



# What Do We Need a World Trade Organization For?

The Crisis of the Rule-Based Trading System and  
WTO Reform

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## Bertelsmann Stiftung and WTO Reform

If international trade is not governed by rules, mere might dictates what is right. The World Trade Organization (WTO) serves as a place where trade policy issues are addressed, disputes arbitrated, legal frameworks derived and enforced. Through these functions, the WTO ensures that the rules of trade policy are inspired by fairness and reciprocity rather than national interest. It is more important than ever to vitalise the global public good that it represents against various threats that have been undermining it.

The Global Economic Dynamics project of Bertelsmann Stiftung is a firm believer in rules-based international trade. In 2018, we published an extensive report with propositions on how to revitalise the WTO, based on the deliberations of our High-Level Board of Experts on the Future of Global Trade Governance. In 2019 and 2020, we follow up on this report with a series of policy contributions, providing fresh ideas and elaborating on concepts already introduced in the report. These contributions cover the areas of the Appellate Body crisis, dealing with the competitive distortions caused by industrial subsidies, enabling Open Plurilateral Agreements within the WTO while providing reassurance to concerns of the membership at large with such forms of flexible cooperation and, finally, improving working practices in WTO Committees.

We are very grateful to Ignacio Garcia Bercero for publishing his thoughts on WTO reform as part of our series. While he occasionally draws on previous publications of the Global Economic Dynamics project, this publication is a stand-alone piece in its own right. It shares with our other publications the ambitions to modernise and reinvigorate the WTO in order to maintain and enhance this public good.

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## Executive Summary

The World Trade Organization, which in 1995 succeeded the General Agreement on Tariffs and Trade, has been the cornerstone of a rule-based trading system based on non-discrimination, progressive liberalisation and a binding system of third-party adjudication of disputes. During the GATT era, trade expanded from 10% in 1945 to more than 40% of GDP and by 2008 the share had further increased to more than 60%. With the accessions of China and Russia all significant trading nations were subject to the same system of rules.

Despite its achievements, the rule-based trading system is experiencing a profound crisis. The US and China have entered into an era of geopolitical conflict that has trade and technology at its epicentre. There is an increasing questioning as to whether the rules of the WTO are relevant to address distortions due to the role of the party/state in the management of the Chinese economy. The Trump administration has decided to open a trade war with China outside the framework of WTO rules and has taken action to prevent the continuing functioning of WTO dispute settlement. The crisis of WTO has however much deeper roots. The failed Seattle Ministerial of 1999 was a first signal both of the external contestation of trade agreements and of deep divisions of the members as to the direction in which the trading system should evolve. The failure of the Doha Development Agenda has undermined the credibility of the WTO as a forum of negotiations and shifted the centre of gravity of international trade to bilateral negotiations.

The first part of this article presents an argument about the continued relevance of the rule-based trading system. It starts by looking into the root causes of the US-China trade conflict and argues that it is possible to manage competition with China on the basis of an updating of the rules of the WTO. What would be required is the acceptance by China of commitments that correspond to its weight in the world economy and negotiations on improved rules to deal with the negative spillover of industrial policies. The article then discusses what can be considered to be the core tenets of the rule-based trading system. Contrary to the view according to which the WTO represents a neoliberal hyper globalisation compact, it argues that the WTO essentially retained the flexibilities that characterised the GATT “embedded liberalism” paradigm. Moreover, the demise of the WTO and its replacement by a new geo-economic order, would lead to a world of escalating conflicts that would put in question the basis for international cooperation not only on trade but critically on the recovery from the covid-19 pandemic and the transition towards climate neutrality.

The second part of the paper presents a series of proposals to reforming the World Trade Organization. In order to build confidence, it suggests that the next WTO Ministerial Conference should agree on some initiatives that show that the WTO can be relevant in the context of recovery from the pandemic and contribute towards sustainability goals. It should also open a process of reform that considers improvements of the three core functions of the institution. As regards the negotiating function, it is argued that the WTO needs to be able to accommodate open plurilateral agreements and develop a more pragmatic approach to special and differential treatment for developing countries. As regards WTO dispute settlement, suggestions are made to improve the appellate function, reinforce the fact finding powers of panels, provide for faster proceedings and establish an agreed interpretation of certain provisions of WTO law on trade remedies. Finally, in order to restore a common sense of purpose to the trading system, it is suggested that to culminate the reform process Heads of State and Government should adopt a Declaration that commits WTO members to support the implementation of the UN Sustainable Development Goals. In order to fulfil this task a number of reforms are proposed to reinforce the role of WTO as a forum to ensure transparency of trade policies and their coherence with the broader goals of the international community.

## Introduction

The rule-based trading system is experiencing its most serious crisis since its inception. For the first time since 1934<sup>1</sup> the US appears to have abandoned its longstanding support for rule-based trade, at least as far as relations with China are concerned (although actions under sections 232 and 301 of US trade law are by no means limited to China).<sup>2</sup> At the same time, while China mouths support for the WTO and open trade, in reality the grip of the party/state over the economy has significantly tightened and there are no signs of China being ready to accept the increased level of commitments that would correspond to its global economic weight. The strategic nature of the US-China conflict risks condemning to irrelevance the rule-based approach to trade and investment relations on which the GATT/WTO system is based. At a time of intense geopolitical and technological rivalry, it is no exaggeration to say that, in the absence of mutually acceptable rules that allow for interface between different forms of capitalism, it would be hard to avoid trade differences escalating to the point of becoming political disputes, potentially threatening world peace<sup>3</sup>. Even in the absence of major political conflict, the decoupling of the US and China economies would be costly and place other countries and companies in the invidious position of having to choose with whom to trade and invest.

The US-China conflict would make it difficult to sustain let alone enhance cooperation on global challenges and notably on the recovery from the Covid-19 pandemic and the fight against climate change. The economic impact of the pandemic will result in a recession that is deeper than that caused by the 2008 financial crisis. The situation is likely to be particularly dire for vulnerable developing countries. Discussions about reshoring and increased public support for strategic industries may lead to an increase in tensions that goes well beyond the current US-China trade war. While post-financial crisis the G20 at least entrusted the WTO with a limited monitoring role in seeking to avoid a proliferation of protectionist responses, geopolitical tensions will make cooperation on trade more challenging now. Restoring trust in international institutions can only be achieved if these are seen as being fit for purpose by helping to channel cooperation towards providing effective responses when uncoordinated national action poses a risk to everyone's welfare. The current crisis raises the question of what the purpose of the World Trade Organization (WTO) is. The combination of a world recession and a geopolitical conflict between two of the three largest trading powers represents a stress test for the WTO, from which it may emerge either strengthened or fatally wounded.

The roots of the WTO crisis predate and go beyond the current US-China conflict. In a way, the failure of the Seattle Ministerial in 1999 was the first signal of a globalisation backlash and a questioning of the new body's legitimacy both by public opinion and a significant part of its membership. While the General Agreement on Tariffs and Trade (GATT) originally functioned as a "club" of likeminded countries with a common sense of purpose, the WTO aspired to become a universal organization but lacked a common vision of the direction in which it should evolve. The failure of the WTO as a negotiating forum with the collapse of the Doha Development Agenda (DDA) further aggravated this legitimacy crisis as the organisation was seen as being unable to deliver on its liberalisation function and trade policy decisively shifted towards negotiations outside the WTO framework. It was, in any event, the emergence of China as the largest trading nation that led to a more fundamental questioning in the US of the adequacy of WTO rules and the body's enforcement mechanism to manage trade relations with China. While there were longstanding US concerns on the jurisprudence of the WTO Appellate Body (AB), the decision

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<sup>1</sup>The Reciprocal Trade Agreements Act of 1934 provided authority for the negotiation of agreements based on the principle of non-discrimination. These agreements were the template for the negotiation of the GATT. For a detailed discussion of the evolution of US trade policy, see Douglas Irwin, *Clashing over Commerce*, University of Chicago Press 2017.

<sup>2</sup> The Trump Administration used Section 232 of US trade law to introduce, on alleged grounds of national security, restrictions on imports of steel and aluminium and to threaten restrictions on imports of cars. China is only very marginally affected by these measures, which primarily impact US allies such as Japan and the EU. The US has applied discriminatory import tariffs against China under Section 301, but also threatened such restrictions against France in response to the introduction of a digital tax.

<sup>3</sup> For an interesting historical comparison of the circumstances leading from trade conflicts to war in the early days of the XX Century and the situation today see Daniel W Dresdner, *Will today global trade wars lead to World War III?* Reason, May 2019.

by the Trump Administration to block the appointment of AB members should be understood in the broader context of the US-China conflict. The emergence of China as the world largest trading nation has exacerbated some of the structural factors that had undermined the legitimacy and effectiveness of the WTO as a new organisation. The die, however, is not cast. This is not the first time that the trading system has experienced a period of turbulence. There are certain commonalities between the current situation and the trade conflicts of the 1980s, which eventually resulted in the big leap forward of the transformation of GATT into the WTO. The period between the end of the Tokyo Round (1979) and the establishment of the WTO in 1995 was also a period of managed trade and aggressive US unilateralism. The main difference was that conflicts at the time were between countries that were political allies and where the differences between their respective economic systems were less marked. Moreover, the US was then advocating for a reinforcement of the rules of international trade and was the main proponent of binding dispute settlement.

WTO reform needs to look beyond the current US-China conflict. Indeed, reform can only succeed if all WTO members see the value of reinforcing multilateralism in trade and avoiding the fragmentation of a global trading system into one based on conflicting regional alliances. The more fundamental question raised by the current crisis is the need to define a common sense of purpose that links the trading system to the global challenges faced by the international community. At a time when cooperation is essential to respond to life threatening challenges, the world cannot afford to dismantle the system of cooperation on trade that has been progressively developed since the creation of the GATT in 1947. It is an illusion to think that a retreat from multilateralism in trade could be compatible with the stronger cooperation needed to tackle other global challenges, notably those relating to health or climate change.

For the WTO to ensure its relevance two conditions should be met: 1) As an institution it should be seen as providing value to all its Members, including low income countries, and play a supportive role in attaining the UN Sustainable Development Goals, which represent the common aspirations of the international community. The trading system should therefore foster the integration within global and regional value chains of African and other countries that now have limited participation in trade and investment flows. It should also contribute towards environmental sustainability and social inclusion, which is crucial for maintaining support for open trade policies. 2) The US and China would need to accept that a modernised rule book provides the basis for their economic interaction and that their trade differences should be settled on the basis of binding third party adjudication. This modernisation of the rules would, in all likelihood, need to go together with establishing a better balance of rights and obligations among all participants in the global trading system.

This paper aims at presenting an analysis of the WTO challenges. The first part discusses how the emergence of China has impacted on the functioning of the rule-based trading system. It then argues that, notwithstanding profound changes in the world economy, the fundamental tenets of the WTO system retain their relevance. The second part outlines possible elements for a WTO reform agenda that strengthens the legitimacy and effectiveness of the institution and ensures balance amongst its three core functions: negotiations on rules and market access commitments, binding third party adjudication and monitoring and deliberation on trade policies. The final section concludes. A summary of policy proposals is included in the annex.

## **1 The crisis of the rule-based trading system**

The current crisis affecting the rule-based trading system is best understood as a combination of structural factors that led to a tipping point with the change of political leadership in the US and China. The main factor is the emergence of China as the largest trading nation on the basis of a state capitalist model combined with a geopolitical conflict with the US in which trade and security considerations are often interlinked. Other structural factors include the lack of a common purpose guiding WTO activities, the paralysis of the negotiating function and the difficulty of maintaining the adjudication function as rules become increasingly outdated and contested. The US sought initially to respond to the increasing role of the party/state in China under XI Jinping through a strategy



based on building alliances to put pressure on its rival to change its policies by negotiating rules in plurilateral settings without Chinese participation. This approach was discarded by President Trump as he decided to ignore US tariff commitments primarily vis-à-vis China and to undermine the functioning of the dispute settlement system in order to create leverage for bilateral negotiations. Section A discusses the implications of the US-China conflict for the functioning of the global trading system. Section B examines more broadly the purpose of the GATT/WTO system to identify to what extent it retains its relevance in the new geopolitical context.

## 1.1 China's emergence as a key trading power has profoundly transformed the foundations for rule-based trade

Between 2000 and 2017, China's share of world merchandise exports increased from an already highly significant 3.9% to an astonishing 12.8%. This is substantially larger than the share of US exports (8.7%)<sup>4</sup>. China is the world's largest producer of manufactures and, on the basis of PPP exchange rates, the largest economy. Moreover, increasingly China is becoming highly competitive in the more advanced manufacturing sectors and in services.

China is justifiably proud of these achievements and deeply suspicious of what it perceives as attempts to contain its ascent. However, such a phenomenal increase in China's share of world trade has profound implications for the global trading system.

The GATT/WTO system has always relied upon a balance of rights and obligations amongst the leading trading nations. The period of turbulence of the 1980s was to a large extent the result of the need to accommodate the consolidation of the EC/EU as an equal trading power as well as to manage the emergence of Japan as a manufacturing powerhouse. In all key respects the Tokyo Round and Uruguay Round negotiations were concluded on the basis of transatlantic bargains, within which Japan and key emerging economies were progressively incorporated. The outcome of these negotiations were based on overall reciprocity among the US, the EU and Japan. While China made significant commitments to join the WTO, the 2001 bargain is insufficient today to maintain a balance of commitments among the key players of the trading system.<sup>5</sup> The sheer weight of China in the system is such that it would be impossible for the US or the EU to accept anything less than fully reciprocal commitments by China.

The complexity of establishing such a balance is exacerbated by the nature of the Chinese state capitalist model. Contrary to initial expectations, the role of the party/state in the Chinese economy has increased rather than diminished since WTO accession. While the WTO should be ready to accommodate different systems of ownership, Chinese industrial policies are characterised by their lack of transparency and the aggressive attempt to gain competitive advantage through state intervention and massive subsidies.<sup>6</sup> The view has been put forward that the Chinese system of state capitalism is of a different nature to that of other WTO members and that existing WTO rules or their enforcement mechanism are ill-adapted to cope with the distortions caused by state intervention in the Chinese economy. In his very influential article on the "China Inc", Mark Wu distinguishes between: a) Issues covered by WTO rules, but where the outcome of dispute settlement proceedings may be challenged due to the indeterminacy and highly contested nature of the rules (i.e. what constitutes a public body under the subsidies agreement or how to deal with market distortions under antidumping law) and b) Issues falling outside the scope of current WTO rules, such as discriminatory competition law enforcement or restrictions on

<sup>4</sup> World Trade Organization data portal, <https://data.wto.org> (accessed on November 19, 2019) quoted in Anabel Gonzalez and Eunji Jung, developing countries can help restore the WTO dispute settlement system, Peterson Institute for International economics (PIIE), January 2020.

<sup>5</sup>For a detailed account of US-China negotiations leading to WTO accession see Paul Bluestein, Schism, Centre for International Governance and Innovation, 2019, Chapters 2 and 3.

<sup>6</sup> For an analysis of the increasing role of the state in the Chinese economy see Nicholas Lardy, The State strikes back: the end of economic reform in China, 2019, PIIE

data flows).<sup>7</sup> Others have pointed out, however, that existing WTO rules, together with specific WTO plus provisions of China's Protocol of Accession, could be used more aggressively to discipline China's non-market behaviour.<sup>8</sup> Whatever the merit of each view, the Trump Administration has opted to deal with China's industrial policies outside the context of WTO rules.<sup>9</sup>

The outcome of negotiations between the US and China are reflected in the so-called phase one agreement of January 2020. The agreement includes some liberalisation and reform commitments, notably those relating to certain aspects of intellectual property rights (IPR), such as trade secrets, or those relating to the opening of the financial services sector. It also enshrines commitments on technology transfer that are in certain aspects more precise than those included in China's Protocol of Accession, although their effectiveness may be limited in the absence of a credible mechanism of third-party adjudication. More worryingly, at the centre of the agreement are purchase commitments that are based on managed trade and reinforce the role of the state in the Chinese economy. As an enforcement mechanism, the agreement relies on consultations and unilateral remedies. The phase one agreement does not address the distortive impact of industrial policies and it is difficult to see how these could be tackled in a bilateral context. The agreement is therefore best characterised as an uneasy and temporary truce, which still maintains discriminatory tariffs on a very substantial part of bilateral trade.<sup>10</sup>

The future of the global trading system will crucially be affected by how the US and China choose to manage their trade relationship. When China joined the WTO, the prevailing view amongst US policy makers was that it would progressively converge towards the institutions of a market economy based on the rule of law. Very few hold that view now. China, for its part, faces the challenge of how to change its economic model so as to adapt to slower economic growth and avoid falling into a middle-income trap.<sup>11</sup> The argument can be made that reforms that strengthen the rule of law and limit the role of state owned enterprises could bring the necessary growth of productivity to manage the transition.<sup>12</sup> However, this does not seem to be the path chosen by the Chinese leadership whose priority seems to be to reinforce party control of the economy. The increase in bilateral tensions reinforces those on both sides arguing for a decoupling of the US and Chinese economies.

If convergence is not a realistic perspective in the short to medium term, there are three possible "C" scenarios: Confrontation, Competition and Cooperation. *Confrontation* would imply that, after the November elections in the US, there will be a continuation of the current trade war and discriminatory tariffs will be maintained or increased leading to a significant decoupling of the US and China economies.<sup>13</sup> While a bilateral negotiating track may be kept open, it is highly unlikely that it would result in any meaningful reform of Chinese industrial policies and the potential for escalation would be high. The EU and Japan are unlikely to join the US in a confrontation strategy although they would reinforce their own defences to counter the impact on their market of China's trade distortive

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<sup>7</sup> Mark Wu, The "China inc": a challenge to global governance, 57 *Harvard International Law journal* 1001(20016).

<sup>8</sup> See Weihuan Zhou, Henry Gao and Xue Bai, *Building a market economy through WTO inspired reform of state-owned enterprises in China*, Cambridge University Press, 16 October 2019

<sup>9</sup> The US view has been forcefully articulated by Ambassador Shea in his statement at the Davos Informal WTO Ministerial of January 2020: "To remain relevant, the WTO needs to get back to its core principles - first amongst them being that the institution supports open, market-oriented policies across the membership. We cannot be complacent for maintaining these core principles. We cannot settle for 'coexistence' with non-market-oriented policies that are damaging global trade, leading to severe overcapacities and unfair competitive conditions for our workers and businesses. Those who founded the WTO had the goal of moving all economies towards market openness and free market competition". (available in website US mission Geneva).

<sup>10</sup> Economic and trade agreement between the United States and the People's Republic of China, Phase One, January 15, 2020x (available on USTR website). For an analysis of the phase 1 agreement see Chad P Bown and Mary E Lovely, *Trump's phase one deal relies on China's state-owned enterprises*, March 3, 2020, PIIE. See also WI Huan Zhou and Henry Gao, *US-China Phase One deal: A brief account*, Kluwer regulating for globalisation blog, 22 January 2020

<sup>11</sup> See George Magnus, *Red Flags: Why Xi's China is in Jeopardy*, Yale University Press, 2018, in particular Chapter 7.

<sup>12</sup> See Lardy in footnote 7:

<sup>13</sup> In a highly integrated world economy, decoupling will be costly. Moreover, in the absence of correction of macroeconomic imbalances, there will be trade diversion towards alternative suppliers. The argument is succinctly made by Stephen Roach in *US, China and the myth of global decoupling*, 26 Dec 2019. He notes that trade currently represents 28% of global GDP, whereas it only represented on average 13.5% during the Cold War.

policies. *Competition* would imply that, although China would not necessarily introduce major reforms of its domestic industrial policies, it would agree to further open up its economy and accept that other countries reinforce their defences against the impact on their markets of China's industrial policies. While discriminatory tariffs would have to be eliminated and WTO dispute settlement restored, there would in turn be significant latitude for the use of trade remedies, investment screening and export controls as defensive instruments. *Cooperation* would combine elements of competition with a broader recognition that there is a need to redesign the rules of the global trading system in a way that manages more effectively the spill overs of industrial policies.

A rule-based approach would be more effective than bilateral negotiations in disciplining the impact of subsidies and other distortions linked to state intervention in the economy. Such a strategy is, however, unlikely to work unless the US is ready to join forces with other countries that share concerns about the distortive impact of China's industrial policies and enter into negotiations within a multilateral/plurilateral framework. In order to get Chinese buy-in, the disciplines agreed would have to be even handed and recognise the need for interaction between different economic systems. What can be expected from China is not a fundamental change in its economic model but rather the acceptance of effective rules to deal with the negative spill overs of industrial policies. Contrary to the negotiations that brought the accession of China to the WTO, the aim would not be to develop China-specific rules but rather to develop rules that apply across the board and are relevant to discipline market distorting behaviour. Moreover, contrary to the Trans-Pacific Partnership (TPP), China will be in a position to help shape those rules from the beginning rather than being expected to adhere to rules fixed by others.

An approach based on the identification and response to negative spill overs has certain elements in common with that recently advocated by a group of American and Chinese economists and trade experts, although their joint statement is too much focused on the bilateral perspective and does not properly address the multilateral dimension.<sup>14</sup> . Depending on their impact, industrial policies can have three types of negative spillover effects: a) Distortions of competition in global markets; b) Injury in the market of the importing country; c) Restrictions on competition in the market of the country adopting the industrial policies. In the case of certain subsidies that have a particularly serious negative impact on global markets, the response could take the form of new rules that prohibit or strongly discourage such subsidies. As regards other distortive subsidies or practices with an injurious impact, what is needed is to ensure the effectiveness of available trade remedy laws in cases of pervasive state intervention. As regards competition in the Chinese market, a substantial reduction of tariffs and further liberalisation of market access for investment would broaden the options for firms to accede to the Chinese market and limit the potential for the state to distort market outcomes. In order to be effective, those commitments should be combined with disciplines on "competitive neutrality" so as to avoid distortions of competition that affect foreign owned firms already established in the market. This last dimension is of course the more challenging since international rules may be of limited effectiveness in the absence of a robust domestic system based on the rule of law.

Competition, and cooperation can be considered as forming a continuum depending on the degree of ambition and effectiveness of the rules to be agreed. In both scenarios, there is an acceptance that Chinese state capitalism represents a major competitive challenge but that such competition needs to be managed on the basis of commonly accepted rules. The proposals on WTO reform in this paper can be situated in an intermediate stage in which cooperation needs to be combined with a recognition that, in the absence of convergence, trade rules need to counter market distortions linked to state intervention. A cooperation/competition strategy does not exclude conflicts but provides the tools to address them. It acknowledges that there is a geo-economic dimension to technological competition with China, but that rules are needed to prevent geopolitical tensions escalating into confrontation. To quote former USTR Robert Zoellick, cooperation would give the opportunity to China to act as a

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<sup>14</sup> US-China Trade Relations A way forward, the US-China Trade Policy Working Group Joint Statement, <https://cdn.shanghai.nyu.edu>. Signatories are economists and legal scholars from the US and China. For a critical assessment see Wihuan Zhou and Henry Gao, US-China Trade War: A way out?, Forthcoming 2020, World Trade Review.

“responsible stakeholder” which contributes to shaping the rules of the global trading system.<sup>15</sup> Whether China would be ready to take that challenge remains an open question.

## 1.2 The continued relevance of the basic tenets of the GATT/WTO system

The emergence of China is only the most prominent of a series of developments that have profoundly altered both the objective and intersubjective conditions affecting the trading system. These include the backlash against globalisation and the consequential erosion of support for trade and investment agreements, the climate crisis, the digitalisation of the economy and the emergence of new technologies with profound implications not only for trade policies but also for security, competitiveness, taxation and competition policies. Politics in several of the key players in the world economy is dominated or strongly influenced by nativists with a limited appetite for international cooperation. The global system of governance is unbalanced in terms of the strength of institutions supporting trade and investment vis à vis those that promote human rights, the protection of the environment, health or development.<sup>16</sup> The fundamental question is to what extent the WTO as it emerged in 1995 still retains its relevance or whether the only realistic way forward is to scale back multilateral cooperation on trade. These trends have been exacerbated by the sense of insecurity and vulnerability to external shocks generated by the pandemic, which increases the political salience of calls for reshoring.

Two hypotheses have been presented that would seem to support the proposition according to which the WTO rules-based system may no longer provide the appropriate framework for the conduct of international trade relations. In his book “Straight talk on trade”, Dani Rodrik presents the “hyper globalisation” hypothesis, according to which the neoliberal ideology pushed from the 1980s for the elimination of all transaction costs that hindered trade and capital flows. In his view, the careful balance of the GATT was abandoned and replaced by an attempt to harmonise behind the border policies and to eliminate the flexibilities that aimed at sustaining the process of progressive liberalisation. He therefore argues for scaling back those commitments in the WTO agreements that are seen as being too intrusive of domestic policy space and expanding domestic safeguard procedures to respond to social dumping.<sup>17</sup> A second, although not necessarily contradictory hypothesis, is presented in a recent article by Anthea Roberts, Henrique Moraes and Victor Ferguson.<sup>18</sup> It argues that we are witnessing a transition from a post-cold war neoliberal order to a geo-economic order, which would require significant changes to the rules, norms and institutions of international trade and investment. Although the article is descriptive and eschews normative prescriptions, it predicts that countries in the new geo-economic order would find it more difficult to agree on rules and that in so far as rules are developed, they may take the form of selective multilateralism or multilateralism minus one solution. It also notes that a geo-economic approach to trade and investment would result in a significant increase in security related restrictions and less recourse to third party adjudication of disputes. The new geoeconomic order would therefore seem to imply that efforts to restore the relevance of the rulebased WTO system are doomed to failure in a context of great power competition.

In this paper, I would like to outline an alternative hypothesis to explain the evolution of the trading system in the period between 1995 and the present day. In doing so, I draw inspiration from the seminal article by John Ruggie that, for the first time, characterised the Bretton Woods/GATT regime as being sustained by a common social purpose that combined multilateralism with the preservation of domestic stability -what he named “embedded

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<sup>15</sup> Robert Zoellick, when deputy secretary of State, made a speech in 2005 asking China to become a “responsible stakeholder” in international organizations. He has recently made the case for moving from a logic of confrontation to one of cooperation: “Cooperation as a stakeholder does not mean the absence of differences. Stakeholders compete too. The management of these differences should take place within a larger framework that offers common benefits”. See: *The China challenge, National interest*, February 14 2020

<sup>16</sup> For a broad perspective on institutions of global governance see Jean Pisani Ferry, *Can Economic multilateralism survive?* Robert Schuman Centre for Advanced studies, 2019/14.

<sup>17</sup> Dani Rodrik, *Straight talk on trade*, Princeton University Press, 2018, Chapter 1, pp 27-29 and Chapter 10, pp 227-235.

<sup>18</sup> Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, “Towards a geo-economic order in international trade and investment”, *Int Economic Law Journal*, volume 22, issue 4, December 2019,

liberalism".<sup>19</sup> Some commentators on the history of the world trading system have drawn from this a contrast between the social purpose of the GATT, which reflected a common commitment by participants to the welfare state, and the neoliberal ideology that, in their view, inspired the establishment of the WTO.<sup>20</sup> My argument is rather that the establishment and evolution of the WTO from the GATT reflects a complex and messy negotiated outcome that includes some neoliberal tendencies but does not fundamentally depart from the core tenets of the embedded liberalism paradigm. To revert to the article by Ruggie, the changes from GATT to WTO can be explained as changes of instruments (rules and procedures) rather than a change of the basic principles and norms (normative framework).<sup>21</sup> I further argue that adapting to the new realities of the 21st century can still be accommodated without a change in the normative framework, although important changes would be required in rules and procedures and the common social purpose should be adapted to reflect the reality of an organization of quasi-universal membership.

In what follows, I will aim first to identify what could be considered as the core tenets of the GATT/WTO normative framework and briefly discuss for each of them the implication of the GATT to WTO transformation, the role of jurisprudence in solving some of the tensions between "neoliberalism" and "embedded liberalism" and finally refer to the challenges that arise as a result of transformations in the world economy and shifts in the relative weight of the main trading partners. This normative framework is presented as a balance between four elements: progressive liberalisation based on the Most Favoured Nation (MFN) principle, respect for regulatory autonomy while respecting the non-discrimination norm, effective trade remedies (i.e. safeguards, antidumping and countervailing duties) to respond to domestic adjustment pressures and a system of third-party adjudication that avoids escalation and politicisation of disputes.

### 1.2.1 Progressive MFN-based liberalisation

The progressive reduction of tariffs on the basis of the MFN principle was the "raison d'être" of the GATT and also its main historical achievement. Major tariff reductions were undertaken in 1947 and as a result of negotiations during the Kennedy (1967), Tokyo (1979) and Uruguay Rounds (1995). Reductions were based on reciprocity amongst a subset of industrialised countries. While developing countries assumed tariff commitments during the Uruguay Round, most of these took the form of ceiling bindings – i.e. bindings at a level higher than applied tariffs. It is important to stress that the fundamental aim of the GATT/WTO system was not simply to bring tariffs down over time but also to ensure non-discrimination and stability in tariff commitments. When the trade regime was extended to cover services, a similar approach was followed as for goods – i.e. to identify a set of negotiable policy instruments on which liberalisation commitments could be progressively bound in a schedule. In the absence of a generally applicable instrument on which to focus negotiations, such as tariffs, the General Agreement on Trade in Services (GATS) system of scheduling is more flexible than that of the GATT since there is no horizontal prohibition of quantitative restrictions or on measures that depart from national treatment. Countries take commitments to eliminate restrictions to market access and national treatment on the basis of a positive list approach.

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<sup>19</sup> John Ruggie, *International regimes, transactions and change: embedded liberalism in the post-war economic order*, *International Organization* 36, Issue 2 (Spring 1982)

<sup>20</sup> An early discussion on how to recover the spirit of "embedded liberalism" in the WTO can be found in Robert Howse and Kalypso Nicolaidis, *Legitimacy through higher law? Why constitutionalising the WTO is a step too far*, in *The Role of the judge in international trade regulation*, Thomas Cottier and Petros Mavroidis (ed), University of Michigan Press (2000). For a discussion of the evolution from GATT to WTO and the "embedded liberalism" paradigm see Andrew Lang, *World trade law after neoliberalism*, Oxford University Press, 2011, chapters 2 and 3.

<sup>21</sup> The article by Ruggie was written before the transformation of GATT into WTO. It is interesting to note that Ruggie considered that the changes introduced in the monetary and trading system at that stage still remained within the 'embedded liberalism' paradigm. Arguably, the changes of the 1970s in the monetary system were more far-reaching than the transformation of GATT into WTO.

The market access outcome of the Uruguay Round negotiations can be explained as remaining within an “embedded liberalism” paradigm with substantial liberalisation combined with a respect for sensitivities. The main question moving forward is to what extent the failure of the DDA negotiations can be seen as being of limited impact since most tariffs are de facto low or whether there are costs associated with the failure of the WTO to deliver significant additional liberalisation since its creation. In Part 2 of this paper, I will argue that the current structure of market access commitments is hard to sustain and that further market access negotiations would be important to maintain the relevance of WTO commitments and better reflect changes in the relative weight of participants in the world economy.

### **1.2.2 Preserving domestic regulatory autonomy while respecting the non-discrimination norm**

The GATT approach to domestic regulation was based on the objective of avoiding discrimination against imported products, although under certain circumstances a country could discriminate in pursuit of a legitimate public policy goal, provided that such discrimination was not arbitrary or protectionist in nature. The key provisions reflecting this “embedded liberalism” paradigm are Article III and Article XX of the GATT. After tariffs were reduced to much lower levels for industrial products and most quantitative restrictions were eliminated, industrialised members of GATT shifted their attention to so-called non-tariff barriers to trade. A first result as regards domestic regulation disciplines was the Tokyo Round plurilateral agreement on Technical Barriers to Trade (TBT). The Uruguay Round introduced two main changes as regards the relationship between the trading system and domestic regulation: the conclusion of an agreement on Sanitary and Phytosanitary Measures (SPS) and the acceptance by all WTO members of the disciplines of the TBT and SPS agreements.<sup>22</sup>

To what extent do the new TBT and SPS agreements reflect a neoliberal ethos that fundamentally departs from the original GATT approach? The text of the agreements includes certain elements that appear to go beyond the “non-discrimination” norm, in particular the reference to international standards under both agreements and the role of science and regulatory coherence under the SPS agreement. As in other WTO agreements, the language agreed by negotiators included enough elements of indeterminacy to allow for different degrees of deference to the decisions of regulatory authorities. There is a need to consider therefore how the rules have been interpreted by the Appellate Body (AB). The comprehensive study by Robert Howse on 20 years of jurisprudence by the AB includes a detailed analysis of both the jurisprudence relating to Article III and XX of GATT and on the TBT and SPS agreement.<sup>23</sup> The main findings can be summarised as follows: a) The AB has developed an interpretative approach to articles III and XX that preserves the right of Members to choose their desired level of regulatory protection, including as regards environmental and ethical concerns, and limits strict scrutiny to correcting specific features of a regulatory measure that appear to imply arbitrary discrimination or impose an undue burden on importers or foreign suppliers; b) The AB has also been ready to interpret the SPS and TBT agreements in a manner that maintains a similar balance to that reflected in its Article III/XX jurisprudence.

Is this a signal of an activist AB that has fundamentally altered the neoliberal ethos of the Uruguay Round agreements? It is worth noting that rather than representing “overreach”, AB jurisprudence on domestic regulation has aimed at ensuring deference towards the regulatory choices of Members. There has been very little contestation

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<sup>22</sup> The Uruguay Round also introduced two major expansions of competence in the trading system, i.e., the inclusion of services and intellectual property. The principles underlying the GATS are very similar to those applicable to trade in goods. TRIPS can be more easily characterised as an agreement that aims at harmonising behind the border policies. To be noted, however, that to a large extent harmonisation was based on standards already developed in WIPO treaties. It is interesting to note that there has been very limited WTO litigation based on TRIPs. Perhaps this is a signal that governments are reluctant to test the limits of the interpretation of TRIPs provisions. In one of the few instances of WTO exercising its legislative function, its General Council adopted in 2003 an amendment of TRIPs on the issue of patents and public health.

<sup>23</sup> Robert Howse, *The World Trade Organization 20 years on: Global Governance by judiciary*, the *European Journal of International Law*, Vol 27, no 1.

by WTO members over AB rulings on issues relating to the articulation between WTO rules and non-trade concerns. In my view the explanation lies in the fact that the basic GATT provisions and the Uruguay Round agreements were sufficiently open ended as to be susceptible to different interpretations. While it cannot be excluded that some Uruguay Round negotiators may have seen the SPS or TBT agreements as an opportunity to push the boundaries of the non-discrimination norm, the rulings of the AB in its early days contributed towards shifting the views of Members towards an approach to interpretation that essentially maintains the basic normative framework of the GATT system.<sup>24</sup> AB jurisprudence on domestic regulation for non-trade concerns has therefore played an important legitimating function by maintaining the necessary policy space for governments, while correcting elements of arbitrariness and ensuring even handedness in the treatment of imported products or services.<sup>25</sup>

### 1.2.3 Maintaining effective remedies to respond to domestic adjustment pressures

Maintaining an effective system of trade remedies as a response to injurious import competition was from the beginning a critical element of the balance between multilateral liberalisation and preserving domestic stability. In particular the United States has always seen effective trade remedies as a key component of the rule-based trading system. The US Reciprocal Trade Agreements programme of the 1930s was based on the political commitment that reduction of tariffs would be undertaken in a manner that avoided injury to domestic producers. The domestic bargain that made it possible for the US to participate in the negotiations that led to the establishment of the GATT included the commitment to incorporate in the new agreement an escape clause that authorised the reintroduction of import restrictions in instances of serious injury.<sup>26</sup> The history of US trade policy since then has aimed at maintaining a vitally important equilibrium between trade liberalisation initiatives and a reinforcement of domestic legislation that authorises administrative import protection when certain conditions are met. During the 1970s there was a general perception that the GATT safeguard provisions were too unwieldy and this led to two policy responses. On the one hand, a reinforcement of anti-dumping law as the instrument of choice to respond to injurious competition and, on the other, to the proliferation of discriminatory restrictions mostly negotiated outside the framework of GATT (the so-called “grey area measures” such as “voluntary” export restraints or “orderly” marketing arrangements). The Tokyo Round negotiations led to plurilateral agreements on anti-dumping and subsidies and countervailing measures. Negotiations on safeguards failed, however, due to the then European Community’s insistence on the principle of selectivity (i.e. the possibility of applying safeguard action only to “disruptive” suppliers).

What was the impact of the Uruguay Round negotiations on the principle of maintaining effective trade remedies? A first important outcome was the agreement to prohibit so called “grey area” measures and to restore multilateral disciplines on safeguards. There were two reasons explaining this policy shift by the EU and the US. First, anti-

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<sup>24</sup> The two most important rulings of the Appellate Body showing sensitivity to health and environmental concerns took place in January 1998 (“Hormones”) and October 1998 (“Shrimps Turtle”) i.e., well before the major contestation of the trading system during the Seattle Ministerial Conference of 1999. The two main rulings reinforcing this deferential jurisprudence intervened in March 2001 (“Asbestos”) and November 2001 (Shrimps Turtle 2), i.e. before the Doha Ministerial Declaration. The Appellate Body therefore anticipated political developments in the WTO and significantly limited the risk of external contestation of its legitimacy. .

<sup>25</sup> In a commentary on the article by Howse, *op cit*, Andrew Lang has argued that the Appellate Body has developed a “regulatory balance” approach that is in between the embedded liberalism and the neoliberal approach to the interpretation of the non-discrimination norm. He disagrees with the characterisation of the Uruguay Round agreements as “neoliberal” and notes: “The practice since the Uruguay Round and the response of WTO members to AB jurisprudence over the last 20 years suggests an alternative story, in which the views of the membership as a whole remained unsettled and mobile in the years following the conclusion of the Uruguay Round and have since been solidifying around something very similar to the approach that the AB has adopted”. See Andrew Lang, *The judicial sensibility of the AB*, *The European Journal of International Law*, Vol 27, no 4 (2017).

<sup>26</sup> See Irwin, *op cit*, p.654, on the discussion concerning legislative authority to participate in the Geneva Conference that resulted in the establishment of GATT as a provisionally applied agreement.

dumping law had become the preferred instrument to provide import relief, thereby limiting the salience of the issue of “selectivity” for safeguard measures. Secondly, the safeguards agreement introduced a number of flexibilities in relation to the original GATT provision and, in particular, the suspension of rebalancing rights by affected exporters for safeguards of less than three years duration. Negotiations on anti-dumping were amongst the most difficult in the round due to the conflicting perspectives of major users (primarily the US and the EU) and those of countries that had been significantly affected by anti-dumping duties (such as Japan and Korea). The final agreement was an uneasy compromise that avoided major changes in relation to the Tokyo Round plurilateral agreement but left several key provisions undefined. A key element agreed in the final phase of the negotiations was a special deferential standard of review (Article 17.6 of the antidumping agreement). As regards subsidies and countervailing measures, the agreement prohibits export subsidies and local content subsidies, while for other subsidies there is a need to demonstrate serious prejudice. The more innovative element was the inclusion of both an amber box of subsidies, for which there would be a rebuttable presumption of serious prejudice, and a green box for certain types of research and development as well as environmental and regional subsidies. These two provisions, however, expired shortly before the Seattle Ministerial and no consensus on their extension was reached.

The outcome of the Uruguay Round maintained the basic normative framework on trade remedies of the GATT/WTO system. The rules on safeguards were made more flexible than under Article XIX of GATT and the basic balance of the Tokyo Round anti-dumping and subsidies agreement remained unaltered. There are, however, two factors that complicate this narrative. These relate to the role of AB and, more importantly, to the consequences of the accession of China to the WTO. A highly debated issue is the extent to which AB jurisprudence has significantly limited the effectiveness of trade remedies. A discussion of this issue goes beyond the scope of this paper, but I would like to venture a few general remarks. The area of policy where AB jurisprudence has been more constraining is safeguards, where the case can be made that a more deferential approach would have better reflected the balance of the Uruguay Round agreement.<sup>27</sup> As regards anti-dumping, despite the controversy relating to the practice of “zeroing”, it is worth noting that most “losses” in WTO dispute settlement have related to procedural elements that can be easily corrected by the investigating authority and that therefore it would be difficult to argue that AB jurisprudence has significantly undermined the effectiveness of the instrument.<sup>28</sup> On subsidies, there are good arguments to criticise the restrictive interpretation made by the AB of the conditions under which a state-owned enterprise may be considered as a provider of a subsidy.<sup>29</sup> However, the problems relating to the effectiveness of the subsidies agreement are broader than the issue of the interpretation of the term “public body”. Indeed, the fundamental problem of subsidies discipline is the difficulty of establishing serious prejudice for non-prohibited subsidies and linked to this the time lags involved in WTO dispute settlement and the weakness of available remedies.

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<sup>27</sup> For an early critique of Appellate Body jurisprudence on safeguards see William J Davey, *The limits of judicial processes*, the Oxford handbook of international trade law, January 2005.

<sup>28</sup> “Zeroing” is a method to calculate dumping margins that gives a zero value to transactions where the margin of dumping is negative, thereby resulting in higher dumping margins. The issue was very controversial in the Uruguay Round and the US considered that its practices were protected by the deferential standard of review in Article 17:6 of the Anti-dumping Agreement. Davey, *op cit*, criticises the limited significance attributed by the AB to Article 17:6 in the zeroing rulings. On zeroing, see also Roger. P Alford, *Reflections on US zeroing: a study in judicial overreach by the WTO AB*, 45 *Columbia Journal of Transnational law*, 2006-2007. For a different perspective see Chad P Bown and Thomas J Prusa, *US Antidumping: much ado about zeroing?* In *Unfinished business? The WTO Doha agenda* (Will Martin and Aditya Matoo eds)

<sup>29</sup> What constitutes a “public body” is critical for the applicability of subsidy disciplines to China where resources are often channelled through state-owned enterprises, On the AB decision, see Isabel Van Damme, *The Appellate Body use of the articles of state responsibility in US-Antidumping and countervailing duties (China)* in C. Chinkin and F Baertens (eds), *Sovereignty, Statehood and State Responsibility. Essays in honour of James Crawford* (Cambridge University Press). For the views of three participants in the Uruguay Round negotiations on subsidies see Michael Cartland, Gerald Depayre and Jan Woznowski, *is something going wrong in WTO dispute settlement?* 46 *Journal of World Trade* (2012).



AB jurisprudence on trade remedies has therefore failed to perform the same legitimating function as in cases relating to domestic regulation.<sup>30</sup> In all fairness, it has to be said that the lack of normative consensus amongst WTO members has not facilitated the task of the adjudicator. In Part 2 of this paper, I argue that some adjustments in the jurisprudence of trade remedies are required. However, the fundamental question is whether the rules and procedures need to be clarified or adjusted so as to reflect the impact of market distortions on the application of antidumping and countervailing duty law.<sup>31</sup> The interaction of different economic systems within a shared framework of rules with fewer frictions would require a careful balance between stronger disciplines on domestic industrial policies and sufficiently effective trade remedies to counter market distortions. The adjustments required to trade remedies rules are better addressed through negotiations since any ruling on such highly sensitive matters by the Appellate Body would inevitably be heavily contested.

#### 1.2.4 Third party adjudication of trade disputes

The original GATT had a very rudimentary system for adjudicating on trade disputes. However, from the early days there was a desire to avoid trade disputes taking on a political dimension and this led to a process of progressive “legalisation” of dispute settlement procedures. Already before the Uruguay Round, GATT rulings essentially relied on legal reasoning and dispute settlement procedures had increasingly become codified. The system became, dysfunctional in the 1980s as panellists had to adjudicate on sensitive issues for which there was no normative consensus amongst GATT members. Many of these cases related to conflicts between the US and the European Community on preferential agreements, domestic regulations on sanitary matters and subsidies. As a result, panel reports frequently were blocked. Tensions were further aggravated by the US decision after the Tokyo Round to pursue a more aggressive enforcement policy. This included the unilateral application of sanctions for issues not covered by internationally agreed rules, such as intellectual property or services, or when the dispute settlement procedure was blocked because of the consensus rule.<sup>32</sup>

The key issue in the Uruguay Round was not therefore a conflict between a diplomatic and a judicial approach to dispute settlement. Indeed, the European Community was at the time a defender of the consensus rule and of a “diplomatic” approach to dispute settlement, whereas the US was pushing for binding adjudication.<sup>33</sup> Most aspects of the dispute settlement understanding were negotiated at the technical level and were already agreed by the time of the Montreal Midterm Review. The key political trade-off was between doing away with the positive

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<sup>30</sup> What explains the more deferential approach followed by the Appellate Body in cases relating to non-trade concerns in relation to trade remedies cases? There is no simple answer to this question, but I would venture to suggest three reasons: a) In the case of trade remedies, there is a much higher degree of internal contestation and textual indeterminacy than on issues relating to the interpretation of Article III/XX or the TBT/SPS agreement. In reality the latter issues are classical questions of how to balance trade and non-trade concerns that any legal system needs to address; b) The Appellate Body was much more sensitive to the challenge to WTO legitimacy that could arise from rulings in areas that went beyond the narrow trade competence and therefore raised broader issues of external legitimacy; c) The US was the only member significantly contesting rulings on antidumping and safeguards, whereas other main trading partners were supportive of AB jurisprudence.

<sup>31</sup> For a discussion of the ambiguities relating to the concept of “market distortions”, see Andrew Lang, *Heterodox markets and 'market distortions' in the global trading system*, *Journal of international economic law*, 2019, 22, p677

<sup>32</sup> The best history of dispute settlement in the times of GATT and early WTO has been written by the late Robert Hudec. A collection of his essays can be found in Robert Hudec, *Essays on the nature of International trade law*, London, Cameron May 1999. For a discussion of disputes between the US and in the European Community in the 80s see Ignacio Garcia Bercero, *Trade laws, GATT and the management of trade disputes between the US and the EEC*, *Yearbook of European Law*, January 1985.

<sup>33</sup> The argument has sometimes been made according to which the European Commission sees the Appellate Body as fulfilling internationally a similar role to that of the European Court of Justice at the EU level. In reality, the Commission has always opposed direct effect of WTO provisions and supported a deferential interpretation of the Article XX exception that is clearly at odds with the jurisprudential approach of the ECJ as regards restrictions to internal trade. This difference in jurisprudential approaches is not affected by the fact that panels and the AB may sometimes use concepts like proportionality also used by the ECJ. See also Claus Dieter Ehlerman, *Six years on the bench of the “World Trade Court”: some personal experiences as member of the Appellate Body*, *Journal of World Trade* (2002). Ehlerman highlights the substantial differences in the interpretative approach of the ECJ and the Appellate Body.

consensus rule and the US acceptance of relying exclusively on third party adjudication to enforce its trade rights. Once a solution was found on this point, it was not too difficult to conclude negotiations on the new Dispute Settlement Understanding (DSU). The decision to create an Appellate Body was the result of a consensus among the lawyers in charge of the negotiations that a mechanism was required to correct legal errors by panels and to maintain legal coherence. At no point was there a deeper reflection on the broader systemic implications of combining a “judicial-like” institution with a panel system that essentially relied on diplomats working on a part-time basis and with the essential support of the GATT/WTO secretariat.<sup>34</sup>

Does binding dispute settlement and the AB's creation signal a change of the normative framework on which the original GATT was based? There is indeed little question that the decision to rely on binding adjudication and do away with the consensus rule represented a major change in the trade regime with important implications for the overall functioning of the system. I would argue, however, that binding dispute settlement can still be explained as a change of rules and procedures rather than a change of the normative framework. The need to rely on greater legalisation of procedures represented the culmination of evolutionary changes that responded to the growing complexity of trade disputes and the need to rely on the “law” as the necessary legitimating factor to convince domestic constituencies of the need to comply with decisions emanating from an international organization. The normative impulse is not therefore fundamentally different from that of the original GATT founders, although old GATT hands would certainly reminisce on the greater scope for diplomatic solutions to disputes in the body's early days.<sup>35</sup> The reality is that reverting to the pre-WTO system would not bring back the club-like process in which countries would use dispute settlement as part of a continuum of diplomatic negotiations. It would rather bring back the conflicts of the 1980s in a much more volatile and politically fragile environment.

In any event, it is important not to confuse “legalisation” with the influence of a neoliberal ethos.<sup>36</sup> The decision in the Uruguay Round to rely on the rule of law for dispute adjudication reflected a determination to do away with power diplomacy in the conduct of trade relations. It has to be seen together with the decision to prohibit grey area measures and to harness Section 301 within a multilateral framework. Uruguay Round negotiators were not in favour of “constitutionalising” international trade law or giving direct effect to WTO rulings.

To recapitulate, I consider that the transformation of GATT into WTO did not represent an abandonment of the overall normative framework underlying the GATT system. Of course, the system could no longer rely on the commitment by a small group of countries to maintain the balance between multilateral liberalisation and domestic stability. The rules agreed reflected a tension between “neoliberal” and “embedded liberalism” tendencies and the organisation lacked a common sense of purpose about what the WTO was aiming to achieve. In terms of institutional design, the Uruguay Round significantly reinforced the dispute settlement function, while introducing no major changes in the structure for decision making and negotiations. If anything the flexibility to develop rules amongst a subset of WTO members was significantly curtailed and the requirement to issue binding interpretations of WTO rules made more rigid.<sup>37</sup> The negotiating function became paralysed due both to institutional rigidity and profound differences as to the direction in which the organisation should evolve. The Appellate Body played an important legitimating role in maintaining balance between the right to regulate and the strengthening of the

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<sup>34</sup> An early analysis of the tension between the appellate and panel phase of dispute settlement can be found in Joseph HH Weiler, *The rule of lawyers and the ethos of diplomats: reflections on the internal and external legitimacy of WTO dispute settlement*, 35 *Journal of World Trade*, 2001.

<sup>35</sup> For a recollection about the early days of GATT see Paul Luyten, *We were young together: at the GATT 1956-1958*, Gabrielle Marceau (ed), *A history of law and lawyers at GATT/WTO*, Cambridge University Press. Luyten was responsible for developing over his long career the position of the European Community in GATT negotiations. He retired at the beginning of the Uruguay Round.

<sup>36</sup> For the argument that the intellectual origins of the WTO can be linked to the neoliberal movement see Quin Slobodian, *Globalists: The end of empire and the birth of neoliberalism*, Harvard University Press (2019). The book provided a very interesting historical analysis. It overestimates, however, the influence that certain members of the GATT secretariat had on the Uruguay Round negotiations. In particular, there was no receptivity by Uruguay Round negotiators to arguments in favour of the direct effect of WTO provisions. For an influential critique of the arguments in favour of constitutionalising the WTO see Howse and Nicolaidis, *op cit*

<sup>37</sup> For a study of the evolution of the institutional provisions of GATT/WTO see Joost Pauwelyn, *The transformation of world trade*, Duke Law School legal studies, October 2005. The author argues that reduced “exit” due to binding dispute settlement went together with a reinforced “voice” through the strengthening of the consensus rule and higher voting requirements.

“non-discrimination” norm as regards domestic regulation. Its role has been much more contested as regards its jurisprudence on trade remedies, which are, however, of key importance for the management of the interface between countries with different economic systems due to the state's role in the economy. As a result, a negative loop has developed over time in which the absence of adaptations to the rules feeds into increasingly strident criticism by the US of an “activist” AB. The system as it emerged from the Uruguay Round was therefore unstable and poorly adapted to respond to changes in the world economy and in the geopolitical context, although until recently all major players saw the value of abiding by its rules.

The structural changes in the world economy and the US-China conflict are bound to require important adaptations of the rules and procedures of the WTO. Contrary to the situation during the Cold War, two of the three main players in the trading system are engaged in a geopolitical conflict and the dividing line between trade policy and national security has become blurred. The digitalisation of the economy raises questions for which current WTO rules provide no response. Climate change and the consequences of the Covid-19 pandemic will result in profound economic transformations and greater public intervention in the economy. Does this mean that the normative framework provided by WTO rules has lost its relevance? Part 2 of this paper will argue for a number of reforms that update rules and institutions, while maintaining the core tenets of the GATT/WTO system. Much depends, however, on the evolution of the US-China conflict and how other WTO members react to the new political and economic context. The current crisis gives rise to four risks to the viability of the rule-based trading system:

**The use of tariffs or quotas as a geo-economic instrument:** While national security-related restrictions are likely to become more frequent, their impact on the viability of a rule-based system will be less pronounced if the policy instruments used are sufficiently targeted on security risks linked to critical technologies or critical infrastructures.<sup>38</sup> Investment screening and export controls on critical technologies are two instruments that are likely to become more frequent but do not upset the core tenets of the GATT/WTO system. (Indeed such instruments have largely remained outside WTO disciplines) On the other hand, the use of tariffs or quotas as a tool to protect certain economic sectors or act as unilateral retaliation against the policies of others would fundamentally question the stability of a rule-based trading system. It is, therefore, crucial that the current policy of the Trump Administration to use section 232 of US trade law as an instrument of protection or of Section 301 to apply unilateral discriminatory restrictions outside WTO dispute settlement is corrected and does not become the new norm. Using national security as a justification for pursuing economic objectives risks undermining the legitimacy of those instances in which there is a genuine security reason to restrict trade or investment.

**Increased recourse to beggar thy neighbour trade and industrial policies:** The US-China conflict has both a geopolitical and a level playing field dimension. In the absence of modernised rules to deal with the negative spill overs of industrial policies, there is a risk that conflicts relating to the level playing field become geopolitical. Or conversely that economic instruments are weaponised to achieve geopolitical goals. This risk has been increased by calls for reshoring as a reaction to the Covid-19 pandemic. While there is a case for increasing the resilience and diversification of global value chains (in particular in the health sector), the risk is that, if uncontrolled, such policies could open a spiral of trade restrictive actions. The potential for conflict will increase exponentially as a growing number of countries react to the trade distortive policies of others, investment or export controls start being used for reasons unrelated to national security or there is a re-emergence of “grey area measures” whether in the form of “voluntary” export restrictions or discriminatory import purchase commitments. Avoiding such a negative spiral would require the acceptance by all key players in the trading system of enhanced disciplines on the negative spill overs of industrial policies. This is why negotiations on subsidies and other forms of state intervention in the economy should be at a key component of the WTO reform agenda.

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<sup>38</sup> There is, however, a risk of conflicts arising from differences in the assessment of risk amongst allies as illustrated by the current transatlantic tensions on how to deal with access to telecommunications networks by Huawei. Such risk is magnified if one party seeks to impose its risk assessment on the other. While the WTO is not the proper forum to adjudicate on difference in the assessment of security risk linked to technologies, close transatlantic cooperation and dialogue is needed to avoid conflicts.

**The erosion of binding third party adjudication:** Even if most users of the WTO dispute settlement have agreed on an arbitration mechanism that maintains a functioning system of third party adjudication, the fact that such a system would not apply in trade relations between the US and other trading partners introduces an element of instability that cannot be sustained over the medium term. The US-China deal is structured in such a manner that each of the parties can unilaterally determine whether there is a breach. This is fundamentally against the principles underlying dispute settlement since GATT days. The fact that the US seeks to play by different rules is likely to make trade differences with it difficult to manage and prone to an escalation of conflicts. Problems would, moreover, not be limited to disputes involving the US: Interim arbitration among a subset of WTO members is unlikely to have the same legitimacy as a universal system of adjudication. In so far as disputes relate to highly sensitive issues on which rules have not been updated, arbitration is likely to be increasingly under strain. Restoring a legitimate universal binding system of third-party adjudication is essential for maintaining a rule-based approach to international trade relations.

**The fragmentation of the global trading system:** The paralysis of the WTO negotiating function has led to a proliferation of regional trade agreements. While until recently this could be seen as a benign development that could contribute to competitive liberalisation, the picture changes in a context where key players of the trading system no longer feel bound by WTO rules and such rules are not subject to effective enforcement. The risk is that preferential agreements are progressively transformed into exclusionary hub-and-spoke agreements that seek to establish spheres of influence based on conflicting rules. Such bilateral or regional trade agreements are unlikely in any event to provide effective rules for managing conflicts relating to the spill over effects of industrial policies. No free trade agreement, for instance, has developed effective disciplines on subsidies, since participants are unlikely to wish to tie their hands in the absence of disciplines on major subsidisers. In many areas, free trade agreements do not go beyond a reaffirmation of existing WTO rules and their enforcement mechanism is untested. Restoring the credibility of the WTO negotiation and adjudication function is essential both to limit the trade diversion impact of regional trade agreements and to update global trade rules so as to avoid fragmentation of the global trading system and conflicts between blocks. This also argues for major trading powers prioritising WTO reform over the bilateral trade agenda.

The continuation of these trends can lead to a dystopian scenario in which the US and China seek to achieve full decoupling of their economies and to establish spheres of influence. Other big players would increasingly come to the view that they should also be released from the constraints of the rules of the trading system. The consequence is likely to be a breakdown of international cooperation on trade and the exponential growth of both protectionist actions and trade conflicts. And any escalation in trade conflicts would make it impossible to step up cooperation on recovery from the Covid-19 pandemic, climate change or other issues where effective action requires the commitment of both China and the US. To the extent that the WTO survives, it would have lost its relevance. While the EU and others can (and should) try to shore up the rule-based trading system, it is difficult to imagine a functioning WTO without the effective participation of either the US or China.

The new geo-economic order is, therefore, unlikely to be very orderly. It would be illusory, however, to think that the old order can simply be restored.<sup>39</sup> What is needed is to create an order that responds to the global challenges of the 21 century, while building upon the normative framework of the rule-based order that can and should be preserved. As regards the trading system, the core tenets of the GATT/WTO system are as relevant

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<sup>39</sup> In a recent article in *Foreign Affairs*, Richard Hass has compared the current geopolitical context with the Concert of Europe of the 19th Century. The crisis of the Concert of Europe due to the emergence of new powers and economic transformations led to a deterioration in the pre-existing order and eventually to World War 1. This deterioration can, however, be managed through policies that strengthen certain aspects of the old order and supplement them with measures that account for changing power dynamics and new global problems. In this context, he writes: "The United States also needs to reach out to others to address problems of globalization, especially climate change, trade and cyber operations. These will require not resurrecting the old order but building a new one. Efforts to limit and adapt to climate change need to be more ambitious. The WTO must be amended to address the sort of issues raised by China's appropriation of technology, provision of subsidies to domestic firms, and use of non-tariff barriers to trade." (Richard Hass, *How a World Order Ends: And What Comes in its Wake*, *Foreign Affairs* January/February 2019.

today as they were in 1947 or 1995. They are also sufficiently flexible to be adapted to the new geopolitical context. As the two main architects of the WTO system, the US and the EU have a strategic interest in cooperating to update the rules of that system. China has the opportunity to act as “responsible stakeholder” if, instead of simply defending a status quo from which it greatly benefits, it is ready to assume those responsibilities that are consonant with its weight in the global economy. Fundamental political choices need to be taken on how to manage the US-China rivalry. It is to be hoped that instead of deepening confrontation or seeking *ad hoc* bilateral short-term fixes, both the US and China are ready to engage in negotiations to adapt rules and commitments that were agreed 25 years ago when the WTO was created. The EU and other players in the trading system should deploy all necessary efforts to steer discussions in such a direction through their advocacy of an ambitious agenda for WTO reform.

## 2 An agenda for WTO reform

The WTO as an organisation performs three core functions: negotiations of binding rules and market access commitments, adjudication of disputes and monitoring and deliberation on trade policies. In order to ensure its continued relevance, improvements in these three functions should be addressed that contribute both to their effectiveness and legitimacy.

The most critical reform is to restore the credibility of the negotiating function so as to ensure that market access commitments and rules respond to the realities of 21st century trade, including the emergence of China as the largest trading nation. There is, moreover, a close connection between the crisis in dispute settlement and the failure to ensure an updating of the rules, in particular those relating to trade remedies. A reformed WTO should also be in a better position to contribute towards the implementation of the UN sustainable development goals (SDGs). Strengthening the role of WTO as a forum for deliberating on trade policy challenges and for addressing trade concerns and promoting regulatory cooperation can also deflect pressure from WTO dispute settlement.<sup>40</sup>

Reform should result in a better balance between the role of the political organs of WTO, the Appellate Body and the Director General/Secretariat. While this paper is not focused on institutional reforms, the changes proposed on the three core WTO functions also have institutional implications. WTO political organs would be reinforced through an improved negotiating function, mechanisms for AB accountability and high-level support for the contribution of trade policy to the broader goals of the international community. The AB should witness less pressure on its role as a result of updated rules, an improved monitoring function and a reinforcement of the role of panels in fact-finding. In comparison with the first 25 years of the WTO, the appellate function is likely to play a more limited role and be strictly focused on the correction of legal errors by panels while exercising a maximum of judicial economy. The Director General (DG)/Secretariat can be expected to play a critical role in a reinforced policy function by promoting WTO values and cooperating with UN bodies in contributing towards the implementation of the SDGs. This should imply an acceptance by WTO members of the DG's role in taking initiatives and making proposals for deliberation by WTO members.

### 2.1 Revitalising the WTO negotiating function

#### 2.1.1 Problem identification

At the conclusion of the Uruguay Round negotiations, there was a widespread view that the days of comprehensive negotiating rounds were over and that the WTO would have to reimagine its negotiating function.<sup>41</sup> This was not, however, the path taken in the run-up to the Seattle Ministerial. Instead three conflicting views emerged on the future WTO negotiating agenda. The American view, supported by the Cairns group of agricultural exporters, was that negotiations should focus on market access and in particular on the unfinished business of the Uruguay Round. The EU was concerned about an unbalanced focus on agriculture and sought to lead the way in support of a comprehensive agenda including development of new rules on investment, trade facilitation, procurement and competition. There were, however, very few takers. Most developing countries were resentful about the way in which the Uruguay Round had been concluded and argued for an agenda focused on implementation and re-balancing of Uruguay Round commitments. After the failed Seattle Ministerial, close transatlantic cooperation and

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<sup>40</sup> See Robert Wolfe, Reforming WTO Conflict management, Why and How to improve the use of "Specific Trade Concerns", Bertelsmann Stiftung Working Paper, 24 2 2020 and Informal learning and WTO renewal, using thematic sessions to create more opportunities for dialogue, Bertelsmann Stiftung Working paper, 24, 2, 2020

<sup>41</sup> During the initial phase of the Uruguay Round, institutional issues were discussed in the Functioning of the GATT group (FOG), where the EC presented its proposal to establish a Multilateral Trade Organization (later changed to WTO at US request). The American chairman of the FOG group, Julius Katz, several times argued that in future the negotiating function should be a permanent feature of the organisation rather than being structured in periodic negotiating rounds.

efforts to bring developing countries on board led to the launch of the so-called Doha Development Agenda (DDA).

The DDA when launched was based on a highly ambitious and comprehensive agenda that had to be negotiated and concluded as a single undertaking requiring consensus of all WTO members. With the benefit of hindsight, it is easy to understand why the DDA was doomed to fail. The rules part of the negotiations was soon abandoned or neglected, thereby missing the opportunity to update the WTO rule book to cope with the challenge of the incorporation of China into the trading system.<sup>42</sup> There was very little cross-fertilisation between the effort to launch the DDA and the conclusion of the China accession negotiations, even if both events happened at the same time. Indeed, China's accession also had a negative impact on the readiness of WTO members to envisage ambitious market access negotiations as countries were experiencing difficulties in adjusting to the "China shock" of intensified import competition. The negotiating effort was, moreover, mostly focused on tariffs and agriculture subsidies and a lesser priority was given to services despite the fact that this was the most dynamic sector of the world economy. Although negotiators were very close to reaching an agreement on the key market access issues, by July 2008 the DDA negotiations had all but collapsed and the focus of trade policy had decisively shifted towards bilateral and non-WTO plurilateral agreements.<sup>43</sup>

The failure of the DDA has seriously impacted on the credibility of the WTO as a negotiating forum. The interest of the business community has shifted towards the bilateral agenda. Fear of failure and complacency lead to the reluctance of governments to discuss in the WTO arena core market access issues or hard commitments relating to the level playing field. It is difficult, however, to see how a rule-based solution to US-China tensions can be achieved in the absence of negotiations that encompass subsidies, trade remedies and core market access issues. And such issues are unlikely to be solved in the absence of a broader negotiation that is open to participation by other WTO members. Delivering on trade liberalisation is also important for the WTO to contribute to economic recovery, in particular if market opening can be seen as contributing to broader public health and sustainability objectives. Moreover, in defining a new agenda for the WTO, one should not totally ignore the DDA legacy. Many countries have made clear that commitments on agriculture have to be part of any WTO reform agenda. To avoid the pitfalls that led to failure in 2008, a new approach to negotiations that is simpler and avoids core sensitivities is required.

### 2.1.2 Proposals for WTO reform

This paper does not aim at providing a comprehensive overview of all the issues that could be part of the WTO negotiating agenda. The focus in this section is, first, on those horizontal issues that need to be tackled to introduce greater flexibility into the WTO negotiating function. A rigid single undertaking approach should be avoided by accommodating open plurilateral agreements within the WTO system. This would restore a flexibility that the GATT used to have when a series of plurilateral agreements emerged at the conclusion of the Tokyo Round. On special and differential treatment, a way forward on a highly divisive topic could be based on combining greater differentiation in market access commitments with a more targeted approach in rules negotiations. This could be based on country-specific flexibilities that support the efforts of developing countries wishing to further integrate

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<sup>42</sup> The original DDA mandate had a strong rules component. Apart from the so-called Singapore issues (investment, competition, transparency in government procurement and trade facilitation), there was a broad mandate to negotiate on trade remedies and a rather limited mandate to negotiate on trade and the environment. The EU was the main proponent of the inclusion of investment and competition in the global trade agenda. The proposals were relatively modest - a basic framework of rules on competition, a focus on investment market access to the exclusion of investment protection standards or investor to state dispute settlement. Despite this, they suffered from the general fatigue about new rules negotiations and the fear about "mandate creep" linked to the experience of the Uruguay Round negotiations. Unfortunately, the EU only signalled at a very late stage an opening towards plurilateral agreements and failed to articulate the reasons why rules on investment and competition would be important in view of the incorporation of China within the global trading system.

<sup>43</sup> For a history of the DDA negotiations see Paul Blustein, *Misadventures of the Most Favoured Nations*, Public Affairs, New York

within the global economy. In terms of substantive negotiating areas, this paper focuses on market access and rules relating to the level playing field; since these are at the core of the US-China conflict. It does not substantively discuss, therefore, other important negotiating areas such as e-commerce. Negotiations relating to dispute settlement and to sustainable development are discussed in the next two sections.

### **A new architecture for plurilateral agreements**

Under Article X:9 of the WTO agreement, the Ministerial Conference may decide by consensus alone to add trade agreements concluded by a group of WTO members to Annex 4. This provision has not been used since the WTO entered into force. Instead, WTO members have concluded plurilateral agreements through the technique of adding such agreements to their schedules of tariffs or services commitments. This approach is likely to be followed for the new disciplines being negotiated on domestic regulation of services. It is not clear, however, how other ongoing plurilateral initiatives can be incorporated within the WTO. Inclusion in the schedule has two main drawbacks: a) Any non-participant may bring a dispute settlement case for breach of scheduled commitments. This would be politically difficult to accept if plurilateral agreements include meaningful WTO-plus commitments (i.e. prohibition of certain types of subsidies); b) Some rule commitments may have no logical connection to the schedules. Where to schedule, for instance, commitments on investment facilitation since investment in sectors other than services is not covered by WTO commitments? Where should the commitments of an e-commerce agreement be scheduled since these have a much broader scope than services trade?

The proliferation of plurilateral initiatives since the Buenos Aires Ministerial is a signal that many WTO members see merit in using the WTO framework to develop new rules.<sup>44</sup> Even if not all members decide to subscribe to the commitments, plurilateral agreements open to any interested WTO member would avoid the fragmentation of the trading system arising from different rules on the same topic included in free trade agreements (FTAs). WTO plurilateral agreements also have the advantage of being serviced by the WTO secretariat and subject to WTO dispute settlement.

There is a need, therefore, to restore the flexibility that the system used to have to conclude in the WTO framework open plurilateral agreements.<sup>45</sup> Provided that the rights of non-participants are not undermined, there is no justification for exploiting the consensus rule to prevent countries from using the WTO framework to agree on disciplines that go beyond the current WTO rules. If the rights of non-participants are preserved, blocking incorporation of an open agreement in Annex IV of the WTO can only be explained as an illegitimate attempt to push issue linkages. The alternative to open plurilateral agreements would not in any event be genuine multilateral rule making but rather increased reliance on FTAs or on other forms of negotiation outside the WTO framework. The legitimacy of WTO plurilateral agreements crucially hinges on ensuring the principle of openness and inclusiveness so that any interested WTO member has the opportunity to participate in negotiations and decide whether or not to subscribe to the new commitments. A WTO secretariat responsibility should, therefore, be to take steps to facilitate participation by developing countries, including through the coordination of support for capacity building and the dissemination of objective information on the issues under negotiation. The agreements should, moreover, have in-built flexibilities for gradually taking on commitments in areas linked to capacity constraints.

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<sup>44</sup> During the Buenos Aires Ministerial conference, a large number of WTO members announced their participation in initiatives to discuss within the WTO framework negotiations on trade related aspects of electronic commerce (71 members), investment facilitation (70 members), micro, small and medium sized enterprises (87 members). Other members have joined since. Although not formally part of the WTO agenda, meetings are open to the participation of any interested member.

<sup>45</sup> The focus on concluding the Uruguay Round as a single undertaking led the WTO drafters to limit the flexibility to conclude open plurilateral agreements in comparison with what was available in the days of the GATT. With the benefit of hindsight, this was a mistake. On the issue of open plurilateral agreements, see Bernard Hoekman and Petros Mavroidis, WTO "a la carte" or "menu du jour": assessing the case for more plurilateral agreement, *The European Journal of International Law*, Volume 26, no 2(2016). See more recently Bernard Hoekman and Charles Sabel, Open plurilateral agreements, Global spill overs and the Multilateral trading system, Bertelsmann Stiftung, Working paper, version 25, 3, 2020.



In order to encourage the integration of such agreements within the WTO, it would be helpful if the ministerial conference were to adopt a framework decision providing that open plurilateral agreements that meet certain conditions could in principle be added to Annex 4. Although a case-by-case decision would still be needed to incorporate a specific agreement, the ministerial decision would provide the framework to consider such requests and make it more difficult for a country to block consensus if the conditions are fulfilled. The key criteria to be met by open plurilateral agreements could include:

- 1) Agreements should be negotiated within the WTO framework and open to participation by any interested WTO member. The WTO secretariat will service negotiations and ensure their transparency vis-à-vis all members and the public. A particular effort should be made to disseminate information that facilitates participation by developing countries.
- 2) The request to include an agreement in Annex 4 should signal support by a significant number of WTO members representing a significant percentage of trade. This requirement does not need to be translated into a precise numerical target so as to leave scope for case-by-case consideration.
- 3) After its conclusion, the agreement should be open to accession by any member that is ready to accept the same commitments as the original members. In the case of developing countries, certain commitments would be subject to transitional periods linked to capacity constraints. The WTO secretariat would coordinate assistance linked to capacity building.
- 4) Non-participants should be able to attend meetings of the relevant committees as observers. This would facilitate their capacity to evaluate the functioning of the agreements in case they decide to join at a later stage.
- 5) The agreement may not limit the existing rights of non-participants under the WTO agreement. This notwithstanding, non-participants may not bring claims against participants that are based on the provisions of the plurilateral agreement.

This final condition provides the crucial difference with the approach of including plurilateral agreements in the schedule of commitments. Let's imagine for instance a plurilateral agreement on subsidies that includes a ban on unconditional guarantees, as recently suggested by the US, EU and Japan. A country that does not participate in the plurilateral agreement could of course challenge an unconditional guarantee granted by a participant, but it would need to demonstrate serious prejudice under the provisions of the subsidies agreement to which it is party. If the stricter subsidies rules took the form of scheduled commitments, it would be possible for any WTO member to bring a case based on the prohibition of unconditional guarantees, even if it has not been ready to accept the same discipline for its own subsidies. Such free riding is likely to be politically unacceptable. It is important to stress that the limitations on participants of being able to bring claims based on the plurilateral (agreement) does not represent a breach of the MFN provisions in the WTO agreement. It is simply the logical consequence of the fact that a plurilateral agreement cannot confer rights or impose obligations on non-participants.

It has sometimes been suggested that it should also be possible for plurilateral agreements to derogate from the MFN rule. It is difficult, however, to imagine how WTO members could accept that their existing rights should be limited through an agreement of which they are not members. Derogations from MFN would only be possible if the agreement fulfils the conditions of Article XXIV (goods) or Article V GATS (services). Certain commitments in a plurilateral agreement may however be made conditional upon the fulfilment of certain objective conditions, as is already the case for a number of WTO rules relating to regulatory matters.

The criteria enumerated in the framework ministerial decision are, therefore, intended to provide a balance between the values of inclusiveness, protection of the rights of non-participants and the possibility for participants to assume commitments that go beyond WTO rules without free riding. At the time of writing, plurilateral initiatives are ongoing on electronic commerce, domestic regulation on services and investment facilitation. While some of these may be concluded as scheduled commitments, for others the new architecture for open plurilateral (agreements) provides a more appropriate institutional framework. An open plurilateral may also be the more realistic

approach to strengthen WTO disciplines on industrial subsidies. Beyond the immediate reform agenda, the new architecture for open plurilateral agreements would increase the WTO's capacity to adapt its rule book to respond to new challenges in the world economy and restore the centrality of the multilateral system for rules development. The WTO toolbox could combine four instruments: scheduled commitments on market access; multilateral rules in those instances in which there is a need to modify WTO agreements or develop a common interpretation of WTO rules; open plurilateral agreements on developing new rules; and non-binding guidance on areas unripe for binding and enforceable rules.

### **A new approach to special and differential treatment**

One of the keys to unblock negotiations in the WTO is to develop a new approach to special and differential treatment, i.e. those special provisions or derogations that apply to developing countries.<sup>46</sup> The US has already put the issue firmly on the WTO agenda by arguing that certain categories of countries should not claim such special and differential treatment. The US proposal fails, however, to differentiate between China and other emerging economies that have only achieved competitiveness in limited sectors and some of which are still in the lower middle-income World Bank category.<sup>47</sup> This proposal has been strongly contested by a coalition of developing countries led by China and there appears to be little prospect of finding a resolution on the basis of an abstract discussion of what constitutes developing country status.

A more pragmatic approach could be based on a distinction between how to tackle special and differential treatment in negotiations on market access (and subsidies) and in new rules negotiations. As regards market access, the GATT/WTO system has never had rigid rules regarding special and differential treatment, but rather relied on expectations as to reciprocity, which evolve over time. On the basis of the realities of the world economy, it is reasonable to expect a higher level of commitment from three categories of countries: a) OECD members (including future accession countries); b) High-income countries according to the World Bank classification; c) Countries that represent a sufficiently high percentage of exports globally or per sector. With more than 12% of global exports, China should certainly be considered as fulfilling the export competitiveness criteria. Other middle-income countries that are competitive at the sectoral level would be expected to take on full commitments only for sectors in which they are competitive. Rather than having a rigid approach as to what constitutes export competitiveness at the sectoral level, tariff negotiations could address this issue as part of the discussions on what constitutes a critical mass, sector per sector. In the case of subsidies negotiations, it may be necessary, however, to agree on specific export competitiveness thresholds at which stricter disciplines would be triggered at sectoral level.

As regard new rules negotiation, the approach developed in the trade facilitation agreement could provide a basis for establishing a closer connection between special and differential treatment and genuine capacity constraints. The aim of special and differential treatment should be to enable countries to benefit from rules that foster integration within the global economy. In the course of negotiations, individual developing countries could indicate in which precise areas they need more time to fulfil commitments and the reasons for any such derogation. In so far as some rules may require institution building, it is logical to link fulfilment of commitments to support for capacity building. Once negotiations are concluded, countries that so desire could enter into cooperation programmes that identify their capacity building needs and the mechanisms for support. An important component of WTO reform

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<sup>46</sup> On special and differential treatment, see Patrick Low, Hamid Mamdouh and Evan Rogerson, Balancing rights and obligations in the WTO - a shared responsibility, Government of Sweden, and James Bacchus and Inu Manak, The development dimension: What to do about differential treatment in trade, Cato institute, April 13 2020

<sup>47</sup> The US proposal is included in WT/GC/W764(15 February 2019). See also US Communication in W/757/Rev 1 of 14 February 2019. The US proposes that WTO members will not avail themselves of special and differential treatment if they are members of OECD or are in the process of negotiating accession to the OECD, are members of the G20, are classified as high income by World Bank or account for 0.5 percent or more of global merchandise trade. To be noted that the US proposal would include countries like India, Indonesia or Vietnam that are classified by the World Bank as lower middle-income countries. While those countries are competitive in certain sectors, it is difficult to argue that under no circumstances may they have a legitimate case for special and differential treatment. For a criticism of the US criteria see Anabel Gonzalez, Revisiting special and differential treatment in the WTO, East Asia Forum 26 March 2019.

would be to extend the role of the secretariat to coordinate and mobilise resources in support of trade-related capacity building. This may be of particular relevance to ensure the inclusiveness of new agreements on issues such as e-commerce or investment facilitation. Since new rules negotiations are likely to take the form of open plurilateral agreements, countries would in any event have the option to leave until a later stage any decision on whether or not to join the new agreement.

While it would be desirable to agree multilaterally on certain common principles relating to special and differential treatment, it may be more realistic to have participants develop informally a convergent approach on how to tackle such treatment in each individual negotiating area. This would allow for the necessary flexibility to consider the conditions of each specific area of negotiations. On market access and subsidies, the prospects for making progress would in any event require a convergent approach that includes China, the US and the EU. On new rules negotiations, a dialogue with the African group would be of critical importance in identifying which flexibilities are needed to facilitate their participation in plurilateral agreements on new rules.

### **Negotiations on subsidies and on trade remedies**

As discussed in Part 1 of this paper, the current disciplines on industrial subsidies are ineffective and a major source of tension between China and other major trading partners. The issue of subsidies has, however, a much broader significance than the US-China conflict. There is evidence that following the 2008 financial crisis, subsidies have become the most significant instrument distorting market access and competition in international markets.<sup>48</sup> Recovery from the pandemic is also likely to imply more government intervention in the economy. While there may well be a justification for more active industrial policies, there is also a significant risk of negative spill overs and trade conflicts. Only countries with deep pockets are likely to prevail in a global subsidy war. At the same time, there is a need to recognise that subsidies may be necessary to correct for market failures. The challenge is to define WTO rules in a manner that ensures non-interference with government action to correct such failures while providing effective remedies to counter negative spill overs on third countries.

A balanced approach to negotiations would have to include disciplines both on industrial subsidies and on domestic agricultural support, although the approach to each negotiation needs to take into account differences in the legal framework. On industrial subsidies, the US, EU and Japan recently agreed on a trilateral statement that includes ideas on how to reinforce existing WTO disciplines. In particular, their proposals include the identification of additional categories of prohibited subsidies and of subsidies for which the party granting the aid needs to demonstrate that there is no serious impact on trade or on capacity (i.e. there is a reversal of the burden of proof). Moreover, the incentive to notify subsidies would be dramatically enhanced by prohibiting non-notified subsidies unless the subsidiser provides the required information upon a counter notification. The trilateral proposal is also critical of AB jurisprudence on “public body”, although it does not yet offer an alternative test to determine when a state-owned or -controlled enterprise meets the requirement.<sup>49</sup>

Apart from the proposals included in the trilateral statement, consideration could be given to three additional elements: a) updating the Uruguay Round's lapsed green box so as to cover certain types of environmental, regional and research and development subsidies. This would provide the necessary balance for stricter disciplines on trade distortive subsidies and ensure coherence with the sustainability dimension; b) ensuring transparency and progressive elimination of production related fossil fuel subsidies. More generally, disciplines on subsidies should balance the trade distortive impact of a subsidy and its positive or negative contribution towards environmental

<sup>48</sup> According to Simon Evenett (Global Alert Trade Report, 2019), by November 2019 5.8% of world trade was affected by tariff increases, whereas 9.2% was affected by subsidies to import-competing firms and 28% by export incentives.

<sup>49</sup> Joint statement of the trilateral meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January 2020. On the case for subsidies negotiations see Chad P Bown and Jennifer Hillman, WTO a resolution to the China Subsidy problem, PIIE, October 2019; Bernard Hoekmann and Douglas Nelson, Spill overs, subsidies and multilateral cooperation: addressing concerns over industrial subsidies, Bertelsmann Stiftung, 29, 2, 2020; Elvire Fabry, Industrial subsidies at the heart of the trade war, Notre Europe, 27, 1, 2020. On the possibility of reactivating the Uruguay Round green box see Mark Wu, Re-examining “green light” subsidies in the wake of new green industrial policies, International Centre for Sustainable Development, 2015.

sustainability; c) reinforcing dispute settlement disciplines as regards trade distortive subsidies. These reinforcements could relate to the fact-finding powers of panels (and the possibility of drawing adverse inferences in case of lack of cooperation) and more rapid remedies. (See further discussion in section B).

The negotiations on industrial subsidies should be open to participation by any interested WTO member, although participation by OECD members, high-income countries and China is critical to success. As regards other participants, stricter disciplines on subsidies could be linked to an export competitiveness test. If the agreement can only be concluded as an open plurilateral, participants could seek inclusion under Article X.9 of the WTO on the basis of a new architecture for plurilateral agreements discussed above. While the commitments would be applied on an MFN basis, only participants would be able to launch a dispute settlement case based on the stricter rules of the plurilateral. The green box would only apply among participants, thereby providing an incentive for participation.

Any updating of WTO rules should also include a clarification of certain aspects of existing trade remedies rules. A starting point could be a discussion of areas where members feel that the rules are unclear and may benefit from a collective interpretation under Article IX.2 of the WTO agreement. Some of these may relate to areas where WTO members may wish to correct AB jurisprudence. On issues relating to safeguards, the aim could be to have a more flexible interpretation of a number of provisions of the Safeguards Agreement, such as the requirement to demonstrate unforeseen developments, the qualifying criteria for an import increase or the causation analysis. Negotiations on anti-dumping are likely to be more controversial and the key for success should be to identify a sufficiently limited list of issues for clarification that reflect a balance of the interests of WTO members. As regards subsidies, a distinction could be made between the negotiation of new rules (discussed above) and a clarification of some of the existing rules, such as the question of what constitutes a “public body”. As noted in the following section of this paper, the possibility of reaching agreement on a clarification of trade remedies rules would be facilitated by including such joint interpretations as part of a broader negotiating package that includes improvements of the dispute settlement function.

A reinforcement of the disciplines relating to industrial subsidies and a clarification of rules on trade remedies are the critical elements required to address the negative spill-overs of industrial policies in global markets or in the market of the importing country. They do not, however, tackle distortions of competition in the market of the country introducing trade distortive industrial policies, unless these take the form of a prohibited subsidy. To a certain extent, market access negotiation on tariffs and investment would increase the contestability of markets. However, there may still be significant distortions of competition between foreign firms and state-owned enterprises or other domestic firms. A possibility worth exploring would be to launch negotiations on an open WTO plurilateral agreement on competitive neutrality. The aim would be to ensure a level playing field amongst all companies established in the market and to avoid regulatory favouritism vis-à-vis certain domestic firms. The agreement could cover issues relating to regulatory transparency, the conduct of state-owned enterprises, the implementation of competition law, as well as certain aspects of intellectual property, such as trade secrets and forced technology transfers. Provisions on these issues have been included in a number of recent FTAs such as the CTPP or the EU agreements with Japan, Canada, Vietnam and Singapore. Issues relating to “competitive neutrality” also feature in EU/China negotiations on an investment agreement and in the US/China phase one agreement.

### **Negotiations on tariffs**

There has been so far very little discussion about tariff negotiations in the context of WTO reform.<sup>50</sup> This can be explained because of the failure of both the DDA and of the negotiations to eliminate tariffs on environmental goods. There is a logical reluctance to engage in negotiations that appear to have limited prospects of success. Moreover, many countries prefer to keep tariffs as a bargaining chip for bilateral negotiations. It is difficult to see, however, how the WTO can retain its relevance when tariff schedules have lost any connection with economic

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<sup>50</sup> For a proposal on multilateral tariff liberalisation see Kimberly Ann Elliot, A first step to revive the rules-based trading system, Centre for Global Development, Policy Paper 165, January 2020.

realities. The aggressive tariff policy of the Trump Administration also signals that the *status quo* on tariffs is hardly sustainable and the USTR has indicated the need for a rebalancing of tariff commitments. It is worth therefore reflecting on a possible tariff initiative that is economically meaningful and politically workable. To be economically meaningful, bindings should convey a credible signal of stability to traders and investors and the more advanced and competitive countries should be ready to eliminate a substantial proportion of their tariffs. To be politically workable, negotiations should support broader goals of the international community, ensure a better balance of commitments amongst the key players and, where relevant, avoid free riding.

The need to support economic recovery from the impact of the Covid-19 pandemic provides the right political context both for a sectorial tariff initiative focused on the health sector and for a broader tariff liberalisation exercise that enhances confidence among traders and investors and, restores world trade to the situation prior to trade conflicts and the pandemic. Tariff negotiations should also aim at contributing towards the implementation of the sustainable development goals. Beyond the immediate impact of the elimination of tariffs and the increase of tariff bindings, what matters is the signal that countries are ready to support multilateral liberalisation and to reverse tariff increases introduced in the context of the trade war.

Sectoral initiatives should be considered in two areas that support broader goals of the international community. The most urgent that could be concluded not later than next year's WTO Ministerial would be the elimination by the largest possible number of countries of tariffs on pharmaceutical products, medical devices and other medical supplies. This would contribute towards reducing costs for health systems that have been put under serious strain by the pandemic. It should be part of a broader trade and health initiative that aims to reinforce disciplines on export restrictions, enhance cooperation to ensure access to vaccines and ensure a coordinated response when essential medical supplies become scarce. As many countries as possible should also be ready to resume negotiations on the elimination of tariffs on environmental goods, thereby positively contributing towards climate objectives and the implementation of the SDGs. For the two sectoral initiatives, the OECD, high-income countries and China should lead by example by offering to suspend their tariffs autonomously, pending the conclusion of a broader agreement. The aim should be that as many WTO members as feasible are ready to assume some level of tariff reduction. Since the elimination of tariffs aims at fulfilling public policy goals, there should be no need to insist on a rigid critical mass requirement.

Beyond sectoral initiatives, a fundamental objective should be to ensure that bindings correspond to current commercial realities. All WTO members should be ready to bind all their tariffs. Moreover, with the possible exception of least developed countries, tariffs should be bound at the MFN applied level. This would restore the credibility of tariff bindings and itself convey a critical signal of stability to traders and investors. Developed countries and recently acceded countries have already bound tariffs at applied levels with only very few exceptions. OECD countries, high-income countries and China should therefore be ready to consider a broad tariff elimination initiative. The threshold for tariff elimination could be fixed at 5% or 10% depending on the level of ambition.<sup>51</sup> The elimination of those tariffs could be made conditional upon reaching a mutually satisfactory critical mass agreement, including participation by countries that are competitive at the sectoral level. Discussions on how to achieve a critical mass should also consider the best approach to follow in sectors where there is a significant disparity of tariffs amongst the main trading nations. (For instance, tariffs on passenger cars are zero in Japan, 2.5% in the US, 10% in the EU and 20% in China). A critical condition for success is that the outcome of negotiations reflects a parity of commitments among the key trading partners, and in particular the US, the EU and China.

The binding of tariffs at applied level and the elimination of a substantial number of tariffs would have a major economic impact and provide stability and predictability to global value chains since it would include tariffs on most inputs and intermediate products. It would also avoid the costs associated with compliance with rules of origin and ensure that the vast majority of trade is subject to the non-discrimination rule, thereby limiting trade

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<sup>51</sup> Elliot, *op cit*, has suggested eliminating only tariffs that are 2% or lower. In my view, it is preferable to start with an ambitious approach and, if necessary, carve out certain sectors that may give rise to special sensitivities. To be noted that agriculture tariffs would also be covered by the exercise.

diversion. . Ideally, a positive dynamic would be created, in which countries may wish to participate as part of a policy of fostering better integration in global value chains. The US, China and EU have already eliminated vis-à-vis many trading partners the tariffs that would be covered by the multilateral initiative. This is a signal that such tariffs do not reflect core sensitivities and that the main issue is likely to be balance among the three main players and, in certain sectors, the avoidance of free riding.

The more challenging issue would be how to avoid free riding. Assuming that the US, EU and China are ready to launch negotiations, all WTO members could be invited to contribute in terms of comprehensive bindings at applied levels and tariff reduction commitments in sectors where countries are competitive. If negotiations fail to achieve a critical mass on the basis of a broad package, three options could be considered: a) for products where tariffs of the key players are low or there is a broader public policy goal, free riding could be ignored; b) more sensitive products could be excluded from the package. c) products that carry a free riding risk could also be covered combined with the inclusion of a product-specific safeguard that allows for reintroducing higher MFN tariffs up to a commonly agreed level in the event of a surge of imports from countries that are not ready to take on tariff reduction commitments.

In comparison with the approach followed in the DDA negotiations, the above modalities for tariff negotiations would have the advantage of simplicity and would not require long negotiations. By linking tariff reductions to broader policy goals (health and environmental protection, integration in global value chains), it should be easier to gather political support and avoid mercantilist dynamics. The sacrifice in negotiating chips for free trade negotiations is a price worth paying for a broad multilateral tariff exercise that eliminates the gap between bound tariffs and applied rates and ensures a better balance between the tariff commitments of key trading partners.

### **Negotiations on services and investment**

As in the case of tariffs, services schedules have gone unaltered since the conclusion of the Uruguay Round. Since this was the first time that services negotiations were undertaken, there is a huge gap between commitments and commercial realities. Indeed, many countries have been ready to go well beyond their GATS commitments in free trade negotiations and *de facto* such preferential commitments are applied on an MFN basis. While the WTO is currently tackling the development of rules on domestic regulation on services, e-commerce or investment facilitation, there have been no WTO negotiations on market access commitments relating to services since the demise of DDA negotiations (where, in any event, services attracted less attention than agriculture or manufacturing).

A possible way forward would be to launch WTO negotiations on services and investment market access amongst interested countries. The negotiations could build upon the progress achieved on the suspended plurilateral Trade in Services Agreement (TISA) but would have some important differences: a) as in the case of the Buenos Aires initiatives, negotiations should be open to any interested WTO member; b) countries that had participated in TISA would maintain their last TISA offers. Other participants should be ready to submit an initial offer that at least corresponds to their most ambitious FTA commitments; c) negotiations on national treatment for investment should include both services and non-services sectors. This would correct one of the main weaknesses of the GATS architecture. There is no substantive reason for treating investments in the manufacturing sector differently to those in services sectors. In bilateral agreements, countries systematically make commitments on both types of investments. Indeed, most countries wish to attract investments in the manufacturing sector and apply fewer restrictions than in services sectors. The negotiations would be limited, however, to investment market access without commitments on investment protection. Market access commitments would only be subject to state-to-state dispute settlement. This would, therefore, exclude the more sensitive aspects of investment negotiations, where there are ongoing efforts to reform bilateral investment treaties through the establishment of a multilateral investment court.

Unlike in the case of tariffs, there are fewer concerns about achieving a critical mass in services/investment since *de facto* preferential commitments are normally applied on an MFN basis. That being said, options could be left

open until negotiations are concluded. The aim should be to encourage as broad a participation as possible, including particularly African countries that may wish to use participation as a signal of their openness to investment. As discussed below, a major programme of support for reforms to improve the investment climate could be launched in connection with the work of the African Union to develop the African Continental Free Trade Area.

## 2.2 Restoring and improving binding dispute settlement

### 2.2.1 Problem identification

Despite the efforts made to find an accommodation of US concerns, it has not been possible to find a way for the US to lift its veto on the appointment of Appellate Body (AB) members<sup>52</sup>. In the absence of a functioning AB, the losing party in a dispute can appeal “into the void” and block the outcome of dispute settlement procedures. *De facto* this implies a return to the system in place before the conclusion of the Uruguay Round negotiations. The decision by a significant number of users of WTO dispute settlement to enter into a multi-party arrangement to maintain the appellate function sends an important political signal. It also preserves amongst a significant subgroup of WTO members a functioning binding dispute settlement system. It is not, however, a definitive solution since it is hardly sustainable in the longer term to have a global trading system in which different members play by different dispute settlement rules.<sup>53</sup>

There is a need, therefore, to continue to engage with the US to identify an acceptable way of unblocking the appointments of AB members without compromising on the effectiveness and legitimacy of WTO dispute settlement. In this connection, the three fundamental principles to uphold are compulsory jurisdiction, the negative consensus rule for adoption of reports and the independence of the AB. AB legitimacy as an institution very much rests on appointing its members on a fixed term and enabling them to exercise their function in full independence from WTO members or secretariat. Independence is, however, compatible with greater accountability or significant changes in the approach to the appellate review function.<sup>54</sup>

The recent USTR report on the AB has the advantage of setting out in detail the US criticisms of its jurisprudence.<sup>55</sup> The report raises eight systemic issues where the US considers that the AB has exceeded its mandate and six areas where it considers that the AB has adopted an incorrect interpretation of WTO agreements. It is worth noting that five of the eight systemic concerns had been raised already by the US in the discussions leading to the draft General Council decision on improvements of AB practices, while three had not been raised in that context.<sup>56</sup> All but one of the areas where the USTR raises substantive concerns relate to the interpretation of rules on trade remedies, i.e., the safeguards, anti-dumping and subsidies agreement.<sup>57</sup>

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<sup>52</sup> For an overall discussion of US criticisms of the Appellate Body see Chad P Bown and Soumaya Keynes, *Why Trump shot the sheriffs: the end of WTO dispute settlement 1.0*, Peterson Institute of the International Economy, March 2020. For the possible consequences of the absence of a functioning appellate body see Joost Pauwelyn, *WTO dispute settlement post-2019*, 7 July 2019 (draft)

<sup>53</sup> Text agreed the 27th of March of 2020 (available on DG trade website) to be notified to the DSB as JOB/DSB/1/Add 12. The arrangement is based on Article 25 of the DSU and fulfils the same functions that used to be performed by the Appellate Body. It is open to endorsement by any WTO member. The parties would agree on a pool of ten arbitrators selected by lot.

<sup>54</sup> There have been many proposals to introduce changes in the functioning of the Appellate Body to respond to US concerns. For a recent proposal see Simon Lester, *WTO Dispute Settlement Misunderstanding: How to bridge the Gap between the United States and the Rest of the World*, *International Economic Law and Policy Blog*, April 19, 2020.

<sup>55</sup> USTR, *Report on the Appellate Body of the World Trade Organization*, February 2020 (available on USTR website)

<sup>56</sup> These relate to the failure in some cases by the AB to issue a recommendation to bring a measure into compliance, opinions by the AB on matters that fall within the competence of other WTO bodies and the consideration by the AB that decisions not based on Article IX:2 can be deemed to interpret WTO agreements.

<sup>57</sup> The US also criticises the Appellate Body for considering that a measure that has a detrimental impact on imports is in breach of Article I:1 or III:4 even if such differential impact stems exclusively from a legitimate regulatory distinction. The Appellate Body normally considers those

The proposed General Council decision presented by Ambassador Walker of New Zealand at the end of last year aims to respond to the five initial systemic criticisms presented by the US. The draft decision represents a significant institutional innovation. If adopted, it would be the first time that WTO members provide guidance on the exercise of the adjudication function, since negotiations to improve the dispute settlement understanding have failed to reach a result.<sup>58</sup> The draft decision is presented as a decision of the General Council, although some of its provisions appear to be in the nature of an interpretation of the Dispute Settlement Understanding (DSU). For instance the decision interprets Article 17.6 of the DSU in the light of Article 3.4 DSU as implying that the AB “shall address issues raised by parties...only to the extent necessary to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements in order to resolve the dispute”. This would reinforce the authority of the AB to exercise judicial economy since the main reason why certain rulings can be considered as “obiter dicta” was the prevailing view in the AB that there is a need to address substantively all the issues raised by the parties. To be noted, however, that the draft decision has an uncertain legal status and some of its provisions would have benefited from more discussion and clearer legal drafting.<sup>59</sup>

It now appears, however, very unlikely that the US would be ready to join a consensus to resume the appointment of AB members on the basis of an improved Walker Decision. It is therefore useful to have a better understanding of what are the main problems affecting the functioning of the WTO dispute settlement system without being narrowly focused on the question of whether or not the AB has exceeded its mandate.<sup>60</sup> Indeed, while certain AB decisions on systemic or substantive issues should be corrected, the underlying reason for such decisions was often a good faith attempt to answer problems linked to the panel phase of dispute settlement proceedings or a lack of clarity in the rules in highly contested areas of WTO law. From that perspective, I consider that there are four main problems relating to the functioning of WTO dispute settlement, three of which relate to the rules of the DSU and one to substantive areas of WTO law. What follows is a short attempt at identifying those problem areas:

#### **The timeliness of WTO dispute settlement:**

Timely resolution of disputes is critical for the legitimacy of WTO dispute settlement. Compared with other international or regional adjudication systems, the WTO performs well in terms of duration of proceedings. Nevertheless, the weakness of WTO remedies makes it essential to stick to the deadlines that were provided in the DSU. Unfortunately, the duration of dispute settlement proceedings has greatly increased in comparison with initial practice after the WTO was created. According to a recent study by James Bacchus and Simon Lester, a comparison of the first ten panel and AB reports with ten more recent cases shows an increase in duration of proceedings from 265-455 days to 365-1117 days (panels) and from 57-114 days to 117-170 days (AB).<sup>61</sup> What these numbers show is that, while there is undoubtedly a problem as regards the non-respect of the 90-day deadline for AB reports, the most significant breach of the DSU deadlines relates to panel proceedings. Indeed, an argument can be made that the increased complexity of cases at the panel stage, length of panel reports and the increase in the number of issues brought to appeal has been the main reason for the increased duration of appeal procedures. While greater exercise of judicial economy and more deference to the assessment by panels of the facts of the

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regulatory distinctions as a justification under Article XX. A problem may, however, arise if the policy goal pursued, while legitimate, is not covered by Article XX. The USTR criticism appears therefore to be valid. See contrasting views of Simon Lester and Steve Charnovitz in *International Economic Law and Policy* blog, February 14, 2020.

<sup>58</sup> For an analysis of the DSU negotiations see Ignacio Garcia Bercero and Paolo Garzotti, *Why have negotiations to improve the Dispute Settlement Understanding failed so far and what are the underlying issues?* *The Journal of World Investment and Trade*, December 2005. Unfortunately, the DSU negotiations never attracted high level political attention. The opportunity was therefore missed to introduce a number of reforms that could have prevented the current crisis.

<sup>59</sup> The “Walker” Decision can be found in Annex to JOB/GC/222.

<sup>60</sup> It is unfortunate that discussions have exclusively focused on responding to US concerns rather than looking more broadly into how the system can be improved in both effectiveness and legitimacy. For a recent paper including broader reform proposals, see Bernard Hoekman and Petros Mavroidis, *Preventing the Bad from getting worse: the end of the World (Trade Organization) as we know it?*, EUI Working papers, January 2020.

<sup>61</sup> James Bacchus and Simon Lester, *Trade Justice delayed is trade justice denied: How to make WTO dispute settlement faster and more effective*, Cato institute, November 20, 2019



case would allow the AB to stick to DSU deadlines, the overall improvement of effectiveness would be quite limited unless the root causes of more lengthy panel proceedings are also addressed.

#### **The establishment of the factual basis of a dispute:**

Under the DSU, panels have exclusive responsibility as triers of facts. It has been noted that the factual complexity of disputes has significantly increased over time. In some cases, notably on trade remedies and some SPS cases, the factual assessment undertaken by domestic investigating authorities has to be reviewed. In subsidies or some SPS cases, requests are made for the views of external experts or additional information to be sought in addition to those provided by the parties. In cases where the measure complained about lacks transparency, it may be difficult to establish a proper factual record unless panels are ready to make greater use of their powers to seek evidence and, if necessary, draw adverse inferences from lack of cooperation by the respondent. Moreover, critical issues relating to the factual record are not sufficiently considered during the panel proceedings and may only become apparent once the panel report is issued to the parties. In the absence of structural changes in panel procedures and in the panel composition process, it is difficult to see how a proper factual basis for a case can be established within the timeframes of six to nine months envisaged in the DSU.

The USTR report seems to argue against any form of AB review of the assessment made by the panel of the facts. A good argument can be made for deference to the factual assessment made by panels and to avoid the complexities attached to so-called Article XI reviews.<sup>62</sup> However, it would hardly serve the cause of legitimacy in dispute settlement if egregious errors by panels or lack of due process were to be ignored. The Walker Decision does not go as far as the USTR report, but includes an exhortation, of limited effectiveness, that parties should avoid advancing “extensive and unnecessary arguments in an attempt to have factual findings overturned on appeal”. It also has a rather legally unclear provision according to which the DSU “does not permit the AB to engage in a *de novo* review” or to “complete the analysis” of the facts of the dispute. It is to be hoped that the intention is not to prevent the AB from completing the analysis in all circumstances. Otherwise, the consequence would be that the complainant would have no other option than starting proceedings *ex novo* in case the AB reverses the legal findings on which the panel based its decision while other legal claims remain pending. It would appear, therefore, that improving the effectiveness of WTO dispute settlement would need to combine a reinforcement of the authority and expertise of panels to establish a proper factual record coupled with a deferential standard of review by the AB so that reversal of the factual assessment by panels only intervenes in very extraordinary circumstances. In the medium term, it would also be useful to reflect on the possibility of introducing remand procedures.

#### **The balance between independence and accountability:**

The independence of the adjudicator is critical for the legitimacy of WTO dispute settlement. Compliance with WTO rulings crucially depends on trust based on the fact that AB members are independent from any pressure by WTO members or secretariat and make their rulings based purely on legal considerations. Ad hoc panellists selected in most cases by the DG and with limited legal expertise lack a similar legitimacy. Independence does not mean, however, lack of accountability. A valid criticism of the AB has been its reluctance to engage in dialogue with WTO members. It could, for instance, had helped to defuse criticisms if it had been ready to explain the reasons why it was difficult to complete appeals in 90 days or why certain choices were made on jurisprudential questions such as the exercise of judicial economy or the review of factual assessments by panels. While the Dispute Settlement Body (DSB) can serve as a forum for members to voice concerns about specific rulings of the AB, DSB meetings are mostly dominated by the explanatory statements of the winning and losing parties with a

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<sup>62</sup> Article XI of the DSU describes the functions of panels. It provides that the panel should make “an objective assessment of the matter before it, including an objective assessment of the facts of the case...”. This has been the basis for the AB to review factual assessments by panels. Initially this review was limited to cases of egregious errors, but later cases have expanded the grounds for review. As a result, parties often raise claims under Article XI to relitigate the facts of the case.

domestic audience in mind.<sup>63</sup> Being regularly engaged in discussions with members would help the AB in avoiding “clinical isolation” from the membership and could help in the development of an adjudicating function that is more sensitive to members’ evolving views. In this connection, the Walker Decision already envisages the establishment of a mechanism for regular dialogue between members and the AB. The challenge is how to design such dialogue in a manner that significantly enhances accountability.

### **Correcting jurisprudence on trade remedies:**

There is no need to agree with all the points made in the USTR report to acknowledge that certain aspects of AB jurisprudence on trade remedies may have to be corrected. As previously argued, an effective system of trade remedies is a critical part of balance within the WTO system and the issue of how to deal with market distortions is of central importance for the application of both anti-dumping and countervailing duty law. Greater flexibility on the interpretation of the safeguard’s agreement can also encourage countries to undertake further MFN reduction of tariffs. The challenge would be to define a sufficiently targeted mandate that allows members to correct the jurisprudence on a limited set of trade remedies provisions. The failure of the DDA negotiations on trade remedies clearly illustrates that only a limited and balanced mandate has any chance of succeeding.

An alternative or complementary approach to correcting jurisprudence on a number of substantive issues could be to further develop the standard of review applicable to trade remedies cases or more generally to introduce a more deferential standard of review that applies to broader areas of WTO law. A recent paper by Bruce Hirsh presents a number of suggestions that go in this direction.<sup>64</sup> The Walker proposal includes a very general reference to the specific standard of review in the anti-dumping agreement. This provides for a deferential standard of review both as regards factual determinations and issues of legal interpretation. At the end of the Uruguay Round a decision was adopted calling for consideration of whether the standard of review in the anti-dumping agreement is susceptible of broader application. It would be useful to have a more in-depth discussion as to the merits of further clarifying the standard of review applicable either in trade remedies cases or more broadly. As regards the standard for review of factual determinations by the investigating authorities, there is in practice little difference between what is applied in anti-dumping cases or in other trade remedies cases or indeed on SPS disputes. In so far as there may be problems in relation to existing jurisprudence on, for instance, safeguards, this is not so much linked to the standard of review, but rather the lack of a clear rationale for the substantive criteria applied.<sup>65</sup> As regards the specific anti-dumping standard of review for legal interpretations, the conceptual difficulties attached to what constitutes a permissible interpretation are hard to solve. It is difficult, for instance, to see how a standard of review such as 17.6.ii would have solved the interpretative difficulties linked to the concept of “public body” in the subsidies agreement. In general, it would be more predictable and avoid potential future conflicts if the negotiating effort focuses primarily on clarifying a number of key substantive provisions rather than simply throwing back the ball to adjudicators through an elaboration of the standard of review.

Beyond the four problem areas identified, it is often argued that the fundamental problem of WTO dispute settlement is the absence of an effective mechanism through which members can correct the rulings issued by the AB. In effect, the powers of interpretation provided for under Article IX:2 of the WTO agreement have never been used since this would require either a consensus or an extremely hard to reach 75% majority vote. In the absence of a broader negotiation, it is difficult to imagine that Article IX:2 interpretations on contested issues can be adopted. While different ideas have been put forward to facilitate legislative correction of AB rulings, it is doubtful

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<sup>63</sup> For a discussion of the role of the DSB see Joshua Paine, *The WTO Dispute settlement body as a voice mechanism*, *Journal of World Investment and Trade* 20 (2019)

<sup>64</sup> Bruce Hirsh, *Resolving the WTO Appellate Body crisis*, December 2019, *Tailwind global strategies*. Simon Lester, *op cit*, also proposes a clarification of the special standard of review of the anti-dumping agreement and its application to all trade remedies cases.

<sup>65</sup> On standards of review see Jon Bohannes and Nicolas Lockhart, *Standards of review in WTO law*, *the Oxford Handbook of International Trade Law*, January 2009: For an argument in support of “de novo” review see Holger Spamann, *Standard of review for WTO panels in trade remedy cases: a critical analysis*, *Journal of World Trade* 38(3) 2004.

that these can obtain sufficient support by WTO members.<sup>66</sup> This may well, therefore, be a problem for which there is no solution. It represents, however, a challenge for the legitimacy of dispute settlement for which the best response is likely to be the exercise by the adjudicator of a maximum of circumspection in areas where the outcome of negotiations are rules with a high degree of indeterminacy. This may include cases in which the AB itself puts responsibility back with WTO members by not ruling on certain issues on the basis of the argument that the law is unclear.<sup>67</sup>

To what extent are some issues too sensitive to be subject to WTO dispute settlement? Here a distinction should be made between existing WTO disciplines and possible new ones to be developed in future. As regards existing disciplines, it would be difficult to make a distinction based on the sensitivity of certain issues. While for some WTO members, trade remedies could be particularly sensitive, for others sensitivity may relate more to sanitary or phytosanitary measures or to intellectual property. A possible special case is national security disputes since it is generally recognised that a WTO ruling is unlikely to contribute to solving a genuine security dispute. Instead of carving out such disputes from dispute settlement, a more productive approach could be to devise an alternative procedure to maintain the balance of rights and obligations when national security is used as a justification to protect an economic sector. As regards future negotiations, it would be useful for WTO members to break the taboo according to which new rules inevitably imply dispute settlement. In some areas, there may be enough normative consensus to agree on non-binding best practices but not on binding and enforceable rules. This option should be kept open in the WTO toolbox.

## 2.2.2 Proposals for reform

In light of the current stalemate in discussions with the US, what could be a way forward to restore the dispute settlement function? At the same time as the functioning of WTO dispute settlement amongst a significant number of DSU users is maintained through the interim arbitration arrangement, a process of discussions should be launched on DSU reforms that also includes the US. The starting point could be the draft Walker Decision, but other elements of DSU reform should also be considered. The guiding principle should be to look into areas where changes would enhance rather than limit the legitimacy and effectiveness of WTO dispute settlement. Reforms could include the following:

### Adopting the Walker Decision as an Article IX:2 interpretation of the DSU

The Walker draft decision introduces a significant change of AB practices on issues such as timeliness, judicial economy, lack of precedential value or deference to the factual assessment of panels. In a way it represents a new and more deferential approach to the exercise of the appellate function. A concern has, however, been expressed as to the extent to which the AB will consider itself bound by the terms of the General Council decision. The use as a legal basis of Article IX:2 should dispel those concerns and provide greater legal clarity and legitimacy than the current reliance on the general decision-making powers of the General Council. Indeed, the recent USTR report argues that only an Article IX:2 decision could provide a binding interpretation of WTO rules. It is difficult to imagine in any event that the new AB would wish to see its legitimacy challenged again by ignoring an

<sup>66</sup> A recent proposal is to introduce a more relaxed voting procedure for General Council decisions that provide that a certain issue is too politically sensitive for it to be subject to adjudication. The Council would not interpret the provisions in question but would set aside the interpretation made by the panel or the Appellate Body. In the absence of agreement by the two parties to a dispute, it is, however, unlikely that WTO members would wish to interfere in a dispute or that they would be ready to accept that such decisions can be taken through a vote. See Weihuan Zhou and Henry Gao, *Overreach or Overreacting? Reflections on the judicial function and approaches of the WTO Appellate Body*, University of South Wales Research series, 2019(53)

<sup>67</sup> For the argument that a finding of *non liquet* is compatible with the DSU see Lorand Bartels, *the separation of powers in the WTO: how to avoid judicial activism*, *International Law and Comparative Quarterly* Vol 53 October 2004. For a proposal that WTO adjudicators should be ready to declare a *non liquet* see Hoekman and Mavroidis, *op cit* fn 60.

authoritative interpretation by WTO members of the DSU text. Of course, before adopting such a formal decision, the legally unclear provisions of the current draft would need to be clarified. Moreover, if the US decides to engage in the discussions, it should be possible to consider strengthening certain aspects of the decision. It would also be useful to provide that the decision could be reviewed on the basis of experience and to take into account changes to be introduced on the panel stage of dispute settlement:

An area where the Walker Decision should be strengthened is the regular dialogue between the DSB and the Appellate Body. This is critical to increase the sensibility of the AB to the views of members. It could also provide an opportunity for the AB to explain more proactively the challenges faced on general issues of jurisprudence. In order to facilitate the dialogue between members and the AB, the DSB chairman could establish every year a report that presents an analysis of how the AB has implemented the different elements of decision. The report should not aim at “passing judgement” on individual AB rulings but should be sufficiently substantive to facilitate a focused discussion between the AB and the members. The dialogue would also provide an opportunity for members with serious concerns about the systemic implications of an AB ruling to present the case in a manner that allows for a reasoned discussion going beyond the resolution of an individual dispute. Such a discussion could lead to an agreed interpretation of WTO provisions or at least to signal to the Appellate Body about the views of members as to the systemic implications of its rulings. The interaction between the AB and members would represent an important change in relation to current practice and introduce an adjudication ethos that is more sensitive to the need to maintain internal legitimacy.<sup>68</sup>

### **Restructuring WTO secretariat support for the AB**

The suspension of AB activities has led to the temporary transfer of members of its secretariat to non-legal divisions of the WTO secretariat. Maintaining a separate AB secretariat remains essential to prevent lawyers in both instances being subject to the same chain of command. It should be possible, however, to consider some changes in the organization of the AB secretariat, such as term limits for the director or the possibility for AB members to select lawyers from the secretariat to work as their clerks. It is also worth noting that in the past the US supported the full-time dedication of AB members and an increase in secretariat resources. It would be worth reconsidering these proposals as part of a broader package of DSU reforms.

### **Improvement of the timeliness of dispute settlement and of panel procedures**

One of the paradoxes of US criticisms of DSU functioning is its exclusive focus on the lack of respect by the AB of the 90 days deadline, when panels have often exceeded the more generous 6-month/9-month deadline. Timeliness of dispute settlement remains a critical concern and it would seem appropriate to look into different ways to accelerate procedures. This could include some DSU changes such as eliminating the possibility of delaying the establishment of a panel to the second DSB meeting or doing away with second oral hearing and the interim review of the panel report. In any event, there should be a clear instruction to panels on the need to respect the deadline established in Article 12.9 DSU. However, for this to be achieved without compromising the quality of reports, it would be appropriate to look into improvements in the functioning of the panel phase. The objective should be to reinforce the capacity of panels to establish an agreed factual record of the dispute by focusing more proactively on identifying areas of difference as to the facts through questions put forward at an early stage to the parties. A better structured panel proceeding would do away with the need have two oral hearings, thereby shortening the duration of panels.

An enhanced focus on fact finding and shorter panel proceedings would be significantly facilitated if panellists had greater expertise. In the context of the DSU review, the EU proposed establishing a permanent panel body. More recently, Hoekmann and Mavroidis have proposed a standing roster of 15 to 20 panellists to serve for a term of eight to ten years. Both panellists and AB members would need to be screened by a commission of eminent experts

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<sup>68</sup> See also the proposal to establish an oversight committee on the implementation of the Walker Decision included in: Jennifer Hillman, A reset of the World Trade Organization Appellate Body, Council of Foreign Relations, January 14, 2020

on WTO dispute settlement.<sup>69</sup> A more incremental approach would be to establish at this stage only a roster of panel chairs. This roster would be a default option which would not prevent the parties if they so wish to agree on the three panel members. It might even be worth establishing the roster amongst a subset of frequent DSU users, although disputes involving other members could also rely on the roster if parties to a dispute so agree. Members of the roster would need to have sufficient qualifications and, if agreed multilaterally, be formally approved by the DSB after a vetting process. Having experienced panel chairs would help to reinforce the capacity of panels to seek evidence and ensure that a solid factual record is established. A further complementary idea is the possibility of establishing a roster of panellists with expertise in certain areas of WTO law, such as trade remedies. Apart from the issue of changes in panel proceedings and panel composition, it would be worth consulting practitioners and the WTO secretariat to identify other means to shorten panel procedures and to encourage less lengthy panel reports.

### **Reinforcing the effectiveness of WTO dispute settlement to deal with non-transparent trade distorting action**

A frequent criticism of WTO dispute settlement is that the burden of proof for complainants is too high in cases involving non-transparent government measures. A possible way to correct this would be to encourage panels to make greater use of their powers under Article 13 DSU to seek information and to draw adverse inferences where the respondent fails to cooperate. More experienced panellists are likely to show greater readiness to make full use of the possibilities opened by Article 13.

A broader criticism relates to the fact that remedies come too late and do not correct for damage already caused. While introducing retrospective remedies in the WTO is likely to be a step too far, DSU effectiveness could be strengthened if it was possible to avoid an extended litigation loop as a result of compliance proceedings. An option could be for the complainant, if it so wishes, to include in its submission an assessment of the damage caused by inconsistent WTO action. The original panel and AB ruling could then already include a determination of the complainant's retaliation rights. This in itself could increase the incentive to comply (and deter cases of limited economic significance). A further step would be to provide that such rights could be exercised once the reasonable period of time for compliance expires unless both parties have agreed that there has been proper compliance. One option could be to provide that retaliation can be maintained until a determination of compliance has been made. The main objection against such a change in the DSU is that there should be a presumption of good faith compliance and avoid too easy a recourse to retaliation rights. This objection is particularly strong where the ruling allows for a variety of options for compliance and retaliation may be used to try to limit such compliance options. A more prudent approach would therefore be to limit early retaliation to some particularly serious cases where delay can lead to significant damage. For instance, in the case of safeguards, there is already an automatic right to rebalance once a measure has been considered to be inconsistent with the safeguards agreement. A fast-track retaliation procedure could also be considered in case of prohibited subsidies. For other cases, compliance proceedings would still be required before retaliation is applied, although faster proceedings could still be introduced through an early determination of retaliation rights, a standard timeframe for compliance and the immediate application of retaliation if no measure has been taken to comply at the expiry of the compliance timeframe.

### **Focused negotiations on a limited set of trade remedies provisions**

As discussed above, there is a case for a course correction on some specific aspects of the interpretation of WTO rules on trade remedies. The challenge would be to identify a limited list of topics where members could exercise

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<sup>69</sup> On the EU proposal to establish a Permanent Panel Body see Ignacio Garcia Bercero and Paolo Garzotti op cit. For the proposal by Hoekmann and Mavroidis see op cit fn 60.

their powers of interpretation under Article IX:2. These targeted negotiations should be concluded within a maximum period of three years, during which WTO members could agree not to raise claims relating to the interpretation of those provisions in WTO dispute settlement. (See further discussion in Part 1, section 2 and section 1 of Part 2).

Apart from focusing on the clarification of certain specific rules on trade remedies, there could also be a broader discussion about the standard of review in WTO dispute settlement, which need not be limited to the area of trade remedies. The key issue is what should be the approach to follow in those cases where, despite the application of the rules of the Vienna Convention of the Law of Treaties, there is lack of clarity as to the interpretation of certain provisions of WTO agreements. A declaration that the law is unclear (*non liquet*) would in practice imply that the defendant is likely to prevail in the dispute and therefore shift WTO adjudication in a direction that is less protective of export interests. An open discussion of the pros and cons of such an approach is warranted. It would in any event help legitimacy if the adjudicators are sufficiently thorough in the explanations provided whenever they reach a conclusion in areas where the rules have a high degree of indeterminacy.<sup>70</sup>

### **An alternative procedure to solve security-related disputes**

During the GATT period, self-restraint about the invocation of the national security exception was exercised and, despite the introduction of compulsory jurisdiction, such self-restraint was maintained in the WTO. Recently, however, there has been a proliferation of disputes that require adjudicators to determine whether a measure is justified under the national security exception of the GATT (Article XXI). The Russia transit panel report applied a highly deferential standard of review in cases linked to military conflict but dismissed the Russian (and US) argument according to which the exception could be considered to be self-judging.<sup>71</sup> While Russia and the Ukraine have accepted the panel ruling, the pending disputes on the invocation by the US of the national security exception to justify increased tariffs and quotas on imports of steel and aluminium are much more politically charged. The proliferation of national security related restrictions suggests that it might prove impossible to simply rely on self-restraint as an element of discipline that maintains the balance of rights and obligations. The Russia transit panel shows that countries adopting trade restriction within a military or security crisis are likely to prevail when invoking the national security exception. This is also likely to be the case of security restrictions linked to investment screening procedures or export controls. There is, therefore, a limited incentive to bring such measures to WTO dispute settlement.

The problem are instances when the security justification is closely linked to the desire to support non-military domestic production through tariffs or quotas. Such measures seriously affect the balance of rights and obligations and affected countries will feel the need to react. The best solution would be for the US to reconsider its use of section 232 for those purposes. However, it could also be appropriate to consider an alternative to WTO dispute settlement. An interesting approach has been suggested by Simon Lester and Whang Zhu. In a recent paper, they propose a procedure under which, in the absence of compensation, countries affected by restrictions justified on grounds of national security could introduce rebalancing measures.<sup>72</sup> Building upon this proposal, a special procedure could be developed as an alternative to the launch of a WTO dispute settlement case. The first stage would be a notification by the country intending to adopt tariffs or quotas as a national security measure. Following notification, there would be consultations with countries whose trade is negatively affected by the measures. If no agreement is reached within a certain time frame, negatively affected countries could suspend equivalent concessions vis-à-vis the country taking the measure. Rebalancing action could also be introduced if

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<sup>70</sup> Part of the problem of legitimacy with the jurisprudence of trade remedies is the rather cursory manner in which the Appellate Body considered the specific standard of review for anti-dumping disputes in the zeroing cases. Since this was one of the more critical provisions for the conclusion of the Uruguay Round agreements, a more thorough consideration would have been appropriate so as to avoid the impression that Article 17:6:2 was being read out of the anti-dumping agreement.

<sup>71</sup> Panel report, Russia-Measures concerning traffic in transit/DS512/R (adopted 26 April 2019).

<sup>72</sup> Lester and Zhou, A proposal for rebalancing to deal with national security trade restrictions, *Fordham International Law Journal* 42, issue 5, 2019. For a different approach based on non-violation claims see Nicholas Lamp, At the vanishing point of law: rebalancing, non-violation claims and the role of the multilateral trade regime in the trade wars, Queen University, October 2019

the country fails to notify the tariffs or quotas and does not provide a justification under WTO rules other than Article XXI. In case of disagreement as to the equivalency of rebalancing, the issue could be subject to arbitration. This procedure is, of course, unlikely to have much impact in the case of genuine security-related restrictions. But it could be a valuable deterrent against the invocation of the security exception for economic reasons and provide a politically less charged procedure than WTO dispute settlement, since it avoids asking adjudicators to rule on the justification (or not) of security-related restrictions. It is important to note that this proposal would not limit the right of countries to invoke dispute settlement in relation to invocations of WTO security exceptions. In practice, however, countries are likely to prefer to use the option of consultations and rebalancing since legal adjudication is very unlikely to provide a more effective remedy.

The combination of these reforms would represent a very significant change in WTO dispute settlement. Panels would enhance their capacity to make rulings that are well supported by the facts. The AB would exercise judicial economy and only intervene in case of legal errors or egregious mistakes in factual assessment. This more modest approach to the appellate function would go together with enhanced accountability vis-à-vis WTO member. The timelines of the DSU would be respected both at panel and appellate phases and compliance proceedings could also be faster. Members would have reached a common understanding on the interpretation of key trade remedies provisions, thereby limiting the pressure on the adjudicator arising from indeterminate rules in highly contested areas. The dialogue between the AB and the DSB would enhance internal legitimacy while external legitimacy would be maintained through the independence of AB members and the transparency of proceedings. In overall terms, the “new” dispute settlement system can be expected to be more deferential to members, but this is probably the right way forward given the absence of an effective mechanism for legislative correction.

An important issue is what the right sequencing for the different dispute settlement reforms should be. The adoption of an improved Walker Decision and of changes of the organization of the AB secretariat should be considered sufficient to proceed to the appointment of AB members for the 4-year mandate envisaged in the DSU. The other reforms mentioned in this paper could be accomplished within a maximum time frame of three years. That would give members the possibility to assess both how the Walker Decision has been implemented and the progress made on other reforms before a decision is taken on a possible extension of the mandate of AB members.

## **2.3 WTO reform and sustainable development**

### **2.3.1 Problem identification**

The crisis of the WTO is also linked to the globalisation backlash. WTO members have had from the beginning a troubled relationship with the question of what the purpose of the global trading system is. One of the main reasons for the failure of the Seattle Ministerial was profound disagreement as to the relevance for the trading system of social and environmental concerns as well as on the contribution that the WTO could make to development. Although the DDA was labelled as a development round, views diverged as to how development issues should be tackled. Attempts to negotiate on labour and environment issues in the WTO were rejected in Seattle and only found a limited reflection in the DDA agenda. At a time when the priorities of the international community are recovery from the pandemic, the transition towards climate neutrality and enhancing systems of social protection, one cannot ignore the question of what the broader purpose of international cooperation on trade is. Support for WTO reform will, therefore, inevitably raise the question of what contribution the trading system should make to sustainable development, including its economic, social and environmental dimensions.

The relationship between WTO reform and sustainability requires careful political judgement. If properly handled, however, the issue could be less controversial than 20 years ago. This is partly due to the fact that AB jurisprudence has gone a long way to clarify that WTO rules are no obstacle to adopting autonomous measures for

protecting the environment or even for pursuing ethical concerns.<sup>73</sup> Those measures should, however, be carefully designed to avoid unduly penalising trading partners. There is, then, no need to envisage a modification of WTO rules to accommodate environmental or labour concerns, thereby making discussions with developing countries potentially less difficult.

Still, there should be no complacency as to the importance of including trade and sustainable development issues in the WTO reform agenda. The transition towards climate neutrality will have profound implications for trade and trade policies. The introduction of border carbon measures or different types of subsidies to promote sustainability, even if allowed under WTO rules, can generate tensions in the trading system. Rather than simply relying on adjudication, it would be preferable if the WTO provides an effective forum where the interactions between trade and environmental policies can be discussed.<sup>74</sup>

The Covid-19 pandemic has shown the need for the WTO to contribute towards the coordination of trade responses within a public health emergency. The WTO has already been fulfilling an essential transparency function as regards trade measures adopted in response to the pandemic. But it would be important to go beyond transparency so as to avoid export restrictions and facilitate the allocation of vaccines and scarce supplies to countries in need. This calls for cooperation between WTO and World Health Organisation (WHO) so that both institutions combine their areas of expertise.

Beyond the interaction with health and climate change policies, the SDGs provide an internationally agreed framework to tackle the contribution of trade policy to the different dimensions of sustainable development. In a way, the goals could help define a common purpose for the trade regime that takes into account the diversity of its membership, thereby playing an essential legitimating function. They can provide the answer to the question of why a world trade organisation is needed. By contributing towards the implementation of the SDGs, the WTO could be seen as renewing the commitment to “embedded liberalism” by a much more diverse membership than that of GATT. Of course, trade policy legitimacy can only be achieved through domestic action that ensures that the benefits of trade openness are broadly shared and coherent with sustainability objectives. But by placing the SDG implementation at the centre of the trading system, the WTO can contribute to the necessary deliberations at the domestic level.

The SDGs are closely aligned with the objectives of the world trading system. The WTO Preamble already refers to the objectives of sustainable development, including “the protection and preservation of the environment, as well as ensuring that developing countries secure a share in the growth of international trade commensurate with the needs of their economic development.” The requirement now is to reflect this objective more concretely in the WTO's work.

In order to get developing country support for a broad sustainable development agenda, the sustainability dimension should have as a key objective drawing up a credible response to the concerns of those low-income countries with limited participation in international trade. Facilitating their integration in global and regional value chains should be a central goal of the multilateral trading system. Since most of those countries are on the African continent, one should explore the synergies between the WTO reform agenda and the process of regional integration in Africa.

The sustainability dimension can also reinforce the WTO policy function. Certain issues that may not be appropriately tackled in rules or market access negotiations can be jointly analysed and debated in terms of their relevance for the development of trade policies in a global context. The WTO secretariat already produces reports

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<sup>73</sup>For the broader political context of AB jurisprudence on “Trade And...” see Robert Howse, From politics to technocracy-and back again: the fate of the multilateral trading regime, the American Journal of International law, Vol 96:94

<sup>74</sup> The Commission has launched an impact assessment on a border carbon measure to deal with the issue of carbon leakage. The measure is likely to be introduced only in some highly exposed sectors and would be an alternative to the free allocation of emission allowances. It is particularly stressed that any such measure should be WTO-compatible. For an analysis see Sam Lowe, Should the EU tax imported CO<sub>2</sub>? Centre of European Reform, 24 September 2019



on SDG implementation and there is a growing interest among members to adopt initiatives that demonstrate the WTO's relevance for the broader agenda of the international community.<sup>75</sup> There are, for instance, initiatives to discuss in the WTO context issues such as plastic pollution, climate transition or the circular economy.<sup>76</sup> While most of these relate to the interaction between trade policies and environmental protection, the WTO cannot ignore the fact that in many countries the political debate about trade is also closely linked to the issue of social inclusiveness and distribution of the gains from trade liberalisation. The issue of decent work and the social dimensions of globalisation should be debated in the WTO.

A reinforced policy function could also expand the WTO toolkit beyond an exclusive focus on the development of binding and enforceable rules. Differences in regulatory choices significantly increase the costs of trade. As previously discussed, binding rules cannot and should not go beyond upholding a non-discrimination rule and due process requirements. But the WTO can encourage and support voluntary processes of regulatory cooperation. Such cooperation is mostly carried out in technical organisations with the participation of regulators or standardisers. Following the activities of such organizations is difficult for developing countries with limited resources. There is, therefore, a strong rationale to reinforce the WTO's role in fostering exchange of information on regulatory cooperation or standardising activities in areas of particular relevance for international trade.

### 2.3.2 Proposals for reform

The Ministerial Conference in 2021 could already agree on some elements relating to sustainable development. Agreements could be reached not only on fisheries subsidies, but also on a trade and health initiative, including the elimination of tariffs on medical products as well as on the liberalisation of environmental goods by a significant number of members. This could represent the first step to a broader exercise of integrating sustainability concerns into WTO negotiations and policy deliberations. The process of reform could culminate in a statement by heads of state and government that both renews support for multilateral rule-based trade and signals commitment at the highest level to the contribution by the trading system to implementing the SDGs. On that basis, it is suggested that a WTO reform sustainability agenda could incorporate the following elements:

#### **Statement of Heads of State and Governments on joint commitment to the implementation of the sustainable development goals**

The crisis affecting the rule-based trading system merits attention at the head of state/government (HOSG) level. The Deputy Director General of the WTO, Alan Wolff, has proposed that by 2025, countries should commit to a new charter for the multilateral trading system.<sup>77</sup> This implies a process of reform that starts with next year's Ministerial meeting and stretches over two ministerial conferences. The conclusion of negotiations on modernising the WTO could be signalled by a HOSG meeting that renews the commitment to multilateralism and rule-based trade. The meeting could issue a political statement focused on the contribution of trade policy to SDG implementation. Such a statement should provide a sense of common purpose and direction for the global trading system and identify concrete areas where further work is needed within the perspective of 2030, i.e. the date for the full implementation of the SDGs.

Apart from reaffirming the core values of the multilateral rule-based trading system and welcoming the outcome of WTO reform negotiations, the statement could include a number of political commitments relating to the three key dimensions of the trade and sustainable development nexus: the integration of developing countries into the

<sup>75</sup> WTO, Mainstreaming trade to attain the sustainable development goals, 2020. On the relationship between the trading system and the SDGs see James Bacchus, *The willing world*, 2018 Cambridge University Press

<sup>76</sup> See for instance Carolyn Deere Birkbeck, *strengthening international cooperation to tackle plastic pollution: options for WTO*, Global Governance brief, January 2020, Graduate institute of Geneva

<sup>77</sup> Speech of DDG Wolff at the 13 November 2019 Paris Peace Forum, available in the WTO website.

trading system, the contribution of trade to environmental sustainability and the relationship between trade liberalisation and the promotion of decent work. On each of these areas, specific actions should be identified through which trade policy and the WTO can contribute towards SDG implementation.

The WTO Director General could be entrusted to ensure follow-up on all components of this declaration in cooperation with other organisations within the UN system. This would imply a broadening of the current coherence mandate beyond the IMF and WB so as to include *inter alia* the UN proper, UNEP, WHO and ILO.

### **Mainstreaming sustainability in trade negotiations and in the work of the WTO committees:**

Contrary to what was attempted in the DDA, it appears inappropriate and unnecessary to have a specific mandate for negotiations on trade and environment or on other dimensions of sustainability. A more productive approach would be to ensure that sustainability concerns are mainstreamed into broader negotiations. Thus, negotiations on subsidies should tackle fossil fuel subsidies and the question of an environmental green box. Negotiations on services could give particular priority to the liberalisation of trade in environmental services. This does not exclude, when justified, specific negotiations on particular aspects of sustainability such as the elimination of fisheries subsidies or of tariffs for medical products and environmental goods.

It is important to stress that mainstreaming sustainability should not be limited to rules or market access negotiations. Even more critical is the role of WTO in contributing to the exchange of experiences and best practices and support for policy coherence at the global level. Many of the initiatives being discussed in the trade and environment field have as their main objective support for domestic policy making through policy discussion and better identification of areas for reinforcing international cooperation in forms other than rules or market access commitments. A modernised mandate for the trade and environment committee should cover trade's contribution to the implementation of environment-related aspects of the SDGs, including in particular climate change. The committee could also have early discussions on significant environmental measures with a trade impact. The EU could lead by example by being ready to have a discussion on border carbon measures before its proposal has been finalised. As regards trade and social development, the WTO should provide a forum to exchange experiences on how to ensure that the benefits of trade are broadly shared and how trade can contribute to decent work. This could be done *inter alia* in the context of trade policy reviews and in thematic General Council discussions on the basis of joint WTO/ILO reports.

A reinforced policy function could also enhance the role of WTO committees as a forum to facilitate exchange of information about significant initiatives relating to international standards and international regulatory cooperation. This would complement the important work that is already done in some committees to seek to resolve specific trade concerns. Rather than just focusing on market access concerns in relation to national measures, the aim would be to have a better understanding as to the scope to facilitate trade through closer cooperation amongst regulators and the development of international standards. In view of the difficulty for small developing country administrations to follow developments in the field of international standards, the use of WTO as a forum to facilitate exchange of information could be of particular value from a development perspective. It could also help to identify areas where support can be provided for capacity building. The Director General could explore with other relevant international organisations, including standard setting bodies, the best way to structure this cooperation.

### **A trade and health initiative**

The COVID 19 pandemic calls for a holistic approach that looks not only into tariffs but also into all aspects of WTO rules that may be relevant to facilitate coordinated responses in the context of a health emergency. This would include looking into issues relating to export restrictions, subsidies, trade facilitation, standards, services, intellectual property as well as cooperation with the WHO in ensuring that scarce supplies reach those in need

(including novel vaccines and medical treatments).<sup>78</sup> The outcome of this discussion could be a General Council decision that provides guidance on how WTO rules can be implemented in a manner that provides the necessary tools for countries to react in a coordinated manner within a pandemic and avoid beggar-thy-neighbour policies. This guidance could include setting up a monitoring mechanism to facilitate the delivery of available supplies to countries in need. The WTO could complement information available within WHO by providing data on trade flows and monitoring the use of trade instruments. The combination of WTO and WHO areas of expertise could provide a clear mapping of global supply chains for those medical supplies that are critical. The suggestion of relying at least initially on a non-binding instrument is based on the importance of seeking a rapid multilateral response, but this would not exclude legally binding commitments by a subset of WTO members on issues such as tariff elimination or stricter disciplines on export restrictions.

### **A reinforced Aid for Trade commitment**

The WTO should be entrusted with coordinating a global response by the international community to support enhanced trade and investment for those developing countries that currently play a marginal role in global value chains. Particular attention should be given here to African countries, including support for their efforts to achieve closer economic integration through the African Continental Free Trade Area. Beyond the current focus on capacity building linked to standards, support should be provided for measures that enhance capacity to attract investment, drawing up regulations linked to the digital economy and improving compliance with environmental requirements. This would also facilitate participation by those countries in plurilateral negotiations. The WTO secretariat should regularly monitor developments that affect the integration of developing countries in global value chains and make proposals on how the effectiveness of Aid for Trade programmes could be improved.

### **Recognising the power of initiative of the Director General**

Enhancing the policy function of the WTO and its role in promoting coherence so as to support SDG implementation would also require ensuring that the DG has the capacity to take initiatives and speak on the WTO's behalf, including in emergency situations. The mantra is often repeated that, since the WTO is a member-driven organisation, the roles of DG and secretariat should be strictly circumscribed, and that any secretariat action should be based on the specific direction of members acting by consensus. This implies a much more limited power of initiative than the secretariat has in most UN organizations or that the GATT secretariat used to enjoy at least *de facto*. While fully respecting members' prerogatives, it would greatly contribute to both efficiency and legitimacy if the DG and the secretariat were to be explicitly recognised as having the power of initiative when it comes to promoting the organisation's objectives, including proposing policy initiatives to deal with emergencies. This also implies having the capacity to work together with other bodies within the UN system with competence on development, environmental, social or health matters.<sup>79</sup> The Secretariat should also contribute towards monitoring of trade policies by providing in its reports information available from public sources even if this has not been formally notified by Members.

### **Enhanced consultations of business and civil society**

Legitimacy of trade policy at the domestic level is closely related to transparency, inclusiveness and consultation of all stakeholders with an interest in trade policy making. This includes not only business, but also consumer organisations, trade unions and other non-governmental organizations. Consultation of civil society is a regular feature of the work of UN bodies, including those with important negotiating responsibilities. While the WTO has

<sup>78</sup> See recent proposals by Anabel Gonzalez, Yes, medical gear depends on global supply chains. Here's how to keep them moving, PIIE, March 27 2020; Innu Manak, How the WTO can help in the efforts against Covid-19, Cato, March 27, 2020, and Jennifer Hillman, Six proactive steps in a smart trade approach to fighting Covid-19, Thinking Global Health, March 20, 2020.

<sup>79</sup> Following the Seattle Ministerial, there was a debate about possible institutional reforms in the WTO. The focus of this paper is not on institutional issues, but rather on how to revitalise the three core functions of the WTO. For an early discussion on possible institutional reforms see Ignacio Garcia Bercero, Functioning of the WTO system: Elements for possible institutional reform, International trade law and regulation 6, Issue 4, 4 August 2000.

been developing useful practices on transparency and consultation, WTO reform provides at the very least an opportunity to codify best practices. As regards the negotiating function, transparency should include publication and easy accessibility of negotiating proposals, including those relating to plurilateral talks. The secretariat could also be entrusted with providing regular online debriefings on the state of play in negotiations. On dispute settlement, the practice of open hearings of both panels and AB should be followed systematically unless both parties to a dispute object. As regards the policy function, the WTO public forum already provides a useful opportunity for dialogue. Additional opportunities for interaction with civil society could be explored including by making greater use of online communication tools. Civil society organizations and parliamentarians could be invited to participate as observers in trade policy reviews so as to foster better understanding of the external implications of domestic trade policies. The DG could also nominate a group of business and civil society advisors to discuss important developments affecting the global trading system. The group should be broadly representative of the membership and includes balanced representation of different constituencies.

### 3 So what is WTO for? Some conclusions

At the time of writing, the world is experiencing a deadly pandemic that brings to the fore vulnerabilities linked to the interconnectedness of the global economy. Once the immediate crisis has been overcome, there will be a need to reorient policies for reconstruction and, in that context, review the work of institutions responsible for managing global interdependence. In principle, two scenarios can be imagined. In the absence of a global hegemon, and in a world of increased geopolitical tensions, countries may opt for retrenchment, choose their camps and deepen the tendency to decouple their economies. This was the path followed after the 1918 global pandemic... The other path is for the leading powers to assume joint responsibility for the management of interdependencies and revitalise and renew global institutions so that they are fit for purpose. Common goals for the international community have already been identified in the UN Sustainable Development Goals. What is needed is that each relevant institution is adapted to make the contribution that best suits its mandate. In some areas like health or climate change, it is already clear that this calls for substantially reinforced international cooperation. The strengthening of the welfare state also needs to be supported by a reform of the rules applied to the taxation of international income. But the trading system is a vital artery of the global economy and the legacy of the GATT/WTO system is too precious to discard. Rather than levelling down by weakening cooperation on trade, the requirement is to level up cooperation across a broad range of interconnected policy areas.

This paper has argued that the GATT/WTO system has acted as the essential anchor for the global economy by facilitating progressive liberalisation, ensuring the stability provided by commonly agreed rules and providing a neutral and objective system of third-party adjudication. As such it has made a major contribution to growth and development.<sup>80</sup> While the GATT was originally sustained by a common commitment to combine openness with domestic stability through welfare policies, the WTO has proven unable to identify a common sense of purpose that reflects its almost universal membership. While the drafters of the WTO treaty inscribed sustainable development in the preamble, there has never been a common understanding as to how the new body should respond to those lofty words. To this lack of common purpose has been added the tectonic geopolitical shift resulting from the emergence of China as the world's largest economy and trading nation.

This paper argues that for the WTO to retain its relevance, it needs to reform. And such reform would need to be jointly promoted by the three main trading powers as part of an inclusive process that also integrates the concerns of all other WTO members. Of particular importance is to integrate the concerns and interests of those developing countries that currently play a marginal role in trade and investment flows, many of which are in Africa. As the African Union develops the project of an African Continental Free Trade area, there is a strong case to make support for African integration in the global economy a central pillar of WTO reform.

The advantages of an ambitious WTO reform agenda would appear to be self-evident:

- Cooperation on trade will contribute to economic recovery from the pandemic and reduce the tensions affecting the global trading system. It would also facilitate reinforced international cooperation to tackle other global challenges such as climate change.
- Multilateral trade liberalisation would send a signal of confidence to traders and investors with a positive impact on the world economy at a time of reconstruction and significant downward risks. It would also make a direct contribution to sustainability objectives.
- Heads of state and government would renew their commitment to multilateral rule-based trade and provide political guidance on the contribution of trade to SDG implementation.
- The WTO would be reinforced both in terms of its effectiveness and its legitimacy. This reinforcement would also ensure a better balance between the role of members, secretariat and Appellate Body.

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<sup>80</sup> On the welfare and trade impact of WTO membership see Gabriel Felbermayr, Mario Larch, Yoto Yotov and Erdal Yalcin, *The WTO at 25, Assessing the economic value of the rule-based trading system*, Bertelsmann Stiftung, November 2019.

While the agenda is ambitious, it is also realistic. The market access commitments by many WTO members would essentially consist of binding the existing level of openness. Liberalisation commitments could be undertaken without affecting core sensitivities, thereby avoiding the pitfalls that led to failure of the Doha Development Agenda. While China would need to accept more constraints on its industrial policies, it would be on the basis of disciplines that are even-handed and apply to other WTO members. Those disciplines would only be subject to enforcement through a legitimate process of third-party adjudication. The US and the EU would benefit from an improved balance of commitments and a level playing field with China which would see its leading role in the trading system recognised and protected against unilateral pressures. Cooperation on WTO reform would also provide a stronger political glue to the transatlantic relationship and lead to reduced bilateral tensions.

The postponement of the WTO Ministerial Conference provides time to properly prepare the launch of an ambitious reform agenda. Reform would, of course, need to proceed in different stages and not every issue would necessarily be ripe for decision by the time of next year's conference (MC 12). But it is important that a sense of direction is provided with the overall goal of seeking to reach substantial results over a time frame of not more than four years. Early implementation of results should be possible and open plurilateral agreements should be integrated within the WTO framework. At the time of writing, one cannot predict what would be the state of the world economy in 2021 owing to the uncertainties created by the global pandemic. A sense of crisis could, it is hoped, lead to greater boldness and a decision to agree by MC12 on some urgent steps to restore confidence in rule-based trade and launch an ambitious agenda for reform.

There are in particular three areas where WTO members could give a strong signal of support for multilateral cooperation and show the organisation's relevance when it comes to delivery on the broader goals of the international community. These would include agreement on the elimination of trade distortive fisheries subsidies, a trade and health initiative and the elimination by as many countries as possible of tariffs both on medical products and on environmental goods. Ideally, a decision could also be taken to proceed to the appointment of Appellate Body members on the basis of a decision to improve the appellate function.

Beyond such a boost of confidence, the Ministerial should launch a broad programme of WTO reform that includes pursuing open plurilateral initiatives on drawing up new rules, exploring the scope for negotiations on industrial and agriculture subsidies as well as on tariffs and services/investment, improvements in the dispute settlement understanding and clarification of rules on trade remedies as well as reinforcing the policy monitoring and deliberation function with the overall objective of contributing to SDG implementation. The ministerial meeting that follows in 2023 should be able to identify further progress in the reform agenda and define more precisely the steps needed to conclude reform negotiations. By 2025, a summit meeting at heads of state and government level could seal the process of WTO reform and agree on a statement that includes political commitments to implement the SDGs along with a work programme to deliver on such commitments.

This article has sought to make the case for an ambitious WTO reform agenda. Before concluding, it is worth discussing the issue of political feasibility. The new European Commission has identified WTO reform as its main trade policy priority. The EU can be expected, therefore, to actively promote WTO reform. Of critical importance would be to place such reform within a broader political context of global efforts to recover from the consequences of the pandemic and to renew multilateral institutions' capacity to act not only on trade, but also on climate change, health and other global challenges. An outward-looking EU should be ready to invest politically to strengthen alliances in support of multilateralism. Here, the key determinant for the prospects of moving forward on the reform agenda depends on the interaction between the EU and three other key players: the US, China and the African Union. This is not intended to minimise the contribution of other WTO members, but simply to illustrate that little can be achieved in the absence of sufficient common understanding amongst those four players.

An essential building block for WTO reform is a high degree of convergence in the reform agenda between the US and EU. Throughout the history of the multilateral trading system, EU-US cooperation has been the main driving force for progress achieved in GATT/WTO negotiations. With the demise of TTIP, cooperation on WTO reform can also restore a climate of transatlantic trust and cooperation on trade with positive spill overs for the bilateral

agenda.<sup>81</sup> Looking into the agenda of WTO reform, there is likely to be a high degree of convergence between EU and US on ideas to restore the credibility of the WTO negotiating function. So far, the US has not been active in discussions relating to the relationship between WTO reform and sustainable development, although its position is likely to depend on the outcome of the November elections. The main area of substantive disagreement is the reform of WTO dispute settlement. The hope of this author is that the ideas presented in this paper, together with others that may come from the US side, could facilitate a transatlantic dialogue to identify a package of reforms that restores a properly functioning binding dispute settlement system. As they are the two main users of WTO dispute settlement, there is a high likelihood that other members would be ready to support changes to which both the US and the EU can subscribe.

Beyond convergence on the detailed reform agenda, the fundamental political question is whether the US is ready to accept that its trade relationship with China cannot be managed exclusively at the bilateral level and that priority should be attached to negotiations in a multilateral setting. This paper argues that the phase one agreement with China does not have the potential to develop into an instrument to secure Chinese reforms or to level the playing field. Instead of relying on bilateral purchase commitments, the US would be better served if China were to agree to autonomously reduce tariffs and to further open its market to investments. A suspension of retaliatory tariffs, as well as restrictions linked to the steel and aluminium national security actions and the civil aircraft dispute, would provide a signal of confidence for the world economy and create the conditions to enter into good faith negotiations on WTO reform. Whether the US would be ready to go in this direction is a question for which an answer can only be provided after its November elections.

How would China react if there was a joint transatlantic offer to cooperate in the launch of WTO reform negotiations? In the absence of signals from the US, it is difficult to gauge what Beijing's position would be. China has been highly critical of US proposals on special and differential treatment as well as on the trilateral proposals on industrial subsidies. In reality, however, China has little to gain from claiming special treatment in rules negotiations and could even find an interest in market access negotiations provided a solution could be found on the issue of free riding. Even on the issue of subsidies, China has been careful not to rule out negotiations at the same time as signalling its interest on certain issues such as restoring the Uruguay Round green box.<sup>82</sup> The fundamental political question is whether China is ready to accept responsibilities commensurate with its weight in the global economy. Much may depend on whether it is possible to restore a climate of trust by de-escalating the current conflict.

It may be, of course, that China refuses to engage and insists on maintaining the *status quo*. In that case, the US and the EU could seek to enhance leverage by intensifying cooperation on making use of WTO-compatible instruments to respond against distortive Chinese practices. This could include sharing information on Chinese subsidies for the purpose of countervailing duty cases as well as intensifying cooperation on investment screening and export control procedures. The EU should still seek to persuade the US to cooperate in reforming WTO dispute settlement, as well as moving forward on those aspects of WTO reform not linked to the US-China conflict, notably those relating to sustainable development, trade and health, support for Africa and institutional reform.

Agreement on an agenda by the three main trading powers, while critically important, would not suffice on its own to launch a reform process that has the necessary legitimacy and restores a sense of common purpose to the multilateral trading system. Africa is the region of the world that is least integrated within the world economy and would suffer most from a collapse of the rule-based trading system. African countries can, moreover, be expected to play a key role in developing an acceptable approach on the two key enabling conditions for restoring the WTO negotiating function, i.e. the new architecture for plurilateral agreements and a new approach to special and differential treatment. They are also likely to insist on the importance of agriculture reform and strong commitments

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<sup>81</sup> Cooperation on WTO reform could of course be combined with an intensified bilateral trade agenda, although this is unlikely to take the form of a comprehensive free trade agreement such as TTIP.

<sup>82</sup> China position on WTO reform/GC/W/773.

to inclusiveness and support for capacity building. At this stage, the African Union is engaged on the major political project of establishing the African Continental Free Trade Area. The synergies between regional integration and fuller participation in global value chains is a key challenge for African development. How to develop these synergies should therefore be one of the central objectives of the WTO reform agenda.

The task of winning political support for an ambitious reform agenda is therefore far from being simple. Political developments in the relationship between the US and China will have a major bearing on the prospect to restore trust in multilateral institutions. But all participants in the trading system would need to contribute if the WTO is to regain its place at the centre of a rule-based trading system. While there are no reasons for optimism, the world has already witnessed the consequences of a collapse of cooperation on trade – and the challenge of recovering from the global pandemic and managing the climate transition makes cooperation even more essential.



## Annex: Summary of WTO reform proposals

WTO reform would aim at reinforcing the three main functions of the Organization so as to make it fit to manage the more complex trading environment of the 21 century. In particular, it would:

- Revitalise the WTO negotiating function
- Restore and improve binding dispute settlement
- Reinforce the role of WTO as a forum for monitoring and discussion of trade policies in support of the implementation of the sustainable development goals

The process of WTO reform should in principle be completed within a four-year time frame. Some reforms could be implemented earlier notably those relating to a trade and health initiative, fisheries subsidies and elimination environmental goods.

What follows is a summary of proposals on WTO reform. Ideas are presented in the order that they are introduced in the paper rather than in terms of sequencing:

### 1.Revitalising the WTO negotiating function:

- The Ministerial Conference could agree before the conclusion of the reform process on a framework decision on conditions for open plurilateral agreements to qualify for inclusion under Annex IV of the WTO agreement. The conditions would aim at ensuring transparency and inclusiveness, including facilitating participation by developing countries. Open plurilateral may not limit the existing rights of non-participants, but only participants may bring claims to dispute settlement based on the provisions of the plurilateral agreement.
- As broad support as possible should be sought for a new approach to Special and Differentia Treatment (SDT). As regards rules negotiations, the aim of SDT would be to facilitate participation of developing countries in new agreements through flexibilities that are linked to capacity constraints. As regards market access or subsidies negotiations, full commitments would be expected from OECD members (present or future), High income countries under the WB classification and countries that represent a high percentage of exports at global or sectoral level.
- Negotiations should be launched on subsidies and trade remedies. The negotiations would cover three tracks: a) Agriculture domestic support; b) Strengthened disciplines on industrial subsidies. This would include a strengthened list of prohibited and amber subsidies, an updated green box and fast track dispute settlement procedures. New disciplines could be concluded as an open plurilateral; c) Clarification of specific provisions of the safeguards, subsidies and antidumping agreements in the form of agreed interpretations of the rules under Article IX:2 WTO.
- Agreements to eliminate tariffs on medical products (as part of a broader trade and health initiative) and environmental goods to be concluded by as large a number of participants as possible already by MC 12.
- Exploratory talks should start on possible tariff negotiations to include the binding of all tariffs at applied levels and the elimination by a critical mass of countries of tariffs that are below a certain threshold.
- Exploratory talks should start on possible negotiations on services and investment market access. The negotiations could take as their starting point the TISA negotiations, but be open to the participation of any interested WTO member and be conducted within the WTO framework. The negotiations could also include commitments on national treatment relating to investment in manufacturing sectors.
- Work to continue on the plurilateral initiatives on e commerce, domestic regulation on services and investment facilitation. Commitments on services regulation could be inscribed on services schedules. Other initiatives to be presented when concluded as open plurilateral agreements under Annex IV of the WTO agreement.
- Work to start on a new open plurilateral initiative on competitive neutrality. This could incorporate commitments on regulatory transparency and good regulatory practices, forced technology transfer, the conduct of state-owned enterprises and the implementation of competition law.

### **Restoring and Improving binding dispute settlement**

- Adopting an improved Walker Decision as an Article IX:2 interpretation of the DSU and introducing certain changes on the organisation of the Appellate Body Secretariat. The DSB Chairman to produce a yearly report on the implementation of the Walker Decision as a contribution to a dialogue between the Appellate Body and WTO Members. On that basis it should be possible to appoint Appellate Body Members for a four-year term. Before consideration of the extension of their mandate, the DSB should review the progress made on the implementation of the Walker Decision and on other DSU related reforms.
- Launch discussions to consider possible savings in dispute settlement timelines and improvements in panel procedures. As regards panels the objective should be both to ensure respect for DSU deadlines and reinforce the capacity of panels to establish a solid factual record of the dispute. Consideration should also be given to the establishment of a roster of panel chairs and on faster implementation procedures.
- Agreement on a mandate to develop Article IX:2 interpretations of a limited number of provisions of the Safeguards, Subsidies and the Antidumping agreement. The aim would be to conclude these Article IX:2 negotiations within a time frame not exceeding three years. WTO members would agree not to bring dispute settlement proceedings on issues identified for such targeted negotiations.
- Consideration on a possible consultation and rebalancing procedure in case a country aims to introduce tariffs or quotas on the basis of Article XXI of GATT. This would provide an alternative to recourse to WTO dispute settlement.

### **Reinforcing the role of WTO as a forum for monitoring and policy discussion of trade policies with the overall objective of contributing to the implementation of the sustainable development goals.**

- As a culmination of the reform process, Heads of State and Government could adopt a Declaration that renews commitment to a rule based multilateral trading system and includes political commitments as regards the contribution that the WTO can make to implement the sustainable development goals. This should cover the contribution of trade policies to foster integration of developing countries in regional and global value chains, as well as the role of trade policy in contributing to environmental sustainability and decent work. The Director General would be asked to ensure follow up in cooperation with relevant UN Organisations.
- Sustainability to be mainstreamed in WTO negotiations and policy discussions. Examples of negotiations include disciplines on fisheries subsidies, liberalisation of medical products and environmental goods and services, development of a green box on non-trade distortive subsidies in support of environmental goals.
- Adoption by MC 12 of a Trade and Health Decision that facilitates monitoring and coordination of trade policies in the context of response to a pandemic.
- An enhanced Aid for Trade commitment. The WTO would be asked to coordinate a substantially reinforced programme of support to facilitate capacity buildings on issues relating to standards, compliance with environmental regulations, and improving the investment climate and regulatory capacity in the digital economy. The focus should be on facilitating the integration in regional and global value chains of developing countries with a limited participation in international trade. In this connection, support could also be provided to the African Continental Free Trade Area.
- Expanding the roles of the Trade and Environment and the TBT and SPS Committees. On trade and the environment, a new work programme should be developed on issues such as climate change, trade in plastics or the trade consequences of the circular economy. On TBT and SPS, beyond improvements of procedures for the consideration of specific trade concerns, work should be reinforced on facilitating exchange of information about work on international standards and other regulatory cooperation initiatives.
- There should be explicit recognition and support for the role of the DG to take initiatives in support of the goals of the Organization, including the preparation of analytical reports in cooperation with other UN Organization, proposing initiatives to deal with emergencies or other new and emerging issues and monitoring the respect of transparency commitments.

- Modalities for consultation of business and civil society should be consolidated and further developed. This would include: a) Publication of negotiating texts and online debriefings by WTO secretariat, including on plurilateral negotiations; b) Panels and Appellate Body hearings to be normally held in public; c) The Director General to nominate a representative group of business and civil society advisors to discuss important developments affecting the trading system. The group should be broadly representative of the membership and include balanced representation of different constituencies.

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