

WTO Plurilateral Initiatives, Global Challenges and the New World Economic Order

Progetto UNIBO-MAECI

Il sistema multilaterale degli scambi come piattaforma per affrontare le
sfide globali: gli Accordi e le Iniziative plurilaterali dell'OMC quali
strumenti di governance del nuovo ordine economico mondiale



Edited by Elisa Baroncini
in collaboration with Niccolò Lanzoni and Giulia Bortino

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Global Challenges, the Crisis of the WTO, and the Need for New Rules for the World Economic Order - The Plurilateral Response

Elisa Baroncini

Summary: 1. Introduction – 2. Lights and Shadows of the Multilateral Trading System -3. Plurilateral Tools at the WTO – 4. The WTO Debate on Plurilateral Initiatives -5. Conclusions: The Role of the WTO and the Reasons for this Research Project.

Keywords: WTO Crisis – WTO Formal and Informal Plurilateral Tools – WTO Joint Statement Initiatives – WTO Incorporation of Plurilateral Tools – Transparency.

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1. Introduction

The crisis of the World Trade Organization (WTO) raises a fundamental question: how can the multilateral trading system respond to contemporary global challenges when agreement among all its Members is so difficult to achieve? The demands of sustainable development, the transformation of the economy, the profound changes in global trade, the geopolitical tensions call for new international rules, while persistent negotiating deadlock undermines the WTO's capacity to fulfill its mandate. In this context, plurilateral tools offer an effective and valuable means to advance common objectives and contribute to the creation of new rules for international trade in the XXI century; and the WTO system emerges as an essential global platform to promote and facilitate this process.

In this introductory chapter, we therefore intend to set the scene for the research project on WTO plurilateral initiatives, global challenges and the new world economic order (“Il sistema multilaterale degli scambi come piattaforma per affrontare le sfide globali: gli Accordi e le Iniziative plurilaterali dell’OMC quali strumenti di governance del nuovo ordine economico mondiale”), generously co-funded by the Italian Ministry of Foreign Affairs and International Cooperation (MAECI)¹, with the support also of the Jean Monnet Chair SustainEUorPlanet².

The chapter considers the reasons at the basis of the unprecedented disruptions of international trade and the difficulties of the Marrakesh system, and reconstructs the debate on plurilateral initiatives within the multilateral trading framework. It emphasizes that plurilateral tools within and outside the WTO grounded in transparency, inclusiveness and meaningful participation also by developing and least-developed countries, can help renew international trade rules and foster multilateral cooperation through the formula of variable geometry.

¹ See the dedicated website at the link <https://site.unibo.it/wtoplurilaterals/en>.

² See the dedicated website at the link <https://site.unibo.it/sustaineuorplanet/en>.

2. *Lights and Shadows of the Multilateral Trading System*

Over almost 80 years of activity, the multilateral trading system, initially embodied in the GATT³ and now functioning under the WTO Agreements⁴, has served as a central pillar of global economic and non-economic development. The Marrakesh framework, in particular, offered predictability and stability for international exchanges, through its rulebook extended to services and trade-related intellectual property rights, the expanded and more articulated discipline on free trade for goods, and the sophisticated, rules-based, institutional structure and dispute settlement mechanism for dealing with daily management of international issues, complaints, systematic discussions and periodical rounds of negotiations to update, improve, enlarge the WTO legal framework. The reasonable certainty and reliability of a multilateral trade system are qualities that economic operators highly value and prioritize when planning their business strategies and making long-term investments to realize them. In fact, these features create a very positive context which promotes business collaboration, contributing to peaceful and fruitful relations between countries and peoples.

Currently, the WTO system represents approximately 98 per cent of world trade, and recent economic research “estimates the increase in global prosperity associated with WTO membership at around US\$ 855 billion, equivalent to an average gain of about 4.5 percent of GDP per member”⁵. Evidence also shows that “around 85 per cent of WTO members experienced a decrease in relative consumer prices”⁶ compared to the global average due to their WTO membership. With specific reference to developing countries⁷, one of the most notable trends has been income convergence. “From 1995 to 2023, the average global per capita income, adjusted for inflation, increased by about 65 per cent, but it nearly tripled in low-income and middle-income economies”, and “[b]etween one-fifth and one-third of this unprecedented income convergence can be attributed to trade cost reductions”, while “the percentage of individuals living in extreme poverty decreased from 40 per cent in 1995 to 10 per cent in 2024”⁸.

Despite the notable positive aspects and outcomes just recalled, the multilateral trading system is nevertheless going through the most severe period of disruption “in the past 80 years”⁹. There are several reasons at the basis of the current crisis. *Inter alia*, the great success of the enlargement of its membership -which rose from the 23 original contracting parties of the GATT 1947 to the present

³ *General Agreement on Tariffs and Trade*, adopted 30 October 1947, entered into force 1 January 1948, *UNTS*, 1950, Vol. 55, p. 187.

⁴ See *Marrakesh Agreement Establishing the World Trade Organization* (with final act, annexes and protocol), concluded at Marrakesh on 15 April 1994, entered into force 1 January 1995, *UNTS*, 1995, Vol. 1867.

⁵ Robert STAIGER, *A Critical Juncture for the World Trading System: What the Evidence Tells Us*, *WTO Blog*, 23 September 2026, available at https://www.wto.org/english/news_e/news26_e/blog_23sep26_492_e.htm.

⁶ *Ibid.*

⁷ On the WTO activities supporting the concrete inclusion in the multilateral trading system of the Small and Vulnerable Economies, see the contribution by Giulia BORTINO in this book (*The Informal Group of Small, Vulnerable Economies: Past Achievements, Present Challenges and Future Ambitions*).

⁸ WTO, *World Trade Report 2026 - A Critical Juncture for the World Trading System*, Geneva, September 2026, p. 51. See also Ralph OSSA, *Trade and Inclusiveness: How to Make Trade Work for All*, *WTO Blog*, 10 September 2024, available at https://www.wto.org/english/blogs_e/ce_ralph_ossa_e/blog_ro_10sep24_e.htm.

⁹ Cf. the remarks of the WTO Director General Okonjo-Iweala to the Opening Session of MC14, *MC14 Opens in Yaoundé with Call to Reinvigorate WTO in Time of Crisis*, WTO Press Release, 26 March 2026.

166 economies subscribing to the Marrakesh Agreements- certainly enables us to qualify the WTO system as a universal treaty system. At the same time, it has, however, produced a very articulated WTO Members' composition, characterized by different economic systems -“ranging from free-market democracies to state-capitalist autocracies”¹⁰- and levels of development: this results in the multilateral trading system being often called to the highly challenging, and often unsuccessful, task of finding a synthesis among too many dissimilar domestic political interests and targets. Another consequence of the WTO large and non-homogeneous membership is that the current tariff binding schedules of concessions, reached more than 30 years ago, do not reflect anymore the new economic and geopolitical equilibria: but Article XXVIII of the GATT, the *ad hoc* provision for the modification of schedules, seems not to express the optimal procedures to effectively address the so-called “latecomers” problem, and provide the increased WTO membership with a new balanced set of reciprocal tariff concessions. In fact, rich industrialized countries have low tariff rates due to their decades-old membership in the multilateral trading system, which has produced, round after round, reductions in their customs duties: they have therefore “limited remaining bargaining leverage to offer in exchange for the substantial concessions they now seek from emerging partners”¹¹. “[T]he arrival of powerful new actors”, still having high domestic tariffs, has thus created “an imbalance”, an asymmetry freezing the functioning of “the traditional engine of reciprocity”¹².

Likewise, the emergence of new economic sectors and the strong interconnection between trade policy and environmental, climate, energy, and, more generally, sustainability policies¹³ show that the current WTO rulebook is no longer sufficient to adequately address the various and pressing new global economic and trade-related challenges. With reference, e.g., to the digital economy, it is a fact that WTO rules were written “before the rise of cloud computing, artificial intelligence, digital services, and cross-border data flows”, and that companies working in this field would greatly benefit from the adoption of new international disciplines as the latter would represent a baseline, a rules-based trade environment creating a level-playing field aiding enterprises “to invest, manufacture and compete with greater certainty”¹⁴.

However, the decision-making mechanism of the WTO's political pillar remains based on positive consensus¹⁵. Hence, despite the profound transformation of the global economy and the

¹⁰ Cf. Henry GAO, Weihuan ZHOU, (*When*) *Can Trade Wars Be Good?*, *World Trade Review*, 2025, pp. 515-519.

¹¹ WTO, *World Trade Report 2026 - A Critical Juncture for the World Trading System*, cit., p. 138.

¹² Ibid.

¹³ On health policies and free trade and the relation between trade liberalization and labour standards see in this book the contributions by Susanna VILLANI (*The External Dimension of EU Health Law within the Multilateral Trading System*) and also by Lorenza MOLA and Claudia PAGLIA (*Trade-and-Labour Regulation and WTO Law, or 'Never the Twain Shall Meet'? An Analysis of Recent Practice in the WTO and outside It*).

¹⁴ Remarks by Derek Chapman, Director of Trade Policy, Micron, presented at Working Session 6, *What is the role of the WTO?*, *WTO Public Forum 2026 – Powering the Future*, 16 September 2026, whose record is available at the link <https://www.youtube.com/live/qo6kw3J55LM>.

¹⁵ The positive consensus rule is based on Article IX, para. 1 of the Agreement Establishing the World Trade Organization (WTO Agreement), pursuant to which “[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement”. The recalled provision establishes a preference for the consensus rule “thereby

consequent need for adaptation and modernization of WTO disciplines, the multifaceted nature of WTO membership has made it a daunting task to converge on new rules to revise and expand the legal framework of the multilateral trading system. In particular, since China's 2001 entrance into the multilateral trading system, the WTO's negotiating function has stalled on almost all major issues, even if the "China Shock"¹⁶ is, of course, not the only cause. Nevertheless, central to this serious political blockage is the overwhelming fact that China's WTO membership was not followed by the much-expected transformation to a market-based model for Beijing's increasingly powerful economy. The Chinese economic model is solidly grounded in strict governmental central planning, and its industrial policy is strongly export-oriented, "often carried out by state-owned enterprises (SOEs) that either engage in exporting directly or supply capital and inputs to exporters"¹⁷, and its export strength has also been attributed to "currency manipulation"¹⁸. Especially the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) has proven inadequate to preserve a level playing field for non-Chinese economic operators competing with Beijing's players¹⁹. In the US, significant economic pressure from China's production system affected manufacturing industries in key swing states for the presidential elections. At an initial stage, the United States sought to counter China's export strength by challenging what it considered WTO-incompatible Chinese practices before the multilateral dispute settlement mechanism and by directly adopting trade defense measures. China sharply defended itself before the WTO adjudicators and also filed complaints against several US countervailing and antidumping duties and safeguard measures. The Appellate Body issued a number of reports concluding that the US trade defense measures did not comply with WTO law. The United States heavily contested the appellate decisions; however, it lacked sufficient political power to secure the adoption of authoritative interpretations by the WTO General Council or the Ministerial Conference intervening in the contested WTO reports²⁰, or to directly achieve a

fostering a culture of inclusivity and agreement" (Chang-fa LO, *Unlocking WTO Decision-Making – Rebuilding Cooperative Consensus Culture to Remedy the Efficiency Deficit*, Singapore, 2026, at p. 12). However, consensus is not mandatory, as Article IX, para. 1, second sentence, provides for the subsidiary decision-making of voting. In practice, nevertheless, WTO Members consistently observed the positive consensus rule, conferring a *de facto* veto on each single WTO Member (ibid.).

¹⁶ See the research *The China Trade Shock - Studying the Impact of China's Rise on Workers, Firms, and Markets*, conducted by Professors David Autor (MIT), David Dorn (University of Zurich), Gordon Hanson (Harvard Kennedy School), whose presentation, papers and data are available at the link <https://chinashock.info/>.

¹⁷ Judith GOLDSTEIN, Alan SYKES, *The Perils of Institutional Rigidity, or How the WTO Helped to Sow the Seeds of Trump*, *World Trade Review*, 2025, pp. 481-488, at p. 484. On the problematic integration of the Chinese economy into the WTO system cf. also Petros C. MAVROIDIS, André SAPIR, *China and the WTO: Why Multilateralism Still Matters*, Princeton, NJ, 2021; Alan O. SYKES, *The Law and Economics of International Trade Agreements*, Cheltenham, UK, 2023, chapter 15, pp. 422-449;

¹⁸ Judith GOLDSTEIN, Alan SYKES, *The Perils of Institutional Rigidity* ..., cit., at p. 484. For an in-depth study on currency manipulation and the multilateral trading system, see Robert W. STAIGER, Alan O. SYKES, "Currency Manipulation" and *World Trade*, *World Trade Review*, 2010, pp. 583-627.

¹⁹ On the issue of subsidies and the reform of their discipline in the WTO, see in this book the contributions by Elettra BARGELLINI and Luca RUBINI (*WTO Subsidy Rules in an Era of Industrial Policy: Implications for the Multilateral Trading System*), and by Mandy Meng FANG (*Reforming the WTO Subsidy Rules for Clean Energy Transition: Is the Plurilateral the Way Out?*).

²⁰ Pursuant to Article IX, para. 2, of the WTO Agreement "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements ... The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members".

revision of the relevant WTO rules²¹. The United States then decided to sideline political efforts and dispute settlement engagements, so as to exercise the veto power to block the appointment of Appellate Body members, and thus the functioning of the two-tier stage of the WTO dispute settlement system²², and adopt unilateral measures raising tariffs against, in particular, China, formally invoking the WTO national security exception to justify its domestic measures.

3. Plurilateral Tools at the WTO

The majority of WTO Members refused to get trapped in the paralysis of the multilateral trade negotiations, promoting formal and informal plurilateral solutions within the WTO system²³. With reference to dispute settlement, it was possible to establish an interim alternative to the blocked Appellate Body under Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This is the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), an appellate arbitration mechanism preserving the two-tier dispute settlement mechanism to be respected by those Members accepting it. Notified to the WTO on 30 April 2020²⁴, the MPIA now counts 60 parties, with Barbados being the last country to join the plurilateral²⁵.

Highly relevant, discussed, and commented on are the four so-called Joint Statement Initiatives (JSIs), adopted by like-minded countries at the 11th WTO Ministerial Conference (MC11) held in

²¹ The procedure for revising the Marrakesh Agreements is enshrined in Article X of the WTO Agreement, the provision devoted to “Amendments”.

²² On the criticism of the United States concerning the WTO case law, and the progressive blockage of the functioning of the Appellate Body through the exercise of the veto power cf. *inter alia* Elisa BARONCINI, *Il funzionamento dell'Organo d'appello dell'OMC: bilancio e prospettive*, Bologna, 2018.

²³ For an overview of plurilaterals at the WTO cf. the contribution by Giovanna ADINOLFI in this book (*Plurilateralism and the Multilateral Trading System: Mapping the Legal Landscape of Variable Geometry*), and *inter alia* Gisela GRIEGER, *The WTO's Negotiating Function Towards Plurilaterals and New Trade Challenge*, EPRS | European Parliamentary Research Service, April 2024; International Chamber of Commerce, *What Next for Plurilateral Trade Agreements? - Expanding and Strengthening Plurilateral Agreements in the Multilateral Trading System*, Policy paper, July 2026.

²⁴ See JOB/DSB/1/Add.12, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes - Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, 30 April 2020.

²⁵ See JOB/DSB/1/Add.12/Suppl.19, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, 17 March 2026. On the MPIA cf. the contribution in this book by Davide GRESPLAN (*Reassessing the MPIA: Legal Nature, Institutional Developments, and Its Role in the Multilateral Trading System*), and also Elisa BARONCINI, *Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement*, *Federalismi.it*, no. 22/2020, 22 July 2020, pp. 1-33; Carlo CANTORE, “High Hopes” - *Treaty Interpretation in the First Two Appeal Arbitrations under the MPIA*, in Elisa Baroncini (Ed.), *The WTO as a Major Actor of Sustainable Development and its Reform Process – The EU Approach*, Bologna, forthcoming, 2026; Henry GAO, *Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement*, *Journal of International Economic Law*, 2021, pp. 534-550; Joost PAUWELYN, *The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?*, *World Trade Review*, 2023, pp. 693-701; Peter VAN DEN BOSSCHE, Sai Sumana CHAMARTY, *The MPIA and the Future of WTO Dispute Settlement*, WTI Working Paper Series, WTI Working Paper no. 12/2025.

Buenos Aires in 2017²⁶. They are the JSIs on electronic commerce²⁷, on developing a framework on investment facilitation²⁸, on launching a working group on micro, small and medium-sized enterprises (MSMEs)²⁹, and on advancing ongoing talks on domestic regulation in services trade³⁰. These initiatives represent a shift towards plurilateral negotiations, enabling a subset of WTO Members to progress discussions on contemporary trade issues when there is no political consensus to start and advance them, and they are achieving remarkable results.

In July 2024, a proposal for an Agreement on Electronic Commerce (ECA) was finalized³¹, and subsequently proposed for incorporation into Annex 4 of the WTO Agreement³². The E-Commerce Agreement is also at the center of a very important development, reached on 28 March 2026 at the 14th Ministerial Conference (MC14) taking place in Yaoundé: 67 Members decided to bring the ECA into force through interim arrangements, thus bypassing the lack of positive consensus of the WTO membership to include this plurilateral agreement in Annex 4³³.

In February 2024, the text of the Investment Facilitation for Development Agreement (IFDA) was completed³⁴. The IFDA is currently participated in by 131 WTO Members, with a marked majority of developing countries, that “largely shaped”³⁵ the content of this plurilateral agreement. The IFD Agreement is also open to all the other non-participating WTO Members, based on the most-favoured-nation (MFN) treatment, and aspires to “facilitat[e] the flow of foreign direct investment between the Parties, particularly to developing and least-developed country Parties, with the aim of fostering sustainable development”³⁶. Despite the very high and cross-cutting support, the IFDA has not yet been incorporated into Annex 4 as a formal WTO plurilateral due to the veto of some WTO Members³⁷.

²⁶ On the WTO JSIs see *inter alia* Fiama ANGELES, Riya ROY, Yulia YARINA, *Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges*, Graduate Institute Geneva, December 2020; Sait AKMAN, Bozkurt ARAN, Axel BERGER, Carlos P. BRAGA, Rajeev KHER, Douglas LIPPOLDT, Stormy-Annika MILDNER, Arun NAIR, Claudia SCHMUCKER, Maarten SMEETS, *Reforming the WTO through Inclusive and Development-Friendly Plurilaterals*, *Journal of World Trade*, 2023, pp. 875-888.

²⁷ WT/MIN(17)/60, *Joint Statement on Electronic Commerce*, 13 December 2017.

²⁸ WT/MIN(17)/59, *Joint Ministerial Statement on Investment Facilitation for Development*, 13 December 2017.

²⁹ WT/MIN(17)/58, *Joint Ministerial Statement Declaration on the Establishment of a WTO Informal Work Programme for MSMEs*, 13 December 2017.

³⁰ WT/MIN(17)/61, *Joint Ministerial Statement on Services Domestic Regulation*, 13 December 2017.

³¹ See WTO, *Information on the Agreement on Electronic Commerce*, Geneva, 2025. On ECA, cf. the chapter by Carlo Cantore (Interim Arrangements for the E-Commerce Agreement: Implications for Dispute Settlement) in this book.

³² WT/GC/W/955, *Incorporation of the Agreement on Electronic Commerce into Annex 4 of the WTO Agreement – Communication from the Members Parties to the Agreement on Electronic Commerce*, 5 December 2024. Annex 4 of the WTO Agreements currently contemplates only two WTO Plurilateral Agreements, the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement (GPA). For an analysis of the GPA, see the contribution by Anna Panarella in this book (*Going Plurilateral or Preferential? The WTO Government Procurement Agreement and Its Role in the Modern Global Economy*).

³³ WT/MIN(26)/42, *Declaration on Interim Arrangements for the Agreement on Electronic Commerce (28 March 2026)*, 27 April 2026.

³⁴ WT/MIN(24)/17, *Joint Ministerial Declaration on the Investment Facilitation for Development Agreement*, 25 February 2024. On the IFD Agreement, see the contribution by Niccolò Lanzoni in this book (*Beyond Protection and Liberalisation: Emerging Trends in International Investment Facilitation*).

³⁵ See the presentation of the IFDA on the WTO website, *The Investment Facilitation for Development (IFD) Agreement*, at the link https://www.wto.org/english/tratop_e/invfac_public_e/invfac_intro_e.htm.

³⁶ Article 1 on “Objectives” of the IFDA.

³⁷ See *infra* the subsequent paragraph of this chapter.

Currently, only the results of the JSI on services domestic regulation (SDR) have already entered the WTO rulebook. They have been introduced by 57 parties as commitments in their schedules under the General Agreement on Trade in Services (GATS), while a total of 72 WTO Members have declared their intention to follow the same institutional choice³⁸.

The WTO also hosts various informal groupings considering highly relevant trade-and issues, or sensitive review topics of already existing WTO Agreements. *Inter alia*, in 2020, they were set up: the Informal Working Group on Trade and Gender³⁹; the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade⁴⁰; the Trade and Environmental Sustainability Structured Discussions (TESSD)⁴¹. In 2021, the Fossil Fuel Subsidy Reform initiative was created⁴²; and in 2023, Informal Talks on Trade and Industrial Policy were introduced⁴³.

4. The WTO Debate on Plurilateral Initiatives

Despite their relevance and success among a significant part of the WTO membership, accepting the JSIs within the WTO, on the basis of the consensus rule, remains quite challenging. India, South Africa, and Namibia have been formal opponents to the Joint Statement Initiatives, and they were joined in their position by Türkiye with reference to the IFDA. The first three Members dissented from the launch and discussion of the JSIs within the WTO institutional framework, as well as from the suggestion to formally incorporate them into Annex 4 or to integrate their results by modifying the GATT or GATS schedules⁴⁴. Those developing countries claimed that to start negotiating a new agreement within the multilateral trading system, the previous adoption -by all the WTO membership through positive consensus- of a formal mandate foreseeing the discussions on that agreement was needed; however, the JSIs were announced by a group of Members on the sidelines of the 11th WTO Ministerial Conference in Buenos Aires⁴⁵. Furthermore, India, South Africa and Namibia affirmed that, once the draft of such agreement, contemplated in a WTO negotiating mandate, was finalized, Article X, para. 9, of the WTO -pursuant to which “[t]he Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide *exclusively by consensus* to add that agreement to Annex 4”⁴⁶- had to be observed in order to adopt and qualify that new agreement as a WTO plurilateral legal source officially built-in in Annex 4. They thus rejected

³⁸ On the JSI concerning services and its implementation cf. the contribution in this book by Jan BOHANES (*Services Domestic Regulation - Good Regulatory Practices as part of the WTO Rulebook under a Plurilateral Initiative Implemented on an MFN Basis*), and infra the subsequent paragraph of this chapter.

³⁹ Cf. the chapter in this book by Maryam QASIM (*Trade and Gender Initiatives at the WTO: Analyzing Critical Mass Approach*).

⁴⁰ See the contribution in this book by Roberta MAZZERO (*Trade and Plastic Pollution: The Role of the WTO Dialogue on Plastics and its Relationship with the Global Plastics Treaty*).

⁴¹ See the dedicated WTO webpage *Trade and Environmental Sustainability* at the link https://www.wto.org/english/tratop_e/tesdd_e/tesdd_e.htm.

⁴² See the contribution in this book by Federico SISCARO (*Saving Multilateralism through Informality? The WTO Fossil Fuel Subsidy Reform Initiative in an Era of Fragmentation*).

⁴³ *Members Share Views in Informal Talks on Trade and Industrial Policy*, WTO Press Release, 26 September 2023.

⁴⁴ See WT/GC/W/819/Rev.1, *The Legal Status of “joint Statement Initiatives” and their Negotiated Outcomes – Revision*, 30 April 2021.

⁴⁵ Beyond the WTO documents quoted above, see also ...

⁴⁶ Emphasis added.

the suggestion, advanced by Canada, that if a proposed plurilateral agreement achieves “critical mass of coverage” and is “open” -i.e., it extends its advantages to non-parties through the presence, in its proposed text, of the most-favoured nation clause- no WTO membership consensus is required for that agreement to be listed among the plurilaterals of Annex 4⁴⁷. Likewise, India, South Africa, and Namibia did not consider to be WTO-compatible the other solution promoted by the JSIs’ supporters, when technically feasible -i.e., the addition of the outcomes of a JSI into an already in force WTO Agreement through unilateral amendments to the JSIs’ supporters’ schedules. This approach was chosen to implement the Joint Initiative on Services Domestic Regulation⁴⁸: in this case, each participant inscribed the Reference Paper on SDR⁴⁹ as an “additional commitment” under GATS Article XVIII in its own schedule of specific commitments⁵⁰. But for India, South Africa, and Namibia, this unilateral modification of GATS schedules by the group of WTO Members accepting the SDR Reference Paper confuses amendments to rules (providing for a demanding decision-making mechanism⁵¹) with revisions to schedules (which *inter alia*, pursuant to Article XVIII of the GATS, require a prior negotiation involving all the WTO membership⁵²).

Türkiye joined the three opponents in March 2024, when its Ambassador at the General Council, examining the proposal to incorporate the IFDA into Annex 4 of the WTO Agreement⁵³, declared that his Government dissented to the inclusion of new WTO plurilaterals into the multilateral trading system without the positive consensus of all the WTO Members, as requested by Article X of the WTO Agreement, that “accords Members the right to ensure *the integrity of the WTO legal framework*”, conferring them, in this perspective, a veto power also for proposed plurilaterals not creating “any rights and obligations for the non-parties”⁵⁴. Even so, this year, at MC 14, Türkiye lifted its objection to the formal IFDA incorporation into the WTO legal framework⁵⁵. Indeed, Türkiye’s Minister of Trade Ömer Bolat explained that “[n]otwithstanding its long-standing concerns and reservations on the matter, Türkiye made this decision in order to bolster the WTO and support the development needs of the wider membership, especially the African continent”⁵⁶.

Also South Africa reconsidered its opposition to the WTO incorporation of the JSIs’ agreements, albeit limiting its revised approach, strictly focused to the IFDA, probably bearing in

⁴⁷ JOB/GC/201, *Strengthening and Modernizing the WTO: Discussion Paper – Communication from Canada*, 24 September 2018.

⁴⁸ WT/L/1129, *Declaration on the Conclusion of Negotiations on Services Domestic Regulation*, 2 December 2021.

⁴⁹ INF/SDR/2, *Joint Initiative on Services Domestic Regulation – Reference Paper on Services Domestic Regulation*, 26 November 2021.

⁵⁰ “Members shall inscribe the disciplines in Section II in their Schedules as additional commitments under Article XVIII of the Agreement” (INF/SDR/2, cit., Section I, para. 7).

⁵¹ See Article X of the WTO Agreement and Article VI, para. 4, of the GATS.

⁵² “Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member’s Schedule” (Article XVIII, devoted to “Additional Commitments”, of the GATS).

⁵³ WT/GC/W/927, *Incorporation of the Investment Facilitation for Development Agreement into Annex 4 of the WTO Agreement – Communication from the Members Parties to the Agreement*, 8 March 2024.

⁵⁴ WT/GC/M/210, *Minutes of the Meeting Held in the Centre William Rappard and in Virtual Format on 21-22 March 2024*, 17 May 2024, para. 8.42, emphasis added.

⁵⁵ WTO Press Release, *MC14 Opens in Yaoundé with Call to Reinvigorate WTO in Time of Crisis*, 26 March 2026.

⁵⁶ WT/GC/284, *The Views of Türkiye on the 14th WTO Ministerial Conference Outcomes – Communication from Türkiye*, 7 April 2026. See also *WTO: Türkiye Demands Clarity on E-Transmissions, Rejects 4-Year Moratorium*, TWN, 10 April 2026.

mind that such Agreement is sustained by more than three-quarters of the WTO membership, i.e. 131 WTO members representing all regions, including “94 developing economies, 29 of which are least developed countries”⁵⁷. At the General Council meeting of December 2025, the representative of South Africa declared that “[w]hile at this stage we are not ready to land consensus for incorporation, we have no objection to having this item taken to the Ministers for discussion”⁵⁸. Therefore, South Africa has not completely abandoned its systemic concerns regarding the formal WTO incorporation of all JSI outcomes but has opted for a more pragmatic and constructive case-by-case approach⁵⁹. South Africa’s support for the transmission of the item on the incorporation of the IFDA into Annex 4 of the WTO Agreement for the MC14 agenda was very much welcomed by the IFDA parties, particularly by the developing countries supporting that JSI agreement⁶⁰.

Last but not least, it should be noted that while Namibia’s formal 2021 objection remains on the WTO record, there is nonetheless no public evidence that Namibia is still an active opponent of all WTO plurilateral initiatives today. On the contrary, very recently, India has also begun to soften its rigid stance against JSIs and informal plurilateral initiatives at the WTO, doing so through a new ad hoc communication within the debate on variable geometry in WTO reform discussions revitalized by the Ølberg Report⁶¹. Such Communication, circulated on 15 September 2026, and significantly entitled “Guiding Principles for Plurilateral Initiatives and Agreements at the WTO”⁶², recalls the centrality of the principle of multilateralism, and thus the right and duty of the Members “to preserv[e] the integrity of the WTO framework”⁶³; the nature, complementary to the WTO system, that has to characterize the plurilateral initiatives; and the need to respect “institutional competence and scope of the WTO”⁶⁴. In fact, plurilateral tools “concerning matters principally addressed in other international organizations, as well as initiatives that may extend beyond trade matters as covered by the Marrakesh Agreement, should be approached with due regard to institutional competence, coherence and the avoidance of duplication”, bearing in mind that “[s]uch initiatives should complement, rather than duplicate, or displace, work undertaken in other relevant international fora, and should preserve the coherence of the multilateral trading system and the distinct mandate of the WTO”⁶⁵. Recalling also that consensus-based decision-making has to be preserved, India seems to be now open to plurilaterals, provided that they can be thoroughly examined also by developing countries. This means ensuring that those WTO Members can participate in JSIs discussions in full transparency and meaningful engagement, as well as equipping developing countries with the

⁵⁷ WTO, *The Investment Facilitation for Development (IFD) Agreement*, July 2026, available at the link https://www.wto.org/english/tratop_e/invfac_public_e/invfac_intro_e.htm.

⁵⁸ WT/GC/M/222, *Minutes of the Meeting Held in the Centre William Rappard and in Virtual Format on 16-18 December 2025*, 13 February 2026, para. 10.18.

⁵⁹ On these aspects, see Danish SHAIKH, *The WTO at a Crossroads: Power, Development, and the Future of Global Trade - Interview with South Africa’s WTO Ambassador Mzukisi Qobo*, *The International Wire*, 4 February 2026.

⁶⁰ See the statements by Mozambique, Zambia, and Barbados at the December 2025 General Council meeting reported in WT/GC/M/222, cit., paras. 10.41, 10.175, 10.249.

⁶¹ JOB/GC/483, *WTO Reform – Written Report by Facilitator to the General Council - H.E. Mr Petter Ølberg (Norway) – Facilitator on WTO Reform*, 12 December 2025.

⁶² WT/GC/REFORM/W/14, *Guiding Principles for Plurilateral Initiatives and Agreements at the WTO – Communication from India*, 16 September 2026.

⁶³ WT/GC/REFORM/W/14, cit., para. 1.4.

⁶⁴ WT/GC/REFORM/W/14, cit., para. 3.1, lett. g.

⁶⁵ *Ibid.*

necessary tools to assess whether becoming part of a JSI is beneficial for them. Hence, through the requested set of safeguards ensuring that all Members “understand an initiative’s scope ... [and] its possible implications”⁶⁶, India appears to offer a procedural opening for plurilateral tools -the adoption of a set of safeguards⁶⁷- at the same time constantly seeking consensus to avoid fragmentation and any form of imposition on, or marginalization of, any WTO Member.

The inclusivity approach, benefitting developing and least-developed countries in order to promote plurilateral tools, is concretely advocated in the joint communication from New Zealand, Norway and Singapore dated 9 September 2026⁶⁸. The three WTO Members propose the creation of a platform to enable full and easy access to all the pieces of information concerning plurilateral initiatives, offering *inter alia* a “pool of experts available to provide advice to the interested developing or LDC Member”⁶⁹, a list of technical assistance tools and programmes offered by other international organizations, so as to close the gap of asymmetrical resources and expertise hindering the full, conscious and constrictive participation by all WTO Members.

The debate on variable geometry at the WTO is significantly supported by the important and constructive re-engagement of the United States in the multilateral trading system and its reform process. It is relevant the official communication circulated by the United States within the WTO reform discussions⁷⁰ fostered by the Ølberg Report⁷¹. In December 2025, also in view of the forthcoming 14th WTO Ministerial Conference, the US thus stated that, alongside the principle according to which “no obligation should be imposed on any Member without that Member’s consent”, another “reasonable principle” should be respected within the Marrakesh system, i.e. that “Members ... willing to consent to a new obligation should be able to forge a new agreement among themselves”⁷². In particular, the US encouraged plurilaterals “within the architecture of the WTO agreements”⁷³ -hence implicitly declaring the relevance of the multilateral trading system as a privileged platform to shape the new rules of the commerce of the XXI century, and the central and indispensable role of the WTO Secretariat, which the US has been nevertheless reproaching for its too independent and articulated activities agenda⁷⁴. Plurilateral agreements permitting WTO Members “that are ready to take on new commitments to do so in a reciprocal manner, while allowing other Members to join and gain benefits of those commitments in the future”⁷⁵, make it possible for “like-minded trading partners committed to fair and reciprocal trade to strengthen their ties for their mutual benefit” and represent “a priority” for the US⁷⁶. The North-American country declared to be

⁶⁶ WT/GC/REFORM/W/14, cit., para. 3.1, lett. e.

⁶⁷ Ravi Dutta MISHRA, *India Opens Door to Deals Among Smaller WTO Groups — With Conditions*, *The Indian Express*, 17 September 2026; Kirtika SUNEJA, *India Proposes 8 Guardrails in Softening of Stance on Plurilateral Pacts at WTO*, *The Economic Times*, 18 September 2026.

⁶⁸ WT/GC/REFORM/W/11, *Strengthening Inclusivity of Plurilateral Initiatives – Joint Communication from New Zealand, Norway and Singapore*, 9 September 2026.

⁶⁹ WT/GC/REFORM/W/11, cit., para. 4.

⁷⁰ WT/GC/W/984, *On WTO Reform – Communication by the United States*, 15 December 2025.

⁷¹ JOB/GC/483, *WTO Reform – Written Report by Facilitator to the General Council - H.E. Mr Petter Ølberg (Norway) – Facilitator on WTO Reform*, 12 December 2025.

⁷² WT/GC/W/984, cit., para. 2.1.

⁷³ WT/GC/W/984, cit., para. 2.2.

⁷⁴ WT/GC/W/984, cit., paras. 3.4 and 3.5.

⁷⁵ WT/GC/W/984, cit., 2.2.

⁷⁶ Ibid.

“frustrated by our inability to enter into meaningful agreements at the WTO with other Members that want to do so”⁷⁷, complaining about the few WTO Members vetoing new WTO plurilateral agreements, underlining that “[i]f the WTO is to have a future as a negotiating forum, it is likely to be for plurilateral negotiations”⁷⁸, and concluding that in case of “no path for Members to enter into plurilateral agreements at the WTO”, then “[t]rade negotiations will [nevertheless] happen, but not at the WTO”⁷⁹.

The US approach was promptly endorsed by the European Union. In its January 2026 submission on WTO reform, the EU, invoking predictability, fairness, and flexibility to innovate the multilateral trading system, noted the expanded WTO membership, which entails articulated and diverse needs, interests, and preferences among WTO Members⁸⁰. “[A] reformed future trading system”, observed the EU, thus requires “to cater for a more flexible framework of rules”, further considering that “[a]ccommodating different types of plurilateral approaches is a necessary recognition that the future trading system will inevitably be more multi-layered than envisaged in 1995” and compel “a return to the acceptance of variable geometry as was the case under the GATT”⁸¹. In addition to declaring that “[t]he reformed system should facilitate closer economic cooperation through plurilaterals ... in particular when they are MFN-based”, the EU also called for a reform including informal approaches such as that of clubs among willing partners, and non-open plurilaterals, i.e., agreements within the WTO “where benefits are only available to participants, on a reciprocal basis”⁸².

Another important supporter of plurilaterals is South Korea, looking for “a more responsible exercise of consensus in the consideration of plurilateral outcomes”⁸³ to be facilitated through the possibility for non-participating Members to “submit in writing any concrete concerns regarding possible implications for their existing rights and obligations, which participants would consider as their work proceeds”⁸⁴. Similarly, Japan remarks that “[u]tilizing plurilateral trade agreements is essential for ensuring more agile rule-making that responds to changes in the global trade landscape”⁸⁵, asking Members expressing objections to the incorporation of a plurilateral agreement ... [to] explain the material harm they would suffer from the implementation of the plurilateral agreement, citing the specific provisions”⁸⁶. Besides, building confidence in plurilateral work within the WTO -which includes “formal plurilateral agreements and negotiations as well as less formal, Member-led activity such as structured discussions, dialogues and informal working groups”⁸⁷- is at

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ WT/GC/W/986, *EU Submission on WTO Reform – Communication from the European Union*, 21 January 2026.

⁸¹ WT/GC/W/986, cit., section 3.

⁸² Ibid.

⁸³ WT/GC/REFORM/10, *Revitalizing the WTO's Negotiating Function: A Structured Pathway for Plurilateral Agreements and A Responsible Practice of Consensus – Communication from the Republic of Korea*, 16 July 2026, para. 1.4.

⁸⁴ WT/GC/REFORM/10, cit., para. 2.4.

⁸⁵ WT/GC/REFORM/W/8, *Designing Together a Fairer and More Dynamic System – Communication from Japan*, 13 July 2026, para. 3.3.

⁸⁶ WT/GC/REFORM/W/8, cit., para. 3.4, lett. a).

⁸⁷ WT/GC/REFORM/W/13, *Progress Through Flexibility: The Case for Plurilateral Work at the WTO – Communication from the United Kingdom*, 15 September 2026, para. 2.2.

the heart of the contribution of the United Kingdom to the WTO reform debate, considering transparency and inclusivity the pillars for the success of the flexibility formula at the WTO.

Last but not least, China's pragmatic approach has to be emphasized. It proposes to "enable agile decision-making at different speeds among the diverse membership while respecting the consensus principle"⁸⁸, qualifying plurilateral agreements as "a building block for multilateralism"⁸⁹, and underlining that "[a] middle way between the poles of moving all together and not moving at all will help WTO deliver more for its Members"⁹⁰.

5. Conclusions: The Role of the WTO and the Reasons for this Research Project

From our overview of the WTO plurilateral tools and the interesting, much-participated debate, also within the WTO reform discussion, on their incorporation into the Marrakesh legal framework, it emerges that no WTO Member denies the value of plurilaterals in updating and modernizing the multilateral trading system. Views diverge on the legal basis for promoting plurilateral tools and on the decision-making mechanism to follow to formally include them in the WTO rulebook, but there is always value in discussion, even in an environment of disagreement.

The mounting interest in plurilaterals, also from the business community⁹¹, indicates that all the players of global trade are realizing that the variegated nature of the wide WTO membership is certainly a value, as it allows all Members to systematically meet, exchange views, and debate in Geneva on trade policy and trade-related issues; but, at the same time, makes it very difficult that the 166 trading partners agree all together on any new rules concerning any subject. Therefore, plurilaterals may represent the most effective and close-to-the-mark response to the need for new rules for global trade in the XXI century. They may be formal or informal, they may consist of groupings, or structured discussions; they all have the merit of keeping discussions going. To make the most of the current transversal interest in variable geometry at the WTO, transparency, inclusiveness, and participation, with regard to economic operators and stakeholders too, have to be continually promoted⁹². In this perspective, and work, the WTO Secretariat has to be supported.

The demand for new international regulations to ensure stability and predictability in global trade is leading to several interesting plans and tools also outside the WTO legal framework. We may recall here the set of bilateral agreements and arrangements on digital trade⁹³, critical minerals⁹⁴, and the so-called "Trump trade deals", defined to reduce the very high US tariffs adopted under the current

⁸⁸ WT/GC/W/989, *China's Position Paper on WTO Reform Under the Current Circumstances – Communication from China*, 16 February 2026, para. 8.

⁸⁹ WT/GC/REFORM/W/12, *Further Reflections and Suggestions on WTO Reform – Communication from China*, 14 September 2026, para. 4.2, lett. b).

⁹⁰ WT/GC/W/989, cit., para. 8.

⁹¹ See e.g. the continuous participation of stakeholders at the WTO Public Forum meetings, whose reports, data, and records are available at the link https://www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm.

⁹² See María PAGÁN, *Why Transparency Must Come First in Fixing Global Trade's Big Problem*, Hinrich Foundation Report, September 2026.

⁹³ On digital partnership cf. in this book the contribution by Federico Ferri (*The Legal Dimension of the EU Digital Partnerships: Unicorns or Chameleons?*).

⁹⁴ See e.g. the set of memoranda of understanding signed by the European Commission with several third countries with the EU Raw Material Diplomacy, whose texts are available at the link https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/raw-materials-diplomacy_en.

US administration⁹⁵. They are pragmatic solutions, accepting an immediate agreement on common rules, when possible, without waiting for political conditions to be met before concluding only ambitious, all-inclusive trade and investment treaties.⁹⁶ Additionally, we recall the ongoing booming of the traditional and articulated preferential agreements⁹⁷, together with the strengthening of regional associations⁹⁸ and the creation of clubs⁹⁹. All these forms of cooperation through formal agreements and informal arrangements may represent, and be managed as, “stepping stones toward a global rebalancing”¹⁰⁰, elevating those deals to bigger rules-based collaborations. And the latter could find their natural, most appropriate, and rewarding location at the WTO, where they could be administered in the best transparent, fair, open, and inclusive manner.

As the tight confrontation within the WTO continues, sometimes presenting problematic opposing views, they are the same WTO Members, gathered in consolidated regional and economic fora, who advocate for the cause of the plurilaterals and acknowledge their growing role in innovating the governance of the multilateral trading system. In the May 2026 Suzhou Statement, the Ministers Responsible for Trade of the Asia-Pacific Economic Cooperation (APEC) recognized “the positive role that plurilateral negotiations at the WTO, including the Joint Statement Initiatives (JSIs), are playing in advancing issues of interest to Members, and in addressing contemporary trade issues, fostering new ideas, facilitating economic growth, and building momentum toward multilateral outcomes”¹⁰¹. APEC Trade Ministers also “note[d] the efforts of participating Members of the WTO JSIs to incorporate the Investment Facilitation for Development (IFD) Agreement and WTO Agreement on Electronic Commerce (ECA) into the WTO legal framework ... [and] the efforts by economies to participate in and implement the JSI on Services Domestic Regulation”¹⁰². The Leaders of BRICS countries¹⁰³, in the 2026 New Delhi Declaration, affirmed they “will engage constructively in the WTO reform to enhance the WTO’s authority, effectiveness, inclusiveness, and relevance, and

⁹⁵ For an overview on the Trump trade deals see Inu MANAK, *Tracking Trump’s Trade Deals*, Council on Foreign Relations, 17 March 2026.

⁹⁶ See Marc L. BUSCH, Petros C. MAVROIDIS, *Trump May Have Breathed New Life into the World Trade Organization*, *The Hill*, 18 September 2026.

⁹⁷ On preferential trade agreements (PTAs) see the chapter in this book by Carlo De Stefano (*Environmental Protection, the Fight against Climate Change and the Prevention of Disasters in and outside Plurilateral Trade Agreements*).

⁹⁸ On this issue cf. the contribution by Luca RUBINI in this book (*The EU–CPTPP Dialogue: Mapping the Normative Space of Trade and Subsidy Regulation*).

⁹⁹ They are groups of like-minded countries agreeing on common principles on specific issues to facilitate trade among them. See e.g. the Climate Club set up by the G/ in Elmau: *G7 Leaders’ Communiqué*, Elmau, 28 June 2022, at p. 4; *G7 Statement on Climate Club*, Elmau, 28 June 2022; *G7 Terms of Reference for the Climate Club*, 12 December 2022.

¹⁰⁰ Joost PAUWELYN, *How the US Reciprocal Tariff Plan May Save the Global Trading System*, *World Trade Review*, 2025, pp. 509-524, at p. 511.

¹⁰¹ *2026 APEC Ministers Responsible for Trade Joint Statement*, Suzhou, People's Republic of China, 23 May 2026, para. 16.

¹⁰² *Ibid.* Tu Xinquan, Dean of the China Institute for WTO Studies at the University of International Business and Economics in Beijing, remarked that as “the traditional multilateral trading rules system, mainly designed for goods and services trade, has limited adaptability to emerging issues ... APEC economies should therefore be encouraged to pioneer new approaches within the WTO framework through plurilateral arrangements” (comments reported in *APEC Trade Meet Ends with Broad Consensus*, 26 May 2026).

¹⁰³ BRICS is the forum currently bringing together 11 emerging and developing countries (see the presentation on the Indian governmental website on BRICS: <https://www.brics2026.gov.in/about-us/>). The acronym “BRICS” comes from the original parties of the forum, i.e. Brazil, Russia, India, China, and South Africa.

build an open world economy”¹⁰⁴, and, “[i]n this regard”, the BRICS Leaders “recognize[d] that it is important to identify appropriate pathways for plurilateral initiatives into the WTO legal framework including on development-oriented issues, and to explore the formulation of forward-looking rules in the WTO”¹⁰⁵. Also, the G7 Trade Ministers have endorsed plurilateral initiatives, in their case with a comprehensive approach, as they underlined their relevance both outside the WTO, recalling critical minerals supply chains, and within the WTO context¹⁰⁶.

From what is reported in this chapter, it is crystal clear, on the one hand, the overwhelming recourse by the WTO membership to the institutional structure, the logistics, and the support of the Secretariat of the WTO to discuss not only how to revise the Marrakesh Agreements, but also how to deal with a wide variety of trade-and issues currently not present in the WTO rulebook. On the other hand, the value of the necessary, irreplaceable and indispensable structure of the WTO in handling variable geometry and plurilaterals emerges unchallenged: the multilateral trading system is to be preserved and strengthened as a multilateral platform¹⁰⁷, where it is possible to debate the new topics of global trade and host the new rules of the XXI century, promoting plurilaterals within its system¹⁰⁸, with the possibility to aggregate in plurilateral tools, under the WTO structure, initiatives and deals started outside the Geneva framework¹⁰⁹. The final purpose is to rebalance the world trade order under shared values and fair rules. Reforming and reinforcing the WTO system is consequently a compass to follow for all its Members, and plurilateral tools represent an optimal, available, and effective means to do so.

The complex and challenging scenario presented in this introductory chapter reveals the centrality of plurilateral tools in supporting an open, balanced, growth-promoting, and fair global governance of international trade in our time. It also explains why we humbly decided to submit a proposal to the Italian Ministry of Foreign Affairs and international Cooperation (MAECI) to investigate the demanding issue of plurilaterals in and outside the WTO through a highly qualified international group of research of senior and junior academics, civil servants and practitioners, where we have the privilege and honour to have been joined and accompanied by Professor Giorgio

¹⁰⁴ BRICS New Delhi Declaration: Building for Resilience, Innovation, Cooperation and Sustainability, 12 September 2026, para. 20.

¹⁰⁵ Ibid. See also *The Sixteenth Meeting of the BRICS Trade Ministers: Chair’s Statement and Outcome Document*, 7 August 2026.

¹⁰⁶ “... We note that there is growing recognition among WTO Members of the need to improve the Organization’s ability to respond to contemporary trade realities and Members’ interests. We call for constructive discussion at the WTO to drive meaningful reform. We acknowledge that agreed-upon rules in the WTO are key to facilitating global trade. We underline *the valuable role plurilateral initiatives* can play in advancing progress on issues relevant to Members. We also underline the importance of a permanent moratorium on customs duties on electronic transmissions” (*Evian G7 Trade Ministers’ Communiqué*, cit., para. 12, emphasis added).

¹⁰⁷ See Gabrielle MARCEAU, Jian Ling TEO, Sean RAPP, *Navigating the New Frontiers in International Trade: The World Trade Organization as a Global Governance Forum*, *Journal of World Investment & Trade*, 2025, pp. 1-42.

¹⁰⁸ Bernard M. HOEKMAN, Charles F. SABEL, *Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time*, *Global Policy*, 2021, pp. 49-60; Bernard HOEKMAN, Charles SABEL, *Open Plurilateral Agreements, International Regulatory Cooperation and the WTO*, EUI Working Papers RSCAS 2019/10; Bernard M. HOEKMAN, Petros C. MAVROIDIS, *WTO “à la carte” or “menu du jour”? Assessing the Case for More Plurilateral Agreements*, *European Journal of International Law*, 2015, pp. 319–343; Ana PERES, *Transience of (In)Formality: The Role of the Joint Initiatives in Reforming the WTO Negotiations*, *World Trade Review*, 2024, pp. 385–407.

¹⁰⁹ On this aspect cf. Marc L. BUSCH, Petros C. MAVROIDIS, *Trump May Have Breathed New Life into the World Trade Organization*, cit.

Sacerdoti, former Member and President of the Appellate Body of the WTO, one of the major world experts of International Economic Law.

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Elisa Baroncini
Bologna, September 2026

SECTION ONE

The WTO Reform Process and the Plurilateral Tools

Plurilateralism and the Multilateral Trading System: Mapping the Legal Landscape of Variable Geometry

Giovanna Adinolfi

Summary: 1. Introduction – 2. WTO Plurilaterals – 2.1 Plurilateral Trade Agreements under Article II:3 MA – 2.2 Variable Geometry by Means of Multilateral Trade Agreements under Article II:2 MA – 2.3 WTO Plurilaterals through Modifications of Schedules – 2.4 Regional Trade Agreements – 2.5 Some Tentative Conclusions – 3. Non-WTO Plurilaterals – 4. Concluding Remarks.

Keywords: WTO and Plurilaterals – Variable Geometry at the WTO – Article 18 of the Vienna Convention on the Law of Treaties – Article 41 of the Vienna Convention on the Law of Treaties

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1. Introduction

The multilateral trading regime enshrined in the Marrakesh Agreement (MA) establishing the World Trade Organization (WTO), signed on 15 April 1994 and entered into force on 1 January 1995,¹ is based on the single-taking approach, whereby all 166 WTO Members possess equal legal status and are subject to identical obligations. Since its inception, the WTO legal order has nevertheless accommodated areas of differentiation, for instance by introducing norms for special and differential treatment for developing and least-developed countries and, for the present analysis, by including legal instruments that apply exclusively to a subset of the membership. Over the past decade, this structural variability has gained new momentum. An increasing number of trade and trade-related initiatives are negotiated among coalitions of willing parties, both within and outside the WTO.

This contribution will refer to the outcome of these negotiations as “plurilaterals”. This term will be used to denote any trade deal that does not involve the entirety of the WTO membership, irrespective of the specific legal basis (if any) on which it rests. Understood in these terms, the category cuts across the formal distinctions the WTO legal order itself draws, in particular the distinction between Multilateral Trade Agreements (MTAs) and Plurilateral Trade Agreements (PTAs) under Article II:2 and II:3 of the MA.

Two broad families of deals emerge. The first comprises plurilaterals concluded within, or at least anchored to, the institutional and normative framework of the MA, whose legal effects are governed by the WTO law itself (hereinafter, “WTO plurilaterals”, a broader category than the PTAs envisaged in Article II:3 of the MA). The second comprises “non-WTO plurilaterals”, negotiated and concluded outside the WTO framework, whose subject-matter overlaps with WTO trade or trade-related

¹ The updated texts of the WTO agreements are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

disciplines, and whose relationship to WTO law is therefore governed either by subordination or primacy clauses included in their text or by general international law. This distinction is not merely taxonomic. It matters because the applicable legal regime, and the interpretive tools available to address any frictions with WTO law, differ between the two categories. Where a WTO plurilateral raises questions internal to the institutional and normative architecture of the Organization, a non-WTO plurilateral instead raises questions of general international law, chiefly concerning the law of treaties and States' international responsibility for conduct inconsistent with obligations owed under WTO law.

Against this background, the present contribution pursues a twofold objective: first, to provide a systematic legal mapping of the various forms of trade cooperation that have emerged in recent practice, situating each within, or outside, the institutional and normative architecture of the WTO; and, second, to assess the extent to which this proliferation of differentiated, and at times informal, trade cooperation is compatible with WTO law.

2. *WTO Plurilaterals*

2.1 *Plurilateral Trade Agreements under Article II:3 MA*

Among the various categories of instruments that WTO law contemplates or tolerates but that do not bind the whole membership, the clearest and doctrinally least controversial example is constituted by the Plurilateral Trade Agreements listed in Annex 4 to the MA. Pursuant to Article II:3 of the MA, PTAs bind only the WTO Members that have specifically accepted them and therefore depart openly from the single undertaking approach. As is well known, the original list of PTAs comprised four texts. Today, only two remain, i.e. the Agreement on Trade in Civil Aircraft and the most economically significant Agreement on Government Procurement.²

Annex 4 to the MA does not include a closed list, but its expansion is itself telling of the difficulties that attend this route of trade cooperation. Under Article X:9 of the MA, adding new agreements to Annex 4 requires a decision of the WTO Ministerial Conference adopted by consensus. As a matter of law, a decision that does not meet the objection of any Member is required. Therefore, variable geometry is permitted, provided non-participating Members do not object. When the MA was concluded, this seemed the preferable solution. Once all States participating in the Uruguay Round negotiations accepted a departure from the single undertaking approach for the Annex 4 agreements, it seemed obvious that further departures would require the same degree of convergence.

However, recent practice illustrates how stringent this requirement is. The joint initiatives on investment facilitation for development and on electronic commerce, launched in 2017 at the end of the 11th Ministerial Conference, have led to two agreements designed as strictly anchored to the MA.³

² The other two PTAs, the International Dairy Agreement and the Agreement on Bovine Meat, terminated as of the end of 1997: see WTO doc. IDA/7 and WTO doc. IMA/8, both adopted on 30 September 1997.

³ For a legal analysis of WTO joint statement initiatives, see J. KELSEY, *The Illegitimacy of Joint Statement Initiatives and Their Systemic Implication for the WTO*, in *Journal of International Economic Law* 2022, p. 2 ff.

Regarding the Investment Facilitation for Development Agreement (IFDA)⁴ concluded in 2024 and co-sponsored by 126 Members, participation and membership are open exclusively to WTO Members;⁵ its text is deposited with the Director-General, and the WTO Secretariat services it.⁶ However, the 14th Ministerial Conference in late March 2026 did not agree to incorporate it into Annex 4, due to India's opposition.⁷ The Agreement on Electronic Commerce (AEC) has features similar to those of the IFDA.⁸ Likewise, co-sponsored by 73 members, its incorporation in Annex 4 has also been rejected, in this case due to opposition from India, South Africa, and Türkiye.⁹

WTO law thus imposes a procedural bottleneck on the recognition of new Annex 4 instruments that rests on the principle that nothing is agreed unless all Members concur – a rule that, in effect, grants every WTO Member a *de facto* veto over new PTAs. The cost of this arrangement should not be underestimated: it leaves the multilateral trading system unable to incorporate legal regimes on new and prevailing trade interests through the plurilateral channel, even where a large and economically significant majority of the membership is prepared to move forward.¹⁰ Variable geometry, in other words, appears to be tolerated by WTO law only on condition that no Member objects. This condition neutralises the flexibility the plurilateral format was originally designed to provide, notwithstanding its benefits. The conclusion and entry into force of new plurilateral agreements under Article II:3 of the MA would institutionalise cooperation on new trade issues; the new agreements would be open to later accession by other non-participating WTO Members;¹¹ non-participants to the IFDA would be free riders, since the agreement includes an MFN clause;¹² finally, any disputes among participants could be settled according to the WTO Dispute Settlement Understanding.

With regard to the AEC, because of the above, 67 of its parties adopted, in March 2026, a Declaration on Interim Arrangements, opting for the Agreement to enter into force in their mutual relationships, pending a decision under Article X:9 of the MA.¹³ Paragraph 5 of the Declaration

⁴ The text is available in WTO doc. INF/IFD/W/55 of 13 February 2024. On the IFDA and, more in general, in investment facilitation agreement, see A. BERGER, M. CHI (ed. by), *The Making of an International Investment Facilitation Framework. Legal, Political and Economic Perspectives*, Cambridge University Press, Cambridge, 2025 and D. PAUCIULO, *L'accordo Sulla "Facilitazione degli investimenti per lo sviluppo" adottato dall'Organizzazione mondiale del commercio: una prima lettura*, in *Diritto del commercio internazionale* 2025, p. 467 ff.

⁵ See Article 45.1 of the IFDA.

⁶ See Article 45.1 and 45.12 of the IFDA.

⁷ Previously, South Africa and Türkiye also opposed, but they stepped back, respectively in December 2025 and March 2026: see P. UNGPHAKORN, *129 WTO members fail at 12th attempt to formalise plurilateral investment deal*, posted July 22, 2024 (later updated) available at <https://tradebetablog.wordpress.com>.

⁸ The text of the AEC is available in WTO doc. WT/GC/W/955 of 5 December 2024. In legal literature, see M. BURRI, *A WTO Agreement on Electronic Commerce: An Inquiry Into Its Legal Substance and Viability*, in *Georgetown Journal of International Law* 2022, p. 565 ff.

⁹ For the latest request of incorporation, see WTO doc. WT/GC/W/963/Rev.1 of 3 December 2025; see P. UNGPHAKORN, *E-commerce initiative is the latest WTO rule-making effort to be blocked*, posted February 19, 2025, updated March 30, 2026.

¹⁰ It is estimated that co-sponsors of the AEC cover more than 70% of global trade (see https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm#documents), while an outstanding majority of Members co-sponsoring the IFDA are developing or least-developed countries, mostly interested in its entry into force.

¹¹ Both the IFDA and the AEC reserve accession to WTO Members.

¹² Under Article 5.1 of the IFDA, in applying the provisions set out in the Agreement, parties are bound to accord to investors of other WTO Members treatment no less favourable than that accorded, in like circumstances, to investors of any other Member. The AEC includes no similar provision.

¹³ See WTO doc. WT/MIN(26)/42 of 27 April 2026.

provides that, subject to the completion of the required domestic procedures, the AEC will enter into force according to its Article 29:2, i.e. upon deposit of 45 instruments of acceptance. Acceptance will include the AEC and the Interim Arrangements (IA) annexed to it, according to which the AEC will apply on an interim basis up to the date on which the AEC is added to Annex 4 to the MA (Section I) and the WTO DSU will govern the settlement of disputes (Section IV), with some rectifications, in particular the replacement of the WTO Dispute Settlement Body with the Committee on Electronic Commerce established under the AEC, and the resort to arbitration under Article 25 of the DSU for appeal procedures. Following the 2026 Declaration, a copy of the AEC was deposited with the WTO Director-General and thereafter certified by her.¹⁴ These arrangements have produced unorthodox results. A trade agreement that does not meet the definitions of “multilateral” and “plurilateral” trade agreements under Articles II.2 and II.3 of the MA has been anchored to the WTO institutional framework.

2.2 Variable geometry by means of Multilateral Trade Agreements under Article II:2 MA

A second, less immediately visible, category of WTO plurilaterals emerges from a contextual reading of Articles IX and X of the MA on the conclusion of new Multilateral Trade Agreements. MTAs are, by definition, intended to bind all WTO Members (Article II:2 MA). However, they enter into force only upon acceptance by two-thirds of the membership (Article X:3 MA). As a result, an MTA may enter into force for a demanding majority of Members, leaving a residual group formally outside its scope. This is precisely the pattern observed with the Agreement on Trade Facilitation and the Agreement on Fisheries Subsidies.

In November 2014, the WTO General Council, exercising the functions of the Ministerial Conference as envisioned in Article IV:2 of the MA, approved the protocol amending Annex 1A of the MA to incorporate the Agreement on Trade Facilitation.¹⁵ In 2022, the Ministerial Conference took a similar decision, this time to include the Agreement on Fisheries Subsidies in Annex 1A.¹⁶ Both decisions were adopted by consensus, in accordance with Article IX:1 of the MA, and the two agreements entered into force once ratified by two-thirds of the membership. Currently, these agreements bind 162 and 123 Members, respectively.

The legal position of Members that have not yet accepted the two treaties raises some interpretive puzzles. Indeed, the question arises whether they should be assimilated to States that took part in negotiations, signed the resulting text, and subsequently chose not to ratify, or whether they can be deemed as States that neither participated in the negotiations nor signed the final text. The distinction is not merely academic, since the VCLT attaches specific consequences to treaty signature. Indeed, under Article 18 VCLT, a State that has signed a treaty is obliged to refrain from acts that would defeat its object and purpose pending entry into force. New WTO MTAs, however, are not “signed” by Members in the ordinary sense of the term. It is nonetheless arguable that, by analogy, the consensus decision to include a new instrument in Annex 1A produces equivalent legal effects to a

¹⁴ See *Agreement on Electronic Commerce – Transmission of Certified True Copy*, 10 June 2026, ECA/DEP/1.

¹⁵ See WTO doc. WT/L/940 of 28 November 2014.

¹⁶ See WTO doc. WT/MIN(22)/33, WT/L/1144 of 22 June 2022.

signature: it formally concludes the negotiations and provides evidence of the agreement of any Member on that; it records the WTO's acknowledgement that the membership has agreed on a text open to individual acceptance; and it forecloses further substantive modification without reopening negotiations altogether. If this analogy is accepted, non-participating Members could be regarded, *mutatis mutandis*, as subject to the VCLT obligation not to defeat the object and purpose of the new MTA and, further, to additional good-faith obligations. To the extent that a Member did not object to the consensus adoption of the new MTAs, good faith would arguably require it either to proceed to acceptance or, at the very least, to start and advance its domestic ratification process in accordance with applicable constitutional requirements, rather than remain indefinitely and passively outside the agreement.

2.3 WTO Plurilaterals through Modifications of Schedules

A further, and long-standing, manifestation of variable geometry within WTO law is offered by sectoral liberalisation agreements covering specific goods and services. Relevant practice includes, *inter alia*, the two agreements on trade in information technology products concluded in 1996 and 2015 and, more recently, the Reference Paper on Services Domestic Regulation adopted in 2021 by sixty-seven WTO Members at the end of negotiations conducted outside WTO structures.¹⁷

Although different in their scope and content, these initiatives share some common features. A subset of WTO Members negotiated and agreed on them, typically representing a high share of the relevant trade volume. Further, their legal effect is made operational not by concluding a new agreement whose incorporation into the WTO legal regime requires the approval and entry into force of amendments under Article X of the MA. Rather, the participating Members give the negotiated outcome legal effect by modifying their respective schedules of concessions annexed to the GATT, or schedules of commitments annexed to the GATS.¹⁸ Modifications to these schedules are subject to specific procedural requirements that, in a nutshell, allow other WTO Members to claim that their trade interests would be affected. When submitted, these claims may delay or prevent the modifications from entering into force, as occurred with the Reference Paper on Services Domestic Regulations.

Crucially, because such modifications concern legal instruments that are themselves subject to the most-favoured obligation under both the GATT and the GATS, the ensuing liberalisation would extend, as a matter of law, to all WTO Members – irrespective of whether they participate in sectoral agreements. Nevertheless, the modification procedure requires other Members to refrain from exercising the residual leverage available to them under WTO rules on the modification of concessions by Members that could benefit from the liberalisation at issue.

¹⁷ See WTO doc. WT/L/1129 of 2 December 2021. For a legal analysis, see E. BERTOLA, J. COGHI, M. JELITTO, *Facilitating Services Trade Through the Adoption of Good Regulatory Practices: The New Reference Paper on Services Domestic Regulation*, in *Global Trade and Customs Journal* 2024, p. 74 ff. The negotiations on domestic service regulations began in 2017 as a joint statement initiative, alongside the above-mentioned negotiations on investment facilitation and electronic commerce.

¹⁸ The procedures for the modification of schedules annex to the GATT are set in Article XXVIII of the General Agreement and GATT doc. L/4962 of 26 March 1980. Lists of concessions annexed to the GATS are modified according to Article XXI GATS, WTO doc. S/L/80 of 29 October 1999 and WTO doc. S/L/84 of 18 April 2000.

2.4 Regional Trade Agreements

A final category, briefly mentioned here and widely explored in other contributions to this volume, concerns regional trade agreements concluded under Article XXIV GATT and Article V GATS. These provisions carve out an express exception from the MFN obligation, conditional on the regional agreement satisfying demanding procedural requirements and, more importantly, substantive requirements as to the depth and coverage of the liberalisation undertaken.

2.5 Some Tentative Conclusions

Taken together, these four categories – new PTAs, partially-accepted MTAs, schedule-modifying sectoral agreements, and regional agreements – demonstrate that WTO law is not a monolith hostile to departures from the single undertaking. It does accommodate variable geometry, but consistently subjects its effectiveness to the acceptance, express or tacit, by the wider membership, whether through a decision by consensus (PTAs), a supermajority threshold (MTAs), or residual leverage over schedule modifications (sectoral agreements). The structural dependence on collective acquiescence remains, in the assessment offered here, a significant obstacle to the evolution of a body of rules substantially agreed upon more than thirty years ago, which do not necessarily mirror the trade interests of the present membership.

3. Non-WTO Plurilaterals

Turning to non-WTO plurilaterals, contemporary practice reveals a marked preference, in certain fields, for negotiating trade or trade-related matters entirely outside the WTO, to conclude a formal treaty with its own self-standing legal implications, unmediated by the institutional constraints just described. To illustrate this trend, it is worth recalling the Agreement on Climate Change, Trade and Sustainability (ACCTS), concluded in 2024 between Costa Rica, New Zealand, Iceland and Switzerland. Its core provisions call for eliminating duties on the import and export of a defined list of environmental goods, removing fossil fuel subsidies among the parties, and liberalising trade in environmental services¹⁹. This initiative falls outside the scope of the WTO rules on regional trade agreements, precisely because it fosters trade liberalisation only in defined categories of goods and services, rather than in “substantially all the trade” between the parties and on a “substantial sectoral coverage”, as Article XXIV:8(a) GATT and Article V:1(a) require respectively.

Instruments of this kind may be assessed under the VCLT provisions on successive treaties relating to the same subject-matter. According to Article 30:4 VCLT, when the parties to a later treaty (the ACCTS) do not include all parties to the earlier treaty (the MA), in the relations between States

¹⁹ The text of the ACCTS is available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/agreement-on-climate-change-trade-and-sustainability-accts/accts-text-and-resources>. Entry into force requires ratification by at least 3 three signatories, a condition not yet satisfied. For a comment on the ACCTS, see J. MANOHAR, M. GAURDWA, *Unisng Trade Policy to Address Climate Change: An Analysis of the Agreement on Climate Change, Trade and Sustainability*, in *Global Trade and Customs Journal* 2025, p. 435 ff.

parties to both treaties the earlier treaty applies to the extent it is compatible with the later one. In contrast, the mutual rights and obligations between a State party to both treaties and a State party to only one of the treaties are governed by the treaty to which both States are parties. Accordingly, the four parties to the ACCTS would remain bound by WTO law in their relations with other WTO Members. This means that, for instance, ACCTS cannot be read as excluding the extension, to all other WTO Members, of the tariff concessions that Costa Rica, Iceland, New Zealand and Switzerland have agreed among themselves, as they would be assumed to continue to comply with the MFN obligations under Article I GATT. The ACCTS parties appear to accept this conclusion, as reflected in Article 1.5 ACCTS, where they affirm their intention to apply the ACCTS in accordance with their MFN obligations under the WTO covered agreements.

This practice raises a broader, and more contested, question: whether WTO law remains, in substance, within the control of the Members as “masters of the treaty”, who could decide to modify their mutual rights and obligations in their mutual relations through successive agreements. This topic was discussed in the *Peru – Additional Duty on Imports of Certain Agricultural Products* dispute, where Peru claimed that, in its relations with Guatemala, the free trade agreement concluded with this State prevailed over the obligations owed to it under WTO law, according to Article 41 VCLT on “Agreements to modify multilateral treaties between certain of the parties only”. As Peru argued, WTO agreements do not prohibit their modification among Members, and the specific modification at issue did not alter the rights and obligations of other WTO Members.

The panel and the Appellate Body did not delve extensively into this analysis. Within the panel, the argument prevailed that the FTA between Peru and Guatemala was irrelevant because it had not yet entered into force.²⁰ The Appellate Body took a stricter position, asserting that, as *lex specialis*, WTO rules concerning *inter se* modifications prevailed over general international law, including Article 41 VCLT.²¹ This characterisation of the multilateral trading regime as a closed regime leads to the conclusion that *inter se* modifications are not permitted unless agreed upon according to the WTO law on amendments, waivers, exceptions and RTAs, a position that has drawn criticism from scholars.²²

Read broadly, the Appellate Body’s holding would appear to exclude WTO Members from concluding RTAs that depart from the conditions laid down in Article XXIV GATT or Article V GATS by invoking Article 41 VCLT as an alternative, more permissive legal basis. It does not follow, however, that Article 41 VCLT is thereby rendered wholly irrelevant to plurilateral trade cooperation. It could be argued that, in a plurilateral arrangement among a narrower group of WTO Members that does not purport to constitute a customs union or a free trade area under Article XXIV GATT – such as, arguably, the ACCTS itself – Article 41 VCLT would in principle remain applicable as the relevant successive-treaties framework, precisely because the WTO’s *lex specialis* on RTAs is not engaged.

However, it bears emphasising that a conflict between a non-WTO agreement and WTO law does not, as such, affect the validity of the non-WTO agreement. It instead raises a question of the

²⁰ See panel report in WTO doc. WT/DS457/R of 27 November 2014, paras. 7.526-7.528.

²¹ See Appellate Body report in WTO doc. WT/DS527/AB/R of 20 July 2015, para. 5.112.

²² See J. PAUWELYN, *Conflict of Norms in Public International Law*, Cambridge University Press, Cambridge, 2009.

international responsibility of its parties vis-à-vis other WTO Members for breaches of obligations under WTO law.

4. Concluding remarks

The picture that emerges from this survey is one of a multilateral trading system that tolerates a measure of variable geometry, but consistently conditions its legal effectiveness on the acceptance by wider membership, whether through consensus, supermajority thresholds, residual leverage over schedule modifications, or substantive conditions enforceable through dispute settlement. Non-WTO plurilaterals operate under a different, VCLT-based logic that raises questions about the legitimacy of *inter se* modifications.

Reassessing the MPIA: Legal Nature, Institutional Developments, and Its Role in the Multilateral Trading System

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Summary: 1. The main features of the MPIA – 1.1 Objective: a mechanism to preserve the essential principles and features of the WTO dispute settlement system – 1.2 The features of arbitration based on Article 25 DSU – 1.3 Transitory nature – 1.4 Only limited adjustments to DSU procedures – 1.5 Standing pool of arbitrators – 1.6 Scope of the MPIA – 1.7 Openness and flexibility – 2. Legal nature of the MPIA – 3. Efficiency enhancing procedural adjustments and experience – 4. Experience with appeal arbitration procedures – 5. The recent developments – 6. MPIA and MC14 – 7. Conclusion

Keywords: Crisis of the WTO Appellate Body – Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – Issues of fact and issues of law – MC14.

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1. The main features of the MPIA

The Multi-Party Interim Appeal Arbitration Arrangement Pursuant To Article 25 of the DSU (MPIA) was established on 30 April 2020 when 46 WTO Members¹ issued a communication (“the MPIA Communication”) under the cryptic item “STATEMENT ON A MECHANISM FOR DEVELOPING, DOCUMENTING AND SHARING PRACTICES AND PROCEDURES IN THE CONDUCT OF WTO DISPUTES.”² describing this innovative arrangement and their commitment to use it in order to settle their trade disputes in matters governed by the different agreements covered by the WTO. Its intellectual origin seems largely attributable to a 2017 paper published by a group of well-known international trade lawyers³, while the political drive for putting in place the arrangement is commonly attributed in large part to the EU.⁴

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¹ Given that the EU and its Member States are each of them WTO Members in their own right, in this paper the EU and its Member States are counted as 28 WTO Members. That reflects the count of the total number of WTO Members that is currently 166. See P. Ungphakorn, April 15, 2026, at <https://tradebetablog.wordpress.com/2026/04/15/eu-count-wto-over-zealous-lawyers-common-sense/> (Last accessed on 23 April 2026).

² JOB/DSB/1/Add.12.

³ S. Andersen, T. Friedbacher, C. Lau, N. Lockhart, J. Y. Remy, and I. Sandford, *Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals*, Graduate Institute of Geneva, Centre for Trade and Economic Integration Working Paper no. CTEI-2017-17, 2017.

⁴ For a detailed explanation of the origin of the MPIA and an early analysis of that arrangement, see E. Baroncini, *The EU and the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – A Contingency Tool to Save the WTO*

Six years after its creation, the MPIA participation has grown. With the last three additional WTO members joining shortly before the 14th WTO Ministerial Conference (MC14), the MPIA now includes 61 WTO participants, covering approximately 60% of global trade⁵. Moreover, two appeals have been concluded by the MPIA arbitrators,⁶ one MPIA-like appeal took place⁷ and several disputes between MPIA participants have been solved without an appeal (i.e. with the adoption of the panel report⁸ or a mutually agreed solution⁹).

The MPIA has therefore been tested in concrete cases and it has delivered in the sense that it has enabled the resolution of the trade disputes through a legal procedure characterised by two level of adjudication culminating in a binding decision. But the MPIA has not been applied only in the cases where an appeal was launched. Indeed, the MPIA participants have concluded an arbitration agreement (pursuant to the MPIA) in all the disputes pending among them, thereby excluding the possibility of any appeal into the void. As mentioned above, many of those disputes have already been resolved. It is submitted that the MPIA has helped resolving those disputes, too because appeal into the void was not an option.

Therefore, the time appears ripe for reassessing the MPIA, recalling the institutional developments that occurred in those six years and stress the role the MPIA is playing in the multilateral trading system.

The MPIA Communication describes the main elements of the appeal arrangement. The MPIA Communication counts also two annexes. Annex 1 contains the template appeal arbitration agreement that MPIA participants have undertaken to sign at the start of each dispute among them. Annex 2 sketches out the procedure for the composition of the pool of arbitrators, out of which three individuals will be selected to decide any specific appeal among the MPIA participants.

The main features of the MPIA can be summarised as follows.

1.1 Objective: a mechanism to preserve the essential principles and features of the WTO dispute settlement system

As it is well known, since the end of 2019, the AB has been unable to function due to the US persistent objection to launching the appointment process of the new AB members. It is still possible to appeal a panel report before the AB, but nobody can decide that appeal, which therefore remains pending. Because the panel report cannot be adopted by the Dispute Settlement Body (DSB) as long as the appeal is pending, the dispute cannot be solved by a legal binding decision and may remain in

Appellate Stage, in Bruno Barel, Andrea Gattini (a cura di), *Le prospettive dell'export italiano in tempi di sfide e crisi globali. Rischi e opportunità*, Giappichelli, Torino, 2021, pp. 85-122.

⁵ Outcome of the 14th WTO Ministerial Conference, Directorate-General for Trade and Economic Security, 30th March 2026, https://policy.trade.ec.europa.eu/news/outcome-14th-wto-ministerial-conference-2026-03-30_en (Last accessed on 13 May 2026).

⁶ DS591 Colombia — Frozen Fries (EU), DS611 China — IPRs Enforcement (EU).

⁷ DS583 Turkey — Pharmaceutical Products (EU). Given that the arbitration procedure in this case was based on the template arbitration procedure set out in Annex 1 of the MPIA Communication, for ease of reference this case will be referenced as an MPIA-like appeal arbitration.

⁸ DS603 Australia — AD/CVD on Certain Products (China); DS 601 China — AD on Stainless Steel (Japan); DS524 Costa Rica — Avocados (Mexico).

⁹ DS598 China — AD/CVD on Barley (Australia); DS602 China — AD/CVD on Wine (Australia).

limbo indefinitely. The practice of appealing to a “non-existent” AB is colloquially called “appeal into the void” and it used by some WTO Members to prevent the adoption of an adverse panel report while avoiding at the same time the risk that an appeal adjudicator may confirm the panel’s finding. Faced with the impasse of the AB, the MPIA participants have put in place the MPIA.

The MPIA Communication stresses that the MPIA participants remain committed to find a solution to the impasse of the AB as a matter of priority (4th preambular sentence and paras. 15¹⁰). However, they decided to put in place an appeal mechanism based on Article 25 of the DSU, in order to preserve the essential principles and features of the WTO dispute settlement system, notably its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports (5th preambular sentence).

1.2 The features of arbitration based on Article 25 DSU

Given that the legal underpinning of the MPIA is Article 25 of the DSU it is appropriate to recall the normative elements listed in Article 25 DSU.

Article 25.1 recalls that “arbitration within the WTO” is an alternative means of dispute settlement that can facilitate solution of certain disputes, when the parties agree to have recourse to that method of dispute settlement (arbitration is subject to the parties’ agreement unlike the panel procedure).

Article 25 DSU does not set out any arbitration procedure. It is up to the parties to negotiate and agree such procedure. However, Article 25 DSU sets out a few requirements that any arbitration procedure must comply with to be considered as arbitration within the WTO pursuant to Article 25 DSU.

According to Article 25.2 DSU, agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration procedure.

According to Article 25.3 DSU, other Members may participate in Article 25 arbitration proceedings only with the agreement of the parties to the arbitration agreement.

Article 25.3 DSU adds that the parties shall agree to abide by the arbitration award and that the award shall be notified to the DSB and the Council or Committee of any relevant agreement where any Members may raise any point relating thereto. Hence, unlike a panel or an AB report, any Article 25 DSU arbitration award does not need to be adopted by the DSB to become binding on the parties.

Finally, Article 25.4 DSU, states that Articles 21 and 22 of the DSU shall apply mutatis mutandis to arbitration awards. This means that the DSU procedures for surveillance and implementation of recommendations and rulings of panels and of the AB as well as the procedures for compensation and suspension of concessions apply to any arbitration award based on Article 25 DSU, even if that award is not adopted by the DSB.

In summary, once an Article 25 DSU arbitration award is issued it is binding on the parties and the parties can rely on the DSU procedures for implementing and enforcing it.

¹⁰ In this paper, references to the paragraphs of the MPIA Communication are indicated with “para.” or “paras.” and the corresponding number without more. If the reference is to a paragraph of another text, the name of that text will be spelled out, e.g. para. 4, Annex 1.

It follows that the legally binding nature of an arbitration award based on Article 25 DSU and the procedures to enforce it are not aspects that are at the parties' disposal because they are explicitly regulated by the DSU.

The requirement to notify any arbitration agreement to all Members before the start of the arbitration, the requirement to notify any award once rendered to the DSB or any relevant WTO body, and the possibility for other Members to raise any point and finally the possibility for third parties to participate in the arbitration procedure (if the parties so agree) ensure a considerable degree of publicity to arbitrations based on Article 25 DSU within the WTO. Probably they reflect the consideration that arbitration within the WTO, even if binding only on the parties that agreed to it, may affect other members of the organisation. In a nutshell, arbitration pursuant to Article 25 DSU is not a confidential or private affair unlike other forms of arbitration.

1.3 Transitory nature

The MPIA is conceived as an interim mechanism that should remain in place as long as the AB is not capable of functioning. The interim nature of the mechanism is asserted several times (5th and 8th preambular sentence, paras. 1, 15, and para. 2, Annex 1).

1.4 Only limited adjustments to DSU procedures

The MPIA Communication explains that appeal arbitration procedure will be based on the substantive and procedural aspects of Appellate Review pursuant to Article 17 DSU, while enhancing the procedural efficiency of appeal proceedings. Also, the panel proceedings will be subject to limited adjustments to facilitate the proper administration of the appeal arbitration procedure (para. 8).

The appeal procedures are detailed in Annex 1 to the MPIA Communication (Annex 1) which contains the template arbitration agreement that MPIA participant intend to sign at the early stage of any dispute among them (paras. 3, 10)¹¹. Parties to a specific dispute may, without prejudice to the principles set forth in the MPIA Communication, mutually agree to depart from the procedures set out in the appeal arbitration agreement (para. 11).

Similarly to Article 17.6 and 17.13 DSU, para 9 of Annex 1 states that “[a]n appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel. The arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel”.

Moreover, Annex 1 adds that “Unless otherwise provided for in these agreed procedures, the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review” and in particular the Working Procedures for Appellate Review¹² (WPAR) and the timetable for appeals provided for therein as well as the Rules of Conduct¹³

¹¹ The arbitration agreement should be signed and notified to the DSB within 60 days after the date of the establishment of the panel (para. 10). For pending disputes where, on the date of this communication, the panel has already been established but an interim report has not yet been issued, the agreement should be signed and notified within 30 days after the date of the MPIA Communication.

¹² https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (accessed on 24 April 2026).

¹³ WT/DSB/RC/1.

(para. 11, Annex 1). For greater clarity, several other provisions of Annex 1 single out specific provisions of the WPAR that apply to arbitration proceeding under the MPIA.¹⁴

These provisions underscore the drafters' intention to keep changes to panel and appeal procedures limited. Consistent with that idea, the MPIA Communication on the one hand recognises that litigants may want to depart from the template arbitration agreement, but on the other, it states that this may happen "without prejudice to the principles set forth in the MPIA communication".¹⁵

Limiting the possible adjustments to the panel and appeal procedure reflects several objectives. It reassures WTO Members that the MPIA does not revolutionise the longstanding DSU procedures they are used to deal with. It facilitates the administration of those procedures by the secretariat and the legal community at large. Finally, it is in keeping with the idea of preserving the essential features of the WTO dispute settlement system.

In the following section we will examine the efficiency enhancing arrangements that the drafters of the MPIA have set out in Annex 1, how they have been applied in the appeal procedures that have taken place so far and other procedural adjustments that have characterised those appeals.

1.5 Standing pool of arbitrators

The MPIA participants have also set up a "standing pool" of 10 MPIA arbitrators. Three arbitrators are selected to decide a specific appeal. The arbitrators must be independent from any government and avoid situation of conflict of interests¹⁶. The professional qualifications of the members of the pool are identical to those applicable to the AB members.¹⁷ The selection of the 3 arbitrators hearing a given appeal is not decided by the parties. Indeed, the same random method that was used for the composition of an AB division applies to the MPIA pool. Moreover, the drafters of the MPIA Communication felt the need to clarify that "at the request of a party to a dispute, any member of the pool of arbitrators who is not a national of a participating Member will be excluded from the selection process. Two nationals of the same Member may not serve on the same case."¹⁸

Those provisions bear witness to the fact that appointment to the pool is not contingent on an individual's nationality. Indeed, they imply that also nationals of Members not participating in the MPIA may be appointed to the pool and more than one national of a given Member may be appointed to the pool. Moreover, those provisions may also apply in case of arbitrators with double or multiple

¹⁴ E.g. para. 5, Annex 1 (rules governing the filing of notice of appeal, appellant's submissions, appellee's submission, and multiple appeals), para. 7, Annex 1 (decision making by the arbitrators), para. 11, Annex 1 (Arbitrators and AB may adapt the AB working procedures and timetable in the same circumstances), para. 16, Annex 1 (regulating third party's participation in the appeal proceedings).

¹⁵ For instance, "in April 2021 the EU and Colombia revised their appeal arbitration agreement, mainly to make the panel report available to the pool of MPIA arbitrators right before the suspension of panel proceedings, instead of waiting to do so until the notice of appeal is filed (this gives MPIA arbitrators 20 more days to read the panel report and get acquainted with its findings)" J. Pauwelyn, (2023), *The WTO'S multi-party interim appeal arbitration arrangement (MPIA): What's new?*, in *World Trade Review*, 22(5), pp. 693-701.

¹⁶ While the AB members **shall not** participate in dispute creating conflict of interest (Article 3 DSU), the MPIA arbitrators **will not** participate in dispute creating conflict of interest (para. 4).

¹⁷ "The pool of arbitrators will comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." (para. 4)

¹⁸ MPIA Communication, footnote 2.

nationalities. As a matter of fact, they offer a limited degree of control to the litigants on the composition of the appeal arbitrator.

Other aspects of the working of the MPIA arbitrators resembles that of the AB.

For instance, according to Article 17. 3 DSU, the AB members **shall** be available at all times and on short notice. They **shall** stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA.

Likewise, the MPIA arbitrators **will** stay abreast of WTO dispute settlement activities and **will** receive all documents relating to appeal arbitration proceedings under the MPIA (para. 5). However, there does not seem to be a requirement for the MPIA arbitrators to be available at all times.

With regard to remuneration there is an important difference between AB members and MPIA arbitrators. While AB members were employed by the WTO on the basis of a contract providing for a retainer fee and remuneration on an hourly basis for work on each appeal, MPIA arbitrators are remunerated on an hourly basis for work on the appeals which they hear and decide just like panellists.¹⁹ Given that any arbitration based on Article 25 DSU is a dispute settlement procedure provided for by the DSU, it is obvious that the arbitrators remunerations is covered by the WTO budget and that the secretariat has support the work of the arbitrators.

As it is the case for the AB division deciding an appeal also the three MPIA arbitrator in charge of an appeal bear the exclusive responsibility for the decisions taken in a specific case (respectively, Article 17. 1 DSU and Rules 3.1 and 4.4 WPAR for the AB, and para. 8, Annex 1 for the MPIA arbitrators). The AB division in charge of the appeal shall make every effort to take its decisions by consensus. Where nevertheless a decision cannot be arrived at by consensus, the matter at issue shall be decided by a majority vote (Rule 3.2 WPAR). The same rules apply to the three MPIA arbitrators assigned to a given case (para. 7, Annex 1).

However, there are some differences concerning the rules of ‘collegiality’ of the AB and of the pool of MPIA arbitrators.

Indeed, the AB division responsible for deciding each appeal **shall exchange views with the other Members before it finalizes** the appellate report for circulation to the WTO Members (Rule 4.3 WPAR). Instead, the three arbitrators **may discuss** their decisions relating to the appeal **with all** of the other members of the pool of arbitrators, without prejudice to the exclusive responsibility and freedom of the arbitrators with respect to such decisions and their quality (para. 8, Annex 1).

Moreover, while the AB members **shall convene on a regular basis** to discuss matters of policy, practice and procedure, to **ensure** consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members (Rule 4.1 WPAR), in the MPIA context, the members of the pool of **arbitrators will discuss** amongst themselves matters of interpretation, practice and procedure, **to the extent practicable**, in order to **promote** consistency and coherence in decision-making (para. 5).

While the differences between the rules on collegiality of the AB and of the MPIA pool are not dramatic, the various textual elements that have been highlighted above point in one direction, i.e.

¹⁹ Baroncini, op. cit., p. 112 and Sumana, C. S., & Van den Bossche, P. L.H. (2025). *The MPIA and the Future of WTO Dispute Settlement*. WTI Working Paper; <https://www.wti.org/research/publications/1489/the-mpia-and-the-future-of-wto-dispute-settlement/> (Last accessed on 26 April 2026).

that of de-emphasizing the importance of collegiality (by making it a possibility rather than an obligation), as well as consistency and coherence (which must be promoted rather than ensured). It is also true that given that MPIA arbitrators are remunerated only for the work that they perform in deciding a given case, it would have been excessive to impose on them an obligation to perform certain tasks (e.g. discussing cases they are not responsible for deciding) without any remuneration.

1.6 Scope of the MPIA

The MPIA applies automatically “to any future dispute between any two or more participating Members, including the compliance stage of such disputes” (para. 9). It also applies to any dispute between any two or more participating Members pending on the date of the MPIA Communication, except if the interim panel report has already been issued on that date (para. 9). For Members that joins the MPIA after the date of the MPIA Communication “the date of that Member’s notification to the DSB will be deemed to be the date of this communication for the purposes of” identifying the disputes to which the MPIA applies and the deadline to enter into an arbitration agreement (para. 12).

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Once they receive the interim panel report the litigants become aware of the likely outcome of the case. Hence, the lack of automatic application of the MPIA after the issuance of the interim panel report reflects the idea that a Member’s participation to the MPIA should be motivated by systemic considerations rather than by considerations relating to a specific dispute (whether it is convenient to appeal a specific panel report).

Finally, parties remain free to decide to apply appeal arbitration procedures, such as those contained in Annex 1, to more advanced disputes on an *ad hoc* basis (footnote 3).

Zooming on the arbitration procedures defined in Annex 1, footnote 1 of Annex 1 clarifies that MPIA arbitration applies to the final panel report issued to the parties including any final panel report issued in compliance proceedings pursuant to Article 21.5 DSU.

Moreover, paras. 1 and 16 of Annex 1 clarify that any party to the dispute (not third parties) may appeal the final panel report under this mechanism.

Obviously, the conclusion of an arbitration agreement pursuant to the MPIA, does not mean that the parties are compelled to exercise their appeal right in every single case. Rather, it simply means that they will not be able to appeal the panel report into the void (i.e. to a non-functioning AB). Indeed, where the arbitration has not been initiated under the agreed procedures, the parties shall be deemed to have agreed not to appeal the panel report pursuant to Articles 16.4 and 17 DSU, with a view to its adoption by the DSB. Even if a party had initiated the preparatory step for launching an appeal (e.g. requested the suspension of the panel proceedings) but filed no appeal within the applicable time limits, the panel proceedings will restart and result in the circulation of the panel report and then its adoption by the DSB, as the parties shall be deemed to have agreed not to appeal the panel report

²⁰ Likewise, in case of withdrawal from the MPIA, “Members intend for the MPIA to continue to apply to disputes pending on the date of such withdrawal” for which the interim report has not been issued to the parties yet. “Furthermore, any appeal arbitration agreement entered into under paragraph 10 will remain in effect” (para. 14).

(para. 6, Annex 1). Any appeal may also be withdrawn which may result in the adoption of the panel report by the DSB (para. 18, Annex 1).

As already mentioned, Article 25 DSU leaves it to the parties to the arbitration agreement to decide whether to admit third parties' participation in the arbitration. The MPIA drafters made the choice to allow for third parties' participation as rule, reflecting again the idea to limit departure from the AB proceeding. This is reflected in para. 16 of Annex 1.

1.7 Openness and flexibility

The MPIA is an open and flexible arrangement. Any WTO Member is welcome to join the MPIA at any time or leave the arrangement for that matter. A simple notification to the DSB is sufficient both for joining or leaving the MPIA (paras. 12 and 14).

2. Legal nature of the MPIA

The MPIA Communication is couched in non-binding language. Various paragraphs of the Communication express the participants' intention,²¹ or what they envisage with respect to the MPIA.²²

The drafters of the MPIA Communication therefore did not want to create a legally binding agreement, but a political commitment or a non-binding understanding about how to conduct appeal procedures among themselves as long as the AB remains dysfunctional. That is also reflected in the name of the communication which refers to an "arrangement" rather than to an agreement. In the MPIA context, the only legally binding instrument is the arbitration agreement that the MPIA participants intend to sign within 60 days after the date of the establishment of a panel.

The fact that the MPIA is not a legally binding international treaty, does not mean that the participants lack seriousness about the political commitment contained therein. So far, in all the disputes which fall within the purview of the MPIA, the MPIA participants have notified their agreement to use Art. 25 DSU to resolve any appeals, as required under the MPIA.

The MPIA is often referred as a plurilateral agreement for WTO purposes.

That characterisation is however misleading. Indeed, according to Article II.3 of the Marrakech Agreement (MA), "Plurilateral Trade Agreements" are those agreements and associated legal instruments included in Annex 4, which are (i) binding only on members that have accepted them and (ii) do not create either obligations or rights for Members that have not accepted them.

It follows that a plurilateral trade agreement for WTO purposes is a legally binding international agreement, which does not include all WTO Members. Clearly the MPIA Communication does not meet the first of these conditions.

²¹ For examples para. 1 reads "[t]he participating Members indicate their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure ... as long as the Appellate Body is not able to hear appeals" or para. 10 "[i]n order to render the appeal arbitration procedure operational in particular disputes, the participating Members indicate their intention to enter into the arbitration agreement". See also para. 14.

²² Paras. 4, 7, 8, 15.

With regard to the specific arbitration agreement that the MPIA participants intend to conclude in case of a dispute among them, it can be observed that such an agreement is the concretisation of Article 25 DSU.²³ More precisely, the conclusion of the arbitration agreement is a procedural decision concerning the conduct of a pending litigation. The possibility for any WTO Member to take such a decision is already contemplated by Article 25 DSU, an international agreement ratified by all the WTO members. Therefore, it is not a new legal instrument, but simply the exercise of a procedural right (to enter into an arbitration agreement in a given WTO dispute) contemplated by WTO law.

Obviously, in these circumstances the legal (e.g. Annex 4 incorporation) and political (e.g. risk of WTO fragmentation) issues that are commonly associated to plurilateral agreements do not even arise.²⁴

3. *Efficiency enhancing procedural adjustments and experience*

As mentioned previously, Annex 1 contains some efficiency enhancing procedural adjustments to the AB procedure. Those adjustments reflect some of the well-known concerns that the US has raised against the AB²⁵, i.e. disregard of timeframes for appeal proceedings, issuance of advisory opinions or *obiter dicta*, review by the AB of factual issues, and so on²⁶. The fact that similar adjustments were discussed and supported by many WTO members also during the DS reform discussions both for panel and appeal's proceedings, suggest that those adjustments address concerns of a broader set of Members.

A useful starting point to describe those efficiency enhancing adjustments is the clear statement that the parties expect the arbitrators to issue their award within 90 days from the filing of the notice of appeal (para. 12, Annex 1).

To achieve that objective, Annex 1 grants some instruments to the arbitrators:

- They may take appropriate organizational measures to streamline the proceedings, such as fixing page limits, time limits and deadlines as well as the length and number of hearings required. Those decisions must respect rights and obligations of the parties and due process (para. 12, Annex 1);
- They may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU

²³ Pauwelyn, op. cit., p. 694 explains that “the MPIA is not a plurilateral agreement. It is nested within the multilateral WTO and explicitly foreseen and allowed for under DSU Article 25 (entitled ‘Arbitration’)...”.

²⁴ Because the MPIA does not constitute in itself a legally binding international agreement and because the conclusion of an arbitration agreement is already contemplated by Article 25 DSU, in general joining the MPIA should not require particularly complex domestic procedures such as a fully-fledged ratification. Obviously, that question depends on the domestic law of each WTO Member, but it would appear that several WTO Members did not require to undergo internal cumbersome procedures to join the MPIA (including the EU, see in that respect, Baroncini, op. cit., footnote 66).

²⁵ USTR Report on the Appellate Body of the World Trade Organization, p. 52. https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (Last accessed on 11 May 2026).

²⁶ J. Bohanes, notes that these adjustments are intended to “entice the return” of the US to a binding two tier DS system, in “*The Multi-Party Interim Appeal Arbitration Arrangement and the MPIA Drafters’ Attempt to Improve on the Traditional Appellate Review Process*”, Reckoning and Renewal: The World Trade Organization and Its Dispute Settlement System at 30: Essays in Honour of Valerie Hughes. <https://utppublishing.com/doi/10.3138/9781487570903.027> (Last accessed on 29 April 2026).

(para. 12, Annex 1). The arbitrators' proposal is not binding on the parties, and the parties' refusal to follow it shall not prejudice the consideration of the case or the rights of the parties.

Where despite those measures, the arbitrators are not capable to respect the 90-day timeline, they may propose to the parties to grant them an extension of the period for the issuance of the award (para. 14, Annex 1).

With these provisions, it seems that the MPIA drafters wanted to emphasize first and foremost the importance of prompt settlement of disputes and hence their expectation that appeals should last no longer than 90 days (unless the parties agree to a longer duration).

For that purpose, they also explicitly empowered the arbitrators to take some measures to discipline the behaviour of the litigants, to prevent or disincentivise dilatory techniques, or simply to push them to follow a more efficient approach during the litigation.

Those measures may be binding, when they are only procedural. They may constitute suggestions for the parties in the conduct of the litigation, such as exclusion of Article 11 DSU claims, but they could also include other substantive suggestions such as focussing on some claims or abandoning others.

There might be situations however, where despite all this the arbitrators are incapable of issuing the award within 90 days. In that case they will need to ask for the agreement of the parties to exceed the 90 days' timeframe.

In the two appeal arbitrations that took place so far, the MPIA arbitrators have exercised their faculty to set limits on the length of the parties' oral and written submissions.

Given that the length to the appellant written submission must be set before launching the appeal, those limits were set out by a pre-appeal letter by the pool of arbitrators and sent to the parties before the start of the actual appeal²⁷. The pre-appeal letters in DS591 and DS611 are indeed very similar. Both letters explicitly qualify the word limits for written submissions as indicative, whereas the limits on the length of oral submissions, number of hearings and the deadlines are qualified as strict and subject to adjustment only in exceptional circumstances.²⁸

The similarity of those two pre-appeal letters and the fact that they were issued by the pool of arbitrators suggest an attempt by the MPIA arbitrators to follow a rather standardised approach to these matters.

²⁷ See Annex 2 to Annex A-2 to the Arbitration Award in DS591 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/591ARB25A1.pdf&Open=True> (Last accessed on 29 April 2026), and Annex 2 to Annex A-2 to the Arbitration Award in DS611 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/611ARB25A1.pdf&Open=True> (Last accessed on 29 April 2026).

²⁸ Also in the MPIA-like appeal the arbitrators set an indicative words limit for the parties and third parties written submissions (Annex A-2 to the Arbitration Award in DS583) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/583ARB25A1.pdf&Open=True> (Last accessed on 29 April 2026).

In the DS reform discussions, limits to the length of written and oral submissions have been proposed for the panel stage in the “Consolidated text”²⁹ and they have also been discussed during the formal DS reform process with regard to the appeal/review phase.³⁰

In the same letters, the arbitrators have also sought quite explicitly to disincentivise claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 DSU. The US considers those claims not to be admissible at all before the AB³¹ and many consider that they have been a cause of delay in appeal proceedings.³²

The arbitrators explicitly invited the parties “to consider refraining from making” such claim. In case a party wishes to raise an Article 11 claim, the arbitrators encourage that party to (i) apprise how such claim would affect the 90 day timeline; (ii) evaluate whether that claim has the potential to impact the substantive outcome of the dispute and whether and how it is necessary for the resolution of the dispute; (iii) whether the substance of any possible Article 11 claim could be brought under one of the substantive treaty provisions at issue in the dispute.³³

In the event a party nonetheless decides to bring an Article 11 claim related to the Panel’s assessment of the facts, the Party is requested to set forth succinctly³⁴: (i) whether and how the alleged panel error was raised before the Panel, in particular during the interim review stage; (ii) why resolving the claim is necessary for the resolution of the dispute and why the matter cannot be brought under one of the substantive treaty provisions at issue in the dispute; (iii) in what way the alleged panel error is not simply an appreciation of a factual issue (within the exclusive domain of panels) but amounts to an “issue of law”.³⁵

Given this “institutional disapproval”³⁶ of Article 11 claims, it is perhaps not surprising that no claim of this type was raised in the two MPIA appeals to date.

It is also worth recalling that during the formal DS reform process, Members discussed at length some reform ideas intended to codify a high standard of review for errors relating to the panel’s objective assessment of the facts under Article 11 DSU, and even drafted a text encapsulating those ideas.³⁷ That suggests that concerns about the proliferation of Article 11 claims in appeal proceedings

²⁹ The Consolidated text is contained in JOB/GC/385 of 16 February 2024.

³⁰ Report of the GC Chair of 16/17 December 2024 JOB/GC/DSR/5, in particular the Appeal/Review Tables, pp. 39 and ss. (“the Appeal Review Tables”)

³¹ USTR Report on the Appellate Body of the World Trade Organization, p. 52. https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (Last accessed on 11 May 2026)

³² Sumana & Van den Bossche, op. cit., p. 5.

³³ “... for example as an allegation of panel error in the application of that provision to the facts of the case (rather than an allegation of error in the assessment of facts under Article 11 of the DSU).”

³⁴ The pre-appeal letters also say that this is “without prejudice to the question of whether (and, if so, under what conditions) such claims fall within the appeal mandate set out in Article 17.6 of the DSU and/or paragraph 9 of the Agreed Procedures”.

³⁵ Indeed, pursuant to para 9 of Annex 1 “[a]n appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel.”

³⁶ See Jan Bohanes, in “*The Multi-Party Interim Appeal Arbitration Arrangement and the MPIA Drafters’ Attempt to Improve on the Traditional Appellate Review Process*”, Reckoning and Renewal: The World Trade Organization and Its Dispute Settlement System at 30: Essays in Honour of Valerie Hughes.

³⁷ Appeal/Review Tables pp. 24-25 and 47. Another reform idea consists in conditioning the possibility to raise Article 11 claims before the appeal adjudicator to showing that the matter was raised during the interim review stage (Appeal/Review Tables p. 48).

and their potential effect on the duration of the procedure are shared among a large group of WTO Members.

Another procedural arrangement that the arbitrators have adopted in the two MPIA cases to date to enhance procedural efficiency and facilitate meeting the nine-day time-period was the organisation of a pre-hearing conference. The Pre-hearing conference is intended to help identify the issues that are necessary for the resolution of the dispute, to highlight the key issues raised by the parties in the appeal that need further discussion at the hearing, and/or to discuss any Article 11 claims filed by the parties.³⁸

In this respect, it is to be noted that during the formal DS reform process, Members discussed a reform idea consisting in giving adjudicators the option to organise an early case management conference with the parties to make appeal review more efficient.³⁹

Another aspect of the MPIA procedure that may make it more efficient compared to the AB procedure is outlined in para. 10 of Annex 1.

According to para. 9 “An appeal shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel.” Para. 9 paraphrases Article 17.6 DSU.

Para 10, Annex 1 adds that:

The arbitrators shall only address those issues that are necessary for the resolution of the dispute. They shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues.

This formulation departs significantly from Article 17.12 DSU which states that “The Appellate Body shall address each of the issues raised”. The latter provision has been interpreted as requiring or giving discretion to the AB to examine on the substance also appeal claims that were not necessary for the resolution of the immediate appeal⁴⁰, arguably giving rise to advisory opinions (interpretation of the law that are not necessary to solve a dispute) or *obiter dicta* (statement made in passing) that are not essential for the solution of the case, opposed to the *ratio decidendi* (the rationale or the core reasons of the decision). The AB in some cases pointed to the possibility to exercise judicial

³⁸ Annex 2 to Annex A-2 to the Arbitration Award in DS591 and in DS611, point 4.(ii).

³⁹ Appeal/Review Tables, p. 40.

⁴⁰ For instance, in DS453 Argentina – Financial Service, the AB struck down the likeness analysis of the panel and accordingly concluded that no finding of inconsistency in the panel report was still standing. However, it went on assessing the claims relating to those finding of inconsistency relying on Article 17.6 DSU.

The relevant paragraphs of the AB report read as follows:

“We have found that the Panel’s analysis was in error, and we have thus reversed the Panel’s finding that the services and service suppliers of cooperative countries are “like” the services and service suppliers of non-cooperative countries under Article II:1 of the GATS. We have also reversed the Panel’s finding that Argentine services and service suppliers are “like” the services and service suppliers of non-cooperative countries under Article XVII of the GATS. Our reversal of these findings means that the Panel’s findings on “treatment no less favourable” are moot because they were based on the Panel’s findings that the relevant services and service suppliers are “like”. Moreover, as a consequence of our reversal of the Panel’s “likeness” findings, there remains no finding of inconsistency with the GATS. This, in turn, renders moot the Panel’s analysis of whether measures 1, 2, 3, 4, 7, and 8 may be justified pursuant to Article XIV(c) of the GATS and whether measures 5 and 6 may be justified pursuant to paragraph 2(a) of the GATS Annex on Financial Services. 6.84. At the same time, we note that, for the most part, the claims of error raised by Panama regarding the Panel’s findings on “treatment no less favourable”, as well as the Panel’s findings under Article XIV(c) and paragraph 2(a) of the Annex on Financial Services, concern “issues of law covered in the panel report and legal interpretations developed by the panel”, and hence fall within the scope of appellate review under Article 17.6 of the DSU. Moreover, several of the issues raised in Panama’s appeal have implications for the interpretation of provisions of the GATS. With these considerations in mind, we turn to address the issues raised in Panama’s appeal.” (See paras. 6.83 and 6.84).

economy,⁴¹ i.e. not to rule on the substance of certain claims that are not necessary for the resolution of the dispute⁴², but judicial economy essentially has been characterised as a discretionary power of the adjudicator.

Instead, para. 10, Annex 1 requires MPIA arbitrators to exercise judicial economy. Indeed, it contains a clear instruction to arbitrators to avoid any legal finding that is not necessary for the resolution of the dispute at hand. It also instructs the arbitration to address only the issues raised by the parties. Essentially, the arbitrators should be careful not to make the case for either party. The only legal issues that arbitrators can raise *ex officio* are those relating to their own jurisdiction.

Annex 1 however does not say how the necessity is to be assessed. It is submitted that necessity should be assessed in terms of whether a particular finding would have a concrete impact on the outcome of the dispute at hand (i.e. the appeal before the arbitrators) and, in particular, on the responding Member's implementation obligations. This seems to accord with the approach supported by many WTO Members during the DS reform process.⁴³

Some commentators have argued that necessity should be interpreted with a good degree of flexibility, to allow the appeal adjudicators also to make findings on legal issues that are not essential for the solution of the appeal at hand but might be useful to avoid a new hypothetical appeal in the future⁴⁴. It is submitted that such reading of "necessity" would directly contradict the text of para. 10 Annex 1, which instruct the MPIA arbitrators to *only address those issues that are necessary for the resolution of the dispute*. Assessing the need to resolve a given legal issue in light of a possible future appeal, is tantamount to say that necessity should be assessed by referring to the resolution of a dispute (different from the case pending before the arbitrators) that has not been lodged, yet, and thus is hypothetical.

Such a reading might be defended if one were to take the view that the word "dispute" does not solely refer to the appeal case pending before the arbitrators but to the broader situation of conflicting interests between the parties, which may only be partially captured by the legal arguments that lay before the arbitrators at any given moment. Such a reading, however, would make the assessment of "necessity" even a more speculative and subjective exercise.

So far, all the Article 25 appeal arbitrations have been concluded in less than 90 days. It would be a divinatory exercise to conclude that this was possible because of the emphasis placed by the MPIA participants on the respect of the 90-day timeframe set out in para. 9, Annex 1, or rather because of the efficiency enhancing measures adopted by the arbitrators, or because the parties raised a limited number of claims in each of those appeals. Most probably each of those factors played a role.

It follows, that the possibility for the arbitrators to ask for an extension of the time to issue the award has not been tested, yet. However, one can speculate that were the arbitrators to face a very

⁴¹ Baroncini, op. cit., p.102.

⁴² DS435 Australia — Tobacco Plain Packaging (Honduras), AB report para. 6.52: "we recall that Article 3.4 of the DSU indicates that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter." Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." These overarching aims of the WTO dispute settlement mechanism suggest to us that, while we are required to address each issue on appeal in accordance with Article 17.12, we have the discretion not to rule on the substance of certain claims when doing so is not necessary to resolve the dispute". See also DS33 US – Wool Shirts and Blouses, AB report, p. 19, DS381 US — Tuna II (Mexico), Second Recourse to Article 21.5, AB report, para 6.318.

⁴³ Appeal Review Tables, pp. 19 and 45 as well as Consolidated Text, Title V, Chapter II.

⁴⁴ Bohanes, op. cit, p. 482-483.

complex and lengthy appeal or were the parties not to take up the arbitrators' procedural or substantive suggestions regarding the conduct of the dispute, the arbitrators may feel authorised to ask for an extension.

4. *Experience with appeal arbitration procedures*

As was mentioned earlier, there have been so far three appeal arbitration proceedings grounded on Article 25 DSU, and in all of them the EU was a party.

The first one, took place in 2022 and involved a non-participant (Türkiye). Toward the end of 2021 the EU and Türkiye had two disputes pending. One was brought by Türkiye against the EU in case DS595, *EU — Certain Steel Products* and concerned the EU safeguards on steel products. The other was brought by the EU against Türkiye in case DS583, *Turkey — Pharmaceutical Products* and it was about Türkiye's localization requirement forcing foreign pharmaceutical firms to produce in Türkiye. In late December 2021, because the WTO Appellate Body was paralyzed, the parties suspended both disputes. Later in March 2022 the EU and Türkiye notified under Article 25 DSU an appeal arbitration agreement for each dispute⁴⁵. Both agreements were modelled on Annex 1 of the MPIA Communication. In essence, the parties found it expedient to use the Annex 1 procedures with few adjustments, the most important of which concerned the selection of the three arbitrators. They were to be randomly selected from "a combined list of former Appellate Body Members and appeal arbitrators".

The EU decided not to appeal the panel report in DS595, even though the panel had confirmed certain of Türkiye's claims, and therefore the panel report was adopted by the DSB. Instead, Türkiye appealed the panel report in DS583. The arbitration award in that dispute was circulated within the prescribed period of 90 days, it was only about 50 pages long and it largely confirmed the panel report that found against Türkiye.⁴⁶ Subsequently, both the EU and Türkiye amended the challenged measures and the disputes were resolved.

The second Article 25 DSU appeal arbitration was also completed in 2022, but this time it concerned two MPIA members, the EU and Colombia. Therefore, this was the first appeal under the MPIA. In case DS591, *Colombia — Frozen Fries*, the EU challenged the anti-dumping duties imposed by Colombia on Frozen Fries from Belgium, Germany and the Netherlands. The panel report was then appealed by Colombia on 6 October 2022 and on 21 December 2022 the arbitration award was issued.⁴⁷ Hence, also this appeal procedure was completed in less than 90 days, and the award

⁴⁵ WT/DS583/10

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/583-10.pdf&Open=True> (Last accessed on 10 May 2026)

WT/DS595/10

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/595-10.pdf&Open=True> (Last accessed on 10 May 2026)

⁴⁶ WT/DS583/ARB25

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/583ARB25.pdf&Open=True> (Last accessed on 10 May 2026)

⁴⁷ WT/DS591/ARB25

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/591ARB25.pdf&Open=True> (Last accessed on 10 May 2026)

was only 39 pages long. The anti-dumping duties were found to be in violation of certain provisions of the Anti-Dumping Agreement (ADA). Colombia and EU agreed on reasonable period of time (RPT) for Colombia to remove those inconsistencies. The RPT expired on 5 November 2023, but the EU was not satisfied with the measures taken by Colombia to implement the panel report and the arbitral award. Therefore, the EU launched compliance proceedings pursuant to Article 21.5 DSU. The compliance panel report was circulated in October 2025 and found that Colombia had not fully implemented the panel report and the arbitral award. This time Colombia decided not to appeal and in March 2026 it repealed the anti-dumping duties in question, thereby resolving the six-year-old WTO dispute between the EU and Colombia.⁴⁸

The arbitral award in this case is known for having developed an innovative interpretation of Article 17.6(ii) of the ADA. That interpretation affords more deference to the findings of the investigative authority, when compared to the approach taken by the panel in this dispute and the AB in previous cases.⁴⁹

The third Article 25 DSU Appeal (which is also the second appeal between two MPIA participants) was completed in 2025 in case DS611, *China – Enforcement of Intellectual Property Rights* (DS611). The case concerned the compliance with the TRIPS Agreement of China's issuance of Anti suit-injunction (ASI) for standard essential patents (SEP).⁵⁰ Before the Panel, the EU challenged five court decisions granting an ASI, as well as an alleged unwritten ASI policy in SEP litigation. The EU alleged that Chinese courts unlawfully restricted patent holders from enforcing their rights in foreign jurisdictions, thereby violating certain of China's obligations under the TRIPS agreement.

The Panel found that the EU had proved the existence of an unwritten ASI policy but had failed to demonstrate that it was inconsistent with the TRIPS agreement. In particular, the Panel found (*inter alia*) that the obligation in Article 1.1, first sentence stating that Members must "give effect" to the provisions of the TRIPS Agreement requires Members to implement the provisions of the TRIPS Agreement within their own domestic legal systems, but does not contain any additional obligation

⁴⁸ https://policy.trade.ec.europa.eu/news/access-colombias-frozen-fries-market-restored-eu-exporters-2026-03-17_en (Last accessed on 11 May 2026)

⁴⁹ Pauwelyn, op. cit., p. 700. Jianguo Hu, Journal of WTO and China, *The First Case under Multi-party Interim Appeal Arbitration Arrangement and Its Implications for the Reform of WTO Dispute Settlement System*, Vol. 15, Issue 2, 2025, p.14.

⁵⁰ "If a technical standard requires the use of a patent-protected product or process (i.e. a standard essential patent (SEP)), a producer implementing that standard will need to obtain a licence for its use or risk infringing upon patent owners' rights and the attendant legal consequences of doing so. As part of a SEP holder's patent being included in a standard, the SEP holder typically commits to license the subject matter of the patent to implementers of the standard on fair, reasonable, and non-discriminatory (FRAND) terms. This is known as a FRAND undertaking.

Legal disputes may arise between patent holders and implementers as to whether a particular royalty rate paid by the implementer to the patent holder is FRAND. This may result in domestic litigation in the territories in which the product or process is protected by a patent. As patents are territorial, multiple jurisdictions may be implicated in disputes between parties on the FRAND rate.

Several implementers filed lawsuits in China asking Chinese courts to set the FRAND licensing rate for certain patents required to produce mobile telecommunications products and requesting anti-suit injunctions (ASIs) prohibiting the other party from taking certain legal actions in other jurisdictions. Beginning in August 2020 with a decision from the Supreme People's Court of China (SPC), ASIs were issued in five cases before Chinese courts (and denied in one)." https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm (Last accessed on 13 May 2026).

relating to frustrating the object and purpose of the TRIPS Agreement or other WTO Members' implementation of the TRIPS Agreement.

The MPIA arbitrators reversed that finding and concluded that the corollary of the obligation in Article 1.1, first sentence of the TRIPS Agreement to “give effect” to the provisions of the TRIPS Agreement in a WTO Member's territory, is to do so without frustrating the functioning of the systems of protection and enforcement of IP rights implemented by other Members in their respective territories.

The award in that dispute was also issued within the 90-day deadline and is concise (59 pages). On 20 August 2025, China informed the DSB that it intended to implement the award in a manner that respects its WTO obligations.⁵¹

The two MPIA arbitration awards shows that the MPIA arbitrators have not been shy in performing their task of resolving disputes. They have demonstrated a high degree of independence of judgement both vis-à-vis the AB prior reports as well as the panel whose report they were asked to review.

Given that those appeal-arbitrations took place because of the US blockage of the AB, it is interesting to recall the US attitude vis-à-vis those proceedings. The US did not participate as third parties in the arbitration appeal in DS583. At the DSB meeting of 29 August 2022, when Türkiye made known to the DSB its intention to implement the recommendations and rulings of the panel and the arbitrators, the US took the floor, and it made a mixed statement. On the one hand, it welcome that the parties had found a way to solve their dispute and added that in principle they support arbitration if the parties agree to use that means of settlement. On the other hand, they stated also that the arbitration agreement in this case “incorporated many of the most troubling practices of appellate review under the Appellate Body.”⁵²

In the MPIA appeal proceedings in DS591, the US participated actively as a third party. On 27 January 2023, when Colombia informed the DSB of its intention to implement the recommendations and rulings of the arbitrators US, the tone of the US intervention changed markedly. The US took the floor to comment on the Arbitrator's findings with respect to Article 17.6(ii) ADA, concluding that the arbitrator's analysis of Article 17.6(ii) was persuasive. More precisely, the US stated: “We welcome the Arbitrator's willingness to adopt an interpretation that is consistent with the text agreed by Members, even and especially if the interpretation differs from the Appellate Body's erroneous views”.⁵³

Finally, in the MPIA appeal in DS611, the US was a third party but did not make a written submission. During the DSB meeting of 26 September 2025, it appears that a Member criticised the content of the arbitration award, arguing that the arbitrators had created a new obligation that was not contained in the text of the TRIPS agreement. At the DSB meeting of 19 December 2025, the US

⁵¹ Directorate-General for Trade and Economic Security, https://policy.trade.ec.europa.eu/news/following-wto-ruling-favourable-eu-china-announces-withdrawal-its-anti-suit-injunction-policy-2026-04-01_en (Last accessed on 13 May 2026).

⁵² Statements by the United States at the August 29, 2022, DSB Meeting, 2022, <https://geneva.usmission.gov/2022/08/30/statements-by-the-united-states-at-the-august-29-2022-dsb-meeting/> (Last accessed on 11 May 2026)

⁵³ Statement of the United States at the January 27, 2023, DSB Meeting, https://common.usembassy.gov/wp-content/uploads/sites/25/2023/01/Jan27.DSB_.Stmt_.as_.deliv_.fin_3.pdf (Last accessed on 11 May 2026)

noted that such a criticism correspond to concerns with WTO dispute settlement that the US had raised in the past.⁵⁴ Accordingly, the US suggested that the MPIA was not sufficient to solve the fundamental problems of WTO dispute settlement.⁵⁵

Overall, it would appear that the US' attitude with regard to the MPIA has been so far one of relative "laissez faire" (as far as the US is not part of the arrangement) and it is somehow influenced by the content of each award.

5. The recent developments

As it was mentioned above, Annex 2 of the MPIA Communication sketches out the procedure for the composition of the MPIA pool of 10 arbitrators. In essence, each MPIA participant can propose one candidate. All the candidates undergo a pre-selection process, i.e. an eligibility check intended to ensure that the candidates are persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. The MPIA participants envisage that the pre-selection process will be carried out by the WTO Director General together with the Chairperson of the DSB, and the Chairperson of the Goods, Services, TRIPS and General Councils. They shall recommend the candidates that meet the eligibility criteria. The participating Members will then compose the pool by consensus, ensuring the overall balance. Once it is composed, the pool will be notified to the DSB. The whole composition process should last just three months.

Annex 2 does not specify the tenure of the arbitrators appointed to the pool. This is understandable as the MPIA was conceived as an interim mechanism. However, it sets out that participating Members may agree to modify the composition of the pool at any time. Moreover, it adds that were the AB to remain dysfunctional, "the participating Members will, periodically, partially re-compose the pool of arbitrators, starting two years after composition, in line with the procedures established in this Annex" (para. 5, Annex 2).

It follows that, starting two years after its composition the pool may be partially recomposed in line with the procedure set out in Annex 2.

⁵⁴ While it has been criticised by some Members in the DSB, this arbitral award has been praised by other scholars. For instance, G. Sacerdoti and C. De Stefano consider that "*the MPIA report must be commended in so far as it interpreted the obligation "to give effect" in light of the broader context of the entire TRIPS Agreement. In so deciding, the MPIA arbitrators have followed the AB approach to go beyond the letter of the specific provision at issue in the dispute and to give weight to the object and purpose of the entire agreement in which the provision at issue is inserted...*" (G. Sacerdoti and C. de Stefano, *The WTO and its dispute settlement system in 2025. The panel reports on the territorial extension of TRIPS protection (DS611) and the treatment of "Transnational subsidies" under the SCM agreement (DS618)* (April 20, 2026). Available at SSRN: <https://ssrn.com/abstract=6603518> or <http://dx.doi.org/10.2139/ssrn.6603518> p.8) (Last accessed on 11 May 2026). See also M. Cohen, "*The WTO's Arbitral Decision on Chinese SEP Practices in DS/611: Getting Closer to the Right Kind of Decision*" <https://chinaipr.com/2025/07/26/the-wtos-arbitral-decision-on-chinese-sep-practices-in-ds-611-getting-closer-to-the-right-kind-of-decision/> (Last accessed on 13 May 2026); D. J. Gervais, "*The enduring importance of territoriality in patent rights – Lessons from the WTO Arbitrators in China – Enforcement of Intellectual Property Rights*", (Last accessed on 13 May 2026) <https://ipkitten.blogspot.com/2025/07/guest-post-enduring-importance-of.html>

⁵⁵ US Statements at the December 19, 2025, DSB Meeting, https://geneva.usmission.gov/wp-content/uploads/sites/25/2025/12/Dec19.DSB_Stmt_as_deliv_fin.pdf (Last accessed on 11 May 2026)

Annex 2 says neither what “partially” means nor what periodicity applies to the re-composition. Also, the two-year starting point does not seem to be set out as a point in time carved in stone whose passage would automatically trigger the recomposition of the pool.

The first composition of the pool was notified to the DSB on 31 July 2020.⁵⁶ On 5 July 2022, the MPIA participants informed the DSB that they had decided to leave the pool unchanged and that they would consider a partial re-composition of the pool of arbitrators with effect from 31 July 2024, should the AB still not be capable of hearing appeal at that time.⁵⁷

On 12 July 2024, the MPIA participants informed the DSB that they would launch the process of partial re-composition of the pool on 1st March 2025, should the AB impasse still endure. They also said that they intended to finalise the process of partial re-composition within three months, i.e. by 31 May 2025.⁵⁸

The partial recomposition of the MPIA pool was indeed notified to the DSB on 28 May 2025. The new pool counts six arbitrators from the original pool and 4 new arbitrators. Neither Annex 2 nor the various communication clarify whether the original arbitrator can be reappointed to the pool, therefore it is hard to tell with precision how many arbitrator seats were subject to recomposition.⁵⁹

What deserves to be stressed is the fact that the recomposition occurred according to the schedule that the MPIA participants had communicated to the DSB. The MPIA participants achieved consensus on the recomposition of the pool within the short deadline of three months mentioned in Annex 2.

The smooth recomposition of the MPIA pool stands in stark contrast to what is happening to the AB. During the DSB meeting of April 2026, the DSB failed for the 96th time to reach consensus on the proposal to launch the appointment of the AB members because of the objection of the US. That proposal is currently supported by around 130 WTO Members.

6. MPIA and MC14

Another remarkable development concerning the MPIA happened during the 14th Ministerial conference in Yaoundé, Cameroon. On 28 March 2026 during the Ministerial Conference the EU, Colombia, Pakistan and Singapore hosted a Ministerial meeting for the 61 MPIA participants.

The meeting was the occasion for the MPIA participants to issue a statement reiterating their commitment to achieve a fully and well-functioning dispute settlement system accessible to all Members, while stressing that in the interim, by avoiding appeals into the void, the MPIA supports rule-based trade.

⁵⁶ JOB/DSB/1/Add.12/Suppl.5.
<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/DSB/1A12S5.pdf&Open=True> (accessed on 2 May 2026).

⁵⁷ JOB/DSB/1/Add.12/Suppl.8.
<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/DSB/1A12S8.pdf&Open=True> (accessed on 2 May 2026)

⁵⁸ JOB/DSB/1/Add.12/Suppl.11
<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/DSB/1A12S11.pdf&Open=True> (accessed on 2 May 2026)

⁵⁹ JOB/DSB/1/Add.12/Suppl.14
<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/JOBS/DSB/1A12S14.pdf&Open=True> (accessed on 2 May 2026)

The MPIA participants also encouraged other Members to join the arrangement, stating that “[a]s participation in the MPIA continues to grow, this strengthens our efforts to support a multilateral trading system based on rules.”⁶⁰

During the Ministerial meeting the WTO Director General stressed that “[t]he MPIA has proven effective ... with two appeals successfully resolved through this mechanism so far”. Then she added that the “real success of the MPIA should not be judged just by the number of appeals it handles. Rather, it lies in the commitment of members that have chosen to join it to refrain from appealing cases into the void, and to bring any dispute with another MPIA participant to a timely and binding resolution. The result is a system that can help reinforce the rule of law in trade, support business and consumer confidence, and reduce the risks associated with unresolved disputes, particularly for smaller and more vulnerable economies.”⁶¹

The need to encourage greater participation in the MPIA was also affirmed in the Joint Ministerial Statement from the EU and the CPTPP at the 14th WTO Ministerial Conference.⁶²

It would seem therefore that in the current times characterised by geopolitical tensions and accrued instability in international trade, increasingly the MPIA is seen as a mechanism to reduce instability and unpredictability.

Another interesting development that occurred during the 14th Ministerial Conference that concerns the MPIA relates to the so-called E-Commerce Agreement (ECA).

Work on the ECA agreement begun at MC11 in December 2017. In 2024 the co-convenors Australia, Japan and Singapore announced the conclusion of ECA negotiations. This plurilateral agreement is supported by 72 members⁶³. However, several attempts by the co-sponsor to incorporate the ECA Agreement into the WTO’s legal architecture as a plurilateral agreement failed as the WTO could not reach consensus⁶⁴.

During the 14th Ministerial Conference, 67 WTO Members (participating in the ECA) issued a Declaration on interim arrangements for the Agreement on Electronic Commerce (the Decision on interim arrangement).⁶⁵ The declaration explains that those WTO Members (while continuing to seek the incorporation of the ECA into Annex 4 of the WTO Agreement) have decided to implement the ECA before its incorporation. That decision has been taken because several attempts to incorporate the ECA in Annex 4 have failed, and these Members believe it important to begin benefitting from the ECA as soon as possible.

⁶⁰ WT/MIN(26)/30). MC14: Supporting the rules-based multilateral trading system: The role of the MPIA, Directorate-General for Trade and Economic Security, 28 March 2026, https://policy.trade.ec.europa.eu/news/mc14-supporting-rules-based-multilateral-trading-system-role-mpia-2026-03-28_en (Last accessed on 2 May 2026)

⁶¹ https://www.wto.org/english/news_e/news26_e/mc14_28mar26_350_e.htm (Last accessed on 2 May 2026)

⁶² https://policy.trade.ec.europa.eu/news/joint-ministerial-statement-eu-and-cptpp-14th-wto-ministerial-conference-2026-03-27_en (Last accessed on 2 May 2026)

⁶³ The ECA sets baseline rules for digital trade. The Agreement aims to facilitate e-commerce, ensure an open environment for digital trade and promote trust in e-commerce. It includes a commitment for a permanent moratorium on customs duties on electronic transmissions.

⁶⁴ This happened at the 13th WTO Ministerial Conference and then at the General Council meeting of February and December 2025. See <https://tradebetablog.wordpress.com/2025/02/19/e-commerce-initiative-latest-blocked/> (Last accessed on 2 May 2026)

⁶⁵ [WT/MIN\(26\)/W/26](https://www.wto.org/press/2026/WT/MIN(26)/W/26)

In practice, that means that those Members will proceed with ratification of the ECA and the ECA will come into force when 45 Members have ratified it. An Interim Arrangement Annex has been added to the ECA. It sets out *inter alia* that the provisions of the DSU will apply *mutatis mutandis*, to the disputes between the parties that have ratified the agreement from the moment it enters into force up to the date on which this Agreement is added to the WTO Agreement.⁶⁶

However, given that the AB is not operational, the Interim Arrangement Annex provides that if a party wishes to appeal a panel report, the parties to the dispute shall resort to arbitration under Article 25 of the DSU to decide the appeal. An appendix to the Interim Arrangement Annex sets out the arbitration procedure that applies by default, unless the parties agree to a different procedure. The default arbitration procedure is indeed the MPIA procedure contained in Annex 1 of the MPIA Communication with few adjustments due to the different context. Moreover, the three arbitrators charged with deciding the appeal will be randomly selected from the MPIA pool of arbitrators, unless the parties to the ECA have established a different pool of arbitrators.

The importance of the Decision on interim arrangement of the ECA goes beyond e-commerce.

First, it shows the readiness of some Members to implement agreements that are intended to be incorporated into the WTO, before the incorporation takes place.⁶⁷

Second, and with regard to the MPIA, the Decision on interim arrangement shows that the MPIA (as well as the MPIA pool of arbitrator) is gaining credibility in the international trade law and it may become a point of reference for designing dispute settlement mechanisms also with regard to rules that do not belong (yet) to the WTO. This is even more remarkable when one considers that not all the Members that have issued the Decision on interim arrangement are MPIA participants⁶⁸, and yet they have found it convenient to rely on the MPIA procedure and the MPIA pool of arbitrators as a default option.

7. Conclusion

During the 13th Ministerial Conference (MC13), Ministers adopted a Decision on Dispute Settlement Reform⁶⁹. The decision acknowledged the progress made since the 12th Ministerial Conference (MC12), particularly through the informal DS reform process facilitated by the former Guatemalan DPR, Mr Molina. It reaffirmed the objective set at MC12: to establish a fully and well-functioning dispute settlement system accessible to all members by 2024 and instructed officials to accelerate discussions, build on existing progress, and address unresolved issues, including appeal/review mechanisms and accessibility.

⁶⁶ The text of the ECA and the Annex Interim Arrangement Annex, are attached to the Declaration on interim arrangements for the Agreement on Electronic Commerce.

⁶⁷ This obviously raises a number of legal and political issues that go beyond the scope of this paper. See for instance Peter Ungphakorn, *How 66 (or is it 67?) WTO members are trying to unblock their e-commerce deal* <https://www.hinrichfoundation.com/research/wp/trade-governance/wto-members-unblocking-e-commerce-deal> (Last accessed on 2 May 2026)

⁶⁸ For instance, Argentina, Bahrain, Brunei Darussalam, Burkina Faso, Cabo Verde, The Gambia, Georgia, Israel, Korea, Kuwait, Kyrgyz Republic, Lao, Mauritius, Mongolia, North Macedonia, Oman, Qatar, UAE are not among the MPIA participants at the time of writing.

⁶⁹ [WT/MIN\(24\)/37](#); [WT/L/1192](#).

In line with this mandate, the DS reform process resumed in April 2024, when the Chairperson of the General Council appointed Ambassador Usha Chandnee Dwarka-Canabady of Mauritius as facilitator, thereby formalising the process. From April to December 2024, substantial work was undertaken, yielding significant progress—particularly on appeal/review procedures and accessibility. A 50-page Progress Report of Technical Work⁷⁰ details advancements across various reform areas. However, the process remained incomplete.

At the December 2024 General Council (GC) meeting, the GC Chair urged members to seek common ground and announced plans to hold consultations with interested delegations in 2025 to explore ways to build on the progress made. Yet, 2025 brought no substantial advancement. Consultations on DS reform only began in late autumn, culminating in a December 2025 report by the DSB Chair.⁷¹ The DSB Chair concluded that DS reform remains a priority for most Members, and it is seen as a part of WTO reform. However, many Members called also for the process to resume “*after MC14 once the time is right and all Members are ready*”.

A similar stance was reiterated at MC14, where the DSB Chair again emphasised the need to advance reform post-MC14, contingent on ripe conditions and Members’ readiness to engage.

It appears that in 2025, WTO Members’ focus shifted from DS reform to the broader WTO reform process, causing the DS reform momentum to stall.

This shift is reflected in the WTO Reform Work Plan, included in the Draft Yaoundé Ministerial Declaration on WTO Reform⁷², which however clearly indicates that DS reform must be part and parcel of WTO reform. The draft WTO Reform Work Plan states:

*“We acknowledge that the WTO Dispute Settlement System is not fully and well-functioning and requires reform. We agree that consultations on dispute settlement reform, under the auspices of the DSB, should continue following MC14.”*⁷³

At the time of writing the chances of adoption of the Ministerial Declaration on WTO reform remain unclear.

Even if that Declaration were adopted, experience shows that DS reform is not an easy process and it will not be easy to find a DS mechanism acceptable to all Members, all the more so as long as the reformed WTO rules which that mechanism will serve to enforce remain in the making.

It follows that in the foreseeable future the MPIA will remain the sole mechanism providing participating WTO Members with the assurance that they can achieve a legally binding resolution of trade disputes via a two-phase adjudication process.⁷⁴ It would therefore seem logical for WTO

⁷⁰ See the annex to the General Council Chair’s Statement, [JOB/GC/DSR/5](#).

⁷¹ [JOB/GC/472](#).

⁷² The WTO Reform Work Plan and the Draft Yaoundé Ministerial Declaration on WTO Reform are annexed to the MC14 Chairperson’s Summary WT/MIN(26)/35 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN26/35.pdf&Open=True> (Last accessed on 2 May 2026)

⁷³ Moreover, the “*Takeaway document breakout sessions on WTO reforms*” contains” WT/MIN(26)/39 contains the summaries by the Minister-Facilitators of key takeaways from their respective breakout groups on WTO Reform circulated under their own responsibility. It is a detailed illustration of the different Members position <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN26/39.pdf&Open=True> (Last accessed on 2 May 2026)

⁷⁴ See, in this sense, Sumana & Van den Bossche, op. cit..

Members that genuinely value stability and predictability in international trade and support an international trading system based on rules to join the MPIA.

WTO Subsidy Rules in an Era of Industrial Policy: Implications for the Multilateral Trading System

Elettra Bargellini and Luca Rubini¹

Summary: 1. Introduction – 2. The Transparency Deficit – 3. The Difficulty of Disciplining Subsidies – 3.1 The ‘Public Body’ Problem and the High Threshold of the Law – 3.2 Cross-border Financial Contributions and New Forms of Subsidisation – 4. From Multilateralism to Plurilateralism: Where Should Reform Happen? – 5. The CPTPP as a Building Block? – 6. Intellectual Transplants and the Emergence of a ‘Common Law’ of Subsidies – 7. Concluding Remarks.

Keywords: WTO Subsidies Agreement – Subsidy Transparency – State-Owned Enterprises – Trade Distortions – Plurilateral Agreements – Subsidy Reform – Economic Governance – Public Body Doctrine – CPTPP.

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1. Introduction

Subsidy disciplines occupy a central place in the architecture of the multilateral trading system. Since its adoption at the end of the Uruguay Round, the WTO Agreement on Subsidies and Countervailing Measures (‘WTO ASCM’ or ‘the Agreement’) has represented one of the most significant advances of the multilateral trading order, introducing for the first time a general definition of subsidy,² a specificity test, a taxonomy of prohibited and actionable measures, and a dedicated institutional architecture – the Committee on Subsidies and Countervailing Measures – to oversee its operation.

Yet more than a quarter of a century since its entry into force, the ASCM is increasingly showing its age. Two gaps stand out. First, transparency: the system rests on an incentive structure that does not reward, and barely penalises the absence of, notification. Second, substantive discipline: the legal

¹ This chapter draws on and develops the presentations given at the University of Bologna on 5 May 2026. The authors used Claude (Anthropic) to generate a first draft of the paper on the basis of (i) the research outline and the PowerPoint presentation prepared for the seminar, and (ii) the authors’ previous work on the topic. The AI tool was not used to generate new or original ideas. The authors have reviewed and edited the content of the initial draft as needed and take ultimate responsibility for the content of the published work.

² Agreement on Subsidies and Countervailing Measures (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14 (WTO ASCM), Article 1, providing the first formal, general definition of ‘subsidy’ in the multilateral trading system.

standards developed through WTO jurisprudence have proven both too demanding to capture some of the most policy-relevant forms of subsidisation, and too narrow to reach new instruments of industrial policy, notably those associated with China's state-directed economic model.

Against this background, the multilateral rule-book has proven remarkably resistant to updating. This chapter examines both gaps in turn (Sections 2 and 3), before turning to the institutional question of where reform might realistically occur (Sections 4–6): whether at the multilateral level, through plurilateral initiatives, or – as increasingly appears necessary – through the diffusion of subsidy disciplines via preferential trade agreements ('PTAs') and national legislation, a process that some have started to describe as the emergence of a new 'common law' of subsidies and state-owned enterprises ('SOEs').

2. The Transparency Deficit

Transparency has been a foundational, if imperfectly realised, ambition of the GATT/WTO system since 1947. Already Article XVI of the GATT imposed a basic notification duty on any contracting party granting a subsidy that increased exports or reduced imports, coupled with a duty to enter, upon request, into consultations where serious prejudice was caused to another party.³ The WTO ASCM built on this foundation without fundamentally altering its logic: it introduced the first formal definition of subsidy, confined the notification duty to specific subsidies, and specified in some detail the content notifications should contain – form, financial value, objective, duration, and statistical data permitting an assessment of trade effects.

The persistent problem, however, is one of incentives. As has been influentially argued, the largest subsidisers are frequently the least transparent, and the WTO system, reliant as it is on self-reporting, does not penalise the breach of the notification duty in any meaningful way.⁴ This is not, at bottom, a problem of technical capacity: it is a problem of institutional design that offers no reward for compliance and imposes no cost for its absence. Article 25.7 ASCM specifies that notification 'does not prejudice' a measure's legal status, precisely with a view to reducing the fear of self-incrimination that has haunted the system since the 1960s;⁵ but this assurance has done little to alter the underlying calculus of governments, especially once the WTO's comparatively muscular dispute settlement mechanism entered into force. Paradoxically, the very success of WTO adjudication appears to have made notification more, not less, risky in the eyes of Members.

The consequence is a system in which notifications, where they exist at all, are frequently incomplete, delayed, or vague, and in which the Committee on Subsidies and Countervailing Measures – the body meant to deliberate on this information – is correspondingly starved of the raw material for meaningful peer review. Reform proposals exist: better use of the Permanent Group of

³ General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187 (GATT 1947), Article XVI:1 (Section B of Article XVI was added by the 1955 Review Session). See also GATT 1947, Article X on the general obligation of publication of trade-related laws and regulations.

⁴ Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) 9 World Trade Review 551.

⁵ Article 25.7 WTO ASCM. See GATT Panel, 'Operation of the Provisions of Article XVI' (L/1442 and Add.1–2, adopted 21 November 1961) BISD 10S/201, 206, para 19, identifying fear of self-incrimination as an obstacle to notification as early as 1961.

Experts, the cross-notification mechanism foreseen – but barely used – under Article 25.10 ASCM,⁶ or a decoupling of the transparency function from the shadow of dispute settlement. None of these, however, addresses the more fundamental institutional question developed in Section 4 below: whether a system built on self-reporting by more than 160 Members, several of whom have every incentive not to report, can be fixed through incremental reform alone.

3. The Difficulty of Disciplining Subsidies

Even where information is available, WTO subsidy disciplines are not well equipped to police the practices that most concern governments today. Two distinct difficulties can be identified.

3.1 The ‘public body’ problem and the high threshold of the law

The first difficulty concerns the legal standards developed through more than two decades of WTO litigation, particularly at the hands of the Appellate Body.⁷ The interpretation of ‘public body’ under Article 1.1(a)(1) ASCM is emblematic.⁸ The Appellate Body’s test – requiring that an entity ‘possess, exercise or [be] vested with governmental authority’ to qualify as a public body – has been widely criticised as both under-inclusive, in that it may exclude entities that are functionally instruments of State industrial policy, and difficult to apply, in that it demands an intensive, fact-specific inquiry into corporate governance for which WTO panels are ill-suited.

3.2 Cross-border financial contributions and new forms of subsidisation

The second, and arguably more consequential, difficulty is that the ASCM’s architecture presupposes that a financial contribution is made by the government of the Member in whose territory the recipient is located. This assumption sits uneasily with contemporary patterns of State-directed finance, particularly the cross-border deployment of Chinese capital through instruments such as the Belt and Road Initiative, State-owned banks, and State-owned enterprises operating abroad.⁹ Whether, and how, the ASCM’s definition of subsidy can be construed to capture financial contributions that cross a border before reaching their ultimate beneficiary remains genuinely unsettled.

The cross-border subsidy is not, in fact, a new problem. The question arose during the negotiation of the 1979 GATT Subsidies Code, resurfaced in the United States countervailing duty cases of the

⁶ Article 25.10 WTO ASCM (cross-notification by Members other than the subsidising Member), a mechanism that has been rarely and only selectively used in practice.

⁷ See Pramila Crivelli and Luca Rubini, “‘Flying High in a Plane’: Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (WT/DS316/AB/RW)*” (2020) 19 *World Trade Review* 316, discussing the demanding legal standards that have emerged from WTO subsidy jurisprudence.

⁸ Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US – Anti-Dumping and Countervailing Duties (China))* (adopted 25 March 2011) WT/DS379/AB/R, para 317. See generally Michael Cartland, Gérard Depayre and Jan Woznowski, ‘Is Something Going Wrong in the WTO Dispute Settlement?’ (2012) 46 *Journal of World Trade* 979, on the ‘public body’ interpretation adopted by the Appellate Body.

⁹ See Victor Crochet and Vineet Hegde, ‘China’s “Going Global” Policy: Transnational Subsidies under the WTO SCM Agreement’ (2020) 23 *Journal of International Economic Law* 841.

early 1980s, and has since recurred in a stable set of configurations sharing a single source: the assumption, built into the definition of a subsidy, that support can be attributed to territorially bounded State action.¹⁰ What the recent disputes expose, in other words, is a drafting choice rather than a novelty in the conduct of any particular Member.

In the absence of a negotiated response, the matter has so far been left to the ingenuity of investigating authorities. The European Union's own trade remedy practice has pushed the boundaries of the existing text – for instance, in imposing countervailing duties on Egyptian exports benefiting from Chinese-funded support, relying on the International Law Commission's Articles on State Responsibility to attribute the Chinese financial contribution to the Egyptian government.¹¹ Such interpretation, however understandable as a stop-gap, risks conflating secondary rules of attribution with the primary rules that define what a subsidy is.¹² The United States has taken the opposite route, repealing in 2024 the regulation barring the countervailing of transnational subsidies and thus removing the territorial limit altogether.¹³ Neither approach substitutes for a negotiated rule, and both leave the underlying assumption in place.

The question has now been addressed, for the first time, in WTO dispute settlement. In DS616 the Panel examined the EU's countervailing duties on stainless steel from Indonesia, where the Commission had treated financial contributions of Chinese origin as subsidies of the Government of Indonesia, attributing them on an 'inducement' theory, invoking Article 11 of the ILC Articles on State Responsibility. The Panel rejected the inducement route, holding that Article 1.1(a)(1) ASCM sets out a closed definition that does not permit government-to-government inducement to bring a measure within its scope, while expressly reserving the question whether conduct 'acknowledged and

¹⁰ On the origins of the territorial assumption in the Tokyo Round negotiations, see RR Rivers and JD Greenwald, 'The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences' (1979) 11 *Law and Policy in International Business* 1447; Gary N Horlick, 'An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures' (2013) 8 *Global Trade and Customs Journal* 278, 297.

¹¹ See, eg, Commission Implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt [2020] OJ L189/1; Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt [2020] OJ L201/10, in which the European Commission relied on the International Law Commission's Articles on State Responsibility to impute a Chinese financial contribution to the Egyptian government.

¹² For the underlying methodological objection – that this approach conflates draft secondary rules on attribution of State responsibility with the primary rules defining a subsidy – see Joost Pauwelyn, 'Treaty Interpretation or Activism? Comment on the AB Report on United States – ADs and CVDs on Certain Products from China' (2013) 12 *World Trade Review* 235, making an analogous point regarding the Appellate Body's reasoning in *US – Anti-Dumping and Countervailing Duties (China)* (n 8).

¹³ US Department of Commerce, 'Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws' (2024) 89 Fed Reg 20766, repealing 19 CFR § 351.527 with effect from 24 April 2024; Tariff Act of 1930 § 701, 19 USC § 1671. On the EU's attribution practice, see Case T-480/20 *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission* ECLI:EU:T:2023:90 and Case T-540/20 *Jushi Egypt for Fiberglass Industry v Commission* ECLI:EU:T:2023:91, upheld in Joined Cases C-269/23 P and C-272/23 P *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission* ECLI:EU:C:2024:984, without endorsing the reliance on the ILC Articles; Luca Rubini, 'Are Transnational Subsidies Regulated by EU and WTO Law? The General Court Has Spoken (Cases T-480/20 and T-540/20)' (RSC Policy Paper 2023/09, European University Institute 2023); Victor Crochet and Marcus Gustafsson, 'Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law' (2021) 20 *World Trade Review* 343.

adopted’ by another government might ever be attributed.¹⁴ Significantly, however, it did not decide the prior question of whether transnational subsidies as such may be countervailed under the ASCM, an issue the parties had not put to it. Within the context of a non-operational Appellate Body, the report has been appealed into the void.¹⁵ The definitional question thus remains, for all practical purposes, where the drafters left it.

The cumulative effect of these two difficulties – a demanding ‘public body’ standard and an uncertain reach over cross-border financial contributions – is that the ASCM has struggled to capture precisely the forms of subsidisation most salient in the current wave of industrial policy competition. Faced with this gap, several major trading powers have turned to unilateral remedies and to creative readings of existing disciplines, rather than waiting for multilateral reform that shows little sign of materialising. The EU’s Foreign Subsidies Regulation is perhaps the clearest example of this trend: a unilateral instrument, modelled in substance on EU State aid control, designed to fill a gap that the WTO rule-book – in the assessment of the Commission itself – does not adequately address.¹⁶ Another notable example can be found in the US with the repeal of the old ‘transnational subsidy rule’, thus allowing the investigation and countervail of transnational subsidies.¹⁷

Whatever its merits, the emergence of such instruments illustrates a broader dynamic: where multilateral consensus cannot be reached, the major trading powers do not simply wait – they act, whether through the negotiated diffusion of their own standards (Section 6 below) or through unilateral coercion.

4. From Multilateralism to Plurilateralism: Where Should Reform Happen?

Given the transparency and substantive gaps identified above, and the WTO’s now well-documented inability to update its own rule-book – the fate of the Doha Round being the starkest illustration – a threshold institutional question arises: is the multilateral level still the right place to pursue reform?

There are strong reasons to think that it remains, in principle, the first-best option. Subsidy disciplines are inherently difficult to conceive on a narrow geographical basis: a discipline binding only a subset of trading partners, while leaving the largest subsidisers outside its scope, risks simply displacing distortive practices rather than curbing them. More fundamentally, how can you really regulate a subsidy and its effects for some markets only? Yet the realpolitik of the WTO’s consensus-based decision-making, combined with the evident lack of appetite among the largest Members to bind themselves further, counsels a more pragmatic route: plurilateralism.

¹⁴ Panel Report, *European Union – Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia* (circulated 2 October 2025, not adopted) WT/DS616/R, paras 7.55–7.103. See Luca Rubini, ‘WTO Panel Report, European Union – Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia, WT/DS616/R, Circulated on 2 October 2025’ (2026) 53(1) *Legal Issues of Economic Integration* 95.

¹⁵ The European Union notified its appeal on 21 November 2025, notwithstanding the non-operational Appellate Body, and Indonesia filed a cross-appeal on 27 November 2025.

¹⁶ Commission, ‘White Paper on Levelling the Playing Field as regards Foreign Subsidies’ COM (2020) 253 final; Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1.

¹⁷ See Luca Rubini, “‘We are all just prisoners here, of our own device’: regulating transnational subsidies between domestic and international law” (2026) 21 (7 & 8) *Global Trade and Customs Journal* 270-277.

The WTO structure itself accommodates plurilateral agreements: Article X:9 of the Marrakesh Agreement allows one to be added to Annex 4 by consensus, and Article II:3 confirms that it creates no obligations for Members that have not accepted it. The criteria commonly advanced in the debate – that such an agreement be open to accession, not harm the interests of other Members, and be capable of integration into the multilateral system – are policy conditions rather than textual ones. But, still, they remain highly desirable. There is precedent for the idea: in 1979 a subset of contracting parties concluded under the GATT an advanced code on subsidies, the Tokyo Round Subsidies Code, whose countervailing duty provisions were substantially carried over into the ASCM, although its central innovation, the general definition of subsidy, had no counterpart in the Code.¹⁸ Reaching the consensus required to bring a new agreement within the WTO's legal framework seems out of reach at present, even though this is a less ambitious step than amending the ASCM itself. It is, however, important that academic and policy circles start highlighting it as the most desirable, and necessary, second-best option.

That may change if a broader reform of the WTO gets under way. For now, the more realistic path is an agreement that stands on its own, keeps an institutional link with the WTO without becoming part of its treaty architecture, and is built so that it can be brought inside once participation widens.

To be meaningful, however, a plurilateral discipline on subsidies cannot simply recruit whichever Members are willing; it must, at the very least, include what might be called the 'core' of the system – the United States and the European Union, but also China and India, together with other significant trading nations such as Brazil and Canada and the UK. A plurilateral initiative excluding any of these players would risk being either toothless (if it excluded the major subsidisers) or unpalatable (if it required disciplines the excluded powers would never accept in a multilateral setting). This is a politically demanding threshold, and it is one reason why, to date, plurilateral initiatives on subsidies, such as the Trilateral Initiative gathering the EU, Japan and the United States since 2017, have produced draft texts but little concrete progress.¹⁹

A second dimension of the composition question concerns the developing world. With the partial exceptions of India and Brazil, most developing Members are largely absent from the subsidy conversation at the WTO, and understandably so: the fiscal capacity to subsidise at scale is itself unequally distributed, and a discipline on subsidies is, from the perspective of a Member that cannot

¹⁸ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (adopted 12 April 1979, entered into force 1 January 1980) BISD 26S/56 (Tokyo Round Subsidies Code). See John J Barcelo III, 'Subsidies, Countervailing Duties and Antidumping After the Tokyo Round' (1980) 13 *Cornell International Law Journal* 257; Gary N Horlick and Peggy A Clarke, 'The 1994 WTO Subsidies Agreement' (1994) 17(4) *World Competition* 41. On the conditions for a plurilateral agreement, see Takemasa Sekine, 'Possibility of Developing and Expanding the Regulation of Subsidies through Free Trade Agreements (FTAs): Analysis Focusing on a Trend in FTAs Concluded by the EU' (2020) 16(5) *Public Policy Review* 1. The argument in this and the following paragraph is developed at greater length in Elettra Bargellini, 'The TCA's Subsidy Regime: A Model for Strengthening WTO Rules on Subsidies?' in Elisa Baroncini (ed), *The WTO as a Major Actor of Sustainable Development and Its Reform Process – The EU Approach* (Bologna University Press, forthcoming 2026).

¹⁹ The 'Trilateral Initiative' gathering the EU, Japan and the United States since late 2017; the only draft text circulated to date essentially introduces new categories of prohibited subsidies: see Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (Washington DC, 14 January 2020) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union>> accessed 28 August 2026.

afford them, a discipline on other people's conduct. Where the Chinese State favours a domestic firm it appears to do so through some form of subsidy far more often than do economies with more constrained public finances, which rely correspondingly more on other instruments.²⁰

Such Members do not for that reason abstain from intervening: they reach for other instruments. Indonesia's response to the question of how to capture value from its nickel endowment was not to subsidise domestic processing but to prohibit the export of unprocessed ore – a measure found by the panel in *Indonesia – Raw Materials* to be inconsistent with Article XI:1 GATT 1994, though the report was appealed into the void and never adopted,²¹ and arguably no less distortive than the subsidy it replaced. Export restrictions on critical raw materials, local content requirements and procurement preferences all perform, for governments that cannot write cheques, functions closely analogous to subsidisation. A plurilateral disciplining subsidies among the fiscally capable, while leaving these substitutes untouched, would risk displacing distortion towards instruments that are harder to observe rather than reducing it.

5. *The CPTPP as a Building Block?*

If a freestanding plurilateral negotiation on subsidies is unlikely to succeed in the short term, an alternative is to build on existing agreements that already discipline a subset of subsidy-related conduct among a critical mass of the relevant players. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') is an obvious candidate. Its membership already includes major trading economies, its rules are in several respects more detailed than the WTO's, and, crucially, it is currently the subject of exploratory talks with the European Union and of a pending accession request by China, developments that could, in principle, extend its disciplines toward the 'core' group identified above.²²

The difficulty is that the CPTPP's subsidy-related disciplines are heavily focused on State-owned enterprises and the designated monopolies through which SOEs often operate, rather than on subsidies as a general category. This is a significant limitation: many of the most contentious contemporary subsidy practices – clean energy tax credits, semiconductor incentives, R&D support – are not necessarily channelled through SOEs, and a discipline confined to the SOE context would leave much of the current industrial policy landscape untouched. If the CPTPP is to serve as a genuine building block for a modern subsidy discipline, its rules would need meaningful updating and generalisation beyond the SOE paradigm.

6. *Intellectual Transplants and the Emergence of a 'Common Law' of Subsidies*

²⁰ Simon J Evenett and Johannes Fritz, 'Subsidies and Market Access: Towards an Inventory of Corporate Subsidies by China, the European Union and the United States' (28th Global Trade Alert Report, 2021) <www.globaltradealert.org/reports/gta-28-report> accessed 28 August 2026; Simon J Evenett and others, 'The Return of Industrial Policy in Data' (2024) 47 *The World Economy* 2762.

²¹ Panel Report, *Indonesia – Measures Relating to Raw Materials* (circulated 30 November 2022, not adopted) WT/DS592/R. Indonesia notified its appeal on 8 December 2022.

²² Petros C Mavroidis and André Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press 2021).

Where, then, might the raw material for such an update come from? A promising avenue lies not in any single instrument but in a body of recent practice scattered across several PTAs and national legislative reforms,²³ each of which has, largely independently, grappled with similar problems and converged on broadly comparable solutions. The EU's own generation of PTAs concluded since the mid-2010s – with partners as varied as Japan, Singapore, Mexico and Vietnam – increasingly extend subsidy disciplines beyond goods to services and introduce structured justifications for 'good' subsidies (that at times reproduce, nearly verbatim, the language of EU State aid law).²⁴

The EU's Foreign Subsidies Regulation, for its part, extends a State-aid-inspired methodology to subsidies granted by third countries to companies operating in the EU internal market – a unilateral instrument, to be sure, but one whose substantive standards could plausibly inform a future negotiated discipline.²⁵ The United Kingdom's Subsidy Control Act 2022, adopted after Brexit precisely to replace the EU State aid regime domestically, adds a further data point, demonstrating that even outside the EU a broadly comparable regulatory philosophy – principles-based control, ex ante categorisation of subsidies by risk, and a public transparency register – has proven attractive as a model.²⁶

Among these instruments, the subsidy regime of the EU–UK Trade and Cooperation Agreement ('TCA') deserves particular attention.²⁷ Under Article 363 TCA a subsidy is financial assistance arising from the resources of a Party which confers an economic advantage on one or more economic actors, which is specific in that it benefits certain economic actors over others in relation to the production of certain goods or services, and which has, or could have, an effect on trade or investment between the Parties. The definition covers services and investment as well as goods, closing the gap that renders the ASCM unable to reach a large part of contemporary State support.²⁸

On policy objectives, Article 366 TCA does not attempt an exhaustive list of permitted purposes; it sets out instead a sequence of principles against which any subsidy must be assessed: that it pursue a specific public policy objective remedying an identified market failure or addressing an equity rationale; that it be proportionate and limited to what is necessary; that it bring about a change in the beneficiary's economic behaviour that would not otherwise occur, without compensating costs the beneficiary would have incurred in any event; that it be the least trade-distortive instrument reasonably available; and that its positive contribution outweigh its negative effects on trade and

²³ Luca Rubini, 'State Aid and International Trade Law' in Leigh Hancher and Juan-Jorge Piernas López (eds), *Research Handbook on European State Aid Law* (2nd edn, Elgar 2021).

²⁴ See, eg, the EU's agreements with Japan (signed 2018), Singapore (signed 2018) and Vietnam (signed 2019), and the agreement in principle with Mexico (2018), which extend coverage to services and introduce justifications for 'good' subsidies at times reproducing the language of EU State aid law.

²⁵ The US adopted similar legislation within the context of merger control.

²⁶ See, eg, the Subsidy Control Act 2022 (UK), adopted following the UK's departure from the EU State aid regime, establishing a principles-based domestic system of subsidy control with its own transparency database (the Subsidy Control Database).

²⁷ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (signed 30 December 2020, entered into force 1 May 2021) [2021] OJ L149/10 (TCA), Title XI, ch 3.

²⁸ Article 363 TCA. See Andrea Biondi, 'The New Chapter on Subsidies Regulation in the EU–UK TCA: Some First Impressions' (2021) 20 *European State Aid Law Quarterly* 173, 177; Totis Kotsonis, 'The Squaring of the Circle: Subsidy Control under the UK–EU Trade and Cooperation Agreement' (2021) 20 *European State Aid Law Quarterly* 15.

investment.²⁹ Article 367 then prohibits outright certain categories – unlimited guarantees, rescue and restructuring aid unaccompanied by a credible plan, export subsidies, local content subsidies.³⁰ The architecture is that of Article 107(3) TFEU as elaborated in the Commission’s compatibility practice, transposed into a treaty between sovereigns, and it is preferable to that of Article 8 ASCM, because it does not enumerate the permitted objectives in advance but subjects every subsidy to the same structured justification.³¹

For enforcement the TCA offers various tools, the most interesting of which are the remedial and rebalancing mechanisms. The remedial measures under Article 374 address an identifiable subsidy causing a significant negative effect on trade or investment between the Parties.³² The rebalancing measures under Article 411, by contrast, cannot be applied against an individual subsidy, but they allow a Party to respond to significant divergences in subsidy control between the Parties giving rise to material impacts on trade or investment. The procedure is expedited: consultations are limited to fourteen days, after which the measures may be adopted unless the other Party requests an arbitration tribunal, which must in turn rule within thirty days of its establishment.³³ The speed of that design bears directly on the weaknesses of the ASCM’s remedial architecture. Indeed, transposed to the multilateral level, a comparable acceleration would go some way towards the more immediate compensation or retaliation that a prohibited subsidy may warrant, without waiting for the full dispute settlement process to run its course – a process so slow that, by the time harm is demonstrated, it is often too late to address it.³⁴

The domestic implementation of the TCA in the United Kingdom supplies a further lesson. The Subsidy Control Act 2022 establishes a public subsidy database, and where the statutory duty to publish applies, the one-month period for challenging a subsidy before the Competition Appeal Tribunal runs from the date of entry in that database, so that a failure to publish leaves the subsidy indefinitely open to challenge. The ASCM contains no comparable incentive.³⁵

Taken together, these recent instruments – EU PTAs, the Foreign Subsidies Regulation, the EU–UK TCA, the UK Subsidy Control Act, and potentially a reformed CPTPP – do not obviously amount to a single, coherent code. But their cumulative weight, and the fact that they increasingly involve trading partners well beyond the EU’s immediate neighbourhood, raises a genuine question,

²⁹ Article 366(1)(a)–(f) TCA.

³⁰ Article 367 TCA.

³¹ Article 107(3) TFEU. Bargellini, ‘The TCA’s Subsidy Regime’ (n 18).

³² Article 374 TCA. See Andrea Biondi, ‘Subsidies Control and Enforcement’ in Federico Fabbrini (ed), *The Law and Politics of Brexit, Volume V: The Trade and Cooperation Agreement* (OUP 2024) 218.

³³ Articles 411(1)–(3) TCA. See David Collins, ‘Standing the Test of Time: The Level Playing Field and Rebalancing Mechanism in the UK–EU Trade and Cooperation Agreement (TCA)’ (2021) 12 *Journal of International Dispute Settlement* 617, 635; Catherine Barnard, ‘Level Playing Field Provision in the TCA: An Introductory Guide’ (Paper for the Senedd Legislation, Justice and Constitution Committee, LJC6-13-22 Paper 27, 2022) <<https://business.senedd.wales/documents/s124507/LJC6-13-22%20-%20Paper%2027%20-%20Paper%20by%20Professor%20Catherine%20Barnard%20University%20of%20Cambridge%20Level%20Playi.pdf>> accessed 16 August 2026.

³⁴ Bargellini, ‘The TCA’s Subsidy Regime’ (n 18).

³⁵ Subsidy Control Act 2022, ss 32–33 (subsidy database) and s 71 (time limits for review applications); Competition Appeal Tribunal Rules 2015, SI 2015/1648, r 98A. See Elettra Bargellini, ‘How the SCA 2022 Shapes the Effectiveness of the TCA: Lessons from EU State Aid and WTO’ (2025) 59 *Journal of World Trade* 213, 232; George Peretz, ‘United Kingdom: To Have One Subsidy Control Regime Is a Misfortune: To Have Two Looks Like Carelessness’ (2021) 20 *European State Aid Law Quarterly* 455.

tentatively explored elsewhere: whether what is emerging is best understood as the incremental development of a new ‘common law’ of subsidies and SOEs – a body of converging practice that could, in time, supply the building blocks for a more ambitious plurilateral, or even eventually multilateral, discipline.³⁶

7. Concluding Remarks

The WTO ASCM was a genuine advance for the multilateral trading system, but a quarter-century of practice has exposed two structural weaknesses: an incentive structure that fails to secure meaningful transparency, and substantive disciplines that are simultaneously too demanding, in their legal standards, and too narrow, in their territorial and definitional reach, to capture the industrial policy practices that most concern governments today.

Multilateral reform, though preferable in principle, faces a WTO membership unable to update its own rule-book. The more realistic path is likely to run through plurilateral initiatives among a ‘core’ of major trading powers, built where possible on existing platforms such as the CPTPP, and fed by the accumulating practice of PTAs and domestic legislation that increasingly converge, without any central coordination, on a recognisably similar set of principles and approaches. Whether this converging practice will crystallise, in time, into a genuine common law of subsidies, or will instead remain a patchwork vulnerable to fragmentation and unilateral coercion, is likely to be one of the central questions for the multilateral trading system over the coming decade.

³⁶ Importantly, some of the key principles and approaches of these disciplines are in line with the structural elements of the WTO ASCM disciplines, with reform discussions within the WTO, and also with other initiatives like the Trilateral. The hypothesis of an emerging ‘common law’ of subsidies and State-owned enterprises is being explored by Luca Rubini. See Luca Rubini, “Transcending territoriality: Expanding EU State aid control through consensus and coercion” in Leigh Hancher, Juan-Jorge Piernas-Lopez, and Luca Rubini (eds.) *The future of EU State aid law – Consolidation and Expansion* (2023, Madrid: EU Law Live Press) 119-134.

Reforming the WTO Subsidy Rules for Clean Energy Transition: Is the Plurilateral the Way Out?

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Summary: 1. Introduction – 2. The UK Electric Car Grant and the WTO Compatibility – 3. A Plurilateral Agreement.

Keywords: Green Subsidies – Clean Energy Transition – Process and Production Methods – Electric Vehicles Subsidies – Climate Governance – Decarbonisation – Environmental Conditionality.

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1. Introduction

Facing the intensifying global urgency of climate change, governments around the world are increasingly turning to incentives such as grants, tax credits, and feed-in tariffs to accelerate the adoption of clean energy.¹ Such incentives are often regarded as green subsidies that help create an enabling environment for the development and deployment of clean energy technologies as alternatives to fossil fuels. The importance of green subsidies lies in counterbalancing historical market failures that stem from unpriced carbon emissions and fossil fuel use.² Historically, green subsidies for the clean energy transition have been designed to support a broad range of technologies, such as utility-scale and distributed solar photovoltaic, onshore and offshore wind power, and biomass. Eligibility criteria for these subsidies have commonly been differentiated by nationality, cost, and the maturity of the technologies.³

Nevertheless, an emerging trend sees governments increasingly conditioning access to green subsidies on criteria tied to processes and production methods (PPMs), such as carbon intensity,

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¹ International Energy Agency, ‘Governments Have Unleashed a Wave of Clean Energy Policies to Benefit from the New Energy Economy’ (26 September 2024) <<https://www.iea.org/news/governments-have-unleashed-a-wave-of-clean-energy-policies-to-benefit-from-the-new-energy-economy>>.

² Alfred Kammer, ‘Europe, and the World Should Use Green Subsidies Cooperatively’ (International Monetary Fund Blog, 11 May 2023) <<https://www.imf.org/en/blogs/articles/2023/05/11/europe-and-the-world-should-use-green-subsidies-cooperatively>>.

³ For instance, local content requirements have been widely used by governments to set the eligibility criteria to favor domestic manufacturing in the clean energy sector. See, Mandy Meng Fang, ‘Local Content Measures and the WTO Regime: Addressing Contentions and Trade Offs’ in Damilola S. Olawuyi (ed) *Local Content, Sustainable Development and Treaty Implementation in Global Energy Markets* (Cambridge University Press, 2020), at 41-62.

lifecycle impact, and broader environmental benchmarks.⁴ The use of PPMs relies on highly sophisticated methods of measurement, verification, and comparison. PPMs are thus playing a critical role in determining eligibility for public incentives, making fine-grained distinctions even among otherwise like products and technologies based on their manufacturing footprints.

Much like traditional green incentives, PPM-based subsidies raise a few vital questions: are they compliant with World Trade Organization (WTO) subsidy disciplines? If current rules render them vulnerable to challenge, how should the WTO framework adapt to accommodate this new generation of green subsidies? The scholarly discussions on reforming the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) have been underway for years, especially following the expiration of its non-actionable subsidy provisions in Article 8.⁵ Although judicial willingness within WTO dispute settlement to accommodate climate-oriented regulatory autonomy has arguably risen, the limitations of relying on the interpretative function remain acute.⁶ Adjudication can offer flexibility at the margins, but it cannot replace formal legislative reform of the WTO rulebook.

Against this background, this article uses the United Kingdom's Electric Car Grant (ECG) as an illustrative example to analyse the interface between PPM-based green subsidies and WTO rules. It shows that PPM-based green subsidies are highly vulnerable to challenges under the WTO SCM Agreement. Even without origin-specific discrimination, such subsidies may still struggle to withstand WTO scrutiny. The time has come to update global subsidy rules.

The article is structured as follows: the second part discusses the design and implementation of the UK ECG and applies the relevant WTO SCM rules to assess its compatibility with trade law. The third part presents a possible solution: an issue-specific plurilateral agreement to adopt a carefully calibrated balancing approach tailored to PPM-based green subsidies. The fourth part concludes.

2. The UK Electric Car Grant and the WTO Compatibility

The UK government launched the ECG, a £650 million fund supporting the purchase of new zero-emission vehicles priced at or below £37,000, set to run through at least the 2028-29 financial

⁴ The PPMs have also been used to shape technical regulations, public procurement and other state supports. For instance, the European Union mandates the application of non-price criteria, including environmental sustainability, resilience, and responsible conduct, to at least 30% of their annual renewable energy auction volume under the Net-Zero Industry Act. See, European commission, 'Commission Publishes Guidance on the Application of Non-Price Criteria Under the Net-Zero Industry Act' (22 July 2026) <https://energy.ec.europa.eu/news/commission-publishes-guidance-application-non-price-criteria-under-net-zero-industry-act-2026-07-22_en>.

⁵ See, Robert Howse, 'Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis' (IISD, May 2010); Sadeq Z. Bigdeli, 'Incentive Schemes to Promote Renewables and The WTO Law Of Subsidies' in Thomas Cottier et al., (eds) *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press, 2009) 155. Aaron Cosbey and Luca Rubini, 'Does It FIT? An Assessment of the Effectiveness of Renewable Energy Measures and of the Implications of the Canada – Renewable Energy/FIT Disputes' (E15 Initiative, December 2013) <<http://e15initiative.org/wp-content/uploads/2015/09/E15-Clean-Energy-Technologies-CosbeyRubini-FINAL.pdf>>; Luca Rubini, 'The Good, the Bad, and the Ugly: Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies' (2014) 48(5) *Journal of World Trade* 896;

⁶ Catherine E. Gascoigne and Shawkat Alam, '(Bio)fuelling Up': The Palm Oil Disputes and the WTO's First Encounter with the EU Green Deal' (2026) 35(1) *Review of European, Comparative & International Environmental Law* 38, 45.

year.⁷ Unlike the previous scheme, the ECG introduced sustainability standards into the grant's design and established a two-tiered subsidy: vehicles meeting the highest sustainability credentials by exceeding basic requirements through greener production, lower lifecycle emissions, and supply chain innovation receive a £3,750 grant; those satisfying only the baseline environmental criteria are eligible for £1,500; and vehicles lacking a verified science-based target are excluded.⁸ The amount of grant available per vehicle is determined by its manufacturing carbon footprint, calculated based on the electricity grid intensity in the countries where vehicles are assembled and batteries are produced.⁹

Although the ECG applies to foreign and domestic producers alike, irrespective of their origin, the *de facto* implications are likely to differ. For instance, the vast majority, if not all, of the vehicle models listed as eligible for the two ECG bands are manufactured or assembled in the UK or Europe.¹⁰ Manufacturers based in East Asian countries, notably China and South Korea, are struggling to meet the ECG criteria.¹¹ This disparity prompts a key question: is the UK's ECG compatible with WTO law?

This part applies the WTO subsidy rules to the ECG. The first question is whether the ECG satisfies the definitional requirements of a subsidy under the SCM Agreement. Because the scheme is financed from public funds and administered by government transport authorities as a discount for end consumers, it involves a financial contribution by a government within the meaning of Article 1.1(a)(1). Moreover, by lowering retail prices only for approved models, the grant artificially increases demand for those vehicles. As a result, qualifying manufacturers obtain commercial advantages, including greater price competitiveness and market share, that non-qualifying competitors do not enjoy. In other words, eligible manufacturers are placed in a more favourable position than they would occupy in the market absent the grant.¹² Additionally, the scheme satisfies the specificity requirement under Article 2.1(a) because eligibility is explicitly limited to the vehicle sector and, more narrowly, to manufacturers of zero-emission vehicles that meet defined price and production-sustainability criteria.¹³

The following question concerns whether the ECG constitutes a prohibited or actionable subsidy. Since Article 3.1 of the SCM Agreement identifies only two categories of prohibited subsidies, namely export subsidies and subsidies contingent upon the use of domestic over imported goods, the

⁷ 'How to Apply for Vehicle Eligibility for the Electric Car Grant' (GOV.UK, 1 April 2026) <<https://www.gov.uk/government/publications/how-to-apply-for-vehicle-eligibility-for-the-electric-car-grant/how-to-apply-for-vehicle-eligibility-for-the-electric-car-grant>>.

⁸ Ibid.

⁹ Ibid.

¹⁰ 'Zero Emission Vehicles Eligible for a Grant' (GOV.UK, 21 May 2026) <<https://www.gov.uk/zero-emission-vehicle-grants/cars>>.

¹¹ Gareth Roberts, 'Chinese-made Electric Vehicles 'Will Not Qualify' for Electric Car Grant' (Fleet News, 17 July 2025) <<https://www.fleetnews.co.uk/news/chinese-made-electric-vehicles-to-not-qualify-for-electric-car-grant>>.

¹² Although the SCM Agreement does not define the notion of "benefit", an extensive body of WTO panel and Appellate Body rulings has discussed it. See, Wolfgang Muller, *WTO Agreement on Subsidies and Countervailing Measures: A Commentary* (Cambridge University Press, 2017), at 428-432.

¹³ SCM Agreement Article 2.

ECG does not appear to fall within either category. In the absence of a prohibited subsidy, the scheme may still be characterized as an actionable subsidy under the SCM Agreement.¹⁴

Under Article 6.3(a) of the SCM Agreement, serious prejudice arises when a subsidy displaces or impedes imports of a like product into the subsidizing Member's market.¹⁵ By tying grant eligibility to the carbon intensity of the energy grid in which vehicles and batteries are manufactured, the ECG effectively excludes electric vehicles produced in higher-emission grid environments, such as China. This mechanism artificially raises the relative market price of non-qualifying imports compared with subsidized UK and European models. If this exclusion results in measurable displacement of foreign EVs in the UK market, complaining Members may be able to establish a claim under Article 6.3(a).

The above legal analysis suggests that a successful challenge to the ECG as an actionable subsidy exists. This outcome might be normatively concerning, as it means that subsidies supporting the purchase of vehicles or other clean energy products that are sustainably produced and designed to reduce discrimination may still be vulnerable to scrutiny as actionable subsidies under the current WTO framework.¹⁶ In other words, the current WTO subsidy rules may insufficiently distinguish between subsidies that aim at pursuing a genuine decarbonization goal and those oriented toward protectionism. As a result, countries seeking to correct market failures, internalize environmental externalities, or promote low-carbon production may be constrained by the prospect that even carefully tailored subsidies will be treated as trade-distorting and subject to scrutiny under trade law.¹⁷ In that sense, the ECG illustrates a broader mismatch between the traditional logic of subsidy discipline and the emerging demands of sustainability governance. The current binary structure of the SCM Agreement is ill-equipped to account for environmental purposes, lifecycle emissions, supply-chain sustainability, and other non-traditional criteria that increasingly shape subsidy design.

3. A Plurilateral Agreement

Revising existing WTO rules or creating new ones has proven to be a daunting task in light of the WTO's consensus-based decision-making requirement.¹⁸ In response to the institutional stalemate created by this consensus rule, existing scholarship on WTO reform has increasingly viewed plurilateral agreements as a pragmatic alternative, particularly in areas where multilateral revision has become politically difficult or procedurally slow.¹⁹ Furthermore, their "laboratory" function can

¹⁴ SCM Agreement Part III governs actionable subsidies, which are not banned outright. Instead, they are permitted unless they cause "adverse effects" to the trade interests of another WTO Member. See, SCM Agreement Articles 5 and 6.

¹⁵ Muller, *supra* note 12, 278-281.

¹⁶ Arwel Davies, 'WTO Law Compatibility of the UK's New Electric Vehicle Grant Scheme' (IELPB, 21 July 2025) <<https://ielp.worldtradelaw.net/2025/07/guest-post-wto-law-compatibility-of-the-uks-new-electric-vehicle-grant-scheme.html>>.

¹⁷ Ibid.

¹⁸ Caroline Hug, 'As the WTO Flounders, the World's Middle Powers Go Their Own Way' (Politico, 30 March 2026) <<https://www.politico.eu/article/wto-reform-talks-fail-cameroon-smaller-trade-deal/>>.

¹⁹ Discussions on plurilateralism can be found: Bernard M Hoekman and Petros C Mavroidis, 'WTO "à la Carte" or WTO "Menu du Jour"? Assessing the Case for More Plurilateral Agreements' (2015) 26(2) European Journal of International Law 319; Rudolf Adlung and Hamid Mamdouh, 'Plurilateral Trade Agreements: An Escape Route for the WTO?' (2018) 52(1) Journal of World Trade 85; Olga Biryukova, "'Shaken Not Stirred: WTO as a Ground for Plurilateral Initiatives'

be effectively harnessed to test and refine new disciplines in preparation for possible multilateralization.²⁰

Against this background, this article contends that an issue-specific plurilateral agreement offers the most feasible avenue for reforming the SCM Agreement to accommodate the PPM-based green subsidies. As a threshold matter, its membership should initially include major clean energy producers and deployers, such as the European Union, China, the United States, Japan, and others. Measures such as the UK's Electric Car Grant show how production-process emissions criteria can create significant compliance and market-access concerns, particularly for foreign producers operating in more carbon-intensive energy environments, including China or South Korea. Bringing these key stakeholders into a unified plurilateral forum transforms potential trade conflict into cooperative rule-making. While the participation of all major clean energy players may not be achievable at the outset,²¹ the inclusion of even a subset of them could generate a demonstration effect and encourage broader participation over time, given their shared interest in greater regulatory clarity. By narrowing the number of participating members while focusing on a clearly defined policy area, the agreement could facilitate experimentation with legal standards that are environmentally responsive yet still within trade disciplines.

Rather than offering a broad exception that shields all environmentally oriented support and incentives from trade discipline, the proposed plurilateral framework relies on a calibrated balancing approach. In other words, the aim of reform would not be to place all green subsidies beyond the scrutiny of trade law, but to redesign the relevant disciplines so that they better reflect the specific features of decarbonization-oriented support measures. That would call for a carefully balanced approach: one that preserves meaningful constraints on subsidies that are protectionist, arbitrarily restrictive, or discriminatory, while still leaving members enough regulatory space to pursue decarbonization goals.²²

Several interrelated factors could guide that assessment, including the underlying purpose of the subsidy, the clarity and transparency of the eligibility criteria, and the proportionality of the support to the objective pursued. In this respect, the inquiry would not turn solely on the form of the measure, but also on its design, operation, and practical effect. Taken together, these elements would help distinguish legitimate green subsidies from measures that are protectionist in design or effect. Such an approach would bring subsidy rules closer to the realities of decarbonization governance without undermining the core discipline of the multilateral trading system.

At a moment when the clean energy transition has reached a critical juncture, which demands unprecedented speed to confront compounding environmental crises and geopolitical tensions,

(2022) 17(3) *Global Trade and Customs Journal* 121; Bernard M Hoekman and Petros C Mavroidis, 'Embracing Diversity: Plurilateral Agreements and the Trading System' (2015) 14(1) *World Trade Review* 101.

²⁰ Bernard M Hoekman, 'Plurilateral Pathways to Responsible Industrial Policy' (Hinrich Foundation, 17 March 2026) <<https://www.hinrichfoundation.com/research/article/trade-governance/plurilateral-pathways-to-responsible-industrial-policy>>.

²¹ Admittedly, getting China and the United States to the same agreement is likely challenging.

²² Similar ideas concerning the revision of the WTO SCM Agreement have been discussed in the existing scholarship. See, Steve Charnovitz, 'Green Subsidies and the WTO' (World Bank Policy Research Working Paper No. 7060, 2014); Elena Cima and Daniel Esty, 'Making International Trade Work for Sustainable Development: Toward a New WTO Framework for Subsidies' (2024) 27(1) *Journal of International Economic Law* 1, 7.

international subsidy rules must be fit for purpose. It is time to remove the ambiguities and legal uncertainties that impair the effectiveness of the existing global trade framework.

Plurilateral or Preferential? The WTO Government Procurement Agreement and Its Role in the Modern Global Economy

Anna Panarella

Summary: 1. Introduction – 2. The GPA: Origins and Architecture – 2.1 From the Tokyo Code to the GPA 2012 – 3. Variable Geometry within the GPA – 4. Government Procurement in Preferential Trade Agreements – 4.1 Membership and Government Procurement Provisions in PTAs – 4.2 Reciprocity in PTAs – 4.3 Beyond the WTO and PTAs: A Recent Trend towards Unilateral Reciprocity in Public Procurement – 5. Conclusions.

Keywords: WTO – Government procurement agreement – Plurilateral agreement – Preferential trade agreements (PTAs) – Reciprocity principle – Non-discrimination.

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1. Introduction

Public procurement constitutes a pivotal instrument of national economies, serving to advance government objectives and ensure the effective delivery of public services, while strengthening public sector efficiency.¹ Depending on the country's size, public procurement accounts for approximately 12% to 20% of national GDP.² When properly designed and managed, public procurement procedures can generate multiple, intertwined positive effects. These range from ensuring the most efficient use of public resources and the strengthening of public trust in the State, to the pursuit of broader developmental objectives, including by opening access to procurement procedures to international suppliers and thereby making available the best options at the most competitive price.³ In this context, public procurement is also increasingly serving as an instrument for the pursuit of non-economic objectives, including environmental protection, sustainability and innovation development.⁴

¹ OECD, *Implementing the OECD Recommendation on Public Procurement in OECD and Partner Countries. 2020-2024 Report* (OECD Publishing, 2025), p. 3.

² OECD, *Government at a Glance 2025* (OECD Publishing, 2025), p. 136; E. BOSIO, S. DJANKOV, *How large is public procurement* (World Bank Blogs, 5 February 2020) <<https://blogs.worldbank.org/en/developmenttalk/how-large-public-procurement>> accessed 7 May 2026.

³ R.D. ANDERSON, A.C. MÜLLER, P. PELLETIER, *Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?*, in A.C. GEORGIOPOULOS, B. HOEKMAN, P.C. MAVROIDIS (eds), *The Internationalization of Government Procurement Regulation* (OUP, 2017), pp. 56 seq.

⁴ R.D. ANDERSON, *The WTO Agreement on Government Procurement as a Multipurpose Trade Instrument: A Vision for the Future* in A. LA CHIMIA, M. TRYBUS (eds), *Reforming public procurement law: liber amicorum in honour of Sue Arrowsmith* (Hart Publishing, 2024), pp. 223-238; OECD, *Harnessing Public Procurement for the Green Transition. Good Practices in OECD Countries*, OECD Public Governance Reviews (2024).

Within the multilateral trading system of the World Trade Organisation (WTO), public procurement is disciplined primarily under the Government Procurement Agreement (GPA).⁵ The GPA is a plurilateral agreement, legally binding only for those WTO Members that have chosen to become parties to it. Since its origins, public procurement discipline in the international trade context has been inspired by variable geometry,⁶ thus providing parties with significant flexibility in determining the scope of their participation in the field.⁷ This notwithstanding, the membership of the GPA remains quite limited, revealing that the Agreement is struggling to attract new members, particularly developing and non-market-based economies.⁸ By contrast, outside the WTO institutional framework, an increasing number of preferential trade agreements (PTAs) can be observed disciplining government procurement liberalization.⁹

Against this background, this paper investigates the reasons that may explain why, despite the flexibility embedded in the GPA, States keep resorting to preferential arrangements to discipline public procurement. Addressing this question requires engaging with two interconnected issues. The first concerns how variable geometry is operationalized within the GPA, and what challenges and opportunities it generates for both incumbent and aspiring members. This assessment allows to determine whether, and to what extent, the way in which variable geometry is operationalized within the GPA propels the conclusion of preferential arrangements outside the WTO institutional framework. Secondly, the approach followed in PTAs in this respect must be considered, to determine the causes that may be behind the comparative attractiveness of the preferential route as a vehicle for further international public procurement liberalization.

The study is structured as follows. Section 2 provides an overview of the drafting history of the GPA and discusses the architecture of the Agreement. Section 3 examines the key dimensions through which variable geometry is operationalized within the GPA. Section 4 then turns to preferential arrangements and, drawing primarily on the extensive literature in this field, maps procurement provisions in PTAs to examine the trends emerging therein. Section 5 concludes. The paper argues that the GPA's key features of variable geometry and strict and conditional reciprocity, while having played a historically significant role in enabling the regulation of public procurement within the WTO framework, and related conclusion and expansion of the GPA, are struggling to attract the broader WTO membership necessary for the agreement to function as a global regulatory standard for procurement discipline. This struggle is further exacerbated by the pressures that current global challenges, such as climate change and the energy transition, place on governments, particularly on developing economies.

⁵ Agreement on Government Procurement (adopted 30 March 2012, entered into force 6 April 2014) (GPA 2012).

⁶ For a detailed account on the history of variable geometry within the WTO: A. CONRFORD, *Variable Geometry for the WTO: Concepts and Precedents*, UNCTAD Discussion Paper n. 171, UNCTAD/OSG/DP/2004/5 (2004), p. 2 seq.

⁷ For a detailed reconstruction of the drafting history of government procurement discipline at the multilateral level: A. BLANK, G. MARCEAU, *A History of Multilateral Negotiations on Procurement: From ITO to WTO*, in B. HOEKMAN, P.C. MAVROIDIS (eds), *Law and Policy in Public Purchasing. The WTO Agreement on Government Procurement* (The University of Michigan Press, 1997), pp. 31-56.

⁸ G.W. BUSH, *Bridging The Gap Between International Development And Government Contracts: Why Including The Developing World In The World Trade Organization's Government Procurement Agreement Matters And How It Can Work* in *Public Contract Law Journal*, 2022, 52(1), pp. 1-54.

⁹ A. SHINGAL, V. ERESHCHENKO, *Public Procurement* in A. MATTOO, N. ROCHA, M. RUTA (eds), *Handbook of Deep Trade Agreements* (World Bank, 2020), pp. 395 seq.

2. *The GPA: Origins and Architecture*

2.1 *From the Tokyo Code to the GPA 2012*

Government procurement has traditionally been a sensitive topic within the multilateral framework of international trade law since the very origin of the multilateral trading system. First discussions in this regard were tabled by the government of the United States during the negotiations for an International Trade Organization (ITO). However, the proposal was rejected as other States were generally unavailable to modify their national frameworks in this field, due to the fear of disadvantaging national operators.¹⁰

Further discussions on the introduction of an international discipline of public procurement were again presented, within the framework of the OECD, by the United States in 1969, where a draft on Procurement Guidelines on heavy electrical equipment was submitted.¹¹ The key points discussed and the difficulties emerged in the discussion of this proposal are of interest to consider as they would, to a certain extent, resurface in subsequent discussions on public procurement regulation between trading partners, including in relation to the current version of the GPA. First, the proposal reflected the idea that non-discrimination should have been pursued only at the level of bidding procedures by procuring entities, rather than at the general level through non-discriminatory treatment based on the Most Favoured Nation (MFN) and National Treatment (NT) principles.¹² Second, the narrow scope of the document enhanced divergences across national differences, especially in terms of governmental ownership. Consequently, it became clear that it would have been very difficult, if not impossible, to reach an agreement on one specific sector. Hence, negotiators understood that, on the one hand, discussions should be limited to central government entities;¹³ and, on the other hand, that achieving a shared understanding on government procurement required the inclusion of multiple sectors.

No specific public procurement regime was however included in the 1948 General Agreement on Tariffs and Trade (GATT) and thus Members were not subject to specific constraints on government procurement under the agreement. Subsequently, in December 1977, the GATT Secretariat presented a “Draft Integrated Text for Negotiations on Government Procurement”, which again was based on efforts conducted under the umbrella of the OECD.¹⁴ This was a first step that eventually led, during the Tokyo Rounds (1973-1979) to the adoption of an agreement dealing with public procurement, also known as the Tokyo Code. Concluded in 1979 and entered into force in 1981, the Tokyo Code is

¹⁰ An OECD study conducted in 1966 about governments’ purchasing practices revealed that first, almost all States retained a form of advantage; second, such practices varied widely between one another. See A. BLANK, G. MARCEAU (n 7), p. 38; V. GUIMARAES DE LIMA E SILVA, *The Revision of the WTO Agreement on Government Procurement: To What Extent Might It Contribute to the Expansion of Current Membership?* in *Public Procurement Law Review*, 2008, 17(2), pp. 62 seq.

¹¹ A. BLANK, G. MARCEAU (n 7) 38.

¹² Ibid.

¹³ Ibid.

¹⁴ R.D. ANDERSON AND S. ARROWSMITH, *The WTO Regime on Government Procurement: Past, Present and Future* in S. ARROWSMITH, R.D. ANDERSON (eds), *The WTO Regime on Government Procurement. Challenge and Reform* (CUP, 2011), p. 14.

considered to be the first version of the GPA.¹⁵ Interestingly, the Code, composed of nine articles,¹⁶ was conceived as a plurilateral agreement, legally binding only for those Members that agreed to apply it (Article IX). Furthermore, its scope was limited to procurement procedures on goods, issued by central listed procuring entities above defined thresholds.¹⁷ Considering the subjective scope of the agreement, negotiations at the time also addressed developing countries, and specifically the need to ensure differential treatment to facilitate their participation in the liberalization of government procurement. This led to the inclusion of specific provisions under Article III, encompassing limited derogations from non-discrimination obligations, the extension of the Agreement's benefits to least-developed countries not parties to the Code, and the obligation for developed parties to provide technical assistance in the field of public procurement to developing ones. Nevertheless, the Agreement also contained features that reduced its attractiveness for developing countries. In this regard, a significant obstacle has been identified in the SDR 150,000 threshold (Article I(b)), which was considered too high for developing economies to match, making it difficult for them to table offers capable of attracting the interest of more developed parties.¹⁸

During the Uruguay Round (1986-1994), the Tokyo Code underwent further major revisions.¹⁹ It should be noted from the outset that, while the Uruguay Round negotiations were conducted virtually in parallel with, but separately from, those on a plurilateral agreement on government procurement, the negotiating parties nonetheless considered the two processes to be inextricably linked.²⁰ Indeed, as the Uruguay Round entered its final phases, GPA negotiating parties, with the aim of bringing the GPA negotiations to a conclusion as well, decided to resolve the outstanding issues concerning the scope of the Agreement by introducing country-specific and sector-specific clauses based on reciprocity.²¹ In this perspective, negotiators agreed upon two criteria. First, it was decided that the scope of the Agreement should be determined based on each country's specific cost-benefit analysis, having regard to its national characteristics.²² Second, procuring entities falling within the scope of the plurilateral discipline on government procurement were classified into distinct groups,²³ encompassing central government entities (group A), regional and local government entities (group B), "other entities (...) substantially controlled by, dependent on, or influenced by central, regional

¹⁵ R. KOCH, *Green Public Procurement under WTO Law. Experience of the EU and Prospects for Switzerland* (Springer, 2020), p. 65.

¹⁶ More in details, the Tokyo Code on Government Procurement was articulated as follows: Preamble, Article I (scope and coverage); Article II (National treatment and non-discrimination); Article III (Special and differential treatment for developing countries); Article IV (Technical specifications); Article V (Tendering procedures); Article VI (Information and Review); Article VII (Enforcement and obligations); Article VIII (Exceptions to the Agreement); Article IX (Final provisions).

¹⁷ OECD, Working Party of the Trade Committee, *Government procurement: A synthesis report*, TD/TC/WP(2001)17/FINAL (31 October 2001), p. 7.

¹⁸ A. BLANK, G. MARCEAU (n 7), p. 42.

¹⁹ B. HOEKMAN, P.C. MAVROIDIS, *The World Trade Organization's Agreement on Government Procurement. Expanding Disciplines, Declining Membership?*, Policy Research Working Paper 1429 (World Bank, 1995), p. 2.

²⁰ A. BLANK, G. MARCEAU (n 7) 47.

²¹ R.D. ANDERSON, A.C. MÜLLER, *The Revised WTO Agreement on Government Procurement(GPA): Key Design Features and Significance for Global Trade and Development*, in *Georgetown Journal of International Law*, 2017, 48, p. 957.

²² Ibid.

²³ A. BLANK, G. MARCEAU (n 7) 45; P. DIDIER, *Implementation in the European Union* in B. HOEKMAN, P.C. MAVROIDIS, *Law and Policy in Public Purchasing. The WTO Agreement on Government Procurement* (The University of Michigan Press, 1997), p. 129.

or local government” (group C) and other entities not subject to State control when engaged in commercial activities (group D). These two elements together, namely the determination of the scope of the Agreement in accordance with each party’s specific situation and the classification of procuring entities to facilitate mutual commitments, constituted the core foundation of the 1994 GPA.

Ultimately, the GPA kept its plurilateral nature,²⁴ and presented an expanded scope compared to the Tokyo Code on multiple levels. First, the list of covered procuring entities came to include not only central but also sub-central entities. Furthermore, from a substantive perspective, the Agreement prohibited offsets for developed economies (Article XVI) and strengthened transparency rules (Article XVII). Finally, at the procedural level, it introduced a national-level enforcement mechanism granting suppliers the possibility to bring a complaint where procuring entities were found to have breached the GPA (Article XX). Similarly to the Tokyo Code, also the 1994 GPA envisaged the possibility of its renegotiation. Indeed, under Article XXIV.7(b), the Committee of Government Procurement was entrusted with reviewing the Agreement every three years with the aim to expand its coverage. In this perspective, several rounds of discussions were held since 1997, with a first agreement reached at the end of 2006 and eventually politically agreed upon for conclusion in December 2011, when a mutually satisfactory outcome in the negotiated coverage was achieved.²⁵

The 1994 GPA revision was prompted by the willingness to broaden its membership,²⁶ with a view to making the Agreement a forum capable of accommodating economies at diverging levels of development and characterized by different procurement systems. In other words, the revision of the GPA was more expressly focused on introducing flexibility into the system compared to previous attempts. This is also reflected in the Preamble which provides that “the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party.”

Against this background, the 2012 GPA amendments revolved around three key elements.²⁷ First, market access commitments were expanded. For each party, commitments under the GPA are encapsulated under Appendix I and further articulated in 6 Annexes. Annexes 1 to 3 cover procuring entities, namely central, sub-central and «other entities» respectively. The latter is a broad anti-circumvention category,²⁸ in which countries are expected to include all those entities that, despite not being formally part of the State, are still linked to it by way of State control or ownership, like State-owned enterprises (SOEs). Then, Annexes 4 to 6 specify the scope of commitments in terms of goods, services and works. Finally, Annex 7 contains general notes. Second, the Agreement was revised to include procedural and transparency rules, crystallizing best practices on government procurement.²⁹ The text further introduced a list of definitions of its terms (Article I), and sought to ensure improved governance and more efficient management of public resources by addressing new developments in public procurement, namely electronic and digital procurement, the fight against

²⁴ B. HOEKMAN, P.C. MAVROIDIS, *WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements*, in *European Journal of International Law*, 2015, 26(2), p. 322.

²⁵ *Ibid* 959.

²⁶ C.R. YUKINS, J.S. SCHNITZER, *GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement* in *Trade Law & Development Journal*, 2015, 7, p. 101.

²⁷ R.D. ANDERSON, A.C. MÜLLER (n 21) 962 seq.

²⁸ B. HOEKMAN, P.C. MAVROIDIS (n 19) 3.

²⁹ R.D. ANDERSON, A.C. MÜLLER (n 21) 965.

corruption, and the introduction of stronger enforcement mechanisms at the disposal of suppliers.³⁰ Finally, with a view to increasing flexibility and facilitating the participation of developing and least-developed countries, the Agreement introduced a number of provisions conceived to ensure special and differential treatment for developing economies (Article V), more precisely defined compared to previous drafts.³¹ More specifically, developing countries may have recourse to offsets, price preferences, the phased-in addition of specific entities and sectors, and higher thresholds. However, such advantages are granted on a transitional, temporary, and reciprocal basis. In other words, developing countries may benefit from a delayed application of any provision of the Agreement of up to three years,³² with the expectation of a planned phasing-out of such measures, and a scope determined on a reciprocal basis with incumbent members. Reciprocity also encompasses the grant of the “developing country” status which is hence recognized only to the extent other GPA Members believe that such concessions to be granted to the aspiring members are reasonable on a case-by-case basis.³³

This brief overview of the drafting history of the GPA shows that negotiating efforts acknowledged the need to establish a flexible system since its very origins. The underlying idea was to design a regulatory framework able to accommodate different models of national economies, which would practically translate in differentiated participation both in terms of pace of implementation and scope. The result of these efforts can ultimately be appreciated in the current version of the GPA, whose architecture rests on two key and basic elements.³⁴ First, it establishes a regulatory baseline, a harmonized set of rules that apply to all the signatories of the agreement. These provisions cover, for instance, transparency obligations, procedural rules on the awarding of contracts, requirements governing tendering processes, qualification of suppliers, technical specifications, award criteria, and domestic enforcement review mechanisms. It has further been noted that not all substantive provisions of the GPA are strictly mandatory or directly applicable,³⁵ as some take the form of enabling, encouraging or best-effort clauses that do not impose specific regulatory outcomes. Second, the Agreement is characterized by a differentiated coverage, which reflects commitments agreed by each signatory and are encapsulated in Appendix I and related Annexes.

Despite negotiations and reforming efforts to both ensure flexibility and a special treatment for developing countries, the membership of the GPA remains rather limited. Currently, only 22 WTO Members out of 166 are also signatories of the GPA.³⁶ While between 2016 and 2026 the GPA welcomed five additional Members, namely Australia, the United Kingdom (UK), the Republic of Korea, Moldova and North Macedonia, most of them are developed economies. Beyond its signatories, the GPA also counts 38 observers at the time of writing. While this capacity does not

³⁰ R.D. ANDERSON (n 4) 228.

³¹ A.C. MÜLLER, *Special and differential treatment and other special measures for developing countries under the Agreement on Government Procurement: the current text and new provisions* in S. ARROWSMITH, R.D. ANDERSON (n 14) 340.

³² This would amount to five years for LDCs.

³³ G.W. BUSH (n 8) 12-13.

³⁴ A. SANCHEZ GRAELLS, *The Growing Thicket of Multi-layered Procurement Liberalization Between WTO GPA Parties, as Evidenced in Post-Brexit UK* in *Legal Issues of Economic Integration*, 2022, 3, pp. 248-249.

³⁵ Ibid.

³⁶ This number includes the European Union (EU). Accordingly, counting the EU Member States the substantive coverage of the GPA reaches 49 WTO Members.

grant any right or duty under the Agreement,³⁷ it provides the opportunity to familiarize with its operation by allowing participation to the discussions of the WTO Committee on Government Procurement,³⁸ and enabling access to information about upcoming meetings and related documentation. Most observers to the GPA are developing economies that also committed upon accession to the WTO to accede to the GPA. This is the case for instance of Afghanistan,³⁹ Georgia,⁴⁰ and Jordan.⁴¹ In some cases, proposals for accessions have also been withdrawn, as is the case for Brazil.⁴²

3. *Variable Geometry within the GPA*

The GPA operationalizes variable geometry at multiple levels. First, there is an institutional dimension to consider. Pursuant to Article II.3 of the Agreement Establishing the WTO,⁴³ the GPA is a plurilateral agreement. Accordingly, it establishes duties and obligations only for WTO Members that have committed to it. The plurilateral nature of the Agreement thus introduces variable geometry in the multilateral system in its own right as WTO Members remain free, in principle,⁴⁴ to decide whether becoming parties to it corresponds to their national interests or not.⁴⁵

The second dimension is the procedural one, where the accession process comes to the fore. Accession to the GPA typically involves two key phases. First, the aspiring member submits an initial offer of coverage, delineating the scope of its commitments in terms of the procuring entities it wishes to cover, along with the goods, services, and works. Second, the offer is subject to further refinement through negotiations with existing members, conducted at both the bilateral and plurilateral levels.⁴⁶ Such negotiations are governed by the principle of reciprocity, ensuring that the offer tabled by the aspiring signatory is a satisfactory match with the existing concessions of other GPA signatories. Should no such agreement be reached, and an existing member consider the concessions offered by the aspiring party to be insufficient, the former retains the right to exclude the latter from the scope of its own concessions.⁴⁷ This reflects a strict application of the reciprocity principle within the

³⁷ Article XXI(4) GPA.

³⁸ WTO, *Decisions on Procedural Matters under the Agreement on Government Procurement (1994). Participation of Observers in the Committee on Government Procurement* < https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf > accessed 18 May 2026.

³⁹ Report of the Working Party on the Accession of Afghanistan, WT/ACC/AFG/36, WT/MIN(15)/6 (13 November 2015) 199.

⁴⁰ Report of the Working Party on the Accession of Georgia, WT/ACC/GEO/31 (31 August 1999), 117.

⁴¹ Report of the Working Party on the Accession of Jordan, WT/ACC/JOR/33 (3 December 1999), 170.

⁴² Ministério das Relações Exteriores, *Brazil withdraws offer to accede to the WTO Government Procurement Agreement* (Press Release, 30 June 2023) < <https://www.gov.br/mre/en/contact-us/press-area/press-releases/brazil-withdraws-offer-to-accede-to-the-wto-government-procurement-agreement> > accessed 18 May 2026.

⁴³ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

⁴⁴ As mentioned, accession to the GPA can be discussed during WTO Accessions as a precondition for the successful conclusion of the WTO accession altogether.

⁴⁵ Hoekman and Mavroidis note that plurilateral agreements follow a Pareto-based logic, according to which States that decide not to become parties to such an agreement do not consider to be worse off, while others consider participation to be advantageous. See B. HOEKMAN, P.C. MAVROIDIS (n 24) 326.

⁴⁶ C.R. YUKINS, J.S. SCHNITZER (n 26) 95 seq.

⁴⁷ An example is provided by the European Union (EU), which excludes sub-central procurement entities from the United States (US) from its concessions under Annex 2 with regards to suppliers, services and service providers; or local

context of the GPA, where the refinement of the initial coverage offer is guided by the need to reach equivalent benefits between the negotiating Parties.⁴⁸ Beyond its restrictive character, reciprocity in this context also appears to be conditional in nature, as concessions are given only where an equally satisfactory counter-concession is granted, and withheld in its absence.⁴⁹ Ultimately, while this system enables Members to delineate the scope of their government procurement commitments having regard to their national contexts, strict and conditional reciprocity adds further layers of complexity to an accession process that is already notably lengthy, characterized by high administrative costs especially for developing countries,⁵⁰ and demands extensive preparation on the part of acceding parties.⁵¹

It has been argued that a strict application of the reciprocity principle, while justified by the need to avoid free-riding among signatories of the GPA, has eventually led to the adoption of numerous derogations that ultimately create leeway for protectionist practices.⁵² It has further been noted that a restrictive reciprocal approach does not necessarily entail improved or extended coverage of the Agreement, while it risks giving rise to legal uncertainty owing to the complexity of the concessions it entails.⁵³ In this regard, two situations may be identified, which also appear to be closely intertwined with the economic models of the parties involved in the accession process. In the case of developed, market-based economies, extensive coverage by one member does not necessarily encourage an equivalent level of openness by another. With respect to developing countries and non-market-based economies, a strict application of the reciprocity principle risks hindering, if not altogether discouraging, accession to the GPA. At least three reasons may be identified to account for such difficulties.

First, developing economies may find it difficult to table an offer of interest to developed economies. Second, particularly in the case of States with a significant public sector, countries may struggle to identify a common basis for negotiation capable of yielding reciprocal concessions.⁵⁴ Difficulties arise especially with regard to the coverage of procuring entities other than central or sub-central government bodies or entities, such as State-owned enterprises (SOEs). GPA signatories and aspiring ones may find it difficult to find a meeting point for a reciprocal concession on these entities, typically dealt with under Annex 3.⁵⁵ This struggle is further exacerbated by the fact that GPA signatories follow different methodologies to determine which entities are covered under the

contracting authorities from New Zealand with respect to goods, services, suppliers and service providers. See WTO, Appendix I to the GPA, Annex II of the European Union, Sub-central government entities., note 1, point 1(a) and (f).

⁴⁸ K. DAWAR, *The WTO Government Procurement Agreement: The Most-Favoured Nation Principle, the GATS and Regionalism*, in *Legal Issues of Economic Integration*, 2015, 42(3), pp. 261-262.

⁴⁹ Ibid.

⁵⁰ V. GUIMARÃES DE LIMA E SILVA (n 10) 72.

⁵¹ C.R. YUKINS, J.S. SCHNITZER (n 26) 95.

⁵² K. DAWAR, *The Government Procurement Agreement, the Most-Favoured Nation Principle and Regional Trade Agreements* in A.C. GEORGIOPOULOS, B. HOEKMAN, P.C. MAVROIDIS (n 3), p. 266.

⁵³ W. LIAN, *The Definition of 'Covered Entities' under the GPA: The General Scope and Escape Conditions* in *World Trade Review*, 2024, p. 483.

⁵⁴ W. PING, *Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and other Countries with a Large State Sector into the Global Trading System*, in *Journal of International Economic Law*, 2007, 10(4), pp. 887-920.

⁵⁵ Ibid 895.

Agreement, with some countries adopting a list-based approach,⁵⁶ and others relying on a general definition.⁵⁷ Moreover, even where such a reciprocal basis on coverage can be reached, it may prove relatively easy to circumvent: it would suffice for a government to establish a new SOE after its accession to the GPA in order to avoid its obligations under the Agreement.⁵⁸ This is especially in light of the interpretation of the Panel in *Korea – Government Procurement*,⁵⁹ where it clarified that, in case a listed entity in the Schedules of a Member controls a non-listed one, the scope of the GPA is not extended to comprise the second entity as well, due to the unacceptable degree of uncertainty on the coverage of the Schedules this would entail. Third, while developing countries can take advantage of a differential treatment specifically designed to facilitate their accession to the GPA, this must still be negotiated and agreed with the other parties in accordance with the reciprocity principle.⁶⁰ In this context, there is one last institutional aspect to take into consideration, namely that accession negotiations to the GPA are limited to the specific context of government procurement. In other words, as the GPA is a standalone agreement not subject to the single undertaking approach like other WTO treaties, negotiations and related trade-offs can only consider government procurement issues. In this perspective, Parties are not allowed to make cross-cutting concessions across multiple fields of international trade, such as procurement and services. As a result of such difficulties, the Membership of the GPA is struggling to involve countries such as China,⁶¹ Russia, or Brazil, and markets that are particularly relevant in terms of economic weight are not captured by the discipline of the Agreement.

Finally, closely interconnected with the procedural dimension, variable geometry within the GPA is operationalized at the substantive level. Unlike other WTO agreements, which operate based on unconditional non-discrimination, thereby extending non-discriminatory treatment to all Members on a multilateral basis, unbound from reciprocity, the GPA operates on the basis of conditional discrimination. This means that non-discriminatory treatment applies contingent upon the existence of a reciprocal exchange between the parties concerned.⁶² Together with the procedural dimension and the stringent role that reciprocity plays therein, the conditional nature of non-discrimination may fall short of achieving the core objective of the GPA, namely fostering the openness of public procurement to international competition.⁶³

4. *Government Procurement in Preferential Trade Agreements*

Beyond the WTO institutional framework, preferential trade agreements (PTAs) have increasingly addressed the liberalization of public procurement. While the majority of agreements concluded before the 1990s did not include any procurement provisions, such provisions began to

⁵⁶ See for instance Annexes 3 of Australia, Canada, Hong Kong, Israel, Japan, Korea, New Zealand, Singapore, Chinese Taipei and the United States.

⁵⁷ See for instance Annexes 3 of Armenia, the European Union, Iceland, Lichtenstein, Moldova, Montenegro, North Macedonia, Norway, Switzerland, Ukraine and United Kingdom.

⁵⁸ W. PING (n 54), p. 899.

⁵⁹ Report of the Panel, *Korea – Measures Affecting Government Procurement*, WT/DS163/R (19 June 2000) 3541.

⁶⁰ R.D. ANDERSON, A.C. MÜLLER (n 21) 987.

⁶¹ China's accession negotiations to the GPA started in 2008.

⁶² K. DAWAR (n 48), p. 260.

⁶³ Ibid.

appear with growing frequency between 1995 and 2004, with a marked surge from 2010 onwards.⁶⁴ By the mid-2010s, the inclusion of procurement provisions had become a common feature of PTAs. This trend continues today, with PTAs addressing public procurement being concluded between countries that have traditionally struggled with GPA accession. The Regional Comprehensive Economic Partnership (RCEP), of which China is a party,⁶⁵ is a particularly interesting example in this regard, whose Chapter 16 deals with public procurement, although it does not subject it to dispute settlement. A further example is also provided by the bilateral PTA between China and Switzerland, where the Parties “agree on the importance of cooperation to enhance the mutual understanding of their respective government procurement laws, regulations and agreements”, and commit to “cooperate, consult, and exchange information” as well as to make available national laws and other administrative sources in this field.⁶⁶

4.1. Membership and Government Procurement Provisions in PTAs

The signatories of preferential agreements with procurement provisions are quite diverse. They are concluded between: (i) GPA parties; (ii) GPA and non-GPA parties; (iii) non-GPA parties. From a substantive perspective, procurement provisions in PTAs broadly entail commitments on market access liberalizing procurement contracts on a bilateral or regional basis and prohibit discriminatory practices against foreign suppliers.⁶⁷ The overall aim is to ensure that public contracts are awarded to the most efficient supplier, regardless of its nationality.⁶⁸

Public procurement preferential arrangements can be sorted in three groups. One first group consists of agreements that include only hortatory or aspirational language on government procurement without establishing binding obligations.⁶⁹ Such provisions typically take the form of a statement of objective, for example by recognizing the relevance of procurement to international trade and expressing the openness toward further liberalization in the field.⁷⁰ A second category consists of agreements that go beyond aspirational language but nevertheless do not establish their own procurement disciplines. These provisions usually incorporate references to the GPA, either as a

⁶⁴ A. SHINGAL, V. ERESHCHENKO (n 9), p. 365 seq.

⁶⁵ For a detailed account of China’s accession to the GPA: P. WANG, *Accession to the Agreement on Government Procurement: the Case of China*, in R.D. ANDERSON, S. ARROWSMITH (n 14) 92-116.

⁶⁶ Article 13.4, Switzerland-China PTA (entered into force 1 July 2014). Switzerland was not a GPA party when the agreement was concluded.

⁶⁷ A. CORVAGLIA, A. SHINGAL, *Government Procurement in Twenty-First Century PTAs* in K. CLAUSSEN, M. ELSIG, R. POLANCO (eds), *The Concept Design of a Twenty-First Century Preferential Trade Agreement: Trends and Future Innovations* (CUP, 2025), pp. 131 seq.

⁶⁸ A. DAVIES, K. NADAKAVUKAREN SCHEFER, *Government Procurement*, in S. LESTER, B. MERCURIO, L. BARTELS (eds), *Bilateral And Regional Trade Agreements* (CUP, 2016) 306.

⁶⁹ Ibid 303. See for instance: Article 106, Viet Nam – Japan PTA (entered into force on 1 October 2009)

⁷⁰ See for instance: Article 38 EU-Egypt PTA (entered into force 1 June 2004); Article 38; Article 58 EU-Jordan PTA, (entered into force 1 May 2002).

regulatory benchmark,⁷¹ or by importing GPA obligations directly by reference.⁷² Indeed, PTAs often refer to the GPA as the legal basis for the regulation of government procurement. This is the case even for PTAs between non-GPA parties,⁷³ which therefore extend the GPA legal standard beyond the WTO institutional framework.⁷⁴ In the case of agreements concluded between a GPA and a non-GPA party, the latter may commit to accede to the GPA in the future.⁷⁵ It has been argued that the inclusion of public procurement provisions in PTAs with non-GPA parties may facilitate the reform of their domestic legal frameworks, bringing them into conformity with the WTO plurilateral framework on government procurement and, ultimately, paving the way for their accession to the GPA.⁷⁶ However, the persistently modest growth of the GPA membership against the backdrop of the unabated proliferation of PTAs incorporating public procurement disciplines may suggest that this does not necessarily prove to be the case in practice. A third category consists of PTAs incorporating self-standing chapters on government procurement.⁷⁷ As with the second category, such chapters may be modelled on the GPA framework, an approach regarded as a means of securing a minimum level of market access and non-discrimination commitments while circumventing the need for extensive negotiations.⁷⁸ More recent PTAs belonging to this group tend to deepen commitments on government procurement beyond those found at the WTO level.⁷⁹

Overall, the analysis of preferential procurement commitments reveals an important convergence with the GPA framework, which confirms the key role of the GPA as a regulatory basis for preferential arrangements on public procurement liberalization. At the same time, however, recent PTAs have also started to show emerging deviations from the GPA baseline. While currently limited in scope, these deviations have been interpreted as signaling a shift of a future trajectory in which PTAs progressively diverge from, and extend, the GPA normative baseline,⁸⁰ even between GPA parties.⁸¹

4.2. Reciprocity in PTAs

⁷¹ A. CORVAGLIA, A. SHINGAL (n 67), p. 138; A. DAVIES, *The Evolving GPA: Lessons of Experience and Prospects for the Future* in A.C. GEORGIOPOULOS, B. HOEKMAN, P.C. MAVROIDIS (n 3), p. 27. Examples of PTAs include: EU-New Zealand PTA, Chapter 14 (entered into force on 1 May 2024); Article 276, EU-UK Trade and Cooperation Agreement (entered into force 1 May 2021).

⁷² A. DAVIES, K. NADAKAVUKAREN SCHEFER (n 68), pp. 303 seq. See for instance: Article 20, Canada-EFTA PTA (entered into force on 1 July 2009); Article 14.3(1) Canada-Korea PTA (entered into force on 1 January 2015).

⁷³ OECD, *Multilateralising Regionalism on Government Procurement* (OECD Publishing, 2013) 6.

⁷⁴ B. HOEKMAN, *International Cooperation on Public Procurement Regulation*, EUI Working Paper RSCAS 2015/88 (2015), p. 2.

⁷⁵ Article 16 EFTA-Jordan PTA (entered into force on 1 September 2002); Article 16.8 (Government procurement), China-Australia PTA (entered into force 20 December 2015)

⁷⁶ R.D. ANDERSON, A.C. MÜLLER, P. PELLETIER (n 3), p. 60.

⁷⁷ See for instance: Chapter 9, EU-Viet Nam PTA (entered into force 1 August 2020).

⁷⁸ *Ibid.*, p. 305.

⁷⁹ See for example the EU-UK TCA, Title VI, Chapter 2 on Additional Rules for Covered Procurement, with market access commitments going beyond the GPA framework. See also Chapter 16, UK-Australia PTA (entered into force on 31 May 2023) and Chapter 16 of UK-New Zealand PTA (entered into force on 31 May 2023) have introduced differences in national treatment obligations and domestic review procedure requirements compared to the GPA framework. See A. CORVAGLIA, A. SHINGAL (n 67), p. 144 seq.; B. HOEKMAN, *Trade Agreements in International Cooperation on Public Procurement Regulation* in T. RENSMANN (ed), *Mega-Regional Agreements* (Springer, 2017), p. 326.

⁸⁰ *Ibid.*

⁸¹ K. DAWAR (n 48), pp. 127-128.

Beyond the plurilateral framework of the GPA, commitments on government procurement in PTAs are also grounded in the reciprocity principle. However, certain differences may be identified in comparison with the stringent approach observed in this regard under the WTO framework.

A first consideration has to do with the framework in which the GPA and PTAs operate. Unlike the GPA, which is a stand-alone agreement, PTAs allow for transactional concessions across negotiating areas. Accordingly, the coverage of government procurement provisions may reflect concessions granted and agreed upon between the parties to a PTA under trade areas other than procurement itself, such as trade in services. Cross-sectoral flexibility of this kind is structurally unavailable under the GPA,⁸² whose negotiating scope is confined exclusively to government procurement. In other words, as the GPA operates within the institutional framework of the WTO but outside the Single Undertaking principle, procurement commitments must be negotiated in isolation, without the possibility of cross-sectoral trade-offs with other WTO agreements. PTAs, by contrast, permit such trade-offs, enabling parties to accept procurement liberalization as part of a broader negotiating package. This structural difference is reflected both in PTAs involving non-GPA parties, which have in several cases achieved broader market access commitments than those recorded under the GPA, and in PTAs concluded between GPA parties themselves.⁸³

The second consideration relates more specifically to commitments reached at the preferential level. While reciprocity remains a central objective in the negotiation of government procurement provisions, the manner in which it is operationalized in preferential arrangements tends to be somewhat less stringent than under the GPA. This is particularly significant with regards to the coverage of sub-central procuring entities, which, as seen above, constitutes one of the most sensitive issues within the GPA framework especially for countries with large public sectors and where sub-central procurement activity is especially extensive. In this perspective, it is noteworthy that certain PTAs have tolerated asymmetries in this very area, whereby parties have committed to opening their procurement markets at the sub-central level in the absence of equivalent commitments by their counterparts.⁸⁴

4.3. Beyond the WTO and PTAs: A Recent Trend towards Unilateral Reciprocity in Public Procurement

A further dimension of the relationship between reciprocity and government procurement liberalisation beyond the WTO and PTA frameworks is worth examining. A recent and particularly illustrative example of this tendency is the International Procurement Instrument (IPI),⁸⁵ adopted by

⁸² OECD (n 73), p. 43.

⁸³ Ibid, p. 5.

⁸⁴ Ibid. Examples include PTAs concluded by Chile with Australia, Mexico, and the United States, in which Chile extended coverage to municipal entities notwithstanding the absence of reciprocal commitments on the part of its trading partners. See Annex 15-a, Chile-Australia PTA (entered into force on 6 March 2009); Annex 15 bis-01, Chile – Mexico PTA (entered into force on 1 August 1999); Annex 9.1, Chile-United States PTA (entered into force on 1 January 2004). More recently, see also Annex 9.1, Chile – Hong Kong PTA (entered into force 9 October 2014),

⁸⁵ Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries.

the EU in 2022. Operating outside both the WTO institutional framework and PTAs, the IPI sheds light on what could be an emerging trend towards the unilateral enforcement of reciprocity, as distinct from its negotiated pursuit through international agreements. Designed to protect the interests of EU economic operators participating in procurement procedures in third countries, the IPI confers upon the European Commission the power to investigate situations in which the economic opportunities of the latter are adversely affected by measures or practices restricting access to government procurement markets in such third countries (Article 1 IPI). The IPI thus applies to businesses, goods, services, and works originating from third countries that are neither parties to the GPA nor bound by a PTA with the EU covering public procurement.

Where the Commission finds that such restrictions exist, it may adopt corrective measures ranging from an adjustment to the score assigned to tenderers from the country concerned in EU procurement procedures to the outright exclusion of tenders submitted in those procedures (Article 6(a)-(b) IPI). In this regard, the Commission adopted its first measure under the IPI in June 2025, which excluded Chinese companies from EU public procurement procedures relating to medical devices in respect of contracts with a value exceeding five million euros.⁸⁶ Thus, unlike the GPA and PTA frameworks in which reciprocity is still based on negotiations, the IPI introduces a mechanism of enforced conditional reciprocity, making access to EU procurement markets contingent on the existence of comparable openness in the procurement markets of third countries, without requiring the prior conclusion of an international agreement to that effect. In this perspective, the IPI is considered as an attempt to force reciprocity on countries that did not agree to it in the first place.⁸⁷

5. Conclusions

The analysis carried out in these pages shows that variable geometry has been a defining characteristic of the GPA since the beginning. Within the architecture of the Agreement, variable geometry has been operationalized at multiple dimensions and tied to a strict and conditional reciprocity principle. This approach has arguably been essential to the conclusion of an international agreement on government procurement, allowing, on the one hand, for national specificities in government procurement to be taken into account and, on the other, for free-riding practices to be discouraged. However, the difficulties surrounding the expansion of GPA membership, coupled with the growing number of PTAs addressing public procurement concluded by non-GPA members, prompt the question of whether such a close relationship between variable geometry and reciprocity remains suited to the challenges of today's global economy.

One of the key issues emerging from the tied relationship between variable geometry and reciprocity is the difficulty of including developing and non-market-based economies within the GPA framework. The tension between developed, market-based economies and developing, non-market-

⁸⁶ Commission Implementing Regulation (EU) 2025/1197 of 19 June 2025 imposing an International Procurement Instrument measure restricting the access of economic operators and medical devices originating in the People's Republic of China to the European Union public procurement market for medical devices pursuant to Regulation (EU) 2022/1031 of the European Parliament and of the Council.

⁸⁷ Kamala Dawar, 'The EU 2022 International Procurement Regulation Enters in to Force Reciprocity' 57(1) *Journal of World Trade* 152. The Author further notes that while designed with China in mind, the IPI also singles out other countries that are currently not parties to the GPA, such as India, Turkey and Indonesia.

based ones is not a recent development under the GPA framework. As the drafting history of the agreement reveals, the question of how to include developing countries within the GPA framework has been a persistent concern since its very origins. Yet the issue has acquired even renewed urgency in light of the emergence of major economies that remain outside the agreement but increasingly resort to preferential arrangements to discipline public procurement instead. While the language employed in such agreements may be predominantly hortatory formulations, or may not be subject to dispute settlement, these developments nevertheless suggest that the difficulties associated with expanding GPA membership may lie at the intersection of structural characteristics of the Agreement and of the institutional context in which it is situated, rather than in a general resistance among non-GPA Members to liberalize public procurement as such.

At the same time, however, the analysis of procurement provisions in PTAs reveals that the GPA continues to play a central role in the international discipline of public procurement. The degree of convergence observed between the procurement commitments of most PTAs and the GPA framework remains significant and confirms that the Agreement continues to function as the principal regulatory reference point in this field, even where formal accession has not been pursued or completed. In this sense, the GPA's normative influence still stands, and it extends even beyond its formal membership.

These findings suggest that a new balance within the GPA framework may warrant consideration between, on the one hand, the need to preserve a system based on variable geometry and, on the other, the restrictiveness and conditionality inherent in the reciprocity principle. In other words, this calls for broader reflection on the tensions inherent to a system that seeks simultaneously to expand and deepen over time at the pace of each participant while limiting meaningful engagement to like-minded countries and, in this respect, falling short of genuine inclusiveness. From the perspective of the WTO, such tensions may represent a missed opportunity both to expand procurement coverage for GPA parties and to lay the foundations for the future multilateralization of the field, while simultaneously allowing States greater leeway to address procurement issues outside the WTO institutional framework. The result is a degree of fragmentation observable both within the GPA itself, through divergent coverage schedules and their exceptions, and beyond it, in the proliferation of PTAs and possible unilateral initiatives enforcing reciprocity even in the absence of an international agreement.

Accordingly, reconsidering the balance between variable geometry and the stringency of the reciprocity principle appears desirable if the GPA is to remain a key and inclusive framework in a global economy whose procurement landscape is increasingly shaped by actors and arrangements situated beyond its current boundaries.

Beyond Protection and Liberalisation: Emerging Trends in International Investment Facilitation

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Summary: 1. The WTO and International Investment Law. – 2. Investment Facilitation and the IFD Agreement. – 3. The EU-Angola SIFA. – 4. Conclusions.

Keywords: Facilitation of International Investments – Sustainable Development – World Trade Organisation – WTO Investment Facilitation for Development (IFD) Agreement – EU-Angola Sustainable Investment Facilitation Agreement (SIFA).

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1. The WTO and International Investment Law

Although modern international legal frameworks governing trade and investment originated around the same period in the immediate post-World War II decades (1947 for the *General Agreement on Tariffs and Trade* (GATT)¹ and 1959 for the first Bilateral Investment Treaty (BIT) between West Germany and Pakistan²), their distinct historical trajectories have led to notable differences in the development of legal sources (for example, the significant role of customary international law in investment law compared to international trade law), treaty structures (multilateral in trade vs bilateral or regional in investment), institutional cultures (such as the contrast between State-to-State dispute settlement and Investor-State Dispute Settlement (ISDS) mechanisms), and levels of centralisation.³

These divergences may help explain why, despite the ‘importance of investment for promoting development in connection to trade’⁴ – an interconnection increasingly reflected in new-generation Preferential Trade Agreements (PTAs),⁵ which typically include a chapter on investment protection –

* The author is grateful to Prof. Elisa Baroncini for her valuable suggestions during the drafting of this chapter.

¹ (Adopted 30 October 1947, entered into force 1 January 1948 (on a provisional basis)) 55 UNTS 194.

² (Adopted 25 November 1959, entered into force 28 April 1962) 457 UNTS 24.

³ See, in general, Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) 1-2. For a further historical overview of the commonalities and differences between the two branches of international economic law, especially when it comes to dispute settlement systems, see Giorgio Sacerdoti and Niall Moran, *International Trade and Investment Dispute Settlement: From Rise to Crisis and Reform* (Routledge 2025) 28-36.

⁴ Rodrigo Polanco and Cristián Rodríguez-Chiffelle, ‘Investment Facilitation at the WTO: What’s Old? What’s New? What’s Missing?’ in Julien Chaisse and Cristián Rodríguez-Chiffelle (eds), *The Elgar Companion to the World Trade Organization* (Edward Elgar 2023) 301, 302.

⁵ These agreements, ‘in addition to the classical provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services’, contain ‘provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development’, Court of Justice of the European Union, Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017, para 17. For an overview of deep economic integration at the ‘mega-regional’ level, see Thilo Rensmann (ed), *Mega-Regional Trade Agreements* (Springer 2017). For a focus on the ‘new-generation’ PTAs negotiated and concluded by the European Union (EU), see Giovanna Adinolfi (ed), *Gli accordi preferenziali di nuova generazione dell’Unione europea* (Giappichelli 2021).

the WTO has not traditionally been regarded as the appropriate forum to develop international rules on foreign investment.

While such scepticism persists today, it is important to recognise that investment is not an entirely new issue for the WTO. For instance, the *Agreement on Trade-Related Investment Measures* (TRIMs)⁶ seeks to facilitate investment by clarifying that certain host-State measures are inconsistent with international trade rules (Article III and XI of the 1994 GATT).⁷ The TRIMs prohibits the use of investment-related conditions that distort trade in goods, such as local content requirements (obliging investors to use local inputs in production) or export performance requirements (mandating a certain share of production be exported) (Article 2(1)).⁸ Furthermore, the *General Agreement on Trade in Services* (GATS)⁹ already includes elements that apply directly to foreign investment. It defines four ‘modes’ of supplying services, one of which (commercial presence) refers explicitly to the supply ‘by a service supplier of one Member through commercial presence in the territory of another Member’ (Article I(2)(c)).¹⁰ Additional obligations concerning the treatment of foreign nationals and companies can also be found in other WTO instruments, such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS),¹¹ which mandates the protection of various forms of intellectual property. Such rights may qualify as investments under certain international investment agreements (IIAs).¹²

In 1996, at the First WTO Ministerial Conference in Singapore (MC1), WTO Members agreed to establish a Working Group on Trade and Investment.¹³ Although the group technically still exists, strong opposition, particularly from developing countries, has caused it to lose momentum, and there are currently no active negotiations on binding rules in this area.¹⁴

Investment was initially included in the Doha Round agenda launched in 2001,¹⁵ but was later dropped.¹⁶ Amid the general stalemate in WTO negotiations,¹⁷ new momentum has been found in plurilateral initiatives. At the 11th WTO Ministerial Conference in Buenos Aires in 2017 (MC11),

⁶ Annex 1A of the *Marrakesh Agreement Establishing the WTO* (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 186.

⁷ Annex 1A of the *Marrakesh Agreement Establishing the WTO* (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 190.

⁸ See David Collins, ‘Performance Requirement Prohibitions in International Investment Law’ in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 357.

⁹ Annex 1B of the *Marrakesh Agreement Establishing the WTO* (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183.

¹⁰ So, when a State party commits to allow foreign banks, telecom companies, or legal firms to operate within its borders (Mode 3 commitments), it is essentially opening itself up to foreign investment in those sectors. See Kurtz (n 3) 10.

¹¹ Annex 1C of the *Marrakesh Agreement Establishing the WTO* (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299.

¹² See Emmanuel Kolawole Oke, ‘International Intellectual Property Law as Applicable Law in Investment Disputes’ (2025) *ICSID Review – Foreign Investment Law Journal* 1.

¹³ Singapore Ministerial Declaration, Doc WT/MIN(96)/DEC (13 December 1996) para 20.

¹⁴ ‘Trade and investment ceased to be a WTO issue for the next two decades’, Alan Wm Wolff, *Revitalizing the World Trading System* (Cambridge University Press 2023) 99.

¹⁵ Doha Ministerial Declaration, Doc WT/MIN(01)/DEC/1 (14 November 2001) para 20.

¹⁶ Doha Work Programme, Decision Adopted by the General Council, Doc WT/L/579A (1 August 2004) 3.

¹⁷ Christian Pitschas, ‘Plurilateral Negotiations in the WTO on Services Domestic Regulation and Investment Facilitation for Development’ in Axel Berger and Manjiao Chi (eds), *The Making of an International Investment Facilitation Framework: Legal, Political and Economics Perspectives* (Cambridge University Press 2025) 210, 210 (arguing that ‘JSIs are a result of the stalemate in the Doha Round negotiations, which came to the fore at the 10th WTO Ministerial Conference (MC10) in December 2015’).

various countries launched the so-called Joint Statement Initiatives (JSIs), that is ‘plurilateral negotiations among self-identified groups of WTO Members to produce new rules on particular subject areas’,¹⁸ including one focused on Investment Facilitation for Development.¹⁹ This initiative, supported by 70 WTO Members at its inception, aimed to start structured discussions to develop a multilateral framework on investment facilitation,²⁰ in line with the recommendations of the G20, which had already endorsed – through its Trade Ministers – the *Guiding Principles for Global Investment Policymaking* in 2016.²¹

After more than two years of preparatory work, formal negotiations began on the Agreement on Investment Facilitation for Development (IFD Agreement).²² The text was officially finalised in February 2024 at the 13th WTO Ministerial Conference in Abu Dhabi (MC13).²³ At that time, the initiative – now supported by above 120 WTO Members – formally requested the incorporation of the IFD Agreement into Annex 4 of the Marrakesh Agreement as a Plurilateral Agreement²⁴ (meaning it will apply only to those WTO Members who expressly accept it).²⁵ Notable proponents of incorporating the IFD Agreement include Brazil, Cameroon, Canada, Chile, China, the EU, Saudi Arabia, Singapore and South Korea, among others.²⁶

At the recent 14th WTO Ministerial Conference in Yaoundé (MC14), 129 WTO Members, in a Joint Ministerial Declaration, reiterated the important contribution of the Agreement in providing a rules-based system for promoting open and non-discriminatory regulatory environments, addressing the mutually reinforcing relationship between trade and investment, and attracting and retaining sustainable investment.²⁷

2. Investment Facilitation and the IFD Agreement

It is worth stressing – as the very name suggests – that the IFD Agreement focuses specifically on investment facilitation, rather than *investment liberalisation* or *investment protection*. While the

¹⁸ Jane Kelsey, ‘The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO’ (2022) 25 *Journal of International Economic Law* 2, 2.

¹⁹ Joint Ministerial Statement on Investment Facilitation for Development, Doc WT/MIN(17)/59 (13 December 2017).

²⁰ Ibid, para 4 (calling for ‘beginning structured discussions with the aim of developing a multilateral framework on investment facilitation’).

²¹ Domenico Pauciulo, ‘L’Accordo sulla “facilitazione degli investimenti per lo sviluppo” adottato dall’Organizzazione mondiale del commercio: una prima lettura’ (2026) 32 *Diritto del commercio internazionale* 467, 470.

²² For an overview of the negotiation process, see Axel Berger and Manjiao Chi, ‘Introduction: Law, Politics, and Economics of International Disciplines on Investment Facilitation for Development’ in Id (eds), *The Making of an International Investment Facilitation Framework: Legal, Political and Economics Perspectives* (Cambridge University Press 2025) 1, 3-7, Rashmi Jose, ‘Investment Facilitation for Development Agreement: Why does it matter?’ In *International Institute for Sustainable Development* (17 July 2023), available at www.iisd.org/articles/policy-analysis/investment-facilitation-development-agreement, and Evan Gabor, ‘Keeping “Development” in a Multilateral Framework on Investment Facilitation for Development’ (2021) 22 *Journal of World Investment and Trade* 41, 41-90.

²³ Joint Ministerial Declaration on the Investment Facilitation for Development Agreement, Doc WT/MIN(24)/17/Rev.1 (29 February 2024).

²⁴ Ibid, para 4.

²⁵ Article II(3) of the *Marrakesh Agreement Establishing the WTO* (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3.

²⁶ See Polanco and Rodríguez-Chiffelle (n 4) 304.

²⁷ ‘Joint Ministerial Declaration on the Investment Facilitation for Development Agreement’, WT/MIN(26)/32 (29 March 2026), paras 3-4.

distinctions between these categories of investment regulation are not always entirely clear – there is no universally accepted definition; international organisations and legal scholars use the terms inconsistently, and certain State measures and treaty obligations may overlap these categories –,²⁸ is nonetheless possible to offer a meaningful differentiation.

In particular, the United Nations Conference on Trade and Development (UNCTAD) defines *investment facilitation* as ‘the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries.’²⁹ By contrast, *investment liberalisation* concerns a State’s power to allow, restrict, or place conditions on new foreign investments entering its territory.³⁰ *Investment protection*, on the other hand, ‘is concerned with the safeguarding of foreign investments against interference by the host State ... once the investor has sunk in its resources’,³¹ that is, after an investment has been admitted by the host State. In essence, investment facilitation is concerned with improving the domestic investment climate. This is typically achieved through measures such as enhancing transparency, simplifying administrative processes by cutting bureaucratic hurdles, establishing single-entry points for investors, and strengthening digital systems.³² Unlike traditional investment frameworks, it does not centre on safeguarding investors’ rights, expanding market access, or providing for ISDS. As Federico Ortino observes, ‘by focusing on creating a favourable business environment, countries can attract investment more effectively without compromising their regulatory sovereignty.’³³

At the same time, it may be worth noting that investment facilitation clearly contributes to a more effective operationalisation of investment liberalisation, including by reducing *de facto* barriers to entry through the streamlining of bureaucracy and the simplification of administrative procedures. Moreover, through the enhancement of transparency, consistency, and procedural fairness, investment facilitation may operate as an indirect mechanism for ensuring compliance with foreign investors’ protection standards such as Fair and Equitable Treatment.

²⁸ ‘For example, discussions of investment screening have highlighted that such measures may raise questions of investment liberalization and investment protection and may also raise difficulties in drawing the exact distinction between the pre- and post-establishment phases’, Joshua Paine, ‘Beyond Investment Protection and ISDS: Towards an Investment Law Research Agenda Focusing on Investment Facilitation and Liberalization Commitments’ (2025) *World Trade Review* 1, 5-6. See also Polanco and Rodríguez-Chiffelle (n 4) 305 (arguing that ‘the lines among attracting, facilitating, and retaining are sometimes unclear because investing is a continuum rather than discrete phases’).

²⁹ UNCTAD, *Global Action Menu for Investment Facilitation* (UNCTAD-DIAE 2017) 4. The World Bank defines investment facilitation as ‘the stage of investment promotion which seeks to convert investor interest into an investment decision’, *Investment Regulation and Promotion: Can They Coexist in One Body?* (World Bank Group 2018), 1. For a further discussion, see Jeswald W. Salacuse, ‘Investment Promotion, Facilitation, Admission, and Establishment’, in Id, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 252, 257-261 and Jesse Coleman et al, ‘What Do We Mean by Investment Facilitation?’ in *Columbia Center on Sustainable Development* (21 February 2018), available at <https://ccsi.columbia.edu/news/what-do-we-mean-investment-facilitation>.

³⁰ Jonathan Bonnitcha, ‘Investment Wars: Contestation and Confusion in Debate about Investment Liberalization’ (2019) 22 *Journal of International Economic Law* 629, 630, quoted in Paine (n 28) 5.

³¹ Christoph Schreuer, ‘Investments, International Protection’ in Anne Peters (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2013) para 1.

³² Federico Ortino, *Investment Facilitation in Recent International Investment Agreements* (International Trade Centre 2024) 7.

³³ Ibid.

That said, the distinct focus of the IFD Agreement, when compared to traditional BITs, is evident in its content.³⁴ While this brief contribution does not aim to provide a detailed analysis of the IFD Agreement's provisions,³⁵ a quick overview is warranted.

‘With the aim of facilitating foreign direct investment’ (FDI), the IFD Agreement applies to ‘measures adopted or maintained by a Party relating to investment activities of investors of another Party’ (Article 2(1)). The term ‘measures’ refers to ‘any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form’ (Article 3(b)), while ‘investment activities’ denotes ‘the establishment, acquisition, expansion, operation, management, maintenance and sale or other disposal of an investment’ (Article 3(a)). In sum, the IFD Agreement applies to FDIs across all economic sectors. It also explicitly excludes provisions on market access, investment protection, and ISDS (Article 2(2)), as well as on government procurement and subsidies or grants of a party, which under that party’s laws and regulations are not available to an investor of another Member (Article 2(5)).

The Agreement contains a number of provisions designed to insulate it from existing IIAs.³⁶ Article 2(2) states that the IFD Agreement cannot be construed as to create new or modify existing commitments relating to market access, nor to create new or modify existing rules on the protection of investments or ISDS.³⁷ Article 4, another ‘firewall provision’,³⁸ further ‘ring-fences’ the scope of the Agreement by making clear that it cannot be used to interpret or apply any provision of an IIA, nor can it serve as the legal basis for an investment claim under investor-State arbitration procedures.³⁹ Conversely, IIAs are not to be used in the interpretation or application of the IFD Agreement (Article 4(1)).

Following a ‘normative’ rather than a ‘functional’ approach,⁴⁰ the key pillars of the IFD Agreement include: commitments on transparency (Section II); streamlining and speeding up administrative procedures (Section III); establishment of focal points and promotion of regulatory coherence and cross-border cooperation (Section IV); special and differential treatment for developing and least-developed countries (Section V); institutional arrangements, including the establishment of a WTO Committee on Investment Facilitation entrusted with the task of supervising

³⁴ For the final version of the text see Investment Facilitation for Development Agreement, Doc INF/IFD/W/55 (13 February 2024).

³⁵ For such analysis, see Pauciulo (n 21) 470-482 and Rodrigo Polanco, ‘Investment Facilitation Provisions in International Investment Agreements and the Multilateral Framework on Investment Facilitation for Development’ in Axel Berger and Manjiao Chi (eds), *The Making of an International Investment Facilitation Framework: Legal, Political and Economics Perspectives* (Cambridge University Press 2025) 46, 72-80.

³⁶ Pauciulo (n 21) 471-472.

³⁷ Article 2(2) of the IFD Agreement.

³⁸ That is provisions ‘that seek to address the risks that obligations undertaken under [an investment] treaty might be used to interpret obligations undertaken in other investment agreements under those agreements’ dispute settlement provisions’, Rashmi Jose, *The Joint Initiative on Investment Facilitation for Development: Evolution from 2022 and the road to MC13* (International Institute for Sustainable Development 2023) 3.

³⁹ Even though ‘a WTO agreement cannot necessarily impose interpretive obligations on panels or tribunals constituted under IIAs and, as such, the IFDA has no real control over how such a panel or tribunal may interpret any overlap between these agreements and the IFDA’, Jose (n 38) 3-4.

⁴⁰ ‘A “normative” approach focuses on policies, laws, and regulations that enable foreign investors to establish and operate in a specific location, emphasizing investment procedural aspects ... A “functional” approach focuses on activities to support an investor through various investment phases before public or private entities, usually coordinated by an IPA, emphasizing the practical and operational needs’, Polanco and Rodríguez Chiffelle (n 4) 323.

the proper implementation and operation of the Agreement and a renvoi to the Dispute Settlement Understanding (DSU) for any dispute concerning the interpretation and application of (almost all) provisions of the Agreement (Section VII); and commitments on sustainable investment (Section VI).⁴¹ Within the latter category, participating WTO Members have agreed to encourage investors and enterprises to adopt responsible business conduct principles and standards (Article 37), and to take measures to combat corruption (Article 38). As will be discussed later, however, this section on sustainability remains modest,⁴² especially when compared to the EU-Angola Sustainable Investment Facilitation Agreement.

The only standard typically found in traditional IIAs that appears in the IFD Agreement is the Most-Favoured-Nation (MFN) treatment. In particular, Article 5(1) states that each party ‘shall accord to investors of another Member and their investments treatment no less favourable than that it accords, in like circumstances, to investors of any other [WTO] Member and their investments, in applying the provisions set out in th[e] Agreement in its territory.’ The function of this Article is to ensure non-discrimination among the investors of different WTO Members and their investments in the territory of the parties to the Agreement.⁴³ As has been observed, this standard of protection is ‘realistic’ insofar as ‘implementation of investment facilitation provisions, which are mostly procedural improvements, can only be applied generally, making it difficult to exclude non-participants from benefits.’⁴⁴ Article 5(2)(a)-(b) clarifies that Article 5(1) shall not be construed as requiring a party to extend to investors of another Member or their investments the advantage of any treatment resulting from separate IIAs or investment-related chapters or any other relevant provision in PTAs. Letter (c) extends the carve-out to any measure providing for recognition, including the recognition of the standards or criteria for authorization, licensing or certification of a natural person or an enterprise to carry out an economic activity, or the recognition of prudential measures as referred to in paragraph 3 of the Annex on Financial Services of the GATS. Taken together, Articles 5(1) and 5(2) mean that ‘a Party to [the IFD A]greement must treat investors of IFDA Parties equally when implementing the obligations of this agreement, but they can continue to provide additional benefits under other investment and trade agreements to Parties to those other agreements.’⁴⁵ Finally, Article 5(3) states ‘for greater certainty’ that provisions of any other international agreement entered into by a party do not in themselves

⁴¹ For an in-depth analysis, see Jose (n 38) 6-30.

⁴² For an analysis, see Rashmi Jose, ‘Tough Road Ahead to Integrate Investment Facilitation Agreement into World Trade Organization System’ in *International Institute for Sustainable Development* (11 January 2024), available at <https://www.iisd.org/articles/policy-analysis/integrating-investment-facilitation-agreement-wto> and N Jansen Calamita, ‘Looking for Sustainable Development and Sustainable Investment in the WTO Draft Investment Facilitation for Development Agreement’, in *International Institute for Sustainable Development* (2 April 2023), available at <https://www.iisd.org/itn/2023/04/02/looking-for-sustainable-development-and-sustainable-investment-in-the-wto-draft-investment-facilitation-for-development-agreement/> and Ortino (n 33) 21-22. See also Pauciulo (n 21) 478-479, 486-487 and Polanco and Rodríguez-Chiffelle (n 4) 321 (‘although the promotion of sustainable development is mentioned as a goal in several parts of the Agreement, more concrete commitments in this regard would be welcomed’).

⁴³ In a footnote, the IFD Agreement makes clear that, although the benefits are accessible, Article 5(1) shall not be construed as creating any obligation for WTO Members that have not accepted the Agreement, nor shall it be construed as creating any right for those Members, including the right to refer matters arising from the Agreement to a dispute settlement proceeding under the Dispute Settlement Understanding.

⁴⁴ Jose (n 38) 4.

⁴⁵ Ibid. Notably, the Agreement omits a national treatment clause, meaning state parties are not required to extend to foreign investors the same facilitation benefits granted to domestic investors, and may therefore apply such measures on more favourable terms to their own nationals, *ibid.*

constitute ‘treatment’ as referred to in Article 5(1) and thus cannot be taken into account when assessing a breach of the Agreement. This clause seems intended to prevent the importation of standards of protection from other treaties, insofar as their existence in another IIA could be seen as a form of ‘treatment.’⁴⁶ It may also be observed that, in the absence of a so-called ‘National Treatment’ clause, the parties remain free to apply investment facilitation measures on more favourable terms for domestic investors.⁴⁷

The incorporation of the IFD Agreement into the WTO’s legal architecture has been formally opposed – and thus effectively blocked –⁴⁸ by some Members, most notably India, Namibia and South Africa. It is, however, worth noting that, at the recent MC14, India remained the only Member to oppose the Agreement’s incorporation into the WTO legal framework.⁴⁹ The objections raised by India (and previously by other countries) are based mainly on two grounds. First, they argue that investment facilitation lies outside the WTO’s core mandate, which is trade-focused.⁵⁰ Moreover, the Doha Mandate no longer includes investment as a negotiating item.⁵¹ Second, they criticise the JSI format itself, arguing that it poses systemic risks for the WTO. According to this view, JSIs undermine the consensus-based and inclusive nature of the WTO rule-making process, marginalising the priorities of developing countries and allowing developed economies to advance their own agendas outside the multilateral framework.⁵² These criticisms are made despite a growing number of developing countries have in fact joined the JSIs in recent years – particularly the investment facilitation initiative – driven by economic considerations, direct pressure from a key trading or investment partner, and the fear of being left out of a potentially impactful process.⁵³ Meanwhile, more powerful developing countries, such as India, retain strong negotiating capacity regardless of their formal participation. This explains why they can pursue high-stakes negotiating tactics,⁵⁴ while

⁴⁶ With reference to an almost identical provision contained in the EU-Angola SIFA, see Nathalie M-P Potin, ‘EU-Angola Sustainable Investment Facilitation Agreement: Key Features, Benefits, and Impact’ (2024) 9 *European Investment Law and Arbitration Review* 245, 254. See also, in the same vein, Rebekka Monico, ‘The Role of the EU-Angola Sustainable Investment Facilitation Agreement in the International Investment Law Landscape’ (2025) 79 *Rivista della cooperazione giuridica internazionale* 77, 85 and Nicolò Andreotti, ‘Is EU Investment Policy Fit for Promoting Sustainable Development? Insights from the EU-Angola SIFA’ (2024) 9 *European Papers* 229, 239.

⁴⁷ Pauciulo (n 21) 472.

⁴⁸ In accordance with Article X(9) of the WTO Agreement, which requires consensus for the addition of any Plurilateral Agreement to Annex 4.

⁴⁹ Commerce and Industry Minister Piyush Goyal commented on India’s opposition, stating that it is ‘better to stand alone for the right than to be in a crowd just to look good’, see ‘India stood alone to oppose IFD pact at WTO meet, won’t join crowd just to look better: Goyal’, *The Economic Times* (2 April 2026), available at <https://economictimes.indiatimes.com/news/economy/foreign-trade/india-stood-alone-to-oppose-ifd-pact-at-wto-meet-wont-join-crowd-just-to-look-better-goyal/articleshow/129983713.cms?from=mdr>.

⁵⁰ The Legal Status of ‘Joint Statement Initiatives’ and Their Negotiated Outcomes, Doc WT/GC/W/819/Rev.1 (30 April 2021) para 38.

⁵¹ Ibid. See also above.

⁵² Ibid, paras 4 ff. For a general critique of these initiatives, see Kelsey (n 18) 2.

⁵³ For an analysis, see Shamel Azmeh, ‘Developing Countries and Joint Statement Initiatives at the WTO: Damned if You Join, Damned if You Don’t?’ (2024) 55 *Development and Change* 375, 388-390.

⁵⁴ As a WTO country delegate for a developing country noted in 2022, ‘Horse trading is bound to happen. It could be in the next ministerial or the one after – we do not know – but when it happens, India and South Africa will have a seat at the table but many of us smaller countries will not. What we need to do now is to position ourselves for that moment’, quoted in *ibid*, 390.

also keeping an eye – particularly in the case of India – on containing the growing influence of China, a strong supporter of the IFD Agreement since 2017, in global investment.⁵⁵

3. *The EU-Angola SIFA*

While the establishment of a multilateral system for investment facilitation remains blocked at the WTO, significant developments have taken place in regional and bilateral settings.⁵⁶ Notable examples of the first kind include: the 2017 *Intra-MERCOSUR Protocol on Investment Cooperation and Facilitation*,⁵⁷ the (non-legally binding) 2019 *ASEAN Investment Facilitation Framework*,⁵⁸ and the 2023 *Protocol on Investment to the African Continental Free Trade Area*.⁵⁹ At the bilateral level, apart from efforts by Australia, Canada, China, the Netherlands, and particularly Brazil, through its model Agreement on Cooperation and Facilitation of Investments (ACFI),⁶⁰ the *EU-Angola Sustainable Investment Facilitation Agreement* (SIFA),⁶¹ stands out.

Over the past decade, the EU has successfully established itself as a powerful and influential global actor in shaping international investment frameworks.⁶² The EU-Angola SIFA can be seen as an example of this trajectory. In particular, the Agreement is noteworthy for several reasons: it is the first IIA concluded by the EU with an African country,⁶³ and the first explicitly framed as a

⁵⁵ For an analysis, see Shanthie Mariet D'Souza, 'What is India's game at the WTO?' in *The Interpreter* (27 March 2026), available at <https://www.lowyinstitute.org/the-interpreter/what-india-s-game-wto> (arguing that 'New Delhi's geopolitical concerns include the windfall that the IFD could deliver for the Chinese Belt and Road Initiative').

⁵⁶ For an overview, see Shantanu Singh, 'What's Happening on Investment Facilitation: A survey of recent global developments' in *International Institute for Sustainable Development* (30 September 2023), available at <https://www.iisd.org/itn/2023/09/30/whats-happening-on-investment-facilitation-a-survey-of-recent-global-developments/> and N Jansen Calamita and Stefanie Schacherer, 'Investment Facilitation for Sustainable Development within the Context of the Regional Comprehensive Economic Partnership (RCEP), the ASEAN Investment Facilitation Framework (AIFF) and the WTO Draft Investment Facilitation Framework for Development' (2022) 96 *Studies in Trade, Investment and Innovation* 1.

⁵⁷ *Protocolo de Cooperación y Facilitación de Inversiones Intra-MERCOSUR* (adopted 7 April 2017, entered into force 30 July 2019) Doc MERCOSUR/CMC/DEC N° 03/17.

⁵⁸ (Adopted 8 September 2021), available at <https://asean.org/wp-content/uploads/2021/11/ASEAN-Investment-Facilitation-Framework-AIFF-Final-Text.pdf>.

⁵⁹ (Adopted 19 February 2023, not yet into force), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8533/download>.

⁶⁰ As has been pointed out, Brazil's ACFI 'have ... innovated by emphasizing and solidifying the concept of "facilitation" as the driving force behind investment regulation', Michelle R. Sanchez-Badin and Manu Misra, 'Domestic Governance and Treaty Practice of Brazil's Investment Cooperation and Facilitation Agreements' in Axel Berger and Manjiao Chi (eds), *The Making of an International Investment Facilitation Framework: Legal, Political and Economics Perspectives* (Cambridge University Press 2025) 291, 292. For an overview on Brazil's ACFI practice, see *ibid*, 293-304 and Luciana Maria de Oliveira Sá Pires and Vivian Daniele Rocha Gabriel, 'The Eminent Conflict Between the WTO DSB and the Proposed International Investment Court to Deal with Investment Disputes' in Alberto do Amaral Júnior, Luciana Maria de Oliveira Sá Pires, and Cristiane Lucena Carneiro (eds), *The WTO Dispute Settlement Mechanism: A Developing Country Perspective* (Springer 2019), 245, 258-262.

⁶¹ *Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola* (adopted 17 November 2023, entered into force 1 September 2024) OJ L, 2024/830.

⁶² Angelos Dimopoulos, 'European Union' in Markus Krajewski and Rhea Tamara Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) 434, 456 (arguing that 'the EU has managed to develop a policy framework for foreign investment that presents significant innovations'). From the same author see also, more in general, *EU Foreign Investment Law* (OUP 2011).

⁶³ Monico (n 46) 80.

‘sustainable investment facilitation Agreement.’⁶⁴ It could set a precedent for future agreements, particularly in Africa,⁶⁵ aligning with the European Commission’s 2021 *Trade Policy Review*, which emphasises the EU’s role as Africa’s largest trading partner and calls for deeper engagement and closer economic integration between the continents.⁶⁶ The EU-Angola SIFA also fits within the EU’s broader strategy to promote sustainable investment, diversify value chains, and advance trade in sustainable goods, particularly in support of the green and energy transition.⁶⁷ It represents a concrete example of how the EU’s common commercial policy can be leveraged to facilitate responsible investment,⁶⁸ particularly in the natural resources sector, in a manner consistent with the strategic objectives of the 2024 *Critical Raw Materials Act*.⁶⁹

Moreover, following Opinion 2/15 on the EU-Singapore Free Trade Agreement of the Court of Justice of the European Union, it is now settled that provisions on non-direct investment and ISDS, falling within the mixed competences, require ratification by both the EU and its Member States.⁷⁰ By focusing exclusively on investment facilitation, the EU-Angola SIFA allows the EU to bypass these hurdles and operate entirely within the scope of its exclusive competence under the EU common commercial policy.⁷¹ This facilitates faster implementation and avoids the political risks often associated with investment protection/liberalisation policies.

While FDIs are essential to mobilise the financial resources needed to meet sustainability goals, international investment rules have sometimes been criticised for limiting public policy space through

⁶⁴ It is likely no coincidence that, along with Mozambique and Malawi, Angola is among the African countries familiar with the investment facilitation model, having concluded an ACFI with Brazil already in 2015, see *Agreement for Cooperation and Investment Facilitation between the Government of the Federative Republic of Brazil and the Government of the Republic of Angola* (adopted 1 April 2015, entered into force 28 July 2017), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download>.

⁶⁵ The European Commissioner for Economy and Productivity, Valdis Dombrovskis, has recently announced that ‘following the first ever SIFA with Angola in 2023, discussions with other potential SIFAs are now underway with Côte d’Ivoire, Ghana, Cameroon, and Nigeria’, ‘Remarks by Executive Vice-President Dombrovskis at the Foreign Affairs Council (Trade) press conference’ (21 November 2024), available at https://ec.europa.eu/commission/presscorner/detail/en/statement_24_6005. In January 2026, the European Commission has also concluded negotiations with Ecuador on a SIFA – the first with a Latin American country, see European Commission, ‘Press Release: EU and Ecuador conclude negotiations for Sustainable Investment Agreement’ (23 January 2026), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_26_190.

⁶⁶ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final, 18 February 2021 and Communication from the Commission to the European Parliament, the European Council and the Council, *Communication on a new Africa-Europe Alliance for Sustainable Investment and Jobs: Taking our partnership for investment and jobs to the next level*, COM(2018) 643 final, 12 September 2018.

⁶⁷ For instance, European Commission, *Trade for All: Towards a more responsible trade and investment policy*, COM(2015) 497 final, 14 October 2015. For an analysis, see Andreotti (n 46) 238.

⁶⁸ For further insight into how the EU integrates considerations related to sustainable development into the IIAs to which it is a party, see Domenico Pauciulo, ‘Sustainable Development in EU (Trade and) Investment Agreements: An Overview of Recent Treaty Practice’ in Elisa Baroncini et al (eds), *The UN 2030 Agenda in the EU Trade Policy: Improving Global Governance for a Sustainable New World* (AMS Acta 2025) 277 and Stefanie Schacherer, *Sustainable Development in EU Foreign Investment Law* (Brill 2021). For a general perspective on the EU’s approach to sustainable development as a pillar of global economic governance, see Federico Casolari et al (eds), *Sustainable Development as Fundamental Pillar of Economic Governance and Public Affairs – The EU Approach and International and Domestic Perspectives* (BUP 2025).

⁶⁹ Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials, OJ L, 2024/1252.

⁷⁰ Opinion 2/15 (n 5) para 305.

⁷¹ See Articles 3(1)(e), 206 and 207(1) of the consolidated version of *Treaty on the Functioning of the European Union* (adopted as part of the Treaty of Lisbon 13 December 2007, entered into force 1 December 2009) OJ C202/47.

rigid neoliberal disciplines that prioritise the interests of foreign investors.⁷² Be that as it may, similar to the IFD Agreement, the SIFA, which defines its scope of application by focusing on the kind of activities undertaken by foreign investors,⁷³ provides for a ‘firewall clause’ clarifying that it does not create or modify commitments on investment liberalisation, investment protection, or ISDS (Article 2(3)). Moreover, Article 55 expressly bars investors from invoking the Agreement before the domestic courts of the Parties.⁷⁴ By contrast, the EU-Angola SIFA proposes a facilitation framework explicitly oriented toward sustainable development and, therefore, a more balanced approach to investment governance.⁷⁵

Like the WTO IFD Agreement, but differently from other investment facilitation instruments,⁷⁶ the EU-Angola SIFA contains only one ‘classic’ investment standard: the MFN clause. In particular, Article 4(1)) states that ‘each Party shall accord immediately and unconditionally to investors of the other Party and their investments treatment no less favourable than that it accords, in like situations, to investors of any other country and their investments, with respect to the application of this Agreement in its territory.’ The formulation closely mirrors that of Article 5(1) of the IFD Agreement, and the observations made above in relation to that provision are equally applicable here. The same goes for Article 4(2)(a), establishing that the MFN clause does not require either Party to extend benefits from recognition measures given to third countries, including the recognition of the standards or criteria for the authorisation, licencing, or certification of a natural person or enterprise to carry out an economic activity, or the recognition of prudential measures as referred to in paragraph 3 of the Annex on Financial Services to the GATS. Article 4(2)(b) also excludes coverage of agreements that remove substantially all barriers to investment or require legal harmonisation, an exclusion which was presumably meant to carve out the EU-United Kingdom *Trade and Cooperation Agreement*.⁷⁷ Finally, analogously to Article 5(3) of the IFD Agreement, Article 4(3) specifies ‘for greater certainty’ that provisions included in other international agreements concluded by a party do not in themselves constitute ‘treatment’ as referred to in Article 4(1) and thus cannot be taken into account when assessing a breach of the Agreement.⁷⁸

Following the WTO IFD Agreement’s ‘normative’ approach, the EU-Angola SIFA introduces a set of procedural obligations aimed at enhancing transparency, predictability, and regulatory coherence.⁷⁹ These include: reasonable, objective, and impartial administration of general measures

⁷² Andreotti (n 46) 236.

⁷³ Similar to the IFD Agreement, the SIFA ‘applies to measures adopted or maintained by the Parties affecting investment’ (Article 2(1)), where ‘measure’ ‘means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form’ (Article 3(11)), ‘investment’ means ‘the establishment and operation to perform economic activities by investors of one Party in the territory of the other Party’ (Article 3(7)) and ‘economic activity’ means ‘any activity of an industrial, commercial or professional character or activities of craftsmen, including the supply of services, except for activities performed in the exercise of governmental authority’ (Article 3(4)).

⁷⁴ See Monico (n 46) 87.

⁷⁵ See Preamble and Article 1 of the EU-Angola SIFA.

⁷⁶ Encompassing, for example, provisions relating to access to justice, due process, non-discrimination, and direct expropriation, see Monico (n 46) 84.

⁷⁷ In this sense, Filipe Vaz Pinto and Joana Granadeiro, ‘The Sustainable Investment Facilitation Agreement Between the EU and Angola: A New Model for Investment Agreements?’ in *Kluwer Arbitration Blog* (23 September 2024), available at <https://arbitrationblog.kluwerarbitration.com/2024/09/23/the-sustainable-investment-facilitation-agreement-between-the-eu-and-angola-a-new-model-for-investment-agreements/>.

⁷⁸ See above, Section 2.

⁷⁹ For an in-depth analysis, see Potin (n 46) 245 ff.

(Article 6); publication and public availability of relevant laws and regulations (Article 7); opportunities for stakeholder consultation (Articles 7-8); creation of public websites with legal information and contact points (Article 9); fair, impartial, and transparent authorisation procedures for investment (Articles 19 and 21); establishment of investment facilitation focal points to support and assist investors (Article 22).

Unlike the IFD Agreement – which would fall under the WTO’s DSU (Article 44), save for the commitments on sustainable development under Section VI (Article 44(4))⁸⁰ – the EU-Angola SIFA establishes its own ‘multi-tier dispute avoidance/resolution system’⁸¹ (Chapter VI). Dispute resolution includes initial consultations in good faith (Articles 36-37) and *ad hoc* inter-State arbitration (Article 38). The parties’ consent to inter-State arbitration needs to be given separately for each specific dispute.⁸² However, the text contains no reference to arbitration institutions or rules, which could raise practical challenges (e.g., if the arbitrators fail to agree on a chairperson, a scenario not addressed by Article 38).⁸³ In case one of the parties rejects the request for arbitration or does not comply with the award, the other party may adopt proportionate measures within the scope of the Agreement that are proportionate to the failure to fulfil the specific obligations (Article 38(4)).

Both the IFD Agreement and the EU-Angola SIFA express the goal of facilitating investment in support of sustainable development,⁸⁴ but the latter goes further than the former in this regard. The purpose of promoting sustainable development and its direct linkage with (the facilitation of) foreign investments is emphasised both in the Preamble and the provision concerning the objective of the SIFA.⁸⁵ Article 28(1), which opens the chapter on investment and sustainable development, highlights the three-dimensional nature of sustainable development and states that:

The Parties recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing, and affirm their commitment to facilitate investment in a way that contributes to the objective of sustainable development.

⁸⁰ This exclusion effectively gives rise to ‘a form of hierarchy between broader obligations – facilitating the general flow of investments – and rules specifically aimed at facilitating the flow of sustainable investments’, Pauciulo (n 21) 480 (our translation).

⁸¹ Monico (n 46) 86.

⁸² See Articles 37(4) and 38(4) of the EU-Angola SIFA.

⁸³ Vaz Pinto and Granadeiro (n 77).

⁸⁴ Article 1 of the IFD Agreement states that: ‘The purpose of this Agreement is to improve the transparency of measures, streamline administrative procedures, adopt other investment facilitation measures and promote international cooperation, as a means of facilitating the flow of foreign direct investment between the Parties, particularly to developing and least-developed country Parties, with the aim of fostering sustainable development’. See also the Preamble and Section VI.

⁸⁵ See Preamble, Recitals 1 and 5 and Article 1 (‘This Agreement aims at facilitating the attraction, expansion and retention of foreign direct investment between the Parties for the purposes of economic diversification and sustainable development’).

Article 29(1) further strengthens the connection between the parties' right to regulate, already recalled under Article 2(2),⁸⁶ and the pursuit of sustainable development.⁸⁷ It recognises each party's right to define its own sustainable development policies and priorities, to establish domestic environmental and labour protection levels as it deems appropriate, and to adopt or amend relevant laws and policies accordingly. The parties' right to regulate is reinforced through Article 47, establishing a public policy exception.⁸⁸ It is perhaps worth noting here that in the IFD Agreement this right is referenced only in the preamble and not in such emphatic terms.⁸⁹

Subsequent paragraphs require that the parties shall not weaken, reduce, waive, or derogate from their environmental and labour legislation to encourage investment, nor shall they fail to effectively enforce such laws, which must conform to internationally recognised standards.⁹⁰ However, Article 29(6) specifies that environmental and labour laws must not be used as a means of arbitrary or unjustifiable discrimination or a disguised restriction on international investment.⁹¹ Finally, in addition to recognising the importance of corporate social responsibility, responsible business conduct,⁹² and gender equality⁹³ as means of contributing to sustainable development, the EU-Angola SIFA provides that:

In accordance with their commitment to enhance the contribution of investment to the goal of sustainable development, the Parties shall facilitate and encourage investment in sustainable production and consumption, in environmental goods and services, and investment of relevance for climate change mitigation and adaptation.⁹⁴

⁸⁶ 'The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment, including climate change, public morals, social protection, consumer protection, privacy and data protection, and the promotion and protection of cultural diversity.'

⁸⁷ For an analysis of the right to regulate in the EU-Angola SIFA, see Monico (n 46) 82-83 (concluding that 'by combining the flexibility to regulate in the public interest of the Parties ... with their commitment to facilitate investment in a manner consistent with the economic, social and environmental dimension of sustainable development ... the EU-Angola SIFA is significantly beneficial for host States and allows them to implement the SDG of the UN 2030 Agenda'). See also Luís Heleno Terrinha, 'The Right to Regulate in the EU-Angola Sustainable Investment Agreement: What Lessons for Investment Protection?' in *Kluwer Arbitration Blog* (1 January 2025), available at <https://legalblogs.wolterskluwer.com/arbitration-blog/the-right-to-regulate-in-the-eu-angola-sustainable-investment-agreement-what-lessons-for-investment-protection/>.

⁸⁸ Article 47 states that: 'Nothing in this Agreement shall be construed to prevent the adoption or enforcement by either Party of measures: (a) necessary to protect public security or public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety.'

⁸⁹ '...Recognizing the right of Parties to regulate in the public interest within their territories so as to meet their policy objectives.'

⁹⁰ Articles 29(1), 29(3), 29(4), and 29(5) of the EU-Angola SIFA.

⁹¹ And see Article 45, fn. 46 of the IFD Agreement.

⁹² Article 34 of the EU-Angola SIFA.

⁹³ Article 35 of the EU-Angola SIFA.

⁹⁴ Article 33(1) of the EU-Angola SIFA.

Numerous other international instruments concerning labour protection, environmental safeguarding, and the fight against climate change are expressly invoked to underscore the importance of these commitments in facilitating investment in a manner consistent with environmental, social, and development objectives.⁹⁵ Overall, the Agreement has been described as ‘embod[ying] the pillars of ESG in seeking to “promote sustainable growth”’ within the parties thereto.⁹⁶

4. Conclusions

For many years, States have not extensively utilised IIAs to address investment facilitation. A 2018 survey of nearly 3,000 IIAs revealed that only 35 included explicit provisions on investment facilitation.⁹⁷ In fact, investment facilitation has been identified by scholars as a ‘systemic gap’ in national and international investment policies.⁹⁸ However, in recent years, both States and international organisations have shown a growing interest in ‘closing the gap’ and developing deeper and more comprehensive legal norms in this area.⁹⁹ Indeed, in a 2023 survey, UNCTAD noted that ‘investment facilitation features in recent international investment governance instruments are more common, more diverse and are increasing in depth and specificity, with examples existing across all continents.’¹⁰⁰

Although the IFD Agreement has not (yet) been incorporated into Annex 4 of the WTO Agreement, it already embodies a set of ‘best practices’ to guide host states in the formulation and implementation of their facilitation policies.¹⁰¹ Moreover, the finalisation of the Agreement clearly signals a ‘nascent’¹⁰² trend that has also emerged at the regional and bilateral levels: a shift in the focus of international investment law from liberalisation and protection to facilitation and, in particular, regulatory transparency, improvement of the regulatory environment, cooperation mechanisms, and sustainable development.¹⁰³ Indeed, one may also argue that the IFD Agreement represents the ‘plurilateral evolution’ of these bilateral and regional practices.¹⁰⁴ This trend appears to serve a threefold purpose.

First, it likely reflects an attempt to circumvent the persistent impasse within the international community regarding the necessary or desirable reforms to the FDIs liberalisation and protection

⁹⁵ See Articles 30, 31 and 32 of the EU-Angola SIFA. For an analysis, see Monico (n 46) 88-90.

⁹⁶ Mélida Hodgson et al, ‘The Dawn of a New Era: Advancing ESG Obligations in Arbitration through Plurilateralism’ (2025) 26 *Journal of World Investment & Trade* 301, 318.

⁹⁷ Rodrigo Polanco Lazo, *Facilitation 2.0: Investment and Trade in the Digital Age* (International Centre for Trade and Sustainable Development 2018) 5.

⁹⁸ Pitschas (n 17) 229.

⁹⁹ Polanco (n 35) 80.

¹⁰⁰ UNCTAD, ‘Investment Facilitation in International Investment Agreements: Trends and Policy Options’, *Issue Note No 3* (September 2023), 2.

¹⁰¹ Wentian Zu and Ying Bi, ‘Investment Facilitation and the Structural Evolution of International Investment Law: Toward a Third Configuration’ (2025) *World Trade Review* 1, 15.

¹⁰² UNCTAD (n 100) 2.

¹⁰³ It has been argued that a first shift occurred in the 1980s, when the focus of international investment law gradually moved from a post-colonial framework aimed at investment protection to a globalised one more centred on investment liberalisation, Zu and Bi (n 101) 4.

¹⁰⁴ Although the IFD Agreement has not incorporated all the provisions developed at the bilateral or regional level, see Pauciulo (n 21) 482-485.

system in order to make it more symmetrical,¹⁰⁵ including ISDS reform and alternatives to ISDS.¹⁰⁶ As an example of the latter, the Investment Court System (ICS) – proposed with great ambition by the European Commission and incorporated into agreements like the EU-Canada Comprehensive Trade and Economic Agreement,¹⁰⁷ the EU-Singapore Investment Protection Agreement,¹⁰⁸ and the EU-Vietnam Investment Protection Agreement¹⁰⁹ – has never been fully implemented due to the lack of ratification by national parliaments.¹¹⁰

Second, and in connection with the first point, investment facilitation may also represent a viable alternative to the opposite – and, to some extent, consequent – emerging tendency of states to address investment issues unilaterally through domestic legal mechanisms (for instance, by invoking security exception clauses in IIAs).¹¹¹

Third, the shift toward facilitation represents an effort to more explicitly align the flow of FDIs with the objective of sustainable development.¹¹² Indeed, as has been noted, ‘facilitating cross-border investment is considered crucial for increasing FDI flows, in particular to developing countries and LDCs, as a precondition for achieving the SDGs.’¹¹³

Overall, the described trend marks a movement away from a decentralised, investor-driven governance model toward one that is more public, centralized, and State-oriented in its approach to international investment governance.¹¹⁴ This does not, of course, imply that investment protection and liberalization will necessarily be replaced by investment facilitation in the international governance of FDIs. It does, however, suggest that the growing prominence of the investment facilitation option renders it a complementary, supplementary, or even alternative avenue for reform.¹¹⁵ After all, as already alluded to, investment facilitation, through the enhancement of transparency, consistency, and procedural fairness, may operate as an indirect mechanism for operationalising investment liberalisation and ensuring compliance with investment protection standards. In sum, the question is no longer ‘whether’, but ‘to what extent the concept of investment facilitation will gather momentum and affect investment treaty-making on a broader scale.’¹¹⁶

¹⁰⁵ On this point, see *ibid.*, 7-8.

¹⁰⁶ See Monico (n 46) 87 and Andreotti (n 46) 243.

¹⁰⁷ *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part* (adopted 30 October 2016, provisionally entered into force 21 September 2017) OJ L 11/23.

¹⁰⁸ *Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part* (adopted 30 June 2019, not yet in force) OJ L186/3.

¹⁰⁹ *Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part* (adopted 19 October 2018, not yet in force) OJ L267/3.

¹¹⁰ The EU’s pursuit of investment facilitation agreements does not necessarily signify an implicit rejection of the ICS model *tout court* as the European Commission’s continued support for the establishment of a Multilateral Investment Court (MIC) within the framework of the UNCITRAL reform process also indicates. On this last point, see Ivana Damjanovic, ‘The EU and UNCITRAL: A Multilateral Investment Court’ in *Id., The European Union and International Investment Law Reform: Between Aspirations and Reality* (Cambridge University Press 2023) 349. And see Sacerdoti and Moran (n 3) 242-244.

¹¹¹ As noted by Zu and Bi (n 101) 10, ‘a new trend is emerging in recently concluded, or updated IIAs, whereby contracting parties are expanding the scope for the application of domestic law in various ways.’

¹¹² Potin (n 46) 257-259.

¹¹³ Pitschas (n 17) 229.

¹¹⁴ See Zu and Bi (n 101) 8, 12-14 and Polanco Lazo (n 97) 15.

¹¹⁵ Zu and Bi (n 101) 22. See also Ortino (n 38) 7 (arguing that ‘investment facilitation complements investment liberalization by addressing the operational challenges that foreign investors face within a country’).

¹¹⁶ Salacuse (n 29) 261.

In this evolving context, the EU-Angola SIFA stands out as the most advanced investment facilitation model currently in force, even if it will take time to assess whether the EU-Angola SIFA successfully stimulates sustainable foreign investments. In this respect, it is also up to the institutions involved to promote awareness of this new instrument – by disseminating information, engaging economic operators, and demonstrating the system’s potential – so as to enhance its attractiveness to investors notwithstanding the absence of traditional investment protection standards (apart from the MFN clause) and ISDS.

For now, the apparent rise of investment facilitation deserves closer academic scrutiny, as it is likely that future challenges in investment facilitation will not fit neatly within the existing conceptual categories mainly drawn from the investment protection vocabulary that have dominated investment law scholarship in recent decades

Interim Arrangements for the E-Commerce Agreement: Implications for Dispute Settlement

Carlo M. Cantore¹

Summary: 1. Introduction – 2. The E-Commerce Agreement and its Addition to the WTO Rulebook as a “Plurilateral Agreement” – 3. Interim Arrangements for the ECA – 3.1 ECA Interim Arrangements and Dispute Settlement – 3.2 Implications of the Dispute Settlement Rules – 3.3 Were there alternatives? – 4. Conclusion.

Keywords: Electronic Commerce Agreement – WTO Reform – Plurilateral Agreements – Digital Trade – Article 25 DSU – MPIA – Trade Negotiations – Dispute Resolution – Digital Economy.

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1. Introduction

This short contribution examines the “Interim Arrangements” on the E-Commerce Agreement and the incorporation by reference in the Interim Arrangements Annex of the Understanding on rules and procedures governing the settlement of disputes (DSU). Under the DSU, the Dispute Settlement Body (DSB) is entrusted with a number of important functions regarding the administration of disputes. Pursuant to the Interim Arrangements Annex, these functions will be transferred to the E-Commerce Committee, once the ECA enters into force. This contribution seeks to examine the implications of assigning such functions to the E-Commerce Committee, and explores a possible alternative.

2. *The E-Commerce Agreement and its addition to the WTO rulebook as a “plurilateral agreement”*

In December 2024, after years of extensive negotiations, a subgroup of WTO Members announced the conclusion of the E-Commerce Agreement (ECA).²

The ECA consists of eight sections, with substantive and institutional provisions. Broadly speaking, the ECA includes disciplines aiming at the consolidation and sharing of good regulatory practices in the domain of electronic commerce. In that regard, it identifies a number of priorities, including: (i) Greater reliance on paperless trade and invoices; (ii) Ensuring access to payment and clearing systems under conditions of national treatment to foreign entities established in the territory of a Member; (iii) Prohibition of customs duties on electronic transmissions (including both bytes

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² WTO, Joint Statement on Electronic Commerce, Communication from Australia, Japan and Singapore, INF/ECOM/87 (26 July 2024).

and contents) to be reviewed after five years; (iv) Improved access to government data, without prejudice to intellectual property (IP) laws and data protection laws; (v) Building trust in the e-commerce sphere, by prioritizing consumer protection, data protection, and cybersecurity; (vi) Flexibilities for developing and least-developed economies.

The ECA is the most consequential of the plurilateral initiatives that are being discussed at the WTO. It is the first WTO Agreement entirely devoted to digital trade, which is in and of itself remarkable, especially when considering that the current rules on trade in services were negotiated between the late 1980's and the early 1990's, that is way before the internet revolution. Bekkers et al. (2025) estimate that the immediate adoption of the ECA would increase the participants' GDP by 0.43%, global GDP by 0.14%, and world trade by close to 1%.

At the same time, the achievements of the ECA should not be overemphasized. The ECA, in fact, leaves many of the major obstacles to international trade by electronic means unaddressed. The text of the Agreement does not include rules on data localization, data flows, and source code, which are among the most pressing issues in the field of electronic commerce. Participants to the E-Commerce JSI discussed at length these issues, and the United States had even tabled its text proposal for provisions regulating these aspects. In November 2023, however, the United States withdrew its proposals concerning data localization, data flows, and source code.³ This sent a strong signal to other participants that the major digital trade player in the world was no longer keen to discuss the introduction of meaningful disciplines on those matters. This is also an important element to emphasize as, even prior to the inauguration of the new administration, the United States was already switching gears in its approach towards international rules on digital trade.

As such, many of the major barriers to trade by electronic means remain unaddressed, and the disciplines established in the ECA are not as advanced as E-commerce chapters in several FTAs. In this respect, it can be said that the ECA is an "FTA-minus" agreement.⁴ This is not to diminish the achievements of the ECA, as it establishes a forum where partners with diverging approaches can talk and eventually incorporate new features by means of amendments. But the differences with existing FTAs are not negligible either.

If the birth of the text of the ECA was not easy, the early life of the concluded text has not been easy either. The WTO Agreement, in fact, allows for the addition of new plurilateral agreements to the WTO rulebook if the Ministerial Conference (or the General Council in the intervals of meetings of the Ministerial Conference) so decides "exclusively by consensus", pursuant to Article X:9 of the WTO Agreement. On two separate occasions already, the General Council could not reach consensus on the draft decision to add the ECA to the existing WTO covered agreements, due the vocal opposition of several WTO Members.

³ Simon Lester provides details on the United States' change of mind and its implications on the ECA negotiations. See S. Lester, "The U.S. Changes its Mind in the WTO E-Commerce Negotiations", available at <https://ielp.worldtradelaw.net/2023/10/the-us-changes-its-mind-in-the-wto-e-commerce-negotiations/> (last accessed on 27 August 2026)

⁴ This expression was used by Mira Burri in a presentation on the ECA given at the WTO in October 2025. See M. Burri, "The Landscape of Global Digital Trade Law: Lessons Learned and Outlook" https://www.wto.org/library/events/event_resources/ecom_1310202514/954_2959.pdf (last accessed on 27 August 2026).

At the February 2025 General Council meeting where a draft decision on the incorporation of the ECA into Annex IV of the WTO Agreement was submitted, seven WTO Members objected.⁵

Some of the objections concerned the modalities of the negotiations, and the reliance on a Joint-Statement Initiative (JSI) as undermining the 1998 Work Programme on E-Commerce.⁶

Interestingly, opposition came also from delegations that did take part in the negotiations of the ECA such as Brazil, Indonesia, and Türkiye. Those three Members took issue with the prohibition on customs duties on electronic transmissions, arguing that it would unduly constrain policy space for developing economies in a critical area such as taxation. Brazil further expressed concern with a footnote⁷ in the communication presented by the co-convenors encouraging governments with the capacity to implement the provisions of the ECA not to avail themselves of the special and differential treatment (S&DT) flexibilities provided for in the Agreement.⁸

In the build-up to the Ministerial Conference held in Yaoundé in March 2026, no major movements in the views of opponents were registered. Accordingly, the expectations of major breakthroughs were slim.

3. Interim Arrangements for the ECA

With a surprise move, at the Yaoundé Ministerial Conference held in March 2026, 67 WTO Members (counting the European Union as 27 Members plus one) signed a declaration on “Interim Arrangements” on the E-Commerce Agreement.⁹ In a nutshell, participants aim to complete the required domestic procedures for the acceptance of the agreement without waiting for a decision by the Ministerial Conference¹⁰ on the incorporation of the ECA into Annex IV to the WTO Agreement.

In practical terms, this means that Members Parties to the ECA are ready to have their agreement enter into force as a non-WTO agreement, while they continue to seek a decision by consensus to incorporate the agreement into Annex IV to the WTO Agreement.¹¹

The key aspects of the interim arrangements are the following:

⁵ Bangladesh, Brazil, India, Indonesia, South Africa, Pakistan, and Türkiye. See WTO General Council, Minutes of the Meeting held at the Centre William Rappard and in Virtual Format on 18-19 February 2025, WT/GC/M/216 (29 April 2025), Item 4.

⁶ See, for instance, India’s intervention at the February 2025 General Council Meeting (fn. 5 above), paras. 4.152 – 4.156.

⁷ WTO General Council, Incorporation of the Agreement on Electronic Commerce – Communication from the Members Parties to the Agreement on Electronic Commerce, WT/GC/W/963 (6 February 2025), fn. 1: “*For the purposes of the decision, Members parties eligible for the flexibilities contained in Article 20 of the Agreement on Electronic Commerce with existing capacity to implement the obligations of the Agreement are encouraged to make a binding commitment not to avail themselves of the above-mentioned flexibilities. Such binding commitments include statements made by such Members parties in plenary meetings of the Joint Statement Initiative on Electronic Commerce and will be compiled and published on the WTO website*”.

⁸ Communication from the Members Parties to the Agreement on Electronic Commerce (fn. 7 above), para. 4.141.

⁹ WTO, Declaration on Interim Arrangements for the Agreement on Electronic Commerce, WT/MIN(26)/42 (27 April 2026).

¹⁰ Or the General Council in the intervals of meetings of the Ministerial Conference, pursuant to Article IV:2 of the WTO Agreement.

¹¹ Marceau and Comont (2026) provide a detailed overview of the Interim Arrangements.

- The Interim Arrangements Annex becomes an integral part of the ECA. In the event of a conflict, the Interim Arrangements Annex prevails;¹²
- The Interim Arrangements Annex is set to automatically lapse once the Agreement is integrated in the WTO rulebook;¹³
- The Interim Arrangements Annex incorporates by reference rules on WTO dispute settlement (GATT, GATS, and DSU), *mutatis mutandis*, and establishes appeal arbitration as the default mechanism for the resolution of appeals while the Appellate Body is still not operative.¹⁴

The Interim Arrangements Annex and the ECA gives rise to a number of legal and practical questions. This short contribution focuses on one specific aspect relating to the implications of the Interim Arrangements Annex for the resolution of disputes under the ECA.

3.1 ECA Interim Arrangements and Dispute Settlement

Article 27.2 of the ECA subjects disputes between ECA Parties to the dispute settlement rules laid down in the DSU. Article 1.1 of the DSU, in turn, clarifies that the DSU applies to disputes brought under the WTO covered agreements, listed in Annex 1 to the DSU. As the Interim Arrangements Annex envisages the entry into force of the ECA as a non-WTO Agreement, it stipulates at paragraph 2.1 that “Article 27.1 [of the ECA] does not apply”.

Section III of the Interim Arrangement Annex provides rules on “interim dispute settlement”. Paragraphs 3.1 and 3.2 incorporate by reference the rules on dispute settlement in the GATT, GATS and DSU, *mutatis mutandis*. While the DSU could not apply to disputes under a non-WTO Agreement for the reasons explained right above, the incorporation by reference of its disciplines implies that identical rules will apply.

Paragraph 3.3 of the Interim Arrangements Annex provides some clarifications as to how certain terms of the original DSU shall be understood because of the latter’s incorporation by reference into the Interim Arrangements Annex. Notably, references to “covered agreements” in the DSU shall be understood as references to the ECA, and references to the “DSB” shall be understood as references to the E-Commerce Committee to be established under the ECA.

In the event of an appeal, the Interim Arrangements Annex introduces Article 25 DSU appeal arbitration¹⁵ as a default mechanism while the Appellate Body continues to be unable to hear appeals (Paragraph 3.4). An “Appendix” to the Interim Arrangements Annex establishes “Appeal Arbitration Procedures”. Put simply, the Appendix reproduces key features of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA),¹⁶ including entrusting the existing MPIA pool of arbitrators with the task of adjudicating appeals in ECA disputes.¹⁷ This is noteworthy, as the Interim Arrangements Annex was also endorsed by WTO Members that have not joined the MPIA (e.g. Korea).

¹² Interim Arrangements Annex (see fn 9 above), para. 1.1.

¹³ Interim Arrangements Annex (see fn 9 above), para. 1.2.

¹⁴ Interim Arrangements Annex (see fn 9 above), paras. 2 and 3.

¹⁵ Interim Arrangements Annex (see fn 9 above), para. 3.4 and Appendix – “Appeal Arbitration Procedures”.

¹⁶ See Mavroidis (2026) for a thorough analysis and critique of the MPIA and its operation.

¹⁷ Paragraph 3 of the Appendix clarifies that ECA Committee may decide, by consensus, to establish a separate pool of arbitrators to hear appeals under the ECA.

3.2 Implications of the dispute settlement rules

The drafting technique used for the Interim Arrangements is interesting. Faced with the limits to the scope of application of the DSU, the drafters opted to incorporate its rules by reference, effectively creating a new set of rules specifically applicable to disputes under the ECA, (almost) identical to, but separate from those under the DSU.

The Interim Arrangements Annex is meant to be provisional, as the name suggests. If WTO Members eventually manage to reach a decision by consensus on the incorporation of the ECA into Annex IV to the WTO Agreement, the application of the DSU (albeit incorporated by reference) will presumably ease that transition.

One particularly interesting aspect is the clarification in Paragraph 3.3 of the Interim Arrangements that references to the “DSB” in the DSU shall be understood as references to the E-Commerce Committee. Beyond formalisms, the implications of this clarification might be substantial.

The DSB occupies a prominent role in the WTO legal architecture. Article IV:3 of the WTO Agreement stipulates that “[t]he General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding”.

Under the DSU, the DSB is tasked with a number of functions that are essential for the operations of the dispute settlement mechanism. Article 2.1 of the DSU (*Administration*) reads, in relevant part:

The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.

Under the Interim Arrangements, all of these functions will be transferred to the E-Commerce Committee which will be established once the Agreement enters into force. The DSB has the benefit of over thirty years of practice and is assisted by the WTO Secretariat in discharging its functions. As the ECA will not be a WTO Agreement – at least in the interim – questions have already been raised by non-participants to the ECA regarding the use of WTO resources, including support from the WTO Secretariat, for the operations of the ECA.¹⁸ In response to these questions, the WTO Director-General noted that if support were to be required “in relation to committee servicing, dispute settlement functions and all the other functions”, participants to the ECA “would need to consider

¹⁸ Peter Ungphakorn gives account of the questions raised by certain WTO Members and the answers provided by the WTO Director-General. See P. Ungphakorn, “Text: WTO Head on the E-Commerce Plurilateral Deal and Secretariat Support” (available at: <https://tradebetablog.wordpress.com/text-dg-reply-secretariat-and-e-commerce-plurilateral/>, last accessed, 27 August 2026).

how to manage that, including through any appropriate funding arrangements, consistent with the WTO's applicable budgetary and financial framework".¹⁹

Considering the nature of the functions that the E-Commerce Committee will be called to perform in the administration of disputes under the ECA, support from the WTO Secretariat would be particularly helpful. Some of the functions, in fact, are unique to WTO dispute settlement and would benefit from dedicated support by staff with historical knowledge of the workings of the WTO dispute settlement mechanisms. Moreover, the E-Commerce Committee will be also tasked with the administration of all matters under the ECA, similarly to sectoral committees at the WTO. In a nutshell, the E-Commerce Committee will perform a double function, but the extent to which it will be supported in its activities is still far from clear at this stage.

3.3 Were there alternatives?

Tensions surround the incorporation of new plurilaterals into Annex IV to the WTO Agreement, with some WTO Members effectively acting as veto-players in light of the consensus requirements in Article X:9 of the WTO Agreement. At the same time, participants to the Interim Arrangements desire to have the ECA enter into force as early as possible, reap its benefits and send the message that WTO Members (or subgroups thereof) are still able to negotiate new disciplines, such that the WTO "legislative" function is not completely broken.

Against this background, the economical approach taken by the drafters of the Interim Arrangements Annex is understandable. Instead of negotiating new rules on dispute settlement, the choice was made to incorporate by reference the disciplines of the DSU, which all WTO Members are already familiar with.

At this point, it is useful to ask whether there were alternatives, achieving the same objectives while reducing the burden imposed by the Interim Arrangements Annex on the E-Commerce Committee. We argue that this is another area where Article 25 of the DSU could come to the rescue.

Article 25 of the DSU envisages arbitration as an alternative means of dispute settlement. While currently it is mostly used in the context of appeals, it could well replace the panel stage as well.²⁰ Arbitration proceedings are simply notified to the DSB, but the parties to an arbitration would not need the DSB to establish an arbitration panel or to adopt awards, which the parties to an arbitration agree to abide by when activating the arbitration clause.

Resorting to Article 25 of the DSU also for first instance disputes as a default option would have minimized the burden on the E-Commerce Committee, which would then have to deal with the administration of disputes under the ECA only in minimal part. Pursuant to Article 25.2 of the DSU, the parties to a dispute shall agree on the procedures to be followed. Like in the case of the MPIA, this could be addressed by means of an agreement among the participants on standard procedures applicable in all disputes. In this case, they would mirror the DSU rules on panel proceedings.²¹

¹⁹ See P. Ungphakorn, "Text: WTO Head on the E-Commerce Plurilateral Deal and Secretariat Support" (see fn 18 above).

²⁰ Admittedly, this was its intended function. See Mavroidis (2026) for an explanation.

²¹ The agreed procedures between the United States and the European Union in *US – Steel and Aluminium Products (EU)* could provide guidance. See WTO, *US – Steel and Aluminium Products (EU)* – Recourse to Article 25 of the DSU,

While Article 25 arbitration has not been agreed as the default option *in lieu* of panel proceedings, the incorporation by reference of the DSU into the Interim Arrangements Annex includes Article 25. This means that, once the ECA enters into force, ECA participants can agree to follow the Article 25 route also as an alternative to panel proceedings in the event of disputes between them, so as to minimize the impact of the incorporation by reference of the DSU on the activities of the E-Commerce Committee.

4. Conclusion

At a turbulent time for the multilateral legal order, it is a healthy sign that governments seek creative solutions to overcome deadlocks. In this respect, we share the optimistic view of Marceau and Comont (2026), who lauded the pragmatic approach of the drafters of the Interim Arrangements.

To the extent that subgroups of WTO Members will chose a similar path for other prospective plurilateral agreements, they will inevitably turn to the ECA Interim Arrangements for inspiration. In this respect, we find the incorporation by reference of the DSU to be an interesting idea, as it allows for the reliance on rules that all WTO Members are familiar with, without needing to negotiate new dispute settlement rules. At the same time, the entrustment on a sectoral committee of functions originally assigned to the DSB may not prove easy to deal with, particularly as the WTO-nature of the agreements is contested by non-participants. As such, the extent to which such committees will receive support from the WTO Secretariat remains an open question.

Interim arrangements for future agreements could be drafted so as to feature Article 25 DSU as legal basis also for first instance disputes. This would require small edits to Interim Arrangements drafted for the ECA, and would significantly minimize the (potential) implications of entrusting a sectoral committee with functions that are normally administered by the DSB.

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Services Domestic Regulation

Good Regulatory Practices as Part of the WTO Rulebook under a Plurilateral Initiative Implemented on an MFN Basis

Jan Bohanes

Summary: 1. Introduction – 2. Description of the Reference Paper – 3. The implications of the RPSDR for multilateral trade and WTO governance – 4. The Arbitration Proceedings Pursuant to Article XXI of the GATS between Australia and India – 5. Concluding observations.

Keywords: General Agreement on Trade in Services – Domestic Regulation Disciplines – Regulatory Transparency – Trade in Services – Good Regulatory Practices – Article VI GATS – Open Plurilateralism – Article XXI GATS.

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1. Introduction

The Reference Paper on Services Domestic Regulation (RPSDR - INF/SDR/2) is the result of the Joint Initiative on Services Domestic Regulation which was established in December 2017 by 59 WTO Members and was concluded in 2021. The disciplines contained in the RPSDR were incorporated into the schedules of participating Members in 2024. The results of this JSI and their incorporation into Members' schedules is regarded by many as an important step in the development in the governance of international trade in services.

2. Description of the Reference Paper

Substantively, the RPSDR operationalizes a long-standing, but underdeveloped mandate on domestic regulation under Article VI of the General Agreement on Trade in Services (GATS). Considerable work was undertaken from 1999 by WTO Members in the Working Party on Domestic Regulations which pursued the mandate in Article VI. However, these negotiations produced limited results over 18 years, and there was very little hope of tangible results at the time when the 11th Ministerial Conference was held.

Broadly speaking, the RPSDR establishes disciplines to ensure that certain types of domestic regulation, in particular authorization requirements, licensing procedures, and technical standards, that affect trade in services are imposed and administered in a transparent, impartial, and predictable manner. It bears noting that the term "domestic regulation" has a particular, narrow meaning in the realm of international trade law on services: It designates a residual category of domestic norms other

than, first, the six categories of rules that fall within the scope of "market access" restrictions¹ and, second, discriminatory regulation^{2,3}.

The RPSDR consists of three sections.

Section I contains certain 12 paragraphs that set out certain general, horizontal provisions. Paragraph 1 states that the objective of the RPSDR is to elaborate upon Article VI:4 of the GATS. Paragraph 2 recognizes the difficulties that may be faced by service suppliers, especially those of developing Members, in complying with measures such as licensing requirements and procedures, qualification requirements and procedures and technical standards. Paragraph 3 recognizes the right of Members to regulate and introduce new regulations. Paragraph 5 clarifies that the RPSDR does not require any particular type of legislation or regulation and that, therefore, Members are free to choose the type of regulatory tools they prefer to implement the RPSDR. Paragraph 6 clarifies that the RPSDR is not to be construed as diminishing any obligations of Members under the GATS.

Other parts of Section I clarify that the RPSDR disciplines in Sections II and III – the operative core of the Reference Paper – are to be inscribed into the column for additional commitments pursuant to Article XVIII.⁴ Consistently with Article VI:5 of the GATS⁵, the disciplines apply only in sectors in which specific commitments are undertaken.⁶ The SDR disciplines are intended to be adopted as a package, except that Member may exclude the prohibition of discrimination between men and women.⁷ The remaining paragraphs in Section I speak to transitional periods for developing country

¹ Falling within the scope of Article XVI of the GATS. See also Panel Report, *US – Gambling*, paras. 6.302ff.

² Falling within the scope of Article XVII of the GATS.

³ Strictly speaking, any national norms governing international trade in services could be labelled as "domestic regulation", as they are implemented by domestic – as opposed to international – rule-setting bodies. However, the narrower meaning of the term "domestic regulation" as a residual category after market access and discriminatory rules derives from the international trade law framework for goods trade and its distinction between "border measures" and "internal" or "behind the border" measures. Border measures such as tariffs and quantitative restrictions (like quotas) apply to goods when crossing the border and internal (domestic, behind-the-border) measures apply to goods after they cross the border. Although this distinction between border and behind-the-border measures does not fit the international trade in services paradigm particularly well – given that services do not cross borders in the same distinctive manner as goods do – it has nevertheless influenced the nomenclature of rules pertaining to international services trade. Thus, mirroring the goods paradigm, market access disciplines under Article XVI are analogized to border measures (as these types of measures impact the very establishment of service providers and may prevent the supply of services altogether. Behind-the-border measures in the world of services are broken down into, first, discriminatory measures governed by Article XVII and, two, the residual category, "domestic regulation" under Article VI, each of which is subject to different disciplines.

⁴ Section I, paragraph 7 of the RPSDR.

⁵ Article VI:5 of the GATS specified that it applies "[i]n sectors in which a Member has undertaken specific commitments ...".

⁶ Section I, paragraph 8 of the RPSDR.

⁷ Section I, Article 9. This is the discipline in Section II, paragraph 22(d) and Section III, paragraph 19(d), which provides "If a Member adopts or maintains measures relating to the authorization for the supply of a service, the Member shall ensure that ... such measures do not discriminate between men and women". Footnote 18 specifies that the "[d]ifferential treatment that is reasonable and objective, and aims to achieve a legitimate purpose, and adoption by Members of temporary special measures aimed at accelerating de facto equality between men and women, shall not be considered discrimination for the purposes of this provision.

Members⁸, participation of least-developed Members⁹, and technical assistance and capacity building¹⁰.

Section II contains the disciplines on services domestic regulations for all service sectors other than financial services, which are covered in Section III. The scope of these disciplines is "measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services."¹¹ It is clarified that the SDR disciplines do not apply to scheduled commitments and limitations under Articles XVI (market access) and XVII (national treatment).¹²

Broadly speaking, the following 19 paragraphs in this section can be grouped into three clusters.¹³

First, disciplines aiming at ensuring regulatory predictability and legal certainty and transparency in administrative procedures. This category includes information pertaining to licensing applications, for instance, providing information on the status of an application¹⁴, indicative timeframes for application processing¹⁵, the obligation to ascertain that an application is complete¹⁶, informing applicants of reasons for rejection of applications¹⁷, and providing the opportunity to provide additional information to complete an application¹⁸. Members are also required to allow a reasonable time between promulgation of laws and regulatory and the date of required compliance by service suppliers¹⁹. With respect to examinations for obtaining authorization to supply a services, Members are required to schedule these exams at reasonable intervals, provide a reasonable period of time to enable applicants to request to take the examination, and to accept requests in electronic format, subject to the cost, administrative burden, and the integrity of the procedures involved.²⁰

⁸ Section I, paragraph 10. Pursuant to this provision, a developing WTO Member may designate specific disciplines for implementation on a date after a transitional period of no longer than 7 years after the entry into force of the SDR disciplines. The transitional period shall be inscribed in the respective Schedules. If an "extended" transitional period is required, a request shall be submitted "in accordance with relevant procedures", which are specified to include waiver procedures or Article XXI renegotiation procedures.

⁹ Section I, paragraph 11, which provides that LDC Members shall inscribe the disciplines "no later than 6 months in advance of their graduation from LDC status. LDC Members may also at that time designate transitional periods under paragraph 10.

¹⁰ Section I, paragraph 12. Under this provision, developed and developing Members (the latter if they are "in a position to do so") are encouraged to provide specific technical assistance and capacity building to developing and LDC Members aiming at, for instance, developing institutional and regulatory capacities; assisting service suppliers of developing and especial LDCs to meet the relevant requirements and procedures in export markets; facilitate the establishment of technical standards, and assisting service suppliers in developing and in particular LDC Members to building their supply capacity and comply with domestic regulations.

¹¹ Section II, paragraph 1.

¹² Section II, paragraph 2.

¹³ See also Baiker, Laura; Bertola, Elena; and Jelitto, Markus, Services Domestic Regulation – Locking in Good Regulatory Practices, WTO Staff Working Paper ERSD-2021-14, dated 17 September 2021, available at [WTO | Services Domestic Regulation — Locking in Good Regulatory Practices](#), last visited 1 May 2026.

¹⁴ Section II, paragraph 7(b).

¹⁵ Section II, paragraph 7(a).

¹⁶ Section II, paragraph 7(c).

¹⁷ Section II, paragraph 7(d)(ii).

¹⁸ Section II, paragraph 7(e)(iii).

¹⁹ Section II, paragraph 19.

²⁰ Section II, paragraph 10.

Second, disciplines aiming at general transparency. This would include the requirement to publish or to make available information that is required to comply with statutory or regulatory requirements and procedures for authorization²¹, including fees for authorizations to supply a service²²; establishing enquiry points in order to respond to enquiries from service suppliers or persons seeking to supply a service²³; and providing an opportunity to stakeholders to provide comments on draft regulations and take those comments into account²⁴. Members are encouraged to "explain the purpose and rationale" of any given law or regulation.²⁵

Third, disciplines pertaining to good regulatory practices and regulatory quality. This would include the single window requirement, whereby Members are to avoid requiring an applicant to approach more than one competent authority for each application for authorization²⁶; permit submission of applications for authorization any time throughout the year²⁷; accept applications in electronic format²⁸; accept authenticated copies in place of original documents²⁹; and ensure reasonable fees that are not arbitrary, but rather based on a published measure and that do not restrict the supply of a service³⁰. Technical standards are to be developed and adopted through an open and transparent process.³¹ Echoing Article VI:4 and VI:5 of the GATS, Members shall ensure that measures relating to the authorization for the supply of a services are "based on objective and transparent criteria".³² The procedures are to be impartial and adequate for applicants to demonstrate that they meet the requirements for the supply of a service³³ and that these procedures do not in themselves unjustifiably prevent the fulfilment of the relevant requirements.³⁴

Section III in essence replicates the same requirements for financial services. The differences are relatively minor. For instance, the financial services disciplines do not include the requirement that Members shall avoid requiring applicants to approach more than one competent authority for each application for authorization.³⁵

Many provisions are formulated using flexible or "soft" language. Examples include phrases in which the word "shall" – which indicates a strictly binding effect – is replaced with the more flexible terms "should"³⁶ and/or qualified by phrases such as "to the extent possible³⁷/practicable³⁸". Obligations using this terminology still reflect international legal obligations. Nevertheless, they obviously lend themselves less easily to "hard" enforcement via WTO dispute settlement procedures

²¹ Section II, paragraph 11.

²² Section II, paragraph 9.

²³ Section II, paragraph 20.

²⁴ Section II, paragraphs 16 and 17.

²⁵ Section II, paragraph 18.

²⁶ Section II, paragraph 4.

²⁷ Section II, paragraph 5.

²⁸ Section II, paragraph 6(a).

²⁹ Section II, paragraph 6(b).

³⁰ Section II, paragraph 9.

³¹ Section II, paragraph 21.

³² Section II, paragraph 22 (a).

³³ Section II, paragraph 22 (b).

³⁴ Section II, paragraph 22 (c).

³⁵ Section II, paragraph 4.

³⁶ Section II, paragraph 7(f) and paragraph 11,

³⁷ Section II, paragraph 7(d) and 7(f), as well as Section III, paragraph 6(d)(iii).

³⁸ Section II, paragraphs 4, 5, 7(a), (c), (e), 14 – 19, as well as Section III, paragraphs 4, 6(a), (c), (e), (f), 9, 12 – 17.

as they imply discretionary flexibility for domestic regulators whose precise contours and objective limits are almost impossible to define for an independent third-party adjudicator. However, this does not detract from the important contribution that these disciplines can make to both international and domestic good trade policy governance. For instance, the DRRP can serve as a blueprint for domestic regulatory reform.

3. The implications of the RPSDR for multilateral trade and WTO governance

Beyond its substantive content and its contribution to international governance of services trade, the RPSDR carries important systemic implications as a plurilateral initiative within the multilateral trading system. Negotiated among a critical mass of WTO Members, incorporated into the participating Members' services schedules of specific commitments, and extended on a most-favored-nation (MFN) basis, it exemplifies a flexible approach to rulemaking that avoids the consensus constraints that have impeded multilateral negotiations in recent decades. WTO Members have been able to conclude certain multilateral instruments, in the more recent past the Trade Facilitation Agreement (2013) at the Bali Ministerial Conference, the Ministerial Decision on Export Competition at the Nairobi Ministerial Meeting in 2015³⁹, and most recently the Agreement on Fisheries Subsidies, which was adopted at the WTO's 12th Ministerial Conference in June 2022 and entered into force in September 2025⁴⁰. While each of these documents is significant, they nevertheless represent a relatively limited set of achievements over a period of over 10 years.

In reaction to the perceived slow pace of progress, groups of participating WTO Members have sought to contribute to the emerging architecture of "open plurilateralism". Under this approach, subsets of Members advance new disciplines that are, or at least can be, subsequently multilateralized through the application of the MFN principle. One way of conceptualizing "open plurilateral agreements" is as a middle ground between fully multilateral agreements concluded within the WTO, on the one hand, and preferential agreements outside the scope of the WTO, on the other hand. A leading academic article on this topic views these agreements as a way for "groups of countries to explore and develop their potential common interests on regulatory matters, while safeguarding core aspects of their national regulatory sovereignty and increasing the possibility of regenerating the WTO from within."⁴¹ The term "open" is intended to differentiate these agreements from bilateral and regional free trade agreements, which are typically "exclusive"⁴², even though multi-party free trade agreements can also be open to accession of non-founding parties.⁴³

Despite the perception that plurilateral negotiations are a recent phenomenon – a perception due to, among other things, the joint-statement initiatives (JSI) from the Buenos Aires Ministerial Conference in 2017 – in reality plurilateral efforts have been part of WTO governance since its early

³⁹ WT/MIN(15)/45, WT/L/980.

⁴⁰ [WTO | 2025 News items - WTO Agreement on Fisheries Subsidies enters into force.](#)

⁴¹ Bernard Hoekman & Charles Sabel, Open Plurilateral Agreements, International Regulatory Cooperation and the WTO *Global Policy* 10(3): 297–312 (2019)

⁴² Anwarul Hoda, Supporting Open Plurilateral Negotiations for Multilateral Liberalisation of Trade, ICRIER Working Paper 415 (2023), p. 2.

⁴³ See for instance the UK's accession to the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership in 2024.

years. For instance, soon after the creation of the WTO in 1995, groups of Members entered into three plurilateral agreements on information technology products (1996), telecommunication services (1997) and financial services (1999). Of course, these early plurilateral efforts concerned only additional tariff reductions and service-related commitments, to be incorporated into these Members' goods and services schedules, without significant new substantive rule-making. In contrast, the more recent JSIs aim at the creation of new substantive disciplines, going beyond deepening existing Member-specific goods tariffs and services commitments.

This "open plurilateralism" model has both advocates and critics. Advocates highlight the contribution of this model to incremental rule development by like-minded Members to respond to evolving economic realities, in particular given the growing importance of services and digital trade.⁴⁴ Moreover, the historical lesson from the GATT 1947 era of plurilateral agreements is that "[o]pen plurilateral agreements [like the non-tariff barrier codes developed in the Tokyo Round] facilitated rather than impeded multilateral agreements reached later."⁴⁵ In contrast, critics have raised concerns about inclusivity, fragmentation of the system, and the balance between efficiency and legitimacy in global trade governance.⁴⁶

As aptly described in, for instance, the excellent WTO Staff working paper *Services Domestic Regulation – Locking in Good Regulatory Practices*⁴⁷, SDRs reflect a growing body of good governance principles that have emerged overtime not only at the domestic level in numerous jurisdictions, but have also been increasingly reflected in bilateral and regional free trade agreements. Despite differences in terms of their scope and degree of ambition, SDRs developed through the Joint Initiative largely codify treaty-drafting practices that have evolved over approximately the last fifteen years. Incorporating these disciplines into the WTO framework therefore effectively codifies a common global standard for sound regulatory practices in services markets. The Reference Paper thus has the potential to promote greater consistency across members and can serve as an internationally recognized baseline for domestic regulation while still allowing RTAs to build upon it through additional commitments tailored to particular sectors or modes of supply that are especially significant to their trading partners.

⁴⁴ See for instance Minutes of the General Council meeting on 4 May 2022, WT/GC/M/196, paras. 12.11 – 12.48. Minutes of the General Council meeting on 21 July 2022, WT/GC/M/198, paras. 11.6 – 11.28.

⁴⁵ Anwarul Hoda, Supporting Open Plurilateral Negotiations for Multilateral Liberalisation of Trade, ICRIER Working Paper 415 (2023), p. 7.

⁴⁶ See for instance the paper by India and South Africa, which argues that implementing a joint statement initiative via GATT or GATS schedules introduces a new, different form of legal instrument into the WTO system, which envisages only either multilateral agreements and plurilateral agreements. The paper also appears to argue that a plurilateral negotiation must be based on a negotiating mandate provided by consensus and that, if results are to be implemented via schedules, this, too, should be provided in a multilateral, consensus-based document. (Paper by India and South Africa, *The legal status of "Joint Statement Initiatives" and their negotiated outcomes*, WT/GC/W/819 paras. 6 – 7 and 23 – 28.

⁴⁷ Baiker, Laura; Bertola, Elena; and Jelitto, Markus, *Services Domestic Regulation – Locking in Good Regulatory Practices*, WTO Staff Working Paper ERSD-2021-14, dated 17 September 2021, available at [WTO | Services Domestic Regulation — Locking in Good Regulatory Practices](#),

4. *The Arbitration Proceedings Pursuant to Article XXI of the GATS between Australia and India*

Some of the systemic concerns surrounding the RPSDR were aired in an arbitration procedure pursuant to Article XXI of the GATS between Australia and India.⁴⁸ This appears to have been the first time that these procedures were used.⁴⁹ For other descriptions of this arbitration procedures, see the entry in the Trade β Blog.⁵⁰

Formally, the procedure arose out of procedures under Article XXI to certify certain changes to its GATS Schedule of Specific Commitments. After the negotiations of the Reference Paper had concluded, the JSI participants issued a Declaration on 2 December 2021⁵¹. The JSI participants subsequently sought to incorporate the Reference Paper into their GATS Schedules, by inserting a reference to the Reference Paper in the Additional Commitments column. They requested certification based on document S/L/84, which enshrines the "Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments", that is, procedures based on the premise that the changes to the schedules do not reduce the rights of other Members. The JSI participants took the view that the proposed changes to their GATS schedules constituted "improvements" in the form of new additional commitments relating to services domestic regulation⁵² and that therefore they were not required to invoke the alternative set of procedures, based on document S/L/80. These alternative procedures concern the modification or withdrawal of specific commitments, that is, changes to schedules to commitments that affect the existing rights of Members.⁵³

India and South Africa objected to this approach.⁵⁴ All JSI participants other than Australia subsequently reached a compromise with India and South Africa. This compromise resulted in an amendment of the initial proposal by the JSI participants. Instead of referring to the Reference Paper, they appended the text of the SDR reference paper in its entirety to their schedules.⁵⁵ The substantive

⁴⁸ See Document S/SECRET/13/ARB/F.

⁴⁹ See also Devon Whittle, [WTO: Australia successfully defends its implementation of the Services Domestic Regulation plurilateral in its GATS Schedule](#) (last visited 1 August 2026) and Peter Ungphakorn, [India loses challenge, allowing Australia to go ahead with services commitment – Trade \$\beta\$ Blog](#) (last visited 24 August 2026).

⁵⁰ [India loses challenge, allowing Australia to go ahead with services commitment – Trade \$\beta\$ Blog](#) (last visited 24 August 2026)

⁵¹ See Document WT/L/1129.

⁵² See for instance S/C/W/398 (Canada) and S/C/W/429 (Australia). The proposed text in the Additional Commitments column read "[Member name] undertakes as additional commitments the disciplines contained in Section II of document INF/SDR/2 for all sectors included in this schedule, except financial services. [Member name] also undertakes as additional commitments the disciplines contained in Section III of document INF/SDR/2 for financial services sectors included in this schedule.

⁵³ Formally, this document is entitled "Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules)", issued on 29 October 1999.

⁵⁴ See for instance India's objection to Australia's Notification, as set out in S/L/477, stating that "further information and clarifications are required in order to assess the legal basis and the effect of the proposed improvements, particularly their interaction with Members' existing rights and obligations under the General Agreement on Trade in Services and the Marrakesh Agreement Establishing the WTO." (WTO Document S/L/477). Namibia also joined a paper that had been previously circulated by India and South Africa. WT/GC/W/819/Rev.1

⁵⁵ The amended text inserted in the Additional Commitments column would read: "[Member name] undertakes as additional commitments the attached 'Disciplines on Services Domestic Regulation' for all sectors included in this schedule, except for financial services" and "[Member name] undertakes as additional commitments the attached 'Alternative Disciplines on Services Domestic Regulation for Financial Services' for financial services sectors included in this schedule. See for instance Canada's notification, document S/C/W/398/Corr.1. See also the EU's explanation of

language of the disciplines therefore did not change, but the source of the disciplines was no longer the "stand-alone" separate Reference Paper document, but rather the substantively same text appended to each of the Members' schedule. The JSI participants also inserted language in the accompanying communications stating that the certification processes would not serve as precedent for the incorporation of other JSI outcomes in Members' schedules⁵⁶ as well as statements addressing certain additional concerns raised by India and South Africa.⁵⁷

Australia chose not to join this compromise and insisted on its original proposal from 16 March 2023⁵⁸. Both India⁵⁹ and South Africa⁶⁰ notified their objections to the certification of Australia's schedule. After unsuccessful consultations between India and Australia on 12 June 2023, based on paragraph 2 of S/L/84, India maintained its objection to the certification of Australia's GATS Schedule. In November 2023, Australia notified its intention to modify its GATS Schedule, this time based on paragraph 1 of the "Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) – Modification of Schedules" (S/L/80).⁶¹ On 2 January 2024, pursuant to Article XXI:2(a) of the GATS and Paragraph 3 of S/L/80, India⁶² and South Africa⁶³ identified themselves as "affected Members" and notified Australia of their respective claims of interest. After negotiations in March and April 2024, including an extension, no agreement was reached. On 31 May 2024, India requested arbitration proceedings with Australia pursuant to Article XXI:3(a) of the GATS and paragraph 7 of S/L/80.⁶⁴

The Arbitration Body⁶⁵ made findings on four separate issues.⁶⁶

First, *Australia argued that the Arbitration Body (AB) did not have jurisdiction over the subject matter raised by India*. Australia's objection is not clearly described in the Arbitration findings, but

the process in Report of the Meeting of the Working Party on Domestic Regulation on 24 January 2024, S/WPDR/M/79, paras. 1.33 – 1.39.

⁵⁶ See for instance Canada's notification, stating that "the present certification does not create a precedent for incorporating outcomes in the WTO, including from the Joint Statement Initiatives". S/C/W/398/Corr.1

⁵⁷ These three additional points were: First, that the additional specific commitments "do not diminish the rights nor alter the obligations under the [GATS] of WTO Members that are not undertaking these additional specific commitments" and do not diminish the obligations of the JSI participants. Second, that the additional specific commitments are "without prejudice to the development of any necessary disciplines pursuant to [Article VI:4 of the GATS]. The third point clarifies the meaning of terms "Members", "other Members" and "professional bodies of Members" in the text of the additional disciplines.

⁵⁸ S/C/W/429.

⁵⁹ Communication from India - Notification of objection to Australia's request for certification of its Schedule of Specific Commitments, 18 April 2023, S/L/477

⁶⁰ Communication from South Africa - Notification of objection to Australia's request for certification of its schedule of specific commitments, 19 April 2023, S/L/478.

⁶¹ Notification from Australia pursuant to Article XXI of the General Agreement on Trade in Services (GATS), 17 November 2023, S/SECRET/13.

⁶² Modification of Schedules – Invocation by Australia of Article XXI of the General Agreement on Trade in Services (GATS) – Notification of claim of interest from India, 2 January 2024, S/SECRET/13/CL/2 .

⁶³ Modification of Schedules – Invocation by Australia of Article XXI of the General Agreement on Trade in Services (GATS) – Notification of claim of interest from South Africa, 2 January 2024, S/SECRET/13/CL/1.

⁶⁴ Negotiations under Article XXI of the General Agreement on Trade in Services (GATS) – Request for Arbitration, 3 June 2024, S/SECRET/13/ARB/1

⁶⁵ Composed of Mr Ricardo Ramírez Hernández of Mexico, Ms. Deborah Milstein of Israel, and Mr. Peter Morrison.

⁶⁶ The fifth issue – in the event that compensatory adjustments were warranted, what adjustments could restore the balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in GATS Schedules prior to the negotiations –a became moot (Findings of the Arbitration, para. 3.56)

appears to have centered on the notion argued that India's request for compensatory adjustments was not genuine and only "purported".⁶⁷ The AB found that the arbitration can be triggered by an "affected Member", and that an "affected Member" is "any WTO Member which can point to benefits under the GATS that may be affected by the proposed modification notified by the modifying Member."⁶⁸ The AB explicitly stated that a Member has "discretion to decide if it considers itself to be an affected Member" and, consequently, whether it wishes to trigger arbitration proceedings.

The matter referred to arbitration is the same as the subjected of the failed negotiations in Article XXI:2, meaning that "the adjudicatory function of this Arbitration Body is to make a determination in the context of 'benefits [under GATS ...] that may have been affected'."⁶⁹ That finding, however, could no longer be based on the "affected" Member's discretion. Rather, that Member had to "demonstrate that its benefits under the GATS would be so affected" as to alter the "level of mutually advantageous commitments" to its detriment as compared GATS Schedules prior to the parties' negotiations.⁷⁰ India was thus required to show that its benefits under the GATS would be so affected as to alter the "level of mutually advantageous commitments" resulting in a situation less favourable to trade than that occurring in GATS Schedules prior to the parties' negotiations.⁷¹

The AB's jurisdiction thus consisted of two findings, namely:

(i) examining the compensatory adjustments offered by Australia or requested by India, if any; and (ii) finding a resulting balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in GATS Schedules prior to the negotiations between India and Australia.⁷²

While the AB could have stopped its jurisdictional analysis with this analysis, it nevertheless went on to effectively resolve the substance of the dispute under the rubric of jurisdiction. The AB recalled that, according to India, Australia's proposed modification of its GATS Schedule:

(i) violate[d] the consistency of the GATS multilateral framework (established mechanisms and trade bodies, such as the Council for Trade in Services)⁵¹; and (ii) undermine[d] the single undertaking principle of the WTO⁷³

In response to this argument, the AB effectively resolved the entire dispute by stating:

We do not agree with India that the structural consistency of the GATS multilateral framework and the single undertaking principle are benefits under the GATS within the meaning of Article

⁶⁷ The terms of reference of the arbitration body are set out in paragraph 13 of S/L/80, which provides that "[t]he arbitration body shall have the following terms of reference unless the parties to the arbitration agree otherwise within ten days from the request for arbitration:

'To examine the compensatory adjustments offered by (name of modifying Member) or requested by (affected Member requesting the arbitration) and to find a resulting balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to the negotiations. In such examination, the Arbitration body shall take into account any agreement reached, in negotiations under paragraph 4. above, between the modifying Member and any affected Member'.

⁶⁸ Findings of the Arbitration, para. 3.10.

⁶⁹ Findings of the Arbitration, para. 3.13.

⁷⁰ Findings of the Arbitration, para. 3.14.

⁷¹ Findings of the Arbitration, para. 3.25.

⁷² Findings of the Arbitration, para. 3.23.

⁷³ Findings of the Arbitration, para. 3.28.

XXI:2(a) of the GATS. Neither has India demonstrated how or why a discourse on the structural consistency of the GATS multilateral framework or the single undertaking principle would contribute towards establishing whether compensatory adjustments would be warranted in this case. For these reasons, we agree with Australia⁵⁵ that opining on these issues is not within this Arbitration Body's terms of reference.⁷⁴

The second issue before the AB was whether Australia's proposed modification of its GATS schedule was sufficiently clear. India criticized a series of alleged ambiguities in Australia's proposal, in particular whether the reference to the reference Paper meant that any amendment to the Reference Paper would imply an automatic amendment of Australia's schedule. The AB dismissed this concern and reached the (rather obvious) conclusion that "for any future amendment to INF/SDR/2 to be incorporated into its GATS Schedule, Australia would need to successfully complete a new modification procedure pursuant to Article XXI of the GATS."⁷⁵

India also expressed concerns about a potential conflict between two "separate regimes", one for the disciplines in INF/SDR/2, and another for the existing commitments in Australia's GATS Schedule.⁷⁶ Australia argued that, given that the disciplines in the Reference Paper do not concern the subject matter of the schedules - market access and national treatment disciplines – no conflict could arise "by definition".⁷⁷ The AB sided with Australia, arguing that India had not identified specific instances where the proposed additional commitments would conflict with commitments in Australia's GATS Schedule⁷⁸ and that "the text of Australia's proposed modification and the text of Section II of INF/SDR/2 do not contain language that would modify Australia's existing commitments under Articles XVI and XVII in Australia's GATS Schedule"⁷⁹.

Finally, India argued that terms in the Reference Paper such as "Member", "Members", "other Members", "professional body of Members", and "all Members of the WTO" would give rise to interpretative concerns. First, India argued, these terms could be read as creating new commitments binding on all Members, and not just Australia; and, second, some of these terms could lead to interpretations that would be favourable to other JSI participants and discriminatory against other WTO Members.⁸⁰ The AB again rejected these arguments, ruling that, by virtue of the explicit text in Australia's GATS Schedule, the new disciplines would be binding exclusively on Australia.⁸¹ The AB also did not agree with the argument that references to "Members" in the Reference Paper could be read as limit the benefits of its disciplines to the other JSI participants, as opposed to all other WTO Members.⁸² The AB also noted that Australia had offered clarifications about the text of the Reference Paper to India and had made similar observations at a meeting of the Working Party on Domestic Regulation. These clarifications "reinforce[d]" the AB's understanding of Australia's proposed modification of its GATS Schedule.⁸³

⁷⁴ Findings of the Arbitration, para. 3.30.

⁷⁵ Findings of the Arbitration, para. 3.37.

⁷⁶ Findings of the Arbitration, para. 3.38.

⁷⁷ Findings of the Arbitration, para. 3.39.

⁷⁸ Findings of the Arbitration, para. 3.40.

⁷⁹ Findings of the Arbitration, para. 3.41.

⁸⁰ Findings of the Arbitration, para. 3.43.

⁸¹ Findings of the Arbitration, para. 3.47.

⁸² Findings of the Arbitration, para. 3.48.

⁸³ Findings of the Arbitration, paras. 3.49 – 3.50.

The third – and formally the central – issue before the AB was whether Australia's proposed modifications "alter[] negatively" the level of mutually advantageous commitments. The AB found that this finding "call[ed] for a comparison between the general level of commitments provided for in Australia's GATS Schedule prior to the negotiations, on the one hand, and that provided for in Australia's GATS Schedule, if modified as proposed, on the other hand."⁸⁴ The AB then rejected each of India's contentions as to why that level had been negatively altered. It recalled its finding that India's arguments pertaining to the "structural consistency" of the GATS multilateral framework and the single undertaking principle were not within its terms of reference.⁸⁵ It also recalled its finding that Australia's proposed modification was sufficiently clear to allow for a comparison between the level of commitments in Australia's GATS Schedule prior to the negotiations, and the level of in Australia's GATS Schedule, if modified as proposed. Therefore, Australia's proposed modification did not lack clarity and specificity. The AB also found that India had not identified an instance in which the proposed additional commitments conflicted with Australia's existing commitments in its GATS schedule.⁸⁶ Finally, the AB noted that, despite its explicit request, India has not provided any specific example of how Australia's proposed modification altered the level of mutually advantageous commitments in a manner less favourable to trade.⁸⁷ Based on these findings – some of which had already been reached at a previous analytical stage – the AB found that "India ha[d] not demonstrated that Australia's proposed modification of its GATS Schedule alter[ed] the level of mutually advantageous commitments" such that a situation "less favourable to trade than that provided for in GATS Schedules prior to the negotiations" would arise". As a result, the AB found that no compensatory adjustments were warranted.⁸⁸

The fourth finding concerned the somewhat technical-sounding issue as to what constitute the "findings of the arbitration" in these arbitration proceedings.⁸⁹ The parties' arguments centered on the somewhat varying phrases "arbitration body's findings", "findings of the arbitration body", and "findings of the arbitration" as used in S/L/80. The practical implication of the parties' disagreement was what constituted the findings of the arbitration *to be circulated to WTO Members*.⁹⁰ In India's view, only the conclusion relating to the resulting balance of rights and obligation should be published. According to Australia, the findings of the arbitration under S/L/80 must include reasons and conclusions, because other any affected Member would be unable to establish "substantially equivalent benefits in conformity with those findings" under Paragraph 16 of S/L/80 merely from the bare conclusions of the arbitration. Also, Australia argued, a modifying Member may be impeded in implementing the results of the arbitration under Paragraph 15.⁹¹ The AB effectively sided with Australia's more expansive view, holding that the findings of the arbitration "not only guide the behaviour of the modifying Member in the process of completing the modification of their GATS Schedule, but they also inform the behaviour of the affected Member in the event of the modifying

⁸⁴ Findings of the Arbitration, para. 3.52.

⁸⁵ Findings of the Arbitration, para. 3.53.

⁸⁶ Findings of the Arbitration, para. 3.53.

⁸⁷ Findings of the Arbitration, para. 3.55.

⁸⁸ Findings of the Arbitration, para. 3.56.

⁸⁹ Findings of the Arbitration, para. 3.57.

⁹⁰ Findings of the Arbitration, para. 3.57.

⁹¹ Findings of the Arbitration, para. 3.63.

Member's failure to comply with the findings."⁹² As a result, the AB found, what is communicated as the "findings of the arbitration" had to be sufficiently clear to fulfil these two functions. As a result, the AB found "identity" among the phrases "arbitration body's findings", "findings of the arbitration body", and "findings of the arbitration" as used in S/L/80 and concluded that the findings of the arbitration should include the reasoning underpinning our conclusion below. As a result, it published the entire document – the document contained in S/SECRET/13/ARB/F – as "the findings of the arbitration".

The AB's final conclusion was as follows:

India has not demonstrated that Australia's proposed modification of its GATS Schedule alters the level of mutually advantageous commitments resulting in a situation less favourable to trade than that provided for in GATS Schedules prior to the negotiations between the parties. Absent this demonstration by India, we find that compensatory adjustments are not warranted.⁹³

As a result of this arbitration, Australia proceeded with its originally intended incorporation into its services schedule by means of a direct reference to the Reference Paper. Australia announced to WTO members on 20 December 2024 that it was proceeding to seek certification for its new commitments.⁹⁴ WTO Members were given 45 days to raise any further objections. No objections were raised, and the official certification announcement was issued on 4 February 2025 after the 45 days had expired⁹⁵.

5. *Concluding observations*

An academic commentary described the ruling as "relatively straightforward, without any major surprises."⁹⁶ Whatever the most fitting view on this point, the impact of this ruling is likely limited to the RPSDR and the method by which it was put into legal effect. As Peter Ungphakorn has argued, one consequence should be that the remaining Reference Paper sponsors - and any other country joining this group in the future – would be permitted to use Australia's incorporation approach. Of course, the "copy-and-paste" approach agreed upon by all sponsors prior to the India – Australia arbitration could also continue to be used.⁹⁷ Beyond this point, the award is unlikely to hold much systemic relevance for Article XXI as well as for other JSIs and the discussions surrounding their potential incorporation into the WTO legal order.⁹⁸

⁹² Findings of the Arbitration, para. 3.68.

⁹³ Findings of the Arbitration, para. 4.1.

⁹⁴ S/SECRET/13/ARB/3.

⁹⁵ S/L/554.

⁹⁶ Devon Whittle, [WTO: Australia successfully defends its implementation of the Services Domestic Regulation plurilateral in its GATS Schedule](#) (last visited 1 August 2026)

⁹⁷ Peter Ungphakorn, [India loses challenge, allowing Australia to go ahead with services commitment – Trade β Blog](#).

⁹⁸ One interesting aspect that also arguably has an effect beyond the immediate confines of this arbitration is the arbitrators' view that, when a government incorporates a document by reference into its schedule and that document subsequently changes, the changes to the document are not automatically incorporated into its schedule. Specifically, the AB held that "Australia's GATS schedule cannot be modified automatically to reflect amendments to [document] INF/SDR/2 [the text of the agreement]. Rather, for any future amendment to INF/SDR/2 to be incorporated into its GATS schedule, Australia would need to successfully complete a new modification procedure pursuant to Article XXI of the GATS." (Findings of the Arbitration, para. 3.37).

The typical use of future Article XXI proceedings will be to assess substantive modifications of existing commitments, as the drafters had presumably envisaged. These substantive modifications will be, for instance, when a WTO Member intends to withdraw a sector-specific commitment in order to gain more regulatory flexibility, for instance, the ability to introduce quantitative restrictions on the number of service supplies, to impose limitations on the extent of foreign participation in a particular service sector or to introduce regulation favoring domestic service suppliers. In that sense, the India – Australia Article XXI arbitration can be regarded an outlier case for Article XXI, driven by systemic and political concerns that, while significant for the functioning of the organization and systemic discussions among WTO Members, are not those reflected in the text of Article XXI. The AB seemed to express this very thought when it held that India's arguments were of a systemic nature that transcended the more technical text of Article XXI and that these arguments therefore could not be adjudicated under that provision.⁹⁹

Similarly, this arbitration is unlikely to hold many lessons for other JSIs – including the Investment Facilitation for Development Agreement (IFDA) and the E-Commerce Agreement (ECA) – whose sponsors have not attempted to implement their respective draft agreements via changes in their schedules, but rather via incorporation of the text of the Agreement into Annex 4 of the WTO Agreement. Of course, these methods of putting into effect these two agreements are beset by their own specific political disagreements between Members, but the solution to these disagreements will almost certainly require discussions and approaches different from those used in the context of the RPSDR.

⁹⁹ An observation worth noting in this context is by Devon Whittle, who points out that, given that India had already accepted the *substance* of the Services DR II being included in other WTO Members' GATS Schedules, with some minor clarifications and a change of form, it was difficult for India to argue that the content of the proposed modification to Australia's GAT Schedule altered the level of commitments or was less favourable to trade in the manner envisaged by Article XXI. Devon Whittle, [WTO: Australia successfully defends its implementation of the Services Domestic Regulation plurilateral in its GATS Schedule](#) (last visited 1 August 2026)

SECTION TWO
The WTO Informal Groups and Dialogues

Trade and Plastic Pollution: The Role of the WTO Dialogue on Plastics and its Relationship with the Global Plastics Treaty

Roberta Mazzero

Summary: 1. Introduction. – 2. The plastic pollution problem. – 3. Trade-restrictive measures on plastics and their relationship with existing WTO rules. – 4. The WTO Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade. – 5. The negotiations of an international binding treaty on plastic pollution and the relationship with the DPP – 6. The EU policy on plastics – 7. Conclusion.

Keywords: Informal Dialogue on Plastics Pollution (IDP/DPP) – Global Plastics Treaty – Trade and Environment – World Trade Organization.

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1. Introduction

One of the most alarming challenges of our time concerns the adverse environmental and health impacts caused by plastics throughout its entire life cycle. The production, consumption, and disposal of plastics contribute to the emission of greenhouse gases, the leakage of toxic substances, and the pollution of soil, air, and water. In 2019 alone, 22 million tonnes of plastic materials were released into the environment, causing severe harm to both terrestrial and marine ecosystems.¹ The widespread use of plastic in today's economy, and the projected growth in its production and consumption, only exacerbate this problem. Plastic management has therefore become a crucial topic of discussion at the global level, with increasing efforts by the international community to find shared global solutions.

In this context, international trade has the potential to play a crucial role in combating plastic pollution and promoting sustainable alternatives. As a matter of fact, «international trade occurs at every step of the plastics life cycle – from feedstocks to primary plastics in resin pellet and fibre forms, through to intermediate plastic goods, final manufactured plastic goods and plastic waste».² Therefore, adopting upstream trade restrictions could, for example, reduce trade in raw materials and substances used for plastic production, while other trade measures could in parallel encourage more sustainable substitutes and alternatives or impose product design requirements to promote recyclability and reusability. Downstream interventions, on the other hand, would contribute to an

¹ OECD, *Global Plastics Outlook Economic Drivers, Environmental Impacts and Policy Options*, OECD Publishing, Paris, 2022, p. 21.

² UNCTAD, *Global trade in plastics: insights from the first life-cycle trade database*, UNCTAD Research Paper No. 53, 2021, p. 4.

environmentally sound management of plastic waste. Many states have already implemented trade-related measures to tackle plastic pollution, but addressing a global challenge requires a global and coordinated approach.

It is against this background that the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade was launched in 2020 within the WTO, representing an extremely important platform of dialogue aiming at promoting a circular plastic economy.³ This voluntary initiative has enabled its Members to share experiences and best practices, address common challenges and difficulties, and promote technical assistance and capacity building. This initiative did not produce binding outcomes, but remains a significant contribution towards the creation of an international regulatory framework on plastics.

In parallel with the dialogue carried out within the WTO system, negotiations for the drafting of a new international treaty on plastic pollution have taken place starting from 2022, under the mandate of the UN Environment Assembly.⁴ Notwithstanding the temporary setback in the negotiations, the project of a new treaty, together with the WTO initiative, represents a crucial step forward in the global reduction of plastic pollution.

This chapter will focus on the plastics debate carried out under the Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (hereinafter DPP). After providing a general picture of the plastic pollution problem at the centre of this discussion, the following paragraphs will try to explore the interaction between trade-related measures and existing WTO rules, the current state of the play at the DPP, and its relationship with the negotiations on an international treaty on plastic. Finally, a brief overview of the most relevant measures adopted by the European Union will also be provided.

2. *The plastic pollution problem*

Synthetic plastic is a polymer made from hydrocarbon monomers usually obtained from crude oil. Various additives are incorporated in different proportions, determining the specific chemical and mechanical properties of the resulting polymers and adapting them depending on their intended use.⁵

Synthetic plastic began to be widely produced at the beginning of the 20th century. Due to its versatility, plastic can be manufactured to possess different specific properties for various purposes, moulded into any shape, and produced at relatively low cost. As a result, it has been used in a wide range of applications across numerous sectors. This has led to a significant increase in plastic production and use in all fields, from industry to agriculture, and from packaging to medical equipment.⁶ Today, plastic has become an integral part of the global economy, with annual plastic

³ See WTO, Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade, 17 November 2020, available at https://www.wto.org/english/tratop_e/envir_e/tedweek2020_e.htm; See also the official website available at https://www.wto.org/english/tratop_e/ppesp_e/ppesp_e.htm.

⁴ UNEA Resolution 5/14, *End Plastic Pollution: Towards an International Legally Binding Instrument*, 2 March 2022.

⁵ M. GOEL, *Understanding Plastic Pollution*, in *Plastic Pollution: Challenges and Green Solutions*, edited by M. GOEL, N. G. TRIPATHI, Springer, 2024, p 3 ss.

⁶ G. NAGTZAAM, G. VAN CALSTER, S. KOURABAS, E. KARATAEVA, *The plastic pollution problem, definitions, scope and alternatives*, in *Global plastic pollution and its regulation : history, trends, perspectives*, Edward Elgar, 2023, p.2 ss.; M. GOEL, *Understanding Plastic Pollution*, in *Plastic Pollution: Challenges and Green Solutions*, edited by M. GOEL, N. G. TRIPATHI, Springer, 2024, p 3 ss.

production reaching approximately 415 million tonnes in 2023.⁷ Notwithstanding the economic advantages of this material, the adverse impacts of plastics on the environment and human health are now clearly evident.

Particular attention has been given to pollution from plastic waste, which can accumulate on land or enter the marine environment. For example, the mismanagement of landfills can cause the release of greenhouse gases (hereinafter GHGs) and toxic pollutants into the air and soil through, for instance, photodegradation, uncontrolled open burning of plastic waste, and the leakage of chemical additives. Such pollutants can also leach into groundwater.⁸ Plastic waste dispersed on land and in watercourses eventually reaches the sea, adding to waste originating from the fishing industry. Due to ocean current flows, five major gyres of marine plastic litter are now floating in the oceans, causing devastating harm to the environment. Marine litter may, for example, release toxic substances, affect ecosystems by influencing the levels of oxygen, nitrogen and phosphorous, be ingested by marine species and enter the human food chain.⁹

Depending on the production process, the chemical additives used, and the specific characteristics of the material, plastic products have different lifetimes and levels of durability. They can persist in the environment for hundreds of years and, in some cases, for more than a millennium. In addition, the progressive disintegration and breakdown of plastics products produce microplastics, namely plastic fragments ranging between 1 nanometer and 5 millimetres, or even smaller particles, which are now pervasively distributed throughout the environment.¹⁰

However, the challenge of plastic pollution does not lie exclusively in the end-of-life phase of products and waste disposal. Adverse impacts occur throughout the entire life cycle of plastics beginning with the extraction of fossil fuels, which is a major source of GHG emissions. Similarly, oil refining and plastic manufacturing continue to generate GHG emissions, while the chemical additives introduced during these stages of production become toxic substances when released into the environment.¹¹

The global nature of plastic pollution requires states to adopt coordinated global actions. Consequently, there is a growing need for a new international regulatory framework capable of ensuring effective cooperation and providing legal instruments to prevent and reduce plastic pollution.

⁷ STATISTA, *Plastic waste worldwide – statistics & facts*, available at https://www.statista.com/topics/5401/global-plastic-waste/?srsltid=AfmBOorQclUSLMUGM1HFogPp8jfrebPTwTCI9P_CsNhm9ysjVmnWCwBD#topicOverview. See also OECD, *Global Plastics Outlook Economic Drivers, Environmental Impacts and Policy Options*, OECD Publishing, Paris, 2022.

⁸ M. GOEL, *Understanding Plastic Pollution*, in *Plastic Pollution: Challenges and Green Solutions*, edited by M. GOEL, N. G. TRIPATHI, Springer, 2024, p 3 ss.

⁹ See, for example, UNEP, *From Pollution to Solution: A Global Assessment of Marine Litter and Plastic Pollution*, 2021; J. SCHÄLI, *The mitigation of marine plastic pollution in international law : facts, policy and legal implications*, Leiden, Boston, 2022; S. SINHA, *Plastic Debris, Microplastics, and Marine Pollution*, in *Plastic Pollution: Challenges and Green Solutions*, edited by M. GOEL, N. G. TRIPATHI, Springer, 2024, p 79 ss.

¹⁰ G. SEN, *Overview of Plastics, Usage, Pollution and Mitigation*, in *Plastic Pollution: Challenges and Green Solutions*, edited by M. GOEL, N. G. TRIPATHI, Springer, 2024, p 139 ss.; GESAMP, *Guidelines on the monitoring and assessment of plastic litter and microplastics in the ocean*, edited by P.J. KERSHAW, A. TURRA, F. GALGANI, Rep. Stud. GESAMP No. 99, 2019.

¹¹ UNCTAD, *Plastic Pollution. The pressing case for natural and environmentally friendly substitutes to plastics*, UNCTAD/DITC/TED/2023/2, 2023; M. GOEL, *Understanding Plastic Pollution*, in *Plastic Pollution: Challenges and Green Solutions*, edited by M. GOEL, N. G. TRIPATHI, Springer, 2024, p 3 ss.

A relevant international instrument addressing the harmful impacts of hazardous plastic waste already exists. In 1989 the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter Basel Convention) was adopted to strictly control and reduce the transboundary movement of hazardous waste in order to protect the environment and human health.¹² In 2019, the adoption of the so called Plastic Waste Amendments introduced new entries among the materials listed into three annexes of the Basel Convention, distinguishing between hazardous plastic waste, waste presumed to be non-hazardous and a residual category including, in particular, contaminated or mixed plastics which, although not hazardous per se, require careful management.¹³ Consequently, plastic waste flows started to be regulated under the Basel Convention, with the aim of reducing the international trade and prohibiting the transfer of hazardous waste to other countries without prior informed consent.

It is also worth mentioning the 2023 amendment to the Stockholm Convention on Persistent Organic Pollutants,¹⁴ which listed a substance used as plastic additive, UV-328, among the chemicals to be eliminated due to their adverse effects on the environment and health, although some exceptions were allowed.¹⁵

Despite the role played by the Basel Convention, the need remains for an international treaty specifically dedicated to the environmentally sound and safe management of the entire life cycle of plastics. On these grounds, in 2022 a resolution of the UN Environment Assembly launched the negotiations for the drafting of the first international legally binding instrument on plastic pollution.¹⁶ The negotiations are still ongoing, and the latest session was held in February 2026.

As already mentioned, parallel discussions on plastic pollution have also been carried out within the WTO system through the DPP since 2020. Given the temporary setback of the Intergovernmental Negotiating Committee negotiations, the DPP remains an important forum to continue advancing the debate on trade-related aspects of the plastic pollution problem.

3. Trade-restrictive measures on plastics and their relationship with existing WTO rules

Trade measures aiming at regulating the transboundary movement of plastic products and waste are not new, and in recent decades many Members have adopted different models and approaches to

¹² Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57. See also J. PUCKETT, *Global and National Instruments to Stop the Export and Dumping of Plastic Wastes*, in *Plastic Waste Trade: A New Colonialist Means of Pollution Transfer*, edited by S. GÜNDOĞDU, Springer, 2024, p. 67 ss.

¹³ Secretariat of the Basel Convention, *Amendments to Annexes II, VIII and IX to the Basel Convention*, 2019 (Decision BC-14/12). On recent plastic trade trends, see for example J. DELL, *Major Six-Year Trends in Global Plastic Waste Trade*, in *Plastic Waste Trade: A New Colonialist Means of Pollution Transfer*, edited by S. GÜNDOĞDU, Springer, 2024, p. 55 ss. See also the official website available at <https://www.basel.int/Countries/NationalReporting/DataVisualizationTool/tabid/3216/Default.aspx>.

¹⁴ Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119.

¹⁵ Conference of the Parties to the Stockholm Convention on Persistent Organic Pollutants, *Listing of UV-328*, 2023 (Decision SC-11/11). For a general overview of other international law instrument that may be relevant to address the plastic pollution problem, see for example G. NAGTZAAM, G. VAN CALSTER, S. KOURABAS, E. KARATAEVA, *Current international law and plastic*, in *Global plastic pollution and its regulation : history, trends, perspectives*, Edward Elgar, 2023, p.77 ss.

¹⁶ UNEA Resolution 5/14, *End Plastic Pollution: Towards an International Legally Binding Instrument*, 2 March 2022.

address the problem of plastic pollution and promote sustainable and safe substitutes and alternatives. When examining such trade-restrictive measures, a first question that may be raised concerns their relationship with existing trade rules and their place within the WTO system.

A general, preliminary answer can be found in the preamble to the WTO Agreement, which provides important clarifications on the ultimate objectives of trade. As a matter of fact, economic relations and tariff liberalization are not pursued *per se*, but as means for, in particular, the promotion of sustainable development and the protection and preservation of the environment.¹⁷ Therefore, the adoption of trade restrictions or regulatory requirements targeting certain specific categories of products, for example single-use plastic products (hereinafter SUP) or hazardous plastic waste, for purposes connected with the protection of the environment and human health, is compatible with WTO rules, as long as it does not constitute arbitrary or unjustifiable discrimination or disguised protectionism.

Looking at some specific trade rules and their concrete application in relation to plastic products, some further considerations may be provided.¹⁸ The principle of non-discrimination, which can be articulated in the principles of most favoured nation treatment and national treatment, is one of the cornerstones of the multilateral trading system, requiring equal treatment to like products regardless of their country of origin. However, when dealing with plastic products, substitutes and alternatives¹⁹, the issue of defining what constitute ‘like products’ arises.²⁰ Taking into account the processes and production methods (hereinafter PPMs) seems a necessary choice in order to properly differentiate between fossil fuel-based plastics on the one hand and sustainable substitutes or alternatives on the other.²¹ The use of specific technologies and manufacturing methods produces inherently different products with respect to properties such as recyclability, reusability, safety, and biodegradability, and therefore, when implementing a trade measure targeting a specific category of plastic products, such distinctions become relevant. For the purposes of promoting a circular and sustainable global plastics

¹⁷ The preamble states that “their relations in the field of trade and economic endeavour should be conducted with a view to [...] allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development” Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, preamble. More generally, on the role of sustainability and non-trade values within the WTO system, see, for example E. BARONCINI, *Non-Trade Values in the TBT Agreement: the Analysis of the “Dolphin-Safe” Labelling Scheme by the WTO Appellate Body Report in the US–Tuna II (Mexico) case*, in *Environmental Law Survey 2013*, edited by M. TIMOTEO, Dipartimento di Scienze giuridiche – Alma Mater Studiorum – Università di Bologna, 2014. E. BARONCINI, *The WTO as Major Driver of Sustainable Development and its Reform Process*, AMS Acta Alma DL – Università di Bologna, 2025.

¹⁸ For a more detailed overview of the matters discussed, see for example X. LYU, *Study on the Path of Building the WTO Trade Rules Under the Urgent Need to Tackling Plastic Pollution*, Journal of WTO & China, 2024, 14(1), p. 6 ss.; I. BARŠAUSKAITĖ, T. IRSCHLINGER, V. GUAZZINI, A. AZIZ, *Avoiding Trade Concerns in the Design of Plastic Pollution Measures: Evidence and recommendations for policy-makers*, IISD, 2024.

¹⁹ For the definition of non-plastic substitutes and alternatives, see UNCTAD, *Plastic Pollution. The pressing case for natural and environmentally friendly substitutes to plastics*, UNCTAD/DITC/TED/2023/2, 2023, p. 10 ss.

²⁰ On the definition of like products see, for example, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, 1996.

²¹ The PPMs criteria is even more relevant in the context of assessing the ‘likeness’ of plastic products, as standard classification codes are not sufficiently detailed to distinguish more sustainable substitutes and alternatives, and the end use of such products may be the same. On the debate regarding the PPMs criteria see, for example, I. MUSSELLI, *WTO Law and Environmental Processes and Production Methods (PPMs): A Deconstruction*, Indian Journal of International Economic Law, 2024, 15(1).

economy, the PPMs and the mentioned product characteristics should therefore be taken into account when assessing the likeness of products.

Another aspect that may be raised concerns the prohibition of quantitative restrictions on trade pursuant to article XI GATT.²² As a matter of fact, trade-related measures targeting plastic products may take the form of bans, especially when considering the obligations stemming from the Basel Convention regarding the management of hazardous plastic waste. Article XI GATT does not explicitly provide an exception for environmental or public health purposes. However, the general exception established under article XX GATT, which under subparagraphs (b) and (g) cover measures «necessary to protect human, animal or plant life or health»²³ and «relating to the conservation of exhaustible natural resources [...]»²⁴, may be invoked. Article XX GATT allows derogations from WTO rules, including the prohibition of quantitative restrictions, as long as the measure under scrutiny satisfies one of the criteria listed in the subparagraphs of the article and is not applied in a manner that constitutes «arbitrary or unjustifiable discrimination [...] or a disguised restriction on international trade»²⁵, as required by the chapeau.

Apart from bans, states may implement measures and technical regulations falling within the scope of the Agreement on the Application of Sanitary and Phytosanitary Measures²⁶ (hereinafter SPS Agreement), which covers sanitary and phytosanitary measures necessary to protect human, animal and plant health, or, more often, the Agreement on Technical Barriers to Trade²⁷ (hereinafter TBT Agreement), dealing with technical regulations and standards not covered by the SPS Agreement. In particular, article 2.2 of the TBT Agreement explicitly includes the «protection of human health or safety, animal or plant life or health, or the environment»²⁸ among the legitimate objectives to impose technical regulations, theoretically covering regulations on plastic materials.

Trade-restrictive measures aimed at eliminating plastic pollution while promoting substitutes and alternatives are therefore consistent with the scope and purposes of the WTO and generally compatible with existing trade rules, as long as they do not constitute arbitrary or unjustifiable discrimination or disguised protectionism. However, Members have often faced many practical challenges and difficulties when designing and implementing such measures. Given the scale of the threat posed by plastic pollution and waste, there remains a need for further discussion and coordination between WTO Members to understand how trade rules can be effectively used and

²² General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187.

²³ General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, art XX(b).

²⁴ General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, art XX(g).

²⁵ General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, art XX.

²⁶ Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493. See in particular article 2.

²⁷ Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120.

²⁸ Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120, art 2.2.

improved for a sustainable management of plastics. It was also in response to this needs that the DPP was established.

4. *The WTO Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade*

In November 2020, during the WTO's Trade and Environment Week, seven WTO Members launched the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade, later renamed the Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade.²⁹

The aim of the initiative, as outlined in the inaugural statement, is to «explore how improved trade cooperation, within the rules and mechanisms of the WTO, could contribute to domestic, regional and global efforts to reduce plastics pollution and transition to a more circular and environmentally sustainable global plastics economy »³⁰.

The participants stressed the necessity to develop new global and shared solutions. The adverse impacts of unregulated and mismanaged plastic waste on the environment and human health, particularly aggravated by the peak in consumption of SUP products during the COVID-19 pandemic, were identified as matters of global concern.

Marine litter and microplastics in particular were highlighted among the most urgent areas of discussion, but the importance of adopting a holistic approach addressing the entire life cycle of plastics, from production and consumption to disposal, was stressed by all participants. Moreover, coordination with other international and regional initiatives and relevant stakeholders was raised as a point of discussion to be integrated into the methodologies and work of the DPP. Progressively, new WTO Members joined the DPP initiative, reaching a total of 83 Members as of February 2025.³¹

Six general topics were initially identified as priority fields of action: «improving transparency and monitoring trade trends; promoting best practices; strengthening policy coherence; identifying the scope for collective approaches; assessing capacity and technical assistance needs; and cooperating with other international processes and efforts »³². In the context of the last WTO Ministerial Conference (hereinafter MC14), held in Yaoundé in March 2026, a Ministerial Statement

²⁹ The seven WTO members are Australia, Barbados, Canada, China, Fiji, Jamaica and Morocco. See WTO, Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade, 17 November 2020, available at https://www.wto.org/english/tratop_e/envir_e/tedweek2020_e.htm; See also the official website available at https://www.wto.org/english/tratop_e/ppesp_e/ppesp_e.htm.

³⁰ WTO, Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade, 26 July 2021, WT/CTE/W/250/Rev.1, para 3.

³¹ The 83 WTO members are Albania; Angola; Argentina; Australia; Austria; Barbados; Belgium; Bolivia, Plurinational State of; Bulgaria; Brazil; Cabo Verde; Cambodia; Cameroon; Canada; Central African Republic; Chad; Chile; China; Colombia; Costa Rica; Croatia; Cyprus; Czech Republic; Denmark; Ecuador; Estonia; European Union; Fiji; Finland; France; Gambia; Germany; Greece; Guatemala; Honduras; Hong Kong, China; Hungary; Iceland; Ireland; Italy; Jamaica; Japan; Kazakhstan; Korea, Republic of; Latvia; Lithuania; Luxembourg; Macao, China; Maldives; Malta; Mauritius; Mexico; Mongolia; Montenegro; Morocco; Mozambique; Netherlands; New Zealand; North Macedonia; Norway; Panama; Paraguay; Peru; Philippines; Poland; Portugal; Romania; Russian Federation; Samoa; Saudi Arabia, Kingdom of; Singapore; Slovak Republic; Slovenia; Spain; Suriname; Sweden; Switzerland; Thailand; Tonga; United Kingdom; United States; Uruguay; and Vanuatu.

³² WTO, Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade, 26 July 2021, WT/CTE/W/250/Rev.1, para 3.

was presented, providing a complete overview of the main outcomes of the DPP's work up to that point.

A first crucial area of interest for the DPP members is the improvement of the quality and granularity of data related to trade flows of plastic products and waste, as a significant knowledge gap has been reported by the participants.³³ Making plastic management a policy and legal concern necessarily requires adequate reporting methods to assess the phenomenon, as different standards and methodological choices for the classification of plastics can lead to underestimation or distortion of the global picture of plastic flows.

As a matter of fact, the lack of adequate data is partially attributed to the inadequacy of the current classification system based on the Harmonized Commodity Description and Coding System (hereinafter HS) elaborated by the World Customs Organization. The HS system is currently under revision, and new amendments, which also address plastic waste and the trade of plastic products, will enter into force on 1 January 2028.³⁴ The HS nomenclature presently applied, however, is unable to account for the material composition of certain categories of products, failing to explicitly recognise and register the presence of embedded plastic or to differentiate between reusable and non-reusable products. Moreover, the classification system does not account for the amount of plastic used in the packaging of traded goods, thus underestimating the total amount of plastic actually traded and failing to distinguish more sustainable types of packaging.³⁵

Examples of statistical approaches for better estimating plastic flows were also presented, and the importance of regional cooperation and partnerships to improve trade flow data was highlighted.³⁶ Therefore, improving data transparency on plastic flows is recognized as a challenge but also as a core priority, with a strong need to establish common international standards for collecting data disaggregated by «sector, type of product, by polymer, together with information on embedded plastics, recycled content, and composites and chemicals»³⁷.

Another interesting outcome of the work of the DPP is the mapping of national and regional trade-related plastic measures (hereinafter TrPMs), with a special focus on SUP.³⁸ The results of the DPP survey conducted among participating members show a great variety and fragmentation in the

³³ WTO, *Technical outcome A: Analytical summary of statistical approaches to estimate trade flows of embedded plastics, packaging and single-use products discussed in the DPP*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21.

³⁴ For further information on the HS 2028 amendments related to plastic waste management and trade of plastic products, see the World Customs Organization website available at: <https://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2028-edition/amendments-effective-from-1-january-2028.aspx>.

³⁵ WTO, *Technical outcome A: Analytical summary of statistical approaches to estimate trade flows of embedded plastics, packaging and single-use products discussed in the DPP*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21, para 2 ss.

³⁶ WTO, *Technical outcome A: Analytical summary of statistical approaches to estimate trade flows of embedded plastics, packaging and single-use products discussed in the DPP*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21, para 3 ss.

³⁷ WTO, *Technical outcome A: Analytical summary of statistical approaches to estimate trade flows of embedded plastics, packaging and single-use products discussed in the DPP*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21, para 4.2.

³⁸ WTO, *Technical outcome B: Analytical summary of the different approaches in regulating single-use plastic products discussed in the DPP*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21. The DPP launched a survey on Trade-related Plastic Measures (TrPMs) in June 2022. See WTO, *Dialogue on plastics pollution and environmentally sustainable plastics trade – Factual report of the trade-related plastics measures (TPRMS) survey*, 4 October 2023, INF/TE/IDP/W/11

approaches adopted, starting with differences in the objectives of these measures, the definition of targeted products, and the nature of the interventions.

SUP products, in particular plastic bags and tableware, together with packaging, emerged as the categories of goods most often targeted, but the criteria adopted for their technical definition and requirements can still vary significantly across countries. With regard to SUP products, the survey found that five general criteria are usually adopted, namely «physical property (thickness), usage and purpose, polymer input, and end-of-life properties»³⁹ together with the context. However, which of these criteria are actually used in drafting a single specific measure, and the specific standards applied for each of them, differ significantly depending on both the targeted product and the state adopting the measure.

Aware of the environmental and economic costs of regulatory fragmentation, the participants called for new efforts for the coordination and harmonization of standards. Regional experiences on regulatory coordination were also shared with all the Members.

The DPP also addressed the issue of access to technologies and services for waste management and clean-up activities.⁴⁰ The environmentally sound management of all the phases of production is essential to contribute to ending plastic pollution. As already mentioned, upstream interventions in the value chain of plastics may for example prevent the use of hazardous or polluting materials, and the adoption of new design requirements may facilitate the reuse and recycling of plastics, ultimately reducing the production of waste. An overview of services and technologies that may be applied throughout the plastic life cycle was carried out, and members encouraged cooperation and the liberalisation of such services and technologies to support in particular least developed countries.

Another macro area of discussion is related to the promotion of trade measures favouring safe and sustainable non-plastic substitutes and alternatives.⁴¹ UNCTAD provides definitions for both of these two categories. Non-plastic substitutes are considered «natural materials from mineral, plant, animal, marine or forestry origin that have similar properties to plastics. They do not include fossil fuel-based or synthetic polymers, bioplastics, and biodegradable plastics»⁴², while plastic alternatives consist in bioplastics and biodegradable plastics, where «[b]ioplastics means bio-based polymers materials (e.g., by using vegetable fats and oils, corn starch, straw, woodchips, sawdust, and recycled food waste) and should be subject to material recycling » and «[b]iodegradable plastics refers to the end of life of plastics, indicating that they biodegrade in the natural environment, or that they can be composted »⁴³.

³⁹ WTO, *Technical outcome B: Analytical summary of the different approaches in regulating single-use plastic products discussed in the DPP*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21, para 2.5.

⁴⁰ WTO, *Technical outcome D: Synopsis of goods, services and technologies for waste management and clean-up activities, their challenges and opportunities identified in DPP discussions*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21.

⁴¹ WTO, *Technical outcome E: Synopsis of services, non-plastic substitutes, alternatives to single-use plastics, their challenges and opportunities identified in DPP discussions*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21.

⁴² UNCTAD, *Plastic Pollution. The pressing case for natural and environmentally friendly substitutes to plastics*, UNCTAD/DITC/TED/2023/2, 2023, p. 10.

⁴³ UNCTAD, *Plastic Pollution. The pressing case for natural and environmentally friendly substitutes to plastics*, UNCTAD/DITC/TED/2023/2, 2023, p. 11.

A mapping of different types of non-plastic substitutes and alternatives, together with services for the prevention and mitigation of plastic pollution, has been initiated by the DPP. However, the need for a comprehensive life-cycle impact assessment has been emphasised, in order to avoid the proliferation of non-plastic substitutes and alternatives that do not meet the threshold of sustainability and safety standards.⁴⁴

During DPP discussions, the existence of obstacles to the diffusion of such goods and materials have been highlighted. It has been noted that non-plastic substitutes and alternatives are at a disadvantage due to high costs and the inadequacy of the infrastructure and technology used for their production, especially in less developed countries. The existence of fossil fuel subsidies may also contribute to making the production of petroleum-based plastics relatively cheaper. Moreover, it has been reported that both tariff and non-tariff measures are applied more heavily to marine-based materials in comparison with other equivalent non-plastic substitutes, constituting additional barriers to the diffusion of more sustainable products. The participants have therefore stressed the need to update definitions, standards and regulations related to non-plastic substitutes and alternatives.⁴⁵

Overall, the Ministerial Statement presented at the MC14 demonstrates the existence of many challenges, but also seems to confirm the strength of such an informal and voluntary initiative as the DPP, which creates a much-needed platform for dialogue and coordination.

5. The Negotiations of an International Binding Treaty on plastic pollution and the relationship with the DPP

In March 2022, the UN Environment Assembly adopted a resolution requiring the UN Environment Programme Executive Director to establish an Intergovernmental Negotiating Committee (hereinafter INC) mandated «to develop an international legally binding instrument on plastic pollution, including in the marine environment, [...] which could include both binding and voluntary approaches, based on a comprehensive approach that addresses the full life cycle of plastic, taking into account, among other things, the principles of the Rio Declaration on Environment and Development, as well as national circumstances and capabilities»⁴⁶.

Five INC sessions have been held since 2022 and, although the initial deadline for an agreed text was set by the end of 2024, no agreement has yet been reached. The setbacks in the negotiations have been attributed in particular to the opposition of a minority of petroleum-producing States, as well as pressure and lobbying by the fossil fuel and chemical industries, and issues of trust and transparency that have been risen during the latest sessions.⁴⁷

⁴⁴ WTO, *Factual Summary of Discussions on Sustainable and Effective Alternatives and Substitutes*, INF/TE/IDP/RD/88/Rev.1, 27 January 2023, para. 40 ss.

⁴⁵ WTO, *Technical outcome E: Synopsis of services, non-plastic substitutes, alternatives to single-use plastics, their challenges and opportunities identified in DPP discussions*, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 18 March 2026, WT/MIN(26)/21, para 3.2 ss.

⁴⁶ UNEA Resolution 5/14, *End Plastic Pollution: Towards an International Legally Binding Instrument*, 2 March 2022, para 3.

⁴⁷ See, for example, CIEL, *Fossil Fuel and Petrochemical Lobbyists Overrun Plastics Treaty Negotiations*, 2025, available at <https://www.ciel.org/news/inc-5-2-lobbyist-analysis/>; For a summary report of the INC session 5.2 and an analysis of the discussion, see International Institute for Sustainable Development. Earth Negotiations Bulletin, *Summary of the*

The last session was held in February 2026, during which a new Chair was elected following the resignation of the previous one, together with some other officers. Substantive negotiations on the text are expected to resume in the coming months.

Looking at the work carried out so far and examining the substantive provisions emerging from the current draft text and the ongoing negotiations, the parties seem to have worked towards the phase-out of some plastic products, particularly single-use and short-lived plastics. Other key areas of negotiation include, on the one hand, improving the design of plastic products in order to facilitate reuse and recycling and, on the other, promoting innovation and supporting the development of alternatives and non-plastic substitutes. Furthermore, the parties worked also to ensure the environmentally sound management of plastic waste.⁴⁸

The thematic fields on which consensus could not be reached during the previous sessions, and which contributed to the significant setback of the negotiations, include in particular the regulation of chemicals contained in plastic products, the establishment of binding limits on plastic production, and divergences regarding financing obligations.⁴⁹

A question that naturally arises in this context concerns the points of contact and intersection between the treaty project currently under negotiation and the DPP within the WTO framework, as well as the possibilities for coordination and complementarity.

The same states participating in the DPP are also actively involved in the INC work and have repeatedly demonstrated their awareness of the need to avoid duplication and redundancy. The two initiatives present significant potential for mutual reinforcement, as several thematic areas are addressed in both contexts, including transparency requirements, a life cycle approach to plastics, and recognition of the challenges faced by developing countries and small island states.

At the same time, the two initiatives differ significantly in both scope and institutional setting. The INC process consists of formal treaty negotiations aimed at developing an international legally binding instrument, which is expected to establish a set of general obligations and commitments capable of coordinating a global response to plastic pollution. By contrast, the DPP is characterised by a more focused attention to trade-related measures that can discourage the use of fossil fuel-based plastics while promoting alternatives and substitutes. Moreover, the DPP operates in a voluntary and informal framework outside the WTO's formal negotiating channels, which is supposed to facilitate dialogue among the participants and allow for more practical and detailed discussions on specific trade measures and regulatory approaches. At the same time, this very nature of the DPP and the fact that for now there is no concrete project, for example, to transform this work into a plurilateral binding agreement, falls short of calls for binding rules necessary to address the problem of plastic pollution.⁵⁰

Second Part of the Fifth Session of the INC to Develop a Plastics Treaty, IISD. Aug 15, 2025, available at <https://enb.iisd.org/plastic-pollution-marine-environment-negotiating-committee-inc5.2-summary#brief-analysis-inc-52>.

⁴⁸ The reference text is the Chair's Text published in December 2024, available at <https://wedocs.unep.org/items/e6b68bdd-cccb-4321-90a8-1d98a0a08222>, as no agreement on a final text was reached during the subsequent sessions. Such text is still under negotiations and open to amendment.

⁴⁹ See International Institute for Sustainable Development. *Earth Negotiations Bulletin, Summary of the Second Part of the Fifth Session of the INC to Develop a Plastics Treaty*, IISD. Aug 15, 2025, available at <https://enb.iisd.org/plastic-pollution-marine-environment-negotiating-committee-inc5.2-summary#brief-analysis-inc-52>.

⁵⁰ See A. QUARTA, *The World Trade Organisation Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP/DPP) & the Global Plastic Treaty*, in *The WTO as Major Driver of Sustainable Development and its Reform Process*, edited by E. BARONCINI, AMS Acta Alma DL – Università di Bologna, 2025; X. LYU, *Study on the*

Moreover, while the INC negotiations have a global scope and participation, only 83 WTO Members have so far joined the DPP, raising questions regarding the representativeness of the discussions and the legitimacy of the outcomes. What is certain is that the dialogue carried out within the WTO has proved to be a crucial contribution to the international debate on plastic pollution, but it cannot replace the development of binding international rules.

6. *The EU Policy on Plastics*

When talking about examples of measures taken to address plastic pollution, the case of the European Union can be of great interest. The EU plays a significant role not only at the international level, for example joining and contributing to both the DDP debate and INC sessions, but also internally, demonstrating to be very active in the design and implementation of numerous legislative acts.

In 2018, the Communication from the Commission «A European Strategy for Plastics in a Circular Economy» represented a crucial turning point for the definition and implementation of a European policy on plastic pollution.⁵¹ It envisioned a roadmap for the transition to a circular plastic economy in the European Union, setting out a series of measures to tackle plastic pollution and marine litter along the entire value chain and life cycle of plastics.

The adoption of the EU Plastics Strategy was therefore followed in subsequent years by new legislative instruments and policies addressing multiple thematic areas, in particular the regulation of sustainable alternatives to fossil fuel-based plastics, the growing amount of microplastics in the environment, the introduction of more stringent rules for certain plastic products, in particular SUP, and rules on plastic waste.

Some illustrative example of these internal regulatory developments can be provided, starting with the Directive on Single-Use Plastics, entered into force in 2019.⁵² In particular, it addresses certain categories of single-use items which became subject to consumption reduction obligations, stricter product and marking requirements, and market restriction measures. It also imposes on Member States specific collection and recycling targets. The Directive has been accompanied by a

Path of Building the WTO Trade Rules Under the Urgent Need to Tackling Plastic Pollution, Journal of WTO & China, 2024, 14(1), p. 6 ss.

⁵¹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Strategy for Plastics in a Circular Economy*, COM/2018/028 final. However, it was not the first time the EU has addressed the problem of plastic: see for example the previous Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Closing the loop – An EU action plan for the Circular Economy*, COM(2015) 614 final, and Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, OJ L 285, 31.10.2009, pp. 10–35.

⁵² Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019, p. 1–19. See also the dedicated webpage available at https://environment.ec.europa.eu/topics/plastics/single-use-plastics_en. This directive followed another directive addressing specifically lightweight plastic carrier bags: Directive (EU) 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags, OJ L 155, 6.5.2015, pp. 11–15.

series of implementing decisions aimed at providing transparent, harmonised, and sector-specific rules and methods for its effective implementation.

In 2020, an updated Circular Economy Action Plan was adopted by the Commission in the context of the European Green Deal.⁵³ Recognising the management of plastics as a priority for pollution prevention, the document constituted the policy framework providing for new regulations and directives, which focused on, in particular, the recyclability and reusability of products by intervening in their design, raising consumer awareness, and establishing a ‘right to repair’, among other initiatives.⁵⁴ In this context, some legislative instruments, while not specifically addressing plastic pollution, establish clear and common rules requiring companies to enhance transparency regarding their products and activities, therefore facilitating both public authorities and consumers. More precisely, the Ecodesign for Sustainable Products Regulation⁵⁵ and the Empowering Consumers Directive⁵⁶ through, respectively, the progressive implementation of the Digital Product Passport and stricter rules on environmental claims, may facilitate the identification of the presence of plastic in products placed on the market and the assessment of the risk of microplastic release.

The diffusion of microplastics in the environment is another core issue integrated into the EU roadmap towards a circular plastics economy. In particular, a set of initiatives was adopted in 2023, followed by the so-called Plastic Pellets Regulation, which entered into force in 2025 and aims to prevent plastic losses throughout all phases of the supply chain.⁵⁷

Moreover, on 11 February 2025 the Packaging and Packaging Waste Regulation entered into force. The aim of this Regulation is «to minimise the quantities of packaging and waste generated while lowering the use of primary raw materials and fostering the transition to a circular, sustainable and competitive economy»⁵⁸.

In light of these efforts undertaken by the European Union, a question may arise regarding the effectiveness of such measures. The EU has mostly adopted directives, which offer the advantage of allowing Member States flexibility in implementing their objectives, according to the methods they consider most appropriate to their national contexts. Some Member States have even adopted domestic legislations that are more ambitious than the objectives established at the EU level. At the

⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A New Circular Economy Action Plan For A Cleaner And More Competitive Europe, COM/2020/98 final.

⁵⁴ See also the official website available at https://environment.ec.europa.eu/strategy/circular-economy_en

⁵⁵ Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, OJ L, 2024/1781, 28.6.2024. On the Digital Product Passport, the “digital container for products, components, and materials, which will store relevant information to support products’ sustainability, promote their circularity and strengthen and facilitate legal compliance”, see https://single-market-economy.ec.europa.eu/single-market/digital-product-passport_en.

⁵⁶ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information, OJ L, 2024/825, 6.3.2024.

⁵⁷ Regulation (EU) 2025/2365 of the European Parliament and of the Council of 12 November 2025 on preventing plastic pellet losses to reduce microplastic pollution, OJ L, 2025/2365, 26.11.2025; see also the official website available at https://environment.ec.europa.eu/topics/plastics/microplastics_en.

⁵⁸ European Commission, Packaging waste, available at https://environment.ec.europa.eu/topics/waste-and-recycling/packaging-waste_en. See Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, OJ L, 2025/40, 22.1.2025, p. 1-124.

same time, however, issues related to the delayed transposition and poor implementation of directives by some Members have emerged, significantly affecting the EU's overall ability to achieve its targets.⁵⁹ Surely, there is still room for improvement.

As already mentioned, this initiatives at the internal level are accompanied by the EU's parallel engagement in key international fora of discussion on plastics. The EU is directly participating in the INC process of drafting a new global treaty on plastic, and also joined the DPP, a position consistent with its 2021 Communication on Trade Policy, in which the Commission recognises that the «resolve for the next decade is to ensure that trade tools accompany and support a global transition towards a climate neutral economy, including accelerating investments in clean energy, and promote value chains that are circular, responsible and sustainable »⁶⁰. The discussions within the DPP provide the European Union with the occasion to share its experiences and expertise regarding trade-related measures with other participants, but also with a strategic opportunity to promote its policy priorities on trade and environment.⁶¹ Overall, the European Union is certainly a crucial and indispensable actor to globally address plastic pollution and has consistently demonstrated a proactive commitment to promoting coordination and cooperation at the international level.

7. Conclusion

To address the disastrous effects of plastics on the environment and human health, the international community has begun in recent years to take action through both informal and voluntary initiatives and institutionalized negotiation processes. The WTO Dialogue on Plastics Pollution and the INC sessions can be seen as two sides of the same coin, both playing a necessary role in efforts to reduce global plastic pollution.

This chapter has focused in particular on the contributions of the DPP. First of all, since the launch of the DPP initiative in 2020, a better understanding of plastic pollution has undoubtedly been achieved. Efforts to enhance transparency in both plastic flow data and trade measures, together with progresses in discussions on definitions and standards for non-plastic substitutes and alternatives, have been significant. Over the years, DPP participants have used this forum as an opportunity to overcome common obstacles, share best practices, and engage in capacity-building and technical cooperation. Moreover, this platform has served as a mechanism for coordination not only among its members but also with other international initiatives, first of all the INC negotiations, thereby helping to avoid duplication of efforts and regulatory fragmentation.

However, the DPP remains an initiative voluntary in nature, while negotiations on the much-needed legally binding international treaty on plastic pollution have temporarily halted. Positive

⁵⁹ See G. NAGTZAAM, G. VAN CALSTER, S. KOURABAS, E. KARATAEVA, *Plastic regulation in the European Union*, in *Global plastic pollution and its regulation : history, trends, perspectives*, Edward Elgar, 2023, p. 144. See also, as example, European Court of Auditors, *EU action to tackle the issue of plastic waste*, Review No 04, 2020.

⁶⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM/2021/66 final, p.12.

⁶¹ See A. QUARTA, *The World Trade Organisation Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP/DPP) & the Global Plastic Treaty*, in *The WTO as Major Driver of Sustainable Development and its Reform Process*, edited by E. BARONCINI, AMS Acta Alma DL – Università di Bologna, 2025.

national and regional examples, including those provided by the European Union through its recent legislative measures and policy initiatives, are certainly welcome, but a global approach remains necessary.

Future developments will be crucial in determining how negotiations on the global plastics treaty will resume and evolve. At the same time, the DPP will need to continue delivering concrete outcomes and effective guidance to support the transition towards a circular plastics economy, while avoiding regulatory fragmentation and redundancy with the treaty negotiations. The DPP also has the potential to further strengthen the relationship between trade and environmental protection and to continue advancing trade-based solutions to plastic pollution. As international trade can still play a pivotal role in the global governance of plastics, the DPP is well positioned to contribute to a more coherent, coordinated, and effective international response to this global challenge.

Saving Multilateralism through Informality? The WTO Fossil Fuel Subsidy Reform Initiative in an Era of Fragmentation

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1. Introduction

The multilateral trading system is increasingly confronted with a paradox. On the one hand, global challenges such as climate change, energy transition and industrial decarbonisation require more coordination, more transparency and more collective action. On the other hand, the institutional capacity of the World Trade Organization (WTO) to produce new binding multilateral rules has been weakened by geopolitical fragmentation, negotiating deadlock, the crisis of consensus-based decision-making and the long-standing paralysis of the Appellate Body. This tension is particularly visible in the field of trade and environment, where the need to reconcile open markets, sustainable development and climate mitigation has become increasingly urgent, while formal and binding rule-making remains politically difficult. Against this background, this article examines the emergence, evolution and institutional significance of the WTO Fossil Fuel Subsidy Reform (FFSR), an initiative that offers a significant case study for understanding how the WTO may continue to perform important governance functions even in the absence of traditional multilateral law-making.

The FFSR initiative, in its current form, was launched through a ministerial statement adopted in 2021 by a group of WTO Members seeking to advance the rationalisation and phase-out of inefficient fossil fuel subsidies that encourage wasteful consumption. Since then, it has gradually developed into a structured, although informal, platform for dialogue, transparency, experience-sharing and policy coordination. The latest related WTO document, the 2026 Progress Report, has provided evidence that the initiative has moved beyond general political commitment and has entered a phase of more concrete operationalisation, as it started generating practical outputs.

The article's central argument is that the FFSR Initiative should be understood as a form of informal plurilateralism¹ embedded within the multilateral trading system. It is informal because it does not operate through a formal negotiating mandate, does not constitute a WTO committee in the strict sense, and does not produce binding legal obligations. Its outputs consist instead of ministerial statements, work programmes, progress reports, sample questions, thematic discussions, stakeholder inputs, information papers and preliminary analytical tools. It is plurilateral because it is driven by a coalition of willing WTO Members rather than by the full membership. Yet it remains embedded in the WTO multilateral system because it operates within the WTO institutional space, relies on existing WTO mechanisms such as the Trade Policy Review Mechanism and the Committee on Trade and Environment, and remains open to broader participation by Members and interested stakeholders, creating a platform for dialogue that remains institutionally anchored in the WTO. Rather than representing a departure from multilateralism, the initiative illustrates how flexible and voluntary forms of cooperation can function as adaptive mechanisms within a multilateral institution facing structural constraints. More broadly, the initiative sheds light on the evolving governance dynamics of the WTO in an era of political and economic fragmentation. As formal negotiations become increasingly difficult, informal platforms such as the FFSR Initiative may play a crucial role in sustaining multilateral engagement, fostering transparency, generating reputational pressure, and preparing the ground for future normative developments. While such mechanisms raise important questions concerning inclusiveness, legitimacy, and effectiveness, they may also represent an important strategy for maintaining the relevance of the WTO as a central forum for global trade governance in a rapidly changing international order.

Thus, this article proceeds as follows. The first section situates fossil fuel subsidies within the broader framework of international trade governance, highlighting why these measures are increasingly regarded as a matter of concern for the multilateral trading system, particularly in light of their potential trade-distorting effects and their interaction with global climate objectives. The second section reconstructs the origins and development of the FFSR Initiative within the WTO, tracing its emergence from the initial ministerial statement adopted in 2021 to its consolidation through the MC13 work programme and the 2026 progress report submitted to MC14. The third section analyses the institutional outputs generated by the initiative, including ministerial declarations, work programmes, TPR-related transparency tools, thematic discussions, stakeholder inputs, crisis-support guidelines, and the preliminary grid on subsidy types and impacts. Building on this empirical reconstruction, the fourth section develops the article's central argument by conceptualizing the FFSR Initiative as a form of informal plurilateralism embedded within the multilateral system. The fifth section situates this development within the broader debate on the crisis and transformation of multilateral trade governance, exploring how informal initiatives may contribute to the adaptive resilience of the WTO. The final section reflects on the opportunities and limitations of such mechanisms, considering their implications for inclusiveness, legitimacy, effectiveness, and the future evolution of the multilateral trading system.

¹ C. OELGEMÖLLER, *Informal Plurilateralism: The Impossibility of Multilateralism in the Steering of Migration*, in *British journal of politics & international relations*, 2011, Vol.13, 1.

2. *Fossil Fuel Subsidies as a Trade and Climate Governance Problem*

Fossil fuel subsidies are increasingly regarded as one of the most problematic intersections between trade policy, climate governance and public finance. Yet, despite the apparent simplicity of the expression, the concept itself is difficult to define with precision. Fossil fuel subsidies may take many different forms: direct budgetary transfers to producers or consumers, tax exemptions, reduced excise duties, public guarantees, administered prices, below-market provision of energy inputs, support for fossil fuel infrastructure, or emergency measures adopted in response to energy price shocks. They may support production or consumption; they may concern coal, oil, gas or fossil-fuel-based electricity; and they may be structural, temporary, general, sector-specific or targeted at vulnerable groups. This conceptual difficulty is also reflected in the different methodologies used to measure the phenomenon. The OECD and the International Energy Agency tend to focus on direct budgetary support, tax expenditures and price-gap support, while the IMF adopts a broader methodology that also includes the under-pricing of environmental externalities and foregone consumption taxes². These different approaches explain why estimates may vary significantly, giving evidence that fossil fuel subsidies are not merely a budgetary issue. They are also a question of environmental externalities, market structure and distributive policy.

From a WTO perspective, the difficulty is compounded by the fact that existing WTO subsidy disciplines were not designed specifically to capture fossil fuel support as a category of environmental harm. Article 1.1 of the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement) defines a subsidy as a financial contribution by a government or public body, or any form of income or price support within the meaning of Article XVI of GATT 1994, which confers a benefit³. Article 2 further requires specificity for many SCM disciplines to apply. Fossil fuel support measures may therefore fall within WTO subsidy law where they satisfy these requirements. However, as the SCM Agreement is a trade law instrument, it does not classify subsidies according to their carbon intensity, climate impact or contribution to energy transition. This does not make WTO law irrelevant. Rather, it shows the limits of applying existing subsidy disciplines to a problem that is at once economic, environmental and political. Many fossil fuel-related measures may be general, economy-wide, embedded in energy security policies, or justified as social protection. Others may confer concrete advantages on specific industries or firms. The first analytical task is therefore to avoid treating all forms of energy support as equivalent. A broad category of fossil fuel subsidies exists, but within it one must distinguish between structural or inefficient support that prolongs fossil fuel dependence and temporary measures designed to respond to crises or protect vulnerable households.

² ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *OECD Inventory of Support Measures for Fossil Fuels*, 2025; INTERNATIONAL ENERGY AGENCY, *Fossil Fuel Subsidies in Clean Energy Transitions: Time for a New Approach?*, 2023; S. BLACK, I. PARRY, N. VERNON, *Still Not Getting Energy Prices Right: A Global and Country Update of Fossil Fuel Subsidies*, in *IMF Working Paper*, 236, 2021.

³ WORLD TRADE ORGANISATION (WTO), *Agreement on Subsidies and Countervailing Measures*; WTO, *General Agreement on Tariffs and Trade*, 1994. The SCM Agreement disciplines the use of government subsidies and regulates the actions countries can take to counter the trade-distorting effects of these subsidies. It provides a legal framework for both multilateral dispute settlement and unilateral countervailing duties.

The relevance of fossil fuel subsidies for the WTO does not derive only from climate concerns. It also derives from classic trade-related concerns: market distortions, altered production costs, competitive advantages and transparency deficits. Fossil fuel subsidies may affect trade in at least three ways. First, subsidies to fossil fuel production may alter the price and availability of coal, oil and gas in domestic and international markets. By lowering extraction, production or transport costs, such measures can sustain fossil fuel supply that would otherwise be less competitive. Secondly, consumption subsidies or below-market energy prices may confer cost advantages on domestic producers using fossil fuels as inputs. This is particularly important for energy-intensive sectors such as steel, aluminium, cement, chemicals, plastics and transport, where energy prices represent a significant component of production costs. Thirdly, fossil fuel subsidies may generate pass-through effects along value chains, shaping comparative advantages in downstream sectors and affecting international competition. For these reasons, fossil fuel subsidies cannot be considered purely domestic measures. They may influence trade flows, investment decisions, production patterns and sectoral competitiveness. They may also contribute to overcapacity and overproduction in carbon-intensive industries, particularly when energy-intensive producers benefit from artificially low input costs. Recent WTO work on fossil fuel subsidies has increasingly framed the issue in these terms, linking fossil fuel support not only to environmental harm, but also to trade and competitive distortions in emissions-intensive sectors⁴. The trade relevance of fossil fuel subsidies also explains why transparency has become such a central entry point. WTO law already contains notification obligations. Article 25 of the SCM Agreement requires Members to notify specific subsidies, while Article XVI:1 of GATT 1994 requires notification where a subsidy operates directly or indirectly to increase exports or reduce imports. However, subsidy notifications remain incomplete and uneven, and fossil fuel-related measures are often difficult to identify, classify and compare. The problem is therefore not simply the absence of rules, but the lack of systematic information and shared categories.

The climate dimension of fossil fuel subsidies is equally significant. By lowering the cost of fossil fuel production or consumption, subsidies may encourage inefficient consumption, weaken incentives for energy efficiency, delay investments in renewable energy and contribute to carbon lock-in. In particular, production subsidies may operate as a negative price on carbon emissions by artificially lowering the cost of fossil fuel supply and encouraging higher levels of production and consumption. They may also reduce the effectiveness of carbon pricing instruments by offsetting price signals intended to discourage carbon-intensive behaviour⁵. In this sense, fossil fuel subsidies can at the same time be incompatible with efficient resource allocation and undermine the credibility of climate transition pathways. The international community has long recognised this problem. The 2009 G20 Pittsburgh Leaders' Statement committed leaders to phase out and rationalise, over the medium term, inefficient fossil fuel subsidies while providing targeted support for the poorest⁶. The UN Sustainable Development Goals similarly call for the rationalisation of inefficient fossil fuel

⁴ WTO SECRETARIAT, *Main Types of Fossil Fuel Subsidy Measures: Subsidies in High-Emitting Sectors*, INF/TE/FFSR/W/6, 2025.

⁵ I. GERASIMCHUK, A.M. BASSI, C. DOMINGUEZ ORDONEZ, A. DOUKAS, L. MERRILL, S. WHITLEY, *Zombie Energy: Climate Benefits of Ending Subsidies to Fossil Fuel Production*, in *International Institute for Sustainable Development working papers*, 2017.

⁶ G20, *Leaders' Statement: The Pittsburgh Summit*, 2009.

subsidies that encourage wasteful consumption, while taking into account the specific needs and conditions of developing countries and minimising possible adverse impacts on their development⁷. The Paris Agreement does not directly regulate fossil fuel subsidies, but its temperature goals and its broader decarbonisation logic make long-term fossil fuel support increasingly difficult to reconcile with credible climate action⁸. This broader climate framework helps explain why fossil fuel subsidy reform has become a topic of concern within the WTO. The Marrakesh Agreement itself recognises that trade relations should be conducted with a view to raising standards of living while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development⁹. The WTO is therefore not institutionally blind to environmental concerns. The question is rather how such concerns can be addressed through the specific legal and procedural tools available within the multilateral trading system.

At the same time, fossil fuel subsidy reform is politically sensitive. Energy prices affect households, firms, transport, agriculture, industrial production and access to basic services. In many countries, energy support measures are linked to poverty reduction, fuel affordability, electricity access or social stability. Sudden removal of subsidies may generate distributive shocks, public resistance and political instability, especially where social protection systems are weak. The reform of fossil fuel subsidies therefore cannot be reduced to a simple legal or economic exercise. This sensitivity became particularly evident during the energy crisis of 2021–2023, when many governments introduced temporary measures – including fuel tax reductions, price caps, direct transfers and support for vulnerable consumers – to shield households and firms from rising energy prices. Recent geopolitical tensions stemming from the Iran war and the block of the strait of Hormuz have renewed concerns over energy security, again showing how quickly governments may be tempted to resort to crisis support measures. Certain measures may be socially justified, at least in the short term; others risk entrenching fossil fuel dependence. This distinction is central to the WTO FFSR Initiative. The objective is not to condemn every form of public intervention in energy markets, but to develop criteria for distinguishing harmful, inefficient or structural subsidies from measures that are transparent, targeted and temporary. This is also why fossil fuel subsidy reform is particularly suited to an initial governance strategy based on informality rather than immediate enforceability. Before Members can agree on binding disciplines, they need to identify the relevant measures, understand their effects, distinguish among different categories of support and assess their social and developmental implications. The WTO's Trade Policy Review Mechanism and the Committee on Trade and Environment provide procedural spaces for precisely this type of dialogue. In this sense, fossil fuel subsidies represent not only a trade and climate problem, but also a governance issue: they require institutions capable of producing information, comparison and gradual convergence.

⁷ UNITED NATIONS GENERAL ASSEMBLY, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, 2015, SDG 12.c.

⁸ UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, *Paris Agreement*, 2015, Articles 2 and 4.

⁹ WTO, Marrakesh Agreement Establishing the World Trade Organization, *Preamble*, 1994.

3. *The Emergence and Consolidation of the WTO FFSR Initiative*

Before its formal consolidation, fossil fuel subsidy reform had already appeared in different international fora, including the G20, the G7¹⁰, APEC¹¹ and the United Nations. Within the WTO, the issue had been addressed more indirectly through the Committee on Trade and Environment, subsidy notifications, and Trade Policy Reviews. Although these references remained scattered, they paved the way to a structured WTO process specifically devoted to fossil fuel subsidies. The first important step towards a WTO-based initiative was taken at the Eleventh Ministerial Conference in Buenos Aires in 2017, when a group of Members issued a ministerial statement on fossil fuel subsidies¹². The more decisive moment, however, came in December 2021, with the circulation of the Ministerial Statement on Fossil Fuel Subsidies¹³. Through this statement, a group of WTO Members¹⁴ placed fossil fuel subsidy reform more clearly on the WTO agenda and called for concrete options to advance the rationalisation and phase-out of inefficient fossil fuel subsidies that encourage wasteful consumption. The statement explicitly linked fossil fuel subsidy reform to sustainable development, climate mitigation and the need to reduce trade and investment distortions. At the same time, it acknowledged the specific needs and conditions of developing countries, as well as the importance of protecting poor and vulnerable communities. This initial statement did not create binding obligations, nor did it establish a formal negotiating mandate. Its significance was different. It created a political coalition around a common proposition: that fossil fuel subsidies are not only an environmental concern, but also a matter of relevance for the multilateral trading system. In doing so, the 2021 statement inaugurated the basic logic of the FFSR Initiative: to use the WTO not immediately as a rule-making machine, but as a forum for dialogue, transparency and gradual convergence.

The initiative acquired a more structured institutional form in 2022. The ministerial statement was revised in June 2022¹⁵, while the co-sponsors also adopted a High-Level Work Plan for 2022–2023¹⁶ to maintain political momentum. This marked the passage from a political declaration to a dedicated process of discussion within the WTO, transforming the 2021 statement into an informal plurilateral platform situated within the WTO institutional space.

The initiative reached a further stage of consolidation at the Thirteenth Ministerial Conference in Abu Dhabi in 2024, following which the Ministerial Statement on Fossil Fuel Subsidies¹⁷ gave the initiative a clearer operational architecture, organising the future work around three pillars. The first

¹⁰ G7, *Leaders' Declaration*, Ise-Shima, 2016

¹¹ ASIA-PACIFIC ECONOMIC COOPERATION, *2009 Leaders' Declaration*, Singapore, 2009.

¹² WTO, *Fossil Fuel Subsidies Reform Ministerial Statement*, WT/MIN(17)/54, 2017.

¹³ WTO, *Ministerial Statement on Fossil Fuel Subsidies*, WT/MIN(21)/9/Rev.1, 2021. Although the statement was circulated in the context of the ministerial process leading to MC12, the Conference itself was ultimately held in June 2022 because of the Covid-19 Pandemic.

¹⁴ The statement was issued by the following Members: Albania; Chile; Costa Rica; European Union; Fiji; Iceland; Liechtenstein; Moldova, Republic of; Montenegro; New Zealand; North Macedonia; Norway; Panama; Switzerland; Tonga; United Kingdom; Uruguay; and Vanuatu.

¹⁵ WTO, *Ministerial Statement on Fossil Fuel Subsidies*, WT/MIN(21)/9/Rev.2, 2022. The revised statement was characterised by the enlargement of co-sponsors through the inclusion of Paraguay and Samoa, although it maintained the substantive content of the 2021 version.

¹⁶ WTO, *Fossil Fuel Subsidy Reform: High-Level Work Plan 2022–2023*, WT/MIN(22)/8, 2022.

¹⁷ WTO, *Ministerial Statement on Fossil Fuel Subsidy Reform*, WT/MIN(24)/19, 2024.

pillar concerned enhancing transparency. Co-sponsors sought to improve the availability and quality of information on fossil fuel subsidies through existing WTO mechanisms, especially Trade Policy Reviews. The second pillar concerned temporary crisis support measures, with particular attention to the measures adopted during the energy crisis of 2021–2023. The objective was to distinguish emergency interventions from structural subsidisation and to develop practical guidance so that such measures remain targeted, transparent and temporary. The third pillar concerned identifying and addressing the most harmful fossil fuel subsidies, especially those with significant trade and environmental effects. The MC13 statement was accompanied by a detailed work programme for 2024–2025 and by a non-exhaustive list of sample questions for use in Trade Policy Reviews¹⁸. This was a significant institutional development. The initiative was no longer limited to general political statements. It now had concrete working tools: sample questions, thematic discussions, stakeholder engagement, analytical papers and a phased agenda. The focus on Trade Policy Reviews was particularly important because it allowed the initiative to use an existing WTO mechanism to generate information and peer scrutiny without first creating new legal obligations.

Finally, the most recent stage of the initiative was reached at the Fourteenth Ministerial Conference in Yaoundé, Cameroon, in March 2026. Two documents are particularly relevant. The first is the Progress Report of 2026, drawn up by the Coordinator, New Zealand, for 2024–2025¹⁹. This document is central because it provides the most systematic account of the work undertaken under the FFSR Initiative after MC13, in line with the work plan annexed to the MC13 Ministerial Statement. It confirms that the initiative has moved from political commitment to a more concrete phase of operationalisation. The Progress Report also shows that the FFSR Initiative has increasingly operated as a point of connection between WTO-based discussions and broader climate-governance processes. In this regard, the Netherlands and Colombia drew attention to the upcoming First Conference on Transitioning Away from Fossil Fuels, describing it as a science-based and delivery-focused space for committed countries, subnational governments and other stakeholders, complementary to multilateral efforts such as the FFSR Initiative²⁰.

The second relevant MC14 document is the Ministerial Statement on the FFSR Initiative²¹. This statement does not merely take note of the work carried out after MC13. It adopts two concrete outputs: an updated non-exhaustive list of sample questions on fossil fuel subsidies and fossil fuel subsidy reform for regular use in WTO Trade Policy Reviews, and guidelines for designing transparent, targeted and temporary fossil fuel subsidy measures in response to energy crises.

This incremental sequence — from the 2017 and 2021 ministerial statements to the 2022 work plan, the MC13 work programme and the MC14 outputs — shows that the FFSR Initiative has undergone a gradual process of institutionalisation. Its deeper institutional significance, however, lies in the particular form of cooperation that it embodies: a coalition-led, open-ended and non-binding process operating within the WTO framework.

¹⁸ WTO, *Ministerial Statement on Fossil Fuel Subsidy Reform*, WT/MIN(24)/19, Annexes 1 and 2, 2024.

¹⁹ WTO, *Fossil Fuel Subsidy Reform Initiative: Progress Report by the Coordinator (New Zealand) 2024–2025*, WT/MIN(26)/24, 26 March 2026.

²⁰ This connection will be further examined in the fifth section.

²¹ WTO, *Ministerial Statement on Fossil Fuel Subsidy Reform*, WT/MIN(26)/23, 26 March 2026.

4. From Political Commitment to Operationalized Informality: Outputs and Working Methods of the FFSR Initiative

The institutional significance of the FFSR Initiative lies primarily in the type of governance it has gradually generated. Its outputs do not amount to binding WTO law, nor do they amend the covered agreements or create enforceable obligations. Nevertheless, they are institutionally meaningful because they structure discussion, define relevant information, create expectations of transparency and prepare the ground for possible future normative developments. These statements should therefore not be read merely as political declarations. They transformed the initiative from a general political commitment into a recurring institutional process, providing a calendar, a method and a set of priorities. The 2021 statement placed fossil fuel subsidy reform on the WTO agenda by linking inefficient fossil fuel subsidies to wasteful consumption, trade and investment distortions, sustainable development and climate mitigation. The High-Level Work Plan did not create a new WTO body in the strict legal sense. Rather, it established a forum for dedicated discussions among interested Members and relevant stakeholders, giving the initiative structure and continuity, while avoiding the legal and political difficulties associated with a formal multilateral negotiation. The 2024 MC13 statement deepened this agenda by organising the initiative around a more operational programme of work based on three interconnected pillars: enhancing transparency; addressing temporary crisis support measures; and identifying and addressing the most harmful fossil fuel subsidies. The 2026 MC14 statements recognised the outputs so far produced and paved the way for future developments.

The most concrete output of the FFSR Initiative so far concerns the transparency pillar. The initiative has relied heavily on the WTO Trade Policy Review Mechanism (TPRM), which is designed to improve transparency and understanding of Members' trade policies and practices²². Rather than creating a new reporting obligation, the co-sponsors have sought to make better use of an existing WTO mechanism. The key tool has been the development of sample questions on fossil fuel subsidies for use in Trade Policy Reviews. These questions ask Members to provide information on the nature, extent, design and implementation of fossil fuel support measures, including crisis measures, reform efforts, socio-economic impacts and measures adopted to protect vulnerable groups. Although they do not legally compel disclosure, they structure peer scrutiny and create an expectation that Members should be able to identify, explain and justify their fossil fuel subsidy measures. The 2026 Progress Report finally suggests that this strategy has already produced a measurable effect. It records a notable increase in fossil-fuel-subsidy-related questions in Trade Policy Reviews after MC13, with the average annual number of questions rising from approximately twenty before MC13 to around thirty-eight by December 2025. This is significant because it shows that the initiative has affected WTO practice without creating new law. Through the TPRM, the FFSR Initiative has turned a general transparency mechanism into a thematic transparency tool for fossil fuel subsidies.

The second strand of work – temporary crisis support measures – responds to the experience of the energy crisis of 2021–2023, when many governments adopted measures to protect households

²² WTO, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, Trade Policy Review Mechanism, 1994.

and firms from rising energy prices. These measures included fuel tax reductions, price caps, direct transfers, stabilisation funds and support for vulnerable consumers. The initiative's approach is not to condemn all crisis interventions as illegitimate fossil fuel subsidies. Such an approach would be politically unrealistic and normatively unconvincing. Instead, the FFSR Initiative seeks to distinguish emergency support from structural subsidisation. The key idea is that crisis measures should be transparent, targeted and temporary. Transparency requires that measures be clearly identified and publicly explained. Targeting requires that support be directed towards those most affected, rather than broadly suppressing energy prices for all consumers or firms. Temporariness requires time limits, periodic review and credible phase-out strategies. This pillar is important because it gives the initiative political balance, avoiding an abstract prohibition of public intervention. It recognises that energy price shocks can justify public intervention, especially where vulnerable households are affected. At the same time, it prevents temporary crisis responses from becoming permanent fossil fuel support.

The outputs of the third pillar – the identification of fossil fuel subsidies that are most harmful to trade and the environment – are the most ambitious. The 2026 Progress Report records work on production subsidies and on subsidies passed through to emissions-intensive sectors such as steel, aluminium, cement, chemicals and plastics. This is particularly important from a WTO perspective because the trade effects of fossil fuel subsidies often arise indirectly, through lower input costs for downstream industries. The preliminary grid included in the 2026 Progress Report is expressly described as non-exhaustive, indicative and illustrative. It is therefore not a legal classification and does not determine the illegality of any measure. Nevertheless, it performs a pre-normative function. It begins to organise the field by distinguishing types of subsidies, beneficiaries, fuels, sectors and possible impacts. It connects fossil fuel support to lower production costs, overcapacity, competitive distortions, weaker incentives for low-emission technologies, carbon lock-in and environmental harm. This classificatory work is essential. Before Members can negotiate disciplines, they need shared categories and a common vocabulary. The grid therefore illustrates how informal processes can generate the conceptual infrastructure for future norm development.

The 2026 Progress Report confirms that this architecture has generated continuity. The report does not simply restate the initiative's objectives. It reconstructs the activities carried out in 2024–2025, records the use of Trade Policy Review questions, summarizes work on crisis-support guidelines and describes the preliminary development of a grid of subsidy types and impacts. In this sense, the progress report operates as an instrument of internal accountability. It allows the co-sponsors to show that the initiative has moved from rhetoric to practical work. Also, the outputs of the 2026 MC14 statement – an updated non-exhaustive list of sample questions to use in TPRs and guidelines for designing transparent, targeted and temporary fossil fuel subsidy measures – show that the initiative is not merely rhetorical. Although the initiative remains non-binding, it has begun to produce procedural templates, analytical tools and soft standards capable of influencing WTO practice.

Finally, the FFSR Initiative has developed an important epistemic dimension. Its meetings have involved contributions from international organisations and specialised actors²³, which provided data, methodological tools, policy examples and sectoral analysis. This stakeholder involvement shows that the initiative is an open knowledge platform not limited to WTO Members, which combines WTO procedures with expertise developed in climate, energy, finance and development institutions. This is particularly valuable because fossil fuel subsidies are complex and heterogeneous. Their effects cannot be understood solely through legal categories but need sectoral expertise.

Overall, the FFSR Initiative has moved from political commitment to operationalized informality. Its outputs remain soft, voluntary and non-binding. Yet they are not irrelevant. They generate transparency, structure peer review, develop technical categories, encourage experience-sharing and create the conditions for gradual convergence. The initiative's legal-institutional significance therefore lies not in the production of hard law, but in the proceduralisation of a difficult trade-climate issue within the WTO.

5. *The FFSR Initiative as Embedded Informal Plurilateralism*

The empirical reconstruction developed in the previous sections allows the FFSR Initiative to be conceptualised as a form of embedded informal plurilateralism. This expression is useful because the initiative does not fit neatly into traditional categories of WTO governance. It is not classical multilateral rule-making, because it does not involve the adoption of binding obligations by the entire WTO membership. It is not a formal plurilateral agreement, because it does not create enforceable commitments among a subset of Members. Nor is it an external climate club, because it does not operate outside the WTO. It is instead a coalition-led, non-binding and open-ended process that uses WTO procedures to generate transparency, dialogue and progressively denser common understandings. These features – informality, plurilateralism and embeddedness – are further analysed hereinafter.

Informality characterises both its process and its outputs. FFSR has not been established as a formal WTO body. It does not rest on a universal negotiating mandate. It does not produce covered agreements, actionable rights or enforceable obligations. Its soft law instruments – ministerial statements, work programmes, progress reports, sample questions, guidelines, thematic discussions, Secretariat inputs and stakeholder contributions – are not institutionally irrelevant, as they contribute to organise discussion, define priorities, standardise questions and create expectations of justification. In this sense, the initiative illustrates how informality may produce normative effects without taking the form of binding law. This understanding is consistent with the broader phenomena on informal international lawmaking, which has shown that international cooperation often develops through actors, processes and outputs that do not correspond to classical treaty-making, but may nevertheless influence conduct and expectations²⁴.

²³ Such as the Organisation for Economic Co-operation and Development (OECD), the International Energy Agency (IEA), the International Institute for Sustainable Development (IISD), the Forum on Trade, Environment and the SDGs (TESS), the World Bank, the United Nations Development Programme (UNDP), the Global Environment Facility (GEF) and the Asian Development Bank.

²⁴ J. PAUWELYN, A. RAMSES WESSEL, J. WOUTERS, *Informal International Lawmaking*, Oxford University Press, 2012.

The membership and leadership structure of the FFSR shows its second crucial feature: plurilateralism. FFSR is led by a group of co-sponsors – rather than by the full WTO membership – and coordinated by one leading sponsor: New Zealand. Besides, its membership has expanded incrementally over time, including developed, developing and small island economies, as well as the European Union and its Member States. The institutional framing of the FFSR reveals both the strengths and the limits of the initiative. On the one hand, it is not representative of the entire WTO membership, and several major fossil fuel producers or large subsidising economies remain outside the core coalition. On the other hand, an informal plurilateral setting allows a group of willing Members to keep a politically sensitive issue alive, whereas universal consensus on binding disciplines would be extremely difficult to achieve at the current stage. At the same time, the FFSR Initiative should not be confused with a closed club. It does not create exclusive rights for participants, nor does it impose obligations only on a defined group of parties. It has no ratification procedure and no legal accession mechanism. Participation is political and procedural rather than juridical. In this respect, the initiative differs from formal WTO plurilateral agreements. Article II:3 of the Marrakesh Agreement provides that plurilateral trade agreements included in Annex 4 are binding only on Members that have accepted them and do not create rights or obligations for Members that have not accepted them. The FFSR Initiative is not an Annex 4 agreement and does not seek, at least for now, formal incorporation into the WTO legal architecture. This institutional design is central to the argument developed in this article. The FFSR Initiative is plurilateral in structure, but multilateral in ambition. A coalition of Members provides political energy, but the outputs are designed to diffuse through WTO processes more broadly. This distinction is important because it reduces the risk that plurilateralism becomes an instrument of fragmentation.

However, the defining feature of the FFSR Initiative is its embeddedness. The initiative remains situated inside the WTO institutional environment. It uses WTO documents, WTO meetings, WTO transparency mechanisms and WTO bodies. Notably, it relies on the Trade Policy Review Mechanism as its main operational channel and seeks to connect its work to the Committee on Trade and Environment. It therefore uses the organisation's existing procedural infrastructure to address a problem that cannot yet be regulated through binding multilateral disciplines. The link with the WTO is also normative. The Marrakesh Agreement recognises sustainable development as part of the context in which trade relations should be conducted. By framing fossil fuel subsidy reform as a matter of transparency, trade distortions and sustainable development, the FFSR Initiative draws on this internal WTO language rather than importing an entirely external climate agenda. This reinforces its legitimacy as a WTO-based process. In this regard, the distinction of FFSR from similar external initiatives like sectoral agreements or climate clubs is essential. Climate clubs and treaty-based sectoral arrangements may be useful instruments of cooperation, especially when they produce concrete commitments. For instance, the Agreement on Climate Change, Trade and Sustainability (ACCTS), signed by Costa Rica, Iceland, New Zealand and Switzerland, has been described as containing an enforceable framework on harmful fossil fuel subsidies²⁵. Such instruments may even go further than the FFSR Initiative in legal terms. However, they also raise different institutional

²⁵ Agreement on Climate Change, Trade and Sustainability (ACCTS), signed by Costa Rica, Iceland, New Zealand and Switzerland, 2024.

questions. External climate clubs often operate through exclusion, conditionality or preferential benefits. They may generate stronger commitments, but they do not necessarily reinforce the WTO's deliberative function. The FFSR Initiative is weaker in terms of legal enforceability, but stronger in terms of institutional embeddedness. It does not create a parallel regime outside the WTO. Instead, it uses the WTO's architecture to promote transparency and gradual convergence. This does not mean that external agreements and WTO-based informal initiatives are mutually exclusive. They may interact. External instruments can provide examples of more advanced disciplines, while the WTO-based initiative can expose a broader membership to those experiences. In this sense, the FFSR Initiative may function as an interface between external climate governance and WTO trade governance. This linkage is evident in the 2026 Progress report, which contains a reference to the abovementioned external Conference on Transitioning Away from Fossil Fuels.

To sum up, the concept of embedded informal plurilateralism captures the balance between plurilateral agency and multilateral legitimacy. Plurilateral agency allows a smaller group of Members to act when full consensus is unavailable, giving the initiative direction, continuity and political momentum. Without such agency, fossil fuel subsidy reform would likely remain dispersed across different fora or confined to general climate commitments. Multilateral legitimacy, however, depends on the fact that the process remains anchored in the WTO, preventing it from becoming a purely external or exclusive arrangement. This is the central institutional advantage of the FFSR model. It allows willing Members to move ahead while keeping the discussion within a shared multilateral framework, limiting the risk of fragmentation. This balance is particularly important in the current international order characterised by political and economic rivalry among great powers. If climate-related trade issues are addressed only through unilateral measures, external clubs or regional agreements, the risk of fragmentation increases. The FFSR Initiative offers a more restrained alternative: it advances a difficult issue through soft cooperation, but without abandoning the WTO as the central forum for trade governance. A possible objection is that, if the FFSR Initiative does not create binding obligations, its legal significance is limited. This objection is only partly convincing. It is true that the initiative does not produce hard law enforceable before WTO dispute settlement, yet its legal significance should not be reduced to immediate enforceability, but should be regarded considering its indirect legal-institutional effects. Before hard law can emerge, Members need information, examples, categories and a common vocabulary. To this end, the FFSR has been laying down conditions under which future normative developments become possible: first, it enhances the meaning of transparency under the TPRM by identifying what information on fossil fuel subsidies should be made visible and discussable; secondly, it changes the type of questions Members ask about subsidies, linking them not only to trade effects but also to climate commitments, fiscal costs and transition pathways; thirdly, it contributes to the formation of shared categories, especially through the preliminary work on harmful subsidies and emissions-intensive sectors.

This is why the initiative is best understood as preserving multilateralism rather than eroding it. It does not bypass the WTO through a closed external arrangement. It does not impose binding disciplines without consensus. It does not transform plurilateralism into legal segmentation. Instead, it uses informal and plurilateral methods to maintain collective deliberation within the WTO. In a fragmented international order, this may be one of the most realistic ways for the multilateral system to remain institutionally relevant.

6. Informality, Institutional Adaptation and the Future of WTO Multilateralism

The FFSR Initiative must be understood against the background of the broader crisis of WTO multilateralism. The WTO was designed around a relatively specific institutional model: binding multilateral rules, negotiations based on consensus, transparency obligations and a strong dispute settlement system. In practice, however, this original blueprint no longer fully captures the way in which the organisation operates today. The negotiating function has been weakened by the difficulty of reaching consensus among a large and increasingly heterogeneous membership. The Appellate Body crisis has undermined the authority of WTO dispute settlement. At the same time, geopolitical tensions, industrial policy competition, unilateral trade measures, regional agreements and external climate clubs have contributed to a more fragmented trade order. This does not mean that the WTO has become irrelevant. Rather, it means that some of its most important functions are shifting. If the organisation struggles to produce new binding rules, it may still provide value as a forum for transparency, monitoring, technical dialogue, peer review and gradual norm development. The FFSR Initiative is significant precisely because it operates within this transformed institutional environment. It does not solve the crisis of WTO law-making. However, it shows how WTO Members may continue to use the organisation to address politically sensitive issues even when formal multilateral negotiations are not available.

The WTO, like other international organisations, was designed to function in a particular way, but its practice has evolved in response to institutional blockage. The formal model of multilateral trade governance assumes that Members negotiate rules, adopt binding commitments and enforce them through dispute settlement. Yet contemporary WTO governance increasingly relies on more flexible practices: informal working groups, joint initiatives, thematic sessions, ministerial statements, Secretariat notes, best-practice exchanges and non-binding guidelines. This evolution should not be seen only as a symptom of institutional decline. It may also be understood as a form of adaptation. When formal rule-making is blocked, Members may use informal processes to keep issues on the agenda, collect information, build trust and prepare the ground for future convergence. The FFSR Initiative follows this logic. It does not seek, at least for now, to create a new WTO agreement on fossil fuel subsidies. Instead, it uses existing WTO procedures and informal instruments as a form of institutional resilience, so as to develop a structured dialogue in a time when formal binding tools cannot be used. In this respect, the initiative illustrates a broader transformation of WTO governance and functioning. Being used not only as a rule-making and jurisdictional systems, but also as a platform for policy learning and institutional experimentation, it may preserve the conditions under which binding legislation may eventually become achievable.

A similar evolving dynamic can be observed in climate governance. The previously cited First Conference on Transitioning Away from Fossil Fuels, co-hosted by Colombia and the Netherlands in Santa Marta in April 2026, was explicitly designed as a space for actors willing to move forward on the transition away from fossil fuels in response to the limitations of consensus-based multilateral

processes²⁶. Its methodology combined stakeholder-led dialogues, a high-level segment and thematic work on economic dependence, supply and demand transformation, and international cooperation. The conference did not seek to replace the UNFCCC. Rather, it was framed as a complementary process aimed at creating a coalition of willing actors, maintaining momentum and feeding its outcomes into other multilateral processes. This confirms a broader trend: where universal agreement is difficult, international institutions and coalitions increasingly rely on parallel, flexible and implementation-oriented processes to preserve collective action.

Nevertheless, informal plurilateralism should not be overrated. The FFSR Initiative has important limits. The first concerns effectiveness. Because its outputs are voluntary and non-binding, the initiative cannot by itself compel Members to reform fossil fuel subsidies. It may increase transparency and reputational pressure, but it does not create enforceable obligations or sanctions. There is therefore a risk that the WTO becomes a venue for repeated dialogue without producing concrete reform. The second limit concerns representation. The initiative is open, but openness does not entail inclusion. Agenda-setting power remains concentrated among co-sponsors, the coordinator, participating stakeholders and the Secretariat's analytical framing. This becomes particularly sensitive when the initiative moves from transparency to classification. Identifying which subsidies are 'most harmful' is not a neutral technical exercise. It may influence peer pressure and possible legal developments. For this reason, the cautious language used in the 2026 Progress Report, which describes the preliminary grid as non-exhaustive, indicative and illustrative, is important. The third limit concerns participation by major subsidising economies and fossil fuel-dependent countries. If the initiative remains confined to a coalition of Members already inclined toward reform, its impact may be limited. Its long-term effectiveness depends on whether it can attract meaningful engagement from Members whose policies are most relevant for fossil fuel subsidy reform.

The legitimacy of the FFSR Initiative also depends on how it addresses development concerns. Fossil fuel subsidy reform has different implications across countries. In many developing economies, energy subsidies are connected to poverty reduction, access to electricity, public transport, agriculture, inflation control and social stability. Removing them too quickly may impose high costs on vulnerable households and fragile communities. This is why the language of the initiative repeatedly refers to the specific needs and conditions of developing countries and to the protection of poor and affected communities. These references are not merely diplomatic qualifications. They are essential to the initiative's legitimacy. A fossil fuel subsidy reform agenda perceived as driven mainly by developed or climate-ambitious economies could easily be seen as a new form of conditionality, especially if it expands scrutiny without addressing technology transfer, transition finance, energy access and differentiated capacities. For the initiative to strengthen rather than weaken multilateral legitimacy, it must therefore incorporate just transition concerns. This means recognising that the same measure may have different social and economic functions in different national contexts. It also means ensuring that transparency is not used only to expose developing countries to criticism, but also to identify reform needs, fiscal constraints and support requirements.

²⁶ Government of the Netherlands, *Transitioning Away from Fossil Fuels Conference Concludes with 5 Key Deliverables*, 2026; J. SCHELL, M. SCHULZE-STEINEN W. OBERGASSEL, *The First Conference on Transitioning Away from Fossil Fuels: 24–29 April 2026, Santa Marta, Colombia*, Briefing requested by the European Parliament, PE 786.412, 2026.

Eventually, the future of the FFSR Initiative is likely to depend on whether it can transform soft coordination into more stable normative pathways without undermining its inclusiveness. Several trajectories are possible. The first is the consolidation of transparency practices. The sample questions used in Trade Policy Reviews could become more systematic, and Secretariat analysis could make fossil fuel subsidies more visible across WTO monitoring activities. The second is the development of soft guidance, especially through the crisis-support guidelines and possible reporting templates. The third is greater multilateralization through regular WTO bodies, particularly the Committee on Trade and Environment, so that the issue is not confined to co-sponsor meetings. The fourth is gradual norm development through more precise categories of harmful subsidies, paired with flexibility for development needs and transition safeguards. A harder pathway is also possible in the long term. The existence of treaty-based instruments such as the Agreement on Climate Change, Trade and Sustainability shows that binding disciplines on harmful fossil fuel subsidies are not conceptually impossible. So far, the FFSR has laid the groundwork for the conclusion of binding agreement in a foreseeable future, considering that one of its key contributions was to create the informational, conceptual and procedural conditions that may make future legalisation more realistic.

The answer to the question posed in the title is therefore conditional. Informality cannot “save” multilateralism if this means restoring, by itself, ambitious universal rule-making in a deeply fragmented trade order. But it can preserve some core functions of multilateralism: deliberation, transparency, peer review, institutional learning and gradual convergence. The FFSR Initiative shows that informal plurilateral platforms, when they remain open and embedded in WTO procedures, may contribute to the adaptive resilience of the multilateral trading system. They cannot replace law, but they can help keep alive the institutional conditions from which law may later emerge.

7. Conclusion

This paper has examined the WTO Fossil Fuel Subsidy Reform Initiative as a case study of how multilateral trade governance may continue to operate under conditions of institutional blockage and political fragmentation. Its central claim has been that the FFSR Initiative should be understood as a form of embedded informal plurilateralism: informal because it does not produce binding legal obligations; plurilateral because it is driven by a coalition of willing WTO Members; and embedded because it remains anchored in the WTO institutional framework, using existing mechanisms and connecting its work to broader WTO transparency and deliberative functions.

The first section showed why fossil fuel subsidies constitute both a trade and climate governance problem. These measures are difficult to define and measure, but they may distort markets, alter production costs, affect competition in emissions-intensive sectors and weaken climate transition incentives. Their reform is therefore relevant to the WTO not only because of its environmental implications, but also because of its effects on trade and sustainable development.

The second section reconstructed the emergence and consolidation of the FFSR Initiative. From the 2017 ministerial statement to the 2021 statement, the 2022 High-Level Work Plan, the MC13 work programme and the MC14 outputs, the initiative has followed a deliberately incremental path. Rather than beginning with binding disciplines, co-sponsors have built a process based on political commitment, structured dialogue and progressive institutionalisation.

The third section analysed the initiative's outputs and working methods. Although the FFSR Initiative remains non-binding, it has generated concrete procedural and epistemic tools: sample questions for Trade Policy Reviews, guidelines on temporary crisis support measures, stakeholder inputs, experience-sharing and a preliminary grid on subsidy types and impacts. These instruments do not amount to hard law, but they operationalise informality by generating information, structuring peer review and creating shared categories.

The fourth section conceptualised this institutional form as embedded informal plurilateralism. The FFSR Initiative is neither classical multilateral rule-making, nor a formal plurilateral agreement, nor an external climate club. Its distinctiveness lies in the balance it strikes between plurilateral agency and multilateral legitimacy: a smaller group of Members can move the discussion forward, while keeping the process inside the WTO.

The fifth section situated this model within the broader transformation of multilateral trade governance. It argued that informal plurilateral platforms may contribute to WTO resilience by preserving transparency, deliberation and policy learning where formal law-making is unavailable. At the same time, the limits of this model remain clear: effectiveness, inclusiveness, participation by major subsidising economies and sensitivity to development concerns are essential to its legitimacy.

In the light of this, the question posed by the title of this article requires a qualified answer. The WTO FFSR Initiative, with its distinctive model of embedded informal plurilateralism, does not 'save' multilateralism by replacing formal WTO law-making. It does not create binding obligations, does not amend the covered agreements and does not overcome the political and distributive conflicts that make fossil fuel subsidy reform difficult. In this sense, informality cannot be regarded as a substitute for multilateral rules. However, the initiative shows that, under conditions of political fragmentation, informal cooperation may help preserve some of the essential functions of multilateralism, creating the conditions for future normative developments. In that narrower but still important sense, the FFSR Initiative is not a departure from multilateralism, but one of its contemporary survival techniques.

The External Dimension of EU Health Law within the Multilateral Trading System

Susanna Villani*

Summary: 1. Premises – 2. The EU Constitutional Foundations of Health and Trade 3. The European Union and the Ottawa Group: Shaping a Trade-and-Health Reform – 4. From the Ottawa Group to a Combined EU Legal Strategy of Multilateralism and Strategic Autonomy – 4.1 Strategic Reorientation: Health, Trade and Preparedness after COVID 19 – 4.2 Operationalising Health Protection through Trade and Regulatory Instruments – 5. Conclusive remarks.

Keywords: EU Health Union – Global Health Governance – Trade and Health – Public Health – WTO Reform – Ottawa Group – Pandemic Preparedness – Strategic Autonomy – TRIPS Agreement – Critical Medicines – Health Security.

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1. Premises

The renewed instability affecting key global trade routes – most notably the Strait of Hormuz – has once again drawn attention to the dependence of pharmaceutical supply chains on a limited number of strategic transit corridors. Disruptions in these routes directly affect the circulation of active pharmaceutical ingredients, generic medicines and other critical medical inputs, thereby translating geopolitical and trade shocks into risks for access to healthcare.

These developments illustrate a broader shift in the nature of health-related risks. Increasingly, threats to public health do not arise only from sudden emergencies, but from bottlenecks and fragilities embedded in globally integrated trade and pharmaceutical supply chains. Health risks thus materialise as problems of coordination and interdependence, rather than as isolated events that can be addressed through unilateral responses. The central question becomes how to manage these trade-related bottlenecks in a way that safeguards access to essential medical goods.

The relationship between trade and health has long represented a structural fault line in international trade law. Within the WTO framework, health-related considerations have traditionally been addressed only indirectly, most notably through the general exception contained in Article

XX(b) GATT,¹ the TRIPS Agreement,² the Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement.³ None of these instruments is, however, specifically designed to comprehensively regulate the interaction between commercial rules and public health imperatives, and their combined operation has largely reflected a trade-centred logic in which health appears primarily as a limit or derogation rather than as a systemic objective.⁴

At the turn of the millennium, the tension between intellectual property protection and access to medicines prompted WTO Members to recognise the limits of the existing framework. This acknowledgment culminated in the adoption of the 2001 Doha Declaration on the TRIPS Agreement and Public Health, which affirmed that the TRIPS Agreement «can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health».⁵ While the Declaration clarified and reinforced the availability of TRIPS flexibilities on compulsory licensing and parallel imports, it did not fundamentally alter the trade-centred logic of the WTO legal order, leaving unresolved questions as to how especially health emergencies should be accommodated within global trade rules. Indeed, its focus on intellectual property has largely left unaddressed the trade-related conditions governing the production, circulation and distribution of medical goods beyond patents, including supply-chain disruptions and export restrictions.⁶

The outbreak of the COVID-19 pandemic brought these latent structural tensions into sharp relief. It exposed the fragility of global medical supply chains and revived longstanding debates over the adequacy of existing trade rules in ensuring timely and equitable access to essential medical products. In response, India and South Africa requested that the Council for Trade-Related Aspects

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¹ Article XX(b) GATT allows WTO Members to adopt measures «necessary to protect human, animal or plant life or health», provided that such measures satisfy the necessity test and comply with the requirements of the chapeau of Article XX. In WTO jurisprudence, this provision has been interpreted as an exception justifying unilateral trade restrictions in specific circumstances, rather than as a basis for positive obligations of cooperation (see, *EC — Asbestos*, Appellate Body Report (2001); *Brazil — Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report (2007)). The health measures of Article XX(b) GATT have been elaborated in the Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493 (SPS Agreement).

² TRIPS obliges Members to bring into force intellectual property (IP) laws, including patent protections for inventions. For new pharmaceuticals, TRIPS global patent protection excludes generic equivalents from the marketplace for 20 years. Before TRIPS entered into force in 1995, many developing countries provided a place where generics could be made, much more cheaply, both for home markets, and for markets in other developing and least developed countries. In the context of WTO law on IP, some general rules which would potentially have far-reaching negative effects for global health, such as the global patent protection for new pharmaceuticals, have been modified by a series of mechanisms within the WTO arrangements. Developing countries had a 10-year transitional period and least developed countries were not required to be fully TRIPS-compliant until 2016 (Article 65(4)).

³ For instance, Article 2.2 of the TBT provides that States parties must ensure that mandatory requirements concerning product characteristics must not be more restrictive of trade than necessary to meet a legitimate objective, such as human health protection.

⁴ For insights, B. MCGRADY, *Chapter 5: Health and international trade law*, in *Research Handbook on Global Health Law*, Edward Elgar Publishing, Cheltenham, 2018; K. NAYUNG, *Medical Trade, Public Health, and the Law. Reforming the International Trade System Post-Covid*, Routledge, London, 2023.

⁵ Declaration on the TRIPS agreement and public health, Doha WTO Ministerial 2001: TRIPS, WT/MIN(01)/DEC/2, 20 November 2001, point 4. For comments, see W. HEIN, *Global Health Governance and WTO/TRIPS: Conflicts between 'Global "Market Creation" and "Global Social Rights"'*, in *Global Health Governance and the Fight Against HIV/AIDS*, edited by HEIN, BARTSCH, KOHLMORGEN, Springer, Cham, 2007, p. 49 ff.; A. BOZIK, *Essential Medicines: The Crisis in Developing Countries*, in *Yale Journal of Medicine and Law*, 2011, p. 13 ff.; C. CORREA, D. MATTHEWS, *The Doha Declaration Ten Years on and its Impact on Access to Medicines and the Right to Health*, Discussion Paper, UNDP 2011.

⁶ WTO Agreements and Public Health: A joint study by the WHO and the WTO Secretariat, 2002.

of Intellectual Property Rights recommended the adoption of a temporary «waiver from the implementation, application and enforcement of Sections 1, 4, 5, and 7 of Part II of the TRIPS Agreement in relation to prevention, containment or treatment of COVID-19».⁷

At the same time, and prior to the crystallisation of these debates within the WTO's formal decision-making structures, a number of WTO Members began coordinating their positions through informal channels. In this context, the Ottawa Group – a coalition of like-minded, including Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, South Korea, Mexico, New Zealand, Norway, Singapore and Switzerland⁸ – launched in 2020 a *Trade and Health Initiative* aimed at shaping the multilateral trade agenda in response to the pandemic. The Ottawa Group positioned itself as an informal agenda-setter, relying on principles, best practices and peer coordination, while deliberately operating within, and not outside, the institutional framework of the WTO by channelling its proposals to the WTO Secretariat and the General Council.⁹

One of the Initiative's core areas of intervention concerned trade in medical supplies. The Group explicitly acknowledged that export bans, regulatory fragmentation and lack of transparency had severely disrupted access to vital products during the pandemic. Without questioning the fundamentals of the GATT framework, the Initiative invited WTO Members to reflect on whether existing rules were adequate to support cooperative responses to future health emergencies, emphasising the need for diversified, resilient and non-discriminatory supply chains. In doing so, the Ottawa Group helped frame health not merely as an exceptional concern, but as a systemic issue requiring coordination within the multilateral trading system.

It was against this background that the response of the WTO membership crystallised in the Ministerial Declaration adopted at the Twelfth Ministerial Conference (MC12) in 2022.¹⁰ Following the Ottawa Group's suggestions, the MC12 Declaration also recognised the central role of trade in goods, services and inputs in ensuring access to diagnostics, medical devices and other essential medical products. At the same time, the crisis continued to be addressed primarily through the lens of intellectual property: alongside the Ministerial Declaration on the WTO response to the pandemic, Members adopted a legally binding Ministerial Decision on the TRIPS Agreement,¹¹ temporarily expanding compulsory licensing flexibilities and limiting recourse to dispute settlement with respect to COVID-19 vaccines. Overall, however, the response remained largely non-systematic. Rather than articulating enforceable disciplines capable of governing the circulation and allocation of essential

⁷ Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, para. 12. For general comments, AS. RUTSCHMAN, *Ministerial Decision on the Trips Agreement (WTO)*, in *International Legal Materials*, 2023, p. 289 ff.

⁸ The Ottawa Group was established in 2018 on the initiative of Canada as an informal coalition of like-minded WTO Members aimed at reflecting on the future of the multilateral trading system and advancing WTO reform. Operating without formal status, the Group has functioned as a platform for coordination and agenda-setting within the WTO, particularly in areas where consensus-based reform has proven difficult. See, Joint Communiqué of the Ottawa Ministerial on
WTO Reform
Ottawa, 24–25 October 2018.

⁹ Statement of the Ottawa Group: Focusing Action on COVID 19, June 2020.

¹⁰ Ministerial Declaration on the WTO Response to the Covid-19 Pandemic and Preparedness for Future Pandemics, WT/MIN(22)/31 WT/L/1142, 17 June 2022.

¹¹ Draft Ministerial Decision on the TRIPS Agreement, WT/MIN(22)/W/15/Rev.2 (17 June 2022).

goods in times of global crisis, the multilateral framework relied mainly on declaratory commitments, voluntary cooperation and procedural obligations.¹²

In this context, the participation of the European Union (EU) in the Ottawa Group appears less as a contingent reaction to the pandemic and more as a coherent expression of its broader external action framework. As a member of the Group, the Union aligned itself with an informal initiative explicitly aimed at strengthening coordination, transparency and cooperation within the multilateral trading system, while remaining anchored to the institutional structures of the WTO.

This cooperative posture is firmly rooted in EU primary law. Article 21(1) TEU, reinforced by Article 220 TFEU, requires the Union to develop relations and build partnerships with third countries, and international, regional or global organisations. More broadly, EU primary law mandates the promotion of multilateral solutions to common problems (Article 21 TEU) and the contribution to the harmonious development of world trade and to the progressive abolition of restrictions on international trade (Articles 206 TFEU and 21(2)(e) TEU). Participation in an initiative such as the Ottawa Group thus falls exactly within the Union's constitutional vocation to act as a supporter and shaper of multilateral governance.

In parallel, the Union's engagement in the Ottawa Group must be understood against the backdrop of its evolving trade strategy, increasingly structured around the concept of open strategic autonomy.¹³ This paradigm captures the EU's ambition to safeguard its capacity to take autonomous decisions and to shape its trade strategies in order to protect and promote core EU interests and values set in Article 2 TEU, while at the same time asserting its position within the evolving architecture of international trade law.¹⁴ And, in accordance with an extensive interpretation of Article 3 TEU and the consistent jurisprudence of the Court of Justice of the EU (CJEU),¹⁵ health can be included among the interests protected under EU law.

The paper examines the evolving integration of health considerations into international trade instruments by moving from the Union's perspective in addressing health-related issues within the Common Commercial Policy (CCP) and its engagement in the *Trade and Health Initiative*. To this end, the structure is as follows. It first places health within the constitutional framework of the EU, outlining the scope, limits and cross-cutting nature of Union competences in the field of public health, and identifying the legal foundations that enable its projection into external trade policy (Section 2). It then turns to the EU's role within the Ottawa Group *Trade and Health Initiative*, examining how this informal plurilateral platform has been used by the Union to shape the post-pandemic trade and

¹² C.M. CORREA, N. SYAM, *The WTO TRIPS Decision on Covid-19 Vaccines: What Is Needed to Implement It?*, Research Paper, November 2022.

¹³ For insights, EDITORIAL COMMENTS, *Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem*, in *CMLR*, 2022, p. 313 ff.; D. BROEDERS, F. CRISTIANO, M. KAMINSKA, *In Search of Digital Sovereignty and Strategic Autonomy: Normative Power Europe to the Test of Its Geopolitical Ambitions*, in *JCMS*, 2023, p. 1261 ff.; S. POLI, *Reinforcing Europe's Technological Sovereignty Through Trade Measures: The EU and Member States' Shared Sovereignty*, in *European Papers*, 2023, p. 429 ff.; C. BEAUCILLON, *Strategic Autonomy: A New Identity for the EU as a Global Actor*, in *European Papers*, 2023, p. 417 ff.

¹⁴ E. FAHEY, *The European Union as a Digital Trade Actor: the Challenge of Being a Global Leader in Standard-Setting*, in *International Trade Law and Regulation*, 2021, p. 155 ff.

¹⁵ Joined Cases C-570/07 and 571/07, *Blanco Pérez and Chao Gómez* ECLI:EU:C:2010:300, [2010] ECR I-4629; Case C-141/07, *Commission v Germany* ECLI:EU:C:2008:492, [2008] ECR I-6935, para. 51; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others (Doc Morris)* ECLI:EU:C:2009:316, [2009] ECR I-4171, para. 19.

health agenda within the WTO and to advance a cooperative, principles-based approach to systemic vulnerabilities exposed by the COVID-19 crisis (Section 3). Building on this discussion, the paper analyses how the Union subsequently translated this agenda into a more structured strategy combining multilateral engagement and strategic autonomy (Section 4). More in detail, Section 4.1 analyses the evolution of EU health, trade and preparedness strategies adopted after the pandemic, while Section 4.2 focuses on the operationalisation of health protection through trade and regulatory instruments, including free trade agreements (FTAs), regulatory cooperation mechanisms and strategic partnerships. Finally, the paper concludes by reflecting on the broader implications of this experience for the evolving relationship between trade law and public health beyond crisis contexts (Section 5).

2. *The EU Constitutional Foundations of Health and Trade*

The legal capacity of the EU to address health-related concerns through trade is rooted in its constitutional framework. The Lisbon Treaty attempts to clarify the distribution of competences between the Union and the Member States in the field of health, giving rise to a layered and composite constitutional structure that is central to understanding subsequent developments.¹⁶

First, Article 4(2)(k) TFEU classifies «common safety concerns in public health matters» as a shared competence between the Union and the Member States. Second, Article 6(a) TFEU designates the «protection and improvement of human health» as a supporting competence, thereby confirming that, as a general rule, the Union may only act to support, coordinate or supplement the action of Member States without harmonising domestic laws or displacing national policy choices. Third, and most significantly, Article 168 TFEU constitutes the central legal basis for Union action in the field of public health, combining a horizontal integration clause with more specific and operational competences.

Article 168(1) TFEU enshrines the principle that a high level of human health protection must be ensured in the definition and implementation of all Union policies and activities. This cross-cutting obligation, echoed in Article 9 TFEU, has been of particular relevance in enabling the Union to pursue health-related objectives through legal bases other than those expressly devoted to public health, most notably Article 114 TFEU on the functioning of the internal market and Article 153 TFEU on social policy.¹⁷ In addition, Article 168 TFEU confers more concrete normative powers upon the Union. In particular, paragraph 4 authorises the adoption of harmonisation measures for the setting of high standards of quality and safety for medicinal products, medical devices, and substances of human origin, as well as for veterinary and phytosanitary measures directly aimed at the protection of public

¹⁶ T. K. HERVEY, J.V. MCHALE, *European Union Health Law: Themes and Implications. Law in Context*, Cambridge University Press, Cambridge, 2015; G. BOSI, *Expanding EU Competence in Health? The Need for and Feasibility of Treaty Change*, in *EU Law Live*, Weekend Edition n.107, 8 July 2022.

¹⁷ T. CLEMENS, K. MICHELSEN, H. BRAND, *Supporting Health Systems in Europe: Added Value of EU Actions?*, in *Health Economics, Policy and Law*, 2014, p. 1 ff; D.S. MARTINSEN, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union*, Oxford University Press, Oxford, 2015; A. DE RUIJTER, *The Expansion of EU Power in the Field of Human Health*, Oxford University Press, Oxford, 2016; A. FIORENTINI, *Lo spazio europeo dei dati sanitari. Nuovi equilibri costituzionali tra mercato unico digitale e Unione europea della salute*, Giappichelli, Torino, 2026.

health. Paragraph 5, in turn, permits the Union to adopt incentive measures designed to protect and improve human health, excluding any harmonisation of national laws. Indeed, paragraph 7 carefully calibrates the scope of the Union intervention by preserving the core prerogatives of the Member States in the organisation and delivery of health services, as well as for the allocation of health resources.

Taken together, these provisions illustrate a constitutional balance that allows targeted and functional forms of harmonisation and coordination in areas with clear cross-border implications, while maintaining the primacy of national health systems. This balance is particularly relevant in situations of systemic risk, where fragmented national approaches may undermine both public health objectives and the functioning of the internal market.

The transversal character of health protection acquires further constitutional significance when read in conjunction with fundamental rights. The right to health protection is explicitly recognised in Article 35 of the Charter of Fundamental Rights, which must be interpreted in light of the Union's fundamental values enshrined in Article 2 TEU, including human dignity, equality, solidarity and respect for human rights.¹⁸ These values are not merely programmatic; rather, they translate into concrete legal principles such as universal access to healthcare, the protection of informed consent in medical research and the right to physical integrity. Ultimately, these values give concrete expression to the constitutional identity of the Union in the health domain.¹⁹

On this constitutional basis, the Union has progressively developed an extensive body of harmonised legislation covering safety of medicines, medical devices and equipment; clinical trials regulation; protection of privacy of medical data; recognition of medical qualifications; intellectual property in biotechnological inventions; food safety, labelling and traceability; and tobacco regulation.²⁰

This broad intervention in health-related matters has also extended into the sphere of the Common Commercial Policy (CCP), albeit within the bounds of the competence framework.²¹ Indeed, under Article 207 TFEU, the Union enjoys exclusive competence to negotiate and conclude international agreements concerning trade in goods and services,²² including health-related products and activities. At the same time, Article 207(4)(b) TFEU introduces a safeguard by requiring unanimity for

¹⁸ J. LEGEMAATE, *Integrating Health Law and Policy: A European Perspective*, in *Health Policy*, 2002, p. 101 ff.; T.K. HERVEY, *We Don't See a Connection: The "right to Health" in the EU Charter and European Social Charter*, in *Social Rights in Europe*, edited by G. DE BÚRCA, B. DE WITTE, Oxford University Press, Oxford, 2005; J.V. MCHALE, *Fundamental Rights and Health Care*, in *Health Systems Governance in Europe: The Role of EU Law and Policy*, edited by E. MOSSIALOS ET AL., Cambridge University Press, Cambridge, 2010.

¹⁹ For insights, E. SCISO, R. BARATTA, C. MORVIDUCCI, *I valori dell'Unione europea e l'azione esterna*, Giappichelli, Torino, 2016; L.S. ROSSI, *Il valore giuridico dei valori. L'Articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell'UE e rimedi giurisdizionali*, in *Federalismi.it*, 2020; L. D. SPIEKER, *EU Values Before the Court of Justice*, Oxford University Press, Oxford, 2023.

²⁰ On the scope and content of the EU health law and policy see A. DE RUIJTER, *EU Health Law & Policy: The Expansion of EU Power in Public Health and Health Care*, Oxford University Press, Oxford, 2019; M. GUY AND, W. SAUTER, *The History and Scope of EU Health Law and Policy*, in *Research Handbook on EU Health Law and Policy*, edited by T. HERVEY ET AL., Edward Elgar Publishing, Cheltenham, 2017; T. HERVEY AND B. VANHERCKE, *Health Care and the EU: The Law and Policy Patchwork*, in *Health Systems Governance in Europe: The Role of EU Law and Policy*, cit.

²¹ H. JARMAN, M. KOIVUSALO, *Chapter 17: Trade and health in the European Union*, in *Research Handbook on EU Health Law and Policy*, Edward Elgar Publishing, Cheltenham, 2017.

²² H. JARMAN, *Trade in Services and the Public's Health: A "Fortress Europe" for Health?*, in *European Union Public Health Policy: Regional and Global Perspectives*, edited by S.L. GREER, P. KURZER, Routledge, London, 2013.

agreements covering trade in health services where these risk seriously disturbing the national organisation of such services or prejudicing Member States' responsibility for their delivery. In practice, however, this limitation has lost constraining force, as health-related issues have been increasingly incorporated into trade negotiations and FTAs without triggering systematic recourse to unanimity.

Owing to both the sensitivity of the subject matter and the diversity of legal bases involved, the Union's external action in the health domain displays a complex and layered pattern, in which health considerations are embedded into trade policy through a combination of binding multilateral rules, bilateral trade instruments and sector-specific regulatory arrangements.

The COVID-19 pandemic marked a turning point in this respect.²³ It exposed the insufficiency of a purely defensive and exception-based understanding of health within trade law and highlighted the need for proactive coordination to address systemic risks, supply-chain disruptions and unequal access to essential goods. From a constitutional perspective, the pandemic reframed health not merely as a limit to market integration, but as a cross-cutting interest whose effective protection increasingly depended on the Union's capacity to act externally, including through trade. It is against this background that the Union progressively articulated a more assertive approach to trade and health at multilateral level – most notably through its engagement in the Ottawa Group *Trade and Health Initiative*, which is examined more in detail in the following section.

3. The European Union and the Ottawa Group: Shaping a Trade-and-Health Reform

The EU has played a particularly active role within the Ottawa Group, both in shaping the *Trade and Health Initiative* and in supplying substantive proposals that reflect a broader re-orientation of its trade and health strategy in the aftermath of the COVID-19 pandemic. This role is most clearly illustrated by the *Trade in Healthcare Products – Concept Paper* submitted by the European Commission in June 2020, which provided the analytical and normative backbone for discussions within the Group.²⁴

The Concept Paper is grounded in a dual critique of existing trade practices exposed by the pandemic. On the one hand, it highlighted the regressive effects of tariffs on healthcare products, which disproportionately burden lower-income populations and vulnerable patients. On the other hand, it identified export restrictions as a major source of supply chain disruption, particularly harmful for developing and least developed countries lacking domestic manufacturing capacity. The Commission thus framed trade facilitation as a structural component of global health preparedness, rather than a purely economic policy choice.

²³ For some insights, see I. CARREÑO, T. DOLLE, L. MEDINA, M. BRANDENBURGER, *The Implications of the COVID-19 Pandemic on Trade*, in *EJRR*, 2020, p. 1 ff; B. PIRKER, *Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework Concerning Trade Measures in the Context of the COVID-19 Crisis*, in *European Papers*, 2020, p. 573 ff.; D. UTRILLA, A. SHABBIR, *EU Law in Times of Pandemic. The EU's Legal Response to Covid-19*, EU Law Live Press 2021; V. DELHOMME, T. HERVEY, *The European Union's Response to the Covid-19 Crisis and (the Legitimacy of) the Union's Legal Order*, in *Yearbook of European Law*, 2022, p. 5 ff.

²⁴ European Commission, *Trade in healthcare products Concept paper*, 11 June 2020. For comments, see P. COTTERLAZ, G. GAULIER, A. SZTULMAN, D. ÜNAL, *Pioneering a new classification: a comprehensive study of healthcare products in global trade*, CEPII Working Paper 2024.

To operationalise this vision within the multilateral trading system, the Commission proposed a modular approach articulated around three layers of potential revisions. First, it advocated permanent tariff elimination for a broad range of pharmaceutical and medical goods, building on and extending the 1994 Pharmaceutical Tariff Elimination Agreement.²⁵

Secondly, it outlined crisis-specific disciplines, including limits on export restrictions, enhanced transparency, cooperative supply mechanisms. Most innovatively, it proposed an interpretative clarification of the concept of an «equitable share of international supply» under Article XX(j) GATT.²⁶ Rather than treating Article XX(j) as a residual exception legitimising unilateral export restrictions in situations of scarcity, the Commission suggested reading it as expressing a substantive principle of coordination. In this reading, the focus shifts from justifying individual measures *ex post* to shaping cooperative responses to global shortages that take into account systemic interdependence along pharmaceutical supply chains.

Thirdly, the Paper identified horizontal disciplines of general application, such as customs facilitation, public procurement cooperation and data-sharing, aimed at strengthening the structural resilience of supply chains beyond emergency contexts.

Significantly, these proposals were explicitly designed to operate within the existing WTO framework. They did not call for formal treaty amendments, but relied instead on cooperative interpretation, enhanced use of existing disciplines and incremental norm development. In this respect, the Concept Paper illustrates the Union's broader approach to trade and health: one that combines legal pragmatism with an ambition to shape normative expectations at multilateral level. At the same time, as already stressed, these efforts did not translate into concrete institutional or normative outcomes within the WTO. The proposals advanced within the Ottawa Group ultimately remained without follow-up in terms of binding rules or structured multilateral disciplines. As a result, their significance lies less in their practical impact on WTO law than in what they reveal about the Union's strategic positioning and conceptual understanding of the trade-and-health nexus.

Read in this light, the EU's engagement in the Ottawa Group appears as the external trade-policy projection of a wider preparedness paradigm that had begun to emerge internally during the pandemic. The Union's positioning within the Ottawa Group exemplifies a form of informal, plurilateral cooperation through which it has sought to reconcile its exclusive competence in trade with the inherently shared and politically sensitive nature of public health. More broadly, this experience represents an attempt to move beyond the treatment of health as a mere exception to trade rules and to contribute to its gradual normalisation as a functional concern within multilateral trade law.

²⁵ The 1994 Agreement on Trade in Pharmaceutical Products (also known as the Pharmaceutical Agreement or the Pharma Agreement) eliminates tariffs and other duties and charges on a large number of pharmaceutical products and the substances used to produce them, permanently binding them at duty-free levels. Concluded during the Uruguay Round of trade negotiations, the Agreement was signed by and applies to only a group of participants, who also committed to implement the outcomes on a most-favoured nation basis. Canada, European Union, Japan, Macao (China), Norway, Switzerland, the United Kingdom and the United States currently participate in the Agreement.

²⁶ For general comments on this provision, see B. SHARP, *Responding Internationally to a Resource Crisis: Interpreting the Gatt Article XX(J) Short Supply Exception*, in *Drake Journal of Agricultural Law*, 2010, p. 259 ff.; M. PAULSEN, *Managing Risks as a GATT Exception under GATT Article XX(j)*, in *International Economic Law and Policy Blog*, 2024.

4. From the Ottawa Group to a Combined EU Legal Strategy of Multilateralism and Strategic Autonomy

4.1. Strategic Re-orientation: Health, Trade and Preparedness after COVID-19

A closer legal analysis of the developments following the Ottawa Group *Trade and Health Initiative* reveals that the Union has progressively articulated a combined legal strategy that seeks to reconcile multilateral trade cooperation with objectives of health security and strategic autonomy. This evolution has unfolded in distinct phases. In the immediate aftermath of the COVID-19 outbreak, the Union's response was primarily framed around the need to improve preparedness and coordination in the face of serious cross-border health threats, as set out in the Commission's 2020 Communication on building a European Health Union.²⁷ That focused on strengthening surveillance, crisis response mechanisms and cooperation among Member States, as well as on reinforcing EU agencies, notably the European Centre for Disease Prevention and Control (ECDC) and the European Medicines Agency (EMA). At this stage, health security was still largely conceived as a matter of internal coordination and institutional capacity-building, rather than as an issue of external dependencies or global supply-chain vulnerabilities.

The limits of this internally oriented approach became increasingly apparent as the pandemic exposed the Union's dependence on external suppliers for essential medicines, medical devices and pharmaceutical ingredients. Against this background, the external dimension of health protection began to emerge more clearly in subsequent instruments, most notably with the *EU Pharmaceutical Strategy*.²⁸ It translated the lessons of the pandemic into a more structural assessment of vulnerabilities affecting medicine availability, manufacturing capacity and data generation. The Strategy articulated a dual objective. On the one hand, it sought to ensure a well-functioning single market for medicines and resilient international supply chains.²⁹ On the other hand, it aimed to strengthen the Union's open strategic autonomy, including in times of crisis, and to consolidate the EU's position in the global pharmaceutical landscape.

This evolving understanding of health security was further operationalised through the Communication on the *European Health Union* (EHU)³⁰ and the proposal for a *Critical Medicines Act*,³¹ which explicitly acknowledges that security of supply cannot be achieved through internal measures alone. In this respect, the *Critical Medicines Act* constitutes a key pivot between internal

²⁷ European Commission, *Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats*, COM(2020) 724.

²⁸ European Commission, *Pharmaceutical Strategy for Europe*, COM(2020) 761 final. For comments, S. GARATTINI, Y. NATSIS, R. BANZI, *Pharmaceutical Strategy for Europe: Reflections on Public Health-Driven Drug Development, Regulation, and Policies*, in *Front Pharmacol.*, 2021.

²⁹ For insights, C.P. BOWN, T. J. BOLLYKY, *How Covid-19 vaccine supply chains emerged in the midst of a pandemic*, in *The World Economy*, 2022, p. 468 ff.; P. COTTERLAZ, G. GAULIER, A. SZTULMAN, D. ÜNAL, *L'industrie pharmaceutique européenne: quand rentabilité rime avec vulnérabilité*, in *La Lettre du CEPII*, No. 423, January 2022.

³⁰ European Commission, *The European Health Union: acting together for people's health*, COM(2024) 206 final. For comments, V. DELHOMME, C. VAN OS, *Building the European Health Union (2019-2024): Successes, Limits and Future Perspectives*, in *EJRR*, 2025, p. 3 ff.

³¹ Proposal for a Regulation of the European Parliament and of the Council laying a framework for strengthening the availability and security of supply of critical medicinal products as well as the availability of, and accessibility of, medicinal products of common interest, and amending Regulation (EU) 2024/795, COM(2025) 102 final.

resilience and external cooperation. While primarily aimed at strengthening preparedness within the Union, it expressly recognises the potential to enhance security of supply by facilitating access to alternative sources in third countries. Recital 39 emphasises the importance of diversifying supply beyond the Union, and Article 27 mandates the Commission to assess the feasibility of establishing strategic partnerships with third countries in order to reduce dependency on single suppliers and mitigate systemic risks. The external orientation of the Act thus creates an explicit normative bridge between internal health preparedness and the Union's external trade and cooperation policies.

This bridge is further reinforced by the *European Preparedness Union Strategy*,³² adopted in parallel to the *Critical Medicines Act* and conceived as part of the same policy cycle. Rather than constituting a stand-alone initiative, the Strategy complements and amplifies the logic underlying the EHU and the *Pharmaceutical Strategy* by situating health security, access to medical countermeasures and supply-chain resilience within a broader framework of global preparedness. It explicitly acknowledges that preparedness objectives cannot be effectively achieved through internal action alone and calls for coordinated engagement with trusted third countries, international organisations and private actors, particularly in crisis situations.

The *EU Global Health Strategy*³³ has consolidated this approach by providing the external normative framework within which this combined approach is articulated. By designating global health as «an essential pillar of EU external policy»,³⁴ the Strategy explicitly links health objectives to the Union's geopolitical role and strategic autonomy. Conceived as the external dimension of the EHU, it is structured around three interrelated priorities: delivering better health and well-being across the life course; strengthening health systems and advancing universal health coverage; and preventing and combating health threats, including pandemics, through a One Health approach.³⁵

Beyond these substantive priorities, the Strategy underscores the EU's longstanding role in development assistance as a source of legitimacy for its engagement in global health diplomacy, recalling in particular the *European Consensus on Development*, which recognises health as a core component of the Sustainable Development Goals set in the 2030 Agenda.³⁶ It also emphasises on the development of sustainable partnerships based on co-ownership, notably through the recent Global Gateway framework.³⁷

³² European Commission and High Representative, Joint Communication on the *European Preparedness Union Strategy*, JOIN(2025) 130 final.

³³ European Commission, *EU Global Health Strategy: Better Health for All in a Changing World*, 2022. For comments, see L. BENGSSON, *Health and Security: New Perspectives on the EU's Internal and External Action*, in *The EU Charting its Course in a Geopolitical World*, edited by K. EDHOLM, B. LUNDQVIST, A. MICHALSKI, L. OXELHEIM, Palgrave Macmillan, Cham, 2026.

³⁴ *Ibid.*, p. 4.

³⁵ For insights, JS. MACKENZIE AND M. JEGGO, *The One Health Approach – Why is it so important?*, in *Tropical Medicine and Infectious Diseases*, 2019, p. 88 ff.; F. COLI, H. SCHEBESTA, *One Health in the EU: The Next Future?*, in *European Papers*, 2023, p. 301 ff.

³⁶ Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament, and the European Commission, *The new European consensus on development 'our World, our Dignity, our Future'*, based upon the 2030 Agenda for Sustainable Development (A/RES/70/1).

³⁷ Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *The Global Gateway*, JOIN(2021) 30 final.

Crucially, the *Global Health Strategy* consolidates the recognition of trade policy in global health governance. It stresses the need to ensure that international «trade policy works for global health»,³⁸ notably by preventing disruptions in pharmaceutical and medical supply chains, facilitating access to medicines and medical devices, and promoting the effective use of TRIPS flexibilities, especially to support the scaling-up of production capacity in developing countries. In this way, the Strategy systematises the external dimension of health preparedness that had already begun to emerge through the Union's internal resilience instruments.

This strategic reorientation is fully consistent with the Commission's 2021 *Trade Policy Review – An Open, Supportive and Assertive Trade Policy*³⁹, which reframed CCP as a tool of resilience. While reaffirming the centrality of a stable and rules-based multilateral trading system, the instrument recognised that trade instruments could actively contribute to preparedness by facilitating market access, opening new avenues for diversification and embedding health-relevant considerations into disciplines on export restrictions, transparency and trade facilitation.

4.2. Operationalising Health Protection through Trade and Regulatory Instruments

Within this combined strategic framework, health-related considerations are operationalised through a diversified set of trade and regulatory instruments at bilateral and sector-specific level. Rather than introducing new substantive health standards, recent EU action has focused on reorganising the processes through which health-related goods circulate across borders and on stabilising supply chains through cooperation and mutual reliance with like-minded or strategic partners.

A first and particularly significant layer is represented by sector-specific and procedural instruments, including mutual recognition agreements (MRA) on good manufacturing practices, confidentiality arrangements and structured regulatory dialogues with strategic partners.⁴⁰ These instruments, that operate within the Union's exclusive competences under Article 207 TFEU, do not harmonise regulatory standards nor lower levels of health protection. Instead, they establish legally binding commitments of mutual reliance between regulatory authorities, requiring the acceptance of inspection outcomes, the sharing of compliance information and the waiver of duplicative controls. Hence, they are *de facto* instruments of health-related risk management and preparedness, directly affecting the Union's capacity to secure timely access to medicines, medical devices and active pharmaceutical ingredients.

A similar logic underlies confidentiality arrangements and regulatory dialogues with strategic partners.⁴¹ These mechanisms impose procedural obligations of cooperation, early information-

³⁸ See, *EU Global Health Strategy*, p. 19.

³⁹ European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final.

⁴⁰ The EU has MRAs with several countries, including the United States, Canada, Japan, Australia, Switzerland. For insights, <https://www.ema.europa.eu/en/human-regulatory-overview/research-development/compliance-research-development/good-manufacturing-practice/mutual-recognition-agreements-mra>.

⁴¹ The European Medicines Agency and the European Commission have concluded bilateral confidentiality arrangements with a number of third-country regulators, including the United States, Canada, Japan and Switzerland, enabling the exchange of non-public and commercially sensitive information in the context of regulatory cooperation. For insights, <https://www.ema.europa.eu/en/partners-networks/international-activities/international-agreements>.

sharing and coordinated oversight, thereby embedding public-health considerations into the daily functioning of cross-border trade in regulated products. The resulting differentiation between partners is not based on tariff preferences, but on regulatory trust and administrative interdependence, contributing to a differentiated landscape of health-related trade governance.

Trade agreements concluded by the Union with partners provide a second, broader layer within which this regulatory strategy is embedded. In recent new generation FTAs, health-related concerns are incorporated primarily through strengthened chapters on sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT), regulatory cooperation and trade facilitation. Interestingly, all EU FTAs concluded since 2021 (but also the Comprehensive Economic and Trade Agreement with Canada) include a standard provision within the Intellectual Property Chapters reaffirming the relevance of public health in the interpretation and implementation of TRIPS obligations. In detail, these clauses expressly refer to the 2001 Doha Declaration and commit the parties to the implementation of Article 31 *bis* TRIPS that allows a WTO Member to issue a compulsory licence to manufacture a patented pharmaceutical product for export to another WTO Member that lacks sufficient domestic manufacturing capacity.⁴²

Within this heterogeneous set of agreements, two agreements are significant as show distinct legal modalities for articulating the trade-and-health nexus at bilateral level.

The EU-New Zealand FTA, concluded in the aftermath of the COVID-19 pandemic, reflects a targeted approach.⁴³ Within the SPS Chapter, it includes a dedicated provision (Article 6.14) on antimicrobial resistance (AMR), recognising it as a serious threat to human and animal health and framing it as a specific area for cooperation based on a One Health approach.⁴⁴ Rather than introducing substantive harmonisation obligations, the agreement emphasises information-sharing, mutual recognition of comparable regulatory outcomes, coordination in international fora and institutionalised dialogue within the SPS Committee.⁴⁵ At the same time, it expressly clarifies that initiatives on AMR may not be used to affect trade unless they comply with the SPS Agreement.⁴⁶

By contrast, the EU-Chile Interim Trade Agreement exemplifies a more horizontal mode of integration.⁴⁷ Without referring to specific health threats within the SPS framework, it embeds health-relevant considerations across a range of interconnected chapters, notably those on sustainable food

⁴² By way of example, see Article 18.7 of the EU-New Zealand; Article 20.3 of the CETA; Article 17.8 of the EU-Australia FTA; Article 13.8 of the EU-Mercosur Interim Trade Agreement; Article 10.6 of EU-India FTA.

⁴³ Negotiations for a trade agreement with New Zealand started in June 2018 and were concluded on 30 June 2022; the trade agreement entered into force on 1 May 2024.

⁴⁴ EU-New Zealand FTA, Article 6.14, para. 2.

⁴⁵ *Ibid.*, Article 6.14, para. 6. The cooperative character of the AMR provision is reflected in the practice of the EU–New Zealand FTA Committee on Sanitary and Phytosanitary Measures. At its first meeting in February 2025, the Parties addressed antimicrobial resistance within the framework of the SPS Chapter, exchanging information on their respective regulatory strategies and surveillance systems and reaffirming that any action in this area must remain consistent with the SPS Agreement. See, Minutes of the 1st European Union–New Zealand Free Trade Agreement Committee Meeting on Sanitary and Phytosanitary Measures, 19 February 2025.

⁴⁶ *Ibid.*, Article 6.14, para. 5.

⁴⁷ In 2017, the EU and Chile agreed to modernise the 2002 Association Agreement and replace it with a new-generation agreement that reinforces and deepens their bilateral relationship. The negotiations between the EU and Chile reached their political conclusion in Brussels on 9 December 2022. The modernisation of the existing EU–Chile Association Agreement resulted in two parallel legal instruments, the Advanced Framework Agreement (AFA) and the Interim Trade Agreement (ITA), concluded in parallel on 9 December 2022, and signed in parallel on 13 December 2023.

systems, raw materials and regulatory cooperation. In doing so, it integrates health concerns into the broader demand of coordination and resilience of trade relations.

This operational logic is not confined to trade agreements with highly developed, regulatory-aligned partners, but also applies to the Union's engagement with developing countries. The Economic Partnership Agreement with Kenya⁴⁸ addresses health-related concerns primarily through procedural cooperation, capacity-building and SPS-related assistance, without introducing autonomous health standards. Similarly, in the negotiated FTA with India,⁴⁹ health issues have largely arisen in the context of regulatory cooperation, SPS and TBT disciplines and the management of intellectual property flexibilities, rather than through binding commitments on access or allocation. Given India's central role in global pharmaceutical production, this suggests a focus on stabilising strategic interdependencies rather than exporting the Union's domestic regulatory model.

Read together, these instruments point to a broader reconfiguration of the legal relationship between trade and health. Rather than exporting its regulatory model, the Union prioritises the construction of mutual trust, the facilitation of compliance and the stabilisation of critical supply chains. This process-oriented orientation closely reflects the principles advanced within the Ottawa Group and translates them into operational legal instruments in areas where multilateral rule-making has remained stalled.

At the same time, this strategy also reveals important structural tensions. While the *EU Global Health Strategy* promotes an inclusive and solidarity-based approach to global health, the bilateral implementation of trade and health objectives often produces differentiated outcomes across partners. In agreements with developing countries, health related concerns are predominantly addressed through regulatory dialogue and procedural cooperation. By contrast, binding commitments relating to tariff elimination or to access and allocation of essential goods in crisis situations remain comparatively limited.

While this differentiated model of engagement may prove effective in managing specific risks and dependencies, its reach and distributive effects remain asymmetrical. Although this asymmetry does not amount to a formal inconsistency within EU law, it raises broader questions of coherence and of the long-term implications of relying on fragmented and variable forms of cooperation, rather than on shared multilateral disciplines, for the governance of global health challenges.

5. Conclusive remarks

The *Trade and Health Initiative* launched by the Ottawa Group constitutes a moment of crystallisation within a broader structural reconfiguration of the relationship between international trade law and public health governance. Its significance lies in the normative shift from an exception-based architecture towards a functional integration model, in which health is treated as a systemic

⁴⁸ The EU and Kenya concluded negotiations for an Economic Partnership Agreement (EPA) on 19 June 2023 and entered into force on 1 July 2024. For insights, see G. RUGANI, *The Economic Partnership Agreement between the European Union and the Republic of Kenya: an example of "variable geometry" approach*, in *Quaderni AISDUE*, 2024, p. 1 ff.

⁴⁹ On 17 June 2022, the European Union relaunched negotiations with India for a FTA and an Investment Protection Agreement and an Agreement on Geographical Indications (GIs). Negotiations for a Free Trade Agreement concluded on 27 January 2026.

objective conditioning the structure of the trade instruments, including those concluded by the EU with strategic partners.

At the multilateral level, however, the trajectory from MC12 to MC14 illustrates both the partial opening and the structural limits of this process. While health concerns initially entered WTO discussions on reform and crisis response, they never crystallised into a distinct legal framework. By MC14, held in March 2026, health had disappeared from the ministerial agenda altogether, reflecting not the disappearance of trade-and-health concerns, but rather their displacement towards more flexible bilateral and plurilateral frameworks shaped by geopolitical fragmentation.

On 20 May 2025, the Seventy-eighth World Health Assembly adopted the *WHO Pandemic Agreement* pursuant to Article 19 of the WHO Constitution,⁵⁰ the first binding international instrument specifically devoted to pandemic prevention, preparedness and response. Although the Agreement has not yet entered into force, its normative architecture bears directly on the trade-and-health nexus.

The Agreement explicitly engages with trade-related concerns at several points. In addition to recalling the 2001 Doha Declaration, Article 14(4) provides that emergency trade measures must remain targeted, proportionate, transparent and temporary, and must avoid unnecessary disruptions to trade and supply chains. Likewise, the *Global Supply Chain and Logistics Network* established under Article 13 is mandated to facilitate timely and equitable access to pandemic-related health products by reducing barriers affecting their distribution and allocation. Significantly, these coordination mechanisms are embedded within a WHO institutional framework rather than within WTO rulemaking structures.

For the EU, the Agreement presents both an opportunity and a constitutional challenge. As a regional economic integration organisation within the meaning of Article 32, the Union may become a Party in its own right, with voting rights calibrated to the number of Member States that are parties. The allocation of competences between the Union and its Member States in the implementation of the Agreement will need to be declared pursuant to Article 32(3); it is a requirement that replicates the standard mixed agreement logic of EU external relations law and will likely require coordination under Articles 207 and 168 TFEU. In this regard, the WHO Pandemic Agreement may serve as a further catalyst for the constitutional mediation between trade competence and health protection, while at the same time providing a multilateral anchor for governance approaches that have so far developed primarily through bilateral and plurilateral instruments.

⁵⁰ WHO, Pandemic Agreement, Seventy-eighth World Health Assembly, WHA78.1, 20 May 2025.

The Informal Group of Small, Vulnerable Economies: Past Achievements, Present Challenges and Future Ambitions

Giulia Bortino

Summary: 1. Introduction. – 2. Small, Vulnerable Economies in the World Trade Organization. – 3. Small but Meaningful: SVEs Achievements in the WTO. – 4. Unsuccessful Stories – 5. SVEs Topical Challenges and Portfolios – 5.1 Trade and Investment Facilitation – 6. SVEs and Plurilateral Initiatives – 7. Final Remarks.

Keywords: Vulnerability – WTO law – Subsidies – Development – Economic growth – Population size – Small islands developing states – Plurilateral initiatives.

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1. Introduction

The current debate on the WTO revolves around the need for reformation, in order to better accommodate the interests of all Members, address the imbalances and to bridge the most relevant gaps in the WTO law. The dissatisfaction with the system has emerged in different shapes, starting from the Appellate Body crisis. This led to a number of consequences and initiatives that the WTO Members are pursuing without resorting to multilateralism. Such initiatives include Preferential Trade Agreements (PTAs), Joint Statement Initiatives and the negotiation of Plurilateral Agreements (PAs). All these venues are not multilateral and have been considered as the attempts of accommodating «variable geometry» within the organisation.¹

Without assessing in detail the consequences of these developments for the multilateral trading system, the present contribution focuses on the Informal Group of Small, Vulnerable Economies (SVEs). In contrast to what it is usually thought, the WTO was conceived as a forum to facilitate international encounters and negotiations not to increase trade per se, but to contribute to the improvement of living standards, the increase of employment rates and to reduce waste in resources.²

The analysis comprehends an overview on the origin, characteristics and history of this group at the WTO. The aim is to present the major initiatives at the WTO concerning SVEs, their main challenges in integrating in the multilateral trading system and how they have been assessed. Finally, in light of the results of the research, the contribution will seek to understand what are the main implications of plurilateral initiatives for SVEs.

¹ B.M. HOEKMAN, P.C. MAVROIDIS, *WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements*, in *European Journal of International Law*, Volume 26, 2, 2015, pp. 320 ss.

² See the first recital of the Marrakesh Agreement establishing the WTO; E. BARONCINI (ed.), *The WTO as Major Driver of Sustainable Development and its Reform Process*, AMS Acta Alma DL – Università di Bologna, Bologna, 2025.

2. *Small, Vulnerable Economies in the World Trade Organization*

SVEs are an established informal group at the WTO. Their presence in the multilateral forum dates back to the very first years of the organisation's life. The Ministerial Declaration adopted at the Second Ministerial Conference in Geneva in 1998, already contains a reference: «We remain deeply concerned over the marginalization of least-developed countries and certain *small economies*, and recognize the urgent need to address this issue[.]»³

The actual mandate for the elaboration of a work programme on SVEs arrived during the Fourth Ministerial Conference (MC4) in 2001. The scope of the mandate is to analyse and understand trade-related issues for small economies, in order to identify solutions to increase their integration in the multilateral trading system.⁴ MC4, and the so called Doha Development Agenda (DDA), is considered a turning point for the efforts undertaken at the WTO in relation to trade and development in the fields of Technical cooperation and capacity building,⁵ Least-developed countries⁶ (LDCs) and Special and differential treatment.⁷ However, the mandate did not produce meaningful results until the Sixth Ministerial Conference in 2006,⁸ when the Committee on Trade and Development (CTD) was entrusted with the monitoring of future proposals concerning small and vulnerable economies.⁹ Both ministerial declarations concerning SVEs impose not to create a «sub-category of WTO Members.» This aspect is considered in the literature as an «impossible conundrum», to the extent that WTO Members are encouraged to find solutions and proposals for the better integration of a category of States which are recognised to have specific characteristics without adopting an agreed definition for their identification.¹⁰ For this reason, the group of SVEs is self-selected, developing countries alike, whereas the LDCs, the only sub-category recognised at the WTO,¹¹ are identified by the definition of the UN.¹²

Pursuant to the mandate concerning SVEs in MC4 and MC6, a sub-category of Members was never created; nevertheless, this does not mean that WTO Members did not engage in discussions pertaining to the inherent characteristics of SVEs, which is essential in order to identify the major challenges they face in integrating in the multilateral trading system. The first work programme issued on this topic was a list of characteristics and of implications:¹³ the former mainly addressed the size of the market share, population, geographical morphology, high dependence on imports and exports and exposure to natural disasters. The latter can be summarised as economic openness, rigidity, economic volatility, low resilience, efficiency and capacity of attracting investments and

³ WT/MIN(98)/DEC, paragraph 6, emphasis added.

⁴ WT/MIN(01)/DEC/1, paragraph 35.

⁵ WT/MIN(01)/DEC/1, paras 38-41.

⁶ WT/MIN(01)/DEC/1, paras 42-43.

⁷ WT/MIN(01)/DEC/1, paragraph 44.

⁸ H-P J. WERNER, *Finding answers to the concerns of small, vulnerable economies in the Doha Round*, in Malta: Islands and Small States Institute of the University of Malta, Commonwealth Secretariat, London, 2008, pp. 351 – 357.

⁹ WT/MIN(01)/DEC, paragraph 41.

¹⁰ R. GRYNBERG, J.Y.REMY, *Small vulnerable economy issues and the WTO*, in *WTO at the Margins: Small States and the Multilateral Trading System*, Cambridge University Press, Cambridge 2006. pp. 288-289.

¹¹ See the updated list at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf

¹² United Nations, Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, Least Developed Countries Category, visited on 18 April 2026.

¹³ WT/COMTD/SE/W/1

market access, high production costs. This document was positively welcomed and triggered lengthy debates on which aspects ought to be addressed in more details. One important point raised is why SVEs need a different treatment from LDCs and developing countries.¹⁴ From the literature considered, the key to understand this difference can be derived from the terms used: small and vulnerable.

Smallness is considered the key aspect to understand the difficulties that SVEs face.¹⁵ Operationally, smallness can be considered using different parameters, such as population size, gross domestic product (GDP), trade share, per capita product or income distribution.¹⁶ The most widely used criterion is population, although small population-size states are not necessarily poor. At the WTO the criterion that found application is the one considering trade flows. Indeed, small states are frequently characterised by a high degree of openness to the market. Nonetheless, their trade share remains low.¹⁷ The criterion of the trade share was indeed proposed by the SVEs during the Doha Ministerial Conference and it was used in order to identify those countries that ought to benefit from an extension of the export subsidy programmes. The criteria used were technically three: a) a developing country whose accession protocols did not foresee the elimination of export subsidies, b) a world trade share of 0.10% or less and c) a Gross National Income (GNI) of US\$20 billion or less (based on the World Bank dataset).¹⁸

Turning now to the term «vulnerable, some of the most pressing factors to which SVEs are particularly vulnerable are natural disasters,¹⁹ climate change,²⁰ high trade dependence.²¹ The common characteristics among SVEs is the tougher impact that these factors have on their economies.

Although, the identification and analysis of the characteristics of SVEs has been an important part of the debate at the WTO, especially in the CTD, no comprehensive and official definition of the SVEs Members was never adopted or agreed upon.²² On this matter, it is also relevant to note that other International Organisations (IOs) adopt different criteria to define SVEs, however, they are cognizant of the fact that no single definition can encompass only SVEs, in so far as, depending on the criterion adopted, different states than SVEs will share some of their features.²³ Currently, at the WTO, the Informal Group of SVEs is composed of 32 Members – and one Observer State negotiating accession to the WTO. Most of them are Small Island Developing States (SIDS) and two landlocked States: Bolivia and Mongolia.

¹⁴ WT/COMTD/SE/M/14, paragraph 18.

¹⁵ WT/COMTD/SE/M/1, paragraph 17.

¹⁶ See the literature review in WT/COMTD/SE/W/4

¹⁷ WT/COMTD/SE/W/4, paragraph 4.

¹⁸ G/SCM/38. See H-P J. WERNER, *ibidem*.

¹⁹ WT/COMTD/SE/W41; WT/COMTD/SE/M/41

²⁰ WT/COMTD/SE/W41, WT/COMTD/SE/W/53

²¹ WT/COMTD/SE/M/45

²² WT/COMTD/SE/M/45, paragraph 5.

²³ C. D. BIRKBECK, *Systemic Issues for Commonwealth Small States in the Current Functioning of the WTO*, International Trade Working Papers, The Commonwealth, 2015.

3. *Small but Meaningful: SVEs Achievements in the WTO*

The informal group has been active on a variety of topics with the general goal to obtain better conditions for their participation in the multilateral trading system.

The very first proposal on the negotiating table proposed by SVEs was a success, in so far as it was first debated in the CTD and then submitted to the relevant bodies for approval and integration. The proposal concerned one single request which was to be applied to the Agreement on Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS) and to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).²⁴ These three agreements share the common feature of regulating highly technical matters of international trade: more specifically, the TBT and the SPS Measures agreements contain transparency obligations²⁵ which can result in cumbersome procedures for States with a low administrative capacity.²⁶ Both agreements foresee that developing countries may benefit from technical assistance in order to fulfil their obligations. However, the SVEs framed their inability to fulfil such obligations, because of administrative and capacity constraints as a factor hindering full integration to the multilateral trading system.²⁷ The SVEs proposal to this trade-related issue concerned the designation of regional bodies entrusted with the assistance to SVEs in abiding by such provisions. The proposal was then presented in the single relevant bodies, the TRIPs Council, TBT Committee and the Committee on SPS Measures, where it was discussed and subsequently upheld.²⁸

As recalled in the introduction, another area where the efforts of the SVEs have been successful is subsidization. In this case, the relevant legal basis is the Agreement on Subsidies and Countervailing Measures (SCM), which in Article 3 prohibits the use of subsidies over exported goods, Art. 3.1(a), and imported goods, Art. 3.1(b). The SCM Agreement foresees some dispositions concerning developing countries and LDCs, contained in Article 27, which are commonly known as belonging to the category of SDT clauses (special and differential treatment). The flexibility granted to these WTO Members derives from the acknowledgement of the great importance of economic development programmes, which, if not exempted, are prohibited.²⁹ In addition to the flexibilities provided in Article 27 of the SCM Agreement, which in general foresee a temporal exemption, SVEs obtained the possibility of requesting a further extension of the exemption for specific programmes.³⁰ The request and subsequent granting of the exemption by the Committee is however subject to annual review and satisfaction of conditions. The decision of the General Council does not expressly mention the informal group of small, vulnerable economies, but it makes reference to the document where the criteria used were defined,³¹ and it reports in an Annex the list of eligible programmes per country, for a total of 43 Programmes and 19 WTO Members, of which 16 are currently Members of the

²⁴ WT/COMTD/SE/5

²⁵ P. BOSSCHE, *Essentials of WTO Law*, Cambridge University Press, Cambridge, 2021², p. 181 and 192 – 193.

²⁶ WT/COMTD/SE/5, paragraph 3.

²⁷ *Ivi*.

²⁸ G/SPS/R/42, paragraph 69.

²⁹ P. BOSSCHE, *ibidem*, p. 168.

³⁰ WT/L/691

³¹ G/SCM/39

informal group.³² The eligible export subsidy programmes consist of «full or partial exemptions from import duties and internal taxes», provided that they were already implemented in September 2001.³³

SVEs received special consideration also in the negotiations on agriculture. It is no surprise that agriculture represents a sector where SVEs have been particularly active, since in many cases it consists of the most expanded domestic market sector, which results in a high dependency on it and in a greater vulnerability to natural disasters.³⁴ Given their unicity in this respect, in addition to the flexibilities granted to LDCs and developing countries,³⁵ it was decided that SVEs could benefit from an additional 10% moderation of the cut of the final bound tariff already foreseen in paragraph 63 for LDCs. Moreover, SVEs can cumulatively apply the tiered tariff and the regime for «Special products», i.e. commodities economically and socially important and critical, such as staple food.³⁶

The commitment to maintain flexibilities for WTO Members with specific characteristics was the subject of a draft decision for the Ministerial Conference in Nairobi in 2015.³⁷ During the latter, it was decided that all agricultural export subsidies were prohibited. The prohibition decided was nonetheless accompanied by some extensions for developing countries, whereas there is no mention of SVEs.³⁸

Similarly to agricultural products, SVEs in 2008 were included in the decision of the reduction of bound tariffs concerning Non-agricultural products. Instead of applying the general formula, SVEs could enjoy more flexible criteria. In this case, they were identified by the percentage of world NAMA (Non-agricultural market access) trade lower than 0.1 for the in the years between 1999 and 2001.³⁹

4. Unsuccessful Stories

From the literature reviewed and the Work Programme on Small Economies, Compilation Paper prepared by the Secretariat,⁴⁰ it emerges that in particular two specific requests advanced by the informal group of SVEs have not been included in final decisions.

The first one concerns a request similar to the one tabled in the TRIPs Council, TBT Committee and the Committee on SPS Measures during the negotiations for the Trade Facilitation Agreement (TFA). The proposal by SVEs concerned the possibility to make use of regional bodies in order to abide by the obligations of the agreement under negotiation.⁴¹ By considering the final text of the TFA, however, no mention of SVEs has been retained, and especially it is not expressly retained the possibility of adopting regional approaches to make use of regional bodies.⁴²

The second case refers to the negotiations for the Agreement on Fisheries Subsidies. The latter was adopted in 2022 and entered into force in 2025. SVEs submitted a first proposal already in 2010,

³² As of April 2026.

³³ G/SCM/39, paragraph 2.

³⁴ WT/COMTD/SE/W/14, Appendix A; WT/COMTD/SE/W/38, paragraph 124.

³⁵ TN/AG/W/4/REV.4, paragraph 63.

³⁶ TN/AG/W/4/REV.4, Annex F.

³⁷ WT/GC/W/709, TN/C/W/70, TN/AG/W/10, TN/MA/W/143, TN/S/W/62

³⁸ WT/L/980

³⁹ TN/MA/W/103/REV.3, paragraph 13.

⁴⁰ WT/COMTD/SE/W/22/Rev.12

⁴¹ TN/TF/W/165/REV.5, Article 15 1.1 and WT/COMTD/SE/W/22/Rev.12, page 60.

⁴² Trade Facilitation Agreement, adopted in 2013 and entered into force in 2017.

asking for an exemption on the prohibition of subsidization of vessel construction and operational costs. In this case, the criteria employed for identifying the beneficiaries of such exemption were two: a share of world Non-Agricultural trade not higher than 0.1 percent and no more than 1 percent share of global marine wild capture.⁴³ The interest of SVEs in this agreement stems from their heavy dependence on the fisheries sector. Although nationally this sector plays such a strategic role, if considered in relation to the global fisheries market, their relevance is minimal. In 2011 it was estimated that a majority of Members of the informal group represented less than 0.1 percent of the global marine wild capture.⁴⁴ Moreover, SVEs' exports are generally concentrated in a restricted range of products, among them fish.⁴⁵ Indeed, they argued that most of SVEs do not have the financial capacity to allocate subsidies and that, even where it was possible, their impact on overfishing and overcapacity is negligible and therefore should be allowed in order to support development efforts.⁴⁶

In their understanding, the tabled proposal was a request of additional flexibility, which was backed up by data and a general recognition of their needs by other WTO Members.⁴⁷ In spite of the efforts of SVEs, the requests have not been retained in the final text of the agreement, which instead have flexibilities clauses, i.e. SDT provisions, for developing countries and LDCs. Additionally, Article 8 on «Notification and Transparency» allows countries with a «global volume of marine capture production not exceeding 0.8 per cent» to report notifications on fishery subsidies every four years instead of annually – as provided in Article 25 of the SCM Agreement.⁴⁸

5. *SVEs Topical Challenges and Portfolios*

The WTO issued in total seven Ministerial Decisions on SVEs, one per Ministerial Conference since 2011, which prove the commitment and the space that SVEs have in the organisation, especially if considered the small relevance of SVEs in terms of trade share. All decisions have in common the reference to item k of paragraph 2 of the Work Programme on Small Economies of 2002.⁴⁹ This item mandates two main actions: on the one hand, WTO Members are encouraged to submit proposals, thus Member States are expected to play an active role in finding solutions for SVEs. On the other hand, the Secretariat is entrusted to carry out research on SVEs as requested by the General Council. Such research is mostly focused on WTO rules' impact, administrative and institutional obstacles and the effects of trade liberalisation.

One aspect reiterated in the Ministerial Decisions is the issue of trade facilitation. In fact, one of the underpinning rationale behind the efforts in favour of SVEs is a greater integration in the multilateral trading system. Related to trade facilitation, it is frequently requested to investigate how to reduce trade costs.⁵⁰ Since 2022 we can notice a little change in how the matter of SVEs is addressed in Ministerial Decisions. More specifically, they are more concentrated in specific topics

⁴³ WT/COMTD/SE/M/21.

⁴⁴ WT/COMTD/SE/W/22/Rev.12, page 55; TN/RL/GEN/162/REV.1 paragraph 3.

⁴⁵ WT/COMTD/SE/M/49.

⁴⁶ TN/RL/GEN/162/REV.1 paragraph 3.

⁴⁷ WT/COMTD/SE/M/21.

⁴⁸ This provision applies equally to developing countries and LDCs.

⁴⁹ WT/L/447.

⁵⁰ WT/L/975; WT/L/1030; WT/L/1136; WT/L/1235.

on which research is mandated. MC12 (2022), in addition to trade facilitation, mentions areas such as investments and natural disasters, and it gives great emphasis to the effects of the COVID-19 pandemic and on SVEs integration in this scenario. MC13 (2024) is instead very specific and emphasises three areas that ought to be investigated: e-commerce and digital ecosystems; the accessibility, openness and reliability of supply chains; and finally climate change, particularly «how to integrate trade related climate change adaptation and mitigation policies into the trade policies».⁵¹

In a similar vein, MC14 in Yaoundé, March 2026, focuses on three major trade-related topics: it stresses, again, participation in global digital trade; trade facilitation measures; and it mandates further investigation on «trade logistics, connectivity, and border processes.»⁵²

The trade-related topics contained in the Ministerial Decisions have been investigated and they represent the topical portfolios at WTO concerning SVEs.

5.1 Trade and Investment Facilitation

Starting by considering the export side of the trade market, SVEs are characterised by structural features that have the effect of increasing trade costs. The final cost of the traded product reflects such costs and, consequently, lose competitiveness in the trade market. If SVEs' products are not competitive, they lose the already small share of trade they have access to.⁵³ Trade costs are dispersed in the supply chain and can be categorised as endogenous, i.e. strictly related to the origin or destination of a products; exogenous, i.e. transportation costs, geographical distance and socio-cultural features of the trading partners;⁵⁴ fixed, i.e. one-time investments; and variable, i.e. related to the shipped unit.⁵⁵ SVEs have hence a disadvantaged position in the global market, which is also caused by their geographical location and infrastructures. In addition, SVEs exports are primarily driven by first-sector commodities. This means that a high share of traded products are subject to SPS and TBT measures, making them significantly exposed to Non-Tariff Measures (NTMs).⁵⁶ This aspect is particularly relevant when it comes to the analysis of the obstacles which prevent SVEs from integrating into Global Value Chains (GVCs).⁵⁷ In this case, structural vulnerability of small economies represents a major challenge.

Turning now on the import side of trade relations, as recalled above, SVEs are characterised by a high dependency on imported goods. Moreover, there are territorial aspects that further increase such dependency, such as a low diversification of production sectors and,⁵⁸ in some cases, scarcity of raw materials, which obliges small economies to import final products.⁵⁹ This aspect, has the effect

⁵¹ WT/L/1188.

⁵² WT/L/1235.

⁵³ WT/COMTD/SE/W/34, paragraphs 3.1-3.6.

⁵⁴ WT/COMTD/SE/W/34, paragraphs 4.3 and 4.4.

⁵⁵ WT/COMTD/SE/W/34, paragraph 4.6.

⁵⁶ WT/COMTD/SE/W/34, paragraph 6.6 and 6.7.

⁵⁷ WT/COMTD/SE/W/35, paragraph 2.1.

⁵⁸ WT/COMTD/SE/W/34, paragraph 1.5, 5.5 and 5.10.

⁵⁹ WT/COMTD/SE/W/38, paragraph 2.2.

of making SVEs more severely hit by big countries' subsidies,⁶⁰ especially if we consider that most frequently the number of trade partners of SVEs' is low.⁶¹

As recalled above, trade facilitation is a standing topic related to SVEs at the WTO, since they face more challenges and barriers to trade liberalisations. To the end of easing such barriers, in 2017 the WTO adopted the multilateral agreement on Trade Facilitation (TFA), which entered into force in 2022. Against a backdrop characterised by the crisis of multilateralism, and especially at the WTO, since the blockage of the Appellate Body, the TFA represents a major result and success. This agreement is intended to facilitate trade, and for this reason is particularly relevant for developing countries and LDCs, thus, also for SVEs. In fact, the TFA is expected to have a significant impact on the reduction of trade costs. Studies and projections from reliable data and research centres, such as the Organisation for Economic Co-operation and Development, confirm these expectations.⁶² Given the recent entry into force of the agreement, concrete results convertible into data are not yet available. Considering some of the most recent Trade Policy Reviews, SVEs are indeed working on the implementation of the TFA.⁶³

Although addressed less extensively, the CTD engaged in the importance of international investments in SVEs. Considering their inherent characteristics, it has already been mentioned the extreme vulnerability of SVEs to natural disasters and climate change. The former is indeed a major factor hindering Foreign Direct Investments (FDIs), together with other structural barriers.⁶⁴ Some of the most important barriers are, for instance, the small population size of SVEs, which makes it hard to create economies of scale; the heavy dependence on imports and the consequent sensitivity to external shocks; geographical isolation; the great extension of production of produces and commodities, trade goods particularly exposed to climate change; and finally the high government expenditures, both caused by natural disasters recovery and public services, do not allow for an attractive fiscal environment.⁶⁵

Recent data on investments confirm the need for initiatives intended to increase FDI in SVEs, except for a limited number of countries – small countries – which have indeed attracted high level of FDI, such as Guyana, where international investors have undertaken exploration activities for oil and gas, but also Seychelles, Grenada, St Vincent and the Grenadines, and Antigua and Barbuda, where the ratio of FDI and GDP is around 10%.⁶⁶

In the WTO, investment facilitation has been addressed in a dedicated Joint Statement Initiative (JSI), a format launched at the MC in Buenos Aires in 2017 which consists of informal sub-groups of WTO Members negotiating a plurilateral agreement on a specific area of interest together with like-minded Members. This was the case of investment facilitation. A final text for the plurilateral

⁶⁰ WT/COMTD/SE/W/38, paragraph 2.3.

⁶¹ WT/COMTD/SE/M/1.

⁶² OECD, Trade Policy Brief, *Implementation of the WTO Trade Facilitation Agreement: The Potential Impact on Trade Costs*, 2018.

⁶³ See, for instance, the Trade Policy Review of Belize (WT/TPR/G/484) and Vanuatu (WT/TPR/G/481).

⁶⁴ WT/COMTD/SE/M/40, paragraphs 7-9.

⁶⁵ K. KAMPEL, N. BALCHIN, *Investment Flows into Commonwealth Small States: Trends, Challenges and Implications*, International Trade Working Paper, The Commonwealth, 2025, p. 5.

⁶⁶ *Ivi*, p.9.

Investment Facilitation for Development (IFD) Agreement was concluded in 2024.⁶⁷ The latter was welcomed by several Ministers of SVEs countries, and currently of the 129 Member parties, SVEs are 23.⁶⁸

The purpose of the agreement is to «facilitate» investments by imposing obligations that concern transparency, cooperation, streamline of procedures, as well as special and differential treatment for developing countries.⁶⁹ In spite of the great contribution that the IFD Agreement could potentially – and hopefully – have on increasing investments in SVEs, the adoption of the agreement is currently opposed by one single Member: India.⁷⁰ While a more detailed discussion on the reasons why the IFD Agreement has not encountered full consensus to enable its approval as a plurilateral treaty is not the scope of this analysis, it is significant to recall that one of the criticism concerns the nature of the JSI. The latter, being a plurilateral initiative, rather than a multilateral one, is considered at odds with the multilateral nature of WTO agreements. Such initiatives, in fact, can be adopted only by those Members wishing to become parties, and are thus excluded from the Single Package Principle. In addition, this rule-making process has been criticised for being less inclusive of developing countries' needs, posing a higher risk of marginalisation.⁷¹ This aspect and, more specifically, the role played by SVEs in plurilateral initiatives will now be addressed in more details.

6. SVEs and Plurilateral Initiatives

WTO Plurilateral Initiatives have become an increasingly debated topic. These instruments are considered to be a viable pathway in order to address trade-related matters that do not meet the interest or the agreement of all Members. They address a high variety of topics, ranging from plastic pollution, Fossil Fuel Subsidy Reform (FFSR), Investment Facilitation, to, E-commerce.

Scholarship on plurilaterals thus engages and research the implications of such initiatives, such as the compatibility with the WTO Agreement and practice or the impact on a multilateral trading system that is going through a crisis and that needs a reform.

Concerning the object of the present analysis, i.e. SVEs, the debate has also considered what is the role that, more in general, developing countries, LDCs and SVEs have in plurilateral initiatives.

It emerges that there are different and very distant opinions. On the one hand, it has been argued that plurilateral initiatives depart from the original architecture of WTO on rule-making. In multilateral initiatives every Member has the right to oppose, thanks to the positive consensus mechanism. This practice grants decision-making to all Members and the chance to advance proposals and needs. Against this backdrop, plurilateral initiatives do not ensure the same level of

⁶⁷ N. LANZONI, *From Protection and Liberalisation to Facilitation: The WTO IFD Agreement, the EU-Angola SIFA, and Shifting Paradigms in International Investment Law*, in *The WTO as Major Driver of Sustainable Development and its Reform Process*, AlmaDL – Università di Bologna, Bologna, 2025.

⁶⁸ For the full list visit: https://www.wto.org/english/tratop_e/invfac_public_e/invfac_participation_list_e.htm. The nine SVEs Members that did not join the IFD Agreement membership are: Cuba, Fiji, Guyana, Jamaica, Saint Kitts and the Grenadines, Samoa, Sri Lanka, Tonga, Trinidad and Tobago.

⁶⁹ N. LANZONI, *ibidem*, p.78. For a detailed analysis of the IFD Agreement see the contribution of Niccolò Lanzoni.

⁷⁰ European Commission, MEMO: The WTO Investment Facilitation for Development Agreement, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-and-wto/memo-wto-investment-facilitation-development-agreement_en.

⁷¹ N. LANZONI, *op. cit.*, p. 80.

participation, posing a higher risk of further marginalisation of countries that already struggle to participate in the Geneva trading system.⁷² On the other hand, other positions have argued that plurilateral initiatives represent an opportunity for SVEs, in so far as they can decide to engage in the negotiation of agreements that cover areas of their interest. This position is based on the unfulfillment of the Doha Development Agenda via the multilateral arena.⁷³ In light of this fact, this view posits that plurilateral negotiations are the new chance for SVEs to table their proposals.⁷⁴

From a preliminary consideration of the plurilateral initiatives at present at the WTO, it may be argued that both positions can find empirical validation. Plurilaterals, in fact, do in some cases provide for a negotiating forum on areas that are of particular interest to developing countries and SVEs. This is the case of the above recalled IFD Agreement. This initiative might be considered a positive outcome of this topical trend, as it addressed developmental needs and that may have positive impacts on SVEs. However, it is also true that there are initiatives that are mainly promoted by developed countries, such the E-commerce agreement. This example might be a valid one to prove the first position reported above. In fact, even if e-commerce and digitalisation represent an area of interest for SVEs, which was also explicitly addressed by the Ministerial Decision adopted at MC13, only a small number of them participate in the initiative.⁷⁵ A data that may suggest that SVEs do not consider this agreement as particularly beneficial for them or that in the way it was framed it mainly addresses the interests of the proponent countries.

7. Final Remarks

Considering the very low trade share that SVEs detain of the world trade market, the attention devoted to this group at the WTO is remarkable. The efforts undertaken, especially by the CTD, in holding debates on specific trade-related matters – which are supported by research and interventions by external entities, such as, *inter alia*, UNCTAD,⁷⁶ the World Bank, the Commonwealth⁷⁷ and the International Trade Centre,⁷⁸ – and by the WTO Members, SVEs at the front line, to assess and find solutions to increase integration in the multilateral trading system. As per the developing countries discourse at the WTO, it is clear that the non-attainment of the Doha Development Agenda is likewise relevant for SVEs. However, against the backdrop of the multilateral crisis and the desired reform of the Geneva trading system, the informal group of SVEs has carved and shaped a mechanism based on research, data assessment, political debate which ultimately proved successful in the elaboration of proposals in the negotiations, regardless of their final inclusion. In spite of the absence of a formal recognition of the group, SVEs proved a solid and constant perseverance in working towards their interests.

⁷² J. KELSEY, *The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO*, in *Journal of International Economic Law*, Volume 25, 2, 2022, pp. 2 – 24.

⁷³ C. ZHUAWU, *Embedding Development in WTO Plurilateralism: A Commonwealth Developing Country Perspective*, The Commonwealth, 2022 pp. 2–3.

⁷⁴ *Ivi* 6.

⁷⁵ Among the 71 co-sponsors, the following States belong to the informal group of SVEs: Cabo Verde, Mauritius and Mongolia.

⁷⁶ WT/COMTD/SE/M/48.

⁷⁷ WT/COMTD/SE/M/45.

⁷⁸ WT/COMTD/SE/M/41.

Trade-and-Labour Regulation and WTO Law, or ‘Never the Twain Shall Meet’? An Analysis of Recent Practice in the WTO and outside It

Lorenza Mola and Claudia Paglia¹

Summary: 1. Introduction – 2. WTO and its Context: from the Singapore Ministerial Conference to Nowadays – 3. Extra-WTO outside the WTO: Unilateral Preferences Systems and Regional Trade Agreements – 4. The WTO’s internal discourse on ‘trade and labour’: Transparency Mechanism for Regional Trade Agreements, World Trade Reports, Annual Reports, and Trade Policy Reviews – 5. Conclusions.

Keywords: Trade and Labour – Labour Standards – WTO Law – ILO Conventions – PTAs – Sustainable Development – Labour Rights – Trade Governance – Plurilateral Agreements – Social Clause – Trade Policy – Human Rights.

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1. Introduction

In 2004, Peter Sutherland and his colleagues warned against an expanded reliance on plurilateral agreements, arguing that such a move could open the door to negotiations on «non-trade objectives into trade agreements», including «labour protection». In their words, «if such requirements cannot be justified at the front door of the WTO, they probably should not be encouraged to enter through the side door».² More than twenty years later, the landscape shows the steady trend of regional trade agreements among WTO Members containing labour-related provisions. This might suggest a potential shift in the understanding of the trade and labour linkage that challenges Sutherland’s concerns, or, to the contrary, confirms it.³

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² P. SUTHERLAND et al, (2004) *The future of the WTO: addressing institutional challenges in the new millennium*, World Trade Organization, 2004, p. 23, para. 87.

³ On the nexus between trade and labour, among others, see N. DELGADO, *Towards Work Liberalization: The WTO Discourse on Labour Standards and Policy*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2019, 35, No. 4, pp. 455-482, <https://doi.org/10.54648/ijcl2019021>; D. CHEONG, F. C. EBERT, *Chapter 4: Labour law and trade policy: What implications for economic and human development?*, in *Labour Regulation and Development*, Edward Elgar Publishing, Cheltenham, UK, 2016; B. M. HOEKMAN, P. C. MAVROIDIS, *WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements*, in *European Journal of International*

The present article employs the trade-labour nexus as a deliberate test to explore the limits of the conclusion of plurilateral trade agreements within the WTO. By analysing trade and labour as an ‘extreme case’ in this context, the article seeks to contribute to the doctrinal debate on whether, and under what conditions, plurilateral trade agreements can be compatible with the WTO’s legal and institutional architecture.⁴ Such a question exposes a fundamental tension within the WTO: on the one hand, the organization’s commitment to inclusiveness and, on the other hand, the growing need for variable geometry to address emerging global issues. Indeed, Article X.9 of the WTO Agreement requires that any new plurilateral agreement be adopted «exclusively by consensus». Therefore, even if a significant majority of WTO Members were to support such an initiative, a single dissenting vote could block its formal adoption as a WTO instrument. As Hoekman and Mavroidis observed, this provision renders plurilateral agreements Pareto-sanctioned arrangements, as they can only exist when non-participants accept that the agreement does not harm their interests.⁵ However, in politically sensitive areas like the trade and labour nexus, such acceptance is arguably far from guaranteed.

Accordingly, the main research question gives rise to a series of subsidiary questions. Should a substantial majority of WTO Members ever emerge in support of the adoption of a plurilateral agreement on trade and labour, brought about by the paradigm shift at the regional level, could an interpretative pathway exist that would confer upon such a text the status of a WTO plurilateral agreement despite the opposition of one or more Members?

Beyond the interpretative issue, this inquiry calls for a reflection on a potential reform within the WTO enabling subsets of Members to prompt cooperation in areas of (partially) shared interest without undermining the multilateral system. Should the consensus rule be revisited? To what extent can such a revision be contemplated when applied to areas marked by significant long-standing intense fragmentation, such as the interaction between trade and labour? In the light of the WTO-X category theorised by Horn, Mavroidis and Sapir,⁶ insofar as it would regulate an area not previously addressed by the WTO, could the instrument alternatively be framed as a WTO-X agreement?

Law, Vol. 26, Issue 2, 2015, pp. 319–343, <https://doi.org/10.1093/ejil/chv025>; F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in *Working Paper No 205*, edited by International Institute of Labour Studies, ILO, Geneva, 2010; INTERNATIONAL ORGANIZATION OF EMPLOYERS, *The Evolving Debate on Trade & Labour Standards*, in *IOE Information Paper*, 2006.

⁴ Any analysis on the trade-and-labour nexus in trade arrangements naturally gives rise to the question of what concrete effects labour provisions produce. This fundamental issue is not addressed in the present article. Literature points out that, while empirical evidence suggests that social clauses are not detrimental to trade, their practical impact is constrained, and it depends on the surrounding political and economic context. In other words, on their own, labour provisions are insufficient to counter the potential negative consequences of trade liberalization on working conditions and workers’ rights. On the contrary, such a result may be achieved through the adoption of a comprehensive approach that involves multiple stakeholders, a robust domestic labour law framework, credible enforcement of labour standards, and the active involvement of labour institutions and workers’ organisations. See D. CHEONG, F. C. EBERT, *Chapter 4: Labour law and trade policy: What implications for economic and human development?*, in *Labour Regulation and Development*, Edward Elgar Publishing, Cheltenham, UK, 2016, pp. 114–115; INTERNATIONAL LABOUR ORGANIZATION, *Handbook on assessment of labour provisions in trade and investment arrangements*, edited by International Labour Office, Geneva, 2017.

⁵ B. M. HOEKMAN, P. C. MAVROIDIS, *WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements*, in *European Journal of International Law*, Vol. 26, Issue 2, 2015, pp. 319–343, <https://doi.org/10.1093/ejil/chv025>, p. 326.

⁶ H. HORN, P. C. MAVROIDIS, A. SAPIR, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, in *The World Economy*, Vol. 33, No. 11, 2010, p. 1565.

In the following Sections, we address each distinct dimension of the trade-labour nexus debate. In Section 1, we outline the evolution of such a debate *within* the WTO, from the contentious exclusion of labour at the 1996 Singapore Ministerial Conference to its subsequent treatment within the WTO architecture and in inter-institutional practice. In Section 2, we first explore the *extra-WTO* landscape and examine how WTO Members have responded at the regional level to the elimination of labour from the Organization's mandate, focusing in particular on the development of unilateral preferences schemes and the incorporation of labour provisions into preferential trade agreements (Section 2). In Section 3, we return to the multilateral arena and assess whether, and to what extent, these regional developments have influenced the WTO's own discourse on the trade-labour nexus. We conclude by summarizing the results of the analysis and, in their light, attempt to address the research questions and elaborate further ones.

2. *WTO and its Context: from the Singapore Ministerial Conference to Nowadays*

Since the envisaged ITO project was dismissed, no 'trade and labour' set of rules has been included in the multilateral legal framework for the regulation of trade, from the GATT to the WTO.⁷ The acknowledgement of this nexus into the sphere of trade cooperation was outstanding but did not result from the Uruguay Round of intergovernmental negotiations.⁸ Nor did subsequent effort by the WTO membership at the Singapore Ministerial Conference – or later ones – succeed in bringing about its inclusion. The pace of the trade-and-labour related discourse in the negotiating and institutional settings of world-wide trade regulation highlights a persistent cleavage between countries participating in it.

In the blackletters of the treaties, the Preambles of the GATT 1947 and of the Marrakesh Agreement establishing the WTO contain a reference to 'full employment' without making labour a subject of «mutually advantageous arrangements» on the Members' «relations in the field of trade and economic endeavour». From the viewpoint of contextual interpretation, this hardly allows for integration of labour standards into the commitments on the terms of trade.⁹ The Marrakesh

⁷ In the Havana Charter, trade and employment were juxtaposed. Article 1 sets out the Parties' undertaking «in the fields of trade and employment to co-operate with one another and with the United Nations.». Chapter II deals with 'Employment and Economic Activity', highlighting the «Importance of Employment, Production and Demand in relation to the Purpose of this Charter» in Article 2, while Chapter IV on Commercial Policy lays the provisions later adopted by the GATT. https://www.wto.org/english/docs_e/legal_e/havana_e.pdf. For a reading of the «relationship between trade practices and labour rights throughout the history of the 20th century», from the Havana Charter and the role that the ILO was expected to play in the International Trade Organization to the inclusion of labour provisions in PTAs and Generalized Systems of Preferences, see E. SYCHENKO, *Labour Rights in Global Trade: The Lost Consensus*, in *Italian Labour Law e-Journal*, Issue 2, Vol. 18, 2025; E. DE WET, *Labour Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization*, in *Human Rights Quarterly*, 17, 3, 1995, pp. 443-462.

⁸ Cf. from the WTO website: «nearly all ministers expressed a point of view on the issue. The Chairman of that conference concluded there was no consensus among member governments at the time, and thus no basis for agreement on the issue.», https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm.

⁹ Art. 31, paras. 1 and 2, first sentence, VCLT. Similarly, in *EC – Asbestos*, the Panel stated that «although the preamble to the WTO Agreement refers in particular to expanding trade in goods, it does not give sufficiently precise information on the terms which we must interpret». (Panel Report, *EC – Asbestos*, para. 8.48; in WTO Analytical Index, Marrakech Agreement Establishing the WTO, Preamble, 'First recital', para. 3). In this vein, J. QIN, «*Personal Dignity*» as a Non-Trade Value in Trade Policy?, in *IELP Blog*, 24 June 2020. At the same time, the Appellate Body Report on *EC – Tariff Preferences*, discussing the history of Part IV and the Enabling Clause, observed: «When the GATT 1947 entered into

Agreement adds consideration for «the optimal use of the world's resources in accordance with the objective of sustainable development» to complement the former. Although environmentally qualified in the subsequent text, this could provide a gateway for introducing the social dimension of sustainable development in light of the expansion of the scope of the notion of 'sustainable development' in the law and practice of the international society and refer to it on grounds of interpretation.¹⁰

Furthermore, lacking status of UN specialized agencies, the WTO does not have an embedded commitment to pursuance of UN aims. These include the promotion of «the economic and social advancement of all peoples» and are premised on the determination «to promote social progress and better standards of life in larger freedom».¹¹ This moves the 'importation' of relevant UN values, such as the one just mentioned, to the ground of systemic integration (cf. art. 31.3.c VCLT). The same approach shall be considered in interpreting WTO law, with regard to so-called core labour standards (i.e., the freedom to bargain collectively, freedom of association, elimination of discrimination in the workplace and the elimination workplace abuse (including forced labour and certain types of child labour). The notion was developed by the ILO in 1998, when ILO member governments adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. Under this declaration, ILO member governments endorsed some basic principles which are included in the core ILO Conventions and bind all Members irrespective of ratification of the corresponding conventions.¹²

Looking inside the multilateral agreements in the WTO framework, the GATS deals with apparently labour-related issues. Notably, this figures under the definition of the fourth modality of service exchange through temporary movement of natural persons and commitments relating to it ('GATS mode 4', *ex art. I GATS*), and, broadlier, through the recognition of licenses and diplomas, and domestic regulation.¹³ On the first aspect, the Annex to the GATS specifies that the agreement does not cover measures on access to the employment market, citizenship, residence or employment on a permanent basis.¹⁴ As regards the GATS provisions on domestic regulation at Article VI, its

force, the Contracting Parties stated that one of its objectives was to "rais[e] standards of living". However, this objective was to be achieved in countries at all stages of economic development through the universally-applied commitments embodied in the GATT provisions.» (Appellate Body Report, EC – Tariff Preferences, para. 107; in WTO Analytical Index, GATT 1994 – Preamble (DS reports), 'First recital', para. 3).

¹⁰ Literature on non-trade values and systemic integration in international trade law is vast. On the link between sustainable development and trade regulation, see, among others, K. KUHLMANN, *Sustainable and Inclusive Trade and Development: More Than Words?*, 2023, and the collection of papers in Kuhlmann (ed), *Next Generation Approaches to Trade and Development: Balancing Economic, Social and Environmental Sustainability*, Georgetown Law's Center on Inclusive Trade and Development (CITD).

¹¹ UN Charter, Preamble and Art. 1.3.

¹² On 21 May 2026, the ICJ delivered its Advisory Opinion holding that the right to strike is protected under ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise [Advisory Opinion of 21 May 2026](#).

¹³ On the argument that trade in services benefits national development policies and the achievement of the SDGs, see M. ROY, *Elevating Services: Services Trade Policy, WTO Commitments, and Their Role in Economic Development and Trade Integration*, in *Journal of World Trade*, Vol. 53, Issue 6, 2019, pp. 923-950; see also, WTO-World Bank, *Trade in services for development: Fostering sustainable growth and economic diversification*, 2023, where it is only stated that «Services are today seen as central determinants of productivity, competitiveness and rising living standards» (p. 20).

¹⁴ Annex on movement of natural persons supplying services under the Agreement. Advocacy for the incorporation of migrant worker protection clauses into any multilateral framework that deals with temporary migration can be found in a publication under the auspices of the ILO, suggesting several ways by which the ILO could «influence the debate on GATS Mode 4 both by collaborating with the WTO and also independently, by using its unique tripartite structure,

coverage is operationally understood as encompassing licensing requirements, qualification requirements, and technical standards. Reference to «all measures of general application» to be «administered in a reasonable, objective and impartial manner» is limited to those measures «affecting trade in services» in sectors «where specific commitments are undertaken», and has not been addressed by practice so far.¹⁵ Overall, being services a highly regulated economic sector due to qualification requirements and asymmetry of information, the nexus with labours standards plays in favour of arguments (and provisions) aimed at preserving the right to regulate and avoiding downward harmonization or chill-out effects.¹⁶ In the broader debate accompanying the negotiations on the TiSa (Trade in Services Agreement) among some WTO members, greater acknowledgement of labour standards was advocated through the inclusion of clauses providing «full protection» of human rights, the ILO Fundamental Principles and Rights at Work Conventions as a basis for suspension of the agreement, and implementation of ILO conventions as a prerequisite for adhesion, together with the establishment of a «multi-Party dispute settlement procedure accessible by the public that would make violations of internationally recognised labour standards actionable across service supply in global chains including in trade in tasks».¹⁷

Reverting to the practice of the Organization, Ministerial conferences addressing trade and labour standards are temporarily confined to the 1996-2001 period. The paragraph on labour standards in the 1996 Singapore Declaration reads:

«We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration».

At Doha, in 2001, a paragraph reaffirming the Singapore Ministerial Declaration on labour was included in the Ministerial Declaration, without any specific discussion.

In the meanwhile, in preparation for the 1999 Seattle Ministerial, labour and labour standards were classified among «subjects of intense debate»,¹⁸ where they were narratively addressed from both perspectives of concerns that trade liberalization «destroys jobs, depresses wages and ignores workers' rights», and that a social clause would challenge the development of developing countries.¹⁹ The reports from that time acknowledged a divide within WTO membership. On the one hand, they

international outreach and technical assistance» (Bhatnagar, Pradip, GATS mode 4: Movement of natural persons and protection of migrant workers' rights, 2014).

¹⁵ As of June 2024: cf. https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art6_oth.pdf.

¹⁶ Cfr. WTO, *Joint initiative on services domestic regulation, Reference paper on services domestic regulation*, INF/SDR/2, 26 November 2021, para. 3.

¹⁷ In the envisaged mechanism, «Cases could be submitted on the basis of expectation for responsible business behaviour set out in the OECD Guidelines on MNEs, the ILO Tripartite Declaration on MNEs and the UN Guiding Principles on Business and Human Rights». See Statement on the goals and principles of the Trade in Services Agreement, August 2013, https://www.etuc.org/sites/default/files/Statement_on_the_goals_and_principles_of_TISA_-_August_2013_1.pdf.

¹⁸ https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm.

¹⁹ WTO, *Seattle: what's at stake*, parts 5 and 4, respectively.

refer to the position of some Members in Europe and North America on the legitimacy effect of bringing labour standards into the global trading system and on suggestions that a working group were formed to study the issue of trade and core labour standards. On the other hand, developing countries and least developed countries expressed the position that excluded the issue of core labour standards from the coverage of the WTO, otherwise being a guise for protectionism and undermining their comparative advantage.²⁰

Director generals were also vocal/relevant voices in the debate. In 1999, Director-General Mike Moore addressed the International Confederation of Free Trade Unions (ICFTU) conference on ‘Globalisation and Workers’ Rights’ in Seattle, where he warned that the trade and labour debate of the time was «in many ways a false debate» and obscured «the underlying consensus that exists about the social problems all countries face in this interconnected world, and the need for shared solutions».²¹ In 2003, Director-General DG Supachai Panitchpakdi, in addressing the ICFTU conference at the Cancún Ministerial Conference, noted that divergent positions on the nexus between trade and labour standards in the WTO did not mean that WTO Members were not committed to respecting internationally recognised labour standards.

The linkage between trade and labour in trade arrangements was also indirectly mentioned in the Appellate Body report on the dispute initiated by India against the European Communities concerning the conditions for the granting of tariff preferences to developing countries. When assessing the consistency of the drug arrangements in the EC Regulation at stake with the Enabling Clause, the Appellate Body compared absence therein of a mechanism of inclusion of additional countries in the list of beneficiaries with the provision of such mechanisms in relation to the other specific arrangements for additional preferences under the scheme, notably «the “special incentive arrangements for the protection of labour rights” and the “special incentive arrangements for the protection of the environment”».²²

Furthermore, inter-institutional cooperation is sought at a soft level, notably with the ILO. The relationship takes place between the WTO’s administrative body – the WTO Secretariat – and the ILO. Precisely, the WTO Secretariat attends sessions of the ILO Governing Bodies as an observer. Participation in meetings of the Governing Body’s Working Party on the Social Dimension of Globalization occurs on a routine basis, but only two instances of participation by the then WTO Director General are reported, in 2002 and 2007.²³ Activities consist of compiling statistics, research and technical assistance and training. In 2007, a joint study between the International Labour Office and the WTO Secretariat was issued.²⁴ In presenting the initiative by the two Secretariats, emphasis

²⁰ https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm.

²¹ https://www.wto.org/english/thewto_e/minist_e/min99_e/english/press_e/pres152_e.htm.

²² WTO, EC-Tariff Preferences, DS246, Appellate Body Report, 7 April 2004, WT/DS246/AB/R, para. 182.

²³ WTO website: https://www.wto.org/english/docs_e/legal_e/marag_e.htm.

²⁴ J. MARION, E. LEE, *Trade and Employment: Challenges for Policy Research. A joint study of the International Labour Office and the Secretariat of the World Trade Organization*, Geneva, 2007, available [here](#). The outline reads: «On the basis of an overview of the existing academic literature, the study provides an impartial view of what can be said, and with what degree of confidence, on the relationship between trade and employment, an often contentious issue of public debate. Its focus is on the connections between trade policies, and labour and social policies and it will be useful for all those who are interested in this debate: academics and policy-makers, workers and employers, trade and labour specialists.»

was placed on the intent of the joint study, not to «give policy advice» but to «help policymakers think about policy design and in particular about trade-offs that might be implied».²⁵

Currently, however, the officially published position is that of agnosticism. ‘Labour standards’ are listed among the ‘New and cross-cutting issues’ alongside ‘regionalism’, ‘the environment’, ‘investment’ and ‘electronic commerce’,²⁶ and it is reiterated that «there is no work on this subject in the WTO’s Councils and Committees».²⁷

3. *Extra-WTO outside the WTO: Unilateral Preferences Systems and Regional Trade Agreements*

While the WTO remains resistant to integrate labour standards, there have been numerous approaches to include a labour dimension into trade relations outside the multilateral trading system.²⁸ Notably, in the framework of unilateral preferences schemes, which some WTO Members have established since the 1970s, the United States and the European Union’s Generalized System of Preferences (GSP) allow for the suspension of trade benefits in cases of non-compliance with recognized sets of labour standards.²⁹ The labour clause in the United States’ GSP scheme provided for the withdrawal of trade preferences if a beneficiary country is failing to «tak[e] steps».³⁰ The European Union’s GSP further incorporated an incentive-based mechanism granting additional preferences to countries demonstrating effective implementation of such standards.³¹

²⁵ https://www.wto.org/english/news_e/news07_e/ilo_feb07_e.htm.

²⁶ https://www.wto.org/english/news_e/spsp_e/spsp15_e.htm.

²⁷ https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm.

²⁸ F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in *Working Paper No 205*, edited by International Institute of Labour Studies, ILO, Geneva, 2010, p. 3.

²⁹ With regards to the EU’s GSP, Council Regulation (EC) No. 2501/2001, covering the period from January 2002 to December 2005, is the first GSP scheme that contains special incentives for the protection of labour rights. A third GSP scheme introduced the GSP-Plus arrangements for sustainable development and good governance. On this see Council Regulation (EC) No. 980/2005, applying a scheme of generalised tariff preference, covering the period from January 2006 to December 2008, and Council Regulation (EC) No 732/2008 applying a scheme of generalised tariff preferences for the period from January 2009 to December 2011. With respect to the US’s GSP, the GSP scheme was first authorized by the 1974 Trade Act; see also the Office of the US’ Trade Representative’s [official website](#).

³⁰ Section 502(d) of the 1974 Trade Act sets out that the President (of the United States) must withdraw or suspend the designation of a beneficiary country if «changed circumstances» would bar such a country from designation under the previous sub-section 502(b)(2). Among the bases for ineligibility as a beneficiary country, the latter sub-section points to the failure of «[t]aking steps to afford internationally recognized worker rights to workers in the country[...]» (see Section 502(b)(2), letter G).

³¹ Following Council Regulations No 980/2005 and No 732/2008 (see n. 29), the European Union’s sanction-based GSP transformed into a ‘carrot and stick approach’. Indeed, while the 1995 GSP set out the withdrawal of trade preferences in case of «systemic and serious violations» of ILO Conventions No. 29 and No. 105, the 2002 GSP further provided for a scheme of additional preferences for full compliance with all ILO Fundamental Conventions. Furthermore, on 28 April 2026, a new EU GSP scheme was approved by the European Parliament acting within the EU legislative procedure, applicable from the 1st January 2027 for 10 years, that will strengthen conditionality on, *inter alia*, labour rights; see European Commission, [New Generalised Scheme of Preferences approved for application in 2027 - Trade and Economic Security](#); cf. «It also introduces improved monitoring, greater transparency, and reinforces and updates the links between trade preferences and compliance with international standards» (ibid). See, among many, P. ALSTON, *International Trade as an Instrument of Positive Human Rights Policy*, in *Human Rights Quarterly*, 1982 p. 155 ss.; L. BARTELS, *Human Rights Conditionality in the EU’s International Agreements*, in *Oxford University Press*, 2005; L. MOLA, *I diritti umani nelle relazioni economiche esterne dell’Unione europea: il Sistema di preferenze generalizzate*, in *La Tutela dei Diritti Umani in Europa: tra sovranità statale e ordinamenti sovranazionali*, CEDAM, 2010, pp. 217-245; F. C. EBERT, A.

Against this backdrop, states and other actors (e.g., the European Union) have increasingly negotiated labour provisions in bilateral and regional trade agreements which we will refer to as ‘preferential trade agreements’ or PTAs.³² Following Horn, Mavroidis and Sapir’s designation, some PTAs can be qualified as ‘WTO-extra’ (or ‘WTO-X’) as they deal with issues, i.e. the trade and labour nexus, that fall outside the scope of the WTO mandate, in addition to providing preferential terms for their reciprocal trade relations alongside their commitments under the WTO (‘WTO-plus’ or ‘WTO+’).³³ The first main attempt to link trade and labour in the context of PTAs is the North American Agreement on Labor Cooperation (NAALC), a side agreement to the 1994 North American Free Trade Agreement (NAFTA), which calls the contracting parties to effectively enforce their domestic labour law and to provide for high standards with regards to eleven labour principles.³⁴ The NAALC’s principles are not designed to be a set of common minimum standards, as explicitly laid out in the *chapeau* to Annex I, but they are guiding principles subject to each contracting party’s national labour law.³⁵ Indeed, Article 2 of the NAALC recognizes «the rights of each Party to establish its own domestic labor standards». Some argue that, while the NAALC’s eleven principles encompass ILO’s core labour standards, they are broader in scope, in that they expand on the social and economic dimension of labour rights by ensuring, e.g., minimum employment standards, working health and safety and the protection of migrant workers.³⁶ The issue of labour is also addressed in the 2020 Agreement between the United States, Mexico and Canada (USMCA), replacing NAFTA and NAALC. However, unlike NAFTA, labour provisions in the USMCA are incorporated in the main text, namely in Chapter 23, titled ‘Labor’. This designation is common to all PTAs concluded by the United States after the 2000 US-Jordan trade agreement.³⁷ There are two other notable differences with respect to NAFTA and NAALC. First, the labour provisions under Chapter 23, USMCA, specifically refer to the 1998 ILO Declaration on Fundamental Principles and Rights at Work and the 2008 ILO Declaration on Social Justice for a Fair Globalization,³⁸ and contain new provisions on forced labour and violence against workers.³⁹ Second, the obligations contained in the USMCA are

POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in Working Paper No 205, edited by International Institute of Labour Studies, ILO, Geneva, 2010, p. 6.

³² F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in Working Paper No 205, edited by International Institute of Labour Studies, ILO, Geneva, 2010, p. 3.

³³ H. HORN, P. C. MAVROIDIS, A. SAPIR, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, in *The World Economy*, Vol. 33, No. 11, 2010, p. 1567.

³⁴ On the obligations see Articles 1 to 3, NAALC. On the labour principles, see Annex 1 to the NAALC.

³⁵ The *chapeau* of Annex 1 to the NAALC sets out that the labor principles are «guiding principles that the Parties are committed to promote, subject to each Party’s ‘domestic law’, but do not establish common minimum standards for their domestic law[...]» (emphasis added).

³⁶ L. A. COMPA, T. BROOKS (2019), *NAFTA and NAALC twenty-five years of North American trade - labour linkage*, (Second Edition) in *Wolters Kluwer*, 2019, pp. 28-30, and pp. 43-44.
<http://www.vlebooks.com/vleweb/product/openreader?id=none&isbn=9789403513652>.

³⁷ *Ibid.*, pp. 229-231.

³⁸ See Chapter 23, Article 23.2 that sets out the parties’ commitment, as members of the ILO, to the obligations enshrined in the 2008 ILO Declaration on Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization. See also Article 23.3, which provides that each Party must comply with a set of rights «as stated in the ILO Declaration on Rights at Work».

³⁹ See Chapter 23, Articles 23.6 and 23.7, respectively; see also L. A. COMPA, T. BROOKS (2019), *NAFTA and NAALC twenty-five years of North American trade - labour linkage*, (Second Edition) in *Wolters Kluwer*, 2019, pp. 232-234.
<http://www.vlebooks.com/vleweb/product/openreader?id=none&isbn=9789403513652>.

subject to a peculiar enforcement mechanism that operates on a one-way basis towards Mexico, as outlined in Annexes 31-A and 31-B, USMCA,⁴⁰ which will be explored later in the section.

Since the NAFTA, labour rights provisions have been integrated in several agreements concluded by the United States and the European Union, some confined to domestic labour law commitments (particularly the earlier agreements concluded with the United States),⁴¹ others instead referring to compliance with international labour standards, including the ILO's core labour standards (see *infra*). In the aftermath of the WTO Ministerial Conferences, it is, therefore, worth noting that some of the WTO's most outspoken Members on the trade and labour nexus are also those most active in advancing such a link outside the multilateral WTO framework, where their bargaining power is considerably greater. Empirical data confirm the scale of the growing tendency to include labour standards in PTAs. According to the ILO (as of 2023), the number of regional trade agreements containing labour provisions has risen from only four in 1995 to 60 in 2013. The increase has intensified significantly since the global financial crisis of 2008.⁴² As of February 2023, one in three (113 out of 357) regional trade agreements in force at the time and notified to the WTO incorporated labour provisions.⁴³ The majority of these agreements have been concluded by the United States, Canada, the European Union and New Zealand.⁴⁴

Most notably, the European Union has consistently positioned itself at the forefront of fostering the integration of social development objectives into trade governance, both within the WTO framework and through its preferential trade system.⁴⁵ Following its commitments to the 'Decent Work' agenda, in 2015, the European Union launched its 'Trade for All' strategy through which it attempts to promote European values in its global trade and investment policy by way of a broader framework encompassing labour issues, human rights, environmental protection, and good governance instruments.⁴⁶ In parallel, the European Union has since renewed its undertaking to

⁴⁰ Annex 31-A and 31-B on the Rapid Response Labor Mechanism. See also L. A. COMPA, T. BROOKS (2019), *NAFTA and NAALC twenty-five years of North American trade - labour linkage*, (Second Edition) in *Wolters Kluwer*, 2019, p. 229. <http://www.vlebooks.com/vleweb/product/openreader?id=none&isbn=9789403513652>.

⁴¹ By way of example, Annex 1 to the NAALC requires the contracting Parties to comply with their own national labour law (n. 35).

⁴² CLAUROUS LAW ASSOCIATES, *Trade and Labour under the WTO and FTAs*, Centre for WTO Studies, p. 7, available at [Trade Labour Study.pdf](#).

⁴³ M. CORLEY-COULIBALY, ILO, *Promoting and enforcing compliance with labour provisions in trade agreements: comparative analysis of Canada, European Union and United States approaches and practices*, 2023, ILO, Geneva, p. 17.

⁴⁴ D. CHEONG, F. C. EBERT, Chapter 4: *Labour law and trade policy: What implications for economic and human development?*, in *Labour Regulation and Development*, Edward Elgar Publishing, Cheltenham, UK, 2016, p. 100; M. CORLEY-COULIBALY, ILO, *Promoting and enforcing compliance with labour provisions in trade agreements: comparative analysis of Canada, European Union and United States approaches and practices*, 2023, ILO, Geneva, p. 19.

⁴⁵ In M. CORLEY-COULIBALY, ILO, *Promoting and enforcing compliance with labour provisions in trade agreements: comparative analysis of Canada, European Union and United States approaches and practices*, 2023, ILO, Geneva, p. 20, it is stated that, as of 2023, «the EU accounts for the largest number of RTAs with labour provisions (25), followed by Canada (15) and the United States (14)»; see also INTERNATIONAL ORGANIZATION OF EMPLOYERS, *The Evolving Debate on Trade & Labour Standards*, in *IOE Information Paper*, 2006, p. 5; M. BARBU, et al., *The Trade-Labour Nexus: Global Value Chains and Labour Provisions in European Union Free Trade Agreements*, in *Global Labour Journal*, 9(3), 2018, p. 262 <https://mulpress.mcmaster.ca/globallabour/article/view/3354>.

⁴⁶ EUROPEAN COMMISSION, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Promoting decent work for all - The EU contribution to the implementation of the decent work agenda in the world*, 2006, COM/2006/0249 final; EUROPEAN

support the WTO in the integration of the social dimension of globalisation by advocating within the Organization itself for stronger protection of workers' rights and a more active cooperation with the ILO.⁴⁷

However, within the last two decades, there have been instances where trade-related provisions have been negotiated in trade agreements concluded exclusively between developing countries, in particular among trading partners in Latin American and Sub-Saharan Africa.⁴⁸ Chile is a noteworthy case-study in that it has not only successfully promoted labour provisions with developed countries such as Canada (with which it concluded its first trade agreement with labour provisions in 1997) and the United States (2004), but also with emerging economies, such as Colombia⁴⁹ (2009).⁵⁰ Likewise, a number of African countries have concluded regional trade agreements focusing on cooperation in labour matters, such as the 1993 Treaty of the Economic Community of West African States.⁵¹ The negotiation of labour clauses among developing countries in their reciprocal trade relations arguably suggests that the trade-labour linkage is no longer exclusively a North-South phenomenon, but it has attracted interest also across diverse economic contexts.

The documentation made available by the WTO does not seem to offer a clear indication of states from the Global South's corresponding stance on the trade and labour nexus within the WTO forum.⁵²

COMMISSION, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Trade for All - Towards a more responsible trade and investment policy*, 2015, COM/2015/0497 final; EUROPEAN PARLIAMENT, *Resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment*, 2015/2105(INI).

⁴⁷ EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and sustainable recovery*, 2022, COM(2022)66 final, pp. 1-2 and 20; see also F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in *Working Paper No 205*, edited by International Institute of Labour Studies, ILO, Geneva, 2010, p. 11; INTERNATIONAL ORGANIZATION OF EMPLOYERS, *The Evolving Debate on Trade & Labour Standards*, in *IOE Information Paper*, 2006, p. 5.

⁴⁸ As of 2010, the number of trade agreements among developing countries containing labour provision increased to nine, as opposed to zero in 1990, and in 2016 one quarter of the PTAs with labour provisions were concluded between developing economies. On this see F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in *Working Paper No 205*, edited by International Institute of Labour Studies, ILO, Geneva, 2010; INTERNATIONAL LABOUR ORGANIZATION, *Handbook on assessment of labour provisions in trade and investment arrangements*, edited by International Labour Office, Geneva, 2017, pp. 1 and 12; D. CHEONG, F. C. EBERT, *Chapter 4: Labour law and trade policy: What implications for economic and human development?*, in *Labour Regulation and Development*, Edward Elgar Publishing, Cheltenham, UK, 2016, pp. 100-101; M. CORLEY-COULIBALY, ILO, *Promoting and enforcing compliance with labour provisions in trade agreements: comparative analysis of Canada, European Union and United States approaches and practices*, 2023, ILO, Geneva, p. 18.

⁴⁹ The agreement contains a chapter on labour (Chapter 17) which refers to both commitments under the ILO Declaration and national labour law, as well as on cooperation among the parties.

⁵⁰ Chile's decision to incorporate labour provisions in its trade agreements is partly due to economic reasons and partly because of political coherence. On the one hand, the model trade agreement used by Canada during the negotiations in 1997 favoured the adoption of such provisions as part of a more comprehensive trade package. On the other hand, at the time, Chile was becoming a democracy, thus labour reforms formed part of the agenda of the Executive and the National Congress. On the experience of Chile see INTERNATIONAL LABOUR ORGANIZATION, *Handbook on assessment of labour provisions in trade and investment arrangements*, edited by International Labour Office, Geneva, 2017, pp. 51-55; P. LAZO, *Trade agreements and their relation to labour standards: The current situation*, in *International Centre for Trade and Sustainable Development (ICTSD) programme on EPAs and regionalism*, issue paper No. 3, 2009.

⁵¹ F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in *Working Paper No 205*, edited by International Institute of Labour Studies, ILO, Geneva, 2010, pp. 12-16.

⁵² Academic contributions indicate that the most vocal opponents to the 'trade and labour' nexus among emerging economies are India, Brazil, Pakistan, Argentina and the countries of the Association of Southeast Asian Nations (ASEAN). See, on this, see INTERNATIONAL LABOUR ORGANIZATION, *Handbook on assessment of labour provisions in trade and investment arrangements*, edited by International Labour Office, Geneva, 2017, p. 19; G. FELDER

However, the negotiation of labour clauses and the progressive bridging of the trade and labour gap at the bilateral and regional level, including among developing countries, can arguably signal a potential reconfiguration of the long-standing political dynamics within the WTO that originally led to the exclusion of trade and labour from the competence of the Organization. As mentioned above, developing countries were historically the most vocal defenders of such an exclusion, framing the trade and labour nexus as a vehicle for protectionism and an interference with their autonomy. Against this backdrop, the current engagement of developing countries can, on the one hand, suggest a more favourable political environment for opening a discussion about a potential plurilateral agreement on trade and labour within the WTO. On the other hand, this shift may also indicate that these countries are only willing to close the gap between trade and labour standards in their reciprocal trade relations without any external influence, and thus remain reluctant to address the topic within the WTO.

Turning to the normative arrangement of the trade and labour nexus, it is observed that in both unilateral and treaty settings, mechanisms may be found to incorporate positive incentives, i.e., granting additional trade concessions to countries that undertake specific measures to comply with defined labour standards. Conversely, other arrangements provide for the suspension or withdrawal of trade advantages, such as tariff preferences, in cases of non-compliance with the relevant labour provisions. These mechanisms are generally classified as ‘conditional labour provisions’, when they operate through incentives or sanctions. Instead, ‘promotional labour provisions’ focus on monitoring and cooperation. In some instances, both approaches are combined within the same framework, blending incentive-based and supervisory elements.⁵³

As mentioned above, the USMCA provides for a unique labour-related dispute resolution mechanism which is applicable between the United States and Mexico,⁵⁴ and between Canada and Mexico, and operates one-way towards Mexico.⁵⁵ The Facility-Specific Rapid Response Labor Mechanism (RRLM) allows a complaining party to activate, on a good-faith basis,⁵⁶ a review mechanism when the complaining party believes that workers at a covered facility in Mexico are being denied their labour rights (i.e., right of free association and collective bargaining).⁵⁷ Once the review panel determines that a denial of rights has taken place,⁵⁸ the complaining party may impose

et al., *The Trade and Labour Nexus: Envisioning the Design and Implementation of Future Labour Chapters in Preferential Trade Agreements*”, in *The Concept Design of a Twenty-First Century Preferential Trade Agreement: Trends and Future Innovations*, edited by K. CLAUSSEN, M. ELISG, R. POLANCO, Cambridge University Press, 293, 2025, pp. 291–315; K. KOLBEN, *The New Politics of Linkage: India’s Opposition to the Workers’ Rights Clause*, in *Indiana Journal of Global Legal Studies*, 13(1), 2006, pp. 225–259; J. BHAGWATI, *Trade Liberalisation and ‘Fair Trade’ Demands: Addressing the Environmental and Labour Standards Issues in World Economy*, 18(6), 1995, pp. 745–759. <https://doi.org/10.1111/j.1467-9701.1995.tb00329.x>

⁵³ F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in *Working Paper No 205*, edited by International Institute of Labour Studies, ILO, Geneva, 2010, p. 5.

⁵⁴ See Annex 31-A, USMCA.

⁵⁵ See Annex 31-B, USMCA.

⁵⁶ See Article 31-A.4, Annex 31-A, and Article 31-B.4, Annex 31-B, USMCA which set out the requirements for the establishment of a panel.

⁵⁷ See Article 31-A.2, Annex 31-A, and Article 31-B.2, Annex 31-B, USMCA.

⁵⁸ Pursuant to Article 31-A.3, USMCA (applicable to disputes between Mexico and the US), each party must select and maintain a roster of three individuals to serve as Rapid Response Labor Panelists (six in total), and a third joint list of three individuals designated by consensus. The panelists are appointed for a minimum of four years (Article 31-A.3, para. 3). The panel is composed of three members selected *ad hoc* by the Secretariat from each party list and one from the joint list, following the complaining party’s request (Article 31-A.5). It is worth noting that the same procedure applies for disputes arising between Mexico and Canada as provided for under Annex 31-B.

penalties on the facility, suspend preferential treatments, and, in the event of repeated violations, deny entry of those goods manufactured at the covered facility under review altogether.⁵⁹

It is also worth exploring the 2011 EU-South Korea Free Trade Agreement, which paved the way for the so-called EU's 'new generation' of trade agreements⁶⁰ that incorporate labour (and environmental) provisions within a Trade and Sustainable Development (TSD) chapter.⁶¹ Chapter Thirteen of the agreement at hand establishes an autonomous two-steps dispute-settlement mechanism,⁶² which requires the parties to first engage in government consultations before requesting the creation of an *ad hoc* panel of experts in the event that matters have «not been satisfactorily addressed».⁶³ This mechanism was activated for the first time in December 2018 when the European Commission requested government consultations with the Republic of Korea under Article 13.14, citing concerns on the lack of efforts on the side of South Korea to ratify four out of the eight core ILO Conventions, even after more than seven years from signing the agreement.⁶⁴ Accordingly, the European Commission accused South Korea of breaching its commitments under Article 13.4, paragraph 3, of the EU-South Korea FTA, whereby South Korea undertakes to make «continued and sustained efforts towards ratifying the fundamental ILO Conventions». The consultations took place in Seoul, however, the European Union was not satisfied with how the relevant issues had been addressed and, in July 2019, it requested the establishment of a panel of experts.⁶⁵ In the final report, published in January 2021, the panel ruled in favor of the Republic of Korea stating that the country did not act inconsistently with the contested provision as it demonstrated «tangible, though slow efforts» towards ratifying the core ILO conventions.⁶⁶ Indeed, in the years after the dispute, South

⁵⁹ See, Article 31-A.10(2)(3) and (4), Annex 31-A, and Article 31-B.10(2)(3) and (4), Annex 31-B, USMCA. For more information, see the United States Trade Representative's [official website](#).

⁶⁰ Among the 'new generation' trade agreements it is also important to mention the 2020 EU-Vietnam free trade agreement (EVFTA). For an insight on the EVFTA and a comparative analysis with the EU-South Korea FTA see T. THI NGO (2025). *Vietnam's Implementation of Labour Provisions in the European Union - Vietnam Free Trade Agreement: Recent Developments and Insights*, in *Legal Issues of Economic Integration*, 52(1), 2025.

⁶¹ The agreement at stake was signed in 2009, however, pursuant to Article 15.10.5, it applied provisionally from 2011 and entered into force 2015. On the EU-Korea trade agreement, see A. NISSEN, *Not 'that' assertive: The EU's take on enforcement of labour obligations in its Free Trade Agreement with South Korea*, in *European Journal of International Law*, 33(2), 2022, pp. 607–630; M. CORLEY-COULIBALY, ILO, *Promoting and enforcing compliance with labour provisions in trade agreements: comparative analysis of Canada, European Union and United States approaches and practices*, 2023, ILO, Geneva, pp. 76-83; P. ACCONCI, *Investimenti Stranieri Sostenibili: Diritto e governance internazionale e dell'unione europea*, in *Editoriale scientifica*, Napoli, 2023, pp. 20-22.

⁶² Disputes arising out of Chapter Thirteen must be solved through the dispute settlement mechanism set out in Articles 13.14 and 13.15, as such mechanism works independently from the general dispute settlement system provided for under Chapter Fourteen. Within the procedure on the WTO Transparency Mechanism, WTO members have justified this choice on the basis of the specific nature of the obligations under Chapter Thirteen that require a dispute settlement mechanism with labour (and environmental) expertise (see Questions and Replies, WT/REG296/2/Rev.1, 22).

⁶³ See Article 13.14 on the government consultations and Article 13.15 on the request of a Panel of Experts. Crucially, the panel can be convened if, 90 days after the request for government consultations, the matter remains unaddressed. Once the request is made, the panel must be established within two months and its members are drawn from a roster of at least fifteen experts. Each party selects one expert and the two selected experts jointly appoint the chair, who must be a non-national of either party. The panel must, then, issue its report within 90 days of the appointment of the last expert.

⁶⁴ See the European Union's 'Request for consultations', available [here](#).

⁶⁵ Pursuant to Article 13.15 of the EU-South Korea FTA. See the European Union's 'Request for the establishment of a panel', available [here](#).

⁶⁶ Panel of Experts, Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement Report of 20 January 2021 (2021), pp. 76-77, available [here](#).

Korea ratified the remaining four core ILO conventions and, to the present day, the EU-South Korea trade agreement remains South Korea's most far reaching PTA on labour issues.⁶⁷

A comprehensive examination of extra-WTO initiatives on the incorporation of labour provisions in PTAs cannot overlook the potential coalition-building role played by the so-called mega-regional agreements that, by virtue of their extensive membership, can arguably have the potential to shape the discourse on the trade-labour nexus at the multilateral level.

Among those currently in force, the article addresses the Regional Comprehensive Economic Partnership (RCEP)⁶⁸ and the Comprehensive and Progressive Transpacific Partnership (CPTPP).⁶⁹ With regards to the RCEP, one may note the lack of sustainable development provisions, such as provisions on labour rights.⁷⁰ There is, in fact, no reference to labour anywhere in the text, including in the preamble. Conversely, the CPTPP contains a chapter that is specifically dedicated to labour.⁷¹ Compared to EU trade agreements, the scope of labour obligations under the CPTPP is more narrow, as the mega-regional agreement requires parties to uphold their commitment under the 1998 ILO Declaration, rather than ILO conventions.⁷² However, similarly to the EU-South Korea trade agreement, the CPTPP labour chapter provides for an autonomous, two-steps enforcement mechanism for labour disputes that requires a contracting party to first resort to consultations and, in case of failure, request the establishment of an *ad hoc* panel.⁷³ Furthermore, if parties fail to reach an agreement, the labour chapter allows them to submit the dispute to the Labour Council.⁷⁴ The CPTPP also strengthens enforcement through a progressive sanction mechanism that involves compensation,

⁶⁷ A. NISSEN, *Not 'that' assertive: The EU's take on enforcement of labour obligations in its Free Trade Agreement with South Korea*, in *European Journal of International Law*, 33(2), 2022, pp. 607–630, particularly p. 609.

⁶⁸ RCEP was signed in November 2020 by 15 countries and it was set to become the largest preferential trade agreement in terms of economic output. The fifteen contracting states are the following: Australia, Brunei, Cambodia, China, Indonesia, Japan, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Vietnam, South Korea, and Thailand.

⁶⁹ CPTPP came into force in December 2018 and it is currently composed of eleven parties: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. In 2016, the United States led by the Trump administration withdrew from the agreement and since then, several provisions have been renegotiated, see [From TPP to CPTPP](#). We also recognize that the Trans-Atlantic Trade and Investment Partnership (T-TIP) is among the most prominent mega-regional trade agreements, however it falls outside the scope of the article as it is still under negotiation.

⁷⁰ L. MALINGREY, Y. DUVAL, (2023). *Identifying a Sustainable Path for RCEP: Global Overview and Comparative Analysis of Sustainable Development Provisions in Three Mega Regional Trade Agreements* in *Journal of Asian Economic Integration*, 5(2), 2023, pp. 109–128, <https://doi.org/10.1177/26316846231184936>, pp. 110, 115; J. KELSEY (2021). *RCEP: Nothing to See and Everything to See*, in *Afronomicslaw*, available at <https://www.afronomicslaw.org/category/analysis/rcep-nothing-see-and-everything-see>; W. MARUYAMA, J. T. STOEL, B. KOSTRZEWA, *RCEP: What does it mean for future Asia-Pacific trade and U.S. companies operating in the region?*, Hogan Lovells News, January 2021, <https://www.hoganlovells.com/en/publications/rcep-what-does-it-mean-for-future-asia-pacific-trade-and-us-companies-operating-in-the-region>; J. FRANCOIS, M. ELSIG, *Short overview of the Regional Comprehensive Economic Partnership (RCEP)*, in *Think Tank*, European Parliament, 2021, doi: 10.2861/001684 (pdf), p. 18.

⁷¹ See Chapter 19, CPTPP.

⁷² See Articles 19.2 and 19.3, CPTPP, on the parties' commitment to labour rights as enshrined in the 1998 ILO Declaration.

⁷³ As per Article 19.15, CPTPP, on 'Labour Consultations', which also addresses, at paragraph 12, the possibility to request the establishment of a panel under Article 28.7 situated in Chapter 28 on dispute settlement.

⁷⁴ According to paragraph 10 of Article 19.15, CPTPP, the complaining parties may request that their Labour Council representatives meet within 30 days to address the contested matter. The representatives are, therefore, required to seek a resolution and can also resort to independent experts or conciliation and mediation procedures. On the Labour Council, Article 19.12 provides that this body is composed of senior governmental representatives selected by each party. Its mandate of the Labour Council is very broad, particularly in light of letter h) which sets out that the Labour Council can «perform any other functions as the Parties may decide».

suspension of benefits and monetary penalties.⁷⁵ Despite the different approaches adopted by these two ‘mega-regionals’ with respect to labour-related provisions, some authors do not exclude the possibility of an alignment, given that most RCEP contracting parties are also CPTPP members.⁷⁶

Overall, the designation of labour standards varies across agreements. Some refer to «core labour standards» as defined in the ILO’s 1998 Declaration and/or to ILO conventions,⁷⁷ others commit parties to their own national labour law (e.g., the NAALC and the 1997 Canada-Chile trade agreement). Overall, PTAs negotiated after 1998 generally incorporate ILO conventions and declarations.⁷⁸ As of 2025, 103 RTAs included references to ILO conventions and declarations.⁷⁹ However, in a somewhat atypical fashion, earlier PTAs concluded by the United States contain a selective reference to such standards. By way of example, the regional trade agreement with Chile (2004) recalls the ILO’s core labour standards, but excludes non-discrimination and introduces minimum working conditions.⁸⁰ On the other hand, more recent trade agreements concluded by the United States, such as the aforementioned USMCA and the one with Peru (2009), mention the entire set of principles enshrined in the ILO’s 1998 Declaration, in addition to compliance with domestic law.⁸¹ The latter approach also emerges in PTAs concluded by Canada,⁸² by the European Union⁸³ and in mega-regionals such as the CPTPP. Conversely, there are notable exceptions to the reference of the ILO’s instruments in PTAs signed after 1998. For instance, trade agreements signed by the European Union with parties like Morocco (2000) and Israel (2000) do not refer to ILO instruments, but merely require the parties to engage in a dialogue and to cooperate in a number of areas, including labour relations.⁸⁴ Furthermore, the Treaty for the Establishment of the East African Community

⁷⁵ See Article 28.20, CPTPP.

⁷⁶ Currently, six RCEP members are also members of the CPTPP. J. FRANCOIS, M. ELSIG, *Short overview of the Regional Comprehensive Economic Partnership (RCEP)*, in *Think Tank*, European Parliament, 2021, doi: 10.2861/001684 (pdf), p. 18; L. MALINGREY, Y. DUVAL, (2023). *Identifying a Sustainable Path for RCEP: Global Overview and Comparative Analysis of Sustainable Development Provisions in Three Mega Regional Trade Agreements* in *Journal of Asian Economic Integration*, 5(2), 2023, pp. 109–128, <https://doi.org/10.1177/26316846231184936> p. 122.

⁷⁷ Some authors have highlighted the need for stronger coherence within the framework of ILO instruments, encouraging negotiating parties to refer to ILO conventions «instead of or alongside the ILO’s 1998 Declaration», in light of the latter’s vague and ambiguous normative content, see F. C. EBERT, *References to ILO instruments in trade law: a path toward coherence?*, in *The Elgar Companion to the Law and Practice of the International Labour Organization*, pp. 387-404, Cheltenham, UK: Edward Elgar Publishing, 2026.

⁷⁸ Ibid. p. 392; For a broader analysis on this topic, see F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in *Working Paper No 205*, edited by International Institute of Labour Studies, ILO, Geneva, 2010; G. FELDER et al., *The Trade and Labour Nexus: Envisioning the Design and Implementation of Future Labour Chapters in Preferential Trade Agreements*, in *The Concept Design of a Twenty-First Century Preferential Trade Agreement: Trends and Future Innovations*, edited by K. CLAUSSEN, M. ELISG, R. POLANCO, Cambridge University Press, 293, 2025, pp. 291–315.

⁷⁹ See the ILO, Labour Provisions in Trade Agreements Hub at [ILO Labour Provisions in Trade Agreements Hub](https://www.ilo.org/hub/TradeAgreements). Comparatively, in 2017, around 72 per cent of trade-related provision included a reference to ILO instruments, see INTERNATIONAL LABOUR ORGANIZATION, *Handbook on assessment of labour provisions in trade and investment arrangements*, edited by International Labour Office, Geneva, 2017, pp. 5, 18-25.

⁸⁰ A similar approach can be found in the trade agreements concluded with Singapore (2004), Australia (2005) and Morocco (2006).

⁸¹ It is also worth mentioning the trade agreements concluded by the United States with Colombia (2006) and the one with Korea (2007).

⁸² See, for instance, the trade agreement with Costa Rica (2002) and Peru (2009).

⁸³ See, for instance, the trade agreement with the Cariforum countries (2008) and with Korea (2011).

⁸⁴ For instance, Article 63 of the EU-Israel trade agreement provides that: «1. The Parties shall conduct a dialogue covering all aspects of mutual interest. The dialogue shall cover in particular questions relating to social problems of post-industrial societies, such as unemployment, rehabilitation of disabled people, equal treatment for men and women, labour relations,

(2000), in the same vein as previous African countries' regional trade agreements, does not incorporate labour standards, but focuses on cooperation in labour matters. Indeed, with respect to labour provisions negotiated among developing countries, Ebert and Posthuma (2010) demonstrated that most of these RTAs provide for cooperative and promotional elements rather than binding conditions, which is believed to reflect the similar level of economic development of the signatories and their preference for non-adversarial approaches.⁸⁵ Lastly, one can also identify a category of RTAs in which labour-related provisions are deliberately framed as non-binding. This is the case of the Arrangement on Labour between New Zealand and Thailand (2005), which sets out that «[t]his Arrangement will not legally bind the Participants».⁸⁶

The above analysis prompts an ensuing question in the debate on the trade and labour nexus: can the evolution taking place at the regional level translate into meaningful change within the multilateral framework? Could it pave the way for a more structured engagement on labour issues within the WTO, potentially through a plurilateral agreement on trade and labour?

The following section seeks to provide an initial answer by exploring whether and how the WTO's internal discourse on trade and labour has evolved through the years, particularly in relation to the proliferation of labour clauses across preferential trade agreements.

4. The WTO's internal discourse on 'trade and labour': Transparency Mechanism for Regional Trade Agreements, World Trade Reports, Annual Reports, and Trade Policy Reviews

The WTO has repeated on several occasions that «WTO agreements do not deal with labour standards as such» and that there is no work on trade and labour in Councils and Committees,⁸⁷ including in the Committee on Regional Trade Agreements where such a discussion may be expected to take place. This reflects the steadily growing gap between the subject matters covered in preferential trade agreements and the subject matters falling within the scope of the WTO. Indeed, the WTO often remains silent on many of the new issues addressed at the regional-trade level (i.e., WTO-X), and WTO Members may not even be fully aware of the developments occurring within PTAs.⁸⁸

However, is it truly the case that the WTO does not engage with the trade and labour nexus, or does the Organization address it through a different perspective?

In the aforementioned 2007 joint study between the ILO and the WTO on trade and employment, the two Organizations agreed that «trade and labour policies interact and that greater policy coherence

vocational training, work safety and hygiene, etc.[...]. Article 69 of the EU-Morocco trade agreement instead provides for «regular dialogue» on social matters including «working conditions of the migrant communities».

⁸⁵ In F. C. EBERT, A. POSTHUMA, *Labour provisions in trade arrangements: current trends and perspectives*, in *Working Paper No 205*, edited by International Institute of Labour Studies, ILO, Geneva, 2010, p. 19, it is reported that the Taiwan – China and Nicaragua Trade Agreement is the only exception to promotional labour clauses, in that it contains a labour provision that may result in the suspension of trade benefits.

⁸⁶ See Section 4.1, 2005 Arrangement on Labour between New Zealand and the Kingdom of Thailand.

⁸⁷ See [WTO | Understanding the WTO - Labour standards: highly controversial](#); see also the 2007 WTO World Trade Report, p. 358.

⁸⁸ B. M. HOEKMAN, P. C. MAVROIDIS, *WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements*, in *European Journal of International Law*, Vol. 26, Issue 2, 2015, pp. 319–343, <https://doi.org/10.1093/ejil/chv025>, p. 325.

in the two domains can help ensure that trade reforms have significantly positive effects on both growth and employment».⁸⁹ As mentioned in Section 1, the WTO also recognizes that all its Members share a commitment to a narrower group of internationally accepted core labour standards.⁹⁰ Furthermore, the WTO Secretariat has summarized the key issues on trade and labour that have been raised by Members inside and outside the WTO, as being the following:

«1. The analytical question: if a country has lower standards for labour rights, do its exports gain an unfair advantage? Would this force all countries to lower their standards (the “race to the bottom”)?

2. The response question: if there is a “race to the bottom”, should countries only trade with those that have similar labour standards?

3. the question of rules: should WTO rules explicitly allow governments to take trade action as a means of putting pressure on other countries to comply?

4. The institutional question: is the WTO the proper place to discuss and set rules on labour — or to enforce them, including those of the ILO?»⁹¹

Against this backdrop, our research first began with a systematic search for the expression ‘trade and labour’ within the WTO’s official website, which revealed limited visibility of the topic. Interestingly, the search engine returned a collection of essays drafted under the guidance of the former Head of the LDC Unit within the WTO Secretariat, Taufiqur Rahman, whereby the inclusion of labour clauses in PTAs is acknowledged.⁹² The author of the relevant essay – Marcelo Olarreaga – even encourages a plurilateral approach on labour standards as part of an «offensive» least-developed countries’ negotiating strategy in light of evidence suggesting that labour chapters in PTAs boost exports from low-income and weak-labour-law countries to high-income, strong-labour-law partners.⁹³ However, the opening disclaimer clarifies that the arguments contained in the collection of essays «do not necessarily reflect the opinions or views of the World Trade Organization».

Furthermore, given that regional trade agreements must be notified to – and are subject to review within – the WTO framework in the context of the Transparency Mechanism,⁹⁴ particular attention was devoted to analysing how WTO Members themselves introduce and describe labour provisions when submitting RTAs, and how, if at all, the WTO Secretariat comments on them. Finally, the analysis moved to the WTO iLibrary, where more substantive material emerged in World Trade Reports (WTRs), Annual Reports (ARs) and Trade Policy Reviews (TPRs), which contain scattered, but interesting references to the interaction between trade and labour standards.

The following sections will expand on the results of the research, allowing for a closer examination on how the WTO frames, acknowledges, or omits the trade-labour linkage in its institutional discourse.

⁸⁹ J. MARION, E. LEE, *Trade and Employment: Challenges for Policy Research. A joint study of the International Labour Office and the Secretariat of the World Trade Organization*, Geneva, 2007, available [here](#) p. 10.

⁹⁰ [WTO - Official ministerial website - about the ministerial - labour](#); see also the 2007 World Trade Report, pp. 357-359.

⁹¹ [WTO | Understanding the WTO - Labour standards: highly controversial](#)

⁹² M. OLARREAGA, *Options for an LDC-driven trade agenda*, in *LDCs and the multilateral trading system: looking forward - A collection of essays*, Vol. 1, WTO and EIF, Geneva, 2026, pp. 21-24.

⁹³ *Ibid.* pp. 21-24.

⁹⁴ See the General Council Decision of 14 December 2006 establishing a Transparency Mechanism for Regional Trade Agreements, WT/L/671. Such a mechanism is implemented on a provisional basis by the Committee on Regional Trade Agreements (for RTAs under Article XXIV, GATT and Article V, GATS) and the Committee on Trade and Development (for RTAs under the Enabling Clause).

Transparency Mechanism for Regional Trade Agreements

With respect to the 2006 Transparency Mechanism, the research examined the notification and review process of RTAs introduced in Section 2, insofar as several of those agreements have pioneered the inclusion of labour-related provisions or have contributed to their wider proliferation among regional trade partners. The analysis focused on the documentation made available for each agreement in the WTO's RTA's online portal,⁹⁵ including 'Questions and Replies' and 'Notes on the Meeting'.⁹⁶

Overall, the research revealed that there is no specific or systematic discussion of labour clauses within the framework of the Transparency Mechanism. Third parties have occasionally raised questions concerning the dispute settlement mechanisms applicable to labour issues⁹⁷ or the forms of cooperation on social matters, including labour, as envisaged between the contracting parties of the agreement under review.⁹⁸ Similarly, when the representative of the notifying member presented the agreement, references to labour-related provisions were often absent. In a few instances, however, the novelty and the ambitious scope of such clauses was directly acknowledged by the notifying member.⁹⁹ Most notably, with regards to the Chile-Colombia RTA, the representative of Chile underlined the fact that labour is a «new disciplin[e]» in the agreement, presumably with respect to the Economic Complementation Agreement for the Establishment of an Expanded Space (ACE) signed between the two countries in 1993, to which the RTA is attached as additional protocol.¹⁰⁰ The novelty of labour-related clauses was also highlighted indirectly in instances when the notifying member reported the adoption of innovative and independent mechanisms for the resolution of labour-related disputes under the regional trade agreements under review.¹⁰¹

World Trade Reports

In the 2013 WTR, the WTO Secretariat noted that «WTO members have acknowledged the importance of a set of internationally recognized “core” labour standards [...] but have *significant disagreements on establishing linkages between trade and labour issues in the WTO.*» (emphases added).¹⁰²

⁹⁵ [WTO | Regional trade agreements](#).

⁹⁶ The documentation also includes 'Factual Reports' that are written by the WTO Secretariat, but they fall outside the scope of our research as they are a mere descriptive text on the structure of the regional trade agreement under review.

⁹⁷ For instance, Japan posed a question on the application of the procedure under the RRLM of the USMCA to individual cases (WT/REG407/2, pp. 6-7) and raised its concerns on the double dispute-settlement mechanism under the EU-Korea FTA in the event of cross-cutting issues (WT/REG296/2/Rev.1, p. 22).

⁹⁸ With respect to the EU-Viet Nam FTA, Canada and The Philippines asked what type of cooperation the two contracting parties were planning to undertake with respect to, *inter alia*, labour (WT/REG406/2/Rev.1, pp. 2, 10).

⁹⁹ By way of example, the Representative of Canada highlighted the «ambitious scope» of agreements containing provisions on labour (and on the environment) in the context of the notification of the Chile-Canada trade agreement (WT/REG38/M/1, p. 2). Furthermore, the representative of the United States described the provisions on the protection of labour (and the environment) in the US-Peru trade agreement as «groundbreaking» (WT/REG260/M/1, p. 2).

¹⁰⁰ See the relevant TPR, WT/REG272/M/1, p. 3.

¹⁰¹ With regards to the USMCA, the representative of Canada noted that the agreement included a comprehensive chapter on labour and that, in order to address labour violations, the agreement also provided for an «'innovative' rapid response mechanism» (emphasis added) (WT/REG407/M/1, p. 2, para. 1.12).

¹⁰² See the 2013 WTO World Trade Report, p. 278.

In a 2019 article, Natalia Delgado offered a critical reading of WTRs from 2003 (when the WTR initiative was launched) to 2017, stating that, despite the WTO's consistent claim that labour standards fall outside its scope, the Organization systematically intervenes in the labour-related discourse.¹⁰³ The author demonstrated that, in the reviewed WTRs, the WTO treats the issue of labour through the lenses of trade liberalization. Accordingly, she argues that WTRs call for states to create a malleable and reactive labour market where frictions are erased. Further, she contends that WTRs encourage the reduction of labour law protection, such as the elimination of minimum wages, in order to have an elastic labour force that can adjust to the fluctuations of the market.¹⁰⁴ Indeed, in the words of Delgado, «the WTRs depict the workforce as having neither a human face nor a voice, just like energy, water or land».¹⁰⁵ Overall, Delgado argued that the WTO discourse revolves around two main points, namely that labour is a commodity and that the WTO promotes the liberalization of work.¹⁰⁶

Building on Delgado's findings, this article extends the analysis to WTRs published between 2017 and 2025 to assess whether the WTO's stance has evolved. Crucially, the 2017 WTR on 'Trade, technology and jobs' reports on the impact of trade on labour market outcomes, while the 2024 WTR on 'Trade and inclusiveness' addresses inequalities within the labour markets, particularly with regards to poverty and gender, thus pointing to the fact that the discourse on trade also involves 'trade and ...' policies. However, while we do not contend that WTRs actively promote labour-market deregulation, since they generally illustrate how certain trade policies (including those facilitating worker mobility) may reduce adjustments costs for individual economies, we concur with Delgado that the WTO's discourse remains devoid of any rights-based framing of trade.¹⁰⁷ Indeed, across the analysed WTRs, labour references revolve around three main categories:

1. Employment effects of trade;
2. Skills, human capital and productivity;
3. Distribution effects and inclusiveness, addressing inequality without invoking labour rights.

In conclusion, our extended review of the more recent WTRs confirms that the discourse on labour continues to be framed within a trade dimension and it is never shaped in a rights-based way, reinforcing the scepticism about a genuine and mutual cooperation or convergence between the WTO and the ILO on the trade and labour nexus.

Annual Reports

In the analysed WTO Annual Reports, references to labour provisions in preferential trade agreements are sparse and neutral. In the few instances where such mentions are made explicit, they are framed through the same formula, namely that «Some RTAs also include other issues, such as environmental and labour standards and electronic commerce, which are not covered by the WTO».¹⁰⁸

¹⁰³ DN. DELGADO, *Towards Work Liberalization: The WTO Discourse on Labour Standards and Policy*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2019, 35, No. 4, pp. 455-482, <https://doi.org/10.54648/ijcl2019021>, pp. 461-462.

¹⁰⁴ *Ibid.*, pp. 477-479.

¹⁰⁵ *Ibid.*, p. 478.

¹⁰⁶ *Ibid.*, pp. 477-479.

¹⁰⁷ By way of example, in the 2025 WTO World Trade Report, the term 'decent work' appears solely in reference to the ILO's mandate.

¹⁰⁸ See, for instance, the 2017 WTO Annual Report, p. 90; see also the 2016 WTO Annual Report, p. 86 and the 2015 WTO Annual Report, p. 76.

Therefore, in these reports, the WTO Secretariat merely recognizes the existence of clauses on labour standards and decent work in the context of regional trade agreements, but it does not comment, neither positively nor negatively, on their compatibility with the WTO multilateral framework. Conversely, the repeated wording reflects the WTO's strictly descriptive approach to the issue of trade and labour and confirms that labour standards fall outside the Organization's competence.

Trade Policy Reviews

As a final step, the research sought to map the response of the WTO Secretariat to the incorporation of labour standards and broader commitments to decent work in PTAs in the context of the Trade Policy Review Mechanism.¹⁰⁹ The resulting dataset covers the period from 2008 to 2025 and it is comprehensive of WTO Members from all geographical regions and levels of development, thereby offering a representative overview of states' practice at the regional level.

Overall, the research results allowed to identify 27 TPRs containing some relevant reference to labour standards. These TPRs reveal a heterogeneous landscape. The majority of references appeared in reports on OECD members, such as Canada (2011, 2015 and 2024), the United Kingdom (2025), Norway (2012) and New Zealand (2009), alongside a smaller group of developing countries such as Brazil (2022), Mauritius (2008), Nigeria (2017) and Ghana (2008). Chronologically, most of the analysed TPRs date back from 2010 onwards, reflecting the aforementioned increase of labour clauses in PTAs worldwide after the 2008 economic crisis.

Out of the 27 identified TPRs, only 13 include explicit references to the presence of labour provisions by the WTO Secretariat. Conversely, the remaining 14 TPRs only mention labour standards in the member's own policy statement. In most cases, the Secretariat simply reports the existence of labour provisions in WTO members' preferential trade agreements, as in the TPRs of Chinese Taipei (2018)¹¹⁰, Guyana (2009)¹¹¹ and Belize (2010)¹¹². In others, it highlights the absence of such provisions, as in Japan's 2011 TPR.¹¹³ The WTO Secretariat also occasionally recalls external criticism, such as that directed at the 2010 US-Vietnam trade agreement by US labour unions for lacking minimum labour and environment standards.¹¹⁴ Across these TPRs, a consistent pattern emerges, namely that the WTO Secretariat refrained from any substantive commentary. Indeed, its engagement remains minimal, constraining the review to factual reporting without offering any in-depth observation on the inclusion or the exclusion of labour provision in RTAs. This restraint is further reinforced by the institutional design of the mechanism, as the WTO structures its analysis on,

¹⁰⁹ See Annex 3 of the Marrakech Agreement titled 'Trade Policy Review Mechanism', in particular Part C on the procedure and Part D on reporting which states that «each Member shall report regularly to the TPRB [Trade Policy Review Body]».

¹¹⁰ The WTO Secretariat states that «The Agreement [...] contains provisions on [...] labour and environment issues [...]», p. 35.

¹¹¹ The WTO Secretariat mentioned that «In addition, there are rules [...] on environmental and labour standards in relation to investment», p. 17.

¹¹² The WTO Secretariat reported the reference to «core labour standards or laws» on the trade in services section of the agreement, p. 19.

¹¹³ The WTO Secretariat noted that «The FTAs Japan has concluded do not have chapters on environment or labour. The authorities consider that most FTAs address the issue of sustainable development and labour standards through the reaffirmation of the rights and obligations under other existing international agreements [...]», p. 19.

¹¹⁴ In the 2013 TPR of Viet Nam, the WTO Secretariat addressed the issue in endnote n. 21, p. 39.

inter alia, issues that Members themselves signal as relevant through the ‘Questions and Answers’ process and labour standards have not been advanced in this context. Likewise, it seems that Members have not raised trade and labour-rights issues in the periodical appraisals of the TPR mechanism, where they are invited to highlight new topics that they wish the TPRB to address.

Overall, the analysis of the available WTO’s official documentation suggests that, while the WTO Secretariat acknowledges the existence of labour standards, it does so only descriptively and without any normative evaluation. Indeed, despite the proliferation of labour clauses in PTAs, the WTO maintains a cautious institutional stance, consistent with marginal member-driven input and the long-standing view that the nexus between trade and labour falls outside its competence. However, as mentioned in Section 1, even if the WTO does not itself regulate labour standards, it recognizes the interdependence between trade and labour policies. Accordingly, it is worth remarking that the WTO Secretariat maintains a technical exchange with the ILO through information sharing and joint research and it participates as an observer in the ILO Governing Body and in meetings of the Governing Body’s Working Party on the Social Dimension of Globalisation.

Nonetheless, the WTO’s persistent neutrality, coupled with limited cooperation mechanisms, underscores the Organization and, indirectly, its membership’s enduring reluctance to integrate labour rights into its normative discourse. Taken together, these elements confirm that the trade and labour linkage remains firmly outside the scope of the WTO.

5. Conclusions

The present article leads to a set of findings that highlight two main guiding questions: does the trade-labour nexus remain a divisive issue within the WTO? Has the cleavage among WTO Members evolved or has it remained essentially unchanged? Externally to the WTO, a broad range of members have incorporated labour-related provisions into their preferential trade agreements. However, our analysis of members’ practice within the WTO, particularly in the context of the Transparency Mechanism, reveals a markedly different picture. Two key elements stand out. First, labour clauses are not frequently mentioned and, when they are, they are framed as WTO-X matters, i.e., matters that fall outside the scope of the WTO. Second, even in those rare instances when they are mentioned, a purely descriptive language is used. This conclusion is reinforced by our examination of the World Trade Reports, Annual Reports and Trade Policy Reviews, where the discourse adopted by the WTO Secretariat is neither programmatic nor forward-looking.

The research findings draw further attention to a broader question: do plurilateral initiatives within the WTO emerge through the simultaneous aggregation of individual member’s positions, or do they rest on a prior process where the issue is identified, a coalition is built and a common agenda is structured through the institutional dynamics within the Organization? The research assessed whether mega-regional trade agreements, given their ambitious scope and their extensive membership, could constitute an internal bloc/aggregation capable of being a driving force within the WTO. However, the evidence suggests otherwise. Despite the proliferation of labour provisions in bilateral and (multi)regional settings, there is no indication that these practices have generated coalitions or alignments within the WTO. On the contrary, the diversity of regional approaches, ranging from cooperation-based labour clauses to conditionality regimes and enforceable labour

chapters, produces a fragmented landscape in which, at best, a minimum common denominator may be identified, rather than a shared approach capable of spilling over into the multilateral arena.

Accordingly, our research shows that, outside the WTO, a number of recurring, albeit uneven, patterns have emerged. A first distinctive line concerns the identity of the contracting parties. PTAs concluded by developed countries and other actors display greater ambition on prescriptive and law-enforcement terms, by establishing mechanisms for the resolution of labour-related disputes and, in some cases, sanctions. By contrast, PTAs concluded among developing countries generally employ promotional and cooperation-oriented approaches that reflect the intention to preserve their right to regulate. A residual number of labour-relating agreements, particularly those concluded by Asian countries, are instead designed as non-binding, political commitments. A second pattern relates to the position of the labour clause in the treaty relations between or among partners. North American practice pioneered the use of side agreements (e.g., the NAALC), whereas the European Union, as well as more recent agreements concluded by the United States, incorporate labour provisions within the main text, with the new generation agreement showing a dedicated chapter on labour (e.g., the USMCA and the EU-South Korea FTA). A third and final pattern concerns the normative structure of the labour clause itself. Some PTAs refer to obligations or standards under the ILO's 1998 Declaration and/or the core ILO conventions, while others rely primarily on national labour law. Nonetheless, an increasing number of agreements combine both approaches. Understanding these patterns may offer useful insights into what, in principle, could be achieved within the WTO and whether a plausible pathway for future engagement on the trade-labour nexus can be perceived.

These findings, therefore, invite further reflection. It would indeed be valuable to conduct a broader study on whether, in other controversial areas, the external practice of WTO Members has influenced or has been imported into the multilateral setting when proposing plurilateral initiatives. In other words, do existing WTO plurilateral agreements assume the prior development of extra-WTO practices among subsets of members, or have they emerged independently of such dynamics?

Ultimately, the present article sought to provocatively assess whether, and to what extent, a plurilateral agreement on trade and labour could be envisaged within the WTO framework. The analysis revealed that, under the current legal and institutional framework, such an outcome remains largely unlikely. On the one hand, the WTO continues to explicitly uphold a strict separation between trade and labour, grounded in its crystallized consensus that confines the scope of WTO law to trade matters, leaving little room for labour-related commitments to be negotiated in the multilateral framework. On the other hand, the proliferation of labour-related provisions across PTAs concluded among WTO Members demonstrates that the linkage between trade and labour has found fertile ground in spaces characterized by power asymmetries and selective cooperation.

Arguably, the diversity of approaches calls for discussion at the multilateral level, particularly for least developed countries, for whom the WTO remains a forum where they possess meaningful bargaining power. The USMCA is an emblematic example of an arrangement that would be difficult to replicate in a multilateral setting where power asymmetries are less pronounced, in that it is formally an RTA, but the Rapid Response Mechanism operates as a *de facto* unilateral conditionality scheme imposed on Mexico. Furthermore, some scholars warn that the WTO's persistent inertia on WTO-extra issues could contribute to rendering the Organization increasingly irrelevant as PTAs expand into domains beyond its scope. They argue that the WTO's trade-focused discourse must

evolve to accommodate trade-related issues, if the WTO is to remain a central forum of global economic governance.¹¹⁵ To this end, proposals to relax the consensus rule, such as adopting a two-thirds majority, can arguably foster greater flexibility while, at the same time, prevent the adoption of plurilateral agreements on highly contentious matters.¹¹⁶ Yet, our research shows that, as long as the diversity of experience outside the WTO does not translate into a coherent position within the Organization itself, softening of the consensus rule would only partially allow for overcoming the WTO paralysis on WTO-extra matters. At the same time, our findings indicate that WTO Members do not, at present, appear interested in bringing the trade and labour nexus within the WTO discourse.

¹¹⁵ P. C. MAVROIDIS, *Most Favoured Nation and Exceptions*, in *Trade in goods: the GATT and the other WTO agreements regulating trade in goods*, (Second Edition), Oxford University Press, 2012, p. 230; R. HOWSE, *The World Trade Organization and the protection of workers' rights*, in *Journal of Small and Emerging Business Law*, 1999, p. 27.

¹¹⁶ B. M. HOEKMAN, P. C. MAVROIDIS, *WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements*, in *European Journal of International Law*, Vol. 26, Issue 2, 2015, pp. 319–343, <https://doi.org/10.1093/ejil/chv025>, pp. 326 and 340–341.

Trade and Gender Initiatives at the WTO: Analyzing Critical Mass Approach

Maryam Qasim

Summary: 1. Introduction – 2. Institutional rigidity as barrier to innovation and the rise of variable geometry – 3. Implications of the Mandate Gap on gender initiatives in WTO – 4. Systematic integration and judicial scrutiny – 5. The Critical Mass Approach as a Pathway for Reform.

Keywords: Gender Equality – WTO Reform – Trade and Gender – Buenos Aires Declaration – Plurilateralism – Critical Mass Approach – Joint Statement Initiatives – Soft Law – Women’s Economic Empowerment.

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1. Introduction

The WTO’s legal framework, which was originally meant to promote trade liberalisation, to provide predictability and to resolve trade conflicts based on the principles of tariff reductions and non-discrimination, is now being challenged by the need to respect other values that cross-cut a number of different areas, including gender equality, environmental protection and labour standards.¹ One of these new dimensions is gender, which is gaining in salience because trade policies have differential effects on persons on the basis of their gender, and thus they require a shift from the WTO’s historical “*neutral*” regulatory approach.² The integration of human rights lexicons into WTO discourse represents a paradigmatic shift in global economic governance, moving beyond the traditional confines of tariff reduction and market access toward a normative framework that prioritizes equality, inclusion, and empowerment.³ This convergence is not merely rhetorical, it signals a fundamental reconceptualization of trade as an instrument for achieving broader social objectives, particularly gender equality and sustainable development.⁴ At international level, this trend is supported by treaties such as the Convention on the Elimination of All Forms of

¹ Nellie Munin. (2015). Can a Gender-Sensitive Approach to WTO Regulation Enhance Women’s Contribution to the Global Economy? *Global Trade and Customs Journal*, 10 (3), 111. <https://doi.org/10.54648/gtcj2015010> accessed online on 12/06/2026.

² Acharya, R., Falgueras Alamo, O., Al-Battashi, S. M. T., der Boghossian, A., Ghei, N., Parco Herrera, T., Jackson, L. A., Kask, U., Locatelli, C., Marceau, G., Motoc, I.-V., Müller, A. C., Neufeld, N., Padilla, S., Pardo de León, J., Perantakou, S., Sporysheva, N., & Wolff, C. (2019). Trade and Women: Opportunities for Women in the Framework of the World Trade Organization. *Journal of International Economic Law*, 22 (3), 343. <https://doi.org/10.1093/jiel/jgz023> accessed online on 12/06/2026.

³ O’Hara, C. (2022). Consensus and Diversity in the World Trade Organization: A Queer Perspective. *AJIL Unbound*, 116, 33. <https://doi.org/10.1017/aju.2021.74> accessed online on 14/06/2026.

⁴ Viola, L. A. (2023). Two-sided legitimation strategies: informal groups at the World Trade Organization. *International Affairs*, 99 (3), 989. <https://doi.org/10.1093/ia/iad113> accessed online on 16/06/2026.

Discrimination against Women (CEDAW), as well as soft law instruments such as Sustainable Development Goal 5, which collectively push the WTO to integrate gender issues into its work.⁵

Notwithstanding this progress, there is a significant “*Mandate Gap*” in the integration of gender initiatives in the WTO, as informal discussions on trade and human rights in the General Council and in the TESSD do not become legally binding.⁶ This was evident in the YEAR Buenos Aires Declaration on Trade and Women’s Economic Empowerment, which was adopted by 124 Members accounting for more than 75% of world trade, reflecting high political commitment, but not part of the WTO’s main legal instruments.⁷ This structural constraint leaves important social goals that are achieved through “*outside*” agreements in a legal position somewhere between the two extremes of “*legality*” and “*legality without action*”, and it poses acute questions about their compatibility with WTO law, their enforcement through the DSM, and the level of parliamentary control over them.⁸ The single obstacle to formalization of these initiatives is the dogma of “*single undertaking*” and the high procedural hurdle set forth in Article X:9 of the Marrakesh Agreement, which demands full consensus to add new plurilateral agreements to Annex 4.⁹ This “*consensus veto*” empowers a small minority of Members who would otherwise be at the mercy of strong majority pressure to block the adoption of modern ethical standards in the WTO, such as the ones outlined in TESSD’s “*Just Transition*” framework, and thereby create a “*veto culture*” that prevents institutional evolution.¹⁰

Joint Statements: This leaves Members increasingly constrained to a ‘*variable geometry*’ approach, and negotiating Joint Statement Initiatives (JSIs) on the edge of the multilateral system.¹¹ This division is accentuated by the absence of an interpretative path around the consensus rule, with the result that many soft law arrangements are proliferating without formal ratification processes.¹² One key factor to this evolution is the brevity of formality in WTO negotiations, where informal practices become an integral part of the formal ones and also influence them; this can lead to the emergence of new norms, which then become part of the formal structure and can also become more and more entrenched in the general consensus, although some resistance may arise initially. The need to rely on informal tools, however, has raised serious questions about institutional legitimacy and the

⁵ Bahri, A., & Amaral, R. (2023). Gender Equality Provisions in Trade and Investment Agreements: Are They Widening the Negotiation Capacity Gap? *World Trade Review*, 23 (1), 54. <https://doi.org/10.1017/s1474745623000368> lp;

⁶ Margulis, M. E. (2023). Rights redux: the return of human rights at the WTO. *Review of International Political Economy*, 31 (2), 791. <https://doi.org/10.1080/09692290.2023.2251486> accessed online on 19/06/2026.

⁷ Acharya, R., Falgueras Alamo, & etc.,. Trade and Women: Opportunities for Women in the Framework of the World Trade Organization. 343. World Trade Organization (WTO). (2017). *Joint declaration on trade and women’s economic empowerment on the occasion of the WTO ministerial conference in Buenos Aires*. WT/MIN(17)/60/Rev.1. World Trade Organization.

⁸ Bahri, A., & Boklan, D. (2022). Not Just Sea Turtles, Let’s Protect Women Too: Invoking Public Morality Exception or Negotiating a New Gender Exception in Trade Agreements? *European Journal of International Law*. <https://doi.org/10.1093/ejil/chac003> accessed online on 11/06/2026.

⁹ Hoekman, B.M., & Mavroidis, P. C. (2015). Embracing Diversity: Plurilateral Agreements and the Trading System. *World Trade Review*, 14 (1), 109. <https://doi.org/10.1017/s1474745614000378> accessed online on 23/06/2026.

¹⁰ Peres, A. (2024). Transience of (In)Formality: The Role of the Joint Initiatives in Reforming the WTO Negotiations. *World Trade Review*, 23 (3), 404. <https://doi.org/10.1017/s1474745624000119> accessed online on 18/06/2026.

¹¹ Ghibutiu, A. (2015). The Variable Geometry of the World Trading System. *Procedia Economics and Finance*, 22, 429. [https://doi.org/10.1016/s2212-5671\(15\)00234-8](https://doi.org/10.1016/s2212-5671(15)00234-8) accessed online on 15/06/2026.

¹² Hoekman, B.M., & Mavroidis, P. C. Embracing Diversity: Plurilateral Agreements and the Trading System. 109.

distribution of negotiation capacities, with developed countries much more at the front of the mainstreaming approach, creating a potential widening of the gap between the member states.¹³

In contemporary debates, the human rights vocabulary is beginning to become more commonly heard, swinging on the pendulum of the old belief that human rights are off the WTO agenda.¹⁴ States are adopting human rights arguments in trade rulemaking, and bringing trade issues into the broader scope of their obligations, and make it clear that labour provisions in preferential trade agreements can help improve women's rights, particularly in the Global South.¹⁵ Indeed, the incorporation of gender and labour standards in bilateral and regional agreements like the USMCA and Canada-Chile Free Trade Agreement, shows that not only the development of ideas and policy emulation is at the core of these changes, but also that bilateral and regional solutions are not sufficient to address systemic inequalities in the world.¹⁶

The legal validity of these discussions, however, is always circumscribed, because they can give rise to no legal obligations and are not subject to the enforcement mechanisms of DSM.¹⁷ It leads to a paradox between political goodwill and the legal force of agreements.¹⁸ The use of these soft law tools underscores the “*transience of (in)formality*”, a process in which informal negotiating processes influence and change existing norms and correspond with the formal process without the need for formal changes to the treaties. The idea of transience of (in)formality explains how these informal negotiating practices arise in the context of formal WTO negotiations, modifying the status quo norms and achieving results in spite of the stalemate in multilateral negotiations.¹⁹ This can lead to ‘*variable geometry*’, which means that smaller groups of nations may choose to move towards deeper integration of their economies on a particular policy dimension, while the rest remain unaffected, thus avoiding deadlock in the system caused by any one member state.²⁰

This chapter examines the potential for the effective management of these informal instruments by the WTO, and the question of whether an interpretative pathway exists that can be flexible despite counter votes. The comparative analysis of General Council and TESSD debates also reveals whether the gender and human rights tools are “*WTO-compatible*” when included in Member Schedules, avoiding the requirement for Article X:9 unanimous consent.²¹ In the end, the author suggest the adoption and utilization of “*critical mass*” tool available, showing how the Secretariat and DSM can handle plurilateral commitments which are in line with human rights principles without taking away

¹³ Bahri, A., & Amaral, R. Gender Equality Provisions in Trade and Investment Agreements: Are They Widening the Negotiation Capacity Gap?. 56.

¹⁴ Margulis, M. E. Rights redux: the return of human rights at the WTO. 798.

¹⁵ Bastiaens, I., Postnikov, E., & Kreft, A. (2023). Labour provisions in trade agreements and women's rights in the global south. *Global Policy*, 14 (5), 711. <https://doi.org/10.1111/1758-5899.13267> accessed online on 15/06/2026.

¹⁶ Macdonald, L. C. (2024). Inclusion of gender and labour standards in preferential trade agreements: evidence from North American and Canada-Chile agreements. *Globalizations*, 21 (8), 1434. <https://doi.org/10.1080/14747731.2024.2356354> accessed online on 08/06/2026.

¹⁷ Hughes, V. (2020). Adjudicating International Trade Cases in the World Trade Organization. In *Identity and Diversity on the International Bench* (345). Oxford University Press. <https://doi.org/10.1093/oso/9780198870753.003.0016> accessed online on 06/06/2026.

¹⁸ Hoekman, B.M., & Mavroidis, P. C. Embracing Diversity: Plurilateral Agreements and the Trading System.

¹⁹ Peres, A. Transience of (In)Formality: The Role of the Joint Initiatives in Reforming the WTO Negotiations. 404.

²⁰ Ibid.

²¹ Peres, A. Transience of (In)Formality: The Role of the Joint Initiatives in Reforming the WTO Negotiations. 390.

at the integrity of the plurilateral framework.²² This work aims at offering a blueprint for the inclusion of gender equality in the heart of the WTO system, to keep the WTO relevant and legitimate in a fast-changing global environment and to overcome the deadlock of consensus veto.²³

2. Institutional rigidity as barrier to innovation and the rise of variable geometry:

The institutional structure of the WTO, established under the Marrakesh Agreement, is a significant obstacle to, if not a barrier to, normative innovation, especially in the area of gender equality and human rights integration into the international trade system. The “*Single Undertaking*” principle that all Members must accept all agreements as a whole and the absolute consensus required under Article X:9 for a decision to be made, means that legal evolution will be difficult.²⁴ The overall rigidity of this architecture provides a “*veto culture*” whereby any single member may have veto power over the adaptation of the institution, thereby preventing the formalisation of new social norms in the WTO’s legally binding rules.²⁵ The need to tackle crosscutting issues like gender equality and environmental sustainability, therefore, creates a “*Mandate Gap*” for the organization.²⁶

Given this state of institutional paralysis, Members have increasingly relied on informal avenues and plurilateral discussions via JSIs and in the TESSD to further gender agendas.²⁷ JSIs constitute a form of variable geometry within the World Trade Organization.²⁸ While proponents argue that JSIs are legitimate provided they adhere to Most Favoured Nation principles, critics contend that their informal nature undermines multilateral integrity, fragments trade rules, and exacerbates inequalities between developed and developing nations.²⁹

The main question relating to these developments is whether these informal processes can be integrated into the legal framework of the WTO, or whether far-reaching structural reforms are needed to incorporate the normative innovation into the framework.³⁰

Moreover, institutional rigidity leads to the need for norm innovation and call for a reassessment of WTO decision making procedures. While variable geometry and informal initiatives provide immediate avenues for progress, they are insufficient substitutes for comprehensive structural reform.³¹ The mandate gap must be mediated through developing viable mechanisms that are flexible but also have legal certainty, so that Gender Equality and Human Rights are part and not an

²² Hoekman, B.M., & Mavroidis, P. C. Embracing Diversity: Plurilateral Agreements and the Trading System. 111.

²³ Acharya, R., & etc., Trade and Women: Opportunities for Women in the Framework of the World Trade Organization. 340.

²⁴ Hoekman, B.M., & Mavroidis, P. C. Embracing Diversity: Plurilateral Agreements and the Trading System. 112.

²⁵ O’Hara, C. Consensus and Diversity in the World Trade Organization: A Queer Perspective. 34.

²⁶ Gabler, M. (2010). Norms, Institutions and Social Learning: An Explanation for Weak Policy Integration in the WTO’s Committee on Trade and Environment. *Global Environmental Politics*, 10 (2), 107. <https://doi.org/10.1162/glep.2010.10.2.80> accessed online on 07/06/2026.

²⁷ Peres, A. Transience of (In)Formality: The Role of the Joint Initiatives in Reforming the WTO Negotiations. 395.

²⁸ Azmeh, S. (2024). Developing Countries and Joint Statement Initiatives at the WTO: Damned if You Join, Damned if You Don’t? *Development and Change*, 55 (3), 391. Kelsey, J. (2022). The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO. *Journal of International Economic Law*, 25(1), 11.

²⁹ Azmeh, S. (2023). ‘Saving the WTO’: middle power insiders and joint statement initiatives at the World Trade Organisation. *New Political Economy*, 29(1), 68.

³⁰ Bahri, A., & Amaral, R. Gender Equality Provisions in Trade and Investment Agreements: Are They Widening the Negotiation Capacity Gap? 65.

³¹ Peres, A. Transience of (In)Formality: The Role of the Joint Initiatives in Reforming the WTO Negotiations. 395.

afterthought in global trade governance.³² The future viability of the WTO will depend on its ability to adapt its institutional structure to better seize the values of its Members rather than stick with the Single Undertaking, and to go beyond the rigidities of traditional international cooperation to a more flexible and responsive approach.³³

In the absence of frameworks for effective implementation, new ways of governance can work to entrench and reinforce, rather than challenge, the status quo, as the paradox of gender mainstreaming illustrates. The relevance and legitimacy of the WTO in the future will depend, therefore, on its capacity to adjust its institutional structures to include gender equality and human rights.³⁴ New ideas are currently being argued in the General Council and the TESSD, and they will be the forum where Members are able to test the limits of trade law and social justice.³⁵ As the organization continues to deal with these challenges, the introduction of human rights norms into trade discourse via informal means could become more consensus-driven, and eventually more formalized in the future.³⁶ The findings reflect the nature of international trade governance and show how it can be used to solve complex social issues, through a dynamic process of both informal debate and plurilateral reform.³⁷

3. *Implications of the Mandate Gap on gender initiatives in WTO*

The growing number of informal initiatives leads to the creation of very significant “*mandate gap*,” which leads to implications for the effectiveness of Gender Initiatives at WTO. For instance, as mentioned above, JSIs and declarations like the Buenos Aires Declaration on Trade and Women’s Economic Empowerment are plagued by legal uncertainty, enforcement gaps and issues of democratic accountability. This leads to tension between the Marrakesh Agreement Article X:9 consensus-based decision making process of the WTO and the need for variable geometry to solve today’s social and economic problems. The resulting fragmented legal landscape resist predictability and coherence that are key elements of the multilateral trading system, and leaves important issues regarding the position of these instruments in international law, as well as their ability to achieve concrete results in the field of gender equality and sustainable development.³⁸

The enforceability and limitations of the dispute settlement mechanism: The enforceability of such informal commitments is greatly restricted by the jurisdiction of the DSM. DSM is considered to be one of the most important achievements of the WTO as it offers a rules-based mechanism to solve trade conflicts. But it only has jurisdiction over “*covered agreements*” in the language of Annex 1 of the Dispute Settlement Understanding. As such, the JSIs and declarations are not covered by the DSM, meaning the provisions of these agreements are not readily enforceable in traditional legal

³² Arora, P. (2019). Gender Inclusive Trade and the Limits of Liberal Feminism. *Völkerrechtsblog*. <https://doi.org/10.17176/20190311-152528-0> accessed online on 07/05/2026.

³³ Towns, A., Jezierska, K., & Bjarnegård, E. (2024). Can a feminist foreign policy be undone? Reflections from Sweden. *International Affairs*, 100 (3), 1268. <https://doi.org/10.1093/ia/iaae079> accessed online on 07/05/2026.

³⁴ O’Hara, C. Consensus and Diversity in the World Trade Organization: A Queer Perspective. 74

³⁵ Viola, L. A. Two-sided legitimization strategies: informal groups at the World Trade Organization. 991.

³⁶ Arora, P. Gender Inclusive Trade and the Limits of Liberal Feminism.

³⁷ Margulis, M. E. Rights redux: the return of human rights at the WTO. 799.

³⁸ O’Hara, C. Consensus and Diversity in the World Trade Organization: A Queer Perspective. 35.

proceedings.³⁹ This constraint has a huge impact on the effectiveness of gender and sustainability initiatives, because Members cannot be legally held accountable for their violations.⁴⁰

The democratic oversight and legitimacy concerns: Informal mechanisms also raise concerns about the democratic accountability and institutional legitimacy, as agreements not formally ratified through relevant procedures of member states, such as parliamentary examination and public discussion. This terminal nature diminishes the accountability and transparency in the traditional treaty making process and creates a ‘*democratic deficit*’ in global trade governance.⁴¹ Selected informal groups within the WTO carry out two-way legitimation strategies; they want to increase their authority as well as increase the legitimacy of the formal organisation; however, this can mask the reality of power and influence in the negotiation process.⁴² These concerns are further intensified by the dominance of developed countries in spearheading gender mainstreaming and labor standard initiatives which can push the voices and interests of developing Members participating in these complex informal process of negotiations.⁴³ This negotiation capacity gap not only weakens the inclusiveness of the WTO, but may also result in the application of standards that might be inconsistent with the developmental priorities of all member states and lead to resistance and further fragmentation.⁴⁴

4. *Systematic integration and judicial scrutiny*

Integration of human rights paradigms into the discourse of international trade law precipitates profound interpretative consequences, most notably regarding the prospective incorporation of gender considerations into WTO jurisprudence via Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). This provision, frequently characterized as the “*systemic integration*” clause, mandates that treaty interpreters account for “*any relevant rules of international law applicable in the relations between the parties*” when construing treaty terms. In principle, this establishes a textual conduit between the WTO’s covered agreements and the broader corpus of international law, encompassing instruments such as CEDAW, the International Covenant on Civil and Political Rights (ICCPR), and various International Labour Organization conventions addressing gender-based perspectives in trade-related sectors. The theoretical allure of this interpretative pathway resides in its capacity to harmonize the WTO’s economic orientation with the normative gender perspectives in the international legal order. Recent scholarship emphasizes that the linkage of trade law with human rights law has become increasingly significant, suggesting that the WTO

³⁹ Hughes, V. Adjudicating International Trade Cases in the World Trade Organization. 345.

⁴⁰ Bahri, A. (2020). Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help? *Journal of International Economic Law*, 23 (3), 572. <https://doi.org/10.1093/jiel/jgaa023> accessed online on 07/05/2026.

⁴¹ Viola, L. A. Two-sided legitimation strategies: informal groups at the World Trade Organization. *International Affairs*, 1001.

⁴² Bastiaens, I., Postnikov, E., & Kreft, A. (2023). Labour provisions in trade agreements and women’s rights in the global south. *Global Policy*, 14(5), 702–715. <https://doi.org/10.1111/1758-5899.13267> accessed online on 07/05/2026.

⁴³ Rice, J. S. (2009). Free trade, fair trade and gender inequality in less developed countries. *Sustainable Development*, 18(1), 42–50. <https://doi.org/10.1002/sd.407>

⁴⁴ Bastiaens, I., Postnikov, E., & Kreft, A. (2023). Labour provisions in trade agreements and women’s rights in the global south. *Global Policy*, 14(5), 702–715. <https://doi.org/10.1111/1758-5899.13267> accessed online on 09/05/2026.

legal system is no longer isolated from other areas of international law, thus creating a potential framework for coordinating trade obligations with human rights norms.⁴⁵

Notwithstanding its theoretical promise, the practical application of Article 31(3)(c) to embed gender-specific considerations within WTO adjudication remains largely unexplored and encumbered by significant interpretative caution. This judicial reticence stems from several intersecting factors, primarily the substantial disagreement surrounding the formulation “*relevant rules of international law applicable in the relations between the parties*,” which has generated debate over whether it necessitates unanimous consensus among all WTO Members or merely applicability between the specific willing members. The absence of any WTO agreement explicitly referencing gender or human rights norms implies that any attempt to import gender considerations via Article 31(3)(c) would require an affirmative, and politically sensitive, determination that these contemporary gender norms are indeed “*applicable*” and “*relevant*” to the specific treaty provision at issue, a determination carrying obvious risks of being perceived as judicial overreach into matters properly reserved for the WTO’s political and legislative organs. This structural tension is further complicated by the distinct operational mandates of international institutions, where the WTO’s hard law enforcement mechanisms often intersect with the soft law and technical expertise of other bodies, creating complex diplomatic landscapes that resist simple legal integration.⁴⁶

This pattern of restraint is further corroborated by the limited success Members have achieved in invoking the public morality exception under Article XX(a) of the GATT to justify trade-restrictive measures grounded in non-economic, values-based interests. Although Article XX(a) has been successfully invoked in isolated instances, its application has been circumscribed by a rigorous two-tiered test requiring that the measure be both genuinely designed to protect public morals. This exacting scrutiny illustrates the broader institutional tendency within WTO jurisprudence to treat non-trade values, including those touching on human dignity, equality, and social justice, as exceptions to be construed narrowly rather than as integral interpretative lenses through which trade obligations should be understood.⁴⁷ Consequently, the prospect of utilizing Article 31(3)(c) as a vehicle for embedding gender considerations into the interpretation of core WTO disciplines remains more a matter of scholarly aspiration than settled adjudicative practice. This underscores the persistent tension between the WTO’s formally trade-centric architecture and the growing international consensus that trade governance cannot be meaningfully divorced from its social and gendered consequences.⁴⁸

⁴⁵ Hilpold, P. (2007). Human Rights and WTO Law: From Conflict to Coordination. *Archiv des Völkerrechts*, 45 (4), 497. <https://doi.org/10.1628/000389207783400432> accessed online on 07/06/2026.

⁴⁶ Soave, T. (2020). European Legal Culture and WTO Dispute Settlement: Thirty Years of Socio-Legal Transplants from Brussels to Geneva. *The Law & Practice of International Courts and Tribunals*, 19(1), 107–133. <https://doi.org/10.1163/15718034-12341418>

⁴⁷ Hilpold, P. Human Rights and WTO Law: From Conflict to Coordination. 497.

⁴⁸ Soave, T. European Legal Culture and WTO Dispute Settlement: Thirty Years of Socio-Legal Transplants from Brussels to Geneva.

5. *The Critical Mass Approach as a Pathway for Reform*

In sum, the WTO's legal order has failed to develop an interpretative pathway that could integrate gender dimension into its substantive rules, leaving a significant gap in the protection and promotion of women's rights within the global trading system. As discussed above, the institutional architecture of the WTO, characterized by its consensus-based decision-making and the paralysis of its Appellate Body, has effectively foreclosed the development of a robust legal framework for incorporating gender perspectives, forcing Members to rely on plurilateral agreements.⁴⁹ The rise of plurilateral initiatives reflects the broader institutional crisis of the WTO, where consensus-based decision-making has led to legislative inertia.⁵⁰

The absence of an interpretative pathway capable of overriding the consensus requirement under Article X:9 confirms that the “*Mandate Gap*” is not a problem of legal ambiguity but of constitutional closure. Given this constitutional closure, the critical mass approach offers a viable solution for integrating gender-related commitments into the WTO framework. This approach, which has been successfully used in agreements such as the Information Technology Agreement (ITA), allows agreements among a sufficiently large group of Members to be incorporated into the WTO framework without requiring unanimity. By applying a critical mass approach to gender initiatives, willing Members could move forward with formalizing gender-sensitive trade rules, while maintaining the possibility of broader participation over time.⁵¹

This strategy would address the institutional paralysis caused by the consensus veto and provide a pathway for reforming the WTO's decision-making processes. It would also help to bridge the mandate gap by transforming gender equality from a peripheral concern into an integral component of global trade governance. However, the success of this approach depends on the willingness of Members to overcome political and ideological differences and commit to a more inclusive and equitable trading system. Ultimately, the challenge is to ensure that the WTO remains both relevant and effective in addressing contemporary global challenges, transforming gender equality from a peripheral concern into an integral component of global trade governance.⁵²

⁴⁹ Pusapati, U., & Lakshmi, V. V. (2025). Multilateral Trade Law at a Crossroads: Legal Perspectives on WTO Reforms and Institutional Resilience or Multilateral Trade Law at a Crossroads: WTO Reform, Pandemic Lessons, and Legal Resilience. *Journal of Neonatal Surgery*, 14(22S), 1066. <https://doi.org/10.63682/jns.v14i22s.5990>; Kelsey, J. (2022). The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO. *Journal of International Economic Law*, 25(1), 16. <https://doi.org/10.1093/jiel/jgac004> accessed online on 02/07/2026.

⁵⁰ Muzaka, V., & Scott, J. (2024). Peripheral voices: women in international trade scholarship. *International Affairs*, 100(2), 831. <https://doi.org/10.1093/ia/iaae011>; Pauwelyn, J. (2023). Taking Stakeholder Engagement in International Policy-Making Seriously: Is the WTO Finally Opening Up? *Journal of International Economic Law*, 26 (1), 61. <https://doi.org/10.1093/jiel/jgac061> accessed online on 03/07/2026.

⁵¹ Low, P. (2022). The WTO in Crisis: Closing the Gap between Conversation and Action or Shutting Down the Conversation? *World Trade Review*, 21 (3), 274–290. <https://doi.org/10.1017/s1474745622000064> accessed online on 02/07/2026.

⁵² Chu, S., Holbig, H., Narlikar, A., & Plagemann, J. (2024). In the Eyes of the Beholders: The Legitimacy of Global Governance Institutions under Multipolarity. *International Studies Quarterly*, 68 (2). <https://doi.org/10.1093/isq/sqae034> accessed online on 01/07/2026.

SECTION THREE

Out-of-WTO Plurilaterals and Clusters of Bilateral Agreements and Arrangements

The EU–CPTPP Dialogue: Mapping the Normative Space of Trade and Subsidy Regulation¹

Luca Rubini

Summary: 1. Introduction and Guiding Questions – 2. Part I – The EU and the CPTPP – 2.1 Context: Rule-Makers and Rule-Takers in a Fragmenting System – 2.2 The EU as Rule-Maker – 2.3 The EU–CPTPP Trade and Investment Dialogue – 3. Part II – Comparing the Content of Trade Agreements – 3.1 Macro-Analysis: Chapter Overlap – 3.2 Micro-Analysis: Regulatory Priorities – 3.3 Subsidies, State aid and SOEs: A Field of Contrasts – 4. Towards a ‘Common Law of International Trade’? – 5. Concluding Remarks.

Keywords: CPTPP – EU – Trade Governance – Subsidy Control – State Aid – State-Owned Enterprises – Trade Agreements – Economic Integration – Competitive Neutrality – Plurilateral Cooperation – International Economic Law.

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1. Introduction and Guiding Questions

This brief paper focuses on the current EU – CPTPP dialogue. Its main goal is to introduce the concept of the ‘normative space’ between the EU, the CPTPP and its individual members, and to preliminarily assess it, by identifying convergences and divergences, and trying to make sense of them. It is a very initial exercise which lays down the foundations for a deeper analysis of the legal and political dialogue between the EU and the CPTPP and which the author will carry out in the near future. The scope of the analysis is both general (dealing with the usual subject matter of trade negotiations and agreements) and specific (focusing in particular on the specific chapters on subsidies/State aid and SOEs).

The multilateral trading system (‘MTS’) continues to labour under a protracted institutional crisis, and much of the regulatory action that matters most for trade in goods, services and, increasingly, for the treatment of subsidies and State-owned enterprises (‘SOEs’), now takes place outside it – through unilateral measures and through deal-making. The

¹ This paper draws on and develops the presentations made at the University of Bologna on 5 May 2026 and the European University Institute on 11 June 2026. The author used Claude Version 1.18286.2 (b682d9) to generate a very first draft of the paper (including the tables) using i) the research outline and the PowerPoint presentation prepared for the two seminars and ii) previous authored work on the topic. The AI tool was not used to generate new or original ideas. It was, however, used to better quantify the chapter overlap between EU PTAs and the CPTPP (as per Table 1). The author has reviewed and edited the content of the initial draft as needed and takes ultimate responsibility for the content of the published work.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') occupies an unusual position in this landscape. It is a special agreement not because of its geographical label – the 'trans-Pacific' tag is, on reflection and in consideration of recent developments (the UK entry and now the dialogue with the EU), best forgotten – but because of the quantity and quality of both its parties and its regulation. It is interesting in its own right, and it is increasingly discussed as a possible coordination platform for future WTO reform.

The recent institutionalisation of an EU–CPTPP dialogue sharpens a set of questions that this paper takes as its starting point. Can an enlarged CPTPP, one that incorporates the European Union, become one of the 'barycentres' – perhaps even a 'gold standard' – of international trade regulation? What rules could such an enlarged framework include, and what would be the origin of these rules? What forms of 'EU–CPTPP linking' are realistically available short of formal accession, and what issues would each of them raise?

The paper proceeds in two parts. Part I (Sections 2–3) considers the EU and the CPTPP as institutional actors and maps the current state of their relationship. Part II (Sections 4–5) turns to a comparative analysis of the actual content of the relevant trade agreements, with a particular focus on subsidies, State aid and SOEs – an area of both notable convergence and instructive divergence between the two regulatory models. Section 6 draws the threads together and asks whether the EU–CPTPP dialogue could catalyse a more ambitious normative synthesis.

2. Part I – The EU and the CPTPP

2.1 *Context: Rule-Makers and Rule-Takers in a Fragmenting System*

As the MTS continues to struggle to update its own rule-book, preferential and plurilateral instruments have become the principal laboratories of trade-law innovation. The CPTPP is a leading example, distinguished not only by the depth of its disciplines but by the weight and diversity of its membership.

Understanding how such agreements are made matters. Existing scholarship suggests that mega-regional trade agreements tend to bear the imprint of their largest and most experienced negotiating parties – the 'rule-makers' – with other parties functioning, to a significant extent, as 'rule-takers'.² This dynamic is central to any assessment of what an enlarged, EU-inclusive CPTPP might look like, and whose regulatory DNA it would carry.

The point is best illustrated by the CPTPP's own genesis. The agreement is, in all but name, the successor to the original Trans-Pacific Partnership ('TPP'), and the TPP text was overwhelmingly a product of American drafting. Across the two-and-a-half-year endgame of the negotiations, the United States held the pen on the chapters that mattered most to its own

²See Todd Allee and Andrew Lugg, 'Who wrote the rules for the Trans-Pacific Partnership?' (2016) Research and Politics, on the extent to which mega-regional trade agreements tend to replicate the treaty templates of their largest and most experienced negotiating parties – the 'rule-makers' – with other parties largely accepting the resulting text as 'rule-takers'. Presenting the TPP in 2015, President Obama put the point bluntly: 'The TPP means that America will write the rules of the road in the 21st century ... if America doesn't write those rules – then countries like China will', as quoted in Allee and Lugg, *ibid.*

regulatory agenda: intellectual property protection (including data-exclusivity periods for biologics that proved among the most contentious provisions in the entire text), investor-State dispute settlement, regulatory coherence, e-commerce and the prohibition of data localisation, and – most significantly for present purposes – the detailed disciplines on State-owned enterprises, an area in which no other negotiating party had comparable domestic legislation or negotiating experience to draw on. Smaller and less experienced parties, by contrast, had considerably less influence over the shape of the final text, and in several cases joined the negotiations only after its main architecture had already been substantially settled by the larger players.

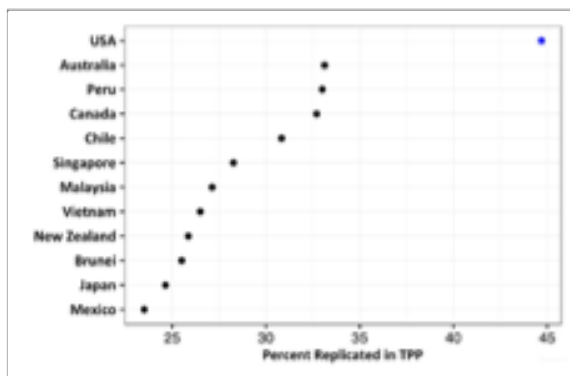


Figure 1. Average amount of past PTA text replicated in TPP, by country. From Allen and Lugg (2016)

The United States’ subsequent withdrawal from the TPP in January 2017 is, in this light, a genuine paradox. The country that had done more than any other to shape the substance of the agreement chose to defect. Yet the withdrawal did remarkably little to alter the American imprint on the text. In concluding the CPTPP, the remaining eleven parties agreed to suspend only a short and targeted list of provisions – mostly concentrated in intellectual property, where the US had pushed hardest and where its departure most directly reduced the value of the bargain for others – while leaving the great bulk of the US-drafted architecture, including its innovative SOE disciplines, entirely intact.

In other words, the US acted as rule-maker for an agreement it ultimately declined to join, and the remaining parties, rather than renegotiating the substance, chose to preserve the American template largely as received. This is a first, and instructive, illustration of the rule-maker/rule-taker dynamic that recurs throughout this paper: the identity of a treaty’s principal architect need not coincide with its eventual membership, and a regulatory model can continue to shape an agreement’s normative trajectory long after its original sponsor has left the table.

2.2 *The EU as Rule-Maker*

The European Union is active across virtually every available playground of trade governance – multilateral, regional and unilateral – and remains the single largest architect of preferential trade agreements (‘PTAs’) in the world. Leveraging the scale of its internal market, the EU has often

succeeded in exporting its own regulatory standards through these agreements, acting as a rule-maker in its own right rather than merely as a taker of externally set templates.

Table 1 – Existing PTAs between the EU and individual CPTPP Members

CPTPP Member	EU Preferential Trade Agreement	Status (June 2026)	Entry into Force / Latest Status
Australia	EU–Australia Free Trade Agreement	Signed, under ratification	Agreement concluded; not yet in force.
Brunei	EU–ASEAN Partnership and Cooperation framework only	No bilateral FTA	No preferential trade agreement currently in force.
Canada	Comprehensive Economic and Trade Agreement (CETA)	Provisionally applied	Since 2017 (pending ratification by some Member States).
Chile	EU–Chile Advanced Framework Agreement (modernized Association Agreement)	Interim trade pillar in force / ratification ongoing	Modernized agreement signed in 2023; implementation progressing.
Japan	EU–Japan Economic Partnership Agreement	In force	1 February 2019.
Malaysia	EU–Malaysia FTA	Negotiations resumed	Not yet concluded.
Mexico	EU–Mexico Global Agreement (modernized)	Modernized agreement awaiting ratification	Original agreement in force since 2000; modernization being adopted.
New Zealand	EU–New Zealand Free Trade Agreement	In force	1 May 2024.
Peru	EU–Colombia/Peru Trade Agreement (later joined by Ecuador)	In force	Peru since 2013.
Singapore	EU–Singapore Free Trade Agreement	In force	21 November 2019.
United Kingdom	EU–UK Trade and Cooperation Agreement	In force	Provisionally applied 1 January 2021; fully in force 1 May 2021.
Vietnam	EU–Vietnam Free Trade Agreement	In force	1 August 2020.

NB: The rows highlighted in yellow indicate the cases where there is no trade agreement yet.

Strikingly, as Table 1 shows, the EU already has PTAs, association agreements or advanced framework agreements – in force, provisionally applied, or under ratification – with ten current CPTPP Members, from the long-standing *EU–Korea* and *EU–Peru* agreements to the very recent *EU–New Zealand* and *EU–Chile* agreements, alongside *CETA* with Canada and the *EU–UK Trade and Cooperation Agreement*. The only partial exceptions are: Brunei, with which the EU currently relies solely on the broader *EU–ASEAN partnership and cooperation framework*, absent a dedicated bilateral FTA, and Malaysia with which the EU is currently negotiating a trade deal.

We believe that this near-complete web of bilateral relationships is the raw material from which any answer to the guiding questions above must be built: what do these agreements have in common, where do they differ, and what does this tell us about the terms on which a future EU–CPTPP relationship might be built?

The EU’s claim to rule-maker status rests on more than sheer numbers, however; it rests on a demonstrable pattern in the content of its PTAs which is a strong indication of its ability to navigate through the vagaries of negotiations and the specifics of its trading partners and make them converge towards a model.

On subsidy and State-aid-related disciplines specifically, EU treaty practice can be sorted into three broad categories: first, agreements modelled essentially on the WTO baseline, with little further elaboration (*CETA* being a good example); a second, much larger group that significantly elaborates on that WTO platform and imports substantial elements of EU State aid law, at times reproducing its language almost verbatim (the agreements with Japan, Singapore, Mexico and Vietnam are the clearest instances); and a third group, comprising accession or association candidates, that essentially transplants the EU State-aid model wholesale as part of the broader project of legal approximation required by EU membership.¹ Tellingly, several of the agreements in the second, most numerous category are with current or prospective CPTPP Members, which is precisely why the comparative exercise in Section 3 below is possible in the first place.

What makes this pattern significant for the rule-maker/rule-taker frame introduced in Section 2.1 is its consistency and direction of travel. As has been observed of this body of practice, apart from the limited first category, the EU systematically pushes for the inclusion of disciplines that, whatever the precise language used, reflect the key principles of its own State-aid regime – with the same basic principles recurring, and their geographic reach expanding, agreement after agreement, increasingly beyond the circle of countries that could be called European.² On this reading, each new-generation EU PTA is not an isolated bilateral bargain but one further instance of the EU extending the territorial reach of its own regulatory standards – the clearest possible illustration of rule-making, rather than

¹Luca Rubini, ‘Transcending territoriality: Expanding EU State aid control through consensus and coercion’, in [Leigh Hancher, Juan-Jorge Piernaz-Lopez, Luca Rubini \(eds.\)](#) *The future of EU State aid law – Consolidation and Expansion* (Madrid: EU Law Live Press) 119-134, 127, distinguishing (i) PTAs modelled exclusively on WTO subsidy disciplines, such as *CETA*; (ii) PTAs significantly elaborating on the WTO platform with borrowings from EU State aid law, such as the agreements with Japan, Singapore, Mexico and Vietnam; and (iii) PTAs that substantially copy the EU State-aid model in view of association or accession, such as the agreements with the Western Balkan States.

²*Ibid.*, 127–128: ‘the EU systematically pushes [for] the inclusion of disciplines that, irrespective of the language used, reflect the key principles of EU State aid law ... Through each new PTA including similar provisions, the substantive standards of EU State aid law extend their territorial reach. This is indeed one of the expressions of EU’s regulatory power at the global level.’

rule-taking, and, it is reasonable to believe, the essential background against which any future EU–CPTPP linkage, discussed next, would have to be negotiated.

2.3 The EU–CPTPP Trade and Investment Dialogue

The formal EU–CPTPP dialogue has, to date, produced two public documents – a 2025 Ministerial Statement publicising the launch of the initiative, and a 2026 Joint Statement issued at the fourteenth CPTPP Ministerial Conference – neither of which contains great surprises.

Admittedly, full EU accession to the CPTPP appears to be off the table as a realistic near-term scenario (and it can perhaps be speculated that one of the reasons for this is exactly the existence of trade agreements specifically, and recently, negotiated with virtually all CPTPP Members). The more interesting question, then, is what forms of political and strategic cooperation might substitute for, or precede, formal linkage in the shape of full accession.

The literature has already identified and suggested several concrete avenues for cooperation short of accession can already be identified: a common protocol on rules of origin, modelled on the Pan-Euro-Mediterranean Convention;³ mutual recognition agreements, building on the EU’s existing arrangements with four CPTPP Members; soft-law digital cooperation agreements, drawing on both EU practice and draft WTO texts; a dedicated climate agreement covering both goods and services, along the lines of the Agreement on Climate Change, Trade and Sustainability;⁴ cooperation on economic security and supply chain resilience, comparable to the US-led Indo-Pacific Economic Framework for Prosperity;⁵ and continued work, within the MTS, on market-distorting practices, building on existing PTA disciplines and the Trilateral Initiative.⁶

Be it as it may, the following analysis will go back to the factual element offered by the existence of a great number of bilateral trade agreements between on the one hand the EU and on the other individual CPTPP Members as well as between these trade agreements and the CPTPP itself.

This analysis may enable to identify the ‘normative space’, built up of common (or indeed different) norms in real trade agreements. It may help to fully understand if, and if so in what respect, these countries are on the same page on certain issues, which is particularly salient in itself and also in consideration that most of the agreements are relatively recent (and hence can be held to have considered recent challenges).

³Regional Convention on pan-Euro-Mediterranean preferential rules of origin (‘PEM Convention’), OJ 2013 L 54/4, as a possible template for a common protocol on rules of origin between the EU and CPTPP Members.

⁴Agreement on Climate Change, Trade and Sustainability (‘ACCTS’), negotiated among Costa Rica, Iceland, New Zealand and Switzerland, addressing inter alia the removal of fossil fuel subsidies and the liberalisation of environmental goods and services.

⁵Indo-Pacific Economic Framework for Prosperity (‘IPEF’), a US-led framework addressing, among other pillars, supply chain resilience and economic security, launched in 2022.

⁶The ‘Trilateral Initiative’ gathering the EU, Japan and the United States since late 2017, addressing market-distorting industrial subsidies and related practices.

3. Part II – Comparing the Content of Trade Agreements

3.1 Macro-Analysis: Chapter Overlap

A first, admittedly descriptive, step in mapping this ‘normative space’ is to compare the presence or absence of salient chapters across the relevant agreements. Methodologically, the AI tool has been asked to take CPTPP’s 30 chapters as the fixed reference list, and to compare this list to each EU trade agreement, asking whether the latter contain a chapter covering substantially the same subject matter. Importantly, this is a one-directional, topical, structural – not a textual (and even less a legal) – match. In other words, it simply says whether that topic is covered or not, and does not enquire the detail, depth or enforceability of the relevant legal provisions.⁷ Finally, there is no weighting: a one-paragraph passing reference and a fifty-article chapter both count as one match if the topic is nominally present. Clearly, this exercise is simply preliminary and generates a preliminary overlap indication. Far more granular analysis would be needed, in particular if actual legal impact of rules were to be determined.

That being said, this very preliminary classification already shows a significant degree of overlap between the EU trade agreements and the CPTPP, the average being above 80%. The two slight outliers are the oldest *EU Peru (Colombia/Ecuador)* (2012), which was negotiated before the *CETA*, a veritable turning point in EU PTA practice, which largely set up the model then consistently followed in subsequent negotiations. Beyond internal organisation, the *EU-Singapore* PTA (2018) is the one that seem to have a real gap since it lacks chapters on State-Owned Enterprises, SMEs, Regulatory Coherence, and Cooperation/Capacity-Building. By contrast, the newest agreements – *EU—NZ* (2023), *EU—Chile* (2023), *EU—Mexico* (2026), *EU—Australia* (2026) – all add entirely new standalone chapters that don’t exist in CPTPP at all, notably Energy and Raw Materials, Sustainable Food Systems, Animal Welfare, Trade and Gender, Anti-Corruption. So, even though the *overlap percentage* holds steady in the 80–90% range for these later deals, that’s because they’re still hitting all the old CPTPP topics *plus* bolting on new ones — meaning the EU template is pulling ahead in scope even where it still tracks CPTPP closely on the shared ground.

The tentative general finding from this very basic matching exercise is one of increasingly significant overlap, suggestive of convergence towards a standardised ‘new generation’ template, both within the EU’s own treaty practice and vis-à-vis the CPTPP. While all EU PTAs concluded with individual CPTPP Members tend to track the CPTPP template, more recently negotiated PTAs seem to go even beyond that template by adding new topics.

⁷ This goal would require a manual and qualitative analysis which is left for the future.

Table 2 – Estimated Chapter overlap between EU trade agreements and CPTPP

#	CPTPP Member	EU Agreement	Signed	Status / Entry into force	Approx. chapter overlap*	Chapters (EU side); CPTPP: 30 chapters
1	Peru	EU–Colombia/Peru(/Ecuador) Trade Agreement	26 Jun 2012	Provisional: Peru 1 Mar 2013, Colombia 1 Aug 2013, Ecuador 1 Jan 2017; fully in force 1 Nov 2024	~75–80%	~14 titles
2	Canada	CETA	30 Oct 2016	Provisionally applied 21 Sep 2017 (investment/ICS chapter still pending remaining national ratifications)	~85–90%	30
3	Japan	EU–Japan EPA	17 Jul 2018	In force 1 Feb 2019	~80–85%	23
4	Singapore	EUSFTA	19 Oct 2018	In force 21 Nov 2019	~70–75%	16
5	Vietnam	EVFTA	30 Jun 2019	In force 1 Aug 2020	~80%	17
6	UK	Trade and Cooperation Agreement (TCA)	30 Dec 2020	Provisionally applied 1 Jan 2021; fully in force 1 May 2021 (EP consent 27 Apr 2021; Council decision 29 Apr 2021)	~85–90% (trade part only)	~25 trade-relevant chapters within Part Two
7	New Zealand	EU–NZ FTA	9 Jul 2023	In force 1 May 2024	~80%	27
8	Chile	EU–Chile Interim Trade Agreement / Advanced Framework Agreement	13 Dec 2023	ITA in force 1 Feb 2025; AFA pending full EU member-state ratification	~85–90%	33
9	Mexico	Modernised Global Agreement (MGA) + Interim Trade Agreement (ITA)	22 May 2026	Not yet in force — pending ratification	~80–85%	~32 (numbering includes interleaved annexes to ~47)

#	CPTPP Member	EU Agreement	Signed	Status / Entry into force	Approx. chapter overlap*	Chapters (EU side); CPTPP: 30 chapters
10	Australia	EU–Australia FTA	Not yet signed — negotiations concluded 24 Mar 2026	Legal/linguistic review; signature expected late 2026/early 2027	~83%	25

It is interesting to make a comparison between all 15 PTAs concluded by the EU after 2010. While one can identify a core of 18 chapters present across all 15 agreements, which cover usual topics,⁸ one does not notice a clear and clean progression since the very first PTA (*EU – Korea*) of this period. In other words, and importantly, chronology alone doesn’t predict scope (and certainly a deeper one). Beyond the core chapters indicated above, what seem to matter in accepting (or not) commitments in other areas is whether the EU’s negotiating partner is willing or able to accept the full modern template, perhaps best exemplified by the most recent agreements with the UK, New Zealand, Chile, Indonesia and Mexico, or whether political urgency and partner-side resistance forced a leaner bargain, such as in the case of India and Mercosur (which are interestingly not CPTPP Members).

Going back to the comparison with the CPTPP template, the following sections will zoom-in specific areas where agreement with trade partners may be more difficult to reach and try to indicate the reasons for this lack of convergence.

3.2 Micro-Analysis: Regulatory Priorities

Chapter presence alone says little about substantive alignment. A closer, provision-level reading reveals a more differentiated picture of where the EU and CPTPP models converge and where they diverge.

For example, electronic commerce disciplines have historically been comparatively weaker in EU FTAs, though stronger in the New Zealand and modernised Chile agreements, and are typically accompanied by explicit safeguards for privacy and personal data protection – a marked contrast with the CPTPP’s emphasis on promoting data flows and prohibiting data localisation. The CPTPP also places considerably more weight on horizontal regulatory coherence disciplines than most EU

⁸ Trade in Goods, Rules of Origin, Trade Remedies, TBT, SPS, Customs/Trade Facilitation, Cross-Border Services/Investment, E-commerce, Temporary Entry, Government Procurement, Competition, IP, Trade & Sustainable Development, Transparency, Institutional Provisions, Exceptions, Dispute Settlement, Final Provisions.

agreements. On labour and environment, the EU tends to fold these issues into a broader sustainable development chapter – a core and distinctive feature of EU treaty practice with no direct CPTPP equivalent – rather than pursuing standalone labour enforcement mechanisms, and its sustainable-development provisions are generally broader in scope than the CPTPP's. Cultural cooperation provisions, meanwhile, appear in some EU agreements but have no CPTPP counterpart at all.

The most consequential divergence, however, concerns State-owned enterprises, where the CPTPP contains unusually detailed disciplines constituting one of its principal innovations, while the EU has so far adopted a more hybrid, and still evolving, approach – the subject of the next section.

3.3 Subsidies, State Aid and SOEs: A Field of Contrasts

Subsidies and SOE regulation, which is closely linked to current narratives about industrial policy, competitiveness and level playing field, and to some extent national and economic security, is arguably the most analytically rich test case for comparing the two models, precisely because it is where the underlying regulatory philosophies diverge most visibly, and because the two disciplines – subsidies and SOEs – turn out, on close reading, to have genuinely different genealogies even within the EU's own treaty practice. Going back to Part I analysis, this divergence is a divergence between the EU and the US model (which, as seen, dramatically shaped large parts of the CPTPP and in particular its Chapter 17 on SOEs).

Table 3. CPTPP-EU PTAs comparison with respect to subsidies and SOEs provisions

Issue	CPTPP	EU New-Generation FTAs
Subsidies	Relatively limited disciplines	Increasingly extensive disciplines
SOEs	Core chapter; major innovation	Present in most modern FTAs, increasingly detailed
Transparency	Strong	Strong
Commercial considerations for SOEs	Strong	Strong
Non-discrimination by SOEs	Strong	Strong
Prohibited subsidies	Very limited	Emerging in newest EU FTAs
Sustainability-related subsidy controls	Absent	Present
Link to State-aid philosophy	Weak	Strong
Resemblance to EU internal State-aid regime	Low	Moderate and increasing

At the level of chapter architecture, the pattern that emerges is indeed a contrast of models. The CPTPP’s SOE chapter, while a landmark achievement in its own right, developed largely independently of any State-aid philosophy and imposes only very limited constraints on subsidies as such, with no serious link to broader sustainability objectives. EU new-generation FTAs move in the opposite direction: subsidy disciplines are increasingly extensive, sustainability-related subsidy controls are present, and the entire architecture bears an increasing – if still only moderate – resemblance to the EU’s own internal State-aid regime, with references to competitive neutrality principles⁹ recurring across both models even as their operationalisation differs sharply.

A closer, provision-level reading of the EU’s own treaty practice confirms this, while adding an important nuance: the subsidy and SOE disciplines within EU PTAs do not share a single origin, but rather trace two distinct genealogies.¹⁰ On subsidies, the EU’s own internal State-aid model is transplanted with growing fidelity. The *EU–Korea* FTA (2010), the prototype of the ‘new generation’, already introduced prohibitions – unlimited State guarantees and aid to insolvent firms absent a credible restructuring plan – drawn as much from EU State aid law (as well as from the WTO ASCM’s serious-prejudice presumptions of the now-lapsed Article 6.1). The transplant becomes explicit in the *EU–Singapore* FTA (2019), whose Annex 11-A, listing categories of subsidies presumed not to distort trade, is in substance a condensed restatement of the compatibility categories of Articles 107(2)–(3) and 106(2) TFEU – a striking instance of EU internal law exported nearly verbatim into an international treaty. The *EU–Vietnam* (2020) and *EU–Japan* (2018) agreements follow the same trajectory, each balancing prohibitions on the most distortive subsidies with express recognition of legitimate public-interest justifications, in markedly EU-inflected language. The *EU – Japan* agreement even invokes the applicability of GATT Article XX to subsidies which, as trade law observers know, has been a difficult question to answer in the WTO. *CETA* (2016) is the clear outlier: its subsidies chapter stays close to the WTO baseline and shows comparatively little EU State-aid influence – a reminder that no single monolithic template governs all EU PTAs, and that the depth of transplantation varies with the weight and preferences of the negotiating partner.

On SOEs, by contrast, the dominant template is not the EU’s own internal law – which has comparatively little to say about the governance of public undertakings as such – but a US-designed model first elaborated in NAFTA and then substantially expanded in the original TPP, whose SOE chapter is widely attributed to American negotiators of the Obama administration.¹¹ This lineage runs through to the CPTPP’s own Chapter 17, and it is this template – built around a formal distinction between a non-discrimination obligation and a separate obligation to act in accordance with ‘commercial considerations’, elaborating the terse language of GATT Article XVII (and deviating from the WTO law jurisprudence of the Appellate Body) – that recent EU PTAs increasingly echo,

⁹On the notion of ‘competitive neutrality’ as a benchmark for the treatment of State-owned enterprises, see OECD, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options* (OECD Publishing, 2011).

¹⁰This paragraph and the next draw substantially on Luca Rubini, ‘*Gli accordi di nuova generazione dell’Unione Europea e le innovazioni in materia di aiuti di Stato e imprese pubbliche*’, in Giovanna Adinolfi (ed), *Gli accordi preferenziali di nuova generazione dell’Unione Europea* (Giappichelli, 2021) 181–210, at 191–204 (chapter-by-chapter analysis of EU–Korea, EU–Andean Community/Central America, EU–Moldova/Georgia/Ukraine, CETA, EU–Mexico/Mercosur, EU–Japan, EU–Singapore, EU–Vietnam and EU–UK subsidy and SOE chapters), and at 202–204 (on the leaked TTIP negotiating texts and the diverging EU/US positions on subsidies and SOEs).

from the *EU–Mexico* agreement’s explicit invocation of CPTPP-style drafting to the *EU–Japan* and *EU–Vietnam* SOE chapters. The EU does not simply copy this template, however: it adapts it, adding characteristically European features absent from the US model, such as express carve-outs for public-service mandates and regional-development objectives, and – in the *EU–Mexico* agreement – a best-endeavour commitment to follow the OECD Guidelines on Corporate Governance of State-Owned Enterprises. The result, as this hybridisation suggests, is that EU SOE chapters are best understood as an internationalised version of a US-originated template, rather than as an export of any distinctly EU model. If combined then, the EU PTA regulation of State aids and SOEs appears hybrid in origin.

That the EU and US models remain genuinely distinct, rather than already converged, is confirmed by the abortive *Transatlantic Trade and Investment Partnership (TTIP)* negotiations (2013–2016), whose leaked negotiating texts reveal a fundamental disagreement on scope: the United States sought to confine any subsidy discipline to ‘non-commercial assistance’ granted at federal level to SOEs alone, while the EU pushed for comprehensive coverage of all enterprises, private and public, at every level of government. This is not a minor drafting difference; it reflects two structurally different conceptions of why subsidies should be disciplined at all – a market-access rationale confined to State-directed commercial actors, against the EU’s broader competitive-neutrality rationale rooted in its own internal State-aid tradition. The collapse of the TTIP talks, alongside the more recent breakdown of *EU–Switzerland* negotiations over precisely the State-aid dimension, is a useful corrective against assuming that convergence between major rule-making blocs is either automatic or guaranteed.

Taken together, these findings sharpen rather than undermine the broader convergence thesis of this paper. What is emerging across EU PTAs is not a single exported EU model, but a composite – EU-inspired subsidy disciplines grafted onto a substantially US-derived SOE architecture, with the CPTPP itself embodying the latter in its purest form. Whether this composite practice amounts to the beginnings of a genuine *jus commune* of subsidies and SOEs, capable of feeding into a future plurilateral or multilateral instrument, remains – as has been observed elsewhere – a live and still unresolved question.¹²

4. Towards a ‘Common Law of International Trade’?

These findings remain, at this stage, initial and rough: they rest on descriptive statistics and tentative qualitative assessment, and are offered as hypotheses subject to fuller verification rather than settled conclusions. With that caveat firmly in place, convergence does appear to be the dominant word for what is happening in the ‘normative space’ mapped across EU PTAs and the CPTPP – to the point where it becomes plausible to ask whether what is emerging deserves to be described as an incipient ‘common law of international trade’.

This convergence, however, coexists with important variations, both within the EU’s own treaty practice and between the EU and CPTPP models, concentrated precisely in those areas – subsidies

¹² Rubini, ‘*Gli accordi di nuova generazione*’, cit., 207–208, tentatively asking whether the accumulating practice of PTA subsidy/SOE chapters is giving rise to a *jus commune* capable, in time, of underpinning a plurilateral or multilateral instrument.

and SOEs foremost among them – where different regulatory traditions and preferences can be expected to pull in different directions. The subsidies/State aid/SOE field is, in this sense, a genuine contrast of models: a US-inspired approach, reflected in the CPTPP, against an EU approach substantially inspired by its own internal State-aid philosophy (with the EU-US-Japan Trilateral Initiative representing a further, partially overlapping, reference point), and with WTO law itself functioning as no more than a distant baseline for both – almost a zeroth level of regulation. The fact that the EU’s own PTA practice on SOEs increasingly borrows from both traditions suggests that hybridisation, rather than the wholesale victory of either model, may be the more likely trajectory.

This raises the central strategic question with which this paper began: can the EU–CPTPP dialogue serve as the catalyst for a next-level synthesis of these two regulatory traditions – and if so, to what extent, and through which of the concrete cooperation mechanisms surveyed in Section 2.3? The evidence assembled here does not yet answer this question, but it does suggest that the normative groundwork for such a synthesis, in the form of accumulating convergence at the level of individual PTAs, is already substantially in place.

5. Concluding Remarks

The EU–CPTPP dialogue, however modest its formal output to date, should be read against the backdrop of a deeper and more consequential development: the gradual convergence of the EU’s own PTA practice with the CPTPP template, both in the macro-structure of chapters and, more unevenly, in substantive content. Full EU accession to the CPTPP may remain off the table, and may indeed represent the most bombastic but simplistic way to view what can become a really substantial trade cooperation. The comparative analysis presented here suggests that the more important process may be happening elsewhere – in the incremental alignment of bilateral treaty practice, chapter by chapter and provision by provision. And the first step in the process should really be one of full awareness of the points of convergence (and divergence) and of the reasons for this (or that).

Subsidies, State aid and SOE regulation remain the most instructive test case precisely because they are the field where the two underlying regulatory philosophies – a US-inspired model embodied in the CPTPP and an EU model rooted in its own internal State-aid tradition – are least aligned, and where the stakes of eventual convergence, or its absence, are highest for the future shape of global economic governance. Whether the EU–CPTPP dialogue can accelerate this convergence into something resembling a genuine common law of international trade, or whether the field of subsidies and SOEs will instead remain a lasting fault-line between two competing models, is likely to be one of the more consequential open questions for trade policy over the coming years.

The Legal Dimension of the EU Digital Partnerships: Unicorns or Chameleons?

Federico Ferri*

Summary: 1. Introduction – 2. Setting the Scene: on the Digital-Related Contents of New Generation Free Trade Agreements Concluded by the European Union – 3. The European Union’s Digital Partnerships: an Overview – 4. Core Legal Issues of the European Union’s Digital Partnerships – 4.1 Soft Law Nature – 4.2 Concerns for the Union’s Democratic Credentials – 4.3 The (Strange?) Case of the EU Digital Trade Agreements – 5. Possible Added Value of the European Union’s Digital Partnerships – 6. Conclusions.

Keywords: Digital Partnerships – Digital Trade – EU – Digital Governance – Data Flows – Artificial Intelligence – Digital Sovereignty – Strategic Autonomy – Technology Cooperation – Data Protection – Soft Law – E-Commerce.

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1. Introduction

The digital transition of the European Union (Union or EU) is one of the main pillars of the European integration process.¹ For about ten years, the Union has adopted numerous legislative acts to advance this goal, which remains particularly important for the European Commission’s strategic planning.²

The completion of the digital transition extends beyond the dynamics of the internal market, even though it is primarily rooted in that domain. In fact, it also involves the Union’s external action.³ This connection is not new and is particularly evident in the latest International Digital Strategy of the Union.⁴

Broadly speaking, the Union’s digital transition can be viewed in part as an objective in its own right or as a means to achieve the European technological sovereignty and foster the open strategic

¹ M. HILTUNEN, *Exploring the Legal Making of the European Digital Economy*, in *European Law Open*, 2024, p. 633 ff.; B. NASCIMBENE, *Il mercato unico digitale è una nuova frontiera dell’integrazione europea?*, in *Eurojus*, 2025, p. 105 ff.; P. DE PASQUALE, *The Digital Sphere as a Factor Transforming the Regulatory Techniques of the European Union: Challenges and Prospects*, in *European Law Review*, 2026, p. 246 ff.; M. NEBBIALI, *Is digital regulation reshaping EU integration?*, in *Journal of European Integration*, 2026, p. 707 ff.

² More information available at https://european-union.europa.eu/priorities-and-actions/eu-priorities/european-union-priorities-2024-2029_en and at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024_en.

³ See more in detail E. FAHEY, *The EU as a Global Digital Actor. Institutionalising Global Data Protection, Trade, and Cybersecurity*, Oxford; London; New York; New Delhi; Sydney, Hart Publishing, 2022.

⁴ European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, *An International Digital Strategy for the European Union*, COM(2025) 140 final. See also A. GARRIDO-MUÑOZ, *The Internal-External Dimension of the EU’s International Digital Strategy in Three Acts* (*European Law Blog*, 22 December 2025, available at <https://www.europeanlawblog.eu/pub/zqkkf5b5/release/1>

autonomy of the EU.⁵ The complexity of the global geopolitical landscape has made this need even more urgent. It is believed that a more developed, autonomous, and assertive Union in the digital sphere will be able to compete more effectively with the powers on which it depends in terms of supply and security. Likewise, the EU will also be better able to promote its own interests on a global scale, rather than having to readjust them to pursue contingent priorities that have emerged as a result of choices made by others.

Among the various tools deployed by the European Union to strengthen its digital transition through external action are four “Digital Partnerships” (DPs) concluded between 2022 and 2023 with Canada,⁶ Japan,⁷ Singapore,⁸ and South Korea.⁹ Presented as vital components in creating unity and connection across the world and as tools that will enable the EU to tackle the digital divide and strengthen its ties beyond continental borders,¹⁰ the DPs are, at first glance, novel instruments in the international and supranational legal landscape.

Since legal scholarship has not addressed DPs in depth, it is deemed appropriate to examine them in this volume in order to better understand how the Union is addressing the challenge of digitization within the broader framework of the Multilateral Trading System. Specifically, the question is whether—in light of their underlying objectives, nature, and content—the four DPs are one-of-a-kind mechanisms or merely transitional solutions destined to blend into the landscape of international instruments aimed at establishing superficial forms of collaboration; in other words, are they unicorns or chameleons?

To answer this question, Section 2 outlines some key background elements related to the EU’s new generation Free Trade Agreements (FTAs). Section 3 provides a general overview of the DPs. Section 4 discusses certain critical issues related to three aspects: the binding force of these

⁵ This remains true even though the expressions at stake are not fully clear from a legal point of view. For more information about them, see N. HELWIG and V. SINKKONEN, *Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term*, in *European Foreign Affairs Law Review*, Special Issue 2022, pp. 1 ff.; S. POLI and E. FAHEY, *The Strengthening of the European Technological Sovereignty and its Legal bases in the Treaties*, in *Eurojus*, 2022, p. 147 ff.; D. BROEDERS, F. CRISTIANO, and M. KAMINSKA, *In Search of Digital Sovereignty and Strategic Autonomy: Normative Power Europe to the Test of Its Geopolitical Ambitions*, in *Journal of Common Market Studies*, 2023, p. 1261 ff.; F. CASOLARI, *Supranational Security and National Security in Light of the EU Strategic Autonomy Doctrine: The EU-Member States Security Nexus Revisited*, in *European Foreign Affairs Law Review*, 2023, p. 328 ff.; P. DE PASQUALE and F. FERRARO, *L’autonomia strategica dell’Unione europea: dalla difesa...alla politica commerciale c’è ancora tanta strada da fare*, in *Diritto Pubblico Comparato ed Europeo*, 2023, p. 1 ff.; J. CARVER, *More Bark than Bite? European Digital Sovereignty Discourse and Changes to the European Union’s External Relations Policy*, in *Journal of European Public Policy*, 2023, p. 2250 ff.; A. MIGLIO, G. PEROTTO and L. GROSSIO, *I meccanismi di finanziamento del settore difesa nell’Unione europea e il loro contributo al rafforzamento dell’autonomia strategica* (Research paper, Centro Studi sul Federalismo, January 2024, available at <https://www.csfederalismo.it/it/pubblicazioni/research-paper/imeccanismi-di-finanziamento-del-settore-difesa-nellunione-europea-e-il-loro-contributo-alrafforzamento-dellautonomia-strategica>).

⁶ Canada – European Union Digital Partnership, available at <https://digital-strategy.ec.europa.eu/en/news/canada-european-union-digital-partnership>.

⁷ Japan – EU Digital Partnership, available at <https://www.consilium.europa.eu/media/56091/%E6%9C%80%E7%B5%82%E7%89%88-jp-eu-digital-partnership-clean-final-docx.pdf>.

⁸ EU – Singapore Digital Partnership, available at <https://digital-strategy.ec.europa.eu/en/library/eu-singapore-digital-partnership>.

⁹ European Union – Republic of Korea Digital Partnership, available at <https://digital-strategy.ec.europa.eu/en/library/republic-korea-european-union-digital-partnership>.

¹⁰ See here. <https://digital-strategy.ec.europa.eu/en/policies/partnerships>.

instruments (4.1), the limitations they may impose in terms of democratic representation and accountability (4.2), and their relative impact on subsequent initiatives aimed at strengthening the Union's relations in the digital sphere (4.3). Finally, in Section 5, the potential added value of the DPs is envisaged in the context of an evolving legal framework for international trade relations. Section 6 concludes.

2. Setting the Scene: on the Digital-Related Contents of New Generation Free Trade Agreements Concluded by the European Union

Beforehand, one preliminary consideration. The four DPs concluded by the European Union just didn't appear out of nowhere. In particular, there is a clear connection between the DPs and the chapters of some post-Lisbon FTAs to which the Union is party. These rules represent(ed) the main outcome of the EU's strategy, keeping in mind that the Union acted as «relatively late mover on digital trade issues» on the international plane.¹¹

On the one hand, it is worth mentioning the chapters on electronic commerce, which feature primarily in the EU – South Korea FTA¹² (Articles 7.48–7.49) and the EU – Vietnam FTA¹³ (Articles 8.50–8.52), or similar chapters included in certain association agreements aimed at establishing so-called “Deep and Comprehensive Free Trade Areas”, namely those with Ukraine¹⁴ (Articles 139–140), Georgia¹⁵ (Articles 127–128), and Moldova¹⁶ (Articles 254–255). These chapters are found under the same heading, but in a slightly more developed form, in the more recent FTAs that the EU has concluded with Canada¹⁷ (Chapter 16) and with Singapore¹⁸ (Articles 8.57–8.61). Essentially, in the chapters on e-commerce, the parties agreed not to impose customs duties on deliveries by electronic means. At most, the importance of e-commerce for trade (and in some cases for social development) is acknowledged, and there are just some priorities to be addressed in future dialogues to encourage more structured cooperation between the parties.

In various recently signed FTAs, the relevant provisions are more detailed; for example, the chapters on digital trade contained in the FTAs concluded by the EU with Chile¹⁹ (Chapter 19), New

¹¹ M. BURRI, *Digital Trade Rulemaking in Free Trade Agreements*, in *Research Handbook on Digital Trade*, edited by D. COLLINS and M. GEIST, Cheltenham-Northampton, Edward Elgar, 2023, p. 24.

¹² Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127, 14.May.2011.

¹³ Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, OJ L 186, 12 June 2020.

¹⁴ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29 May 2014.

¹⁵ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30 August 2014.

¹⁶ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30 August 2014.

¹⁷ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14 January 2017.

¹⁸ Free Trade Agreement between the European Union and the Republic of Singapore, OJ L 294, 14 November 2019.

¹⁹ Interim Agreement on trade between the European Union and the Republic of Chile, OJ L, 2024/2953, 20 December 2024.

Zealand²⁰ (Chapter 12), and Mexico²¹ (Chapter 16). The Economic Partnership Agreement between the EU and Japan²² (Articles 8.70–8.81) appears at first glance to lie halfway between the two approaches outlined above, but must be read in the light of a specific amending protocol which primarily supplements the rules on personal data and privacy,²³ which represent one of the major weak points of the e-commerce/digital Chapters of previous FTAs.²⁴ The Trade and Cooperation Agreement with the United Kingdom²⁵ (EU – UK TCA, Articles 196–212) characterized by a more comprehensive regulatory framework on digital trade.

Overall, all these chapters leave much leeway to the parties. They are not always consistent in terms of wording and definitions and remain poorly prescriptive. In addition, they are limited in scope, also compared to the wide area covered by the Digital Single Market DSM,²⁶ contain numerous exceptions and limitations, and can be further restricted by the parties due to the “right to regulate” clauses. Finally, it is unlikely that these rules can be actually enforced through the dispute settlement mechanisms established under each Treaty.

Based on these brief clarifications, it is clear that the external dimension of the Union’s digital policy must consider other options. For this reason, it is worth examining the new DPs in order to understand what they entail and what legal consequences they may have, in light of the Union’s digital transition objectives within the framework of the European integration process.

3. The European Union’s Digital Partnerships: An Overview

The DPs concluded by the EU with Canada, Japan, Singapore, and South Korea have been agreed upon with some like-minded countries with which the EU had already concluded FTA. The parties clarified that the DPs build on the joint work that led to those agreements. However, the intention is not to replace or duplicate the cooperation mechanisms and activities previously agreed upon under each FTA, nor should that result in additional bureaucratic burdens or heavy coordination costs.²⁷

The four DPs were designed as deep cooperation instruments and undoubtedly foster the expansion of relations between the parties across a wide range of areas characterizing the DSM and, more generally, the digital transition of the EU. Indeed, these DPs have a much broader scope than the chapters of the FTAs touched on above; the very name of these instruments should suggest this circumstance, as the reference is not to digital trade, but to the digital sector as a whole.

²⁰ Free Trade Agreement between the European Union and New Zealand, OJ L, 2024/866, 25 March 2024.

²¹ More information available here: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/text-agreement_en.

²² Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27 December 2018.

²³ Protocol amending the Agreement between the European Union and Japan for an economic partnership, OJ L 2024/1304, 14 May 2024.

²⁴ J.A. MICALLEF, *Digital Trade in EU FTAs: Are EU FTAs Allowing Cross Border Digital Trade to Reach Its Full Potential?*, in *Journal of World Trade*, 2019, p. 855 ff.

²⁵ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30 April 2021.

²⁶ This space is so broad that the European Parliament presented it as «ubiquitous» (<https://www.europarl.europa.eu/factsheets/en/sheet/43/the-ubiquitous-digital-single-market/>). See also the topics indicated here: <https://www.consilium.europa.eu/en/policies/digital-single-market/>.

²⁷ EU – Canada DP, point 7; EU – Japan DP, point. 21; EU – South Korea DP, point 33; EU – Singapore DP, point 16.

Since they were not concluded following the procedure laid down in Article 218 TFEU, their legal basis is not self-evident. However, it seems fair to argue that the (implicit) constitutional anchorage of the DPs derives from a combination of implicit external competences linked to the internal market. For sure, a key legal basis is Article 207 TFEU, establishing the legal framework and scope of the EU's Common Commercial Policy (CCP).²⁸ The same applies to Article 114 TFEU, concerning the adoption of supranational measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market (in this case, in particular, for digital services and data).²⁹ Article 173 TFEU, on industry, is also relevant, as the DPs are clearly aimed at enhancing industrial competitiveness and digital innovation; in particular, even within the DPs, there is at least some sense of the shift in EU industrial policy from an autonomous policy of support to a component of the internal market.³⁰

These digital partnerships are inherently linked to the EU's concept of open strategic autonomy—put simply, the ability to act independently on the global stage, protect economic interests, and uphold democratic values while maintaining open cooperation. Across all four DPs, three distinct structural pillars form their common core.

A primary geo-economic driver of the DPs is the mitigation of dependencies on autocratic regimes and the strengthening of collective technological sovereignty. A crucial operational goal is mitigating systemic vulnerabilities in the hardware that powers the digital economy. As a result, semiconductor supply chains are explicitly prioritized. This directly aligns with the objectives of the EU Chips Act,³¹ legally safeguarding the EU's industrial baseline through trusted international alliances rather than isolationism. Hence, the EU has institutionalized early-warning mechanisms with Japan and South Korea—global manufacturing hubs—to anticipate market disruptions and mitigate chip shortages. This resilience extends to physical and digital infrastructure. All agreements aim to ensure the secure deployment of 5G and next-generation mobile networks (6G). Additionally, cooperation on quantum computing and High-Performance Computing (HPC) is a recurring baseline, emphasizing shared access to supercomputers, joint research initiatives (such as the Horizon Europe association for South Korea and Canada³²), and secure connectivity infrastructure, such as Arctic and trans-oceanic submarine cables.

²⁸ With respect to the relationship between common commercial policy and digital trade, see e.g., P. SAUVÉ and M. SOPRANA, *The Evolution of the EU Digital Trade Policy*, in *Law and Practice of the Common Commercial Policy*, edited by M. HAHN and G. VAN DER LOO, Boston, Brill, 2021, p. 285 ff.

²⁹ It is well known that the internal market has external projections. See *amplius* M. CREMONA, *The internal market and external economic relations*, in *Research Handbook on the Law of the EU's Internal Market Research Handbooks*, edited by P. KOUTRAKOS and J. SNELL, Cheltenham-Northampton, Edward Elgar, 2017, p. 479 ff.

³⁰ On the industry-related nature of some initiatives covered by Article 114 TFEU, see more extensively P. DARMINE and M. PATRIN, *Legal Foundations for a New EU Industrial Policy* (LUHNIP Working Paper Series 3/2024, 29 October 2024), available at <https://leap.luiss.it/wp-content/uploads/2024/10/WP3.24-Legal-Foundations-for-a-New-EU-Industrial-Policy.pdf>.

³¹ Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694.

³² More information available here https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1853 and here https://research-and-innovation.ec.europa.eu/strategy/strategy-research-and-innovation/europe-world/international-cooperation/association-horizon-europe/canada_en.

Secondly, a central commonality is the commitment to safe and ethical Artificial Intelligence (AI), aligning with the principles accepted by the EU internally, to foster transparency, accountability, and the protection of fundamental rights.³³ Furthermore, the DPs seek to bring to light common frameworks for online platform governance and digital markets, aiming to combat foreign information manipulation, guarantee user privacy, and ensure fair competition against dominant tech monopolies; this reflects the rationale behind regulations like the General Data Protection Regulation (GDPR),³⁴ the AI Act,³⁵ and the Digital Services Act (DSA).³⁶ Cross-border interoperability is addressed through the mutual recognition of digital identities and trust services (such as e-signatures and e-invoices), which provides legal certainty for multinational commerce while maintaining high standards of cyber resilience.

Finally, the DPs leverage existing mutual adequacy decisions (especially with Japan and South Korea) to advance the “Data Free Flow with Trust” agenda.³⁷ Indeed, modern commerce relies entirely on cross-border data flows,³⁸ but the EU’s strict privacy mandates under the GDPR and in light of the Charter of Fundamental Rights often raise legal obstacles in global trade frameworks.³⁹ So, the DPs aim at countering unjustified data localization requirements while maintaining rigid protections for personal data, directly aligning with GDPR standards. By systematically targeting digital trade facilitation, the DPs seek to eliminate paperwork, permanently ban customs duties on electronic transmissions, and enhance consumer trust online. Importantly, the DPs were designed to create interoperable frameworks for electronic transactions and guarantee mutual recognition of electronic signatures, e-invoicing, and paperless trading.

Interestingly, the four DPs appear to have been designed as strategic blueprints to promote an anthropocentric digital transformation. In this respect, the European Commission’s 2030 Digital Compass Communication⁴⁰ calling upon the EU to promote a human-centred digital agenda on the global stage is an important background source. This principle/goal is set forth in the very first points

³³ More information available here: <https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence>.

³⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

³⁵ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828.

³⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC.

³⁷ More information available here: https://www.weforum.org/publications/data-free-flow-with-trust-dfft-paths-towards-free-and-trusted-data-flows/?gad_source=1&gad_campaignid=22228224717&gbraid=0AAAAAoVy5F5ovU_KWGlvr-SH4mdp8ceSj&gclid=CjwKCAjwgO7RBhBKEiwAZNP85mljs8VRWT5R7GndOy9mJrvdTd80pYMqZr7I7kadJUc-U4N7ue4LxoC_mcQAvD_BwEl.

³⁸ For exhaustive analyses on this nexus see: M. BURRI (ed.), *Big Data and Global Trade Law*, Cambridge, Cambridge University Press, 2021; S. YAKOVLEVA, *Governing Cross-Border Data Flows: Reconciling EU Data Protection and International Trade Law*, Oxford, Oxford University Press, 2023; N. MISHRA, *International Trade Law and Global Data Governance: Aligning Perspectives and Practices*, Oxford, Bloomsbury Publishing, 2024.

³⁹ See, for instance, T. NAEF, *Data Protection without Data Protectionism. The Right to Protection of Personal Data and Data Transfers in EU Law and International Trade Law*, Cham, Springer, 2023.

⁴⁰ European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *2030 Digital Compass: the European way for the Digital Decade*, COM(2021) 118 final.

of each DP,⁴¹ thereby constituting a cross-cutting pillar of the cooperation between the EU and its partners. The parties often declared to share a vision of the digital economy and society where the design, development, governance, and use of technology are guided by democratic values and respect for universal human rights.⁴² By building a tight-knit network of trusted allies, the EU aims to counter the rise of state-controlled, closed-internet models (such as those championed by China) and ensure that emerging tech ecosystems respect fundamental human rights, transparency, and democratic values.

4. Core Legal Issues of the European Union's Digital Partnerships

4.1. Soft Law Nature

Despite the developments mentioned above, the DPs linking the EU with Canada, Japan, Singapore, and South Korea are certainly characterised by very limited legal force. It is quite clear that the parties had no intention of establishing legal regimes separate from the provisions of their respective FTAs.

In the wake of a process of rapid informalisation of the instruments underpinning international relations,⁴³ the parties to the DPs were not intended to create any rights or obligations under international or domestic law, nor did they give rise to financial implications.⁴⁴ Indeed, at closer inspection, the DPs use hortatory, soft-law language—employing terms like «intend to», «will seek to», or «cooperate on»—rather than the mandatory «shall» found in formal international treaties. The four DPs do not create state responsibility under international law in the event of non-compliance, nor do they trigger the customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties (VCLT). From a strict formalist view, a non-binding political declaration cannot constitute a legal breakthrough in a legal system defined by state consent to binding obligations. The four DPs paved the way for a broader voluntary cooperation on permanently evolving issues. They act as political umbrellas that consolidate existing sector-specific dialogues (such as telecom working groups or science and technology agreements) into a single ministerial forum. In this regard, the explanation provided in point 12 of the EU – Singapore DP is emblematic, stating that «(g)iven the diversity of issues to be addressed, the Digital Partnership will adopt a flexible and living architecture that supports a range of cooperation modalities».

It is thus not surprising that the DPs did not introduce binding, independent dispute settlement mechanisms. This approach lies on a governance framework that is essentially open-ended, in the sense that the parties have opted to monitor the evolution of the partnerships on a year-by-year basis,

⁴¹ EU – Canada DP, point 2 ; EU – Japan DP, point 1; EU – South Korea DP, point 1; EU – Singapore DP, point 2.

⁴² EU – Canada DP, point 2; EU – Japan DP, point 12; EU – South Korea DP, point 14. The EU – Singapore DP openly refers to the European Declaration on Digital Rights and Principles for the Digital Decade as a guiding source for the EU international engagement in the digital field.

⁴³ For details on the expansion of this practice, see A. BERMAN, S. DUQUET, J. PAUWELYN, R.A. WESSEL AND J. WOUTERS (eds.), *Informal International Lawmaking: Case Studies* The Hague, Torkel Opsah, 2012. See also A. OTT, *Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges*, in *Yearbook of European Law*, 2020, p. 569 ff.

⁴⁴ EU – Canada DP, point 7; EU – Japan DP, point 11; EU – South Korea DP, point 38; EU – Singapore DP, point 20.

entrusting quite generic powers to a body commonly referred to as the “Digital Partnership Council”,⁴⁵ that is to say, non-judicial entities unfit to settle disputes or issue binding opinions. Essentially, this body is tasked with tacking stock and updating the priority topics on which the parties are expected to work and can provide guidance on the steps that should be taken. To make this body work properly, the secretariat of each DP is asked to send periodic progress reports to it. So, the core of the DPs implementation rests on political consultations, a traditional, diplomatic model of international relations rather than an advanced legal innovation.

Against this background, the human-centric approach discussed above can at most lead to updated interpretative patterns for the implementation of the (soft) obligations established under the FTAs concluded by the EU with Japan, South Korea, Canada, and Singapore.

4.2. Concerns for the Union’s Democratic Credentials

While the Digital Partnerships signed by the EU with Japan, South Korea, Singapore, and Canada are built to promote ‘human-centric’ and democratic values globally, their structural formation bypasses standard channels of democratic representativeness and accountability.

From a constitutional law perspective, these instruments expose a growing friction between executive agility and the rule of law within the EU’s external digital governance. Because the European Commission bypassed Article 218 TFEU by categorizing these partnerships as political arrangements rather than legal treaties, the mandatory constitutional checks and balances are discarded. The Commission acts as a unitary executive actor, negotiating and finalizing these texts with virtually no prior democratic oversight.

Conversely, the European Parliament had no constitutional right to grant or withhold consent, and its role was relegated to an information recipient. It can issue resolutions, ask parliamentary questions, or publish briefings via its research services, but it cannot amend, halt, or fundamentally reshape the partnership agendas, bearing in mind that these partnerships govern critical public-interest sectors.⁴⁶ This executive-led framework ends up empowering closed-door bodies and intergovernmental procedures. Given that these partnerships do not follow the strict transparency mandates of legislative files, the draft agendas, specific enforcement benchmarks, and minutes of the Ministerial Councils are shielded from public view until joint statements are released.

⁴⁵ EU – Canada DP, points 10-11, 23; EU – Japan DP, points 20, 23, 42-44; EU – South Korea DP, points 29-35; EU – Singapore DP, points 17-19, 36-39.

⁴⁶ According to Article 218 TFEU, the European Parliament’s role depends on the agreement: it usually holds strong leverage through the consent procedure, but has a much weaker position under the consultation procedure. However, for all international agreements, the European Parliament must be fully and immediately informed at every stage. Plus, the European Parliament can ask the Court of Justice to deliver a binding opinion as to whether an agreement envisaged is compatible with the Treaties. Given the nature of the DPs, none of these powers can be exercised by the European Parliament. On the powers of the European Parliament in the framework of Article 218 TFEU, see more generally M. BARDOU, *European Parliament-Commission Relations and International Agreements*, in *European Parliament-Commission Relations and International Agreements*, 2024, p. 405 ff. As for the role(s) of the European Parliament in the context of the CCP, see M. KRAJEWSKI, *New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy*, in *Common Commercial Policy after Lisbon*, edited by M. BUNGENBER and C. HERRMANN, Cham, Springer, 2013.

At the same time, the four DPs raise concerns in terms of the qualified involvement of Civil Society Organizations (CSOs) and Human Rights Defenders (HRDs).⁴⁷ These are crucial actors for the participation of individuals in the political life within the Member States and the EU and as regards legal mobilisation, especially as far as fundamental rights are concerned.⁴⁸ Nevertheless, the DPs' governance is concentrated in a dual structure consisting of executive ministers and select industry stakeholders. This means that the DPs represent a model of digital diplomacy where tech sovereignty and economic security are prioritized, leaving CSOs and HRDs watching from the sidelines.⁴⁹ That makes the constitutional law assessment of the partnerships even more clear-cut, since the EU did not commit to maintain an open, transparent, and regular dialogue with civil society, as required by Article 11 TFEU to foster participative democracy.

While the substance of the DPs aims to protect democracy against authoritarian tech models, the process relies on executive overreach. For true democratic legitimacy, the EU must bridge this gap by establishing inter-institutional agreements that grant the European Parliament formal scrutiny over “soft” digital diplomacy.

4.3. *The (Strange?) Case of the EU Digital Trade Agreements*

The nature and content of the four DTs indicate that these instruments were designed to foster broader and deeper cooperation among the parties involved. Given this, can we say that this cooperation has produced the desired results so far?

A first, tentative answer can be offered after mentioning a new category of instruments that are clearly linked to the DTs. Reference has to be made to the Digital Trade Agreements (DTAs) that the

⁴⁷ The pivotal importance of these actors was stressed by the EU institutions. See CJEU, Case C-78/18, *European Commission v Hungary*, ECLI:EU:C:2020:476, [2020] paras. 110-118; European Parliament resolution of 8 March 2022 on the shrinking space for civil society in Europe (2021/2103(INI)); European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A thriving civic space for upholding fundamental rights in the EU*, COM(2022) 716 final; Commission Recommendation (EU) 2023/2836 of 12 December 2023 on promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes; Council of the EU, ‘Conclusions on the application of the EU Charter of Fundamental Rights; the role of the civic space in protecting and promoting fundamental rights in the EU’, 7388/23.

⁴⁸ K. VAN DER PAS, *All That Glitters Is Not Gold? Civil Society Organisations and the (non-)Mobilisation of European Union Law*, in *Journal of Internal Market Studies*, 2024, p. 525 ff.

⁴⁹ This issue compounds the problems that are already plaguing CSOs and HRDs in various Member States. See e.g., European Union Agency for Fundamental Rights, ‘Challenges facing civil society organisations working on human rights in the EU’ (2016), at <https://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-organisations-working-human-rights-eu>.

Union has recently concluded with Singapore⁵⁰ and South Korea,⁵¹ two of its “digital partners”;⁵² furthermore, a DTA with Canada is being negotiated.⁵³

These two DTAs undoubtedly fall under the scope of the CCP. This is evident from the EU institutional practice, in particular from the recommendation published by the Commission to encourage the launch of negotiations⁵⁴ and, above all, from the subsequent decision adopted by the Council, which cites Article 207(4) of the TFEU as its sole substantive legal basis.⁵⁵ Unsurprisingly, the DTAs are intrinsically linked to existing FTAs with the same parties. The aim is not only to modernise and make the cooperation system more dynamic, but also to complement «the Parties’ international and regional leadership roles in the pursuit of ambitious benchmarks, rules and standards for the digital economy and digital trade».⁵⁶ As for the EU, it appears that what is underway is not so much a search for new partners, but a kind of a reorganisation of the multilateral framework with existing partners.

However, various bottlenecks remain.⁵⁷ The field of application of the DTAs is a bit broader than the e-commerce/digital trade Chapters of previous FTAs, but many exceptions and limitations apply; therefore, these instruments do not bring to the forefront all the contents of the DPs. Second, the DTAs are scarcely prescriptive, thereby bringing limited added value with respect to the EU digital partnerships: the most commonly used phrases are «the Parties shall endeavour to» or «shall encourage their respective bodies to». Last, the anthropocentric dimension underpinning the EU digital partnerships seems to fade away,⁵⁸ as the backbone and key content of the DTAs are much more trade-oriented.

⁵⁰ Agreement on digital trade Between the European Union and the Republic of Singapore, 1 August 2024 (text available here <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/66ccfa9f-e239-4893-8e12-64f8ff1d1221/details>).

⁵¹ Agreement on digital trade Between the European Union and the Republic of Korea, 18 March 2025 (text available here <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/1bddb97a-c02e-41e6-95d1-6e41029c880f/details?download=true>).

⁵² It should be added that South Korea and Singapore are also bound by a similar instrument, renamed the Digital Partnership Agreement (KSDPA), which entered into force in early 2023: see Digital Partnership Agreement Between the Government of the Republic of Korea and the Government of the Republic of Singapore (text available here: https://depository.asean-deal.org/agreement-docs/Korea_Singapore_DEA_full_text_of_agreement.pdf).

⁵³ More information available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_26_553.

⁵⁴ European Commission, Recommendation for a Council Decision authorising the opening of negotiations for digital trade disciplines with the Republic of Korea and with Singapore, COM(2023) 230 final.

⁵⁵ Council Decision authorising the opening of negotiations for agreements on digital trade disciplines with the Republic of Korea and with Singapore, 8886/23.

⁵⁶ Preamble of the EU – Singapore and EU – South Korea DTAs. However, some authors argued that the set of legal bases of these agreements should be broader: V. REMONDINO, *Gli accordi sul commercio digitale tra liberalizzazione degli scambi e protezione dei dati personali e della privacy: implicazioni per la politica commerciale comune dell’Unione europea*, in *Quaderni AISDUE*, 2024, p. 204 ff.

⁵⁷ F. FERRI, *Profili evolutivi della dimensione esterna del Mercato Unico Digitale*, in *Eurojus*, 2025 (Special Issue), p. 84 ff.

⁵⁸ As argued, this is nonetheless a consequence of the so-called «soft register» of the DTAs, which is considered surprising because it ultimately reflects «the Union’s decision to pursue a promotional, rather than assertive, strategy in advancing its non-trade values in this regulatory domain»: S. VILLANI, *The EU Digital Trade Instruments and the WTO System*, in *The WTO as a Major Driver for Sustainable Development and Its Reform*, edited by E. BARONCINI, Bologna, Dipartimento di Scienze Giuridiche – Università di Bologna, 2025, p. 131.

5. Possible Added Value of the European Union's Digital Partnerships

To complete this legal analysis, it is worth expanding the research beyond the borders of classical international law patterns. The unconventional nature of the four DPs could lay the groundwork for innovative changes in line with the Union's aspirations regarding the external dimension of its digital policy

It could be argued that, by bypassing the onerous multilevel ratification procedures required for formal treaties (e.g., the procedures laid down in Article 218 TFEU, plus the requirements underpinning the "mixed agreement" doctrine⁵⁹), the EU and its partners may have created a fast-tracked legal architecture for the governance of many digital-related topics. The DPs allow regulators to sit at the same table in real-time, modifying administrative cooperation as technology evolves. This represents a structural shift from static text treaties to living governance frameworks. Eventually, this approach may also enable the Member States and the third countries concerned to enjoy more leeway to pursue selected public policy objectives and protect certain individual rights.⁶⁰

From an EU standpoint, the DPs should function as a sophisticated mechanism for the extraterritorial exportation of regulatory standards. They serve, at least in part, as a vehicle to export the EU's normative and regulatory digital models (the "Brussels Effect"⁶¹). Topics like human-centric AI, platform accountability, and strict data privacy are anchored into soft law instruments with major Indo-Pacific powers, so that the EU can try to internationalize its internal legislative framework on digital law and fundamental rights.

In particular, the DPs could gradually help the EU pioneer a new legal paradigm focused on economic security and supply chain resilience, rather than pointing exclusively to the removal of tariffs and trade barriers. For example, the inclusion of early warning mechanisms for semiconductor supply chains represents a shift in the objective of international legal instruments. Rather than managing the flow of goods, these mechanisms legally and politically structure how states share information, monitor corporate entities, and intervene in markets during crises. This redefines the intersection of national security exceptions, state aid, and international trade law.

Could this cooperative alignment of domestic laws among a coalition of advanced economies lead to a powerful regulatory bloc? On the one hand, it is hard to assume that this coordinated practice can shape the development of international customary norms or widespread strict obligations contained in wide-ranging multilateral treaties. However, there is some room to suppose that it could crystallize into *de facto* global standards in the landscape of the so-called "Digital Economy Agreements".⁶²

⁵⁹ For more insights on this topic, see M. CHAMON, *Mixity in the EU's Post-Lisbon Free Trade Agreements*, in *The Conclusion and Implementation of EU Free Trade Agreements: Constitutional Challenges*, edited by I. BOSSE-PLATIERE and C. RAPOPORT, Cheltenham-Northampton, Edward Elgar, 2019, p. 39 ff.

⁶⁰ These are top priorities in digital trade relations at the international level. See M. BURRI and K. KUGLER, *Regulatory autonomy in digital trade agreements*, in *Journal of International Economic Law*, 2024, p. 397 ff.

⁶¹ For more details on this paradigm, see A. BRADFORD, *The Brussels Effect: How the European Union Rules the World*, Oxford, Oxford University Press, 2020.

⁶² For more insights on these agreements, see M. BURRI, M. VÁSQUEZ CALLO-MÜLLER, and A. MESMER, *Understanding Digital Economy Agreements as a New Model of Trade Governance*, in *Legal Issues of Economic Integration*, 2025, p. 217 ff.

For example, this bilateral alignment underpinning the four DPs is partly reflected in the textual architecture of the WTO Agreement on Electronic Commerce,⁶³ which in turn represents a plurilateral, legally binding instrument setting forth mandatory, enforceable obligations subject to international dispute settlement frameworks. Put simply, the DPs served as incubators and regulatory laboratories that indirectly paved the way for the binding rules codified within the WTO E-Commerce Agreement. Substantially, the EU and its partners used flexible and coordinated bilateral soft law to progressively build consensus for multilateral hard law; they thus acted as a cohesive pro-reform coalition and contributed to transitioning regulatory commonalities into a foundational global rulebook for digital trade. Hence, the strategic link between the DPs and the WTO E-Commerce Agreement highlights a potential progression in international economic law.

6. Conclusions

Are the new digital partnerships that the Union has concluded over the last few years with Canada, Japan, Singapore, and South Korea more similar to unicorns or chameleons from an EU and international law perspective? This is the (metaphoric) research question underpinning this chapter. The final answer is rather ambiguous, but the study carried out in the previous pages has led to some preliminary insights.

On the one hand, it seems safe to argue that the DPs are not truly innovative legal instruments, as they do not alter the state-of-the-art and, in the short run, can at most play a complementary role to the FTAs binding the same parties as well as a preparatory role in relation to new cooperation mechanisms, if any. This, in turn, raises further questions about the limits of the EU's common trade policy in the face of the major transitions the organization is facing. Therefore, from this point of view, the DPs look more like chameleons than unicorns.

Instead, when viewed through the lens of modern transnational governance, these partnerships may appear as quite innovative instruments in how international law adapts to the realities of the digital frontier. The European Union hopes that the use of informal international lawmaking will produce the conditions to bring about a common working ground for like-minded parties, given that the DPs are uniform in their strategic intent; they combine economic security with normative diplomacy, leveraging joint research and regulatory convergence to build a trusted, secure, and competitive digital ecosystem independent of Sino-American technological duopoly. However, it cannot be ruled out that this approach will expand over the years. In particular, the DPs could become stepping stones toward binding digital trade rules at the international level, going beyond the standard framework of trade agreements that often stall over data privacy. Should this happen, the DPs will probably turn into unicorns.

⁶³ The text of the WTO Agreement on Electronic Commerce is contained in the Declaration on Interim Arrangements for the Agreement on Electronic Commerce of 28 March 2026 and is available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN26/42.pdf&Open=True>.

Environmental Protection, the Fight against Climate Change and the Prevention of Disasters in and outside Plurilateral Trade Agreements

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Summary: 1. Introduction. – 2. The Environmental Protection – 3. The Fight against Climate Change. – 4. The Prevention of Disasters. – 5. Conclusion.

Keywords: Environmental Protection – Climate Change – Sustainable Development – WTO Law – Trade and Environment – Paris Agreement – Carbon Border Adjustment Mechanism – Fisheries Subsidies – Disaster Prevention – Green Trade Measures – Environmental Goods – Climate Governance – Renewable Energy – Trade Exceptions.

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1. Introduction

This contribution focuses on provisions in Plurilateral Trade Agreements (PTAs) aimed at sustainability in relation to the environmental protection, the fight against climate change and the prevention of disasters. The analysis also addresses the practice under the WTO multilateral trading system and non-WTO agreements, including commercial treaties recently negotiated and stipulated by the EU, and refers also to WTO informal groups and dialogues.

This study upholds the notion of PTAs or “plurilaterals” as treaties outside the WTO “single package” in which only a subset of WTO Members are participating. They can aim to create new rules, secure mutual liberalization of tariffs and more broadly overcome the political impasse in the WTO legal order, including its dispute settlement system. In this respect, they may provide an “escape route” for the WTO. They cover areas such as electronic commerce, investment facilitation, and the intersection of trade and gender. More generally, plurilateral initiatives may create a new process or launch a conversation or structured dialogue. Examples are the Dialogue on Plastics Pollution (DPP), the Trade and Environmental Sustainability Structured Discussions (TESSD) and the Fossil Fuel Subsidy Reform (FFSR).

Non-WTO agreements are outside the multilateral trading system, such as Regional Trade Agreements (RTAs) and bilateral trade agreements, as well as Free Trade Agreements (FTAs) corresponding to free trade areas. These treaties should comply nevertheless with Article XXIV of the GATT 1994 and Article V of the GATS.

Prospective developments in the field of international trade law may demand rethinking the traditional dichotomy between economic rights and non-economic values (e.g., environment, health, labour standards), especially in the applications by WTO panels (during the paralysis of the Appellate Body), under the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) and specific adjudicative (arbitral) bodies established by regional or bilateral treaties.

It is submitted herein that the references in treaties to the environmental protection and concerns, although without expressly mentioning climate change, are nevertheless susceptible of being interpreted extensively as encompassing climate change action based on the application of general principles of treaty interpretation such as good faith and effectiveness.¹

2. *The Environmental Protection*

The WTO Environmental Database (EDB) shows that a significant number of environment-related notifications by WTO Members contain climate change-related trade measures.² Relevant examples are represented by the establishment of carbon markets, the introduction of renewable energy subsidies or support (as under the US Inflation Reduction Act of 2022), reforms of fossil fuel subsidisation schemes, import bans targeting carbon-intensive products, the regulatory and administrative application of “green” standards and labelling models and border carbon adjustments (BCAs),³ such as the EU Carbon Border Adjustment Mechanism (CBAM).⁴ Such measures may lend themselves to the allegation of protectionism in the cover of environmental protection against the applicability of the WTO covered agreements. It is also appropriate to mention trade measures with a sectoral “green” scope through which States support the free movement of climate-friendly goods across borders by reducing tariff and non-tariff barriers that are applicable to their commerce.

The Environmental Goods Agreement (EGA) is an example of plurilateral. Its negotiations are currently suspended.⁵ EGA seeks to reduce tariffs on goods considered to have benefits for sustainable production and consumption. The WTO Members involved (46 in total) attempted to agree among themselves a list of such goods and a schedule of tariff reductions on them. Products under consideration covered key areas such as renewable energy generation, energy efficiency, air pollution control, and waste management. These tariff reductions would then be available to all WTO Members on a Most Favoured Nation (MFN) basis, thus profiting non-signatories as well.

Among various examples, Article 16.4(1)-(3) of the EU-Japan Economic Partnership Agreement of 17 July 2018, entered into force on 1 February 2019, focuses on multilateral environmental

¹ Cf. DÖRR, *Article 31*, in DÖRR, SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin, 2018, p. 567. In relation to international investment agreements, commentators have remarked, for example, that “[c]ertainly climate change is an environmental concern” (VADI, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals*, *Vanderbilt Journal of Transnational Law*, vol. 48, No. 5, 2015, p. 1285, at 1344) and “plusieurs traités d’investissement ont pris en considération la dimension environnementale. Cette prise en considération permet aux Etats d’agir avec flexibilité pour gouverner le changement climatique” (BEN HAMIDA, *Droit climatique et du droit des investissements: de la friction à la coordination*, *Revista Brasileira de Arbitragem*, 2021, no. 71, p. 92).

² WTO Environmental Database, available at <https://edb.wto.org>. For example, in 2022, 207 notifications (out of 2250 in total) by Member States were categorised by the WTO Secretariat as pertaining to the objective of climate change mitigation and adaptation.

³ MEHLING et al, *Designing Border Carbon Adjustments for Enhanced Climate Action*, *American Journal of International Law*, vol. 113, 2019, p. 433.

⁴ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (CBAM Regulation). See DE STEFANO, *The International Law Reading of the EU Carbon Border Adjustment Mechanism (CBAM)*, *European Papers – A Journal on Law and Integration*, Vol. 11, No. 1, 2026, pp. 267–288.

⁵ The following WTO Members were parties to the negotiations on the EGA: Australia, Canada, China, Costa Rica, European Union (28 Member States at the time), Hong Kong – China, Iceland, Israel, Japan, Korea, New Zealand, Norway, Singapore, Switzerland, Liechtenstein, Chinese Taipei, Turkey and the United States.

agreements (MEAs) emphasizes the Parties' commitments to effectively implement the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. It provides that: "1. The Parties stress the importance of multilateral environmental agreements, in particular those to which both Parties are party, as a means of multilateral environmental governance for the international community to address global or regional environmental challenges. The Parties further stress the importance of achieving mutual supportiveness between trade and environment. In this context, the Parties shall exchange views and information on trade-related environmental matters of mutual interest in the meetings of the Committee on Trade and Sustainable Development, and as appropriate in other fora. 2. Each Party reaffirms its commitment to effectively implement in its laws, regulations and practices the multilateral environmental agreements to which it is party. 3. Each Party shall exchange information with the other Party on its respective situation and advancements regarding ratification, acceptance or approval of, or accession to, multilateral environmental agreements, including their amendments, which each Party considers appropriate to be bound by, as well as implementation of such agreements."⁶

Similarly, Article 13.5(1)-(2) of the EU-South Korea Free Trade Agreement of 15 October 2009, entered into force on 13 December 2015, establishes that: "1. The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems and they commit to consulting and cooperating as appropriate with respect to negotiations on trade-related environmental issues of mutual interest. 2. The Parties reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party".⁷

The relationship between international trade law and international environmental law, including with respect to the dispute settlement dimension, has been central in the practice of the WTO in the last decades.⁸ It is submitted that State measures imposing bans or restrictions affecting "brown" industries or providing incentives in favour of "green" productions may withstand the DSS scrutiny, but for a finding of discriminatory, selective or protectionist application. The environmental

⁶ EU-Japan Economic Partnership Agreement, 17 July 2018, entered into force 1 February 2019, Art. 16.4(1)-(3).

⁷ EU-South Korea Free Trade Agreement, 15 October 2009, entered into force 13 December 2015, Art. 13.5(1)-(2).

⁸ E.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, adopted on 20 May 1996, WT/DS2/AB/R; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, adopted on 6 November 1998, WT/DS58/AB/R; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, adopted on 17 December 2007, WT/DS332/AB/R. See DELIMATISIS, REINS (eds.), *Trade and Environmental Law*, Cheltenham, 2021; ASMELASH, *The Role of International Trade Law in the Energy Transition*, *Journal of World Investment & Trade*, 2023, vol. 24, p. 847; GOURGOURINIS, *Common but Differentiated Responsibilities in Transnational Climate Change Governance and the WTO: A Tale of Two 'Interconnected Worlds' or a Tale of Two 'Crossing Swords'?*, in DELIMATISIS (ed.), *Research Handbook on Climate Change and Trade Law*, Cheltenham, 2016, p. 31; HERTEL, *Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities*, *Journal of World Trade*, 2011, vol. 45, p. 653; DAVIDSON LADLY, *Border Carbon Adjustments, WTO-law and the Principle of Common But Differentiated Responsibilities*, *International Environmental Agreements*, 2012, vol. 12, p. 63. In addition, the WTO Committee on Trade and Environment (CTE) was established in 1995 as a forum designed for confrontation between Member States on the environmental impact of trade policies. Notably, based on the mandate received in the Doha Round in 2001, the CTE hosted in its "Special Sessions" the negotiations regarding certain aspects of the connection between trade and the environment. The negotiations mainly focused on the relationship between the WTO rules and multilateral environmental agreements (MEAs), the collaboration between the WTO and MEA secretariats and the elimination of tariffs and non-tariff barriers on environmental goods and services.

exceptions among the general exceptions under the WTO covered agreements, for instance under Article XX(b) and (g) of the GATT 1994, namely with respect to the protection of “human, animal or plant life or health” and the “conservation of exhaustible natural resources”,⁹ allow the DSS to recognise the sovereign right to regulate of WTO Members and to consider the application of the police powers doctrine in connection with the States’ legitimate aim to protect public interest. Moreover, the reference to customary rules of interpretation of public international law under Article 3.2 of the Dispute Settlement Understanding (DSU)¹⁰ entrusts WTO adjudicators sufficient techniques to integrate climate change and other environmental considerations pursuant to the hermeneutic canons of systemic integration established under the Vienna Convention on the Law of Treaties of 1969 (VCLT). Indeed, Article 31(3)(c) of the VCLT refers to “any relevant rules of international law applicable in the relations between the parties” that can be taken into consideration as external¹¹ context of the applicable treaty for the purposes of its interpretation.¹² At the same time, as addressed below in relation to the design of domestic climate change actions,¹³ the *chapeau* of Article XX of the GATT 1994 prescribes that such “green” measures shall not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.¹⁴ This postulates that the design and implementation of domestic measures that further climate change action shall be driven by a genuine climate concern and not applied and executed as means of economic protectionism. The specular principle is also found in Article 3.5 of the UNFCCC, pursuant to which “[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”.¹⁵

⁹ Cf. ADINOLFI, *Article XX. General Exceptions [Introduction]*, in STOLL, HESTERMEYER (eds), *WTO – Trade in Goods*, Commentaries on World Trade Law, vol. 2, Leiden, 2022, p. 126. In a case relating to its renewable energy local content requirements (LCRs), India did not rely on the typical environmental exceptions pursuant to Art XX(b) and (g), but, without success, on Art XX(d) of the GATT 1994, alleging that its measures were *inter alia* “necessary to secure compliance with laws or regulations” applicable at the domestic level. In particular, the Indian government argued that the LCRs at issue were necessary for it to comply with the Marrakech Agreement, whose preamble refers to the objective of sustainable development and the protection and preservation of the environment, as well as other international legal instruments relating to environmental protection and the fight against climate change such as the UNFCCC and the Rio Declaration on Environment and Development, adopted by the UN General Assembly on 12 August 1992. See Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Cells)*, adopted on 14 October 2016, WT/DS456/AB/R, paras. 5.97-5.115. Accord, Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Taxes on Soft Drinks)*, adopted on 24 March 2006, WT/DS308/AB/R, paras. 69-70 and 79.

¹⁰ *US – Gasoline* (n 10), at 17: “That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law” (emphasis in the original).

¹¹ SOREL, BORÉ EVENO, Commentary *sub* Art 31, in CORTEN, KLEIN (eds.), *The Vienna Conventions on the Law of Treaties*, Oxford, 2011, p. 808, 835.

¹² *Ex multis*, McLACHLAN, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, *International Comparative Law Quarterly*, 2005, vol. 54, p. 279. For an application of Article 31(3)(c) of the VCLT to the interpretation of Art XX of the GATT 1994, cf. *US – Shrimp* (n 10), para. 158.

¹³ *Infra*, Section 3.

¹⁴ See, for example, Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, adopted on 18 June 2014, WT/DS400/AB/R and WT/DS401/AB/R, para. 5.291 ff. See BARTELS, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, *American Journal of International Law*, 2015, vol. 109, p. 95.

¹⁵ UNFCCC, Art. 3.5. See SANDS, *The United Nations Framework Convention on Climate Change*, *RECIEL*, 1992, p. 270.

3. *The Fight Against Climate Change*

The more specific question of the interaction between the world trade regime and the international climate change regime currently is of key importance.¹⁶ The World Trade Report 2022 has focused on the interlinkages between climate change and international trade by adopting a policy perspective in which international trade rules can contribute to addressing climate change.¹⁷ The Report submitted that leveraging trade to tackle climate change presents several development and growth opportunities and will require significant policy actions for States to advance a just transition towards a less carbon-intensive economy. Moreover, the Intergovernmental Panel on Climate Change (IPCC) has noted that “policies to open up trade can have a range of effects on GHG emissions, just as mitigation policies can influence trade flows among countries”¹⁸ and identified the liberalisation of trade in environmental goods and services as measures that “may both lower trade barriers and potentially bring about GHG emission reductions”.¹⁹

At the level of international law-making, States are progressively inserting provisions related to the fight against climate change and sustainability in general within the renegotiation of their existing trade agreements or in the stipulation of new treaties.²⁰ For example, Article 19.6 of the EU-New Zealand Free Trade Agreement of 9 July 2023, entered into force on 1 May 2024, addresses trade and climate change: “1. The Parties recognise the importance of taking urgent action to combat climate change and its impacts, and the role of trade in pursuing this objective, consistent with the United Nations Framework Convention on Climate Change done at New York on 9 May 1992 (hereinafter referred to as the “UNFCCC”), the purpose and goals of the Paris Agreement, and with other [Multilateral Environmental Agreements] MEAs and multilateral instruments in the area of climate change. 2. In light of paragraph 1, each Party shall effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to nationally determined contributions. 3. A Party’s commitment to effectively implement the Paris Agreement under paragraph 2 includes the obligation

¹⁶ See VAN ASSELT, *Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?*, in ALOGNA, BAKKER, J-P GAUCI (eds.), *Climate Change Litigation: Global Perspectives*, Leiden, 2021, 433; KULOVESI, *Real or Imagined Controversies? A Climate Law Perspective on the Growing Links between the International Trade and Climate Change Regimes, Trade Law and Development*, 2014, vol. 6, p. 55; GROSBON, *Le droit du commerce international au défi des changements climatiques: lever les totems et les tabous*, in MALJEAN-DUBOIS, PEEL (eds.), *Climate Change and the Testing of International Law / Le droit international au défi des changements climatiques*, Leiden, 2022, p. 225; DELIMATIS (ed.), *Research Handbook on Climate Change and Trade Law*, Cheltenham, 2016; PAUWELYN, *Carbon Leakage Measures and Border Tax Adjustments under WTO Law*, in VAN CALSTER, PRÉVOST (eds.), *Research Handbook on Environment, Health and the WTO*, Cheltenham, 2013, p. 448.

¹⁷ WTO, World Trade Report 2022, Climate Change and International Trade, at www.wto.org.

¹⁸ Climate Change 2022: Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC 2022) 1451.

¹⁹ *Ibid.*

²⁰ *Ex multis*, EU-New Zealand Free Trade Agreement, 9 July 2023, entered into force 1 May 2024, ch. 19 (notably Art 19.6 addresses climate change); EU-Japan Economic Partnership Agreement, 17 July 2018, entered into force 1 February 2019, ch. 16, notably Art 16.4, which emphasizes the Parties’ commitments to effectively implement the UNFCCC and the Paris Agreement; EU-South Korea Free Trade Agreement, 15 October 2009, entered into force 13 December 2015, ch. 13, notably Art 13.5(3), and Annex 13. See also, EU-UK Trade and Cooperation Agreement (TCA), 30 December 2020, entered into force 1 May 2021, Preamble (paras. 1, 7 and 9) and Arts 198, 299, 302, 340(3)(e), 393, 401 and 764.

to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement”.²¹

Moreover, Article 16.4(4)-(5) of the EU-Japan Economic Partnership Agreement of 17 July 2018, entered into force on 1 February 2019, emphasizes the Parties’ commitments to effectively implement the UNFCCC and the Paris Agreement. It provides that: “4. The Parties recognise the importance of achieving the ultimate objective of the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 (hereinafter referred to as “UNFCCC”), in order to address the urgent threat of climate change, and the role of trade to that end. The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session. The Parties shall cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development. The Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement. 5. Nothing in this Agreement prevents a Party from adopting or maintaining measures to implement the multilateral environmental agreements to which it is party, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other Party or a disguised restriction on trade”.²²

In similar vein, Article 13.5(3) of the EU-South Korea Free Trade Agreement of 15 October 2009, entered into force on 13 December 2015, states that: “3. The Parties reaffirm their commitment to reaching the ultimate objective of the United Nations Framework Convention on Climate Change and its Kyoto Protocol. They commit to cooperating on the development of the future international climate change framework in accordance with the Bali Action Plan”.²³

The question of whether the WTO, and in particular its Dispute Settlement System (DSS), may constitute an appropriate venue for climate or climate-related litigation and trade adjudicators may act as “climate judges” remains at present unanswered. Moreover, the same enquiry should be addressed in the context of the crisis of the DSS itself due to the paralysis of the Appellate Body since December 2019 and its disruptive impact on the effectiveness of dispute resolution at the WTO.²⁴

The DSS may scrutinise the WTO legality of both pro-climate and anti-climate measures (e.g., a program of subsidies for fossil fuels) affecting trade between WTO Members.²⁵ The challenged State measure may be represented by an act or an omission. An example of a relevant State omission is a Member State’s failure to adopt adequate climate-friendly trade measures in furtherance of its own Nationally Determined Contributions (NDCs) pursuant to the Paris Agreement²⁶ or, based on the WTO covered agreements themselves, to comply with the general obligations to lower or eliminate

²¹ EU-New Zealand Free Trade Agreement, 9 July 2023, entered into force 1 May 2024, Art 19.6.

²² EU-Japan Economic Partnership Agreement, 17 July 2018, entered into force 1 February 2019, Art 16.4(4)-(5).

²³ EU-South Korea Free Trade Agreement, 15 October 2009, entered into force 13 December 2015, Art 13.5(3) and also Annex 13.

²⁴ *Ex multis*, VIDIGAL, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis*, *Journal of World Investment & Trade*, 2019, vol. 20, p. 862 ff.

²⁵ ASMELASH, *The WTO Dispute Settlement System as a Forum for Climate Litigation?*, *Review of European, Comparative & International Environmental Law*, 2022, vol. 32, p. 324; ASMELASH, *Climate Litigation and International Trade Law*, in SINDICO et al. (eds.), *Research Handbook on Climate Change Litigation*, Cheltenham, 2024, p. 328.

²⁶ HELLIO, *Les «contributions déterminées du niveau national», instruments au statut juridique en devenir*, *Revue Juridique de l’Environnement*, Special Issue 2017, p. 33.

tariff or non-tariff barriers to trade also with regard to environmental goods and services. In the latter case, the WTO complaint may be rooted in mere trade concerns in so far as a trade-restrictive measure negatively affects also climate goals and objectives.²⁷

Our proposition that Member States' "green" measures may adjudicated by the DSS as being overall WTO compatible – except for a finding of protectionist application *de jure* or *de facto* – was confirmed by the twin panel reports dated 5 March 2024 and 10 January 2025, respectively, in the *EU – Palm Oil* cases.²⁸ Malaysia and Indonesia challenged certain measures enacted by the EU that applied restrictions on the importations of palm oil, as oil crop feedstocks, and oil palm crop-based biofuels (both complainant States are major world producers of palm oil).²⁹ Concerning the alleged violations of the GATT 1994, the panels found that certain of those measures were *prima facie* inconsistent with the EU's most favoured nation (MFN) and national treatment (NT) obligations pursuant to Articles I.1 and III:4 of the GATT 1994 because they accorded less favourable treatment to palm oil-based biofuel from Malaysia and Indonesia, whose competitive opportunities were diminished and eventually excluded, than that accorded to like products of local or foreign origin, such as rapeseed oil- and soybean oil-based biofuel, thus engendering a detrimental effect.³⁰ The EU further submitted as a defence that its measures pursued the long-standing and legitimate policy goals of the EU biofuels regime relating to "climate change mitigation, environmental and biodiversity objectives and moral concerns".³¹ In this respect, the panels found that the measures at issue related to the conservation of exhaustible natural resources and were made effective in conjunction with restrictions on domestic consumption or production within the meaning of Article XX(g), and were also necessary to protect human, animal or plant life or health within the meaning of Article XX(b).³² Hence, they could be considered as being *prima facie* justified under the GATT 1994 in connection with a legitimate regulatory distinction. However, the panels also had to address the respect by the EU of the compulsory requirements of the *chapeau* of Article XX, which establishes that any Member States' measure – although being provisionally justified pursuant to a general exception – should not

²⁷ While the legal analysis focuses herein on violation complaints, it is also emphasised that the climate question may also be raised in a "non-violation complaint" alleging a distortion of the economic conditions of competition in terms of nullification or impairment of benefits (e.g., for goods and market-opening commitments in services) in the absence of the invocation of breach of a WTO covered agreement. Cf. Art. XXIII of the GATT 1994, Art. 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Art. 26 of the DSU.

²⁸ Panel Report, *European Union and certain Member States – Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia) (EU – Palm Oil (Malaysia))*, adopted on 26 April 2024, WT/DS600/R; Panel Report, *European Union and certain Member States – Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia) (EU – Palm Oil (Indonesia))*, adopted on 24 February 2025, WT/DS593/R. The proceedings in the latter case were suspended various times at the request of Indonesia following the circulation of the *EU – Palm Oil (Malaysia)* report on 5 March 2024. Cf. WT/DS593/13, WT/DS593/14, WT/DS593/15, WT/DS593/16, WT/DS593/17.

²⁹ In particular, the EU relevant measures were implemented within the schemes of the recast of the Renewable Energy Directive establishing a common framework for the promotion of renewable energy in the Union (RED II). Cf. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast).

³⁰ *EU – Palm Oil (Malaysia)* (n 30), paras 7-493, 7.1006, 7.1031, 7.1039; *EU – Palm Oil (Indonesia)* (n 30), paras. 7.1020, 7.1051.

³¹ *EU – Palm Oil (Malaysia)* (n 30), para. 7.497; *EU – Palm Oil (Indonesia)* (n 30), para. 7.512.

³² *EU – Palm Oil (Malaysia)* (n 30), paras. 7.1081 and 7.1085; *EU – Palm Oil (Indonesia)* (n 30), paras. 7.1085, 7.1089-7.1091, 7.1093.

be applied arbitrarily or in discriminatory manner.³³ In this respect, the panels ultimately held that the measures at issue violated the *chapeau* of Article XX because the EU failed to conduct a timely review of the data used (as well as to provide a commenting process) to determine which biofuels were concretely associated with high risk of contribution to GHG emissions, and also because there were deficiencies in the design and implementation of the applicable criteria and certification procedure.³⁴ Therefore, it was overall impossible for the panels to justify ultimately the EU measures at issue.³⁵ At the same time, the binding *EU – Palm Oil* reports confirm the overall WTO compatibility of “green” measures in furtherance of the goals of the Paris Agreement.³⁶

4. The Prevention of Disasters

Trade agreements in general have also addressed the prevention of disasters.³⁷ The World Trade Report 2022 called for the enhancement of the WTO’s existing cooperation with international (and regional) organizations such as the United Nations Office for Disaster Risk Reduction – UNDRR, including in the areas of climate risk prevention, climate-induced disaster relief, transport decarbonization and climate finance.³⁸ A key finding is that international trade can help support climate change strategies, such as prevention and reduction of, and preparedness for, climate risk, as well as recovery and rehabilitation from environmental disasters. In addition, trade can also contribute to strengthening food security during climate-induced supply-side disruptions.

At the WTO’s 12th Ministerial Conference (MC12), which took place from 12 to 17 June 2022 at the WTO headquarters in Geneva, the Member States finally succeeded in securing multilaterally negotiated outcomes on a series of key trade initiatives. The “Geneva package” adopted by Members included an outcome document,³⁹ a package on WTO response to emergencies (comprising a Ministerial Declaration on the Emergency Response to Food Insecurity,⁴⁰ a Ministerial Decision on World Food Programme (WFP) Food Purchases Exemptions from Export Prohibitions or Restrictions,⁴¹ a Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and

³³ GATT 1994, Art. XX. See WOLFRUM, *Article XX. General Exceptions [Chapeau]*, in WOLFRUM, STOLL, HESTERMEYER (eds.), *WTO – Trade in Goods*, Max Planck Commentaries on World Trade Law, vol. 5, Leiden, 2011, p. 464.

³⁴ *EU – Palm Oil (Malaysia)* (n 30), para. 7.1099; *EU – Palm Oil (Indonesia)* (n 30), para. 7.1105.

³⁵ The panels in the *EU – Palm Oil* cases applied a comparable legal analysis and reached analogous conclusions in relation to the violations of the Technical Barriers to Trade (TBT) Agreement (Arts. 2.1, 2.2, 2.9.2, 2.9.4, 5.1.2, 5.6.1, 5.6.2, 5.6.4).

³⁶ The two *EU – Palm Oil* panel reports were not appealed and, therefore, were adopted on 26 April 2024 and 24 February 2025, respectively, by the Dispute Settlement Body (DSB), which recommended the EU to bring its measures into conformity with the WTO covered agreements (WT/DS600/10). The EU agreed with Malaysia on January 2025 and with Indonesia on July 2025 that the reasonable period of time under Art 21.3(b) of the DSU to implement the panel reports will expire on 1 January 2026 (WT/DS600/11) and 24 February 2026 (WT/DS593/18), respectively.

³⁷ On this issue, in general, see ADINOLFI, *Strengthening Resilience to Disasters through International Trade Law: the Role of WTO Agreements on Trade in Goods*, *Yearbook of International Disaster Law*, 2019, vol. 2, p 3. Adde, ADINOLFI, *Natural Disasters and Trade Research. Study II: A Legal Mapping*, World Trade Organization, 2019, https://www.wto.org/english/tratop_e/devel_e/study2_sympnaturaldisaster29112019_e.pdf.

³⁸ World Trade Report 2022 (n 19), p. 40.

³⁹ WT/MIN(22)/24.

⁴⁰ WT/MIN(22)/28.

⁴¹ WT/MIN(22)/29.

Preparedness for Future Pandemics,⁴² a Ministerial Decision on the TRIPs Agreement,⁴³ a Decision on the E-commerce Moratorium and Work Programme,⁴⁴ and an Agreement on Fisheries Subsidies.⁴⁵ In addition, the ministers adopted two decisions (on the Work Programme on Small Economies⁴⁶ and on the TRIPS non-violation and situation complaints⁴⁷) and the “Sanitary and Phytosanitary Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges”.⁴⁸

In the MC12 outcome document, the ministers “recognize[d] global environmental challenges including climate change and related natural disasters, loss of biodiversity and pollution” and “note[d] the importance of the contribution of the multilateral trading system to promote the UN 2030 Agenda and its Sustainable Development Goals in its economic, social, and environmental dimensions, in so far as they relate to WTO mandates and in a manner consistent with the respective needs and concerns of Members at different levels of economic development”.⁴⁹ While the importance of technical assistance programmes in favour of developing countries, especially LDCs, was acknowledged, the Member States praised the role of the Committee on Trade and Environment “as a standing forum dedicated to dialogue among Members on the relationship between trade measures and environmental measures”.⁵⁰

The WTO Agreement on Fisheries Subsidies, entered into force in 2025, has the general purpose to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing and to eliminate subsidies that contribute to illegal, unreported and unregulated (IUU) fishing. It is inserted in Annex 1A to the WTO Agreement. It expressly deals with disaster relief scenarios. In particular, its Article 11 establishes that nothing in the treaty “shall prevent a Member from granting a subsidy for disaster relief, provided that the subsidy is: (a) limited to the relief of a particular disaster; (b) limited to the affected geographic area; (c) time-limited; and (d) in the case of reconstruction subsidies, limited to restoring the affected fishery, and/or the affected fleet to its pre-disaster level”.⁵¹ To this extent, the notion of *disaster* does not comprise economic or financial crises.⁵²

The 14th WTO Ministerial Conference (MC14), held at Yaoundé 2026 on 26–29 March 2026, decided that “the Negotiating Group on Rules shall continue negotiations on additional provisions that would achieve a comprehensive agreement on fisheries subsidies, including through further disciplines on certain forms of fisheries subsidies that contribute to overcapacity and overfishing, recognizing that appropriate and effective special and differential treatment for developing country Members and LDC Members should be an integral part of these negotiations. Members agree to continue to engage constructively in the negotiations, with a view to making recommendations to the Fifteenth WTO Ministerial Conference for provisions that would achieve the comprehensive

⁴² WT/MIN(22)/31.

⁴³ WT/MIN(22)/30.

⁴⁴ WT/MIN(22)/32.

⁴⁵ WT/MIN(22)/33.

⁴⁶ WT/MIN(22)/25.

⁴⁷ WT/MIN(22)/26.

⁴⁸ WT/MIN(22)/27.

⁴⁹ WT/MIN(22)/24, para 14.

⁵⁰ *Ibid.*

⁵¹ WT/MIN(22)/33, Art. 11.1.

⁵² *Id.*, fn 19.

disciplines on fisheries subsidies referred to in Article 12 of the Agreement on Fisheries Subsidies”.⁵³ Pursuant to Article 12 comprehensive disciplines should be adopted within four years of the entry into force of the agreement itself.

5. Conclusion

Plurilaterals are “not always without controversy, and in some cases not all WTO Members agree they are within the spirit or letter of the WTO rules”.⁵⁴ The plurilateral Environmental Goods Agreement (EGA) did not come to fruition. This is inter alia related to difficulty in regulating comprehensively the environment (and climate neutrality) as common good in a treaty to be negotiated within the WTO. With the WTO Agreement on Fisheries Subsidies a milestone for ocean sustainability, which includes more tailored and focus specific approach on non-commercial issues such as the prevention of disasters. In that case, consensus was secured among the WTO membership. However, in other cases, plurilateral trade agreements may provide viable avenue to escape the impasse at the WTO through a variable geometry approach

⁵³ WT/MIN(26)/38.

⁵⁴ See <https://wtoplurilaterals.info>.

SECTION FOUR
Regional Relations and the Multilateral Trading System

Conclusions

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The current challenges to the multilateral trading system, based on the WTO as an institution, and on its network of agreements as the rulebook governing international commerce, risk to make both of them progressively irrelevant. What is even more worrying is that reforming them to take into account such challenges, first of all those originating in worries for national economic security (but also due to environmental – climate change concerns), does not appear to represent a priority for trading nations, while no global alternative system is in view. A power-based, fragmented system, in which political relations rather than economic and commercial consideration determine trade flows, risks to replace, at least de facto, the rule-based multilateral system first established in 1947 with the GATT. As is well-known, this system was institutionally reinforced and content-wise updated and extended to cover services with the establishment of the WTO in 1995. Finally, it was also geographically expanded to the whole world with the admission of China in 2001.

The falling into irrelevance of the GATT/WTO international system of trade governance would leave trade flows and global value chains at the mercy of power-based relations. Rather than increasing the resilience of GVCs, which involve about half of the world trade in goods¹, unilateral political interference, if left unchecked, would undermine their crucial role in efficiently supplying the world with all sorts of products. We are already witnessing how established trade flows based on commercial considerations are being interfered with and re-oriented due to political-economic coercion. Unilateral restrictions not only on imports but also on exports, based on invocation of economic security reasons or environmental protection, widespread recourse to subsidization of domestic industries which unfairly promote exports and penalize imports are becoming typical of an environment where uncertainty is replacing stability.

Until now, international trade flows have been able to keep on developing, though at a slower pace, notwithstanding the increased geopolitical divergences and the fact that some of them (Russia-Ukraine, USA – Iran) have resulted in outright, persistent military conflicts. This positive trajectory is not likely to be maintained, however. The latest UNCTAD Report ² warns that global growth is expected to slow down as the Middle East conflict disrupts energy markets and shipping routes, and raises inflations. The close relation between conflicts and trade, affecting the most basic needs of populations especially in developing countries, is epitomized by the grain export crisis from the Black Sea, where both Russian and Ukrainian vital exports especially to hungry developing countries are currently blocked by the war.

Raising uncertainty is weighing on trade, investment, and supply chains, with real merchandise trade growth projected by UNCTAD to fall from 4,7% in 2025 to 1,5%-2,5% in 2026. In recent years,

¹ See OECD 2026, <https://doi.org/10.1787/8217c2ff-en>, <https://www.oecd.org/en/publications/trends-in-global-value-chains>.

² [Trade and Development Foresights 2026: Global Economy Faces a Geopolitical Challenge](#). See also FT

it was the uncertainty of trade policies and doubts as to the respect of the rules by major trade powers, first of all by the US, that hampered international trade and its historical role of an engine for development. UNCTAD's report suggests that geopolitical conflict has become nowadays a greater threat to growth, accelerating a shift toward policymaking focused on economic security.³

Of what assistance can facing the normative crisis of the WTO be for the purpose of at least containing the sliding of international trade legal framework towards anarchy, thus avoiding the return to beg-your-neighbour policies and hostile block-formation?

The starting point is a reflection on the changed relation between international politics and trade relations, including their legal structuring, in the eyes of some key economic actors, starting with the current US Trump administration. The slogan "trade wars are beautiful and easy to win" (that recent experience has shown to be an illusion) has led the US to resort to trade barriers, first of all tariffs on imports, that is custom duties, to pursue a variety of domestic policies, in plain disregard of its international obligations under the WTO and even regional agreements such as USMCA. The US has resorted to tariffs to "bring back" manufacture to the US intended to curtail foreign imports also in order to reduce the balance-of-payment current deficit. It has agreed to limit those tariffs on a bilateral basis increases against foreign countries undertaking to reduce their barriers to US products and make investments into US industries, besides pressuring weaker trade partners to align their policies towards its "adversaries" with those of the US.

The use of trade restrictions to the access of foreigners to the lucrative American domestic market as an instrument of political power and coercion has been completed by resorting to selective export (and investment) restrictions, notably to obstruct China's entering advanced technological sectors in order to protect US dominance.

The US has thereby not only unilaterally breached several fundamental GATT rules but has also departed, even more radically, from a basic premise of the post WWII multilateral trading system: that international politics and trade relations should stay separate, except in the most extreme cases of political-military conflict. Such relative isolation of trade relations from politics is by now history.⁴

We do not intend to pass judgement here on these policies, nor on their success in advancing the US administration objectives. Time will be an objective judge. We rather wish to stress here that these politicized trade policies, besides being prone to abuse and lacking objective application criteria, have produced two types of reactions which have in turn increased the instability of trade relations and reduced or diverted trade. First, some other major players, such as China, Brazil, joined lately by Canada, have introduced similar trade restrictions of their own towards the US. The second consequence has been that the US course has de facto encouraged other major economies, including the EU, to resort to unilateral measures to pursue their own economic and non-economic goals, although coupled with efforts to ensure their compatibility with the multilateral rules. As to the EU, the most notable example is the CBAM mechanism to offset the price advantage that exporters into the EU of selected energy-intensive products have by enjoying looser environmental production standards in their home countries. Another one is the deforestation regulation restricting the import of agricultural products originating from deforested terrains into the EU. By threatening the countries

³³ See also Ed cOnway, *Trade World: The Ties that Bound Our Past and Could Unravel OUR Future*, WH Allen 21026

⁴ See IMF, Finance & Development, June 2026, *Geoeconomics and the Return of Economic Statecraft*.

Conclusions

of origin with being otherwise excluded from the EU internal market (same with palm-oil), the EU pressures them to adopt environment friendly standards.

Even if WTO-compliant, unilateral measures by major trade actors put strain on the multilateral system and fragment the regime applicable to import-export of goods depending upon their origin and destination. Although the purpose of such measures may be laudable, unilateralism is a second-best method as compared to international cooperation, especially in view of its negative fall-out on the multilateral system. At the same time, unilateralism (“do it yourself”) is a reaction of frustration at the inability of the WTO Members to reform the system in order to address new concerns, such as those connected with fighting environment degradation and global warming.

The paralysis of the decision-making mechanisms of the WTO to update its rule-book was made evident by the lack of agreement on any issue on the table, substantial or just procedural, at the last WTO Ministerial Conference (MC 14) in Yaoundé, Cameroon, in March 2026. On the contrary, first the US and thereafter the EU in the preparation of MC 14 tabled documents proposing to sidestep the fundamental GATT/WTO principle of the most-favoured-nation (MFN) treatment.⁵ Their proposals would allow “clubs” of like-minded parties, although not qualifying for establishing a free-trade-area, to exchange among themselves special advantages on any matter, thus shutting out other WTO members. While some more flexibility (“variable geometry”) may be welcome to enable the WTO to respond to the different needs of its members, this course risks being another blow to the multilateral system, in the absence of any overall reform.

Let us be honest. In the current context, substantive reforms of the WTO rules are impossible in view of the profound divergence among its Members as to how the new rules should look. On the one hand, enlarging members’ policy space to make protectionist measures easier (be it by allowing industrial or green subsidies, or facilitating the imposition of anti-dumping or anti-subsidies duties) will not be acceptable to many if not most countries, whatever their justification (including environmental reasons and economic security).

On the other hand, many WTO members, especially developing members, resist higher harmonized standards and restrictions to the granting of export promoting subsidies and insist on special and differential treatment which other countries consider on the contrary as an anachronistic privilege.

Opposite views also characterize the debate on procedural issues. It is clear to most observers that the existing consensus rule for decision-making is a stumbling block to any reform. A blocking minority of Members opposes however any adaptation of this key traditional principle of the GATT/WTO. The same countries block the adoption of plurilateral agreements, that is agreements negotiated among and adopted by a subset of interested WTO Members only. They are admitted within the WTO, if their adoption is agreed by consensus by all Members (thus including also those who do not intend to participate) provided they are open to any of them. Plurilaterals would add flexibility in the system recognizing the variety of members interests especially in respect of new needs that may affect only some of them.

⁵ As to the US see <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W984.pdf&Open=True> of 15 December 2025; as to the EU see the submission of 21 January 2026, WT/GC/W/986, <https://www.tralac.org/documents/resources/external-relations/wto/7240-wto-general-council-eu-submission-on-wto-reform-21-january-2026/file.html>

If grand reforms look almost impossible for the time being and this includes the semi-paralyzed but key dispute settlement system after the demise of the Appellate Body, notwithstanding its “replacement” among willing Members by the Multi-Party Interim Appeal Arbitration Arrangement – MPIA, “under the radar” negotiations go on within the WTO on different specific matters among different subsets of members. This is made possible thanks to built-in flexibility of some existing agreements (such as negotiating plurilaterals and putting them provisionally in force notwithstanding the lack of consensus for incorporating them formally in the WTO rule-book); in other cases based on previous Ministerial Conferences mandates (such as the Agreement on Fishery Subsidies entered into force in 2025); or by addressing issues currently not covered by existing discipline (such as digital trade/e-commerce, including custom-duty exemption for electronic transactions).⁶

One should place on a different level the renewed impulse towards agreeing comprehensive WTO-plus Free Trade Agreements (FTAs) in conformity with Article XXIV GATT, with the participation of countries hitherto reluctant or contrary to engage in bilateral or regional deals (such as India or Indonesia). FTAs, including “mega-FTAs” such as the Mercosur-EU FTA and the CPTPP (which after the accession of the UK is not just trans-pacific anymore) are being entered at an increased pace also with a view to stabilize the reciprocal trade regimes and resist to the vagaries created by the unilateral, political use of trade restrictions by the US and others.

The valuable contributions collected in the present volume, edited by prof. Elisa Baroncini and her colleagues, are focused on plurilaterals, but cover also other current normative developments addressed in my preceding summing-up. They look at all the most recent instruments to which trading nations resort, both in cooperation and unilaterally, to govern trade relations in the middle of the present uncertain geopolitical upheavals. Its comprehensiveness makes this collection an almost indispensable companion for all those, be they students, scholars, trade diplomats, or internationally operating businessmen, who look for an authoritative, well-informed up-to-date compass to navigate the perilous seas of international trade governance.

The focus on plurilaterals is especially welcome, since they could bridge in respect of specific matters the current divide which is a stumbling block against moving ahead to adapt the WTO rules where needed. Namely between the rigidity of the “single undertaking” and of the consensus rule for negotiation and adoption of additional multinational agreements, on the one hand, and the strict requirements of “substantially all trade” coverage for establishing bilateral and regional FTAs among groups of countries sharing the same interest on any such matter, on the other hand. A WTO partially *à la carte*, following the EU model of “enhanced cooperation” which may be agreed among a subset of its members could avoid throwing away the baby with the dirty water, that is abandoning MFN altogether, inevitably resulting in a general fragmentation of the multilateral trading system.

⁶ See the Environment Goods Agreements (EGA), and those on Service Domestic Regulation, on electronic commerce, and on Investment Facilitation, some of which, not yet formalized, were negotiated informally by groups of interested WTO members through “Joint Statement Initiatives”.

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