

ARTICLE

Special Issue: The Resurgence of the State as an Economic Actor—International Trade Law and State Intervention in the Economy in the Covid Era

# Systemic Changes in the Politicization of the International Trade Relations and the Decline of the Multilateral Trading System

Giorgio Sacerdoti<sup>1</sup> and Leonardo Borlini<sup>1,\*</sup>

<sup>1</sup>Bocconi University, Milan, Italy

\*Corresponding author: [leonardo.borlini@unibocconi.it](mailto:leonardo.borlini@unibocconi.it)

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## Abstract

This Article contributes to the discussion about the development of international trade regulation of state interventionism by situating the tensions that exist about the future design of subsidies and state enterprises treaty regulation in the broader context of current systemic challenges to the multilateral trading system. While recent studies have explored the issues of subsidies and state-owned enterprises (SOEs) as one of the most significant in impact among the contemporary challenges to the WTO, there is certainly scope to discuss further such a problem from the broader point of view of the crisis of the multilateral trading system, its systemic challenges and the concomitant increasing politicization of international trade relations. To this end, this Article analyzes the interactions between the lasting decline of the WTO, growing political interferences with international trade flows and the prospects of reforming multilateral trade rules to address its systemic challenges and manage/mitigate newly central problems of the 21<sup>st</sup> century such as the Covid-19 Pandemic, climate change and the greening of economic production and international trade. The Article argues that existing WTO rules are not adequate to address these challenges and problems. It concludes that, like in the GATT era, it is only the spirit of pragmatism that may provide chances to find alternatives to growing frustration with negotiating inaction and, hence, to reform the system. However, the question remains whether it is possible to find an approach to imagine, remodel and craft multilateral rules that are sensitive to different economic, political, and social choices and able to rebalance the position of all members, large and small, rich and poor.

**Keywords:** Multilateral Trading System; Geopolitical Rivalry; Industrial Policy and Planning; Covid-19 Pandemic; Dispute Settlement System; Politicization of Trade Relations; Role of the Markets and State in International Trade; WTO Modernization; 12<sup>th</sup> Ministerial Conference

## A. Introduction

In recent years one of the basic tenets of the multilateral trading system established after WWII by the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> in 1947, confirmed and reinforced by the World Trade Organization (WTO) in 1995, has been threatened by unilateral actions of several of the main State actors, a sign of mounting geopolitical tensions in a multipolar world. That tenet

<sup>1</sup>General Agreement on Tariffs and Trade (1947), 55 U.N.T.S. 194.

was the “depoliticization” of trade relations (and, similarly, of foreign direct investment regulation) in the interest of the development of international trade based on cooperation, non-discrimination, reduction of border and internal barriers (deregulation), fair competition, and consumers’ benefits, with the ultimate aim of reinforcing friendly relations beyond borders. After “trade not aid”, “trade not war”. This liberal approach does not exclude the recognition in the GATT/WTO system of grounds for unilateral control of trade flows in the interest of economic and non-economic national interests, such as, for example, through safeguard measures and recourse to exceptions under GATT Article XX for the protection of non-trade values (morality, human health, environment, exhaustible resources), or in case of international emergencies (Article XXI).<sup>2</sup> In case of abuse however, recourse to those actions and countermeasures are subject to impartial rule-based evaluation by the WTO dispute settlement system (DSS).<sup>3</sup> In any case, the system was and is based on a market-economy premise: that through liberalization and non-discrimination international competition between private companies motivated by profit would best allocate the benefits of international trade and technological progress.<sup>4</sup>

Recently, however, we have witnessed a reversal of this historical trend that consolidated with the multilateral rule-based trading system transformation and expansion—subject-wise and geographically—from the GATT to the WTO in the mid-1990s. Starting around 2017, when president Trump entered in office in the US, a host of unilateral restrictive measures “justified” by political ends, and actions by a number of countries aimed at protecting national industries well beyond the GATT rules have appeared.<sup>5</sup> This signified not just a return to “old” protectionism, but a new trend to challenging neoliberalism and multilateralism beyond the economic sphere.<sup>6</sup> This course has destabilized multi-country supply chains and hampered international economic cooperation.<sup>7</sup> Affected countries have in turn reacted with countermeasures in the form of further restrictions.<sup>8</sup> Basic positive aspects of globalization and multilateralism have been under attack, possibly beyond the intent of the individual actors involved.<sup>9</sup>

An increased attention by States to domestic needs is politically unavoidable. It should not be opposed per se nor labeled a priori as protectionist or the poisoned fruit of populism. Especially at

<sup>2</sup>See, among many, ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* 235–244 (2011); Henrik Andersen, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18(2) J. INT’L. ECON. L. 383 (2015); Laurence Boisson de Chazournes, *WTO and Non-Trade Issues: Inside/Outside WTO*, 19(2) J. INT’L. ECON. L. 379 (2016).

<sup>3</sup>Robert Howse, *The World Trade Organization 20 Years On: Global Governance by the Judiciary*, 27(1) EUR. J. INT’L. L. 1 (2016).

<sup>4</sup>On the implicit liberal understanding of the GATT/WTO see Petros C. Mavroidis & André Sapir, *China in the WTO Twenty Years On: How to Mend a Broken Relationship?*, in this issue. For the opposite view that during the Cold War there was constantly a struggle between GATT parties over what counted as “normal” forms of states and markets, and of whether any particular vision of state/market relations should shape the interpretation and implementation of GATT disciplines see Anne Orford, *How to Think about the Battle for the State at the WTO*, in this Issue.

<sup>5</sup>Office of the Director General, *Overview of Developments in the International Trading Environment - Annual Report by the Director-General - (MidOctober 2017 to mid-October 2018)*, WTO Doc. WT/TPR/OV/21 (Nov. 27, 2018).

<sup>6</sup>WTO Trade Policy Review Body, *Report of the TPRB from the Director-General on Trade-Related Developments - Mid-October 2021 to mid-May 2022*, WTO Doc. WT/TPR/OV/W/160 (July 13, 2022).

<sup>7</sup>Roberto Azevêdo, *Informal Trade Policy Review Body Meeting – Trade Monitoring Report* (July 24, 2020), [https://www.wto.org/english/news\\_e/spra\\_e/spra305\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra305_e.htm), wherein the former WTO Director General stressed the importance of ‘keeping international trade and investment flows open’ in order to recover from the economic devastation caused by COVID-19 pandemic.

<sup>8</sup>Aljoscha Nau, *World Trade in 2020: The Show Must Go On! COVID 19 Pandemic, Trade Wars and the Deadlock at the WTO: Rule-Based Trade is under Pressure and the EU Must Take the Lead* (IW-Policy Paper No. 9/2020, 2020). An insightful reading of, and interesting data about, recent trade wars are offered by MATTHEW C. KLEIN & MICHAEL PETTIS, *TRADE WARS ARE CLASS WARS. HOW RISING INEQUALITY DISTORTS THE GLOBAL ECONOMY AND THREATENS INTERNATIONAL PEACE* 19–40 (2020).

<sup>9</sup>GREGORY SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM. THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW* 5 (2021).

a moment where the attention of public opinion in developed countries is turning to growing inequality and the negative impact of globalization to local middle and working class, rather than to its benefits for having drawn out of poverty masses in developing countries.<sup>10</sup> Attention to protecting employment, ensuring national control of the economy through industrial policies, preserving local manufacturing capability (such as in facing pandemics, a situation that has made this tendency more evident)<sup>11</sup> encapsulates the current mood towards “deglobalization”.<sup>12</sup> Respect for the individual right of each country to organize its political and economic national system does not require, however, disregarding existing obligations and commitments, or brushing away the broader imperative of international cooperation in an interdependent world, lest long-term economic ties, beneficial for most states, be seriously disrupted.<sup>13</sup> This is exactly what has happened since 2017 as a result of the increasing use of economic tools for the pursuit of strategic and geopolitical aims. The shifts in the current geo-political setting we have just hinted at are grafted in, and necessarily interact with (other) systemic challenges to the multilateral trading system that are now more profound than at any time in its seven-decade history and affects WTO basic functions, namely “the capacity to negotiate, enforce disciplines, monitor policies and ensure transparency”.<sup>14</sup>

This Article contributes to the discussion about the development of international trade regulation of state interventionism by situating the tensions that exist about the future design of treaty rules on state interventionism in the broader context of current systemic challenges to the multilateral trading system and its lasting crisis. While recent studies, including in this Special Issue, have explored trade regulation of subsidies and SOEs as one of the most pervasive in impact among the contemporary challenges to the WTO, there is scope to investigate further such problems from the point of view of the decline of the multilateral trading system and its systemic challenges, including concomitant increasing politicization of international trade relations. To this end, this Article analyzes the interactions between the crisis of the WTO, the growing political interferences with international trade flows, and the prospects of reforming multilateral trade rules to address contemporary systemic challenges and manage/mitigate newly central problems of the 21<sup>st</sup> century such as the Covid-19 Pandemic, climate change and the greening of economic production and international trade.

Following this introduction, in Part B, we argue that the decline of the WTO is influenced and aggravated by increasing political interferences with trade flows. In turn, this course is determined

<sup>10</sup>See, with different lines of argument, Sugata Bose, *Pondering Poverty, Fighting Famines: Towards a New History of Economic Ideas*, in ARGUMENTS FOR A BETTER WORD: ESSAYS IN HONOR OF AMARTYAN SEN, VOLUME II 425 (Kuashik Basu & Ravi Kanbur eds., 2009); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014), JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS REVISED IN THE ERA OF TRUMP* (2017), Dani Rodrik, *Why Does Globalization Fuel Populism: Economics, Culture, and the Rise of Right-Wing Populism*, 13 *Annual Review of Economics*, 133 (2021); *Id.*; A PRIMER ON TRADE AND INEQUALITY (2021); JAMES BACCHUS, *TRADE LINKS. NEW RULES FOR A NEW WORLD* 52–93 (2022).

<sup>11</sup>See Leonardo Borlini, *The Covid 19 Exogenous Shock and the Crafting of New Multilateral Trade Rules on Subsidies and State Enterprises in the Post-Pandemic World*, in this Issue, and the literature referred to therein.

<sup>12</sup>There is no consensus on the definition of “deglobalisation.” It is clear, however, that the process of international economic integration, a major driver of the globalisation process and of economic growth, has been slowing down since the global financial crisis started in 2007. The last decade has witnessed a decline in the growth of international trade in merchandise, a slow-down in the dynamics of global value chains (GVCs), and significant decline in international capital flows in some years. The fast integration of China and other emerging (and developing) economies into global production networks and the impact of technology on jobs, fuelled additional criticisms of globalisation in some advanced economies. As a result, increased ‘politicization of trade policy’ surfaced in many Group of Twenty (G20) economies.

<sup>13</sup>On the structural compatibility between the GATT/WTO system and heterodox institutional forms and market experiences, see the analysis proposed by Andrew Lang, *Heterodox Markets and ‘Market Distortions’ in the Global Trading System*, 22(4) *J. INT’L ECON. L.* 680, 687 (2019), who pointedly argues that the promotion of liberal market values has been an important objective of the GATT/WTO membership, but ‘that so too has the preservation of institutional diversity and the capacity for institutional innovation, against which it has always been balanced’.

<sup>14</sup>Patrick Low, *The WTO in Crisis: Closing the Gap between Conversation and Action or Shutting down the Conversation?* 21(3) *WORLD TRADE REV.* 274, 274 (2022).

by a new central geo-political shift featured by the engagement of several economies, including the US and the EU, in industrial policy and planning, as well as the increased recourse to trade restrictive measures based on political decisions that disregard international commitments. Against this backdrop, we investigate and assess certain systemic challenges to the WTO that are at the root of the current crisis, including the US disengagement with multilateral trade rules; the WTO Dispute Settlement System (DSS) semi-paralysis and its implications; recent oscillations in the position of the EU—the world’s largest trading bloc, by many viewed as the last big defender of rules-based open trade—towards the multilateral trading system; and key substantive areas of WTO requiring urgent reforms, particularly in relation to health and environmental issues, which remained unaddressed or subject to further negotiations in the last Ministerial Meetings. In part C, we reflect on the perspectives for the multilateral trading system in the current geopolitical setting and explore ways forward. Our main claim is a simple one: a comprehensive review of the adequacy of existing WTO substantive and procedural rules should be the primary objective of any program about the revitalization of multilateralism in trade. New multilateral rules must be conceived to accommodate different forms of economic governance that promotes development. We submit that, as a general approach, such a review should aim to granting some more leeway to the protection of national interests by individual countries in specific instances, while protecting the foreign “victims” of those restrictions. Importantly, this approach involves the pragmatic rebalancing of domestic policy space in relation to international economic law constraints, including through adjustment of domestic safeguards on economic, social policy and national security bases. At the same time, recourse to unilateral instruments and countermeasures should remain subject to effective international collective verification and to prompt efficient *ex ante* and *ex post* controls and remedies, which cannot be achieved without a fully-functioning DSS. We then examine the reasons of the complexity of reforming the WTO, and discuss the outcomes of the Ministerial Meeting (MC12), held in Geneva in June 2022, where several key problems, including the respective roles of the markets and state in international trade, remained unaddressed. Part D concludes.

## B. Systemic Challenges to the Multilateral Trading System

### I. The Decline of the WTO System and the Politicization of Trade Relations

The WTO system has been under strain in recent years because of the inability of members (a) to resolve frictions over the application of existing procedural rules (notifications, transparency, dispute settlement, plurilateral agreements) and substantive disciplines, which is due also to diverging views on the adequacy of some of them, such as to subsidies and the role of state-owned enterprises (SOEs); and (b) to negotiate new agreements concerning matters that the existing rule-book, dating back to the mid-1990s, does not cover (e-commerce, data transfer, services).<sup>15</sup> This situation has led

<sup>15</sup>See, among several others, ASSESSING THE WORLD TRADE ORGANIZATION – FIT FOR PURPOSE? (Joost Pauwelyn, Manfred Elsig & Bernard Hoekman, eds., 2017); *China’s Proposal on WTO Reform, General Council, Communication from China* WT/GC/W/773, (May 13, 2019); Peter-Tobias Stoll, *A Washington Wake-Up Call and Hybrid Governance for World Trade*, 69(3) QUESTIONS OF INTERNATIONAL LAW (QIL) ZOOM OUT “IN CLINICAL ISOLATION”, IS THERE A MEANINGFUL PLACE FOR THE WORLD TRADE ORGANIZATION IN THE FUTURE OF INTERNATIONAL ECONOMIC LAW? (2020) <http://www.qil-qdi>. Steve Charnovitz, *A WTO if You Can Keep it*, in *id.*; Bernard Hoekman & Petros C. Mavroidis, *Two Crises and No Obvious Way Out*, in *id.*; Giorgio Sacerdoti, *The Stalemate Concerning the Appellate Body of the WTO: Any Way Out?*, in *id.*; Leonardo Borlini, *A Crisis Looming in the Dark: Some Remarks on the Reform Proposals on Notifications and Transparency*, in *id.*; Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises* 23(2) J. INT’L ECON. L. 371 (2020); Robert Wolfe, *Reforming WTO Conflict Management: Why and How to Improve the Use of Specific Trade Concerns*, 23(4) J. INT’L ECON. L. 817 (2020); the different contributions in REVITALIZING MULTILATERALISM: PRAGMATIC IDEAS FOR THE NEW WTO DIRECTOR-GENERAL (Simon Evenett & Richard Baldwin eds., 2020); Matteo Fiorini, Bernard Hoekman, Petros Mavroidis, Maarja Saluste & Robert Wolfe, *Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members’ Revealed Preferences*, 54(5) J. WORLD TRADE, 667 (2020); *Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System*, COM(2021) 66 final ANNEX (Feb. 2, 2021); Martina F. Ferracane & Mosi Li,

to, and is evidenced by, the lack of success (and, preliminarily, of engagement) in resolving both types of issues within the WTO. Several G-20 members have pursued other approaches to tackle what they have perceived as their priorities concerning trade. These approaches include *unilateralism* through protective measures of domestic markets (industries and workers), *bilateral deals*, (*mega*) *regional agreements*<sup>16</sup> and exploring the avenue of *plurilateral agreements*.<sup>17</sup>

The developments under discussion have been influenced by, and are a sign of, the recent new tendency to the “*politicization*” of *trade relations* in two respects. *First*, political interference with trade flows, which are traditionally determined by business choices based on market and competition conditions, derives, indirectly, from the launching of *industrial policy* programs by several economies (e.g., “Made in China 2025”),<sup>18</sup> including the EU and the US, the latter being free-market economies where the role of the state has primarily been, at least since the 1990s, that of a

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*What Kinds of Rules are Needed to Support Digital Trade?*, in REBOOTING MULTILATERAL TRADE COOPERATION: PERSPECTIVES FROM CHINA AND EUROPE 153 (Bernard Hoekman, Tu Xinquan & Wang Dong eds., 2021); PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 315–326 (5th ed., 2021); Bernard Hoekman & Petros C. Mavroidis, *Preventing the Bad from Getting Worse: Is it the End of the World (Trade Organization) As We Know it?*, 32(3) EUR. J. INT’L L., 743 (2021); Carlos P. Braga, Alejandro Jara, Bozkurt Aran, Douglas Lippoldt, Giorgio Sacerdoti, Leonardo Borlini, M. Sait Akman, Uri Dadush & Fernando de Mateo, *Confronting Deglobalisation in the Multilateral Trading System*, 14(1) TRADE L. & DEVELOPMENT, 385 (2022); Bacchus, *supra* note 10, at 94–113, 137–172.

<sup>16</sup>In recent years, countries involved in economic integration efforts are, often, countries and group of countries from different regions. See e.g., Council Decision 2015/2169/EU, Free Trade Agreement between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part, 2011 O.J. (L 127) 54 (hereinafter: EU-Korea FTA); *Proposal for a Council Decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan*, COM 2018.192 final (Apr. 4, 2018); The US-Singapore Free Trade Agreement, U.S.-Sing. May 6, 2003, 117 Stat. 948, 42 ILM 1026; U.S.-Korea Free Trade Agreement, Mar. 15, 2012, 125 Stat. 428, 46 ILM 642; the India-MERCOSUR Preferential Trade Agreement, June 17, 2003, (final text available at <https://commerce.gov.in/international-trade/trade-agreements/india-mercosur-pta/>); EU-Canada Comprehensive Trade and Economic Agreement, Spt. 21, 2017, OJ L 11, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en); U.S.Colombia Trade Promotion Agreement, Oct. 21, 2011, 125 Stat. 462, <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/final-text>; the China-Costa Rica Free Trade Agreement, Aug. 1, 2011, <http://fta.mofcom.gov.cn/topic/encosta.shtml>; Australia-Chile Free Trade Agreement, Mar. 6, 2009, ATS 6; Peru-Japan Economic Partnership Agreement, Mar. 1, 2012, <https://www.mofa.go.jp/region/latin/peru/epa201105/index.html>; Economic Partnership Agreements (EPAs) between the EU and groups of African, Caribbean, and Pacific (ACP) States, such as the EU-CARIFORUM Economic Partnership Agreement, October 15, 2008, (2008/805/EC), 2008 O.J. (L 289). Instead of referring to these agreements as regional trade agreements, they are often referred to as preferential trade agreements. Recent examples of *regional* and *mega-regional* economic integration include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Mar. 8, 2018, [www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/index.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/index.aspx?lang=eng). The TPP-11 is a separate treaty that incorporates, by reference, the provisions of the original Trans-Pacific Partnership (TPP), defunct after the United States withdrew its signature; the United States-Mexico-Canada Agreement, July 1, 2020, 134 Stat. 2020 (hereinafter: USMCA); and the African Continental Free Trade Area, which is a FTA among fifty-five Member States of the African Union, entered into force between twenty-four of these countries on 30 May 2019. Agreement Establishing the African Continental Free Trade AREA (AfCFTA), May 30, 2019, <https://www.sars.gov.za/legal-counsel/international-treaties-agreements/trade-agreements/afcfta/>. As of 27 April 2022, the parties have become forty-three. For an informed discussion on the impact of the proliferation of such forms of economic integration on the multilateral trading system, see Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30(1) J. INT’L ECON. PERSPECTIVES 95 (2016).

<sup>17</sup>Bernard Hoekman & Petros C. Mavroidis, *WTO “à la carte” or “menu du jour”? Assessing the Case for More Plurilateral Agreements*, 26(2) EUR. J. INT’L L.319 (2015).

<sup>18</sup>“Made in China 2025” (MIC2025) is a strategic plan that was initiated in 2015 to reduce China’s dependence on foreign technology and promote Chinese technological manufacturers in the global marketplace. In 2015, Prime Minister Li Keqiang launched MIC 2025 an initiative which sets to modernize China’s industrial capability. This ten-year, comprehensive strategy focuses heavily on intelligent manufacturing in ten strategic sectors and has the aim of securing China’s position as a global powerhouse in high-tech industries such as robotics, aviation, and new energy vehicles such as electric and biogas. The ultimate goal MIC2025 is to change its perception as a low-end manufacturer to a high-end producer. The plan is only a small portion of a larger directive to develop innovation-driven technology and networks that the current administration is pushing as part of a comprehensive agenda. See further Institute for Security & Development Policy, *Made in China 2025. Background* (June 2018), <https://isdsp.eu/content/uploads/2018/06/Made-in-China-Backgrounder.pdf>; *Premier’s Campaign*

regulator rather than an actor in the market. Even a champion of private enterprise, like the US, and a tenant to rigorous rules against distorting State aid (subsidies) and risks of monopolization, such as the EU, with its rules on competition, are now leaning towards policies aimed at actively supporting specific domestic industrial sectors; building capabilities in “strategic sectors”; reshoring production; granting to domestic producers preferential access to government procurement; and ensuring domestic ownership of major and advanced technological local companies by screening acquisitions from abroad in broadly understood strategic sectors.<sup>19</sup>

The *second* recent development is the increased recourse to trade restrictive measures based on political decisions directly interfering with international trade flows at the cost of disregarding international commitments. The multilateral rule-based trade system was inspired, among others, by the aim to somehow isolate the trade regime from the vagaries of political decisions, relations, and disputes by and between WTO members.<sup>20</sup> Except in the case of UN Security Council sanctions in connection with international conflicts, trade in products with a military use (“dual use”), or serious domestic crises, GATT parties and, thereafter, WTO members have tended to refrain from measures affecting normal trade flows, even in respect of countries with which they do not have particularly friendly relations. Unilateral trade sanctions had been focused until recently against a few countries (“rogue States”, such as Iran and North Korea) or in selective reaction to blatant breaches of international principles (Russia’s annexation of Crimea) or major breaches of human rights (Myanmar), but have not affected otherwise the application of multilateral rules. The restrictive wording of the security exception of Article XXI GATT confirms this traditional

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for *Upgrading ‘Made in China’*, STATE COUNCIL PEOPLE REPUBLIC CHINA (Aug. 18, 2016), <https://english.www.gov.cn/2016special/madeinchina2025/>.

<sup>19</sup>Other contributions to this Special Issue illustrate telling cases of industrial policies and instruments that interfere with trade flows. Here, we would like to mention a few notable examples of the turn in the US and EU policy regarding international trade and investments. To start with, the US has long recognized that certain investments in their territory from foreign persons, particularly those from competitor or adversarial nations, can present risks to U.S. national security. Based on such assumption, over the last few years, the US have repeatedly reinforced the Committee on Foreign Investment in the United States (CFIUS)’s screening of foreign investments. Most importantly, on January 13, 2020, the US Department of the Treasury released two sets of new regulations that comprehensively implement the Foreign Investment Risk Review Modernization Act (FIRRMA)—a law that strengthens the authority of the CFIUS. Among various developments, the regulations adopted in 2020 strengthen CFIUS’s jurisdiction over certain types of non-controlling investments involving critical technology, critical infrastructure, and sensitive data; create *limited* exemptions to CFIUS jurisdiction, including for certain *non-controlling* transactions involving investors from Australia, Canada, and the United Kingdom in defined circumstances; enable CFIUS to review foreign investments in or acquisitions of US real estate that previously fell outside CFIUS’s purview because they did not involve US businesses. Furthermore, on September 15, 2022, President Biden signed an executive order to ensure robust reviews of evolving national security risks by the CFIUS. This Executive Order is the first since CFIUS was established in 1975 to provide formal Presidential direction on the risks that the Committee should consider when reviewing a covered transaction. See: *Fact Sheet: President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by Committee on Foreign Investment in the United State*, WHITE HOUSE (Sept. 15, 2022) <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/>. Illustrative of reinvigorated state interventionism by the US Government is the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act of 2022, granting financial support to US companies up to \$ 50 bn for the building of a domestic microchip industry, aimed at reducing dependency from Taiwan and the People’s Republic of China (PRC) See further: Exec. Order No. 14080, 87 Fed. Reg. 52847 (Aug. 25, 2022), *Implementation of the CHIPS Act of 2022* <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/08/25/executive-order-on-the-implementation-of-the-chips-act-of-2022/>. Turning to the EU, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 established a framework for the screening of foreign direct investments into the Union, 2019 OJ (L 79I) 1, which entered into force on 11 October 2020. This regulation inserted the European Commission into a hitherto jealously guarded area of EU Member States’ authority, viz. the screening of foreign direct investment (FDI) for threats to security and public order. See *id.* Still, Regulation 2019/452 is not aimed at a full harmonization of the FDIs control mechanisms in the EU, nor does it replace the national FDIs screening with an EU level review mechanism. Instead, it promotes cooperation, information sharing and a minimum level of transparency regarding FDIs control between the European Commission and Member States. On a different but related premise is grounded the more recent proposal for an anti-economic coercion regulation (see *infra* § B.IV).

<sup>20</sup>John H. Jackson, *The Case of the World Trade Organization*, 84(3) INT. AFF. 437 (2008).

approach.<sup>21</sup> This has changed recently. Recourse to export restrictions or discriminatory measures for a variety of reasons, including trade concerns, have increased.<sup>22</sup> They have been addressed not only against specific countries, but also against specific companies, both by supply/export prohibitions and by restricting the use of foreign products, and reliance on them by domestic companies (such as in respect of Huawei and its 5G telecommunication technology). These politically motivated measures have been magnified by export restrictions introduced to face the Covid-19 pandemic, especially in the form of export restrictions of sanitary devices, and more recently, of vaccines, in order to protect domestic availability.<sup>23</sup> Unilateral restrictions of this type have led to similar counter-restrictions often frustrating the aims pursued by the countries enacting them.<sup>24</sup>

The broad tendency to politicization illustrated in the present section of this article may be considered a sign of “deglobalization”, that is subordinating the liberalization of trade to domestic non-trade concerns and objectives. As part of this development, consider also the approach followed in recent bilateral and regional free trade agreements (FTAs), notably by the USA in USMCA<sup>25</sup> and by the EU in contemporary bilateral trade agreements,<sup>26</sup> conditioning market opening commitments to compliance with non-trade requirements, such as labor and environmental standards.<sup>27</sup> The intentions of this kind of approach that has been wholeheartedly

<sup>21</sup>Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 187, Annex 1A, Article XXI. Until very recently, this provision was rarely invoked as a defense in WTO disputes and had never been ruled upon by a GATT or WTO panels. In recent years, however, there has been a surge in disputes in which Article XXI, and in particular, Article XXI (b), is invoked. The two-tier test for an otherwise GATT-inconsistent measure to be justified under Article XXI is illustrated in Panel Report, *Russia-Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

<sup>22</sup>As noted by others, the resulting “weaponization” of international trade by several states appears set to restructure the global economic system. See, among others, Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45, 45 (2019); J Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L. J. 79 (2020); Yong-Shik Lee, *Weaponizing International Trade in Political Disputes: Issues under International Economic Law and Systemic Risks*, 56 J. WORLD TRADE 405 (2022); Mona Paulsen, *Let's Agree to Disagree: A Strategy for Trade-Security*, 25 J. INT'L ECO. L. (2022, forthcoming).

<sup>23</sup>COVID-19 related export restrictions have been notified to the WTO by a number of countries, in accordance with the 2012 Decision on Notification Procedures for Quantitative Restrictions: See *WTO Information Note on Export Prohibition and Restrictions*, WORLD TRADE ORG. (Apr. 23, 2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/covid19\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm). For an updated review of these measures, see WTO, *COVID-19: Measures Affecting Trade in Goods* (as of 20 October 2022, [https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_related\\_goods\\_measure\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm)). Their impact in international trade flows is assessed in OECD, *International Trade During the COVID-19 Pandemic: Big Shifts and Uncertainty*, ORG. FOR ECON. CO-OPERATION & DEV. (March 10, 2022), <https://www.oecd.org/coronavirus/policy-responses/international-trade-during-the-covid-19-pandemic-big-shifts-and-uncertainty-d1131663/>.

<sup>24</sup>Giovanna Adinolfi & Giulio Bartolini, *International Economic Law (2020)*, 3 YEARBOOK INT'L DISASTER L., 568, 574–583 (2022). Scholars have devoted particular attention to the flexibilities provided for in the WTO agreements, to assess to what extent they can legitimately justify the adoption of measures clearly at variance with the liberalization and non-discrimination commitments that arise from the participation in the multilateral trading system. See further Bernard Hoekman, Matteo Fiorini & Aydin Yildirim, *Export Restrictions: A Negative-Sum Policy Response to the COVID-19 Crisis*, (EUI Working Paper\RCAS 2020/23); Mona Pinchis-Paulsen, *COVID-19 Symposium: Thinking Creatively and Learning from Covid-19 – How the WTO can Maintain Open Trade on Critical Supplies*, OPINIO JURIS (April 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium-thinking-creatively-and-learning-from-covid-19-how-the-wto-can-maintain-open-trade-on-critical-supplies/>; Joost Pauwelyn, *Export Restrictions in Times of Pandemic: Options and Limits Under International Trade Agreements*, 54(5) J. WORLD TRADE 727 (2020).

<sup>25</sup>Canada-Mexico-United States North American Free Trade Agreement, done at Washington D.C. on December 8 and 17, 1992, at Ottawa on December 11 and 17, 1992, and at Mexico City on December 14 and 17, 1992, 32 I.L.M. 605 (1993).

<sup>26</sup>See Maria Anna Corvaglia, *Labour Rights Protection and Its Enforcement under the USMCA: Insights from a Comparative Legal Analysis*, 20(5) WORLD TRADE REV. 648 (2021). For a critical introduction to human rights clauses in trade agreements see Lorand A. Bartels, *Trade and Human Rights*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 792 (Daniel Bethlehem, Rodney Neufeld & Isabelle Van Damme eds., 2009).

<sup>27</sup>Lorand A. Bartels, *The EU's Human Rights Obligations to Policies with Extraterritorial Effects*, 25(4) EUROPEAN J. OF INT'L. 1071 (2015); Leonardo Borlini, *The EU's Promotion of Human Rights and Sustainable Development through PTAs as a Tool to Influence Business Regulation in Third Countries*, in BUSINESS AND HUMAN RIGHTS IN EUROPE: INTERNATIONAL LAW CHALLENGES, 71 (Angelica Bonfanti ed., 2019); Marco Bronckers, *The EU's Inconsistent Approach*

embraced by the EU in its “new-generation” FTAs negotiations may be laudable. The same approach however results in subordinating opening of trade to all sorts of different concerns and, along with them, protectionist interests.<sup>28</sup> Trade liberalization has been always conceived and conveyed as a means to enhance the welfare of citizens. What is at stake with the developments under discussion—even with the conditioning of trade relations on the respect of international standards—is a shift from the market to the state. If these policies are pursued disregarding existing commitments though, the benefits of a predictable and stable framework for beneficial reciprocal trade gets lost.

The picture looks bleak for free global trade. Pierre-Olivier Gourinchas, the IMF’s chief economist, in June 2022 warned of a world fragmenting into “distinct economic blocs with different ideologies, political systems, technology standards, cross-border payment and trade systems, and reserve currencies”.<sup>29</sup> The so-called “decoupling” from China advocated by US policy makers at various levels is a major example of this tendency. The interference of governments with business choices by advocating “(friend-)reshoring” of global value chains (GVCs) is another manifestation of broadly defined “strategic concerns” that put security before economy.<sup>30</sup>

Because of these combined developments, the trading system becomes more fragmented and litigious, a change which the WTO, as a member-driven organization, based on cooperation and similar value-sharing by its major members, has difficulty in handling, especially in view of the current semi-paralysis of its dispute settlement system (DSS). The DSS is meant to handle “normal” disputes stemming from different bona fide interpretations of existing obligations and is based on the willingness of WTO members to voluntarily comply with the decisions. It is not capable of handling political conflicts that directly challenge existing rules.

## ***II. The US Disengagement with Multilateral Trade Rules from the Trump to the Biden Administration***

This slippery slope culminated in 2018 with the imposition by the US of extra duties on steel and aluminum products beyond the US bound tariffs. The Trump administration based this action domestically on Section 212 of the Trade Act, dating back to the Cuban Missile Crisis of 1962 and rarely invoked since, while publicly defending the restrictions as an instrument to protect the US domestic industry from foreign competition (according to the principles “America First” AND “Bring back jobs to America”).<sup>31</sup> Internationally, the US has relied on the essential security interest exception of Art. XXI GATT. As hinted at above, this is a provision that the GATT contracting parties/WTO members had wisely kept dormant for decades and which had never been subject to panel proceedings before 2017.<sup>32</sup> In fact, the Trump Administration started domestic investigations on the automotive industry thereafter, threatening to apply

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towards Sustainability Treaties: Due Diligence Legislation v. Trade Policy, EJIL: TALK! (Nov, 9 2019), [https://www.ejiltalk.org/the-eus-inconsistent-approach-towards-sustainability-treaties-due-diligence-legislation-v-trade-policy/?utm\\_source=mailpoet&utm\\_medium=email&utm\\_campaign=ejil-talk-newsletter-post-title\\_2](https://www.ejiltalk.org/the-eus-inconsistent-approach-towards-sustainability-treaties-due-diligence-legislation-v-trade-policy/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2).

<sup>28</sup>Thus: is the finalization of the EU-Mercosur FTA stuck more by European citizens’ concerns for the protection of the Amazonian Forest or by the fear of French and Irish cattle growers by the increased competition from Mercosur countries? Arguably, FTAs of this sort may reflect the European tendency to universalize the regional, with the EU seeking to exert some degree of political and economic influence over third countries because the failure to export its (internal) standards to other outside its territory would penalize European firms. See Martti Koskeniemi, *International law in Europe between Tradition and Renewal*, 16(1) EUROPEAN J. OF INT’L. 113 (2015).

<sup>29</sup>Pierre-Olivier Gourinchas, *Shifting Geopolitical Tectonic Plates*, FINANCE & DEVELOPMENT, June 2022, at: <https://www.imf.org/en/Publications/fandd/issues/2022/06/shifting-geopolitical-tectonic-plates-straight-talk>.

<sup>30</sup>On reshoring see the various reports published in 2022 at: <https://www.globaltradealert.org/reports>.

<sup>31</sup>For greater detail about these tariffs, see DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES AND MATERIALS*, Fourth Ed., 139–143 (2022).

<sup>32</sup>Panel Report, *supra* note 21, para. 7.20–7.23.



Section 212 to car imports from Europe.<sup>33</sup> What followed were countermeasures in “self-defense” by most countries hit by extra duties, which too have a dubious foundation in the WTO system, since they had not been authorized by the Dispute Settlement Body (DSB) pursuant to findings of a panel or the Appellate Body, as it is mandated by Article 23 of the Dispute Settlement Understanding (DSU).<sup>34</sup> Measures and countermeasures ended up at the WTO dispute settlement system even though no panel report had yet been issued.<sup>35</sup>

The recent “trade war” with China—which is only a part of a chain of increasing tensions among the largest global trade powers—started with two waves of extra-duties imposed on most imports from China into the US, a measure for which a GATT basis was not even invoked, not to mention the disrespect for the requirement to go first to dispute settlement proceedings under the above-mentioned Article 23 of the DSU. In a seeming process of perverted mimicking, additional politically motivated trade restrictions have soon followed, such as by the US against Hong-Kong,<sup>36</sup> or between China and Australia.<sup>37</sup> New export restriction by China on rare earth and critical materials are looming as political measures, while the previous restrictions had been subject to panel and appellate proceedings at the WTO and rulings, to which China had complied.<sup>38</sup> In the context of some of the above-mentioned disputes, multilateral rules have been the object of further unauthorized derogations. The EU has complained that the so-called “Phase 1” agreement between the US and China of January 2020—by which some, but not all, of US extra duties were removed (but none of China)<sup>39</sup>—was in breach of MFN treatment.<sup>40</sup> Only Canada and Mexico have been exempted from the US extra-duties on steel and aluminum,

<sup>33</sup>The claim that car imports from the EU (such as Mercedes or Audi models) could threaten essential security interests of the US was defined as “ludicrous” by *The Economist*. See *President Donald Trump is Trashing Deals in Favor of Tariffs. That May Backfire on America*, *THE ECONOMIST* (June 8, 2019).

<sup>34</sup>See Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU], Article 23. For a pithy and insightful assessment of the reactive measures at issue under WTO law see Joseph Weiler, *Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System*, *EJIL: TALK!* (July 25, 2018), <https://www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/>.

<sup>35</sup>See the cases brought separately by China, India, the EU, Canada, Mexico, Norway, Russia, Switzerland and Turkey against the US in 2018–2019 (DS 544, 547, 548, 550, 551, 552, 554, 556 and 564, respectively). Some of these WTO members have adopted immediate trade restrictions against the US as countermeasures under Article 8 of the Safeguards Agreement, having considered the US measures to be in reality disguised safeguards. The US has in turn challenged these countermeasures as unjustified, claiming that its own measures are bona fide security-based, and started proceedings against Canada, China, the EU, Mexico and Turkey (DS 557, 558, 559, 560 and 561 respectively). Since the US measures against Mexico and Canada have been lifted after the conclusion of the USMCA Agreement replacing NAFTA effective on 1 July 2020, these cases have been withdrawn. All other cases were still pending before panels at the end of 2021 with no report issued yet.

<sup>36</sup>Jeffrey J. Schott, *A Coming Clash over Hong Kong Sanctions?*, Peterson Institute of International Economics: Washington, D.C., (2021), <https://www.piie.com/blogs/trade-and-investment-policy-watch/coming-clash-over-hong-kong-sanctions>.

<sup>37</sup>*China Trade Row Has Cost Australia \$3 Billion in Lost Exports*, *BLOOMBERG*, (January 21, 2021), <https://www.bloomberg.com/news/articles/2021-01-21/china-trade-row-has-cost-australia-3-billion-in-lost-exports>.

<sup>38</sup>*China Targets Rare Earth Export Curbs to Hobble US Defence industry*, *FINANCIAL TIMES*, (February 16, 2021), <https://www.ft.com/content/d3ed83f4-19bc-4d16-b510-415749c032c1>.

<sup>39</sup>In the so-called “Phase-1” agreement between the US and China of 15 January 2020, the extra tariffs imposed by the US on Chinese exports to the US in 2018 were not lifted (but just reduced in part), leaving the tariffs imposed as countermeasures by China on imports from the US untouched. See *US-China Economic and Trade Agreement*, (January 15, 2020), [https://ustr.gov/sites/default/files/files/agreements/irreconcilable%20with%20the%20most%20favored%20nation%20\(mfn\)%20rule%20the%20cornerstone%20of%20the%20world%20trading%20regime%20the%20us-china%20phase%20one%20deal%20has%20not%20expanded%20us%20exports%20to%20china%20as%20expected%20either](https://ustr.gov/sites/default/files/files/agreements/irreconcilable%20with%20the%20most%20favored%20nation%20(mfn)%20rule%20the%20cornerstone%20of%20the%20world%20trading%20regime%20the%20us-china%20phase%20one%20deal%20has%20not%20expanded%20us%20exports%20to%20china%20as%20expected%20either). See Gary Clyde Hufbauer, *Managed trade: Centerpiece of US-China Phase One Deal*, Peterson Institute of International Economics: Washington, D.C., (2020), <https://www.piie.com/blogs/trade-and-investment-policy-watch/managed-trade-centerpiece-us-china-phase-one-deal>.

<sup>40</sup>The EU has immediately expressed its reserve as to the WTO-consistency of such a bilateral “mercantilistic” deal, see *EU Trade Commissioner Criticises US-China Trade Deal*, *FINANCIAL TIMES*, 17 January 2020. China has challenged the US measures at the WTO while the US has not impugned China’s countermeasures. The Panel, in Case 543 (commented hereafter), circulated on September 15, 2020, appealed by the US, has affirmed its jurisdiction notwithstanding the agreement of January 15, 2020, and has found the US measures in breach of Article I and II GATT.

because of the signing of the USMCA agreement replacing the North American Free Trade Agreement (NAFTA) in 2020, while Brazil and Argentina introduced “voluntary” export quotas on their exports to the US.

Besides, the tensions among the US, EU and China are exceptionally “acute with respect to industrial subsidies”,<sup>41</sup> and, relatedly, the vexing question about trade rules on state-owned enterprises (SOEs). This is clearly an area of regulation where the three powers diverge. Its normative implications are explored from different perspectives by Matsushita’s, Mavroidis’ and Sapir’s, and Borlini’s articles in this Special Issue, as well as by other recent and insightful pieces of legal scholarship.<sup>42</sup> Here, it is worth stressing that in 2019–2020 the conflict over trade regulation of industrial subsidies between the US and China hardened in several respects. Central to such tensions is the criticism raised by the US (and other WTO Members) of China’s widespread use (or abuse) of subsidies to and through its SOEs, which distort international competition and are not adequately dealt with by the special provisions of China’s Access Protocol to the WTO (a criticism that China of course rejects).<sup>43</sup> Reform of substantive provisions of the WTO Agreement on Subsidies and Countervailing Measures (ASCM)<sup>44</sup> was advocated in a joint statement of the United States, the European Union and Japan in January 2020.<sup>45</sup> This proposal includes broadening the concept of SOEs and overturning the restrictive interpretation of the term “public body” in the ASCM, which has been adopted by the Appellate Body in several reports—one of the grounds of complaint by the US against the Appellate Body jurisprudence.<sup>46</sup> Yet, even ruling out further liberalization of trade in goods and services, which protectionist and populist sectors of public opinion reject, it is difficult to envisage even modest reforms where consensus is lacking. Majority voting or plurilateral agreements would leave out important players and would defeat the very purpose of the exercise.

Another important issue raised by the US that has found some support among developed WTO members is the proposal to review the privileged self-defined status of developing country at the WTO.<sup>47</sup> Specifically, the US government suggested in a Memorandum of 2019 that the participation of a country in the G-20, which requires being a major economic and trading power, should be considered incompatible with developing member status.<sup>48</sup> Earlier, in September 2018, the European Commission expressed a similar position when discussing the inefficiencies of the WTO system at the root of the current crisis, noting that: “The system remains blocked by the antiquated approach to flexibilities which allows over 2/3 of the membership including the world’s

<sup>41</sup>Bernard Hoekman, Xiquan Tu, & Robert Wolfe, *China and WTO Reform*, EUI WORKING PAPER 7, at 9 (2022).

<sup>42</sup>See, among others, PETROS C. MAVROIDIS & ANDRÉ SAPIR, *CHINA AND THE WTO: WHY MULTILATERALISM MATTERS* (2021); Robert Howse, *Official Business: International Trade Law and the Resurgence (or Resilience) of the State as an Economic Actor*, 43 U. PA. J. INT’L L. 821 (2022); Hoekman, Tu, and Wolfe, *supra* note 41, at 7–8.

<sup>43</sup>See Leonardo Borlini, *When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements*, 35 LEIDEN J. INT’L. 313, 315–323 (2020), and the literature referred to therein.

<sup>44</sup>Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

<sup>45</sup>Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union Washington, D.C. (January 14, 2020), [https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158567.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf).

<sup>46</sup>For a critical assessment of this case law see, among many, Joost Pauwelyn, *Treaty Interpretation or Activism? Comment on the AB Report on United States – ADs and CVDs on Certain Products from China*, 12(2) WORLD TRADE REV. 235 (2013).

<sup>47</sup>The developing member status is an area identified for WTO reform by the US, the EU and the Trilateral Trade Ministerial Cooperation. The grievance is that some of the world’s top trading States that declared themselves as developing members are taking advantage of the 155 special and deferential treatment provisions embedded across the range of WTO agreements. This status grants them weaker commitments, undermining the functioning of the multilateral trading system and impeding the negotiation of future agreements. See generally Weinian Hu, *China as a WTO developing member, is it a problem?* CEPS POLITICAL INSIGHT No. 2019/16, <https://www.ceps.eu/ceps-publications/china-as-a-wto-developing-member-is-it-a-problem>.

<sup>48</sup>Federal Register, *Developing-Country Status in the World Trade Organization. Memorandum for the United States Trade Representative, Memorandum 26 July 2019, Reforming*, (July 26, 2019), <https://www.federalregister.gov/documents/2019/07/31/2019-16497/reforming-developing-country-status-in-the-world-trade-organization>.

largest and most dynamic economies to claim special treatment.”<sup>49</sup> Still, the US proposal has strongly been rejected by those States which would be affected by it, first of all China.<sup>50</sup>

As evidenced by Schoenbaum in his article for this Special Issue, the Biden administration has been inspired by *disengagement* in respect of the WTO, which it has gone on practicing though having dropped the aggressive tones of the USTR under Trump.<sup>51</sup> For the limited scope of this article, there is no need to illustrate in detail the elements of the current US administration’s trade policy. It requires here only a summary of the general stance. The Biden administration embraces an approach to trade in terms of “competition rather than cooperation”, “engagement instead of dispute adjudication”, “loose regional frameworks rather than binding commitments”.<sup>52</sup> In practice, rather than promoting multilateral trade reforms and reinforcing the WTO, the Biden administration continues its predecessor’s protectionist policies so that trade may serve domestic *political* ends.

In such a context, “US officials and commentators have begun to offer *new languages* and frameworks for envisioning the future international economic regime”<sup>53</sup> submitting that a new paradigm of industry protection—what US Treasury Secretary Janet Yellen has named “fried-shoring”<sup>54</sup>—should replace the approach of multilateralism and liberalism embodied in the WTO. This systemic change in trade policy mainly consists in the strategic use of tariffs, subsidies, and buy-American rules *without regard to the rules of the multilateral trading system*. These strategies represent a decisive retreat from economic globalization and the multilateral trading system. A debilitated, inoffensive, even if ineffective WTO fits the low priority that international trade matters have in the current political agenda in the US, except for confronting China as a “strategic competitor” in respect of which taking an adversarial position is being advocated.<sup>55</sup>

### III. The Attack to the WTO Appellate Body and the Semi-Paralysis of the Dispute Settlement System

The challenge to the multilateral rule-based system has also affected, as is well known, its dispute settlement system.<sup>56</sup> The WTO adjudicatory branch has been paralyzed by the US blocking of the

<sup>49</sup>European Commission, *Concept Paper on WTO Modernization*, (September 18, 2018), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_5786](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5786).

<sup>50</sup>HU, *supra* note 47.

<sup>51</sup>Thomas J. Schoenbaum, *The Biden Administration’s Trade Policy: Promise and Reality* in this Issue. See also James Bacchus, *Biden and Trade at Year One. The Reign of Polite Protectionism*, 926 *Cato Policy Analysis* (Apr. 26, 2022); NERINA BOSCHIERO, *US TRADE POLICY, CHINA AND THE WTO*, (forthcoming).

<sup>52</sup>Hard rules and commitments are also dismissed by the US in regional agreements as shown by the latest US initiative, the Indo-Pacific Economic Framework for Prosperity (May 2022), <https://ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef>, with a dozen initial partners: Australia, Brunei, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and Vietnam. This new initiative comprises four “pillars”: Trade (without market access commitments), supply chains, infrastructure, taxation and anticompetitive conducts. For an informed comment see Petros C. Mavroidis, *The Indo-Pacific Economic Framework*, INTERNATIONAL ECONOMIC BLOG (May 5, 2022), <https://ielp.worldtradelaw.net/2022/05/petros-mavroidis-on-the-indo-pacific-economic-framework.html>.

<sup>53</sup>Orford, *supra* note 4.

<sup>54</sup>See *Transcript: US Treasury Secretary Janet Yellen on the Next Steps for Russia Sanctions and ‘Friend-Shoring’ Supply Chains*, NEW ATLANTICS, (Apr. 13, 2022).

<sup>55</sup>See MAVROIDIS & SAPIR, *supra* note 42, Ch. 4.

<sup>56</sup>The WTO Dispute Settlement System has been operational for more than two decades now. Over that period, it has arguably been the most prolific of all international State-to-State dispute settlement systems. As reported, among others, by Van den Bossche, *supra* note 15, at 173-4: “[B]etween 1 January 1995 and 1 October 2020, a total of 596 disputes were brought for WTO resolution. In more than one-fifth of these disputes the parties were able to reach an amicable resolution through consultations, or the disputes were otherwise resolved without recourse to adjudication”. In other disputes, parties have resorted to adjudication that, over the same period, “resulted in 248 reports of dispute settlement panels and 170 reports of the Appellate body, meaning that 70 per cent of the circulated panel reports have been appealed” (italics added). In comparison, between 1 January 1995 and 1 October 2020, “the International Court of Justice (ICJ) in the Hague rendered seventy-eight

Appellate Body by preventing the appointment of its members since 2018. This move too can be labelled as political, since it finds no basis in the WTO agreements as a legitimate reaction by a dissatisfied member in respect of the functioning of the system or its jurisprudence.

Effective and prompt redress of the protectionist measures decried above has been made impossible by the paralysis of the WTO DSS, thus giving an advantage to the strongest party in respect of a weaker one, which may be compelled to concede on the negotiation table advantages that would be legally unwarranted. As a matter of fact, all panel reports issued in 2020 (as well as those issued in the first part of 2021) have been “appealed into the void”, that is to the non-operating AB, and their adoption has remained blocked since. The same happened in 2021, except for two panel reports that were not appealed.<sup>57</sup> This practice determines that if a solution to a dispute is found, this is found at the diplomatic/political level. From a rule-based one, the trading system is going back to a power-based system, hence, the objective that within the WTO “right prevails over might” is weakening.<sup>58</sup> If appeal “into the void” remains possible, “issued panel reports will have no legal value, unless the disputing parties forgo their right to appeal and accept the panel report as the final world in their dispute”.<sup>59</sup> Further, and strictly related, in respect of dispute settlement, non-compliance calls for non-compliance as a reaction. Thus, the EU envisages now to immediately adopt countermeasures against the other party of a dispute involving the EU if the former appeals an unfavorable panel report into the void, thereby preventing the issuance of a final binding report according to the rules.<sup>60</sup> As had been widely anticipated, this situation has had a negative impact on the effectiveness of the panel stage, notwithstanding the appearance of “business as usual”. Panels have gone on working in 2020: six reports have been issued; seven new panels have been established by the DSB; and, at the end of 2020, 33 panel proceedings were pending. Still, as noted above, all panel reports issued in 2020 have been appealed “into the void”, leaving also these disputes in a limbo with no resolution in sight.<sup>61</sup>

Looking specifically at the dispute settlement system in 2021, the 33 panels which were in place at the end of 2020 have resulted in the issuance of seven reports in 2021. A review of the information available confirms the widely held belief that the panel’s work develops at a remarkable

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judgements and seven advisory opinions, and the International Tribunal for the Law of the Sea (ITLOS) in Hamburg rendered fifteen judgments and two advisory opinions and issued orders in another fourteen cases.”

<sup>57</sup>World Trade Organization, *Chronological List of Disputes Cases*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last accessed Jan. 11, 2023).

<sup>58</sup>The first chair of the WTO Appellate Body, Julio Lacarte Muró, argued that the DSS works to the advantage of all Members, but it especially gives security to developing-country Members that habitually, in the past, lacked the political or economic influence to enforce their rights and protect their interests. See Julio Lacarte-Muró & Petina Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 3(3) J. INT’L ECON. L. 395 (2000).

<sup>59</sup>Hoekman, Tu, & Wolfe, *supra* note 41, at 13.

<sup>60</sup>The EU announced that in such a case by an opposing party in a dispute with the EU, it would resort immediately to countermeasures, relying on general international law rules in the area of State responsibility. See European Commission Press Release, *Commission Reinforces Tools to Ensure Europe’s Interests in International Trade*, 12 December 2019. See further *infra* § B. IV.

<sup>61</sup>The cases involved are: Panel Report, *Indonesia—Measures Concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc. WT/DS484, art. 21.5 (adopted Nov. 22, 2017) (hereinafter *Indonesia – Chicken*); Second Complaint of the Russian Federation, *European Union—Cost Adjustment Mythologies and Certain Anti-Dumping Measures on Imports from Russia*, WTO Doc. WT/DS494 (Dec. 17, 2018); Panel Report, *United States—Countervailing Measures on Softwood Lumber from Canada*, WTO Doc. WT/DS533 (Aug. 24, 2020); Panel Report, *United States—Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543 (adopted Sept. 15, 2020); Panel Report, *Korea—Sunset Review of Anti-Dumping Duties on Stainless Steel Bars*, WTO Doc. WT/DS553 (appeal filed on January 22, 2021); Panel Report, *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567. Panel Report, *Australia—Anti-Dumping Measures on A4 Copy Paper*, WTO Doc. WT/DS529 (adopted Jan. 27, 2020), issued on December 4, 2019, was adopted by the DSB on January 27, 2020.

slow pace, even without considering the time necessary to compose panels, often by far exceeding the official deadlines.<sup>62</sup> In 2021 panels have been established in 10 cases and thereafter duly composed. Comparing the number of new cases in 2021 to those of the previous years, the impression is that the filing of new cases is discouraged by the absence of a functioning Appellate Body since proper finalization of disputes is thereby made unlikely.<sup>63</sup> On the other hand, disputes which have been considered to be charged with political overtones, irrespective of their economic and trade significance, are going on being brought to the WTO, an evidence that the WTO remains the only forum where disputes involving trade restrictions, for whatever reasons these have been introduced, can be addressed legally, possibly helping in defusing underlying political tensions, even in the absence of a prompt solution. This has been the case of tensions between Australia and China (and vice-versa)<sup>64</sup> and the case of import restrictions by China, challenged by the EU, against exports from Lithuania due to the establishment in Vilnius of an official Taiwan's trade office.<sup>65</sup>

This situation has not been effectively remedied by the alternative appellate arbitration, which the EU had proposed in order to overcome the stalemate, and ensure a two-tier, independent and impartial dispute settlement system pending the solution of the Appellate Body paralysis.<sup>66</sup> As it is known, the resulting negotiations among a group of WTO members led to adoption of the Multi-party Interim Appellate Arbitration Arrangement (MPIA) under the possibility provided by Article 25 of the DSU to resort to an arbitration as an alternative means of dispute settlement.<sup>67</sup> On 1 January 2022, 26 WTO Members were a party to the MPIA, including Brazil, Canada, China, the European Union and Mexico, i.e., five of the ten most frequent users of the WTO dispute

<sup>62</sup>For example, in DS598 it took 3 months to compose the panel after its establishment (May 28, 2021/ September 3, 2021) and more than 4 months in DS602 (October 26, 2021/March 4, 2022) as opposed to the requirement that this be effectuated by the WTO Director-General (DG), presumably promptly after 20 days left to the Parties to agree as provided for in Article 8 DSU. This is due to the fact that the DG seeks *de facto* the agreement of the Parties on the panelists' names and several Members are prone to veto persons they think are not well disposed towards their position. See Panel Report, *China — Anti-dumping and countervailing duty measures on barley from Australia*, WTO Doc. WT/DS598; Panel Report, *China — Anti-Dumping and Countervailing Duty Measures on Wine From Australia*, WTO Doc. WT/DS602.

<sup>63</sup>11 panel reports were issued in 2019 (11 new panels were established in this year), and 5 in 2020 (7 new panels were established in this year), against 11 panel reports issued in 2018 (28 new panels were established in this year), and 9 in 2017 (10 new panels were established in this year).

<sup>64</sup>See *China – AD/CVD on barley (Australia)*, WT/DS598 (panel established on May 28, 2021, MPIA Article 25 DSU notification of August 20, 2021), *China- AD/CVD on Wine*, WT/DS602 (panel established on 26 October 2021, MPIA notification of December 16, 2021), the complainant in both cases being Australia; Panel Report, *DS603 Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS603 (panel established on February 28, 2022, China complainant).

<sup>65</sup>DS610, *China — Alleged Chinese restrictions on import and export of goods and supply of services from Lithuania* (consultations request of Jan. 27, 2022).

<sup>66</sup>EU Press Release, *Council Approves a Multi-Party Interim Appeal Arbitration Arrangement to Solve Trade Disputes*, (Apr. 15, 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/04/15/council-approves-a-multi-party-interim-appeal-arbitration-arrangement-to-solve-trade-disputes/> (with text of the MPIA attached).

<sup>67</sup>This MPIA became effective on 30 April 2020, when it was notified to the DSB. Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, WTO Doc. JOB/DSB/1/Add. 12, (Apr. 30, 2020) [https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc\\_158731.pdf](https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf). On July 31, 2020, the participants notified the WTO of the ten arbitrators who will hear appeals of WTO panel reports under the MPIA, marking the final step to make the MPIA operational for disputes between the participants. The MPIA is explicitly a temporary mechanism, in place only till a lasting solution to the AB paralysis is found and agreed on. It applies to all disputes between the parties. Arbitrations under the MPIA bears similarities to appellate proceedings under article 17 of the DSU, but also, some important differences. Specifically, MPIA appeal arbitration awards are final and binding on the parties, without requiring adoption by the DSB. However, the usual implementation and enforcement mechanism, established in arts. 21 and 22 of the DSU, applies to these awards. See Peter Van den Bossche, *Is There a Future for the WTO Appellate Body and WTO Dispute Settlement System*, 15–22 (WTI Working Paper No. 1/2022, Jan. 17, 2022) <https://www.wti.org/research/publications/1344/is-there-a-future-for-the-wto-appellate-body-and-wto-dispute-settlement/>.

settlement system, but none of the appellants against the panel reports issued since are party to it. Just one arbitration appeal has taken place in 2022 between Turkey and the EU.<sup>68</sup> Interestingly enough, the United States did not hesitate to lodge two such appeals in 2020, evidencing the self-serving scope and effect of its blocking of the Appellate Body.<sup>69</sup>

#### IV. The Change in the EU Position

While the US has definitively contributed to the politicization of trade relations and, particularly, to the WTO DSS current paralysis, a recent change in the EU trade policy makes the future of the multilateral trading system even more uncertain. Such a change is mainly reactive in nature. But it may raise additional trade frictions and, albeit in the context of a more articulated approach to trade,<sup>70</sup> departs from the supportive approach to the multilateral trade system the EU has traditionally adopted,<sup>71</sup> including by tabling since mid-2018 detailed proposals for the WTO “modernization”;<sup>72</sup> expressing officially its concerns regarding the DSS semi-paralysis;<sup>73</sup> and, eventually, concluding *pro tempore* the MPIA. Such a new position in trade affairs is visible in a number of recent acts and initiatives of the Union institutions.

To start with, we recall that, as a reaction to the paralysis of the Appellate Body, the EU made it clear already in 2019 that it is ready to immediately adopt countermeasures, relying on the general international rules on State responsibility, against the other party of a dispute brought before the WTO DSS, when the latter appeals an unfavorable panel report into the void, thereby preventing the issuance of a final binding report according to the rules. This approach is now embodied in EU Regulation 2021/167 (so called “EU Enforcement Regulation for Trade Disputes”), which modified Regulation EU Regulation 654/2014 of 15 May 2014.<sup>74</sup>

Even more importantly, in its 2021 Communication that illustrates the new EU trade agenda, the EU Commission proposes a more assertive role for the Union in defending its rights and enforcing trade deals with other countries;<sup>75</sup> advocates a more “open, sustainable and assertive” trade policy in light of the more uncertain and fragmented current context of globalization where geopolitical concerns dominate and dictate policies;<sup>76</sup> and stresses the importance of trade policy as a tool to support the EU “open strategic autonomy” by backing the EU’s ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and value.<sup>77</sup> Thus, also the EU is *de facto* embracing a geo-political approach to international trade regulation.

<sup>68</sup>Arbitration under Article 25 of the DSU, *Turkey – Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc WT/DS583/ARB25, (July 25, 2022).

<sup>69</sup>At the DSB of December 14, 2020, China decried the US appeal in *US – Tariffs on Chinese Goods*, WT/DS543, labelling it “an abuse of procedural rules,” noting that the US had not subscribed to the alternative appeal arbitration (MPIA). See Minutes of Meeting, WT/DSB/M/446 12 (Dec. 14, 2020).

<sup>70</sup>See Nerina Boschiero & Stefano Silingardi, *The EU Trade Agenda – Rules on State Intervention in the Market* in this issue.

<sup>71</sup>For a collective effort to explore and elucidate the main legal and constitutional complexities of the relation between the EU and the WTO we refer to the different essays in the landmark *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* (Gráinne de Búrca & Joanne Scott eds., 2001).

<sup>72</sup>See, e.g., European Commission *supra* note 49; WTO General Council for Trade in Goods, ‘Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements – Communication from Argentina, Australia, Canada, Costa Rica, the European Union, Japan, New Zealand, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States’, JOB/GC/204/Rev.1, JOB/CTG/14/Rev.1 (1 April, 2019).

<sup>73</sup>See, e.g., *Communication from the European Union, China, Canada, India, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council*, WTO Doc. WT/GC/W/752 (Nov. 23, 2018).

<sup>74</sup>Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union’s rights for the application and enforcement of international trade rules, OJ (L 49), 1.

<sup>75</sup>*Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, 18.12.2021, COM (2021) 66 final (Feb. 18, [https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159438.pdf](https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf)).

<sup>76</sup>For an assessment of the European Communication in the context of the current trade actions of the EU, see Boschiero & Silingardi, *supra* note 70.

<sup>77</sup>*Trade Policy Review*, *supra* note 75.

A third and recent initiative is rather telling about the current EU position regarding international trade relations and, implicitly, about a meaningful (reactive) departure from multilateralism in this field. As it is known, the close integration of the world economy and global interdependence has amplified the opportunities for foreign nations to interfere in the sovereign choices of a state/polity through trade and/or investment restrictions. As noted elsewhere, economic coercion has lately “been on an upward spiral and is painfully felt around the globe”.<sup>78</sup> The so-called “EU’s Anti-Coercion tool” is an attempt to address economic coercion. On 8 December 2021 the EU Commission tabled a proposal for a new Regulation on the protection of the Union and its Member States from economic coercion by third countries.<sup>79</sup> It aims at protecting the interests of the Union and its Member States by enabling the Union to respond to economic coercion at a time when “there is an increasing and significant use of economic coercion by third countries that threatens to undermine the rights and interests of the Union and Member States.”<sup>80</sup>

This instrument aims to dissuade third countries from engaging in economic coercion, in the first place, or from continuing such behavior. As a last resort, the Union may counteract the economic coercion. The Union response “may take the form of a broad range of measures, following a determination of an act as coercive, including efforts to enter in consultations with the third country concerned to facilitate an agreed or adjudicated solution, where possible, a variety of countermeasures and international cooperation.”<sup>81</sup> Therefore, while the new framework is primarily designed to deter economic coercive action through diplomatic means such as dialogue and engagement, it also permits to retaliate with countermeasures “comprising a wide range of restrictions related to trade, investment and funding.”<sup>82</sup>

One of the central legal problems raised by the proposal is the compatibility of some of the envisaged responses with the WTO prohibition against unilateral actions not complying with DSU requirements. The mere fact that the EU is proposing such an instrument and envisages such actions without even mentioning WTO obligations among the requirements triggering the EU response, shows the widespread belief that, in the current context, reliance on WTO instruments only is not deemed adequate to ensure fairness and respect of rules in international economic relations.

## V. The Latest Developments: Covid-19 and Market Oriented Economies Adopting Industrial Policies

The COVID-19 economic and trade crisis has further hit the multilateral trading system at a critical time.<sup>83</sup> Respect for WTO rules has reached a low level, due to States’ increasing recourse to unilateral restrictive measures of dubious legality (to say the least), even considering the

<sup>78</sup>Chien-Huei Wu, 57(2) J. WORLD TRADE 297 (2023). J. WORLD TRADE (forthcoming Oct. 2022).

<sup>79</sup>European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and Its Member States from Economic Coercion by Third Countries*, COM (2021) 775 final (Aug. 12, 2021), available at: [https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc\\_159958.pdf](https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_159958.pdf). Within the European Parliament, the file has been assigned to the Committee on International Trade (INTA). The draft report was published in April 2022 and the Committee is expected to vote its report by early 2023.

<sup>80</sup>See also European Commission Press Release IP/19/6748, Commission reinforces tools to ensure Europe’s interests in international trade, (December 12, 2019), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2091&title=Commission-reinforces-tools-to-ensure-Europes-interests-in-international-trade>.

<sup>81</sup>European Parliament Briefing, *Proposed Anti-Coercion Instrument* (June 16, 2022), [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2022\)729299](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729299) (adding that “[w]hile there is broad support for creating a legislative tool to address the growing problem of economic coercion, opinions are divided as regards the severity of countermeasures and the manner of establishing when they should kick in”).

<sup>82</sup>The Explanatory Memorandum attached to the Proposal for an Anti-Coercive Regulation (*supra* note 79) defines economic coercion as referring “to a situation where a third country is seeking to pressure the Union or a Member State into making a particular policy choice by applying, or threatening to apply, measures affecting trade or investment against the Union or a Member State.”

<sup>83</sup>See Bacchus, *supra* note 10, at 71–79.

extraordinary situation brought about by the pandemics. Only at the beginning of 2021 the situation started to improve, although many trade-restrictive measures, officially adopted to ensure medical supplies during the first part of the pandemic, have remained in force for a long time notwithstanding multiple appeals in favor of international cooperation in facing the crisis.<sup>84</sup> Thereafter trade statistics have shown a more substantial and quick recovery of international commerce than had been anticipated,<sup>85</sup> although this recovery has been again hampered by the war of Russia against Ukraine in 2022 and the ensuing disruption of trade relations and basic food and other products supply well beyond the countries directly involved in the war.

Besides, Nancy Pelosi's controversial visit to Taiwan, as speaker of the US House of Representatives in August 2022 was the last episode of the growing geopolitical tensions between China and the US. These tensions are rooted in the long-lasting race for global technology leadership, with the EU and a number of Asian countries striving to play key roles as well. Over the past decade, the combination of China's plans to gain global technological and economic primacy and Xi Jinping's Grand Strategy has triggered reactions in the West and China's neighboring countries which have developed their own industrial plans. The pandemic and the war in Ukraine further confirmed that economic advantages (especially in strategic sectors) may turn into political options and strategic alliances. The EU too may have to consider reducing its dependency on Beijing in strategic sectors such as semiconductors, batteries, and critical materials. Its new policy of "strategic autonomy" may soon be put to test.<sup>86</sup>

Irrespective of these recent political developments adding to tensions that reflect on trade relations, the new central geo-political shift is the engagement of US and EU in industrial policy and planning. This is being done to upgrade strategic independence from foreign (mainly Chinese sources), as well as reinforce domestic production, especially in developing/venturing into new technological new sectors that, allegedly, require direct financial support by the State. Another related development is screening and blocking foreign investment in these sectors where the domestic industry independence is perceived at stake. Finally, European countries faced with the energy crunch (especially due to the politically-motivated stop to Russian supplies of gas to EU countries) rely on SOEs but also private domestic company to ensure alternative supplies. A further important aspect of this late development is that subsidization and other form of government protection does not concern only State-owned or controlled companies but also private domestic companies.<sup>87</sup>

<sup>84</sup>For a critical assessment of these measure see COVID-19 AND TRADE POLICY: WHY TURNING INWARD WON'T WORK (Richard Baldwin & Simon J. Evenett eds., 2020) (ebook). Groups of WTO Members tabled proposals at the WTO General Council in April 2020 with a view to ensuring open and predictable trade in agricultural and food products (WT/GC/208).

<sup>85</sup>Press Release, WTO, Trade Shows Signs of Rebound from COVID-19, Recovery still Uncertain, (Oct. 6, 2020), [https://www.wto.org/english/news\\_e/pres20\\_e/pr862\\_e.htm](https://www.wto.org/english/news_e/pres20_e/pr862_e.htm) ("Main points: World merchandise trade volume is forecast to fall 9.2% in 2020. The projected decline is less than the 12.9% drop foreseen in the optimistic scenario from the April trade forecast. Trade volume growth should rebound to 7.2% in 2021 but will remain well below the pre-crisis trend. Global GDP will fall by 4.8% in 2020 before rising by 4.9% in 2021.").

<sup>86</sup>In December 2022, China requested WTO dispute consultations with the United States, challenging US export control and related measures with respect to certain advanced computing semiconductor chips and manufacturing products, super-computer items, as well as related technologies and services, destined for or otherwise related to China. The request was circulated to WTO members on 15 December. See *Request for Consultation by China, United States – Measures on Certain Semiconductor and Other Products, and Related Services and Technologies Request for Consultations by China*, WTO Doc. WT/DS615/1 (Dec. 15, 2022).

<sup>87</sup>To take the case of our own country, Italy, in the first half of 2022, former Prime Minister Draghi engaged in a number of visits to gas-producing countries in Africa to ensure supplies to Italy. He was accompanied by the top management of ENI, the major Italian State-controlled company (but listed at the stock exchange), which signed relevant contracts with various SOEs in the suppliers' countries. For other recent instances of allegedly WTO-incompatible subsidies to companies in the energy sector see Andy Bounds, *EU Accuses US of Breaking WTO Rules with Green Energy Incentives*, FINANCIAL TIMES (Nov. 6, 2022), <https://www.ft.com/content/de1ec769-a76c-474a-927c-b7e5aef7d9e>.



## C. Reflecting on the Perspectives for the Multilateral Trading System

### I. The Current Geopolitical Global Context and the Multilateral Trading System

The global political climate has become less hospitable to internationalization efforts and institutionalized forms of international cooperation, with increasing tensions among global powers, nationalism on the rise and international organizations under stress. As amply evidenced in the forgoing analysis, one of the features of the current geopolitical situation is the increasing use of economic tools by States for the pursuit of strategic and geopolitical goals, and a new trend to challenging neoliberalism and multilateralism even beyond the economic sphere.<sup>88</sup> Essentially, late trade conflicts between major players can be read as a signal of both political and economic tensions. And, like the ongoing recourse to trade restrictive measures based on political decisions, these conflicts are not a temporary incident, but rather an outgrowth of long-brewing tensions within the multilateral trading system. In a parallel and related development, the process of international economic integration, a major driver of globalization and economic growth, has clearly been slowing down since the global financial crisis. The last decade has witnessed a decline in the growth of international trade in manufactured goods, a slow-down in the dynamics of GVCs, and significant decline in international capital flows in some years.<sup>89</sup>

Against this backdrop, Hoekman, Tu, and Wolfe raise a valid point when they opine that “absent reforms the [WTO] will be less able to assist major Members to attenuate economic conflicts.”<sup>90</sup> And it goes without saying that agreement *at least* among the US, China and the EU—the three world’s largest traders, whose relations are the setting where several tensions in the trading system rise—is needed to address and, ultimately, resolve the main problems of the WTO.<sup>91</sup> Thus, a review of the adequacy of existing WTO substantive and procedural rules should be the primary objective of any “revitalizing multilateralism in respect to trade” program. New multilateral rules must be conceived “to support the generalized gains from liberalized trade and global production, not an attempt to isolate” one of the major players like “China” or “reform its economic (and political) system”.<sup>92</sup> The latter is indeed ostensibly a misconceived goal that originates in an incomplete understanding of such a system’s complexity by some commentators and trade experts.<sup>93</sup>

The other main *telos* of any project of “WTO modernization” should be a thorough assessment of whether and how exiting multilateral rules should be amended *in light of the new political and economic concerns* States share in today’s interconnected, digital world. We submit that, as a general approach, such a review *should aim to granting some more leeway to the protection of national interests* by individual countries *in specific instances*, while *protecting the foreign “victims” of those restrictions*. This approach involves the pragmatic rebalancing of domestic policy space in relation to international law constraints, “including through accommodation of domestic safeguards on economic, national security, and social policy grounds.”<sup>94</sup> At the same time, it entails great role for remodeled multilateral trade rules and a reinstalled fully functioning dispute settlement system. As an exemplificative case, one could envisage enlarging the right to resort to the security exception also beyond the context of an international emergency amounting to an armed conflict or heightened tensions or crisis surrounding a state, such as is currently limited under Article XXI

<sup>88</sup>See also Vinod K. Aggarwal & Andrew W. Reddie, *Economic Statecraft in 21<sup>st</sup> Century: Implications for the Future of the Global Trade Regime*, 20(2) WORLD TRADE REV. 137 (2021).

<sup>89</sup>Braga, Jara, Aran, Lippoldt, Sacerdoti, Borlini, Akman, Dadush & de Mateo; *supra* note 15, at 385–7.

<sup>90</sup>Hoekman, Tu, & Wolfe, *supra* note 41, at 7.

<sup>91</sup>*Id.* at 7–8. This position is also voiced, among others, by Joel P. Trachtman, *Functionalism, Fragmentation, and the Future of International (Trade) Law*, 20(1) J. WORLD INV. & TRADE, 15 (2019); Shaffer, *supra* note 9; Mavroidis & Sapir, *supra* note 4.

<sup>92</sup>Hoekman, Tu, & Wolfe, *supra* note 41, at 7.

<sup>93</sup>For influential arguments on the inability of the WTO disciplines to address Chinese state capitalism see Mark Wu, *The “China Inc” Challenge to Global Trade Governance*, 57 HARV. J. INT’L L 261 (2016); and, more recently, Ming Du, *Unpacking the Black Box of China’s State Capitalism*, in this Issue.

<sup>94</sup>Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115(4) AM. J. INT’L., 622, at 623 (2021).

GATT.<sup>95</sup> In such a case, the WTO members, whose trade rights have been affected, should be allowed to take immediate rebalancing countermeasures/safeguards in the form of proportionate restrictions to the exports of the party resorting to the exception. What is important to stress here is that unilateral suspensions of a previously accepted commitment must come at a price *in a system based on reciprocity*. Furthermore, efforts to reach agreements should at least precede unilateral measures—notably to ensure the supply of essential food products, pharma, medical devices, and vaccines, thus avoiding unilateral restrictions, especially in connection with a pandemic. In any case, recourse to unilateral instruments (and to any countermeasures) should remain subject to *effective international collective verification* and to prompt efficient *ex ante* and *ex post* controls and remedies, which cannot be achieved without a fully-functioning DSS.<sup>96</sup> The same holds true for bilateral deals whenever they are not building blocks for multilateral cooperation promoting further liberalization, but instead undermine the respect of multilateral rules including the basic principle of non-discrimination beyond the limits of Article XXIV GATT.

## II. The Complexity of a “WTO Reform”

The need for a WTO modernization is undisputed.<sup>97</sup> Things get definitely more complicated when one considers the scope and complexity of the reforms at stake, as well as the political obstacles and legal challenges to a successful modification of the existing legal framework. To begin with, the main problem for any WTO reform is that, while the positions of the EU and the USA are broadly aligned on the WTO reform agenda, China often diverges as to the priorities accorded to the subjects of reform.<sup>98</sup> More generally, the original survey of the expert trade policy community conducted in 2020 by Hoekman and Wolfe offers impressive evidence of the divergence among the major trade powers.<sup>99</sup> We have already hinted at the substantial difference in position on the modification of the rules on industrial subsidies, and to China’s unrelenting opposition to any reform that challenge its identity as a developing country, a modification strongly supported, among others, by the US and the EU.<sup>100</sup> Similarly, most developing members (including China) have firmly resisted the US proposal for a decision on “Procedures to Strengthen the

<sup>95</sup>An emergency in international relations has been found to refer to “a situation of armed conflict, or the latent armed conflict, or of heightened tensions or crisis, or of a general instability engulfing or surrounding a state”. Panel Report, *Russian Federation – Measures Concerning Traffic in Transit*, ¶¶ 7.76, 7.114–7.123, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

<sup>96</sup>Similar suggestions were made by The U.S.-China Trade Policy Working Group, Joint Statement, *US-China Trade Relations: A Way Forward* (Oct. 18, 2019), [https://www.inet.econ.cam.ac.uk/files/us-china\\_trade\\_joint\\_statement\\_2019.pdf](https://www.inet.econ.cam.ac.uk/files/us-china_trade_joint_statement_2019.pdf); and now, in more detail, by Shaffer, *supra* note 94, at 622–70, who, in focusing on the US-China Relations proposes pragmatic approach to “Rebalancing Within a Multilateral Framework”, as a middle ground between those seeking to reinforce the WTO system with new rules that limit the state’s role in the economy, and those who reject WTO constraints in favour of a power-based system.

<sup>97</sup>See also Bernard Hoekman & Robert Wolfe, *Reforming the World Trade Organization: Practitioner Perspectives from China, the EU, and the US*, 29(4) CHINA & WORLD ECON. 1 (2021) (noting that “global trade governance has not kept up with ongoing changes in the structure of the world economy and shifts in the composition of cross-modern flows”). In spite of the sometimes-radical difference in the suggested solutions, such an assessment is shared by all the WTO reform proposals submitted by members/groups of members over the last five years. The different proposals are available at: [www.wto.org](http://www.wto.org).

<sup>98</sup>See Mavroidis & Sapir, *supra* note 4; Gao, *supra* note 15; Matteo Fiorini, Bernard Hoekman, Petros C. Mavroidis, Douglas Nelson & Robert Wolfe *Stakeholder Preferences and Priorities for the Next WTO Director General*, 12(S3) GLOB. POL’Y 12 (2021); Schoenbaum, *supra* note 51.

<sup>99</sup>Bernard Hoekman & Robert Wolfe, *Reforming the World Trade Organization: Practitioner Perspectives from China, the EU, and the US*, 29(4) CHINA & WORLD ECON. 1 (2021) noting that: “global trade governance has not kept up with ongoing changes in the structure of the world economy and shifts in the composition of cross-modern flows.” In spite of the sometimes-radical difference in the suggested solutions, such an assessment is shared by all the WTO reform proposals submitted by members/groups of members over the last five years.

<sup>100</sup>On the relevance of special and preferential treatment and the qualification of developing countries for the progress in WTO negotiations see also Bacchus, *supra* note 10, at 98–99.

Negotiating Function of the WTO”<sup>101</sup> that define new yardsticks for assessing which countries will not avail themselves of special and differential treatment. Another area where the three economic powers substantially diverge, consider regulation of data flows. Digital trade is currently ubiquitous. Currently, regulation of data flows is highly “fragmented ranging from essentially laissez faire approaches in some countries (with US being on this end of the spectrum), to more tightly regulated environments in others, whether motivated by protection of privacy and citizen rights, perceived secure imperatives or concerns about market power and abuse of dominant positions by lead firms,”<sup>102</sup> with the EU and China being both at the more regulated end of the spectrum.

Secondly, a substantial obstacle to the modernization of the multilateral trading system is the need to achieve consensus to address issues that are not currently regulated, or are poorly regulated, by multilateral agreements. The move to plurilateral initiatives started with the Doha round dead in 2017<sup>103</sup> can only serve as a partial solution to the current stalemate though. In fact, alternatives aired to concluding negotiations by consensus, including majority voting, plurilateral and “mega-regional” agreements, transforming the WTO in a “club of clubs”,<sup>104</sup> have so far failed to convince a critical mass of members (possibly not even a sizeable minority of them) that they represent viable solutions for the future of the organization.

Furthermore, the WTO working practices and the operation of the institution must be fixed.<sup>105</sup> Consider the goal of having high quality information viz. transparency of actor behavior and expectations, which is a core element of regulation international regimes, and the related need to enhance the WTO monitoring mechanisms and increase compliance with the dozens of notification obligations established by the different multilateral trade agreements.<sup>106</sup> By the same token, improving the operation of WTO committees and councils is particularly important in the short run, when agreement on new binding rules on contested policies and practices is implausible due the distance in the major players’ understanding of the nature and magnitude of the problems that require cooperation.<sup>107</sup> The bodies under discussion are the first deliberative organs for exploring emerging issues and discussing trade concerns without recourse to the DSS. As pointedly argued by Evenett and Fritz, a *condicio sine qua non* for multilateral cooperation is a shared understanding of the extent and spillover effects on trade of contested practices.<sup>108</sup> Thus, WTO committees and councils should first and foremost engage in procedures to collect and share information, policy dialogue and mutual review.<sup>109</sup>

Finally, due to the DSS semi-paralysis, WTO/GATT rules are currently deprived of the teeth of universal, binding and enforceable adjudication. Contrary to the optimistic expectations of some

<sup>101</sup>Draft General Council Decision, *Procedures to Strengthen the Negotiating Function of the WTO*, WTO Doc. WT/GC/W/764 (Feb. 15, 2019).

<sup>102</sup>Hoekman, Tu, & Wolfe, *supra* note 41, at 9.

<sup>103</sup>This development has seen several WTO members moving away from multilateral negotiations and the working practice of consensus by furthering so-called “joint statement initiatives.”

<sup>104</sup>See Carlos P. Braga, Alejandro Jara, Bozkurt Aran, Douglas Lippoldt, Giorgio Sacerdoti, M. Sait Akman, Leonardo Borlini, Uri Dadush & Fernando de Mateo. Policy Brief, *Confronting “De-globalization” in the Multilateral Trading System* (Sept. 2021), <https://www.t20italy.org/2021/09/08/confronting-deglobalization-in-the-multilateral-trading-system/>.

<sup>105</sup>See in greater detail the different contributions referred to *supra* note 15.

<sup>106</sup>For substantiated analysis of the current obligations and procedures and the proposals of reforms to improve transparency see Robert Wolfe, *Is World Trade Organization Information Good Enough? How a Systematic Reflection by Members on Transparency Could Promote Institutional Learning*, BERTELSMANN STIFTUNG (2018); Henry Gao, *The WTO Transparency Obligations and China*, 12(2) THE J. OF COMP. L., 329 (2018); Statement, *Procedures to Enhance Transparency and Improve Compliance with Notification Requirements under WTO Agreements*, WTO Doc. JOB/GC/204/Rev.6 (Sept. 14, 2021).

<sup>107</sup>Hoekman & Wolfe, *supra* note 99, at 5–7.

<sup>108</sup>Simon J. Evenett & Johannes Fritz, *Subsidies and Market Access Towards an Inventory of Corporate Subsidies by China, the European Union and the USA*, HINRICH FOUNDATION, 15–16 (Oct. 26, 2021), <https://www.hinrichfoundation.com/research/wp/protectionism/gta-28-report-subsidies-market-access-corporate-subsidies-by-china-eu-us/>.

<sup>109</sup>Hoekman, Tu, & Wolfe, *supra* note 41, at 11 (adding that “[t]his applies to a range of policy areas, including subsidies and SOEs. WTO members do not necessarily know enough about SOEs, not just in China but more broadly, to be sure whether and where SOEs create a systemic problem, and hence what ought to be done”).

commentators, who emphasize the potential advantages of DSU article 25 arbitration, such as its flexibility and consensual nature,<sup>110</sup> to date, this system has proved dysfunctional.<sup>111</sup> Solutions have been proposed to overcome the current stalemate.<sup>112</sup> Most WTO members agree that the DSS must remain binding in order to ensure the effectiveness of the rule-based multilateral system, and an Appellate Body is necessary to ensure coherence to the case law and the “stability and predictability” (Art. 3.2 DSU) of the rule-based multilateral trading system. Yet, due to the persistent opposition by the US, re-establishing a fully-operational DSS does not seem a feasible option, at least in the next future.<sup>113</sup>

The lack of progress in relaunching the dispute settlement system in 2021 goes on par with the lack of materials developments concerning revitalizing the functioning of the WTO in general. Formal and informal work under various formats is proceeding on several issues, from regular committee meetings under the various WTO agreements, to subjects left open from the 2017 Ministerial Conference (MC-11), such as fisheries subsidies, and recurrent or new themes (such as trade and environment sustainability or plastic trade and pollution). The WTO weekly schedule is busy with “joint initiatives”, “structured discussion informal groups”, working parties, open-ended negotiating meetings or “informal dialogue” sessions but no result materializes. Discussions at an advanced stage on possible plurilateral agreements, to be open to all Members on a non-discriminatory basis, namely the International Technology Agreement (ITA) and the EGA (Environmental Goods Agreement (EGA) aimed at abolishing custom duties on covered products (still to be exactly defined), have not been concluded though having been on the table for years.

Even more worrisome has been the absence of action by and within the WTO to face trade restrictions on medical devices and vaccines during the Covid-19 pandemics. Initial restrictions by several countries have been mostly removed subsequently by national decisions that leveraged government engagement in industrial production, notably through subsidization, rather than by concerted action at the WTO. For long during the two years of pandemic it has remained uncertain whether the initiative by South Africa and India on one side, and the US and the EU on the other, (the so-called “Quad text”) for the loosening of patent protections of ingredient and processes necessary for the manufacture of Covid-19 vaccines in the interest of developing country would result in a formal waiver to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>114</sup> before the natural decrease of the pandemics could render it superfluous.<sup>115</sup>

<sup>110</sup>See, among others, Julia Qin, *DSU Article 25 Arbitration: A Long-Term Solution for the Appellate Body Crisis?*, INT’L. ECON. L. AND POL’Y BLOG, (September 25, 2022), <https://ielp.worldtradelaw.net/2022/09/dsu-article-25-arbitration-a-long-term-solution-for-the-appellate-body-crisis.html>.

<sup>111</sup>We however agree with Van den Bossche *supra* note 67, at 27 that: “[t]his state of affairs, while obviously far from ideal, does offer a welcome opportunity for MPIA tribunals to *experiment* with approaches to appellate review different from the approach taken by the Appellate Body”.

<sup>112</sup>So far, proposals for reform of the WTO DSS have mainly focused on institutional improvements of the AB—as represented by the technical proposals (‘quick-fix’) issued in 2019 by the New Zealand Ambassador Walker, then chair of the General Council—or possible replacement of the two-tier adjudication with one-tier adjudication by a standing body of full-time panelists, as suggested by Bernard Hoekman & Petros C. Mavroidis, *To AB or Not to AB? Dispute Settlement in WTO*, 23(3) J. INT. ECON. L., 1 (2020).

<sup>113</sup>On the need for a careful consideration of the kind of appellate review and dispute settlement for the future of the system, see Van den Bossche, *supra* note 67, at 27–28.

<sup>114</sup>Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

<sup>115</sup>The Quad text was disclosed on the WTO website in May 2022 in anticipation of the MC12 in June 2022. See WTO General Council, *Members welcome Quad document as basis for text-based negotiations on pandemic IP response*, WORLD TRADE ORGANIZATION (May 10, 2022), [https://www.wto.org/english/news\\_e/news22\\_e/gc\\_10may22\\_e.htm](https://www.wto.org/english/news_e/news22_e/gc_10may22_e.htm).

### III. Minimal Signals from the 12<sup>th</sup> Ministerial Conference

The MC12, held in Geneva in June 2022 after having been repeatedly postponed due to the pandemic delivered only some minor results. The commitment of the participants (all 164 members of the WTO) to re-launch the multilateral system is set forth in clear terms in the final document (“[w]e resolve to strengthen the rules-based, non-discriminatory, open, fair, inclusive, equitable, and transparent multilateral trading system with the WTO at its core”).<sup>116</sup> Members undertook to work both at the reform of the WTO and towards reinstating a fully functioning dispute settlement system by 2024, which is seemingly good news. Notable systemic developments are, first, that the “single undertaking” approach that has contributed to the failure of the Doha Round has been *de facto* abandoned; and, secondly, that, in terms of programmatic goals, the focus of the WTO will be more and more geared towards sustainable development, environmental and health issues rather than being focused on purely trade matters.<sup>117</sup>

Yet, the pessimistic expectations about MC12 were not misplaced. There are several systemic issues that need fixing and remained unaddressed in Geneva. These issues permeate and debilitate multiple aspects of the WTO’s functioning, including “the capacity to negotiate, enforce disciplines, monitor policies and ensure transparency”.<sup>118</sup> Negotiations went nowhere (or did not even start) on the systemic problems we illustrated in the foregoing analysis—namely, the DSS crisis; the issues surrounding the appropriate level of balance between rights and obligations among members at different level of development; the (in)effectiveness of several transparency obligations and mechanisms to reduce information asymmetries among WTO members; the respective role of markets and the state in international trade. At the same time, the crucial subject of agriculture (domestic support, export and import restrictions, and market access) remained on the table for further negotiations. Furthermore, new issues are finding their way more urgently and explicitly onto the WTO agenda. Most importantly, pressure is mounting for the greening of economic activity.<sup>119</sup> As notions such as the circular economy take hold, “governments will increasingly need to factor green production into trade in order to be competitive,” with “tensions between the pursuit of environmental sustainability and discriminatory trade policies aimed to achieve green goals (. . .) already emerging”.<sup>120</sup> Measures such as additional tax credits for electric vehicles produced locally and other forms of subsidization or government intervention to address environmental needs will likely be challenged because of unwarranted discrimination and found inconsistent under WTO law. A related issue for the WTO is the relationship between trade and climate change: “in the absence of any international agreement on pricing carbon, several governments are developing carbon tax arrangements in order to stem carbon leakage and lost investment opportunities as industries are tempted to migrate to locations where less stringent climate change policies are in place.”<sup>121</sup> Absent adequate coordinatiof, the multilateral trading system and

<sup>116</sup>Results of MC12 are available on the WTO website. Paragraph 3 of the final “Outcome document” (WT/MIN(22)/24) reads as follows: “[w]e commit to work towards necessary reform of the WTO. While reaffirming the foundational principles of the WTO, we envision reforms to improve all its functions. The work shall be Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues. The General Council and its subsidiary bodies will conduct the work, review progress, and consider decisions, as appropriate, to be submitted to the next Ministerial Conference”. MC12 Outcome Document, ¶ 3, WTO Doc. WT/MIN(22)/24 (Adopted June 17, 2022). As to dispute settlement, paragraph 4 reads as follows: “[w]e acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.” Informal work with the participation of the US on the issue has started promptly. *Id.* ¶ 4.

<sup>117</sup>*Id.*

<sup>118</sup>Low, *supra* note 14, at 274.

<sup>119</sup>See, e.g., *The EU Green Deal – A Roadmap to Sustainable Economies*, SWITCH TO GREEN, <https://www.switchtogreen.eu/the-eu-green-deal-promoting-a-green-notable-circular-economy/>.

<sup>120</sup>Low, *supra* note 14, at 288.

<sup>121</sup>*Id.* at 289.

climate change regimes may be mutually harmful. As with the other systemic issues, MC12 did not address such problems in any substantive way.

In spite of the general inertia on systemic procedural and substantial reforms, MC12 produced two outcomes that, read optimistically, may attenuate the commonplace of the WTO terminal decline. First, central in the “Geneva package” is an agreement curbing or outlawing subsidies to illegal, unreported and unregulated fisheries, concluded after more than 20 years of discussion and negotiations. This is the second additional agreement to the original Marrakesh package (after the one reached in 2013 on Trade Facilitation). Its relevance is not symbolic though: although “overfishing is one of the greatest threats to ocean health”<sup>122</sup> most countries, “regardless of their stage of development, subsidize their fisheries”.<sup>123</sup> In line with the programmatic afflatus that featured MC12 though, the Fisheries Agreement envisages further negotiations to be completed within defined time limits. It requires moreover acceptance by two thirds of the membership to enter into force. Nonetheless the results and the momentum given to WTO activities stand out in a period of lasting decline, in particular after years of failures in negotiating new rules.

Secondly, a decision was reached to allow the use of compulsory licenses in favor of developing countries manufacturing Covid-19 vaccines.<sup>124</sup> Yet, the decision taken in Geneva in June 2022 depart from the TRIPS waiver as originally proposed by India and South Africa in 2020. This waiver would have involved an immediate, albeit temporary, global easing of intellectual property rights on COVID-19 vaccines and treatments to enable them to be produced on a far larger scale, to support global health. Instead, due to strong resistance from the EU, the UK and other Western governments, it took too long to reach an agreement at the WTO on a weak text, the benefits of which for the global South are yet to be seen. In fact, despite political commitments and words of solidarity, rather than waive intellectual property protections, the Ministerial Decision of 17 June 2022 provides clarifications to current “flexibilities” under the TRIPS Agreement and a narrow exception to an export restriction on Covid-19 vaccines for the duration of five years.<sup>125</sup> Particularly problematic is the fact that the WTO decided to postpone by six months the decision around extending the agreement to cover diagnostics and therapeutics.<sup>126</sup>

#### **IV. The Role of the Markets in International Trade. Are Existing Rules on Subsidies and SOEs Adequate in the New Geopolitical Context?**

This Special Issue focuses on a specific systemic challenge confronting the multilateral trading system viz. the relative roles of markets and the state in determining economic outcomes. While a recurrent and central element in the proposals for WTO reform, the crafting of new international rules on prominent forms of state interventionism such as subsidies and state enterprises is an extremely difficult normative exercise. The reason has mainly to do with substantive policy

<sup>122</sup>Isabel Jarrett, *Fisheries Subsidies Reform Could Reduce Overfishing and Illegal Fishing Case Studies Find*, PEW CHARITABLE TRUSTS, (July 22, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/07/22/fisheries-subsidies-reform-could-reduce-overfishing-and-illegal-fishing-case-studies-find>.

<sup>123</sup>Bacchus, *supra* note 10, at 221.

<sup>124</sup>Ministerial Conference, *Draft Ministerial Decision on the TRIPS Agreement*, WTO Doc. WT/MIN(22)/W/15/Rev.2, (June 17, 2022).

<sup>125</sup>*Id.* ¶¶ 3–6.

<sup>126</sup>*Id.* ¶ 8. it does not come as a surprised that NGOs like Amnesty International have criticized the Ministerial decision on the TRIPS Agreement not only as “a hollow response to Covid-19, but it sends the message that intellectual property rights outweigh the rights to health and life.” *Covid-19: WTO Ministerial Decision on TRIPS Agreement Fails to Set Rules that Could Save Lives*, AMNESTY INTERNATIONAL (June 17, 2022), <https://www.amnesty.org/en/latest/news/2022/06/covid-19-wto-ministerial-decision-on-trips-agreement-fails-to-set-rules-that-could-save-lives/>. Harsh criticism is voiced also by *TRIPS “Waiver failure”: EU Betrayal of Global South on Vaccine Access Obscured by Lack of Transparency*, CORPORATE EUROPE OBSERVATORY (July 7, 2022), <https://corporateeurope.org/en/2022/07/trips-waiver-failure-eu-betrayal-global-south-vaccine-access-obscured-lack-transparency>. For a critical position in the legal scholarship see Anne Orford, *Why It’s Time to Terminate the TRIPS Agreement*, AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW (forthcoming 2023).

challenges to the WTO membership. It is acknowledged that new multilateral trade rules must be conceived to support “the generalized gains from liberalized trade and global production”, with China “central to WTO reforms.”<sup>127</sup> Still, China’s position on new international rules impacting on instruments such as selective protection, credit subsidies, and SOEs—which have all played a role in making it the manufacturing powerhouse that it is—seems irreconcilable with that of the other largest world’s traders. Dani Rodrik is right in arguing that “China’s phenomenal globalization success is due as much to the regime’s unorthodox and creative industrial policies, as it is to economic liberalization”.<sup>128</sup> Yet, the continued divergence between economic systems constitutes a fertile ground for ongoing trade frictions, and China’s unorthodox and activist industrial policies are precisely what the USA, the EU and other WTO members aim at constraining by means of new trade rules on government intervention in the economy. To make things even more complex, in the current dynamic geopolitical setting, several countries, including the EU, US and other Western WTO members increasingly resort to direct forms of government intervention in the economy and even private companies through activist industrial policies based on subsidies and preferential treatment.

At this juncture the question is: Are current rules on subsidies and state enterprises in GATT/WTO (and possibly also in respect of trans-border investments) adequate to this new geopolitical context? Do such rules appropriately reflect the ambivalent nature of such state interventions as, on the one hand, industrial policy tools to resolve general “strategic” concerns, and, on the other hand, instruments to pursue public policy goals and correct market failures—which is, after all, their principle *raison d’être*?

Our unsurprising answer is no. We leave to the other contributors to this Special Issue to analyze in depth the flaws of the current WTO disciplines and discuss alternatives. We nonetheless want contribute to that discussion by offering our preliminary reflections on some chief problems regarding trade regulation of subsidies and state enterprises in the WTO system, and their prospects of reforms in light of the current shifts in the geopolitical setting. Let us start with the GATT/WTO regulation of state enterprises. We recall that the GATT/WTO rules on state enterprises established in GATT Article XVII are “minimalistic”.<sup>129</sup> Under such provisions, each member undertakes that its state trading enterprises (STEs), state-owned enterprises or private enterprises operating under state-conferred monopolies or privileges shall, with respect to purchases or sales involving either imports or exports, act in a non-discriminatory manner and make such purchases and sales solely in accordance to commercial considerations.<sup>130</sup> Article XVII GATT is, however, of

<sup>127</sup>Hoekman, Tu, and Wolfe, *supra* note 41, at 7. See also Henry Gao, *WTO Reform: A China Round?*, 114 PROCEEDINGS OF THE ASIL ANNUAL MEETING 23 (2021).

<sup>128</sup>Dani Rodrik, *The Double Standard of America’s China Trade Policy*, PROJECT SYNDICATE (May 10, 2018), <https://www.project-syndicate.org/commentary/american-trade-policy-double-standard-by-dani-rodrik-2018-05>.

<sup>129</sup>Art. XVII GATT reads as follows: “(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, . . . such enterprise shall, in purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.” It continues: “(b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall . . . make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.”, underlining added. In short, with this provision, the GATT recognized that, by acting, even only indirectly, as a trader, a government may influence the direction of international trade through its purchase and sales decisions, but prohibitions are limited. Other GATT provisions that relate either directly or indirectly to STEs are Arts. II (Schedule of Concessions) and XX General Exceptions). Also, an Interpretative note to Arts. XI, XII, XIII, XIV, and XVIII specifies that throughout these pro-visions, the term ‘import restrictions’ and ‘export restrictions’ include restrictions made effective through state trading operations.

<sup>130</sup>See Ernst-Ulrich Petersmann, *GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform*, in STATE TRADING IN THE 21ST CENTURY, 71, 80–1 (Cottier & Mavroidis eds., 1998).

limited use in regulating the magnitude of today's state capitalism.<sup>131</sup> Not only is its application restricted to the above-referred commercial transactions, but it is also marked by some uncertainty with respect to the principle of national treatment.<sup>132</sup> Furthermore, case law has been significantly weakened by the finding that it suffices for STEs to act in a non-discriminatory manner to comply with the provision.<sup>133</sup> While it is questionable whether in so doing, *ipso facto*, STEs act also in accordance with commercial considerations and afford competitors adequate opportunity to compete for participation—and economic logic would not support this view of the AB<sup>134</sup>—this interpretation is by now water over the dam, as “there is not one single deviation from this case law”.<sup>135</sup> Finally, according to the AB, Article XVII GATT does not apply to an STE's transactions when no foreign enterprises are directly involved.<sup>136</sup>

Interestingly, although the scope of those provisions covered only exports and imports and purchase and sales of goods, and the existing rule are generally considered outdated and inadequate to address the issues surrounding commercial and financial operations of state enterprises,<sup>137</sup> GATT Art. XVII marked the beginning of international trade regulation on SOEs. Moreover, some of the basic concepts such as commercial consideration as the test of judging whether activities of SOEs have been incorporated in subsequent trade agreements such as recent free trade agreements (FTAs). The most advanced among such FTAs, such as the CPTPP and the USMCA, establish an independent chapter on SOEs, which seeks to incorporate the traditional disciplines inherited from the GATT and NAFTA (i.e., the concepts of non-discrimination and commercial considerations), as well as the new framework labelled as non-commercial assistance (NCA), the main aim of which is to prevent adverse effects or injury to the interest of other parties as a result of advantages that SOEs obtain because of their proximity to the government.<sup>138</sup>

Authors like Mavroidis and Sapir<sup>139</sup> and Matsushita<sup>140</sup> argue that the insertion of such sorts of comprehensive discipline in the WTO framework would significantly contribute to the regulation of the negative cross-border spillovers that, either by design or inadvertently, the operation of SOEs can determine. It is hard to tell whether and when agreement on such updating of the WTO rule book will be found (at least) among the major members of the WTO. An optimistic reading emphasizes that China's recent application to join CPTPP would suggest its willingness to engage in negotiations on substantive rules about state intervention in the economy. Yet, whether an agreement on such new rules is politically and technically feasible remains an open question.

<sup>131</sup>Andrea Mastromatteo, *WTO and SOEs: Article XVII of the GATT 1994*, 16(4) *WORLD TRADE REV.* 601 (2017).

<sup>132</sup>Panel Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶¶ 6.48, 6.50, WTO Doc. WT/DS276/R (Apr. 6, 2004). The panel confirmed that the principle of non-discrimination at Art. XV includes also the most favored nation clause, but did not elaborate on the national treatment obligation.

<sup>133</sup>Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶¶ 89, 93–106, WTO Doc. WT/DS276/R (Aug. 30, 2004). The AB rejected the argument that Art. XVII:1(b) establishes a separate, general competition-law-type obligation on STEs to follow ‘commercial considerations’ in all of their purchases and sales.

<sup>134</sup>See PETROS C. MAVROIDIS, *THE REGULATION OF INTERNATIONAL TRADE. VOLUME I: GATT*, 410–12 (2016) (discussing the case law to this effect).

<sup>135</sup>Petros C. Mavroidis & Merit E. Janow, *Free Markets, State Involvement and the WTO: Chinese State-Owned Enterprises in the Ring*, 16(4) *WORLD TRADE REV.* 571, 573 (2017).

<sup>136</sup>Appellate Body Report, *supra* note 133, ¶ 157.

<sup>137</sup>Borlini, *supra* note 43, at 316.

<sup>138</sup>*Id.* at 325–26.

<sup>139</sup>See Mavroidis & Sapir, *supra* note 4 (arguing that “[t]he WTO could thus introduce an agreement inspired by Chapter 17 of the CPTPP and/or Chapter 22 of the USMCA. This would address a great deal of the concerns expressed by China's trading partners. Ultimately, it will be a matter for courts to decide, since they will be called upon to enforce this provision”).

<sup>140</sup>See Mitsuo Matsushita & C.L. Lim, *Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules*, 19(3) *WORLD TRADE REV.* 402, 402–23 (2020) (suggesting that the future SOEs rules should allow enough flexibility for SOEs that deal with market failures situations and provide public goods); and Mitsuo Matsushita, *Interplay of Competition Law and Free Trade Agreements in Regulating State-Owned Enterprises*, in this Issue.



Success is premised not only on China but on the inclination of the US to accept new regulation.<sup>141</sup> The CPTPP experience shows that this condition cannot be taken as granted.

A second important and related problem is the vexing question about the determination of public bodies and, relatedly, the restrictive interpretation of the term ‘public body’ in the ASCM, which was adopted by the AB in several reports—one of the grounds of complaint by the US against the Appellate Body jurisprudence.<sup>142</sup> The ASCM definition of subsidy, for purposes both of multilateral rules and permissible unilateral responses (countervailing duties) includes financial contributions not only by governments but also by public bodies. One of the last cases decided by the AB before its demise in 2020 confirms this conclusion. In *US—Countervailing Duty Measures on Certain Products from China*<sup>143</sup> the AB qualified its previous jurisprudence and found (by majority) that the absence of an express delegation of governmental authority does not necessarily preclude concluding that an entity is a “public body” under Article 1.1(a)(1) ASCM.<sup>144</sup> A public body determination must be conducted on a case-by-case basis. In this regard, a holistic approach is necessary which takes into due account: (i) evidence that an entity is exercising governmental functions, especially if it is a sustained and systematic practice; (ii) evidence of the scope and content of the relevant government policies; (iii) evidence of the meaningful control over an entity by the government; and (iv) whether the conduct or functions of an entity are ordinarily classified as governmental in the legal order of the relevant Member. Therefore, according to this test, “a public body is an entity that possesses, exercises or is vested with governmental authority”.<sup>145</sup>

The difficulty in applying the relevant terms and provisions of the ASCM in a reasonable, consistent and useful manner result thereby clearly. Even more problematic is its application in the present context of increased indirect recourse to various forms of subsidization. Whatever the import of the current rules and their interpretation they do not appear able to cope with the new context, which implies wide derogations from non-discriminatory non-preferential treatment requirements for state-controlled and subsidized domestic companies in the pursuit of industrial self-reliance and geo-political, strategic, economic national objectives. The question is how much the new outlook impacts the application of existing rules on subsidies and SOEs and the prevailing approach towards reinvigorating and updating them. Making them more effective to address traditional problems and attaining the original objectives does not seem to be still a valuable objective.

Similar remarks can be made in relation to another key issue regarding existing WTO rules on subsidies, which is the current absence in the ASCM of defined categories of subsidies for industrial products that are immune from challenges (so-called) “non-actionable subsidies”. It is time for the reinstallation of such defined categories of subsidies, hence, providing domestic constituencies with a substantial policy space to pursue primary societal goals and address market failures, without the risk of counter-actions by trade partners.<sup>146</sup> As widely evidenced in the

<sup>141</sup>Hoekman, Tu, & Wolfe, *supra* note 41, at 19.

<sup>142</sup>See Panel Report, *US—Pipes and Tubes (Turkey)*, WT/DS 523 (Dec. 18, 2018) (appealing “into the void” by the US, where the panel followed the AB criteria finding that the US had not demonstrated that the Turkish pension fund was a public body just because of the control exercised by the government over it).

<sup>143</sup>Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China - Recourse to article 21.5 of the DSU by China*, WTO Doc. WT/DS437/AB/RW (July 16, 2019).

<sup>144</sup>See also Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 317, WTO Doc. WT/DS379/AB/R (March 15, 2011), (rejecting the view of “public body” as an entity controlled by a government and instead focused on whether the latter possesses, exercises or is vested with government authority).

<sup>145</sup>Appellate Body, *supra* note 143, ¶¶ 5.95–96.

<sup>146</sup>See Gary Horlick & Peggy Clarke, *Rethinking Subsidy Disciplines for the Future’s Policy-Options for Reform*, 20(3) J. INT’L ECON. L., 673 (2017). Chad Bown & Jennifer Hillman, *WTO’ing a Resolution to the China Subsidy Problem*, 22(4) J. INT’L ECON. L., 557 (2019) (supporting the case for reestablishing a “green light” category of non-actionable benign subsidies such as subsidies for basic research and development, environmental subsidies such as subsidies for renewable energy, subsidies for depressed regions within a country, subsidies to address natural disasters, etc. This position coincides with the EU proposal at the Doha Development Round for the reinstallation of “green light” subsidies).

literature,<sup>147</sup> subsidies can serve key economic goals and non-economic societal objectives. To mention only some topical and key instances: climate change policies often entail government support for the development of new technologies for reducing greenhouse gas emissions in various sectors of a country's economy and perhaps in other countries. Moreover, as the global pandemic has dramatically evidenced, there are incentives for governments "to promote domestic industries in order to redress dependence on global supply chains where bottlenecks may preclude ready access to essential inputs (medicines, semi-conductors, etc.)."<sup>148</sup> That much being said, we share Sykes'<sup>149</sup> skepticism that the prospects of any consensus within the multilateral system on new subsidies disciplines in the foreseeable future are negligible, a skepticism which is strengthened by the stalemate in the WTO political organs and, above all, the semi-paralysis in the DSS. These latter course in particular reflects, among other things, harsh criticism by the US Government (and others) over the AB interpretation of many open-textured subsidies rules and exceptions thereto.<sup>150</sup>

#### D. Conclusions

The multilateral trading regime faces a formidable range of systemic problems, "unprecedented in their range and complexity."<sup>151</sup> The system is not adequate to address these changes and manage/mitigate newly central problems of the 21<sup>st</sup> century such as the Covid-19 Pandemic, climate change and the greening of economic production and international trade. The reasons are many. But one essential consideration emerges in the foregoing analysis: existing multilateral rules do not reflect different economic, political, and social choices appropriately, and tensions arising out such differences are salient features of the contemporary geopolitical setting. The conditions that favored the creation and consolidation of the WTO do not exist anymore. Following the collapse of the USSR, enthusiasm for free markets helped to spur support to the historical trend that consolidated with the multilateral rule-based trading system transformation and expansion—subject-wise and geographically—from the GATT 1947 to the WTO, a truly "global enterprise in a way that the GATT was not."<sup>152</sup> Today, that enthusiasm in the prevalence of the market and the retreat of the government in business activities is in tensions with the interests of the now expanded membership. The participation to the multilateral trading system by States is indeed *highly pragmatic* as opposed to highly principled.<sup>153</sup> And the implicit ideological supremacy of the free-market system, and maybe the trust in the system, has since been declining.<sup>154</sup> As widely

<sup>147</sup>See Dominic Coppens, WTO DISCIPLINES ON SUBSIDIES AND COUNTERVAILING MEASURES: BALANCING POLICY SPACE AND LEGAL CONSTRAINTS, 5–17 (2014); Luca Rubini, THE DEFINITION OF SUBSIDY AND STATE AID, 27–67(2009); Daniel K. Tarullo, *Norms and Institution in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000).

<sup>148</sup>Michael Trebilcock, *Brief Reflections on the Subsidies Imbroglia in International Trade Law*, 23 J. WORLD TRADE 165, at 165 (2022).

<sup>149</sup>Alan Sykes, *The Limited Case for Subsidies Regulation* (Stanford Law and Economics Olin Working Paper, Paper No. 472, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2531051](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2531051).

<sup>150</sup>See also Trebilcock, *supra* note 148, at 166.

<sup>151</sup>Low, *supra* note 14, at 288.

<sup>152</sup>See Judith L. Goldstein, Douglas A. Irwin & Alain Sykes, *20th Anniversary Issue*, 21(3) WORLD TRADE REV. 269, at 271 (2022).

<sup>153</sup>The pragmatic nature of the participation to the multilateral trading system by States is no novelty. Robert Hudec showed that the positions taken by newly independent states at the GATT were not based on ideological adherence to the virtues of either liberal internationalism or preferential treatment, but on a key strategic lesson they had learned from their colonizers – that 'economic benefit was maximized by controlling trade and suppressing competition from alternative suppliers'. Robert E Hudec, *DEVELOPING COUNTRIES IN THE GATT/WTO LEGAL SYSTEM* 30 (2010).

<sup>154</sup>The liberal understanding assumed in the WTO system is not an ideology that all WTO members states would necessarily subscribe to. Similar remarks are made in relation to international investment law by Panagiotis Delimatsis, Georgios Dimitropoulos & Anastasios Gourgourinis, *State Capitalism and International Investment Law – An Introduction*, in *STATE CAPITALISM AND INVESTMENT LAW* (Panagiotis Delimatsis, Georgios Dimitropoulos & Anastasios Gourgourinis eds., forthcoming 2023).

acknowledged, “there is no one form of economic governance that promotes development, much less one that universally applies across national contexts.”<sup>155</sup>

In relation to this matter, the supporters of the WTO during the Uruguay Round of negotiations assumed that the main problem with the GATT “was its flexibility”.<sup>156</sup> The resulting rule-based system was aimed at *constraining* members through the single undertaking of all the rules in the treaty and the promise of enforcement of the same rules by the DSS. In creating the WTO though, they did not consider that for several states, “the GATT had been valued precisely because of its flexibility”, permitting governments to soothe “powerful domestic groups” without compromising “a general commitment to open market”<sup>157</sup> and take certain *extra ordinem* measures such as orderly marketing arrangements and voluntary export restrictions as needed compromises “between market discipline and political necessity”.<sup>158</sup> Arguably, forcing adherence to the multilateral rules of the single undertaking has intensified underlying economic and political differences in the WTO membership.<sup>159</sup> Moreover, as the developments explored in Part B of this writing show, this approach may also prove untenable for market-oriented economies as soon as industrial strategic considerations, independence in the supply of goods of primary necessity, and geopolitical objectives require different arrangements concerning the relative roles of markets and the state in determining the outcomes of economic activity. About this dynamic development, we have argued that the politicization of trade relations has been and is a decisive factor in the progressive shrinking of the WTO. Yet, the causal direction goes both ways: Much of the current politicization of trade flows is explained by the limits of the current rule-based system to handle systemic challenges to the multilateral trading system.

Trade scholars have recently lay out possible options for restoring the functioning of the system.<sup>160</sup> Like most of them we remain pessimistic that any comprehensive reform will achieve acceptance among the key members. The current murky situation where WTO/GATT rules remain the basis and yardstick of the conduct of trade relations but are deprived of the teeth of universal, binding and enforceable adjudication, with widespread derogations and disrespect, cannot be sustained for long. And yet, this situation is likely to remain for some time a basic feature of international trade regulation, increasing the legal uncertainty surrounding transnational business operations and trade relations. Relatedly, there is another critical problem with reforming the system: like in the GATT era, it is probably only the *spirit of pragmatism* that may offer some chances to find alternatives to what appears to many as a scenario of endless frustration with negotiating inertia due to minoritarian vetoes—and, hence, chances to reform extant multilateral rules on systemic issues such as the roles of the markets and state in international trade, and the making of more space for regulatory autonomy, including proportionate defensive measures with multilateral oversight and dispute settlement. Still, one cannot ignore that most of the *pragmatic venues* exposed by experts to rewrite WTO rules focus on the *initiative* of powerful states.<sup>161</sup> Take

<sup>155</sup>Shaffer, *supra* note 94, at 623. Alternatives to pure forms of liberalism, or in Stiglitz’s words “better ways to the market”, exist and have been successfully experimented, for example, by Poland and China. See Stiglitz, *supra* note 10, at 270–82.

<sup>156</sup>Goldstein, Irwin & Sykes, *supra* note 152, at 271.

<sup>157</sup>*Id.* at 271.

<sup>158</sup>*Id.*

<sup>159</sup>For an insightful elaboration on the accentuation of economic and political differences in the WTO membership, see Henry Gao, *China’s Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation*, 21(3) WORLD TRADE REV. 342 (2022) (taking a detailed look at the origin of China’s interest in joining the WTO and offering a Chinese perspective on the developments since then).

<sup>160</sup>See Low, *supra* note 14, at 274; Shaffer, *supra* note 94, at 622; William J. Davey, *WTO Dispute Settlement: Crown Jewel or Costume Jewelry?*, 21(3) WORLD TRADE REV. 291 (2022); Americo B. Zampetti, Patrick Low & Petros C. Mavroidis, *Consensus Decision-Making and Legislative. Can International Law Help?*, 56(1) J. WORLD TRADE 18 (2022).

<sup>161</sup>As argued by Orford, *supra* note 4, in this Issue, this trend is “demonstrated by the approach taken to negotiating a temporary waiver of provisions of the TRIPS Agreement in the context of the COVID pandemic, the growing use of ‘climate clubs’ as a means of addressing the decarbonization of the economy, and the turn to plurilateral negotiations at the WTO as a way for more powerful members to move forward on issues such as services and investment liberalization.”

the persuasive case made by Zampetti, Low and Mavrodīs for amending Article X of the WTO Agreement<sup>162</sup> to regularize the status of non-discriminatory *inter se* agreements and, hence, promote a variable geometry approach in modernizing the global trading system. Admittedly, “the larger countries will be the main architects”<sup>163</sup> of new non-discriminatory *inter se* agreements. In addition, because these instruments, beyond establishing an open-ended approach to membership, espouse MFN treatment for all WTO members regardless of whether they participated in the initiatives, the same countries will not necessarily be their main beneficiaries. And yet, the ultimate decision on *how, when and with what subjects and scope moving forward the multilateral trading regime* will depend on power politics and relative economic size.<sup>164</sup> The question remains whether the only alternative to this kind of approaches is submitting to further stasis and decline the WTO’s role in global trade governance or it is possible to imagine, remodel and craft multilateral rules that are “sensitive to different economic, political, and social choices”<sup>165</sup> and able to rebalance the position of all members, large and small, rich and poor.

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<sup>162</sup>Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994).

<sup>163</sup>Low, *supra* note 14, at 286.

<sup>164</sup>Extant non-discriminatory *inter se* agreements are indeed referred to as “critical mass” agreements. If the trade share of participants is not considered sufficient in terms of some threshold, critical mass agreements will not reach the finishing line.

<sup>165</sup>Shaffer, *supra* note 94, at 623.