in telecoms); requirements for accession to non-WTO international agreements or arrangements

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[19] ORG. ECON. CO-OPERATION & DEV. [OECD], REGIONALISM AND THE MULTILATERAL TRADING SYSTEM (2003).

[20] Richard E. Baldwin, *Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade*, 29 WORLD ECON. 1451 (2006). For a less optimistic view of the role of RTAs in supporting multilateral liberalization, *see* Andrew Hughes Hallett & Carlos A. Primo Braga, *The New Regionalism and the Threat of Protectionism* (World Bank Pol'y Res., Working Paper No. 1349, Aug. 1994); For a more negative view, see JAGDISH BHAGWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE (2008).

[21] *See, e.g.*, Koen G. Berden et al., *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, Eur. Commission (Dec. 11, 2009); https://www.gtap.agecon.purdue.edu/resources/download/5177.pdf.

(e.g., the Paris Agreement on climate);[22] and trade-related co-operation. An OECD review of RTAs notified to the WTO between 2001 and 2014 found that over half of them included WTO-plus measures in areas such as services, investment, transparency, competition, IPRs, technical barriers to trade (TBTs), sanitary and phytosanitary measures (SPS), movement of people (e.g., temporary movement of professionals), and export restrictions.[23] In the period since 2014, WTO regional trade working papers have reported on increased coverage in RTAs of topics such as gender, labour, telecoms, investment, competition policy, TBTs, e-commerce, environment, small and medium size enterprises, services trade, IPRs, and trade facilitation.

Regional 'WTO-plus' innovations often intersect with the WTO member country's priorities for the organisation. **Table 1**, in the Appendix, highlights some illustrative cross-references between the DG's listing of member priorities and the approaches found in current generation mega-RTAs. In each area, there are relevant experiences and innovations that can be drawn from recent accords such as the CPTPP, RCEP, USMCA, and EU bilateral agreements. These may not provide ready-made solutions for the WTO, but rather serve as potential starting points for discussion.

3. Next Steps

How might WTO members advance based on this experience? At the multilateral level, for instance, in the case of trade and environment, one option might be to simply mandate membership in relevant existing multilateral environmental agreements. Another option in that regard might be to negotiate a new requirement that members must have a domestic statute on environmental protection, even if the exact terms of protection are left open and determined at the national level. In other cases, a plurilateral opt-in arrangement may provide a vehicle for generalising a particular lesson from RTAs (e.g., services, domestic regulations, e-commerce, investment facilitation, integration of trade rules with competition rules). For example, some RTAs have advanced services discipline by requiring transparency, stakeholder consultation, and contestability in trade-related regulatory processes. Even where a stepwise, plurilateral approach is employed, it can be applied on an MFN basis to provide market openness, as we have seen in

[22] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[23] Iza Lejárraga, *Deep Provisions in Regional Trade Agreements: How Multilateral-Friendly?: An Overview of OECD Findin*gs, (OECD Trade Pol'y Papers, No. 168, 2014).

other areas such as tariff reductions under the WTO's Information Technology Agreement.[24]

If a traditional binding trade agreement is not feasible on an issue at the WTO, it may still be possible to establish a working group to promote convergence. Mega-RTAs are generally meant to be sustaining agreements that evolve using standing bodies to monitor, consult, and co-operate. The introduction of a similar structured approach could be applied via a WTO committee of interested members.[25] Such an approach may permit progress in sensitive areas like protection of trade secrets (an unfinished point of business under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)),[26] even though a formal plurilateral arrangement may not be feasible at the moment.[27]

B. *How the China-EUCAI Informs Us on China's Willingness to Support WTO Reforms* [28]

It is difficult to imagine that any major reform of the WTO or any new multilateral or plurilateral deal will succeed without the concurrence of the major stakeholders, namely China, the EU, and the United States (US), and to some degree India and Brazil. The role of China deserves special attention because of its relative newness

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[24] WTO, Ministerial Declaration on Trade in Information Technology Products, WTO Doc. WT/MIN(96)/16 (adopted on Dec. 13, 1996).

[25] In his recent assessment on rebooting globalisation, former Bank of England Governor Mark Carney suggests there is a case in some areas for moving beyond traditional trade agreements. Citing his experience with the Financial Stability Board after the GFC, he touts the effectiveness of a softer, co-operative, trust-based approach that aims for regulatory harmonisation or equivalence, consultation prior to action, transparency, and convergence. This provides some flexibility where political expediency may demand it, but also develops ties among the parties that tend to be respected because of their mutual long-term, self-interest. Such an approach may be better suited to overcoming political blockages with respect to complex and contested trade issues where behind-the-border impediments are a particular challenge. For example, this might be the case with labour markets and mobility (Mode IV services), climate change and trade, or market access in sensitive services (e.g., education). *See* Mark Carney, *A Chance to Reboot Globalisation,* FIN. TIMES (Mar. 19, 2021), https://www.ft.com/content/85939eef-8427-49b6-9640-ea8f34a5fcf0.

[26] 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).

[27] Douglas C. Lippoldt & Mark F. Schultz, *Trade Secrets, Innovation and the WTO*, INT'L CTR. TRADE & SUSTAINABLE DEV. & WORLD ECON. F. (Aug. 2014), https://e15initiative.org/wp-content/uploads/2015/09/E15-Innovation-LippoldtSchultz-FINAL.pdf.

[28] This section of the note is based on Uri Dadush & André Sapir, *Is the European Union's Investment Agreement with China Underrated?*, BRUEGEL (Apr., 2021).

as a major player and because of doubts about whether its 'socialism with Chinese-characteristics' — the implications of pervasive and intrusive interventions by the government in China — can be corralled by WTO rules that were devised by liberal market economies.[29]

We try to address this question by examining the content of the China-EU CAI which was concluded in December, 2020. It is important to preliminarily note that despite its potentials, the CAI is currently kept on the back burner by the two parties. Still, the CAI is a relatively new type of bilateral agreement — entailing only liberalisation of investment — and it was concluded against a background of other important developments in China's trade and industrial policies.[30] The agreement, which includes state-to-state dispute settlement, has potentially important systemic implications because it provides important clues as to what China is willing to do on market access, especially in its restricted service sector, and because it covers rules on subsidies, state-owned enterprises, etc. which have been a bone of contention at the WTO.

1. China's CAI Commitments are based on its New Foreign Investment Law (FIL)

Foreign firms wanting to invest in China have always needed to comply with the country's prevailing FIL, which sets out the general principles applicable to foreign investment. The latest FIL was adopted on March 15, 2019 and entered into force on January 1, 2020.[31] It is intended to make foreign investment in China easier, and more attractive by levelling the playing field with Chinese companies. Importantly, the FIL specifies that when international agreements to which China is a party contain provisions more favourable to the admission of foreign investors, those

[29] Jacques Pelkmans, *China's "Socialist Market Economy": A Systemic Trade Issue*, 53(5) INTERECONOMICS 268, 269 (2018); https://www.intereconomics.eu/contents/year/2018/number/5/article/chinas-socialist-market-economy-a-systemic-trade-issue.html.

[30] These include the coming into force of China's new Foreign Investment Law, on which China's commitments in the CAI are largely based, the signing of the Regional Comprehensive Economic Partnership (RCEP) agreement with Asian neighbours', which entails mainly market access provisions and liberalization of rules of origin, and the Phase 1 agreement with the United States, which includes sections on intellectual property protection and on forced technology transfer.

[31] For an extensive discussion of the 2019 FIL, see World Bank, *2019 Investment Policy and Regulatory Review – China*, WORLD BANK GROUP (2020), https://openknowledge.worldbank.org/bitstream/handle/10986/33600/China-2019-Investment-Policy-and-Regulatory-Review.pdf?sequence=1&isAllowed=y.

provisions will take precedence over the existing Chinese Foreign Direct Investment (FDI) regulations.[32]

2. The CAI Binds China's Liberalisation in Services (Mode 3) which must be Applied based on MFN under WTO Rules

In the services sector, the CAI binds China's unilateral liberalisation for the benefit of EU firms; however, because the CAI does not conform to General Agreement on Trade in Service (GATS) Article 6 (substantially all services trade across all modes),[33] China's liberalisation is based on MFN. Comparing the CAI with China's WTO commitments under Mode 3 shows three main improvements:

First, China completely opens to foreign investment in eight sectors that were previously closed in its WTO schedule: veterinary services, services related to management consulting, placement and supply services of personnel, telephone answering services, money broking, motor-vehicle financing by non-bank financial institutions, sporting services, and supporting services for rail transport.

Second, China partially opens to foreign investment in eleven sectors that were previously closed in its WTO schedule: database services, research & development (R&D) services for natural sciences, interdisciplinary R&D services, printing and publishing, market research and public opinion polling services, trading of derivative products including futures and options, asset management, hospital services, entertainment services, passenger air transportation services, and freight air transportation services. In these activities, China retains some limitations on market access, such as joint-venture requirements.

Third, in most other sectors for which China had previously made only partial commitments, the obligation to form joint ventures has been removed. The main exceptions are some audio-visual services, most telecommunications services, and all educational services, where China's concern seems to be more political than economic.[34]

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[32] Foreign Investment Law of the People's Republic of China, (promulgated by the Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020)[hereinafter FIL].

[33] General Agreement on Trade in Services art. VI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

[34] China will also continue to apply joint-venture requirements in three financial services sectors and three transport services sectors.

3. China's Liberalisation of Investment in Manufacturing is Bound in Several Sectors and Bans forced Technology Transfers (TT) in Covered Sectors, in line with the FIL in the CAI

Under the CAI's positive list, investment in thirty manufacturing sectors is also liberalised. Of these, twenty are free of any limitations, including any joint-venture or ownership requirements. The market access provisions in the CAI apply only to EU firms, and they need not be applied on an MFN basis since the WTO does not cover investment in goods.

Foreign companies in China have long complained that China uses foreign ownership restrictions, including joint-venture requirements, to force them to TT to Chinese entities.[35] China's WTO commitments have been of limited help in tackling this.

The CAI contains an obligation for the parties not to "impose or enforce any requirement or enforce any commitment or undertaking … to transfer technology, a production process, or other proprietary knowledge to a natural person or an enterprise in its territory". As noted by Mavroidis and Sapir (2021), the words 'impose or enforce' are crucial.[36] They imply that states (the parties to the agreement) cannot impose TT requirements on foreign firms that want to invest in their jurisdictions and that in case such firms decide to do business in their jurisdictions through a joint venture, the local partner will not be able to enforce any commitment for TT that it may have extracted from the foreign partner as a condition for the joint venture.

4. CAI makes Headway in Dealing with the Problem of Unfair Competition from SOEs

For the first time in an international agreement to which China is a party, CAI contains a precise and comprehensive definition and inclusion of SOEs, by applying rules to SOEs at all levels of government, including local government, and by improving transparency. SOEs play an important role in the global

[35] *See*, *e.g.*, Request for Consultations By the European Union, *China — Certain Measures on the Transfer of Technology*, WTO Doc. WT/DS549/1/Rev. 1 (Jan. 8, 2019); OFF. OF THE U.S. TRADE REP.: EXEC. OFF. OF THE PRESIDENT, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (Mar. 22, 2018), https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF.

[36] P.C. MAVROIDIS & A. SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (2021) [hereinafter Mavroidis & Sapir].

economy and the WTO agreement places no restriction on their operation, provided they operate on a commercial basis (see Part III:C). However, well before China's WTO accession, and increasingly since, concerns about the competitive distortions caused by China's large SOE sector have been prevalent.[37]

A notable omission from China's accession protocol to the WTO was a definition of an SOE, which proved to be a cause of confusion and major disputes. The CAI refers to SOEs as 'Covered Entities' and establishes criteria to recognise them. These criteria go beyond full or majority ownership to include the power of the state to appoint directors and to control the decisions of the enterprise through "any other ownership interest" or even without "any ownership stakes". Firms granted monopolies by the state are also defined as SOEs. The definition applies at "all levels of government", which includes the operation of SOEs owned by local and regional governments. Under Section 2 Article 3 of the CAI, covered entities must "act in accordance with commercial considerations in the purchases and sales of goods or services in the territory of the Party …" and not discriminate.

5. CAI provides New Disciplines on Subsidies in the Covered Service Sectors.

The CAI's disciplines on subsidies in services represent a major improvement since the WTO only covers subsidies in goods trade. Subsidy disciplines under the Agreement on Subsidies and Countervailing Measures (ASCM)[38] and China's accession protocol date back to when China was a relative minnow in global trade. As China rose to be the world's largest trading nation, dissatisfaction with aspects of these agreements grew. The dissatisfaction is heightened by the increasing importance of services in the global economic activity and trade, since the WTO disciplines do not cover subsidies in services. The intention to negotiate disciplines on subsidies in services was included in Article XV of GATS, but these negotiations never took off.

The most important innovation of CAI is to cover subsidies in the eligible service sectors covered by the CAI. However, CAI's enforceable provisions relate only to

[37] At the time of China's WTO accession, SOEs accounted for a large share of economic activity in China. They still account for between 23% and 28% of GDP in China today, compared to about 15% in the EU, *see* CHUNLIN ZHANG, WORLD BANK, HOW MUCH DO STATE-OWNED ENTERPRISES CONTRIBUTE TO CHINA'S GDP AND EMPLOYMENT? (July 15, 2019), https://documents1.worldbank.org/curated/en/449701565248091726/pdf/How-Much-Do-State-Owned-Enterprises-Contribute-to-China-s-GDP-and-Employment.pdf.

[38] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter ASCM].

transparency (notification) and consultation relating to subsidies. If a subsidy above a certain size is found to exist, the subsidising party is not required to remove the subsidy or to accept the complainant's countervailing measures, but only to use its best endeavours to find a solution. Neither the China-US Phase One deal nor RCEP include new provisions on subsidies, so the CAI is a step forward.

6. Under the CAI, China undertakes Modest Commitments on Labour and Environmental Standards.

Potentially important for the WTO are the CAI's sustainable investment provisions, which cover labour and environmental standards. Such provisions are commonly included in the EU's and the US's bilateral or regional agreements. However, this is the first time that they have been adopted by China, which has opposed including these disciplines in WTO agreements. However, the sustainable investment provisions are not subject to the state-to-state dispute settlement mechanism, only to review by an expert group on request by one of the parties (a 'naming-and-shaming' approach).

By negotiating the CAI, China has shown that it is willing to consolidate (bind) its progress on investment liberalisation under its FILs into an international treaty, and that it intends to continue making Chinese firms confront world-class competition on their own turf. In the covered service sectors, though the liberalisation is far from complete, it affects all foreign investors and not just those from the EU.

Moreover, by agreeing to disciplines on transparency about subsidies, SOEs, and forced technology transfer, China has taken another step towards promoting 'competitive neutrality' between firms that are state-owned (or state-influenced) and private firms, including both Chinese and foreign firms. Considering the commitments that China made on TT and intellectual property protection in its Phase One deal with the US, with the CAI, China is also signalling, both at home and abroad, that it wants to deal with the major concerns raised by foreign firms competing in China or with Chinese firms in overseas markets.

C. WTO Law and the Case of SOEs [39]

1. Treatment of SOEs in the WTO Multilateral Agreements

[39] This section elaborates on L. Borlini, *When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements*, 33(2) LEIDEN J. INT'L L. 313 (2020).

There is no textual reference to the term 'SOEs' in the WTO Agreements. Until very recently, trade scholars barely even mentioned SOEs because they were not seen as a WTO problem. But there is no doubt that many provisions of the WTO are applicable to SOEs.[40] WTO agreements do not contain any provisions differentiating between approaches to property rights at the domestic level.

Yet, to a limited extent, state capitalism is regulated. This is the case when SOEs' positions overlap with a different legal status (e.g., 'state-trading enterprise' (STE), 'monopoly or exclusive service supplier', 'public body'). Chief among the provisions regarding the role of state in trade relations is Article XVII of the GATT.[41] Under such provisions, each member undertakes that its state trading enterprises (STEs), SOEs or private enterprises operating under state-conferred monopolies or privileges shall, with respect to purchases or sales involving either imports or exports, act in a non-discriminatory manner and make such purchases and sales solely in accordance with commercial considerations.[42] Article XVII GATT is, however, of limited use in regulating the booming nature of today's state capitalism. Not only is its application restricted to the above-referred commercial transactions, but it is also marked by some uncertainty with respect to the principle of national treatment.[43] Furthermore, case law has been significantly weakened by the finding that it suffices for STEs to act in a non-discriminatory manner to comply with the provision.[44]

The scope of Article VIII of the GATS — and, hence, its potential inclusion of SOEs — is even narrower than the provision in the GATT, since it only applies to monopoly suppliers and exclusive service suppliers. Also, the resulting discipline is weaker. Essentially, Article VIII(1) GATS stipulates that, in the supply of the monopoly service in the relevant market, monopolies or exclusive service providers do not act in a manner inconsistent with that member's obligations under Article II of the same agreement, which codifies the MFN principle, and its

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[40] 1 P.C. MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE 403–405 (2016) [hereinafter Mavroidis].

[41] General Agreement on Tariffs and Trade, Art. XVIII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

[42] *See* E.U. PETERSMANN, *GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform*, *in* STATE TRADING IN THE 21ST CENTURY 71, 80–81 (T. Cottier & P.C. Mavroidis, eds., 1998).

[43] Andrea Mastromatteo, *WTO and SOEs: Overview of Article XVII and Related Provisions of the GATT 1994*, 16(4) WORLD TRADE REV. 601 (2017).

[44] Mavroidis, *supra* note 40, at 403–405; Leonardo Borlini & Peggy Clarke, *International Contestability of Markets and the Visible Hand: Trade Regulation of State-owned Enterprises between Multilateral Impasse and New Free Trade Agreements*, 26(3) COLUM. J. EUR. L. 84, 94–97 (Jan. 2020).

specific commitments.[45] Article VIII(2) prohibits the "abuse of [a supplier's] monopoly position" when it competes outside the scope of its monopoly rights, if the member country has made a specific commitment to fair dealing.[46] Since the application of the national treatment principle in the GATS is limited to sectors in which a state party has taken on specific commitments, in many WTO members, service providers who enjoy a monopoly in some strategic sectors are not subject to this requirement.

More meaningfully, the WTO rules on government subsidies provide a more focused scope of coverage of SOE activities. The ASCM also mirrors the ownership-neutral philosophy of the GATT/WTO. Hence, it does not impose any obligation regarding SOEs. However, the application of its provisions to SOEs has proved rather troublesome: in determining the existence of a subsidy, a central issue is the meaning of the term 'public body' in the ASCM. The question of how to determine whether an entity is a public body becomes particularly challenging when the entity involved is an SOE. According to the ASCM, a subsidy could be conferred by a government, a public body, or a private body that has been 'entrusted or directed' by the government to make a financial contribution.[47] But the boundary between a government and a public body is not crystal clear. It is controversial whether the two terms are functionally equivalent, or the term 'public body' covers something that is not covered by the term 'government'. [48] Such characterisation is relevant for the subsidy assessment under the ASCM because, in many situations, the state confers a subsidy not through the government itself but through entities affiliated with or controlled by the government. SOEs could thus constitute a ready means for providing subsidies in a non-transparent way. Indeed, the 'SOE-as-provider' problem has led to intense conflict under the ASCM and attracted growing academic and policy debate.[49]

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[45] GATS, *supra* note 33, art. VIII(1).

[46] *Id.* at art. VIII(2).

[47] ASCM, *supra* note 38, at art. 1.1(a).

[48] Appellate Body Report, *United States — Definitive Antidumping and Countervailing Duties (China)*, ¶ 317, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011).

[49] *See also* Thomas J. Prusa & E. Vermulst, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through*, 12 WORLD TRADE REV. 197, 227–228 (2013); Ru Ding, *Public Body or Not: Chinese State-Owned Enterprises*, 48(1) J. WORLD TRADE 167, 170–171 (2014); Ming Du, *China's State Capitalism and World Trade Law*, 63(2) INT'L & COMP. L. Q. 409, 430–433 (2014); M. Wu, *The "China Inc." Challenge to Global Trade Governance*, 57(2) HARV. INT'L L. J. 261, 300–305 (2016); J. Wang, *State Capitalism and Sovereign Wealth Funds: Finding a "Soft" Location in International Economic Law, in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 405, 411–414 (C.L. Lim eds., 2016); Mavroidis & Sapir, *supra* note 36.

As such, in 2011, the AB of the WTO emphasised that a 'public body' determination involves a careful assessment of the core features of the entity concerned and its relationship with government, and especially whether the entity exercises authority on behalf of government. Despite certain ambiguity on the legal standard formulated by the AB, as well as practical reasons for interpreting the rules on subsidies in a more adaptive way, the adjudicatory body of the WTO has lately reaffirmed the rigid boundary of the existing rules, explicitly rejecting the US argument that government-ownership may be a dispositive factor to making an entity a public body.[50] Having refuted the formal ownership test, the AB should clarify what else matters. Case law shows that the AB insisted on drawing a malleable line, providing a multi-factor test to reply to the question above. Still, the additional evidence that may be required is not entirely clear at present and the AB seems to enjoy a wide degree of discretion in this regard.[51] On the other hand, 'SOEs-as-providers' can be captured by Article 1.1(a)(1)(iv) of the ASCM that provides for private bodies, which have been entrusted or directed to carry out the functions that constitute potential subsidies (such as transfer of funds).[52] But not all governmental measures vis-à-vis a private intermediary would necessarily amount to 'entrustment' or 'direction', since both terms demand a significant degree of command-and-control authority on the side of the government. Moreover, the use of private vehicles poses more of an evidentiary challenge for Panels, as they must examine how the ostensibly private conduct can be ascribed to a government entity, which will not necessarily be eager to disclose that relationship to the rest of the world.

2. The Regulation of SOEs in the Protocols of Accession

Recognising the limitations of general multilateral trade rules, the WTO members chose to add customised disciplines for certain members on an ad-hoc basis through the contracting process of the negotiation of protocols of accession. China's Protocol of Accession includes the most elaborated provisions on non-market economies (NMEs), as well as additional constraints on the activities and financial situation of SOEs.[53] The treatment in the text, however, was very concise, and essentially provided China-specific adjustments to existing WTO agreements such as the ASCM. The Protocol did not quell the anxieties about the Chinese

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[50] Appellate Body Report, *United States — Countervailing Duty Measures on Certain Products from China*, ¶ 317–322, WTO Doc. WT/DS437/AB/R (adopted Dec. 18, 2014).

[51] J. Pauwelyn, *Treaty Interpretation or Activism? Comment on the AB Report on United States — ADs and CVDs on Certain Products from China*, 12 WORLD TRADE REV. 235, 235–237 (2013).

[52] Appellate Body Report, *United States — Countervailing Duty Investigation on DRAMS from Korea*, ¶ 113, WTO Doc. WT/DS296/AB/R (adopted June 27, 2005).

[53] WTO, Accession of the People's Republic of China, WTO Doc. WT/L/432 (Nov. 23, 2001).

state sector and did not provide any specific provision addressing the long-standing issue of SOEs as pass-through vehicles for subsidies. Also, the discipline on subsidies to SOEs is solely applied to subsidies contingent on the trade in goods. The provisions on regulatory preferences other than subsidies are vague and again, cover only the activities of SOEs in relation to trade in goods. Thus, the current state where virtually no jurisdiction seems to be happy with the treatment of SOEs comes as no surprise and as discussed in the previous part, the CAI may help address some of these concerns.

3. The WTO Rules on Transparency and the Negative Spill-over Effects of SOEs' Operations

Disclosure of information on SOEs is essential to understand the extent to which state action — the only thing subject to international trade rules — alters the terms of competition in relation to the operation of SOEs. Article XVII GATT imposes on WTO members transparency obligations in the form of notification of the products which are imported into or exported from their territories by STEs and information to supply to other parties. However, the main challenge of the Working Party on STEs, since it first took up its mandate in 1995, continues to be improving the rate of compliance by WTO members with the duty to notify.[54]

Article 25 of the ASCM requires all WTO members to notify the Committee on Subsidies and Countervailing Measures of any industrial subsidy, regardless of whether they are conceded to a private enterprise or an SOE, that falls under the definition provided by Article 1.1 and that is specific under the meaning provided by Article 2 of the same treaty.[55] This obligation is particularly relevant for SOEs because, as mentioned above, the competitive advantages which they frequently enjoy often take the form of subsidies (direct or indirect). Yet, the duty to notify subsidies in the industrial sector is not enforced by any sanctions and, historically, WTO member states' compliance with this provision has been extremely low.[56]

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[54] *See generally* Leonardo Borlini, *A Crisis Looming in the Dark: Some Remarks on the Reform Proposals on Notifications and Transparency*: *'In Clinical Isolation.' Is There a Meaningful Place for the World Trade Organization in the Future of International Economic Law?*, QUESTIONS INT'L L. (Jan. 31, 2020), http://www.qil-qdi.org/in-clinical-isolation-is-there-a-meaningful-place-for-the-world-trade-organization-in-the-future-of-international-economic-law/.

[55] ASCM, *supra* note 38, at art. 25.

[56] While the SCM requires notification by each WTO member state to the Committee on Subsidies Countervailing Measures of all specific subsidies by June 30 of each year, no matter if granted to private or public enterprises, it does not provide for any effective sanction if reports are not submitted or if they are incomplete. The poor compliance record testifies that this occurs frequently. For an in-depth illustration of this problem and reinforced transparency provisions on subsidies in contemporary free trade agreements, see Leonardo Borlini & Claudio Dordi, *Deepening International Systems of Subsidy Control: The*

Information about SOEs is also collected through the Trade Policy Review Mechanism (TPRM),[57] which helps improve transparency. Nonetheless, the TPRM too, especially regarding countries with limited transparency, fails to provide a picture that is sufficiently complete for understanding the actual and potential impact of negative spillovers on the trading system as a result of SOEs' operations.[58] Moreover, in the absence of a shared definition of SOEs, of any understanding of the reasons why these enterprises should be subjected to multilateral rules, or according to which they can violate the principles of non-discrimination, it is not possible to derive a general duty of transparency on the impact of negative spillovers on the trading system because of SOEs' operations.

D. The DSS: From a Success Story to a Paralysing Crisis

The WTO DSS has operated to the satisfaction of most members and other stakeholders for more than twenty-five years. It was drafted at the Uruguay Round (1986-94) of multilateral trade negotiations which established the WTO by improving upon the GATT mechanism of dispute settlement.[59] The latter was not binding in that the adoption of report of the *ad hoc* panels, established in case of trade disputes, could be blocked by the losing party. When this became more frequent in the 1990's, the system fell into disrepute.

As agreed in the Uruguay Round, *first*, a permanent AB was added to review the legal reasoning and findings of the panels in view of the importance of accuracy and consistency of interpretation in a system which would include soon many

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(Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements, 23(3) COLUM. J. EUROPEAN L. 551, 571–574 (2017).

[57] The Trade Policy Review Mechanism (TPRM) is the main transparency instrument of the WTO, providing opportunities for a process of collective evaluation of the trade policies and practices of individual members. The TPRM was founded to some degree in public choice theory, and Annex 3 of the Marrakesh Agreement recognizes the inherent value of domestic transparency of government decision making. Efforts to enhance transparency have been a feature of the multilateral trading system since its creation in 1947, as denoted by the various requirements concerning notification and publication of information contained in the original General Agreement on Tariffs and Trade. For TPRM, see *WTO Analytical Index: Guide to WTO Law and Practice, Annex 3: Trade Policy Review Mechanism*, WTO, https://www.wto.org/english/res_e/publications_e/ai17_e/tprm_e.htm.

[58] Robert Wolfe, *Sunshine Over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?*, 16(4) WORLD TRADE REV. 713, 715 (2017).

[59] *See Dispute Settlement System Training Module: Chapter 1: Introduction to the WTO Dispute Settlement System: The Dispute Settlement Understanding*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s2p1_e.htm.

more participants and covering several new WTO complex trade agreements. *Second*, the blocking by the losing party was made practically impossible by requiring a reverse consensus in order not to adopt a panel or AB report.[60] The success of this balanced system is evidenced by the fact that in almost all disputes the losing party has complied with the rulings of the report, or has agreed upon compensation with the other party, thus re-establishing the balance of commitments agreed in the negotiations.

Another positive feature concerns the interpretation of the agreements submitted to the DSS: not only have most rulings been broadly accepted on technical matters, but often also those concerning sensitive issues, such as non-discrimination under the GATT, custom duties, technical barriers, and health issues (though with some exceptions as to antidumping and subsidies). The AB has managed to define the dividing line between trade and non-trade matters in areas relating to the protection of health, animal species, and the environment, issues that have been a focus of public opinion world-wide, irrespective of the economic interest involved.

The system worked smoothly at full gear until 2017. More than six hundred cases were brought to the DSS resulting in more than three hundred panel reports and 140 AB reports. Afterwards the DSS started to show fatigue, especially because of the length of the proceedings well beyond the speedy resolution that had been envisaged. Rising complexity and numbers of disputes constituted the main contributors to the strain. In other words, the DSS which had been characterised as 'the jewel of the crown' became a 'victim of its own success'.[61]

The US after having raised a number of criticisms of the adjudicatory approach of the AB ("judicial activism") and concerns about certain interpretations (as to "zeroing", subsidies and SOEs), then started to block the periodic renewal of the AB positions by preventing the required consensus within the WTO membership.[62] During the Trump administration, with the continued blocking of

[60] While rendering the system more binding the drafters inserted important flexibility into the Dispute Settlement Understanding (DSU) that governs the dispute settlement system (DSS): reports are binding only for the future, after a reasonable period of time to be agreed upon; agreed compensation is possible in lieu of compliance with an adverse report; countermeasures in case of non-compliance has to be strictly proportionate to the trade loss suffered.

[61] Giorgio Sacerdoti, *The Challenge of Re-establishing a Functioning WTO Dispute Settlement System*, CTR. INT'L GOVERNANCE INNOVATION (Apr. 20, 2020), https://www.cigionline.org/articles/challenge-re-establishing-functioning-wto-dispute-settlement-system/ [hereinafter Sacerdoti].

[62] The US specific criticisms to the operations of the AB could be summarized as follows: (a) the AB not respecting the ninety days deadline for rendering its reports; (b) the AB addressing issues not necessary to decide a dispute, thus de facto rendering unauthorized

new appointments, the AB had to cease operations as of the end of 2019 due to a lack of judges. In this environment, panel proceedings — while continuing to take place — are ultimately ineffective. Losing parties are able to systematically appeal unfavourable panel reports to the non-operational AB, thus paralysing the DSS's outcomes.

An interim 'appellate arbitration' has been agreed to by twenty-two WTO members, based on an initial proposal by the EU and Canada to bypass the unavailability of the AB, however, it has not been triggered up to now.[63] Its effectiveness has not been tested and is in any case inapplicable when the appellant is not a participant, as testified by the many pending disputes where panel reports have been appealed 'in the void'. Since none of the proposed solutions for relaunching the AB members selection process have reached the required consensus, the paralysis of the DSS has become a major concern for the operation of the multilateral trading system in general.[64]

1. Key Issues to be Addressed

Several solutions have been proposed to overcome the current stalemate. Most WTO members agree that in order to do so: (i) the DSS must remain binding in order to ensure the effectiveness of the rule-based multilateral system; (ii) an AB is necessary to ensure coherence to the case law and the 'stability and predictability' (Art. 3.2 Dispute Settlement Understanding (DSU))[65] of the rule-based multilateral trading system.

It has been stressed by many that some of the problems raised by the US do not depend solely on the AB. For example, the overstepping of the ninety-day panel deadline is due in part to the scarcity of resources allotted to the AB, with just seven part-time member positions. In the case of the ninety-day proceedings deadline, the WTO members could improve operations if they were to give

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'advisory opinions'; (c) the AB treating its previous decisions as 'binding precedent' thereby blocking the possibility of changes of interpretation; and (d) by its 'gap-filling' interpretation the AB would have overstepped its competence to the prejudice of the WTO members altering the balance of rights and duties among them. *See* Robert E. Lighthizer, *Report on the Appellate Body of the World Trade Organization*, U.S. TRADE REP. (Feb., 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

[63] *See*, Council of the EU Press Release 7112/20, Council Approves a Multi-party Interim Appeal Arbitration Arrangement to Solve Trade Disputes (Apr. 15, 2020).

[64] Sacerdoti, *supra* note 61.

[65] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

guidance on procedures and on the interpretation of contested or obscure provisions under Art. IX.2 of the WTO Agreement.[66] Unfortunately, this has never happened.

In 2019, New Zealand Ambassador Walker, then chair of the General Council, was appointed as 'Facilitator' to unblock the stalemate. His technical proposals ('quick-fix') are considered by most WTO members to be adequate or, in any case, to provide a good basis to resolve the issues.[67] The stability of the case-law is important to ensure the predictability of the rules, since interpretation of any provision in dispute by the AB is relevant for all members. This does not mean that precedents should be binding per se, a statement that in fact the AB has never endorsed.

E. A Club of Clubs Approach

Since the WTO's establishment in 1995, membership has expanded to include China, Russia, and thirty-four smaller economies at various stages of development.[68] China, a developing country, has become the world's largest trading nation. Meanwhile, the fabric of production and patterns of consumption have been transformed and services have increased their share in global value from 54% to 64% and this was reflected in their increased share of trade.

The modus operandi of the WTO needs to be rethought to reflect changes in the global economy, the diversity of its membership, and the increased range of trade issues it is required to tackle. In doing so, the WTO must find new ways to advance open and predictable trade without abandoning its basic principles of non-discrimination (i.e., MFN and national treatment). It must move from a mindset where everyone must agree on everything for any deal to be struck, to one where deals are struck as waypoints towards the ultimate objective.

Waypoints are not novel to the organisation even if it is not always thought of as such. For example, under *Special and Differential Treatment* (SDT), developing countries retain certain flexibilities until they self-designate as advanced countries. Under Article XXIV of the GATT and Article VI of the GATS, members can

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[66] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. IX.2 [hereinafter Marrakesh Agreement].

[67] Agenda Item 4, *Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)*, WTO Doc. JOB/GC/222 (Oct. 15, 2019) [hereinafter Agenda Item 4].

[68] *Current Status of WTO Accessions*, WTO, https://www.wto.org/english/thewto_e/acc_e/acc_status_e.htm.

strike *regional agreements* that discriminate against other members provided they fulfil certain conditions.[69]

Other examples of waypoints in the WTO are *plurilateral agreements*, on specific issues among a subset of members. These include agreements that have been sanctioned by all members as part of a broader deal and which are not MFN (e.g., the Government Procurement Agreement sanctioned in the Uruguay Round) and 'critical mass' agreements in which members accounting for a large share of trade undertake obligations but allow the benefits of the agreement to be applied on an MFN basis (open plurilaterals). These agreements can take different forms ranging from currently on-going Joint Statement Initiatives (JSIs) to market access in areas of health and environmental goods. They can be effective waypoints towards non-discrimination insofar as they have reasonable provisions for acceding to them.

Changing the mindset of the WTO from the pursuit of difficult-to-achieve universal deals to regional and plurilateral waypoints for a functioning WTO in rule-making, i.e. the WTO should move in the direction of a 'Club of Clubs' approach as suggested several years ago by Robert Lawrence.[70] In Lawrence's conception, the 'Clubs' are plurilateral agreements, but one could explore the concept in the context of other exceptions to non-discrimination under WTO rules as well.

As a 'Club of Clubs', the WTO would actively promote trade opening and predictability in all forms of tracks: regional, plurilateral, and multilateral realising its functions more effectively. It would support these processes through hard disciplines when possible — i.e., international treaties subject to legal recourse — but also through softer consultation, coordination, and peer review mechanisms (as at OECD or the Stability Forum). Operating the WTO in this way would require devising a more proactive role for the Secretariat and for the committees. The DG's role would need to shift from lead promoter of multilateral deals to lead promoter of all trade deals that conform to WTO rules.

IV. RECOMMENDATIONS FOR POLICY MAKERS

Trade is an important driver of economic advancement and globalisation, but it creates not only winners but also losers. This brings a backlash against globalisation and further politicisation of trade policy. One major challenge is to make it more inclusive, supported by a better functioning trading system. Hence, improving the functioning of the WTO and bringing back its centrality are vital.

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[69] GATT, , at art. XXIV; GATS, *supra* note 33, at art. VI.

[70] *See* Robert Z. Lawrence, *Rulemaking Amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection*, 9(4) J. INT'L ECON. L. 823 (2006).

The globalisation debate must address sensitive trade matters stemming from globalisation of economic relations of sovereign powers. The following proposals could serve as reminders for WTO members to take steps in the reform process.

Recommendation 1: National security and public morals are valid exceptions to the application of multilateral rules, but they should not be abused under unilateral restrictive measures. As a first step, members should commit to a credible standstill on new trade-restrictive measures, including trade-distorting subsidies. Unilateral restrictive measures destabilise GVCs and put at risk one of the main positive results of trade liberalisation — stability and predictability of the trade regime for all. Legitimate national concerns, such as the availability of medical devices and vaccines in the face of pandemics, should be addressed through enhanced cooperation and mutual support rather than through unilateral restrictive measures.

Recommendation 2: In developing WTO responses to new issues at the multilateral level, due reference should be made to the experience of existing RTAs, with a view to adapting and generalising lessons where appropriate. From each of the member country priority areas cited by DG Ngozi Okonjo-Iweala upon her appointment, – ranging from COVID response to reform of dispute settlement, WTO rulebook enhancement, services trade facilitation, environmental action, subsidies disciplines (fisheries, agriculture and industry), and enhanced special and differential treatment, among other areas — there are relevant insights to be drawn from recent RTAs.

Recommendation 3: On issues where a formal binding international trade agreement is not yet workable, it may be possible to promote convergence and coordination via issue-specific focused dialogue on emerging trends in trade-related policies, standards, and regulations, including development of best practices and recommendations. Recent RTAs such as the CPTPP and RCEP provide examples of structures developed with such objectives in mind, as does the experience with soft law development at the OECD.

Recommendation 4: The agreed, yet to be ratified EU–China CAI provides a relevant illustration of means to bridge divisive issues between leading trading nations with different domestic economic models. Potentially relevant examples include the agreement's precise and comprehensive definition of SOEs, disciplines on subsidies in covered services, commitments on labour and environmental standards, and transparency provisions.

Recommendation 5: Potential multilateral disciplines on SOEs should consider the experience in recent RTAs (e.g., the CPTPP and USMCA) with obligations related to non-discrimination and commercial considerations. These cover services and

investment, domestic operations of firms, respect for the principle of national treatment, and SOE compliance with requirements for non-discrimination and commercial considerations.

Recommendation 6: The ASCM should be updated, drawing on RTA experiences by providing an illustrative list of public bodies and their characteristics, including with respect to SOEs. This would reduce uncertainty in the application of the relevant rules. Under the potential reform of the WTO dispute settlement mechanism, cases related to the ASCM should be informed by the proposed illustrative list of public bodies in the ASCM, but the Dispute Settlement Body (DSB) or other committees should be empowered to provide further clarification within the bounds of the illustrative list.

Recommendation 7: The promptness of DSS proceedings is important and should be reinstated at all levels, including panels, appeal, and compliance through appropriate updating of relevant procedural rules (including improved efficiency of panel proceedings) and by administrative and financial arrangement within the WTO. A smoother functioning of the negotiating process of the WTO could help reduce the pressure on the DSS. This could include giving guidance and authoritative interpretations of contentious issues and provisions, for instance under Art. IX.2 WTO Agreement or otherwise.[71] Work on updating the DSS should start promptly and be carried out speedily as a priority.

Recommendation 8: WTO reforms should include improved transparency and notifications, particularly with respect to subsidies. The rule making in this area should focus on creating incentives for WTO members to fully comply with their notification obligations. Transparency is the basis of trust. The system cannot rely solely on notifications by governments. The Secretariat has shown that it is fully capable of collecting public information and organising it to enhance transparency. The Secretariat should be instructed or encouraged to use its resources in cooperation with other international agencies in advancing this agenda.

Recommendation 9: Where universally applicable trade rules are currently out of reach, the WTO should be able to flexibly accommodate regional and plurilateral agreements under its auspices. The conclusion of negotiations under JSIs — for example the JSI on Services Domestic Regulation, on e-commerce, and on Investment Facilitation — could be a good starting point. This approach would promote further liberalisation (including via more proactive engagement of the Secretariat and related committees) while also fostering conformity of any such partial agreements with existing WTO rules. However, for the JSIs to become more inclusive and to increase the participation of developing countries,

[71] Marrakesh Agreement, *supra* note 66.

developmental concerns need to be addressed. It is also important for negotiating members to pay regard to transparency.

Recommendation 10: Through its Trade Policy Reviews, and in cooperation with the World Bank and others, the WTO should play a more active role in the arena of domestic trade reforms and promotion of unilateral trade liberalisation. This could include provision of advisory support drawing on the cumulative experience of members, relevant international organisations, and the WTO Secretariat.

Economic, financial and other developments in the global economy create volatilities and even geopolitical fragmentation which ultimately increase the pressure on trading relations. The politicisation of trade supported by anti-globalisation narratives usually ends up with increased protectionism. However, our experience suggests that these measures have not been complementary to developmental objectives of trading nations, especially developing countries. An effective trading system and a properly functioning WTO serve to cushion the problems. Therefore, challenges faced by the multilateral system need to be resolved. Many reform proposals have been tabled so far to address the challenges, but with divergencies. A recoupling of differing approaches is vital. We recall the WTO members have had sufficient experience of resolving many issues under diverse schemes, hence best practices under regional and plurilateral agreements could be multilateralised, if they wish to achieve larger gains from trade and eliminate the uncertainty looming out of global economic upheavals.

APPENDIX

Table 1. WTO DG Priorities and RTAs: An Illustrative Comparison

Priority Areas identified by WTO DG	**RTA & Related Experience**	**Observations**
COVID-19 Response: Support World Health Organisation's COVID-19 Vaccines Global Access (COVAX); tackle export restrictions and vaccine nationalism; mobilise manufacturing capacity for pharmaceutical products without discouraging R&D.	COVID-19 Policy Co-ordination at Regional Level: i) Internal regional market openness: EU acts to maintain free circulation of goods, air freight, critical workers & essential services; Guidelines March 16, 26 & 30, 2020.[72] ii) Open plurilateral to support free trade in essential goods: Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic, initiated by New Zealand and Singapore on April 15, 2020 and signed by seven other nations.[73]	RTAs provide supplementary assurance of market openness in relevant product areas. Note: At WTO, under TRIPS, there exists flexibility for the United Nations (UN) Least Developed Countries (LDCs) lacking domestic pharmaceutical production capacity.[74] Perhaps this might be exploited in the event LDC access to vaccines continues to lag.

[72] European Commission Press Release IP/20/468, COVID-19: Commission Presents Guidelines for Border Measures to Protect Health and Keep Goods and Essential Services Available (Mar. 16, 2020).

[73] Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic, Sing.-N.Z., Apr. 16, 2020, MINISTRY FOREIGN AFF.: SING (Singapore), https://www.mfa.gov.sg/Overseas-Mission/Geneva/Mission-Updates/2020/04/Singapore-New-Zealand-Declaration-on-Trade-in-Essential-Good.

[74] General Council, *Least Developed Country Members: Obligations Under Article 70.8 and Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products*, WTO Doc. WT/L/971 (Dec. 2, 2015).

DSB: Unblock the system to work for all WTO members including small developing countries & LDCs. Amb. Walker's recommendations (2019) can be used as a starting point.[75]	USMCA: Reinforces state-to-state dispute settlement, removes or limits investor-state dispute settlement (ISDS).[76] RCEP: Dispute settlement is only state-to-state, led by consultation, with remaining disputes subject to possible ad hoc panels convened in a forum of the litigants' choice;[77] ISDS is cited as a matter for future talks, with uncertain outcomes.[78]	RTAs employ similar state-to-state dispute settlement, which can be binding; underscore hesitancy on provisions for ISDS in the trade context. Note: Some proposals for WTO appear to focus on narrowing the scope of future determinations by the DSB and enforcing existing WTO commitments and procedures in an expeditious manner that avoids imposing new obligations on members.[79]
WTO Rulebook: Update rules to cover the digital economy and e-commerce; promote trade inclusiveness for MSMEs, women, and developing countries.	RCEP: E-Commerce chapter cross references World Customs Organization (WCO) paperless trade provisions, authentication, consumer	RTAs have shown benefits of alignment in approaches to dealing with practical matters around international e-commerce governance while allowing flexibility

[75] Agenda Item 4, *supra* note 67.

[76] *USMCA: A Legal Interpretation of the Panel-Formation Provisions and the Question of Panel Blocking*, CONGRESSIONAL RES. SERV. (Jan. 30, 2020), https://sgp.fas.org/crs/row/IF11418.pdf.

[77] Diane Desierto, *The Regional Comprehensive Economic Partnership (RCEP)'s Chapter 19 Dispute Settlement Procedures*, EUR. J. INT'L L.: TALK! (Nov. 16, 2020), https://www.ejiltalk.org/the-regional-comprehensive-economic-partnership-rceps-chapter-19-dispute-settlement/ [hereinafter Desierto].

[78] *RCEP – Bigger, But Is It Better? Taking Stock of Asia's New Free Trade Agreement*, HOGAN LOVELLS SEA VIEW (Dec. 2020), https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2020-pdfs/2020_12_23_global_regulatory_alert_rcep_bigger_-but_is_it_better.pdf.

[79] *Dispute Settlement in the WTO and U.S. Trade Agreements*, CONGRESSIONAL RES. SERV. (Feb. 1, 2021), https://crsreports.congress.gov/product/pdf/IF/IF10645.

	protection; duty free electronic transmissions; cybersecurity (nationally determined); with weak protections against data localisation or data transfer limits, due to exemptions for 'essential security interests'.[80] USMCA digital trade (factsheet) (also US-Japan Digital Trade Agreement):[81] offers duty-free treatment for digital products, protection for free flow of data and against data localisation requirements; also offers some cybersecurity, consumer protection, privacy commitments, and safe harbour provisions for Internet Service Providers (ISPs) and platforms.[82] Singapore's Digital Economy Agreements[83] with partners such as (i) New Zealand & Chile, and (ii) Australia provide	in some areas (e.g., specifics of privacy and cybersecurity requirements). Note: WTO talks are underway and could deliver a framework for Ministers to consider in time for MC12 in June 2022.

[80] Regional Comprehensive Economic Partnership Agreement, ch. 12, Jan. 1, 2022, ASSOCIATION OF SOUTHEAST ASIAN NATIONS [ASEAN] SECRETARIAT, https://rcepsec.org/wp-content/uploads/2020/11/All-Chapters.pdf.

[81] USMCA, *supra* note 13,; *see also Fact Sheet on U.S.-Japan Digital Trade Agreement*, OFF. U.S. TRADE REP. (Oct. 2019), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/october/fact-sheet-us-japan-digital-trade-agreement.

[82] Anupam Chander, *The Coming North American Digital Trade Zone*, COUNCIL FOREIGN REL. (Oct. 9, 2018), https://www.cfr.org/blog/coming-north-american-digital-trade-zone.

[83] *What Are Digital Economy Agreements (DEA's)?*, MINISTRY TRADE & INDUSTRY, SING., https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements.

	for digital trade facilitation and improved interoperability of standards.	
Trade in Services: Enhance rules concerning domestic regulation and investment facilitation.	An OECD survey in 2014 found 105 regional agreements notified under GATS including nearly ninety with WTO-plus measures. Many had sector specific chapters (e.g., forty-four had a chapter on financial services; thirty-six had on Information and Communications Technology (ICT)). Some had coverage of investment, competition, labour mobility, and capital.[84] ISDS has proven controversial, e.g.: (i) North American Free Trade Agreement (NAFTA) partners reduced provisions for ISDS in USMCA (2020);[85] (ii) In CPTPP, New Zealand carved out exemptions from certain	Progress was made among twenty-three members in the negotiations for the *non-WTO* Trade in Services Agreement (as of 2020).[87] This may indicate areas where gains may be had in a new WTO plurilateral: national treatment in some issues, ratchet clauses that prevent backsliding on liberalisation steps, and transparency. Note: WTO negotiations for an investment facilitation framework face an ISDS perceptions challenge, even though ISDS is not included.[88] The actual deal may aim to improve transparency, predictability, and procedural efficiency; and establish ombudsperson mechanisms.

[84] Iza Lejarraga, *Deep Provisions in Regional Trade Agreements: How Multilateral-Friendly?: An Overview of OECD Findings*, (OECD Trade Pol'y Papers, NO. 168, 2014).
[85] USMCA, *supra* note 13.

	ISDS provisions via side-letters.[86]	WTO talks (JSI) are advancing among sixty-five members to discipline domestic regulation of services, aiming for: clear, predictable, transparent, and least-trade-restrictive regulation.[89]
Environmental Action, including Climate Change: Support green and circular economy; revive environmental goods and services negotiations, while remaining vigilant for risk of protectionist measures.	CPTPP provides an example with some mandates (e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) membership); requires a domestic law on environmental protection, but flexible on specifics.[90] Requires compliance with	CPTPP and RCEP may foreshadow limited scope for specific disciplines multilaterally on these issues; environmental provisions may be relegated to a plurilateral deal such as the proposed Environmental Goods Agreement (EGA).[94] Note: The WTO's EGA

[87] Trade in Services Agreement (TISA), GLOBAL AFF.: CAN. (Jan. 1, 2020), https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/tisa-acs.aspx?lang=eng#:~:text=The%2023%20Members%20of%20the,Peru%2C%20South%20Korea%2C%20Switzerland%2C (Canada).

[88] George A. Berman et al., *Insulating a WTO Investment Facilitation Framework from ISDS*, COLUM. CTR. SUSTAINABLE INV. FDI PERSP., NO. 286 (2020), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3694&context=faculty_scholarship.

[86] *See also* Hon. David Parker, *New Zealand Signs Side Letters Curbing Investor-State Dispute Settlement*, N.Z. GOV'T (Mar. 9, 2018), https://www.beehive.govt.nz/release/new-zealand-signs-side-letters-curbing-investor-state-dispute-settlement.

[89] *Participants in Domestic Regulation Talks Conclude Text Negotiations, On Track for MC12 Deal*, WTO (Sept. 27, 2021), https://www.wto.org/english/news_e/news21_e/serv_27sep21_e.htm.

[90] *CPTPP Outcomes: Environment*, AUSTRALIAN GOV'T: DEP'T FOREIGN AFF. & TRADE (Feb., 2019), https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-environment#:~:text=The%20CPTPP%20Environment%20Chapter%20aims,environmental%20protection%20in%20CPTPP%20countries.

	International Labour Organisation (ILO) labour rights and co-operation on labour issues.[91] EU RTAs have trade and sustainable development chapters based on (i) international labour conventions (ILO), (ii) multilateral environmental accords (e.g., the Paris Agreement), (iii) a level playing field in relevant standards; (iv) sustainable management of natural resources.[92] RCEP lacks an environmental chapter,but does affirm the UN Convention on Biological Diversity.[93]	is similar to the WTO's Information Technology Agreement covering electronics. The nearly complete EGA should provide a basis for duty free treatment for a broad swath of goods trade (perhaps 5% of global goods trade).
Fisheries Subsidies: Prohibit subsidies for illegal, unreported, and unregulated fishing, as well as overfishing and overcapacity; conclude broad terms of accord soon, with MC12 to settle	EU trade and sustainable development chapters in RTAs cover sustainable management of natural resources including fisheries,[95] e.g., in the EU-Vietnam accord, Article 13.9.[96] The EU-United	RTAs often inadequately discipline fisheries subsidies, but some do cover fisheries management and mandate support for international agreements on fisheries.

[94] *Environmental Goods Agreement (EGA)*, WTO, https://www.wto.org/english/tratop_e/envir_e/ega_e.htm.
[91] *Id.*
[92] *Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)*, EUR. COMMISSION (July 11, 2017) [hereinafter TSD].
[93] Desierto, *supra* note 77.
[95] TSD, *supra* note 92.
[96] Free Trade Agreement, European Union-Viet., June 12, 2020, O. J. L 186/2.

modalities for implementation.	Kingdom (UK) RTA includes fisheries management specifics.[97] USMCA disciplines subsidies (Article 24.20),[98] and fisheries management. CPTPP includes disciplines and transparency requirements on fish measures that contribute to overfishing, overcapacity and illegal, unreported and unregulated fishing.[99]	Note: WTO action in this area could address a gap in the existing global institutional framework.
Agricultural Trade: Market access for developing country exports, reduction of trade-distorting domestic support, and ending export restrictions (with exemption for purchases under the World Food Program).	EU-UK Trade and Cooperation Agreement provides duty-free, quota-free access for agricultural products, though border controls still apply.[100] USMCA builds on NAFTA duty-free market access provisions to provide improved	WTO actions to improve the global regime could build upon the partial liberalisation achieved via WTO Uruguay Round and various RTAs. Trade distorting support and export restrictions have been inadequately disciplined in RTAs.

[97] Elena Ares, *UK-EU Trade and Cooperation Agreement: Fisheries*, HOUSE OF COMMONS LIBR. (Mar. 18, 2021), https://researchbriefings.files.parliament.uk/documents/CBP-9174/CBP-9174.pdf.

[98] USMCA, *supra* note 13, at ch. 24.

[99] *Promoting Sustainable Economic Development and Maintaining High Levels of Environmental Protection are Key Aspects of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, N.Z. FOREIGN AFF. & TRADE, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/environment/.

[100] *Trade and Agriculture Commission: Final Report (Executive Summary)*, GOV'T U.K.: DEPT. INT'L TRADE (Mar. 12, 2021), https://www.gov.uk/government/publications/trade-and-agriculture-commission-tac/trade-and-agriculture-commission-final-report-executive-summary.

	openness in the Canadian dairy market for US exporters, updated SPS disciplines (requiring non-discriminatory science-based transparency for NAFTA partners).[101]	
Industrial Subsidies: Agree on stronger disciplines, including coverage of support via SOEs.	CPTPP disciplines support for SOEs and non-commercial behaviour by SOEs, with exemptions and exclusions related to public interest & small-scale operations.[102] This closes some gaps on SOEs in the WTO framework. RCEP omits disciplines in this area, with only an indirect reference to the applicability of competition provisions to entities regardless of form of ownership.[103]	Some current generation RTAs are beginning to address this issue. But these remain incomplete. Note: The EU, Japan and the US made a joint proposal for reform of the WTO Agreement on Subsidies and Countervailing Mechanisms. This would clarify definitions and tighten disciplines on subsidies (see: declaration of January 2020).[104]
Revisit Special and Differential Treatment (SDT):	RTAs tend to establish a goal of equivalent reciprocal treatment, even	RTAs have shown that convergence toward reciprocal treatment can

[101] *USMCA vs NAFTA: Major Differences Between USMCA and NAFTA in Key Chapters*, INT'L TRADE ADMIN.

[102] *What does the CPTPP Mean for State-Owned Enterprises?,* GOV'T CAN. (Sept. 12, 2018), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/sectors-secteurs/state_owned-appartenant.aspx?lang=eng.

[103] Terence P. Stewart, *Regional Comprehensive Economic Partnership Signed on November 15, 2020*, WASH. INT'L TRADE ASS'N (Nov. 16, 2020), https://www.wita.org/blogs/regional-comprehensive-economic-partnership/.

[104] *Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union*, EUR. COMMISSION (Jan. 14, 2020), https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf.

Some developing countries are voluntarily forgoing SDT (e.g., Brazil);[105] the WTO Trade Facilitation Agreement combines aligned trade objectives, but offers tailored, member driven support.	though transition periods are often included especially for developing partners (e.g., the EU's Economic Partnership Agreements are 'reciprocal, but asymmetrical').[106]	be economically beneficial. Increased openness and competition can be a catalyst for productivity, growth, and improved competitiveness.
WTO Procedural Reforms: Ensure members meet existing transparency and notification obligations; improve functioning of organisation via additional on-line tools, such as existing e-agendas for meetings; address quickly emerging trade challenges maybe through yearly WTO Ministerials; improve agility of WTO, including consideration of the consensus requirement for decisions.	CPTPP includes a chapter on transparency, providing for stake-holder comment periods on proposed member country measures; allowance of reasonable time between decisions on new measures and implementation; requires purpose and rational of decisions to be presented; appeals are held before a neutral tribunal.[107] Members have recourse to dispute settlement on transparency and notification requirements. In due course, experience from establishing the new RCEP Secretariat may	RTA experience with institutional development (e.g., NAFTA, Association of Southeast Asian Nations (ASEAN) Economic Community, EU internal market) provides useful reference points for WTO. For example, means for tracking delivery by members on transparency commitments and means of promoting compliance.

[105] *Brazil Foreign Ministry to Forego Special Treatment at WTO*, AGENCIA BRASIL (Apr. 2, 2019), https://agenciabrasil.ebc.com.br/en/internacional/noticia/2019-04/brazil-foreign-ministry-forego-special-treatment-wto.

[106] *Economic Partnerships*, EUR. COMMISSION (Feb. 28, 2022), https://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/.

[107] *CPTPP Outcomes: Transparency*, AUSTRALIAN GOV'T: DEP'T FOREIGN AFF. & TRADE (Jan., 2019) https://www.dfat.gov.au/sites/default/files/cptpp-transparency.pdf.

	provide lessons for WTO reform.[108]	
Strengthen WTO Secretariat: Shift from silos to a task-based approach, provision of services to membership for implementation, monitoring, dispute settlement, and negotiations.	USMCA includes a six year review point, at which time the ministerial-level Free Trade Commission of representatives from each of the three parties will report on any recommendations for the USMCA operation (Article 34.7).[109]	RTAs often employ an interagency approach to negotiation and management. Consider establishing a periodic independent review of the functioning of the Secretariat to ensure adequate resources, appropriate tasking and methods by reference to the best practices of different RTAs.

Sources: WTO Conference Series; and General Council, Appointment of Next DG.[110]

[108] Simon Lester, *Deborah Elms on the Absence of ISDS, Prospects for a Secretariat, and Dispute Settlement in RCEP*, INT'L ECON. L. & POL'Y BLOG (Nov. 18, 2020), https://ielp.worldtradelaw.net/2020/11/the-absence-of-isds-in-rcep.html.
[109] USMCA, *supra* note 13, ch. 34.
[110] WTO Conference Series; General Council, Appointment of Next DG, *supra* note 9.