The WTO as Major Driver of Sustainable Development and its Reform Process

Progetto UNIBO-MAECI
L'Organizzazione mondiale del commercio quale protagonista dello sviluppo sostenibile nel rilancio del sistema multilaterale

edited by

Elisa Baroncini

with the collaboration of

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The WTO as Major Driver of Sustainable Development and its Reform Process/ edited by Elisa Baroncini, with the collaboration of Alessandra Quarta, Giulia Bortino e Niccolò Lanzoni – Bologna: Alma Mater Studiorum Università di Bologna, 2025.

ISBN 9788854972087
DOI https://doi.org/10.6092/unibo/amsacta/8513

All works published in are double-blind peer reviewed.
Questo volume è stato sottoposto a una procedura di valutazione anonima da parte di due *referees*.
Dipartimento di Scienze giuridiche
Direttore Federico Casolari
Università di Bologna
Via Zamboni 27/29
40126 Bologna

Cover pictures:
First picture (top left): Palazzo della Farnesina, Ministry of Foreign Affairs, Rome; Second picture: Palazzo Malvezzi, Law School, Bologna; Third picture: WTO Building, Geneva, ©WTO; Fourth picture: Advisory Centre on WTO Law.
Back cover: Sfera Grande, by Arnaldo Pomodoro.

First edition: August 2025

This open-access book is published as an implementing activity of the UNIBO-MAECI Project "L'Organizzazione mondiale del commercio quale protagonista dello sviluppo sostenibile nel rilancio del Sistema multilaterale" with the support of the Italian Ministry of Foreign Affairs and International Cooperation (2024-2025), coordinated by Prof. Dr. Elisa Baroncini.

Official website: https://site.unibo.it/wtosust/en

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ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA | DEPARTMENT OF LEGAL STUDIES

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Despite what is often stated by a mistaken narrative on the multilateral governance of the global economy, the WTO system promotes trade liberalisation not as an end in itself, but as a tool to achieve sustainable development. The Preamble of the Agreement establishing the WTO, in fact, unequivocally states that WTO Members "[r]ecogniz[e] that their relations in the field of trade and economic endeavour should be conducted with a view to *raising standards of living* … expanding the production of and trade in goods and services, while allowing for *the optimal use of the world's resources* in accordance with *the objective of sustainable development*, seeking both to *protect and preserve the environment* and to enhance the means for doing so in *a manner consistent with their respective needs and concerns* at *different levels of economic development*"[1].

Coherently, a distinctive feature common to all the WTO Multilateral and Plurilateral Agreements is that of enshrining exception clauses[2], considering legitimate interests[3] and the precautionary principle[4], in the light of which obstacles to trade for goods and services are WTO-compatible when they fulfil certain requirements to pursue non-trade values.

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[1] Preamble of the Agreement Establishing the World Trade Organization, done at Marrakesh on 15 April 1994, emphasis added.

[2] See e.g. GATT Article XX, pursuant to which "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; … (e) relating to the products of prison labour; … (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"; or GATS Article XIV declaring that "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety …"; and also TRIPs Article 8, according to which "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement …."

[3]. "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are*, inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products" (Article 2.2 of the TBT Agreement).

[4] See Article 5.7 of the SPS Agreement: "[i]n cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information."

In its 30-year practice, each institutional activity of the multilateral trading system – the dispute settlement mechanism, the daily management of the WTO Multilateral and Plurilateral Agreements by the WTO bodies, the WTO political pillar initiatives – has been highlighting the sustainability perspective of its wide and articulated legal framework.

Indeed, since its inception, the WTO case law clarified, e.g., that clean air is an exhaustible natural resource[5], as well as sea turtles[6], observing that "the objective of protecting human life and health … 'is both vital and important in the highest degree'"[7] and "protecting the environment is no less important"[8]. WTO adjudicators also concluded that "market transparency, consumer protection, and fair competition"[9], together with consumer information and animal welfare[10] fall into the legitimate objectives recalled by Article 2.2 of the TBT Agreement. Very recently a WTO Panel found that "areas with high-carbon stock, such as forests, wetlands and peatland" are exhaustible natural resources within the meaning of GATT Article XX (g)[11], confirming that "the reduction of CO2 emissions is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range

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[5] "The Panel Report took the view that clean air was a 'natural resource' that could be 'depleted.' Accordingly … the Panel concluded that a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning of Article XX(g)" (WT/DS2/AB/R, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*; Appellate Body Report, adopted on 20 May 1996, at p. 14).

[6] "Textually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources. The complainants' principal argument is rooted in the notion that 'living' natural resources are 'renewable' and therefore cannot be 'exhaustible' natural resources. We do not believe that 'exhaustible' natural resources and 'renewable' natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable', are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as 'finite' as petroleum, iron ore and other non-living resources … From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary' … It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources … Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling *the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g). We turn next to the issue of whether the living natural resources sought to be conserved by the measure are 'exhaustible' under Article XX(g). That this element is present in respect of the five species of sea turtles here involved appears to be conceded by all the participants and third participants in this case. The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'). The list in Appendix 1 includes 'all species threatened with extinction which are or may be affected by trade.' … For all the foregoing reasons, we find that the sea turtles here involved constitute 'exhaustible natural resources' for purposes of Article XX(g) of the GATT 1994" (WT/DS58/AB/R, *United States — Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, Appellate Body Report, adopted on 6 November 1998, paras. 128, 130, 131, 134).

[7] WT/DS332/AB/R, *Brazil — Measures Affecting Imports of Retreaded Tyres (Brazil — Retreaded Tyres)*, Appellate Body Report, adopted on 17 December 2007, para. 179.

[8] *Ibid*., para. 144.

[9] WT/DS231/AB/R, *European Communities — Trade Description of Sardines (EC — Sardines)*, Appellate Body Report, adopted on 23 October 2002, para. 263.

[10] See WT/DS381/AB/R, *United States – Measures concerning the importation, marketing and sale of tuna and tuna products (US – Tuna II (Mexico))*, Appellate Body Report, adopted on 13 June 2012, paras. 302-303.

[11] WT/DS600/R, *European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (EU – Palm Oil (Malaysia))*, Panel Report, adopted 26 April 2024, para. 7.276.

of policies that protect human life or health"[12], as "global warming and climate change pose one of the greatest threats to life and health on the planet"[13].

In parallel, the WTO political pillar confirmed and strengthened the sustainability nature of the multilateral trading system. Already in the 1996 Singapore Ministerial Conference, WTO Members declared that "[f]ull implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development"[14], further stressing, in the 1998 Geneva Ministerial Declaration, that they would have continued "to improve [their] efforts towards the objectives of sustained economic growth and sustainable development"[15].

It should therefore come as no surprise to note that the first international agreement implementing one of the Sustainable Development Goals (SDGs) of the UN 2030 Agenda[16] has been reached within the Geneva system. The WTO Agreement on Fisheries Subsidies, adopted at the 2022 Geneva Ministerial Conference, is "the first broad, binding, multilateral agreement on ocean sustainability"[17]. It prohibits subsidies for fishing irregularly (illegal, unreported and unregulated (IUU) fishing) and catching overexploited stocks, thus putting into practice, even if with five years of delay[18], SDG 14.6[19].

More generally, with reference to the UN 2030 Agenda, it has to be underscored that the latter considers international trade as "an engine for inclusive economic growth and poverty reduction", thus requiring States to maintain and go on strengthening "a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization, as well as meaningful trade liberalization"[20]. Consequently, the WTO Secretariat reports regularly to the UN High-Level Political Forum, indicating in its reports the contribution of the multilateral trading system to several SDGs[21].

Last but not least, it has to be remarked that the WTO practice has recently been characterised by the setting up of initiatives concerning environmental and climate change issues, i.e. the Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade[22], the Trade and Environmental Sustainability Structured Discussions (TESSD)[23], and the Fossil Fuel Subsidy Reform (FFSR)

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[12] WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, *Brazil – Certain Measures Concerning Taxation and Charges (Brazil – Taxation)*, Panel Report, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R, para. 7.880.

[13] *EU – Palm Oil (Malaysia)*, Panel Report, para. 7.281.

[14] WT/MIN(96)/DEC, *Singapore Ministerial Declaration*, 13 December 1996, para. 16.

[15] *WTO Geneva Ministerial Declaration*, adopted on 20 May 1998, para. 4.

[16] A/RES/70/1, *Transforming Our World: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015.

[17] WTO, *Agreement on Fisheries Subsidies*, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (accessed in August 2025).

[18] The WTO Agreement on Fisheries will enter into force on 15 September 2025, having being ratified by two-thirds of the WTO membership. See IISD, *Milestone Reached as on WTO Global Agreement on Fisheries Subsidies Enters Into Force*, 9 September 2025.

[19] "By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation."

[20] UN 2030 Agenda, para. 68.

[21] See World Trade Organization, *WTO's Contribution to Attaining UN Sustainable Development Goals: 2024 Update to the High-Level Political Forum*, Geneva, 2024.

[22] See World Trade Organization, *Plastics Pollution and Environmentally Sustainable Plastics Trade*, at the link https://www.wto.org/english/tratop_e/ppesp_e/ppesp_e.htm (accessed in August 2025).

[23] See World Trade Organization, *Trade and Environmental Sustainability*, at the link https://www.wto.org/english/tratop_e/essd_e/tessd_e.htm (accessed in August 2025).

initiative[24]. The WTO system is also demonstrating a strong commitment to contribute to the achievement of the SDGs involving stakeholders and civil society: under the input of the WTO Director General Okonjo-Iweala[25], two advisory groups have been created, i.e. the Civil Society Advisory Group[26] and the Business Advisory Group[27], engaging non-state actors and stakeholders.

The purpose of the research project "L'Organizzazione mondiale del commercio quale protagonista dello sviluppo sostenibile nel rilancio del Sistema multilaterale", co-funded by the Italian Ministry of Foreign Affairs and International Cooperation (Ministero degli Affari Esteri e della Cooperazione Internazionale (MAECI))[28], is to present and analyse the WTO as a major sustainability actor, also considering its reform efforts to promote fairness and inclusivity in the global economy, and better, more effective, management and functioning of the WTO Agreements and the WTO institutional structure. The research has been conducted constantly considering the approach and contribution of the European Union to the sustainability issues and reform process of the multilateral trading system: being the present study also addressed to Italian diplomats, the EU supranational dimension is regularly present in the works of the research team, as the Italian Ministry of Foreign Affairs develops its relevant activities also within the EU policies and in collaboration with the EU institutions. Special attention has been devoted to the WTO compatibility of major instruments of the European Green Deal, and to the development dimension, focusing on the African Countries through the analysis of the Piano Mattei.

To realize the present research, experts belonging to academia, together with officials from international (the WTO and the Advisory Centre on WTO Law (ACWL)), EU, and national institutions have been involved.

Beyond expressing my gratitude to all the authors of the present book, let me acknowledge once again the relevant and generous support of MAECI in funding this research, with the precious assistance of Dr. Giorgio Cammareri. Furthermore, I am very grateful to the Director of the Department of Legal Studies of the University of Bologna, Prof. Federico Casolari, for having welcomed and constantly encouraged this UNIBO-MAECI project. I am also obliged to my collaborators Drs. Alessandra Quarta, Giulia Bortino and Niccolò Lanzoni: their patient and industrious help has been essential for editing this book, recording the podcast series, and organizing the Bologna Workshop on 15 April 2025, where the members of the research group were able to present their preliminary work, exchange ideas and discuss, with the most authoritative views and comments by Dr. Enrico Valvo, Head of Common Trade Policy, MAECI Directorate-General for Europe and International Trade Policy, and Prof. Giorgio Sacerdoti, Emeritus at Bocconi University and former Member and President of the WTO Appellate Body.

The present research is being published at a moment of heavy difficulty for the WTO system. There is, in fact, the quasi-paralysis of the political pillar in adopting new rules and reforming the multilateral trading framework (see e.g. the South-African and Indian vetoes against the insertion in Annex IV of the WTO Agreement of the Investment Facilitation for Development Agreement (IFDA),

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[24] See World Trade Organization, *Fossil Fuel Subsidy Reform*, at the link https://www.wto.org/english/tratop_e/envir_e/fossil_fuel_e.htm (accessed in August 2025).

[25] Cf. World Trade Organization Press Release, *DG Okonjo-Iweala Sets up Civil Society and Business Advisory Groups*, 21 June 2023.

[26] World Trade Organization, *Civil Society Advisory Group*, https://www.wto.org/english/forums_e/ngo_e/csag_e.htm (accessed in August 2025).

[27] World Trade Organization, *Business Advisory Group*, https://www.wto.org/english/forums_e/business_e/bag_e.htm (accessed in August 2025).

[28] For the story and further details and documents on the UNIBO-MAECI project, see the dedicated website at the link https://site.unibo.it/wtosust/en.

so much looked after by several low-income countries)[29] and the prolonged US blockage of the Appellate Body[30] combined with the recent tough contestations by Washington D.C. against the Marrakesh system alleging its inability to express the new global economy equilibrium, or obtain from China the observance of all the WTO rules[31]. While due attention is necessary for the reasons at the basis of several criticisms of the negative developments of globalization, a multilateral, transparent, informed, inclusive and rules-based system is still needed by the international Community to work towards the sustainability of the global economy, avoiding imbalances and constantly looking for a fair sharing of the wellness generated by exchanges and technological developments. We therefore humbly hope, with this book, to provide a constructive contribution to the debate on the reform of the WTO system, showing how sustainable development can be pursued and needs, to be achieved, also a renewed multilateral platform discussing innovative common trade rules and fostering constant dialogue.

Bologna, August 2025

[29] TWN Info Service on WTO and Trade Issues, *WTO: South Africa, India oppose IFD Agreement at MC13*, 1 March 2024.
[30] See, recently, the US veto against the proposal on Appellate Body appointments at the meeting of the WTO Dispute Settlement Body (DSB) in June 2025: WT/DSB/M/503, *Minutes of Meeting Held in the Centre William Rappard on 23 June 2025*, 15 July 2025.
[31] US Presidential Documents, *Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits*, Executive Order 14257 of April 2, 2025, Federal Register Volume 90, Issue 65, April 7, 2025.

SECTION ONE

The WTO Reform Process and Sustainability – The EU Relevance

WTO Dispute Settlement Reform: Different Initiatives with Uncertain Outcomes

Davide Grespan*

Keywords: Crisis of the WTO Appellate Body – Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – The Molina informal consolidated text (CT) – Issues of fact and issues of law.

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1. Introduction

Following the blockage of the Appellate Body's (AB) appointments by the US, as of December 2019 the WTO does not have a functioning dispute settlement system (DSS) that ensures a final binding settlement of trade disputes between WTO Members. In other words, the multilateral mechanism created during the Uruguay Round to enforce the WTO trade rules agreed by all WTO Members is dysfunctional. Even though a WTO Member (respondent) can neither prevent the establishment of a panel to hear the legal grievances of another Member, nor can it prevent the panel to conclude its work with a report containing a detailed analysis of the legality of the respondent's measure, it suffices for the respondent to appeal that report to put the dispute in limbo indefinitely. Indeed, there is no appeal adjudicator that can hear and decide the appeal, and as long as the appeal has not been decided, the Dispute Settlement Body (DSB) cannot give a ruling and recommendations to solve the dispute. This practice, called appeal into the void, has been used frequently since 2019. There were 31 appeals into the void in December 2024.[1]

It is therefore not surprising that the initiatives to reform the DSS have multiplied in the last six years first with the Walker process (lead by the former New Zeeland Ambassador Davide Walker), then with the informal DS reform process lead by Mr Marco Tullio Molina, former Deputy Permanent Representative of Guatemala to the WTO (the Molina Process), and more recently with the formal DS reform process (the formal DS process) lead by the former Mauritius Ambassador Usha Dwarka-Canabady.

The Walker process took place in 2019. It was a last-minute attempt to address various concerns raised by the US with regard to the functioning of the AB, in order to prevent it from ceasing to operate. In October 2019, Ambassador Walker reported to the General Council (GC) on the outcome of that informal process. It presented, under his responsibility, a draft General Council Decision on

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* The author is the head of the legal office in the EU permanent representation to the WTO. The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the EU or any of its Institutions.

[1] Report of the General Council (GC) Chair of 16/17 December 2024 JOB/GC/DSR/5.

the functioning of the AB.[2] However, the US did not engage in that process, let alone agree to the draft decision.[3]

The Molina process started after the MC12, while the formal process started after MC13. During MC12 the WTO Members committed "to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024."[4] That objective was repeated in very similar words during MC13, in the Ministerial Decision on Dispute Settlement Reform. That decision also acknowledged the work that had been done during the Molina process. Accordingly, at MC13 Ministers invited officials to "build on the progress already made, and work on unresolved issues, including issues regarding appeal/review and accessibility to achieve the objective by 2024 as we set forth at MC12."[5]

A common aspect of all those reform initiatives is that they all started essentially from the perspective of addressing the concerns of the US with regard to the DSS. Those concerns focus to a large extent (but not exclusively) on the AB.[6] Some relate to procedural aspects of the AB functioning (e.g. rule 15 of the AB working procedures[7] allowing AB members to complete a case after the expiry of their term of office, the duration of appeal proceeding well beyond the limit set in the DSU, the "cogent reasons" doctrine, etc.), while others relate to substantive matters (e.g. the AB interpretation of certain WTO provisions, notably, but not exclusively, in the area of Trade Defence Instruments – "zeroing" with regard to the Antidumping agreement, the notion of "public body" with regard to the Subsidy and Countervailing duties agreement, and "unforeseen developments" with regard to the Agreement on Safeguards, etc.).[8] Among the substantive US concerns with the WTO DSS there is one which has nothing to do with the AB. It is triggered by the fact that "WTO panels have repeatedly interpreted WTO rules to find that the WTO has the authority to pass judgment on actions determined by the United States to be in its essential security interests."[9] In fact, the AB never had the occasion to decide a dispute relating to the essential security interest of the US or any other WTO Member.

With the passage of time, other concerns and interests have emerged in the context of the DS reform initiatives. They have translated into reform proposals that do not target directly the appeal stage, even though some of them may indeed be intended to respond to the US' concerns.[10] This is true in particular for the Molina Process, which produced the "informal consolidated text" (CT)[11]. The CT is a package of potential reforms organised in different Titles and Chapters addressing various

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[2] JOB/GC/222.

[3] *For more details about the Walker process, see Van den Bossche, P. (2024), Can the WTO Dispute Settlement System Be Revived?*, in *Constitutionalism and Transnational Governance Failure*, World Trade Institute Advanced Studies, Brill/Nijhoof, p. 308.

[4] WT/MIN(22)/24 WT/L/1135, para 4.

[5] WT/MIN(24)/37 – WT/L/1192.

[6] USTR Report on the Appellate Body of the WTO (FEB 2020) https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf

[7] Working procedures for appellate review, WT/AB/WP/6 and WT/AB/WP/W/7.

[8] The concerns of the US with the AB and more in general with the WTO have been recently grouped together in the USTR 2025 Policy Agenda and 2024 Annual Report, "THE WORLD TRADE ORGANIZATION AT THIRTY AND U.S. INTERESTS" https://ustr.gov/sites/default/files/files/reports/2025/2025%20Trade%20Policy%20Agenda%20WTO%20at%2030%20and%202024%20Annual%20Report%2002282025%20--%20FINAL.pdf

[9] The concerns of the US with the AB and more in general with the WTO have been recently grouped together in the USTR 2025 Policy Agenda and 2024 Annual Report, "THE WORLD TRADE ORGANIZATION AT THIRTY AND U.S. INTERESTS" at 4. On this matter, see the Communication of the US "*Reflections from the United States on the Handling of Disputes Involving Essential Security Measures*" of 11 December 2024, JOB/DSB/10.

[10] A sizeable number of reform proposals addresses the matter of accessibility for developing countries of the WTO DSS.

[11] JOB/GC/385.

aspects of the DSS. However, there is no reform proposal in the CT under the title of the appeal/review.

Another common aspect of these reform initiatives is that they seek to address the US procedural concerns relating to the functioning of the AB, rather than the US concerns with certain AB legal interpretations that the US considers erroneous. However, as explained below, some of the procedural reforms that have been envisaged may also help to address some of the substantive concerns raised by the US.

While engaging in various reform initiatives, in 2020 a group of WTO Members (including some of the frequent users of the DSS such as the EU, China, Canada, Brazil, and Australia) have put in place a contingency measure to preserve the parties right to appeal in disputes among them, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).[12] In a nutshell, the MPIA is a communication endorsed by a group of WTO Members (at the time of writing 57 WTO Members[13]) containing a political commitment to enter into a binding appeal arbitration agreement grounded on Article 25 of the DSU in disputes among them, as long as the AB remains dysfunctional. Annex I of the MPIA communication contains the template arbitration agreement (and the procedural rules governing the arbitration) that the parties endorsing the MPIA communication are to sign in each dispute. The arbitration procedure is modelled on the AB procedure with some procedural and substantive adjustments aiming at enhancing efficiency and ensuring respect of the 90-day timeframe for the appeal stage. The WTO Members participating in the MPIA have appointed a standing pool of 10 arbitrators. Three arbitrators are appointed from the pool to decide an appeal according to the same random appointment method used for composing an AB division. In essence, the MPIA eliminates any possibility for the participating Members to appeal into the void a panel report in disputes among them. This means that, from a legal viewpoint, those disputes will have to be solved (and not kept in limbo) either through the appeal arbitration or (if none of the litigants appeals) via a mutually agreed solution or with the adoption of the panel report by the DSB.[14]

The purpose of this paper is to briefly recall the different DS reform initiatives that WTO Members have developed since 2019 and then describe the main results of the formal DS reform process, with a special focus on appeal/review. The formal DS reform process focussed essentially on three themes, (i) appeal/review; (ii) accessibility; (iii) and "work done thus far" (a recap of the work done during the Molina process).[15] Moreover, the formal process adopted the interest-based approach imported in the WTO for the first time by Mr Molina. The close linkages with the Molina process are also shown by many references to the Molina process disseminated in the outcome documents of the formal process. Therefore, the formal DS reform process can be described as an attempt to complement the Molina process and create a package of reforms "with the view to having a fully and well-functioning dispute settlement system accessible to all Members." It is therefore necessary to spend a few words on the Molina Process and some of the reform ideas contained in the CT.

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[12] JOB/DSB/1/Add.12 of 30 April 2020 (the MPIA Communication).

[13] After the UK joined on June 25, 2025, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) has 57 WTO Members, covering 57.6% of world trade.

[14] For more details on the MPIA, see Baroncini, E., *The EU and the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – A Contingency Tool to Save the WTO Appellate Stage*, in Barel, B., Gattini, A., (a cura di), *Le prospettive dell'export italiano in tempi di sfide e crisi globali. Rischi e opportunità*, Giappichelli, Torino, 2021, pp. 85-122; Pauwelyn, J. (2023), *The WTO'S Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's new?*, *World Trade Review*, 22(5), 693-701.

[15] Report of the GC Chair of 16/17 December 2024 JOB/GC/DSR/5, paras 3 and 5.

An interest-based approach to negotiations focuses on understanding and addressing the underlying interests and needs of all parties involved, before negotiating over specific positions or demands or legal texts. In the GC report of 14 February 2024[16] (a few days before the 13th WTO Ministerial Conference), Mr Molina described the interest-based approach with the following example:

> "Consider a scenario where two persons go to the market to buy a pumpkin, and there is only one left. In a position-based negotiation, they may pursue outcomes where one person wins and takes the pumpkin home, and the other person loses. Another outcome would require the two finding a "compromise" and split the pumpkin, leading to suboptimal results.
> In contrast, an interest-based approach seeks to understand the underlying interests. For example, one person may be interested in using the pumpkin for decoration, while the other wants it for a soup. Through an interest-based approach, they can agree to purchase the pumpkin together, each can pay half of the price, and then divide the pumpkin according to their respective interests — one person could get the pulp for the soup and the other the shell for decoration. The result is that both parties are fully satisfied, and the pumpkin is optimally used."

The interest-based approach instilled a new dynamic in WTO negotiations. WTO negotiations often occur in iterations. Negotiators meet and present different (sometimes competing) texts and the chair tries to consolidate into a single draft. That results in complex negotiating texts with bits of text between brackets (language that is not yet agreed upon by all parties) or with different colouring (to distinguish various proposals, amendments, or inputs from different Members).

Instead, negotiations on legal drafting started relatively late during the Molina process. First, from April 2022 to January 2023 meetings were convened to understand Members' interests regarding the dispute settlement system. Based on that exercise (during which about 230 interests were identified), the Molina process started in February 2023 and the first step was to compile a list of more than 70 ideas and conceptual approaches proposed by Members to potentially address the interests identified. Once that phase was completed, the legal drafting exercise started. Fifty-two delegates contributed to the drafting exercise of the CT through seven rounds. The seventh revision of the CT, spanning more than 50 pages, is devoid of square brackets and colour coding. That does not mean, however, that the CT is a consensual document agreed by all WTO Members. Indeed, as explained by Mr Molina "During the informal process on dispute settlement reform, we have adhered to the principle that nothing is agreed until everything is agreed Eventually, Members will have the opportunity to review the text as a comprehensive package to determine its overall acceptability... The text represents the most optimal calibration achievable until today in most of the areas under consideration, but not in all of them."[17] Moreover, as explained below, some Members clearly indicated that they have reservations with the reforms proposed in the CT.

[16] JOB/GC/385, para 1.21.
[17] JOB/GC/385.

2. The reform proposed in the consolidated text

The CT is organised in eleven Titles each of them addressing different aspects of the DSS.[18]

The first addresses alternative dispute resolution procedures and arbitration (ADR) and it is more than a dozen pages long. It provides for an articulated set of procedures for good offices, conciliation and mediation as well as a template for simplified arbitration procedures. There are also specific rules for mediation or conciliation in the course of consultations or during the compliance phase. The parties to a dispute can agree to deviate from most if not all of those procedural rules and good offices, conciliation, mediation and arbitration remain subject to the parties' agreement to engage in such procedures.

The prominent space that ADR and arbitration take in the CT suggests that Members envisage or hope for a more frequent use of those alternative methods to solve their disputes.

Title II concerns the panel proceedings. Overall, it is intended to streamline the panel proceedings by simplifying certain procedural steps and adopting other arrangements to ensure that the timeframes are respected. Chapter I "Establishment of Panels" seeks to reduce by half the period between the presentation of a panel request to the DSB and the establishment of a panel.

Chapter II "Panel Composition" provides for a number of mechanisms intended to increase the expertise of potential panellists (notably of those listed in the indicative list) and upgrading the panel composition process, especially when a party to the dispute requests the DG to appoint the panellists.

Currently, third parties' citizens may not serve as panellists, unless the parties to the dispute agree otherwise. The CT inverts the default situation. In summary, citizens of third parties unaffiliated with their government are in principle eligible to become panellists. The litigants may still object, but the inversion of the default solution could help expanding the panoply of well-qualified individuals that are potentially available to serve as panellists, notably in cases where many Members are third parties.

Moreover, under the current system, the indicative list is maintained by the Secretariat pursuant to Article 8.4 of the DSU. When assisting the parties in the panel composition process, the Secretariat may propose individuals from the indicative list in accordance with Article 8.6 of the DSU, but, most often than not, the Secretariat proposals do not come from the indicative list. Article 8.7 sets out that, if after 20 days from the date of establishment of the panel, the parties have not agreed on the panellists, each party may request the Director General (DG) of the WTO to appoint the panellists after consulting with the parties.

In this respect, the CT aims at providing Members with a "Meaningful indicative list", by encouraging Members to nominate up to three of its own citizens and, optionally, one non-citizen for inclusion in the list. These nominations are to be made taking into consideration gender balance and geographic diversity. Nominees to the indicative list must possess significant relevant experience, defined as no less than ten years, which does not need to be continuous. Relevant experience includes legal practice primarily in international economic or trade law matters, or substantive engagement with subject matters relevant to WTO-covered agreements. Academic expertise may be accounted for as relevant experience but only if combined with practical experience. The Chair of the DSB, with the WTO Secretariat's support, reviews the nominations for inclusion on the indicative list. If the Chair believes a nominee lacks the required qualifications, the Chair may recommend the Member

[18] For a more detailed and critical analysis of the CT see Sacerdoti, G., and Moran, N., *International Trade and Investment Dispute Settlement. From Rise to Crisis and Reform,* Routledge 2025, Chapter 8; and Van den Bossche, P., *The Uncertain Future of WTO Dispute Settlement: An Appraisal of the February 2024 Consolidated Text Resulting from the Molina Process on Dispute Settlement Reform*, World Trade Institute, WP No. 2/2024, available at www.wti.org/research/publications/1443/the-uncertain-future-of-wto-dispute-settlement-an-appraisal-of-the-february-2024-consolidated-text-resulting-from-the-molina-process-on-dispute-settlement-reform/.

concerned against the nomination. While the Member may proceed despite the Chair's recommendation, other Members may request to hold confidential consultations with the Chair to be informed of any such recommendation. Then the DSB adopts the list, and the list shall be reconstituted every four years to ensure its continued relevance and accuracy. The Secretariat is encouraged to use the indicative list in proposing nominations for the panel to the parties.

These reforms bear witness to the Members' intention to increase the average expertise of the potential panellists included in the indicative list, making that list more meaningful, while preserving each Member's prerogative to nominate to the list the individuals they deem fit. Those reforms should make it easier for litigants to agree on the composition of the panel and increase the frequency of panellists drawn from the indicative lists (thereby enhancing the transparency of the panel composition process).

However, despite the indicative list may become more meaningful, the litigants may still be incapable of agreeing on the composition of the panel. In that case, any party to the dispute may request the DG may to appoint the panellists. In that scenario, the CT sets out that the parties may agree to submit each a list of at least 30 individuals drawn from the meaningful indicative list.[19] If some individuals appear in the list of both parties, the DG must appoint panellists that from the overlap on both lists. If the overlap provides fewer than three individuals, the DG has the authority to complete the panel by appointing additional members.

Those proposed reforms aim at creating a framework for the DG' appointments of panellists. They allow each party to provide an indication to the DG about some of the individuals contained in the indicative list that they would feel comfortable having to have as panellists. That may facilitate the DG choice of panellists and make it more predictable for the parties to the dispute.

The CT's Chapter III "Streamlining the panel process" addresses the submission of evidence (in the first written submission, except for rebuttals), the timing of filing of submissions (sequential submission both for the first and second submission of each party), the meetings with the parties (the default becomes one hearing instead of two, but each litigant can request a second hearing focused on selected issues), and requires panels to send questions to the parties before the hearing.

Some of those reforms reflect the practice of many panels (e.g. submission of evidence, pre-hearing questions) but the value of codifying such practice should not be underestimated. Other reforms could probably be enacted by panels in specific disputes already under the current DSU. Again, by making those reforms ideas the default procedural arrangements they may become in due course common practice rather than case specific procedural rules.

Chapter IV "Conciseness and Timeframes" introduces binding word and time limits for written and oral submissions to the panel, mandatory timeframes that should be adhered to by panels, and standardized timetables for the panel proceedings. Different limits and timeframes apply depending on the complexity of the dispute. This is clearly a very innovative chapter that is intended to simplify disputes and shorten their duration.

As already mentioned, Title III "Appeal/Review Mechanism" does not contain any text. In the GC report of 14 February 2024,[20] Mr Molina explained that discussions on this matter were ongoing. He added: "[w]e all recognize that there are conceptual differences among Members regarding the operation of the system, and, therefore, we prioritized concluding other elements of the text." Indeed, many of the interest and concerns raised with regard to the appeal or review mechanism "may already be addressed in the existing text."

[19] Litigants may agree on a different figure.
[20] JOB/GC/385.

Title IV "Compliance" lays out rather articulated reforms for the stage of compliance. It seeks, first of all, to simplify negotiations concerning the reasonable period of time (RPT) within which a Member should comply with an adjudicative report. To that end, it sets out a standard RPT of nine 9 months. It also seeks to promote the use of consultations "at the level of ministers or designated senior officials" and ADR mechanisms during the compliance stage, by reducing the standard RPT to six months where a Member refuses to engage in those procedures. Moreover, either party still has the possibility to request binding arbitration to establish the length of the RPT if it finds that the standard RPT is too long or too short. In that case, the arbitrator may fix an RPT that is shorter or longer than the standard one, but it shall not exceed 15 months.

Title V "Guidelines for Adjudicators" is divided in three chapters.

The first chapter "Treaty interpretation" starts by recalling that according to the DSU an adjudicator shall interpret the covered agreements in accordance with customary rules of interpretation of public international law and in that respect it refers explicitly to Articles 31, 32, 33 of the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969 (Vienna Convention of VCLT). It then paraphrases the text of Article 32 of the VCLT, which allows recourse to supplementary means of interpretation (e.g. the preparatory work of the treaty and the circumstances of its conclusion) when the application of the general rules of interpretation leaves the meaning of a provision ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

The above does not appear to be a reform (i.e. a change to the status quo). However, the emphasis on the supplementary means of interpretation may embolden adjudicators to make use of them more readily. On the other hand, it has been noted that for the WTO covered agreements there are no *travaux préparatoires* adopted by the parties and therefore this chapter would be "unfortunate."[21]

The second paragraph of this first chapter deals with the burden of proof. It states that the burden of establishing a prima facie case of inconsistency with a WTO obligation rests on the complainant, who must demonstrate the existence of an obligation in the covered agreements that governs the measure claimed to be inconsistent. If the complainant fails to demonstrate the existence of such an obligation or that the obligation governs the allegedly inconsistent measure, then the adjudicator shall conclude that the complaining party has not made out a claim of inconsistency. Again, one may wonder whether this is in any way innovative.[22] Perhaps the sentence "Members recognize that a provision may not contain an obligation governing the allegedly inconsistent measure" may be understood by some adjudicators as an instruction to exercise restraint when engaging in expansive interpretations of the WTO agreements.

The second chapter "Focus on what is necessary to resolve the dispute" instructs adjudicators to focus on what is necessary to solve the dispute, including through the exercise of judicial economy. It follows that the exercise of judicial economy is just one of the instruments to focus on what is necessary.

A second instruction for adjudicators indicates that they shall only make such findings as will assist the DSB in making the recommendations and the rulings "and shall limit their reasoning only to that which is necessary to support their findings and conclusions." This is a clear message to adjudicators to keep their report succinct, to the point and avoid *obiter dicta*.

Finally, in order to keep the focus on what is necessary to support the dispute, as long as the final report has not been issued to the parties, adjudicators can invite the parties to focus on or exclude

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[21] Van den Bossche, P., *The Uncertain Future of WTO Dispute Settlement: An Appraisal of the February 2024 Consolidated Text Resulting from the Molina Process on Dispute Settlement Reform*, World Trade Institute, WP No. 2/2024, at 10.

[22] Ibid.

certain claims. The invitation is not binding and even if it is accepted it does not preclude the party from raising the same claim in different proceedings. This provision is clearly inspired to the text of the MPIA which contains almost identical language.[23]

The third and last chapter of this Title is about the "Non Precedential value of past reports", which means that "a previous report that interprets or applies a provision of the covered agreements does not have binding force in respect of a subsequent dispute." It continues by indicating that each adjudicator bears the responsibility to develop his/her own interpretation in line with the customary rules of interpretation of public international law and any authoritative interpretations adopted by the Ministerial Conference or the General Council pursuant to Article IX:2 of the Marrakesh Agreement (to date the Ministerial Conference and the General Council have not adopted a single authoritative interpretation). The Chapter also clarifies that an adjudicator may rely upon previous reports only to the extent he/she finds that they are relevant and persuasive and that there can be no presumption that previous reports are persuasive.[24]

This chapter has been criticised by some scholars for opposite reasons. On the one hand, it has been noted that it does not say anything new, given that it is undisputed that previous WTO reports do not have precedential effect. On the other hand, it has been criticised as creating uncertainty and affecting consistency by limiting the possibility for adjudicators to rely on previous reports to support their findings.[25]

The first argument cannot be a criticism for those who value the WTO DSS. If the language contained in the CT reflects the status quo, there can be no harm in codifying that language (unless one takes issue with the status quo). The second criticism might go a bit too far. Admittedly, the wording of this chapter is not the most streamlined. However, if one accepts that previous reports have no precedential value, it follows that they may be relied upon only to the extent an adjudicator finds them relevant and persuasive. This requires an adjudicator to explain (at least concisely) why they are persuasive rather than presuming that they are persuasive because they constitute a precedent. After all, the CT does not contain any amendment to Article 3.2 of the DSU which states that "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."

It is submitted that this chapter implies an implicit rejection of the "cogent reasons" doctrine developed by the AB in *US – Stainless Steel (Mexico)*.[26] It neither prevents adjudicators to rely on a previous report to reach the same interpretation nor to support that conclusion by concisely referring to the reasoning contained in a previous report (insofar as that reasoning is in line with the customary rules of interpretation of international law). At the same time, it also means that adjudicators do not need to find a cogent reason to depart from a previous report, if they believe that the interpretation of the provision at issue in line with the customary rules of interpretation of international law leads to a

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[23] MPIA Communication, Annex I, point 13.

[24] Chapter III of Title V reads: [a]n adjudicator may use a previous report in developing and explaining its own interpretation only to the extent the adjudicator determines the report to be relevant to a provision at issue in the dispute and to contain persuasive analysis of that provision under customary rules of interpretation of public international law, or to distinguish its interpretation from a previous report. Neither Members nor adjudicators may presume that an interpretation of the covered agreements contained in a WTO dispute settlement report is persuasive."

[25] Van Den Bossche, P., *The Uncertain Future of WTO Dispute Settlement: An Appraisal of the February 2024 Consolidated Text Resulting from the Molina Process on Dispute Settlement Reform*, World Trade Institute, WP No. 2/2024, at 10; Sacerdoti. G., Moran, N., *International Trade and Investment Dispute Settlement From Rise to Crisis and Reform*, 2025, Routledge – London, chapter 8, para 3.1.

[26] WT/DS344/AB/R, para 160 "… the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."

different conclusion. Admittedly, that may reduce consistency in the relevant jurisprudence. However, to a certain extent, that seems to be inherent in a legal system where previous decisions have no precedential value by default.

Title VI titled "Procedures to discuss legal interpretations" is composed of two chapters. The first chapter, "Discussion of reports in relevant WTO bodies" creates a mechanism for Members "to discuss the technical and policy implications of the provisions interpreted in adopted DSB reports, and arbitration awards notified to the DSB" in the context of the relevant WTO body (i.e. the competent committee). Members' discussion shall not relate to dispute-specific facts, or the implementation of the report. The discussion should take place at the first formal meeting of the relevant WTO body to be held "no more than [X] months following the date of adoption of the adjudicative report or the notification of the arbitration award." This means that the mechanism would not be available for "old" reports, i.e. adopted X months before the first formal meeting of the relevant WTO body.

The second chapter established an "Advisory Working Group" as "a mechanism for WTO Members to discuss, build consensus and provide guidance on legal interpretations developed by adjudicators." The Advisory working group is supposed to be used rarely and shall not re-litigate disputes or function as an appeal/review mechanism.

The discussion in the Advisory Working Group can be requested by a Member or by the DSB only after the adoption of the report by the DSB (or the notification to the DSB of the arbitration award), after the expiry of the reasonable period of time and also after the same interpretation has already been discussed in the relevant WTO body, pursuant to the first chapter of Title VI. In addition, within six months from the establishment of the Advisory Working Group, any Member may request a discussion of any legal interpretation developed in reports that were adopted at the DSB before the establishment of that group. In other words, the Advisory Working Group is available to discuss reports adopted before and after its establishment. Hence, Members have the possibility to bring before the Advisory Working Group legal interpretations contained in previous reports with which they disagree.

The outcome of the discussion can take different forms, inter alia:

- a draft recommendation to the Ministerial Conference for the adoption of an authoritative interpretation in accordance with Article IX:2 of the Marrakesh Agreement;
- a recommendation to the DSB to agree that the interpretation at issue shall not be considered as persuasive; or
- a record of Members' diverging views about the interpretation. The record shall include (i) the number of the Members that expressed the views during the discussion, (ii) the Members that supported or did not support the interpretation discussed and (iii) their respective reasonings.

The outcomes of the discussions in the Advisory Working Group shall not have any retroactive effect on the disputes, nor shall they affect the validity or implementation of the report. However, they shall be circulated as WTO unrestricted documents and shall be included in the WTO Analytical Index.

This title reflects the intention to create an institutional dialogue between Members and adjudicators (one could say between the negotiating and the dispute settlement function of the WTO). It strikes a balance between providing adjudicators with Members' feedback about how they have performed their function while preserving their independence and the integrity of the dispute settlement process. Indeed, the dialogue is not an appeal review mechanism, or a means to re-litigate a dispute. It cannot impact on the outcome of a given dispute nor on the implementation of a given report. The practical effects of this dialogue are forward looking and for that purpose they are recorded and made easily accessible to all through the WTO analytical index.

Title VII "Secretariat Support" seeks to ensure adequate secretariat support for WTO adjudicators, and clarifies the respective roles of the Secretariat and adjudicators. It establishes that the adjudicators shall have full responsibility for decision making and even if they draft the report with the support of the Secretariat, the adjudicators only shall draft the conclusions of the reports. The Secretariat, as far as it is concerned, shall help in drafting the report under the adjudicators' written instructions, and to ensure that its support is responsive to the parties' submissions, the Secretariat shall not provide issues papers before the first written submissions of the parties.

The Title VIII "Transparency" provides for different options to increase transparency of WTO litigation. It seeks to ensure real-time or delayed access to submissions for all WTO Members, observations of hearings by all WTO Members and the public, and the publication of submissions and timetables on the WTO website.

Title IX "Accessibility with respect to technical assistance, capacity building and legal advice" proposes enhanced support for developing and least-developed Members. Initiatives may include capacity-building programs, technical assistance, and legal advice to build stronger dispute settlement capabilities among these Members. This chapter has been rewritten during the formal DS process, although it is submitted that the substance has not changed dramatically.

Title X "Accountability mechanism" establishes a mechanism for periodic reviews to assess the operation of the DSS and the implementation of the reforms contained in the CT. The review of the implementation of the reforms shall be based on a report of the DSB Chairperson containing factual and statistical information on 25 different reform elements, some of which have a quantitative performance target. The report prepared by the DSB Chairperson, after consulting the Members, may contain recommendations on actions to be decided by the DSB. After reviewing the operation of the DS system on the basis of the report, the DSB may take such actions as it deems necessary and appropriate, but those actions shall not affect the rights or obligations of any Member with respect to previous recommendations or rulings.

The CT is not a consensual document. Some Members found it difficult to participate in the Molina process and hold reservations both about the process and the proposed reforms.[27] In particular, Bangladesh, Egypt, India, Indonesia, and South Africa, issued a joint communication a few days before the CT was published titled "Dispute Settlement Reform: Reflections on Substantive Issues",[28] taking issue with virtually every single reform proposal contained in the CT. In essence, according to those Members the CT is fundamentally flawed.

3. The three outcomes of the formal process

On 16 and 17 of December 2024, the Chair of the General Council (GC) gave a public account of the three outcomes of the formal process on "Appeal/Review", "Accessibility" and "Works done thus far." From his report, it emerges that the formal process was both, intensive (about 170 hours of technical meetings over six months) and it produced significant progress. According to the GC Chair:

"… on Appeal/Review, we now have draft negotiating text on potential reforms that would: (i) narrow the claims reviewable on appeal/review to those that would have a material impact on the respondent's implementation obligations; (ii) clarify adjudicators' role with respect to reviewing the panel's objective assessment of the facts of the case; (iii) make changes to the existing interim review

[27] See for instance: Joint Communication from Egypt, India and South Africa, *Reflections on the Reform of the WTO Dispute Settlement System*, 24 November 2023, JOB/DSB/7; Communication from Indonesia, *Dispute Settlement Reform Discussion: A Thought on the Process*, 15 September 2023, JOB/DSB/6; Communication from the African Group on Dispute Settlement Reform, 13 July 2023, JOB/DSB/5.

[28] JOB/DSB/8, Dated 12 February 2024.

stage of the panel process such that it provides a more meaningful opportunity for the panel to correct factual or legal errors; and (iv) clarify Members' expectations with respect to adherence to timeframes."

However, significant progress does not equate to agreement. Accordingly, the GC Chair encouraged Members to reconcile their interests and concerns on other core issues of appeal/review, including the form that an appeal/review mechanism should take and what its role should be. In that context, he stressed that "the majority of Members have indicated that their interests are best-served by the key features of the current system without fundamental changes to them."

With regard to "Accessibility", the GC Chair explained that "we now have a substantive, near-final draft of a chapter relating to the two areas of "Capacity Building" and "Technical Assistance." While the area of "Costs and Funding" remains contentious, the GC Chair indicated that "a first draft table to capture the WTO Members' interests and concerns has now been produced."

Finally, on "Works Done Thus Far", the GC Chair explained that a number of information sessions had taken place on the CT and other contributions presented by some WTO Members during the Molina process.[29] The objective of those information sessions was to reach a common starting point among all Members in terms of understanding the interests and concerns reflected in the "Works Done Thus Far."

A Progress Report of Technical Work (Progress Report) is annexed to the GC Chair report of December 2024. It describes in more details the work carried out by WTO Members on those three work streams, and notably on Appeal/Review during the formal process.

The reminder of this contribution focuses on the Appeal/Review part of the Progress Report.

3.1 Appeal/Review

With regard to the theme Appeal/Review, the Progress Report contains the Appeal/Review Tables, which reflects key aspect of the technical work on this matter. The tables cover six sub-topics (A) Scope or review; (B) Standard or review; (C) Form of the Mechanism; (D) Reducing/Changing Incentives to appeal; (E) Clarifying Members expectation of adjudicators; (F) Access to the mechanism. Each table is subdivided in a few elements and often there are several reform ideas for each element, as well as an explanation of the key objective(s) of the different reform ideas. A column with observations completes the table and provides useful insight.

The introductory note of the Appeal/Review tables explains that "The objective of Members is to identify reforms that will, when taken together (and with other reforms of the dispute settlement system), best meet the interests and address the concerns of all Members. The tables should not be read as implying that all sub-topics or elements require reform."

Moreover, some reform ideas have been moved to drafting, i.e. they have been translated into legal text, while the form of that legal text remains open (e.g. GC decision, DSU amendment, etc.). Those legal texts are annexed at the end of the Appeal/Review Tables as draft negotiating texts.

The reform ideas that moved to drafting are those that, during the formal process, showed the most potential in terms of meeting the interests and concerns of Members in combination with other reform ideas. However, the Progress Report stresses that this should not be read as implying that consensus has been reached on any particular reform idea or that these reform ideas are necessarily exhaustive.

It is therefore interesting to briefly describe the different reform ideas contained in the Appeal/Review Tables with a particular attention to those that have been moved to drafting.

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[29] Notably JOB/DSB/7 and 8.

3.2 Scope of Review

With regard to the scope of review, Members discussed about "Filters, criteria or admissibility tests for claims." Under this element, the Progress Report indicates that one reform idea has been sent to drafting i.e. that of limiting the review on the merits to those appeal claims that, assuming they were well-founded, would have a material impact on implementation (MII).

The objective of this reform idea is to focus appeal/review on the issues necessary to resolve the parties' dispute, to avoid perception of 'law-making' by the adjudicators and to ensure adjudicators do not make advisory opinions or provide unnecessary reasoning.

Accordingly, the appellant has the burden to demonstrate that each of its appeal claims has a MII. That demonstration should be contained in the notice of appeal and the appeal submission. The adjudicator should then start by assessing the MII with regard to each appeal claim, without examining the merits of the claim. Hence, MII requires an assessment by the adjudicator at the outset of the case and before examining the merits of each claim of appeal.

However, once the adjudicator has determined that some claims have MII, he/she will start assessing them on the merits according to what he/she believes is the most efficient order of analysis. This implies that the finding on a given claim may make it un-necessary to assess the merits of the next claim (e.g. resolving the next claim would not have any more an impact on the implementation). It follows that, any time he/she has assessed the merits of a specific claim, the adjudicator is requested to check the persistence of MII for the reminder of the claims. Therefore, the initial assessment of MII is not definitive and may change in the course of the adjudicative process. The adjudicators' decision and reasoning with respect to MII would be set out in their final report at the latest.

The most difficult element to grasp of this reform idea is the notion of what impact on implementation would be "material." The negotiating text explains that it must be an impact on "the implementation of the recommendations and rulings in the dispute by the Member concerned with respect to a measure" and that a claim has a material impact on implementation, if its acceptance by the appeal adjudicators would result in a material change in what the Member concerned needs to do to bring a measure into compliance.

Hence, the impact must be assessed with regard to the implementation in respect to each measure separately, and it refers to what the Member has to do to bring that measure into compliance, but not to "… the means of implementation of the recommendations and rulings." It follows that "what the Member has to do" cannot refer to the form of the implementing measures to be adopted. Rather it must relate to some substantial aspect of the measure, which is the object of the recommendations and rulings of the adjudicator.

While a negotiating text of MII is attached to the Progress Report, there seem to be several elements that Members still wish to discuss and the reform idea looks far from being consensual.

Indeed, the Appeal/Review Tables explains that "… some Members have suggested that the inclusion of 'material' may not be necessary if any change to the respondent's implementation obligations would be considered 'material.' In response to this questioning, it has been suggested that 'material' is an important qualification where there are multiple appeal claims with respect to the same measure, if one such claim has resulted in a finding of inconsistency with WTO rules giving rise to an obligation for the responding Member to bring itself into compliance, other similar or related claims may no longer have MII because a compliance obligation to remove or amend the measure has already arisen …."

Moreover, it appears that the coordinators of the drafting group of this reform idea have prepared some examples to help Members understanding MII, but those examples are not included in the Progress Report.

Moreover, some Members wonder to what extent MII would differ from judicial economy[30]. In response, it has been suggested that MII would be a way for adjudicators to focus only on what is necessary to resolve the dispute, and could operate separately or in conjunction with the exercise of judicial economy. Other questioned the value added of MII, wondering whether a mandatory requirement for adjudicators to focus only on what is necessary to resolve the dispute may be derived already from the CT.

Those remarks suggest that MII is a concept that goes beyond judicial economy. First, there is a burden on the appellant to demonstrate at the outset that its appeal claims have MII. There is no such burden with respect to judicial economy. Second, while the exercise of judicial economy is discretionary for the adjudicator, the adjudicator would be required to check the MII for each claim on an ongoing basis. Hence, MII unlike judicial economy, is mandatory. Third, MII tells adjudicators what they have to do in order to focus on what is necessary to resolve the dispute. They have to assess an appeal claim on the merits only insofar as it appears that the claim has a MII.

The Appeal/Review Tables list a few more aspects of this reform idea that may still need to be considered by Members including how MII "would apply to claims relating to procedure or to the conduct or integrity of the proceedings" and possibility of developing "guidelines for the adjudicator."

Finally, some Members appear to be concerned by this reform idea because: (i) legal errors that do not have an impact on implementation could not be corrected; (ii) it may increase complexity of appeal; (iii) disputes where what is at issue is not the manner of implementation but procedural or systemic aspects risk remain unresolved.

It is submitted that the concern under (ii) is misplaced. MII mandates adjudicators not to assess the merits of certain appeal claims, thereby necessarily narrowing the matter before them and hence the complexity of the case.

It is further submitted that the concerns under (i) and (iii) are somehow overlapping. With regard to (i) the Appeal/Review Table refers to the CT, which clarifies that previous reports do not have precedential value. This means that assuming a legal error may remain in a panel report if it is not demonstrated that correcting it would have a MII, that legal error will not constitute a precedent for future cases.[31] By the same token with regard to (iii), an appeal claim that only matters for its procedural or systemic implications, but has no impact on what the Member has to do to implement the recommendations and ruling in that particular case, is a claim that aims at creating a precedent that may be useful for future cases, a sort of inducement to law-making. In essence, those two concerns are in contradiction with the key objectives of this reform idea: to focus appeal/review on the issues necessary to resolve the parties' dispute and to avoid the perception of 'law-making' by the adjudicators.

The second reform idea under this subtopic, that of creating a leave to appeal mechanism, seems to have raised several concerns listed in the Appeal/Review Tables and it has not yet been developed further.

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[30] "The practice of judicial economy, which was first employed by a number of the GATT panels, allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. Although the doctrine of judicial economy allows a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not compel a panel to exercise such restraint. At the same time, if a panel fails to make findings on claims where such findings are necessary to resolve the dispute, then this would constitute a false exercise of judicial economy and an error of law." Appellate Body Report WT/DS276/AB/R *Canada — Wheat Exports and Grain Imports*, para. 133.

[31] Of course, a potential legal error may remain in the panel report also under the current system as there is neither an obligation to appeal all possible legal errors, nor is the AB authorised to correct legal errors *motu proprio*.

3.3 Standard of Review

The second subtopic in the Appeal/Review Tables is the Standard of Review that the appeal adjudicators should apply when examining whether or not the panel made an error, be it in the interpretation and application of the law (legal error) or in the establishment of the relevant facts (factual error).

With regard to legal error, the Appeal/Review Tables shows that different standards of review were discussed but Members could not even start to converge on any of them.

Currently, according to Art. 3.2 of the DSU,[32] in the analysis of an appeal claim of legal error, the adjudicators apply the customary rules of interpretation of public international law. This means, in very general terms, that the degree of scrutiny by the appeal adjudicators (the standard of review) may be more or less intense depending on the nature of the WTO provisions at stake. When the legality of a national measure is to be scrutinised in light of a clear and unconditional WTO obligation that does not leave any margin of appreciation to the Member concerned, the adjudicator' scrutiny will be more intense. On the other hand, if a provision is at stake that recognises the Member's margin of appreciation, the scrutiny will necessarily have to reflect that margin.

However, three alternative standards of reviews for appeal claim of legal errors were proposed during the formal process. Those alternative standards are more restrictive in the sense that they would make it more difficult for the appeal adjudicators to find that the panel made a legal error, and thereby they would reduce the opportunity for "rule making" by the appeal adjudicators. In essence, the three alternative standards aim to make sure that the appeal/review adjudicators grant more deference to the panel than did the AB.

The first alternative standard would require the appellant to establish that the panel's decision on a legal issue was 'clearly erroneous' or 'plainly unreasonable.' The second would require the appellant to demonstrate that the panel interpretation is unreasonable/impermissible, based on the customary rules of interpretation of public international law. The third would require the appellant to focus on the panel itself (rather than on the panel's legal interpretations), and demonstrate for instance that "it was guilty of gross misconduct, bias, or serious conflict of interest … seriously departed from a fundamental rule of procedure … manifestly exceeded its powers, authority or jurisdiction...."

Those proposed alternative standards were not very successful as many Members said that they "would not meet their interests in being able to seek correction of legal errors, as well as other interests, including consistency, coherence, legitimacy and fairness. Those Members consider that [those standards] could result in inconsistent outcomes which would undermine predictability." Other Members stressed that the third proposed standard of review would be limited to situations of panellists' misconduct and most errors of law would not be able to be corrected.

Of the three alternative standards proposed, the second one should be the most familiar to WTO lawyers as it echoes Article 17(6)(ii) of the ADA. However, whilst Article 17(6)(ii) of the ADA applies to the review by the panel of the investigating authority's interpretations and thereby is aimed at granting the latter some deference, the second standard proposed would apply to the panels' interpretations. Hence, under the second standard of review proposed panels would still be required to apply the current standard of review pursuant to Article 3.2 of the DSU. However, the appeal adjudicators would need to apply a different standard and show deference to panels' interpretations. This proposed standard seems therefore grounded on the assumption that panels' legal interpretations

[32] A specific standard of review is mandated for Panels by Article 17(6) of the ADA both when reviewing the assessment of facts and alleged legal errors made by the investigating authorities.

are generally sounder than those of the second instance adjudicators.[33] Therefore, while addressing the concerns of judicial rule-making and gap-filling by the appeal adjudicators, the proposed standard could give raise to concerns of judicial rule-making and gap-filling by panels.

It is also hard to see how any of those standards would address the concern of the creation of de facto precedents by the appeal adjudicators. Whether the appeal adjudicators apply a broad or narrow standard of review is disconnected from the question of whether their respective interpretations may be perceived as being de facto authoritative. A deferential standard of review may decrease the frequency by which the appeal adjudicators correct the panel's interpretations. However, the more a correction becomes exceptional the more it may be perceived as being absolutely warranted and therefore de facto authoritative.

With regard to the standard of review for factual errors it appears that Members' discussion was more productive. Indeed, three reform ideas under this element were developed into a legal text, which is annexed to the Appeal/Review Tables. The objectives are to ensure that the panel's role as the trier of facts is respected, that any ensuing appeal/review focusses only on legal issues, and to reduce the complexity and number of appeal/review claims.

In respect of factual errors, the starting point is Article 11 of the DSU, according to which a panel should make an objective assessment of the matter before it, including an objective assessment of the facts, whereas appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel (pursuant to Article 17.6 of the DSU).

The first reform idea allows the appeal adjudicator to reverse the panel's assessment of the facts only to the extent that there is an egregious factual error. Such an error would raise to the level of an issue of law[34]. The second reform idea makes clear that merely resubmitting the factual arguments from the panel stage is not sufficient to demonstrate an egregious error. The third in essence indicates that the meaning and effect of 'municipal law' is a question of fact.

Those reforms ideas appear to be a clarification of the starting point recalled above (in line with some earlier AB reports[35]) rather than a radical innovation.

These three reform ideas were developed in four paragraphs of legal text attached to the Appeal/Review Tables.

The first paragraph recalls that the panel is the trier of the facts. Hence, appeal adjudicators may find that the panel failed to make an objective assessment of the facts pursuant to Article 11 of the DSU only to the extent an appellant establishes an egregious error. A footnote clarifies for greater certainty that the meaning and effect of municipal law in the domestic jurisdiction of the Member concerned is an issue of fact.

The second paragraph conveys the idea that an egregious error is something more than an error in the appreciation of evidence, and may include: (i) a serious distortion or misrepresentation of the facts; or (ii) a serious or deliberate disregard of relevant evidence submitted by a party, or (iii) an obvious error as to a fact. Those abstract categories are not particularly telling in discerning an egregious error from a simple error in the appreciation of the evidence and seem to be at least in part overlapping.[36]

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[33] This assumption is somehow counterintuitive. Indeed, countless legal systems provide for a second instance reviewing the legal interpretations of the first adjudicator. If the first instance interpretations were in general sounder than those of the second instance, then all those legal systems would be self-inflicted on themselves an undesirable step prone to create more legal errors than removing them.

[34] A violation of the duty under Article 11 DSU to make an objective assessment of the facts.

[35] See for instance AB Report WT/DS26/AB/R WT/DS48/AB/R, *EC – Hormones (US)*, paras 132, 133.

[36] For instance, it is submitted that there is no real difference between a serious distortion and a serious misrepresentation of a fact.

However, the last two paragraphs of the legal text appear more useful.

The fourth paragraph explains what the appellant needs to do to demonstrate the existence of an egregious error. It "must specifically identify the error made by the panel and the evidence to which the error relates." Moreover, resubmitting the same factual arguments made before the panel is not sufficient to demonstrate the egregious error. In practice, the appellant must be precise in identifying what error the panel made and the evidence to which it relates.

The third paragraph sets out the conditions under which the appeal adjudicator may find an egregious error. This paragraph applies to any type of egregious errors (including the three categories exemplified in the second paragraph). An egregious error must be evident on the face of the panel record. In assessing whether the panel made an egregious error, appeal adjudicators shall not carry out a new evaluation or weighing of the evidence and facts.

That seems to mean that the appeal adjudicators will have to look at the evidence on the record in the light of the appellant's explanation. When – on that basis – the adjudicator is able to realise *ictu oculi* (in the blink of an eye) that the panel made an error in the assessment of facts (without engaging in the complex exercise of evaluating and weighting the evidence and the facts) then that error is manifest or obvious and therefore egregious. On the other hand, when finding the error requires the appeal adjudicator to engage in re-evaluating and re-weighting the evidence and the facts, then the alleged error would be a simple error in the appreciation of evidence, which is not for the appeal adjudicator to review.

3.4 Form of the mechanism

Under this sub-topic several elements were discussed but none of them made it to the drafting stage.

The first element focuses on whether the appeal/review should be an institutional mechanism or rather a function.

Under the current system, the AB is a standing body composed of 7 individuals that have a 4-year term and may be reappointed only once. Appeal is therefore an institutional mechanism pursuant to the DSU.

Five reform ideas were discussed, all of them aimed at removing the "standing" or institutional nature of the appeal adjudicator. Because of that nature, the appeal adjudicator "may be perceived as having greater authority and legitimacy than other adjudicators, which leads to 'rule-making' and de facto precedent, and also does not guarantee correct decisions."

Those ideas cover a broad spectrum going from the ad hoc selection of adjudicators, a mix of standing and ad hoc adjudicators, increasing the number of standing adjudicators, add some adjudicators to the panel during the interim review phase (and eliminate the appeal phase), to the creation of a committee of WTO Members to review panel reports.

However, it appears that "most Members consider that a standing body of highly-qualified experts supports their interests, which include correctness, predictability, consistency, coherence, legitimacy, transparency, accountability, fairness and efficiency." In addition, some Members have indicated a willingness to explore a form of standing body different from the current system.

It appears also that Members discussed the model of dispute resolution under the United Nations Convention on the Law of the Sea (UNCLOS), which provides an example of a system with compulsory jurisdiction, while allowing members a choice between standing adjudicative bodies or ad hoc arbitration. While one Member seemed to be interested in such a system, the majority noted that their interests would not be met by a system that uses ad hoc arbitration as a default.

The second element discussed is about how appeal adjudicators are selected. Under the DSU, the AB members are appointed by the DSB by consensus. It was proposed to appoint adjudicators via a

mechanism agreed by the disputing parties to address a concern that adjudicators appointed by the Membership are perceived to speak on behalf of all Members. However, given that this reform idea presupposes that there would be no standing body, it raised concerns with the same Members who appear attached to the standing nature of the appeal body. It was also highlighted that an ad hoc appointment process may be time consuming and therefore run counter Members' interest in the prompt disposal of appeal procedure (Adherence to timeframes).

With regard to the expertise of adjudicators and their representativeness, Members did not discuss any particular reform proposal but expressed interest in ensuring that adjudicators have a high level of expertise and some Members also in ensuring gender balance.

On the contrary, a number of reform ideas were discussed as regards the Adjudicators' ability to make their own Working Procedures and Adjudicators' decision-making.

With regard to the working procedure for appellate review, three reform ideas were discussed to address the concern that adjudicators may alter Members' rights through their working procedure, and rather make sure that the working procedures for appellate review are regularly reviewed by Members (notably via Accountability Mechanism provided for by the CT). While there seemed to be some interest for these ideas, Members decided to come back to them at a later stage. Indeed, the formal process was addressing also some matters currently dealt with by the AB Working Procedures[37]. If those matters would be governed by rules decided by Members in the course of the formal DS reform process, Members may have a different appreciation of those three reform ideas.

A matter which is currently governed by the AB Working Procedures, which Members discussed during the formal process is the adjudicators' decision making. The AB Working Procedures provide for decisions relating to an appeal to be taken solely by the three adjudicators assigned to a particular case. However, those three adjudicators shall exchange views with the other AB members before finalizing a report. Moreover, the three adjudicators shall make every effort to take their decisions by consensus, and when that is not possible they shall decide by a majority vote. Finally, the AB Working procedures set out that adjudicators shall (a) convene on a regular basis to discuss matters of policy, practice and procedures; (b) stay abreast of dispute settlement activities and, in particular, receive all appeal documents.

To address "a concern that collegiality and consensus emphasize consistency above correctness, and are not necessary or appropriate to resolve disputes", it was proposed to apply different decision-making rules, such as requiring that a panel decision may be modified or reversed only if all appeal adjudicators agree. There is, however, an obvious tension between the concern (that consensus emphasizes consistency above correctness) and the proposed reform (requiring consensus for whatever correction). This reform idea cannot be inspired by the desire to pursue correctness, as it makes more difficult to correct any possible panel's legal error. Rather itt is intended to give more deference to panels. Therefore, it pursues the same objectives sought by the alternative deferential standards of review for legal errors that were discussed before.

3.5 Reducing/changing incentives to appeal

Under the sub-topic of reducing/changing incentives to appeal, three elements were addressed by Members: (i) adjusting the reasonable period of time for compliance, (ii) Members to adopt a political commitment to reduce appeals, and (iii) enhancing the interim review phase. The ideas gathered under "enhancing the interim review phase" were sent to drafting.

[37] Working Procedures for Appellate Review, WT/AB/WP/6 and WT/AB/WP/W/7.

It is therefore appropriate to start examining how Members envisaged to enhance the use of the interim review phase.

Under the DSU, parties have an opportunity to submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members.

In order to improve the quality of panel reports (by giving the panel an opportunity to correct factual and legal errors, or improve its reasoning), and avoid some appeals or narrow the number of claims on appeal, Members discussed the idea of requiring or incentivize Members to raise the substance of the claim with the panel at the interim review stage. Some indeed considered that under the current system a Member could have an incentive not to raise a possible error during the interim phase in order not to give the panel the opportunity to correct it or improving the reasoning of its report. That Member could then raise that error at the appeal/review stage increasing its chances to obtain a reversal of the panel report on that point.

Against this background, the negotiating text attached to the progress reports states that if "a party to a dispute considers that an interim report contains an error that requires correction and that it might otherwise appeal, it shall endeavour to request the panel to review those precise aspects of the interim report…" in particular, "such a request shall concisely describe the error and refer to the paragraphs of the interim report in which it is found."

Moreover, when an appeal is filed, the notice of appeal shall indicate "whether review of those precise aspects of the interim report related to the alleged error was requested during the interim review stage …."

The consequence of not requesting the review of a given error during the interim review stage however differs depending on the type of error.

With regard to "… an error in the assessment of the facts pursuant to Article 11 of the DSU, appeal adjudicators shall only address that claim if review of those precise aspects of the interim report that relate to the alleged error was requested during the interim review stage."

This means that with regard to egregious factual errors (that according to the reform idea described above can be reviewed by the appeal adjudicators), the reform idea in question introduces an admissibility requirement. However, some Members do not seem comfortable with this admissibility requirement and are concerned that it may unduly affect capacity-constrained Members. Other Members did not share that concern. Indeed, it should be recalled that "egregious factual errors" are obvious or manifest errors. Hence, for that simple reason they "should be readily identifiable at the interim review stage" by any Member involved in the dispute, and notably the main parties.

Moreover, a footnote clarifies that the admissibility requirement does not apply to errors in the final report that were not in the interim report. Obviously, errors that are not contained in the interim report cannot be raised during the interim phase.

With regard to factual errors that do not reach the threshold of being egregious, those factual errors do not fall in the remit of the appeal adjudicators even under the current rules of the DSU as interpreted by panels and the AB. Hence, the reform idea in question does not change anything in that respect.

In practice, this reform idea creates a strong incentive for the parties to raise during the interim review phase any allegation of factual error in order to avoid that the appeal adjudicators may be precluded to review an error that they may consider egregious.

It can be observed that the creation of such an incentive will provide the panel with the opportunity to correct any egregious error rather than leaving it in the panel report exposing itself to the criticism of the appeal adjudicators. Hence, this mechanism, if implemented would drastically reduce the chances that egregious factual error may end up before the appeal adjudicators.

"[F]or any other claim, if the review of those precise aspects of the interim report related to the alleged error was not requested during the interim review stage … the party shall briefly explain the reasons in its Notice of Appeal."

This provision means that with regard to legal errors there is no admissibility requirement. Indeed, Members did not support the idea of limiting appeal/review claims to the legal issues raised during the interim review. The incentive to raise those errors during the interim review phase remains therefore essentially an encouragement.

Making a more effective use of the interim review requires that there is sufficient time for that review. With regard to the duration of the interim review phase it was noted that the CT already contains a proposal for standard timetable for panel proceedings with more time allocated to the interim review compared to the current standard timetable contained in Appendix 3 of the DSU.

The other elements that were discussed under the sub-topic of reducing or changing incentives to appeal, focused on possible adjustments to the reasonable period of time (RPT) for compliance and Members' adoption of a political commitment to reduce appeals. Pursuant to the DSU, if it is impracticable for a Member to comply immediately with an adopted panel or Appellate Body decision, the Member concerned shall have a RPT to do so. The RPT is fixed after the adoption of the report by the DSB. When the parties cannot agree about the duration of the RPT, they can ask an arbitration to make a decision in that respect.

With regard to the possible adjustments to the RPT, three ideas were proposed aimed at reducing the responding Member' incentive to file an appeal just to gain additional time to comply.

The first is about changing the calculation of the RPT so that the start date for RPT – in the event of an appeal by the respondent – coincides with the initiation of an appeal by the responding party. When the complainant successfully appeals a panel report (e.g. the panel found that there was no violation of a WTO rule, but the appeal adjudicator finds that there is indeed a violation), the starting date of the RPT would remain the same, i.e. the date of adoption of the appeal adjudicator's report. That is because (i) the obligation to comply would arise exclusively from the appeal adjudicator's report and (ii) the complainant has no interest in appealing a panel report just to gain time. Rather it is interested in prompt compliance.

In some legal systems, the decisions of the first instance adjudicators are immediately enforceable and even the lodging of an appeal does not automatically suspend their enforceability.[38] This reform idea seems to reflect the same underlying logic. However, even if it was suggested that this idea could apply only when the appeal was unsuccessful, a number of concerns were raised against it, including that Members may find it politically or practically difficult to start making changes to their measure when there is no DSB finding that the measure is indeed WTO-incompatible.

The second idea is about providing the responding party with a longer RPT if it does not appeal. Some Members found that this idea would give a positive incentive not to seek appeal/review and would represent a better use of the parties' time and resources. Other Members found that it could result in longer compliance periods in cases where the losing party had no intention to seek appeal/review and hence it would run against the objective of prompt settlement of disputes.

More in general, concerns were raised with linking the length of the RPT or its start date to a Members' decision to seek (or not to seek) appeal/review, as the RPT is intended to be a "reasonable

[38] For instance, Article 278 of the Treaty on the Functioning of the European Union reads: "Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended." See also Article 60 of the Statute of the Court of Justice of the European Union for more details.

period of time" for that Member to bring itself into compliance (i.e. the period of time the Member objectively requires to achieve compliance).

According to the third idea, when a responding party appeals and all or most of its claims are not upheld, this could be a factor to be considered when the RPT is determined. However, this idea was not supported by any Member because it would be impractical to implement.

With regard to adoption of a political commitment to reduce appeals, some Members supported this idea, because appeals should be exceptional. Other Members thought that appeal should not be systematic, automatic, frivolous or tactical. Some Members considered that such a political commitment could signal to Members the need to exercise restraint when deciding whether or not to appeal. However, there was also broad support to preserve the right of Members to appeal. In this regard, some Members expressed strong concerns with placing any political pressure on Members to reduce appeals.

3.6 Clarifying Members' expectations of adjudicators

Many reform ideas are listed under the subtopic of "Clarifying Members' expectations of adjudicators." Many of those ideas are linked to the CT, and that is shown by the frequent references to the CT contained in the Appeal/Review Tables.

Three of those reform ideas were sent to drafting, but the Progress Report contains legal text reflecting only two of them, both relating to the adjudicators' adherence to time-frames.

With regard to the latter, under the DSU appeal proceeding should last 60 days and in exceptional circumstance up to 90 days. The duration is calculated from the notification of the decision to appeal to the circulation of the appeal report to the Membership in the three WTO official languages.

It is however common knowledge that the AB did not manage to conclude many appeals within those timeframes. Those delays are due to a variety of reasons which are recalled in the Appel/Review Tables: e.g. complexity of the appeal, exceptional workload, and overlap in the composition of AB divisions, translation requirements, staff shortages, and other external factors such as delays requested by the parties.

To ensure prompt resolution of disputes, respect of the timeframes, and at the same time make sure that parties and adjudicators remain focussed on the issues necessary to resolve the dispute, the Progress Report contains a draft text reflecting the idea that the appeal/review stage must be completed within 90 days, subject to some flexibility/exceptions.

According to that text, Members reaffirm the time-frames set out in Article 17.5 of the DSU, including that the duration of appeal proceedings shall in no case exceed 90 days.

However, there are two flexibilities. First, in exceptional circumstances, where the appeal adjudicators, in consultation with the parties, consider that it is not practicable to circulate the report within 90 days, the end date of the 90-day period is not anymore the circulation of the report to the Membership. In those cases, the end date is the day the appeal adjudicators issue their report to the parties in the language in which appeal proceedings have been conducted. Then the appeal adjudicators will have 30 more days to circulate their report to the Membership in the three official WTO languages.

The second flexibility relates to situations of force majeure, i.e. "an unforeseen event beyond the control of the appeal adjudicators or the parties that prevents the conduct of the appeal proceedings." In such a scenario, the appeal adjudicators may, in consultation with the parties, suspend the appeal proceedings for as long as the unforeseen event continues to prevent the conduct of these proceedings. Once the appeal proceedings are suspended, the time-frames set out in Article 17.5 of the DSU shall be extended by the amount of time that the appeal proceedings were suspended. The appeal adjudicators shall inform the DSB in writing of a decision to suspend the appeal proceedings within

one week of such decision, together with an estimate of the period of suspension and the reasons that prevent the continuation of the appeal proceedings.

The Appeal/Review Tables record the concern that the provisions concerning force majeure would allow for the formal suspension of appeal proceedings, without providing any guarantees for the resumption of such proceedings. It is difficult to understand such concerns given that the provision in question only authorises the suspension for the duration of the unforeseen event, and not one day longer. But even if it were true that there is no guarantee of resumption of the proceedings, it must be highlighted that Article 12.12 of the DSU allows for a suspension of the panel proceeding (at the request of the complainant) without any guarantee of resumption.

All in all, it is clear that the text on adherence to timeframes shows the Membership attachment to the idea of prompt resolution of disputes and the DSU timeframes, while it allows for very limited flexibility falling short of the flexibility that de facto characterised the AB practice.

However, for those timeframes to be able to be respected, the factors that caused appeal proceedings to last longer than provided for by the DSU will need to be addressed. Members seemed to be aware of that. Indeed, the Appeal/Review Tables contain an observation that "Members generally have an interest in ensuring that the timeframes are achievable, noting the number of related reforms under discussion." This seems to suggest that Members believe that the package of reforms under discussion would allow the Appeal/Review adjudicators to respect the above timeframes.

With regard to the element of "adjudicators' output (decision or report)", many reform ideas were proposed. The first is for appeal/review reports to focus only on what is necessary to resolve the dispute/arguments by the parties and the second is to clarify that previous reports are not binding on adjudicators. While some Members proposed those ideas others highlighted that the CT already contains language that addresses the objectives pursued by those ideas in the Chapters "Focus on What is Necessary to Resolve the Dispute", "No Precedential Value of Past Reports", and "Advisory Working Group."

Other reform ideas were gathered under this element, but the most interesting one appears to be that of clarifying that adjudicators should focus on assessing the panel's interpretations, findings and conclusions based on the claims of error and arguments put forward by the parties. This idea was sent to drafting, which implies that it was considered capable of reconciling different interests, but it did not translate into legal text.

According to the Appeal/Review Tables, this "inductive approach" would require the precise alleged legal errors to be clearly identified in the notice of appeal or notice of other appeal. The adjudicators would then start their analysis from the appellant or other appellant' arguments. They would not be required to simply adopt those arguments. They could also consider arguments of the other party and the third parties, and could develop their own reasoning or an interpretation that does not strictly follow the arguments of the parties. However, they would do so only to the extent that this is necessary to rule on the claims of error as formulated by the appellant. Hence, this inductive approach would change neither the standard of review, nor the burden of proof. The party making the claim of error would bear the burden of establishing that error.

It could be wondered to what extent this idea represents a reform compared to the current practice. The response to that question is probably contained in the Appeal/Review Table. Indeed, some Members "consider that appeal/review adjudicators previously adopted an approach of doing their own analysis first and then comparing the result with the panel's analysis and the arguments put forward by the parties." Therefore, this idea would reduce the adjudicators "interpretation or analysis in the abstract / removed from the actual arguments of the parties", thereby addressing concerns regarding rule-making and overreach by adjudicators.

A number of reform ideas are also grouped under the element of "clarifying adjudicators' role in streamlining appeal/review"; they concern the establishment of word and time limit for written and oral submissions, requiring adjudicators to give the parties written questions in advance of the hearing, without limiting the questions the adjudicators may pose at any time, empowering adjudicators to convene an early case management conference with parties before the hearing, and providing for mandatory standardized timetable for appeal proceedings.

All of those ideas are aimed to make appeal proceedings more efficient and simpler so that the adjudicators can effectively adhere to the timeframes. To a certain extent they reflect the ideas contained Chapter "Streamlining the Panel Process" of the CT and echo the provisions contained in the MPIA.

However, the Appeal/Review Tables show that at least five different ways to design word and time limits were considered (mandatory limits, mandatory but with different degrees of flexibility, and purely indicative limits). The supporter of mandatory word and time limits believed that those limits: (i) should not be left to the parties to decide as a systemic approach is needed; (ii) would help to meet timelines; and (iii) they are common in other international tribunals that deal with complex subject matter. Moreover, it was recalled that the AB, when faced with an increasing workload, launched a discussion on the possibility of setting word limits for submissions and conducted a review of the length of appeal submissions between 2009 and 2015 (JOB/AB/2). The idea is therefore not unheard of. While some believed that the review made by the AB could be a starting point others pushed for more stringent limits, not reflecting the past practice, which was characterised by many disputes lasting longer than the DSU timeframes.

Some Members viewed the imposition of mandatory limits as an arrangement that would simplify appeal proceedings, thereby facilitating accessibility to the DS system of capacity constrained Members. Others had a diametrically opposite view, considering that those limits would affect those Members in particular.

Some Members proposed to follow the approach adopted in the CT with respect to panel proceedings, and provide for mandatory word and time limits but with some flexibility linked to the degree of complexity of a dispute. However, there was a lack of convergence on how to assess the complexity of an appeal proceedings (e.g. based on the degree of complexity of the panel proceedings or other criteria), and whether it is advisable to create such a distinction at all.

Members also discussed how flexibilities would operate in practice, given that the appellant's submission is currently due on the date of the notice of appeal. One suggestion was that the adjudicators could set word limits for any potential appeal in a pre-appeal letter to the parties. There could then be an opportunity for a party to request a higher limit based on the complexity of the issues the party wants to address. Another suggestion was for the appellant to use a pre-appeal letter to explain to the adjudicators that the dispute was complex and would need a higher word limit.

Members also discussed different figures for the length of submissions. The following figures were put forward:

- 40 pages for a standard appeal and 80 pages for a complex appeal (third parties: 15/30); and
- 30 pages limit for a standard appeal and 60 pages for a complex appeal, with additional flexibility at the discretion of adjudicators in justified circumstances (third parties: 15/25);
- On the basis of JOB/AB/2, 75 pages was suggested as a good starting point.

In summary, the impression that emerges from the Appeal/Review Table is that Members discussion around word and time limits was very rich and detailed. However, no single idea emerged as potentially capable of reconciling the different concerns and interests of Members.

With regard to the idea of requiring adjudicators to give the parties written questions in advance of the hearing, and empowering adjudicators to convene an early case management conference with

parties before the hearing, some Members questioned the necessity of these reforms. However, it was felt that they could be optional tools, which can be employed on a case-by-case basis provided they do not negatively impact on the timeframes.

Finally, some Members supported the idea of providing adjudicators with mandatory standardized timetable for appeal proceedings based on the timelines of the AB Working Procedure.

3.7 Access to the mechanism

The last subtopic of the Appeal/Review Tables contains only one element and a single reform idea concerning access to the appeal mechanism.

Under the DSU, any party can automatically access the appeal mechanism simply by notifying the DSB of its decision to appeal a panel report. In contrast, according to the proposed reform idea access to the appeal mechanism would be granted only based on a bilateral or plurilateral agreement between the disputing parties, on a one-time or ongoing basis.

This reform is designed to allow Members to choose specific features of the system that in their view would help them in resolving their disputes. Essentially, it envisions a scenario where the disputing parties could agree to implement an appeal mechanism for a particular dispute or for some or all of their disputes. Additionally, the proposal envisages the scenario where a group of Members could agree to have an appeal mechanism applicable to any or some disputes among the group's Members. This scenario reflects the situation under the MPIA, which ensures that, in any dispute between participating Members, there is a functioning appeal mechanism that provides a final, binding resolution to their dispute.

A key difference is that the MPIA serves as a temporary solution, intended to be in place only while the AB is unable to function. In contrast, this reform idea proposes a "new normal", where the appeal mechanism would apply exclusively to those Members who have chosen to subscribe to it.

This reform idea was not particularly successful; as the majority of Members believed that the right to appeal must be guaranteed and should not depend on the consent of the opposing party. There was indeed widespread support for the existing system, where any party may seek an appeal or review to correct legal errors through compulsory jurisdiction. "This is seen as essential to preserving a system where all Members can enforce their rights, especially for developing countries and LDCs so as to help them to navigate power imbalances. It is also seen as important for the system's legitimacy. Some Members also consider that there should be no opportunity for an opposing party to strategically block an appeal."

4. Conclusion

DS reforms appear to have been a priority for the WTO Membership in the last five years. Two Ministerial Conferences have focussed on the need to address this matter and various reforms processes have been conducted. As noted, these developments have been triggered by the US blockage of the AB appointments, and it is therefore understandable that a common denominator of the various reforms proposals has been to address the concerns raised by the US. When considered side by side, the Molina process and the formal DS reform process, appear complementary. The latter focussed notably on appeal/review, which is not covered in the CT and the documents contained in the Progress Report concerning appeal/review have countless references to the CT prepared during the Molina process. Moreover, a specific work stream of the formal process focussed on explaining the outcomes of the Molina process and the concerns raised by some Members with those outcomes to the Members that did not participate fully to the Molina process. Finally, to respond to the request

of developing countries, the formal DS reform process focussed also on accessibility expanding the work done during the Molina process.

Therefore, one possible scenario could be that Members will continue building on those initiatives until they will be able to agree on a reformed DS system. The General Council Chair Report of December 2024 points to that direction indicating that the GC Chair will hold consultations with interested delegations to hear views on how to build on the progress achieved.

While the US has recently asserted that it "remains committed to working towards a fundamentally reformed and improved system" it also added "WTO Members continue to have vastly different perspectives on the role of WTO dispute settlement … The United States will reflect on the extent to which it is possible to achieve a reformed WTO dispute settlement system that advances U.S. interests while preserving U.S. sovereignty."[39]

It has been noted at the beginning of this paper that the common feature of the different reform initiatives of the last few years is that they seek to address the US procedural concerns relating to the functioning of the AB, and only indirectly the US concerns with certain AB legal interpretations, which the US considers erroneous. In this respect, it is worth recalling that according to the USTR "It would be contrary to U.S. interests to support a dispute settlement system that adopts these and other interpretations that depart from the plain text as agreed to by the United States."[40]

This raises the question of whether it is at all realistic to achieve a reformed WTO dispute settlement system acceptable to the US by focusing solely or prominently on procedural reforms. While time will probably answer that question, it would appear that the MPIA is for the time being the only functioning binding DSS to which WTO Members can resort to in order to solve their trade disputes according to the agreed rules.

[39] USTR *2025 Trade Policy Agenda and 2024 Annual Report*, February 2025, "THE WORLD TRADE ORGANIZATION AT THIRTY AND U.S. INTERESTS", at 5.
[40] USTR *2025 Trade Policy Agenda and 2024 Annual Report*, February 2025, "THE WORLD TRADE ORGANIZATION AT THIRTY AND U.S. INTERESTS", at 5.

National Security in the WTO (Legal) System – Where We Stand and the Path Ahead

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Keywords: Non-trade policy concerns – Treaty interpretation – GATT Article XXI – National security.

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1. Introduction

Since the publication of the WTO panel report in the dispute *Russia – Traffic in Transit* in 2019, national security-related WTO jurisprudence has become one of the essential topics of the discussions about the organisation's future. According to one view, represented most prominently by the United States, Article XXI of the General Agreement on Tariffs and Trade (GATT 1994) and other national security provisions under WTO law should be entirely self-judging, meaning that it should be solely up to the invoking Member to determine whether the legal conditions for invoking Article XXI or another national security provision are being met. In contrast, according to most other WTO Members, Article XXI should be subject to objective review by WTO panels, albeit with discretion granted to the invoking Member with respect to certain aspects of the national security justification. The debate has focussed not only on the substance of WTO panel rulings and on the interpretation of the WTO national security-related legal provisions itself. Accommodating national security concerns in domestic trade regulation is also widely regarded as a key building block for WTO reform and for restoring the full functionality of the WTO dispute settlement system. As former USTR General Counsel Warren Maruyama and former WTO Deputy-Director General Alan Wm. Wolff have stated, "there can be no return to binding dispute settlement acceptable to all without agreement as to how claims of national security are to be dealt with." [1] However, the same authors have qualified the conflicting views of Members on how to handle national security-related dispute resolution as "unresolvable."[2]

Against this backdrop, this article provides an overview of the topic of national security within the WTO legal system. I first describe the unique position of national security among the non-trade policy objectives that governments may pursue in departure from otherwise applicable legal rules. I

[1] Warren Maruyama and Alan Wm. Wolff, Saving the WTO from the national security exception, Petersen Institute for International Economics (PIIE) Working Paper, 23-2, p. 18, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718.
[2] Warren Maruyama and Alan Wm. Wolff, Saving the WTO from the national security exception, Petersen Institute for International Economics (PIIE) Working Paper, 23-2, p. 6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718.

then summarize how the WTO Agreement addresses national security in legal terms, in Article XXI of the GATT 1994 and in analogous provisions in the services and intellectual property pillars of the WTO Agreement, and how WTO panels have to date interpreted this provision. In the final section, the article examines certain proposals on how to resolve the current impasse and overcome the disagreement between WTO Members and provides a few reflections on the implications of these proposals.

2. The unique nature of national security as non-trade policy concern in international trade agreements

Multilateral trade rules, as well as bilateral or regional trading systems, impose obligations that limit the policy space enjoyed by governments under domestic trade laws. Governments may nevertheless set aside these obligations to pursue legitimate non-trade policy objectives. This may give rise to WTO-legal measures that restrict imports or that affect market access opportunities for imported products and services provided by foreign service suppliers. For instance, a government is entitled to impose import restrictions on potentially contaminated foreign meat in order to protect the health of domestic consumers.[3] The legitimate policy objectives that justify trade restrictions include, most typically, public health, public morals, environmental protection, consumer protection and information, as well as national security.

The policy space that trade agreements grant governments to pursue these legitimate police objectives is, of course, not unlimited. Rather, trade agreements seek to balance the rights of the regulating Member, on the one hand, against the rights and the legitimate interests of other Members, on the other hand. The goal is to find the appropriate balance between "freedom of action and accountability."[4] The criteria for defining that balance are very similar across practically all trade agreements, whether WTO law or bilateral or regional trade agreements. This reflects what Joseph Weiler has called the "common law" of international trade, that is, shared legal principles and practice across global, regional and bilateral trade agreements.[5] The criteria for ensuring this balance between freedom of action and international accountability include most prominently the "necessity" test, under which a regulating Member must apply, among various alternatives, the least-trade restrictive measure to achieve its desired policy objective. Other, less intrusive criteria include the obligation to avoid arbitrary discriminations and to maintain some sort of even-handedness. This balance of rights and obligations, of constraints and conditional policy space, is monitored by WTO political bodies and is ultimately adjudicated by dispute settlement adjudicatory bodies. Generally speaking, this balance of constraints and conditional policy space has evolved and worked reasonably well over the more than seven decades of the multilateral trading system. There is no reason why – assuming adequate political will of all WTO Members to accept international constraints on trade policy-related decision-making – this system should not continue to function well also in the future.

National security policy is part of the basket of legitimate public policies for which WTO Members can claim policy space. However, national security possesses unique features that make it different from other legitimate public policy areas. This is because national security, as the term itself

[3] Article XI and XX(b) of the GATT 1994.
[4] Warren Maruyama and Alan Wm. Wolff, Saving the WTO from the national security exception, Petersen Institute for International Economics (PIIE) Working Paper, 23-2, p. 14, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718.
[5] Joseph Weiler, The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade? Oxford University Press (2001).

already suggests, is the quintessential embodiment of sovereignty and security (including military) interests in international relations. It ultimately touches on the very existence of a polity, its basic functioning and its survival.[6] As a result, subjecting national security concerns to international oversight is significantly more complicated than imposing international legal constraints on other policy areas.[7]

The interface of national security and trade in the GATT/WTO system has historically been understood to cover, for instance, trading relations with unfriendly or downright hostile countries in times of war[8] or similar heightened tensions[9], export controls on sensitive materials such as weapons or dual-use goods[10], and matters concerning nuclear materials[11]. In recent years, the United States has sought to rely on WTO national security provisions for legal cover in a particularly controversial area, that is, for the protection of certain national industries, with the stated goal of ensuring adequate domestic supplies of goods deemed particularly important in case of armed conflict and of avoiding reliance on potentially unreliable foreign sources.[12] In the modern digital economy, trade-related national security measures may also involve limitations or prohibitions on communication services, related data transfers, and restrictions related to intellectual property.

From a strictly legal-technical perspective, it would be possible to apply the same analytical tools – for instance, the necessity test – to identify bona fide national security-type measures and to distinguish them from disguised protectionist measures, in much the same way as drawing the boundary between WTO-consistent and WTO-inconsistent environmental or consumer protection measures. However, national security is, by its very nature, a policy area that requires a particularly wide margin of discretion for the regulating government. For understandable reasons, governments will be more reluctant to allow an international tribunal to sit in judgment over their national security concerns than over, for instance, environmental measures involving retreaded tyres[13] or health-related prohibitions on the use of asbestos in construction materials[14]. As a result, it is more challenging to identify the appropriate balance between "freedom of action and accountability" in a multilateral governance system when it comes to national security. This balance is difficult to find at the best of times, and even more so in times of ever-growing geopolitical tensions between Members of the same system.

For the overwhelming part of its existence, the multilateral trading system managed to avoid explicit national security-related disputes: The national security clause(s) remained dormant and were kept out of the GATT/WTO dispute settlement system. The "old" GATT 1947 and its modern

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[6] Warren Maruyama and Alan Wm. Wolff, Saving the WTO from the national security exception, Petersen Institute for International Economics (PIIE) Working Paper, 23-2, p. 6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718.

[7] See for instance the Panel in *Russia – Traffic in Transit*, that stated that the negotiating history of Article XXI of the GATT 1947 suggested that the matters (later) reflected in Article XX and Article XXI "were considered to have a different character, as evident from their separation into two articles." Panel Report, *Russia – Traffic in Transit*, para. 7.98.

[8] See for instance the trade embargo by the European Communities, Canada, and Australia on Argentina in connection with the Falklands/Malvinas war, European Communities, Australia, and Canada, "Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons" (Revision), Communication to GATT contracting parties (4 May 1982), L/5319/Rev.1.

[9] See for instance Ghana's import ban on goods from Portugal, GATT CONTRACTING PARTIES, Nineteenth Session, Summary Record of the Twelfth Session (9 December 1961), SR.19/12.

[10] *US – Export Restrictions (Czechoslovakia*). GATT/CP.3/SR.22 (08/06/1949).

[11] Article XXI(b)(i) of the GATT 1994.

[12] See for instance the United States' 2018 "national security"-motivated import restrictions imposed on steel and aluminium, driven by the idea that economic harm to domestic steel and aluminium industries constitutes a threat to the national security of the United States, due to the strategic importance of these industries.

[13] See Panel Report, *Brazil – Retreaded Tyres* (WT/DS332/R).

[14] See Panel Report, EC – Asbestos (WT/DS135/R).

successor, the WTO system, functioned on the basis of self-restraint of WTO Members (GATT Contracting Parties). Governments were judicious in invoking national security concerns to justify trade-restrictive measures. Similarly, governments exercised self-restraint in challenging other governments' measures, either simply deciding to "live with them", reaching a bilateral settlement[15] or – in one instance – excluding from a panel's jurisdiction over a dispute the ability to review the national security aspect.[16] Rather than seeking a judicial resolution, the relatively limited instances of invocations of national security as justification for trade action were instead typically discussed in the GATT political bodies.[17] Members made statements about the need for sovereign-decision making in matters involving national security[18], but the detailed contours of discretion were never determined with precision, and neither the GATT 1947 nor the WTO ever formally declared which party to a national-security related disagreement was correct. The collective view of the GATT and later WTO community appeared to be that disputes about national security are "wrong cases", that is, political disputes for which no legal solution can be found, such that any attempts at a legal conclusion will end up damaging the overall credibility and effectiveness of the system as a whole.[19]

This balance fell apart in the mid-2010s. In a series of disputes involving a range of different scenarios, WTO panels were requested to adjudicate disputes about trade-restrictive measures for which a national security-related justification was being claimed. Just like the above-mentioned "wrong cases" theory posited, the resulting panel rulings were controversial and for the most part were not accepted by the losing responding party and thus were appealed "into the void."[20] The following section summarizes the rulings of those panels.

3. WTO legal provisions dealing with national security and their interpretation by WTO panels

In this part, I summarize the WTO legal provisions concerning national security and the WTO panel jurisprudence under these provisions. The current set of rules consists of Article XXI of the GATT 1994 and the identical provisions in Article XIV *bis* of the GATS and 73 of the TRIPS Agreement. The GATT 1994 text was developed by the drafters of the GATT 1947, led by the United States, and has remained unchanged since.

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[15] An example would be the settlement between the European Union and the United States in the US – Helms Burton dispute (DS38), in which the panel authority lapsed due to suspension of its work for more than 12 months, pursuant to Article 12.12 of the DSU. (WT/DS38/6).

[16] Panel Report, US – Trade Measures Affecting Nicaragua, L/6053. One instance in which a dispute concerning the national security clause was decided, albeit by a non-judicial working party and based on a vote, was the case *US – Export Restrictions (Czechoslovakia*). GATT/CP.3/SR.22 (08/06/1949)

[17] See for instance Ghana's import ban on goods from Portugal, GATT CONTRACTING PARTIES, Nineteenth Session, Summary Record of the Twelfth Session (9 December 1961), SR.19/12; the United Arab Republic's reference to Article XXI in the context of its accession to the GATT, GATT CONTRACTING PARTIES, Twenty-Sixth Session, Report by the Working Party on Accession of the United Arab Republic (25 February 1979), L/3362; the trade embargo by the European Communities, Canada, and Australia on Argentina in connection with the Falklands/Malvinas war, European Communities, Australia, and Canada, "Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons" (Revision), Communication to GATT contracting parties (4 May 1982), L/5319/Rev.1; discussion in the GATT General Council of an invocation of Article XXI by Sweden to justify import restrictions on footwear, 2L/4250, p. 3.

[18] See for instance European Communities, Australia, and Canada, "Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons" (Revision), Communication to GATT contracting parties (4 May 1982), L/5319/Rev.1

[19] Robert E. Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 159 (1980); *see also* William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 67 – 78 (1987).

[20] In *Russia – Traffic in Transit*, Ukraine did not appeal and the panel report was adopted. In *Saudi Arabia – IPRs*, Saudi Arabia appealed "into the void" (to the no longer functional Appellate Body) and Qatar subsequently announced "that it has agreed to terminate the dispute" and that it would not seek adoption of the report. In the two disputes involving the United States as responding party, the United States appealed into the void.

Article XXI provides as follows:

Article XXI
Security Exceptions

> Nothing in this Agreement shall be construed
> (*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (*b*) **to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests**
> **(i) relating to fissionable materials or the materials from which they are derived;**
> **(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;**
> **(iii) taken in time of war or other emergency in international relations; or**
> (*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

As noted above, in a series of WTO disputes since 2015, WTO panels have clarified the meaning of Article XXI(b), which is the part of Article XXI of greatest practical relevance.[21] These disputes cover a range of factual scenarios from genuine military conflict in *Russia — Traffic in Transit*[22], a break-down in diplomatic relations and severing of practically all ties in *Saudi Arabia — IPRs*[23], concerns regarding China's curtailing of autonomy of Hong Kong in *US — Origin Marking Requirement*[24], to a Member's objective of protecting domestic industries with an alleged national security objective in *US — Steel and Aluminium Products*[25].

All panel reports converge around the following reading of Article XXI.

On the one hand, a WTO Member is granted very wide discretion to take measures "which it considers necessary for the protection of its essential security interests." These "essential security interests", WTO panels have clarified, are those that relate "to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[26] The essential security interests must be articulated "sufficiently

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[21] Article XXI(a) authorizes WTO Members to withhold information the disclosure of which the Member considers contrary to its essential security interests. For its part, Article XXI(c) authorizes Members to take action "in pursuance of [their] obligations under the United Nations Charter for the maintenance of international peace and security."
[22] DS512.
[23] DS567.
[24] DS597.
[25] DS544, DS547, DS548, DS550, DS551, DS552, DS554, DS556, and DS564. Of these nine proceedings, only four (544,552,556, and 564) resulted in a panel report.
[26] See for instance Panel Report, *Saudi Arabia – IP Rights*, para. 7.249 and 280. Panel Report, *Russia – Traffic in Transit*, para. 7.130.

enough to demonstrate their veracity"[27]. For instance, if the responding Member is invoking an "emergency in international relations" that is not immediately recognizable as armed conflict, or a situation of breakdown of law and public order, "the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise." In these cases, the "essential security interests" must be articulated with "greater specificity than would be required when the emergency in international relations involved, for example, armed conflict."[28]

Once the essential security interest has been sufficiently articulated, the phrase "which [the WTO Member] considers" grants wide discretion to the regulating Member to take measures to pursue that essential security interest. The sole disciplining standard is a "minimum requirement of plausibility", under which the challenged measure must not be "implausible as [a] measure[] protective of these [essential security] interests."[29] As long as there is "any link between the relevant actions and the protection of its essential security interests", the measure will be considered justified.[30] Thus, effectively, a measure can be declared to be WTO-inconsistent only if it has no link whatsoever to the stated essential security objectives. This is of course a significantly more deferential test than the standard objective "necessity" test, under which WTO panels examine, based on party-adduced evidence and acting as an objective trier of facts, in particular, whether the regulating Member can achieve its stated regulatory goals by means of an alternative less trade-restrictive measure.[31]

In order to compensate for this very wide margin of discretion granted by the chapeau of Article (b), the "enumerated subparagraphs"[32] in Article XXI(b)(i), (ii) and (iii) limit the regulatory freedom of WTO Members to three specific scenarios or contexts. The first scenario pertains to "fissionable materials or the materials from which they are derived", that is, scenarios involving nuclear materials. The second scenario relates to "the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment." This second scenario would cover, for instance, export restrictions on military or dual-use goods, but presumably also export restrictions on goods that, while not of a military or dual-use character themselves, are nevertheless intended to be supplied to a "military establishment", e.g. any goods that contribute to the functioning of that establishment.

The third scenario – which has so far been the most relevant scenario in dispute settlement practice and policy discussions – is when action is taken in time of "war" or "[an]other emergency in international relations" in Article XXI(b)(iii). To date, this provision has been the subject of all WTO disputes about national security. All WTO panels have so far agreed that the term "other emergency in international relations" denotes an exacting standard, designating a form of crisis in international relations akin to a war, such as "armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state"[33] or a "breakdown or near-breakdown in [diplomatic] relations"[34]. This is of course a high threshold that, as one panel found, does not include "mere" political disagreements. For instance, human rights-related concerns of the United States in relation to actions taken by China with respect to Hong Kong did not qualify unless they would have been accompanied by a (near-)breakdown or other severe disruptions of diplomatic relations.[35]

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[27] Panel Report, *Russia – Traffic in Transit*, para. 7.134.
[28] Panel Report, *Russia – Traffic in Transit*, para. 7.134.
[29] Panel Report, *Saudi Arabia – IP Rights*, para. 7.288.
[30] Panel Report, *Saudi Arabia – IP Rights*, para. 7.242.
[31] See for instance Panel Report, *EC – Seals*, para. XXX.
[32] Panel Report, *US – Origin Marking Requirement*, 7.127.
[33] Panel Report, *Russia – Traffic in Transit*, para. 7.76.
[34] Panel Report, *US – Origin Marking Requirement*, para. 7.289.
[35] Panel Report, *US – Origin Marking Requirement*, para. 7.354.

WTO panels have also looked into the negotiating history of Article XXI and the practice of GATT Contracting Parties under this provision during the GATT 1947. Thus, the Panel in *Russia – Traffic in Transit* concluded that the negotiating history "confirms the Panel's interpretation of Article XXI(b) of the GATT 1994 as requiring that the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself"[36] That panel also stated that "there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny."[37] The following panel in *Saudi Arabia – IP Rights* provided no further insights into the negotiating history and instead referenced the analysis of the Panel in *Russia – Traffic in Transit*.[38]

A significantly more detailed examination of the historical context in which Article XXI was initially drafted and subsequently applied until the advent of the WTO was provided by the four panels in the *United States – Certain Measures on Steel and Aluminium Products*.[39] The analysis is contained in a separate supplement to the panel report, stretching over more than 60 pages,[40] examining materials regarding the interpretation of Article XXI(b) of the GATT 1994. These materials include: (a) negotiating history of Article XXI of the GATT 1947 and preparatory works of the Havana Charter for the International Trade Organization (ITO)[41]; (b) internal documents of the US delegation to the negotiation of the ITO draft charter and GATT 1947[42]; (c) GATT Council Decisions under the GATT 1947[43]; (d) views expressed by GATT contracting parties prior to the creation of the WTO[44]; and (e) negotiating history of the Uruguay Round, including aspects such as the formulation of security exceptions in international agreements concluded after 1947.[45] The panels could not find "any clear indication in these materials of the "self-judging nature" or "non-justiciability" of Article XXI(b) of the GATT 1994 as contended by the United States. To the contrary, the panels found in these materials support for the general conclusion that the terms of Article XXI(b)

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[36] Panel Report, *Russia – Traffic in Transit*, para. 7.100.
[37] Panel Report, *Russia – Traffic in Transit*, para. 7.100.
[38] Panel Report, *Saudi Arabia – IPRs*, footnote 754 referring inter alia to the analysis of the negotiating history by the panel in *Russia – Traffic in Transit*.
[39] See for instance, Panel Report, *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), para. 2.34, referring to the conditions in the Vienna Convention on the Law of Treaties (VCLT) for the consideration of negotiating history and emphasizing that their interpretation did not leave the meaning of the provision "ambiguous or obscure" in relation to the contested interpretive issues in this dispute, nor that it led to a result which was "manifestly absurd or unreasonable."
[40] Panel Report, *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), pp. 11 – 73.
[41] Panel Report, *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), paras. 2.1 – 3.37.
[42] Panel Report, *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), paras. 4.1 – 4.48. While the panel's analysis on this point is interesting and provides interesting insights, the internal discussions of the United States delegation are described in extensive detail in Mona Pinchis-Paulsen's writing. The United States delegation to the ITO and GATT 1947 negotiations consisted, broadly speaking, of a faction from the United States Department of State (USDOS) that advocated a rules-based, multilateral approach and therefore saw the national security exception differently than another, more sceptical and sovereignty-minded faction that consisted of officials from the Army, Navy and War Departments (Services Departments). While the USDOS "sought to curb unilateralism" and therefore accepted that the United States would also have forgo unfettered discretion, the "Services Departments" "wanted to preserve open-ended powers for the United States." These two factions within the United States delegation were very much divided on the topic of whether the national security exception should be self-judging and non-justiciable. The ultimately adopted text of Article XXI reflected the proposal of the USDOS faction, with the majority of the US delegation rejecting the attempts of the Services Departments faction to make Article XXI entirely self-judging. Mona Pinchis-Paulsen, Trade Multilateralism and US National Security: The Making of the GATT Security Exceptions, Michigan Journal of International Law, Volume 41, Issue 1 (2020), 109 – 193.
[43] Panel Report, *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), paras. 6.1 – 6-11.
[44] Panel Report, *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), paras. 7.1 – 7.66.
[45] Panel Report, *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), paras. 8.1 – 8.49.

of the GATT 1994 establish a right to take action for the protection of essential security interests *in the conditions and circumstances described in the three subparagraphs*.[46]

The most recent panel on Article XXI to date, the panel in *US – Origin Marking Requirement* also read the GATT 1947 negotiating history as a confirmation that "the subparagraphs were intended to limit an invoking Member's right to take any action it considered necessary for the protection of its essential security interests." The panel also found "confirmation for our reading of the structure of Article XXI(b) in the modification applied to the provision by the negotiators of the Havana Charter, which clearly stated that the subparagraphs refer to "action" and not to "essential security interests", thereby excluding the subparagraphs from the scope of the phrase "which it considers" in the chapeau."[47]

4. Proposals to resolve the current impasse

Although many WTO Members appear to be in agreement with the above-mentioned caselaw, the United States has stated that it considers this line of panel caselaw to be "seriously flawed"[48]. Since the first panel report in 2019, the United States has "rejected the Panel's flawed interpretation and conclusions and reiterated that the United States has held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide-range of threats to its security."[49] It has also stated that it:

> firmly believes that litigating matters of essential security at the WTO undermines the foundations of the WTO by dragging the Organization into debating inherently political matters. Adjudicating questions of national security in the WTO is not only incompatible with the purpose of the WTO, a trade organization, but will not advance WTO Members' shared interests in the WTO as a forum for discussion and negotiation.[50]

In contrast, the European Union – as a representative of the opposing view – has been very explicit that, in its view, reading Article XXI of the GATT 1994 as totally "self-judging" "had simply no basis in the WTO Agreements."[51] Rather, the European Union has stated its agreement with the line of interpretation of WTO panels that:

> for an action to fall within the scope of Article XXI(b), it had to be objectively found to meet the requirements of one of the enumerated subparagraphs of that provision, and that evaluation could not be left entirely to the invoking Member. The EU also welcomed the Panel's interpretation of the relevant conditions that had to be met for the

[46] Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.142.
[47] Panel Report, *US – Origin Marking Requirement*, para. 1.175.
[48] Minutes of the DSB Meeting, 26 April 2019, para. 8.6.
[49] 2025 Trade Policy agenda and 2024 annual report of the President of the United States on the Trade Agreements Program, p. 100. Available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://ustr.gov/sites/default/files/files/reports/2025/2025%20Trade%20Policy%20Agenda%20WTO%20at%2030%20and%202024%20Annual%20Report%2002282025%20--%20FINAL.pdf (last visited 9 June 2025)
[50] JOB/DSB/10, p. 1.
[51] Minutes of the DSB Meeting, 26 April 2019, para. 8.11.

> invocation of Article XXI(b)(iii) of the GATT to succeed. … Article XXI of the GATT struck a balance between the legitimate latitude for WTO Members to invoke the security exceptions for genuine security measures and the need to curtail potential abuse. This balance was also reflected in the … interpretation [of WTO panels].

The EU also stated that it:

> fully recognized the special nature of security interests covered by the security exceptions, and the need for a margin of discretion for the Member invoking these exceptions. However, as the EU had explained in its third-party submission in this dispute, such discretion could not be unfettered, since that could give rise to abuse.[52]

The European Union's view is shared by numerous other WTO Members.[53] In the view of those Members, it is not acceptable for another WTO Member to justify trade restrictions simply by declaring that it is in its national security interest to do so. In contrast, the United States' continuing criticism of existing WTO rulings under Article XXI – which enjoys bipartisan support in Washington – is an indication that the fundamental policy conflict about national security will not go away. Indeed, as already noted above, former Deputy Director-General Alan Wm. Wolff has called the conflicting views of Members on how to handle national security-related dispute resolution "unresolvable."[54] Experience has thus confirmed the concerns of some practitioners and scholars alike, namely, that national security-related disputes belong to a category of cases that make legal demands that are impossible or extremely difficult to meet politically[55] and that have instead contributed to the impasse in which the organisation finds itself. This disagreement about the proper legal approach to national security-motivated trade measures has become an additional stumbling block between WTO Members in the discussions about a revitalization of the WTO in its entirety, including with respect to the reform of the dispute settlement system.

So how can the WTO move from here? The first step is to recognize that the problems surrounding the national security clause are not a product of improperly non-deferential interpretation by WTO panels. The interpretation of Article XXI and other security-related provisions across a range of panel reports reflects the legally most plausible reading of these provisions. Moreover, the largely consistent interpretation of the provision by four consecutive (sets of) panels indicates that the caselaw is settled and unlikely to change. The United States' demands thus cannot be met on the basis of the current text of Article XXI alone, without further action by all Members acting collectively. Instead, an adjustment to the functioning of the trade-national security interface would have to be found elsewhere.

One option would, of course, be a return to the pre-2015 world when the GATT/WTO membership as a whole exercised due restraint, both in invoking national security and in challenging

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[52] Minutes of the DSB Meeting, 26 April 2019, para. 8.6. WT/DSB/M/428.

[53] See for instance Minutes of the DSB Meeting, 26 April 2019, Canada (para. 8.7), Turkey (para. 8.9), Australia (para. 8.10), and Mexico (para 8.12). WT/DSB/M/428.

[54] Warren Maruyama and Alan Wm. Wolff, Saving the WTO from the national security exception, Petersen Institute for International Economics (PIIE) Working Paper, 23-2, p. 6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718.

[55] Robert E. Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, 13 Cornell International Law Journal 145, 189-92 (1980).

national-security-related measures. In other words, the WTO could return to a world in which Members tolerated each other's implicit or explicit – but restrained and thus infrequent – reliance on the national security provision in their priority areas. That equilibrium, of course, is more complicated to achieve today, after the provision has been subject to dispute settlement and panel reports. First, Members have much greater clarity about how a WTO panel would deal with an invocation of Article XXI. An affected Member is much more certain today than in the pre-2015 world that a Member invoking a national security rationale for a trade-restrictive measure will not be granted unlimited discretion. Second, the much broader WTO membership and in the current world of heightened geopolitical tensions no longer allows to view economic and trade relationship as an ideologically neutral area in which even ideologically opposed countries can agree on a common set of rules. Third, the claim of the United States' – and potentially of other Members –that national security justifies the protection of industries deemed to be strategically important – a claim that the GATT 1947 membership rejected during the GATT 1947 era in the Swedish Boots dispute[56] – is difficult for many WTO Members to accept. Finally, the United States' linking of the national security framework with the reform of the entire dispute settlement system is also a complicating factor.

This leaves three possibilities. First, Members could choose to amend the text of Article XXI and other national security provisions, reflecting the agreement of the entire Membership. There is, of course, a range of possible outcomes that a modified text could reflect. For instance, in order to reflect the United States' preference for entirely unfettered and effectively non-justiciable discretion – and for effectively removing national security-related measures entirely from the ambit of WTO dispute settlement –the three scenarios in Article XXI(b)(i) – (iii) could be eliminated. This would remove the central constraining element on the invocation of national security. This approach is reflected in FTA provisions such as that of the Korea – US Free Trade Agreement, which does not contain the listing of three scenarios in Article XXI(b) and instead provides, in Article 23.2, that "[n]othing in this Agreement shall be construed … to preclude a Party from applying measures that it considers necessary for … the protection of its own essential security interests." The same provision features in Article 29.2 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Another possible way of amending Article XXI – so as to allow greater flexibility, while still constraining the discretion of regulating governments in some manner – would be to expand Article XXI(b) to accommodate other legitimate concerns. A relevant example is the Regional Comprehensive Economic Partnership Agreement (RCEP), whose Article 17.13 includes within the scope of national security those measures that are "taken so as to protect critical public infrastructure including communications, power, and water infrastructures."[57]

However, currently it appears extremely difficult to imagine that WTO Members would achieve agreement on an amendment, given that an amendment requires a two-thirds majority and, in practice, must, in any event, be done by consensus. Moreover, the second approach would not appear compatible with the United States' demands that the invocation of Article XXI be self-judging. Indeed, expanding the scope of the scenarios under Article XXI(b) in which Article XXI can be invoked would be based on *precisely the opposite assumption*, that is, that the existence of scenarios referred to in Article XXI(b) can be objectively determined by a WTO panel. The fact that there would be a wider range of scenarios in which national security could be invoked successfully would unlikely be of satisfactory comfort for the United States, at least based on its publicly-stated views.

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[56] L/4250, 17 November 1975.
[57] Footnote omitted.

Second, affected Members could explore non-violation claims as a potential balancing factor for national-security related discretion.[58] The view that non-violation claims are the proper remedy for invocations of national security has long been espoused by the United States. Non-violation claims are a peculiarity of the WTO legal order and were initially "seen as a tool to mitigate (mainly through diplomatic means) the impact of"[59] measures not disciplined by the GATT 1947, such as domestic subsidies. A successful non-violation claim does not require the regulating Member to modify or withdraw the measure in question. Rather, the regulating Member can only be requested to make "a mutually satisfactory adjustment", of which compensation may be a part.[60] Ultimately, the affected Member may request the right to suspend equivalent concessions.[61] However, a non-violation dispute might take just as long as a violation-based dispute and, perhaps even more fundamentally, is not necessarily easy to win: As one of the conditions for a successful invocation, the affected Member must demonstrate that it could not have reasonably anticipated the introduction of the trade-restrictive measure at the time when the relevant GATT obligations were created.[62] Although this criterion can be satisfied even with respect to measures that are explicitly provided for under GATT exceptions provisions[63], in practice will likely be more difficult. The non-violation remedy was initially introduced to provide redress for categories of trade-affecting measures left outside of the disciplining reach of international trade agreements, such as domestic/production subsidies during the GATT 1947 era. Applying the non-violation remedy to a category of measures that are explicitly provided for in the agreement (such as exceptions provisions like Article XX or XXI) is therefore a different scenario. Indeed, the panel in *EC – Asbestos* found that "in accepting the WTO Agreement Members also accept a priori, through the introduction of these general exceptions, that Members will be able, at some point, to have recourse to these exceptions"[64]. It bears noting that that the *EC – Asbestos* panel was referring to WTO-*consistent* recourse to an exceptions provision[65], which suggests that an affected WTO Member could argue that it could not reasonably anticipate a WTO-*inconsistent* national security-related measure, thereby satisfying that particular condition in invoking the non-violation remedy. However, this would require the affected Member to bring a violation case, thereby contradicting the very objective of avoiding violation-based challenges. Although both the panel and the Appellate Body in *EC – Asbestos* admitted the possibility that a WTO-consistent measure could be subject to the non-violation remedy, the panel also cautioned that the burden of proof on the

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[58] See the discussion in Vitaliy Pogoretskyy, Resolving National Security-Related Disputes under the WTO Non-violation Remedy: Fit for Purpose?, Global Trade and Customs Journal, Volume 20, Issue 4 (2025), 264 – 271. Nicolas Lamp, At the Vanishing Point of Law: Rebalancing, Non-violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars (4 Oct. 2019). Queen's University Legal Research Paper, available at SSRN, https://ssrn.com/abstract=3470617; and Simon Lester, National Security Disputes, NonViolation Nullification or Impairment, and Authoritative Interpretations, International Economic Law and Policy Blog (27 Jan. 2023), https://ielp.worldtradelaw.net/2023/01/national-security-disputes-non-violation-nullifica tion-or-impairment-authoritative-interpretations.html.

[59] Vitaliy Pogoretskyy, Resolving National Security-Related Disputes under the WTO Non-violation Remedy: Fit for Purpose?, Global Trade and Customs Journal, Volume 20, Issue 4 (2025), 264 – 271, 265.

[60] Article 26.1(b) of the DSU.

[61] Subject to the conditions explicitly spelled out in Article 26.1(b) of the DSU, the DSU procedures under Article 22 continue to apply.

[62] Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper (Japan – Film), WT/DS44/R, paras 10.72–10.73. See also Vitaliy Pogoretskyy, Resolving National Security-Related Disputes under the WTO Non-violation Remedy: Fit for Purpose?, Global Trade and Customs Journal, Volume 20, Issue 4 (2025), 264 – 271, p. 268.

[63] See Appellate Body Report, EC – Asbestos, para. 188.

[64] Panel Report, *EC – Asbestos*, para. 8.272.

[65] Panel Report, *EC – Asbestos*, para. 8.272. ("we are justified in treating recourse to Article XIII:1(b) as particularly exceptional in relation to measures justified by Article XX(b).")

complainant is high where the measure is introduced a long period of time after the relevant tariff concession was made.[66]

Given these difficulties surrounding the invocation of the non-violation remedy, various proposals have been made in scholarly writing as well as in official proposals at the WTO to modulate the non-violation procedure, by creating a fast-track of sorts to provide compensation or a right for affected Members to retaliate. This fast-track or right to compensation or to retaliate is conceived of as a balancing factor for the affected/complaining Member, to offset the grant of a green light to the responding Member to rely on Article XXI without any legal constraints. Thus, as noted above, these proposals are effectively based on giving up on legal disciplines on invocations of national security.

For instance, Simon Lester and Huan Zhu have advocated for a safeguards-like rebalancing rules[67], administered and supervised by a "Committee on National Security Measures."[68] Former Appellate Body Member Jennifer Hilmann similarly suggested an immediate right to retaliate (without specifying the legal basis), emphasizing the challenges of a traditional non-violation complaint as a reason to create this more immediate right to rebalance.[69] Alan Wolff and Warren Maruyama have proposed a "National Security Multi-Party Interim Arrangement (NSMPIA)" that would essentially introduce an accelerated mini-dispute settlement procedure to determine the level of nullification and impairment (economic harm), providing the basis for parties to agree on compensation or for the affected party to seek authorization to retaliate.[70] These same authors also propose, as an alternative, "a renegotiation procedure along the lines of GATT Article XXVIII, in which national security actions could be notified to the WTO and subject to accelerated procedures for compensation negotiations." In the absence of agreement, the affected Member would be entitled to take retaliatory action whose level could be challenged by the national security-invoking Member if that Member considered the level of retaliation excessive.[71] As another example, Dr. Vitaliy Pogoretskyy, in a tribute to the late Dr. Frieder Rössler and reflecting Dr. Rössler's writing on the non-violation remedy, proposes a flexible procedure for which the non-violation remedy would provide merely an institutional framework that parties could adjust in accordance with their preferences, by means of a General Council decision or an authoritative interpretation under Article. This proposal comes very close to the United States' December 2024 proposal, which is discussed further below.

Of course, an affected Member could claim that its rebalancing measure, taken in response to a national security-type measure of the first Member, is itself also a matter of national security and can therefore be undertaken immediately, without going through any kind of process.[72] The answer to this pragmatic argument is that an institutionalized framework or process is useful to ensure proportionality between the trade impact of the original national security and the retaliatory measure.

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[66] Panel Report, *EC – Asbestos*, para. 8.292.
[67] These rules would presumably mirror, mutatis mutandis, Article 8 of the Safeguards Agreement.
[68] See Simon Lester and Huan Zhu, Fordham International Law Journal (Vol 42:5) (2019), 1451 – 1474, 1472,
[69] See the transcript, https://tradetalkspodcast.com/wp-content/uploads/2023/01/Episode-175-Transcript-Complete.pdf, p. 16.
[70] Warren Maruyama and Alan Wm. Wolff, Saving the WTO from the national security exception, Petersen Institute for International Economics (PIIE) Working Paper, 23-2, p. 20, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718.
[71] Warren Maruyama and Alan Wm. Wolff, Saving the WTO from the national security exception, Petersen Institute for International Economics (PIIE) Working Paper, 23-2, p. 20ff, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718.
[72] Vitaliy Pogoretskyy, Resolving National Security-Related Disputes under the WTO Non-violation Remedy: Fit for Purpose?, Global Trade and Customs Journal, Volume 20, Issue 4 (2025), 264 – 271, 269.

In December 2024, the United States submitted a proposal that represents a more refined version of its long-standing position that national-security related claims should be channelled exclusively via the non-violation remedy. Under the United States' proposal, this would be achieved by means of an authoritative interpretation, stating that, under Article XXI(b) of the GATT 1994, Article XIV bis:1(b) of the GATS, and Article 73(b) of the TRIPS Agreement:

> each Member determines for itself whether an action it takes is necessary for the protection of its own essential security interests and whether one or more of the circumstances set out in the subparagraph endings are present.[73]

As a result, according to the United States' proposal, a WTO panel would no longer be permitted to review a Member's invocation of these provisions and would instead "limit its report to the DSB to note that invocation."[74]

Further, under the United States' proposal, the invoking Member would accept fast-tracking a non-violation complaint, and Members affected by a national security measure would have a right to rebalance trade concessions by imposing retaliatory trade measures. The reference to non-violation complaints is interesting. It reflects the long-standing United States' view that non-violation complaints are the proper procedural avenue to deal with invocations of national security arguments. Here, the United States seeks to bypass the discussion on whether the non-violation complaint had been intended by the drafters to be the sole remedy of affected parties[75], an argument that was rejected e.g. by the panels in US – *Steel and Aluminium Products*. [76] The discussion becomes irrelevant, because, under the United States proposal, affected Members will have voluntarily accepted the recourse to the non-violation remedy and will have foregone recourse to standard violation proceedings.

5. Reflections on these proposals

The discussion in this article seeks to highlight the dilemma that the national security issues present to the functioning of the World Trade Organization. All of the above-mentioned proposals about a fast-track rebalancing mechanism could, of course, provide possible solutions to the current impasse, should WTO Members choose to embrace them.

The common feature of these proposals is that they accept that no consensus between WTO Members can be achieved about the justiciability of national security-related measures. Under these proposals, a WTO Member's invocation of Article XXI will no longer be legally policed at all by a WTO panel. If WTO Members were to agree on this point, this would represent an important carve-out from the WTO legal system as it has functioned since 1995, because the legal reviewability by an independent third-party adjudicator would be lost with respect to an entire category of measures.

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[73] JOB/DSB/10, p. 2.
[74] JOB/DSB/10, p. 2.
[75] *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), paras . 3.6 and 3.9.
[76] See e.g. *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), para. 2.42. Those panels stated that, while there was a "shared understanding" among negotiators that members affected by security measures could submit non-violation complaints, there was no indication that non-violation complaints would be the only remedy for the imposition of security measures. See also *US – Steel and Aluminium Products (Turkey)*, Supplement 1 (WT/DS564/R/Suppl.1), para. 3.37.

Another aspect worth noting is that, if WTO history is any guidance, the likelihood of successfully negotiated compensation in response to national security measures is not very high. Compensation in instances of adverse WTO rulings has historically been difficult to agree on.[77] [78] Therefore, any action taken under these proposed mechanisms would, in the great majority of instances, likely be retaliation, that is, counterbalancing that is economically self-harming, because it results in lower levels of trade and thus in fewer gains from trade. While this is economically not efficient for the vast majority of Members, retaliation has historically been regarded as a particularly impractical option for many small and middle-sized economies, given the high risk of economic self-harm.

On the other hand, if a solution based on these elements is indeed the only realistic manner to relaunch the WTO dispute settlement system and to revitalize the organization as a whole, as some authors claim,[79] some Members may regard this approach, despite all of its drawbacks, as ultimately preferable to a non- or semi-functional dispute settlement system. As imperfect as it may be, the proposed removal of one category of measures from the dispute settlement system may be regarded as preferable to a system in which any litigated outcomes, in any areas of WTO law, can be appealed into the void and any panel rulings are at risk of not being implemented by recalcitrant Members.

A third, and final, observation is that the proposed solutions can only work if WTO Members exercise a degree of self-restraint in invoking the national security exception. As the Chairman of the Negotiating Commission wisely reminded the delegates in 1947, "the atmosphere inside the ITO will be the only efficient guarantee against abuses of [the national security provision] of the kind to which" one of the delegates had pointed.[80] This statement applies to any mix of legal or negotiations-based mechanisms. Some degree of self-restraint and mutual forbearance is essential even if WTO Members were to agree to the United States' proposal and were to remove any possibility to challenge national security-related measures in the dispute settlement system and instead to rely on compensation or retaliation. This need for continued self-restraint is demonstrated by the recent tariffs imposed, or announced, tariff increases by the United States that appear to cover practically all traded goods. If national security is invoked for across-the-board tariff increases, the already limited likelihood of agreeing on compensation is further reduced, given that the importing Member would by definition have no tariff lines on which it could envisage compensation. Compensation would thus be possible only by providing additional market access or benefits in the field of services or intellectual property rights. Moreover, even if cross-compensation or cross-retaliation could be achieved, proportional retaliation would require increasing tariffs or cross-retaliating on a vast volume of trade that, even for large economies, would likely have significant economic implications.

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[77] Of course, Members may reach negotiated solutions that mitigate the impact of the restrictive measure, such as the special deals agreed upon by the United States with respect to the Section 232 steel and aluminium measures with countries like Argentina, Brazil or Australia. This is of course not "compensation" within the meaning of WTO law, because the affected Members are not offered previously unavailable tariff or other concessions to make up for the economic loss created by the national security-related measure.

[78] The key reason is probably that compensatory market opening for other products is politically difficult to agree to for both Members. The offending Member must open its market for other, potentially entirely unrelated products or services and must do so on an MFN basis. The complaining Member must abandon the goal of achieving or restoring market access for the industry that may have invested heavily into the multilateral process, something that industry will likely object to and will therefore not regard as satisfactory a solution that provides greater market access for an unrelated industry.

[79] Warren Maruyama and Alan Wm. Wolff, Saving the WTO from the national security exception, Petersen Institute for International Economics (PIIE) Working Paper, 23-2, p. 3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718.

[80] UN Economic and Social Council Commission A, Verbatim Report of the Thirty-Third Meeting of Commission A, GATT Doc E/PC/T/A/PV/33, at 19. At 21

As Craig van Grasstek observed in his book "The History and Future of the World Trade Organization":

> If the multilateral trading system had to be reduced to a single sentence, it might be this: it receives its inspiration from economists and is shaped primarily by lawyers, but it must operate within the limits that the politicians set.[81]

The "limits that politicians set" in this quote is essentially synonymous with the "atmosphere in the organization", as debated by the GATT 1947 drafters almost 80 years ago. It is only with renewed political commitment, mutual trust, and the genuine interest of all Members in the effective functioning of the organization that the concerns and disagreements around national security can be resolved, for the benefit of the entire WTO Membership.

[81] Craig van Grasstek, The History and Future of the World Trade Organization, Geneva, 2013, p. 21.

Climate Change and Subsidies: Possible Options for Change

Elettra Bargellini

Summary: 1. Introduction. – 2. The SCM Agreement. – 2.1 'Good' and 'bad' subsidies. 2.2 Transparency. – 2.3 Remedies. – 3. Legal techniques for reform. – 4. Conclusion.

Keywords: WTO – SCM Agreement – Climate change – Green subsidies – Transparency – Plurilateral agreement.

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1. Introduction

The global return of industrial policy reflects the convergence of major challenges: the climate crisis, growing geopolitical uncertainty, the need for economic resilience, and long-standing development inequalities.[1] These pressures are fuelling a new wave of industrial and green policy measures. Among these challenges, climate change stands out as one of the most urgent drivers, pushing governments to increasingly acknowledge that achieving international climate goals – such as tripling renewable energy capacity, doubling energy efficiency by 2030, and phasing out fossil fuels[2] – will require substantial private as well as public investments.[3]

There are various ways in which states can intervene through industrial policies to rapidly scale up efforts to meet their climate change goals; subsidies emerge as one of the most widely used instruments.[4] Analyses based on data from the Organisation for Economic Cooperation and Development (OECD) show that many of the subsidies introduced in recent years explicitly pursue two main goals. First, they aim to make high-emission legacy industries more sustainable – particularly energy-intensive sectors such as steel, aluminium, and chemicals. Second, they seek to foster the development of markets for low-carbon technologies, including solar panels, wind turbines, batteries, and green hydrogen.[5]

However, while essential to the green transition, public financing of green industrial policies increasingly places national industrial decarbonisation efforts in conflict with international subsidy rules, as outlined in the WTO's subsidy framework.[6]

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[1] Violette Millot and Lukasz Rawdanowicz, 'The Return of Industrial Policies: Policy Considerations in the Current Context' (OECD Economic Policy Papers, No 34, 31 May 2024) http://dx.doi.org/10.1787/051ce36d-en.

[2] See United Nations General Assembly, *Transforming our World: 2030 Agenda for Sustainable Development* (A/RES 70/1, 2015) Goal 7.

[3] Elena Cima and Daniel C Esty, 'Making International Trade Work for Sustainable Development: Toward a New WTO Framework for Subsidies' (2024) 27(1) *Journal of International Economic Law* 1, 10; Stephanie J Rickard, *Spending to Win: Political Institutions, Economic Geography, and Government Subsidies* (Cambridge University Press 2018) 67-72.

[4] Simon Evenett and others, *The Return of Industrial Policy in Data* (IMF Working Paper 24/1, 2024) https://www.imf.org/en/Publications/WP/Issues/2023/12/23/The-Return-of-Industrial-Policy-in-Data-542828; Bernard Hoekman and Douglas Nelson, 'Industrial Policy and International Cooperation' (2025) 24 *World Trade Review* 136.

[5] Millot and Rawdanowicz (n 1) 11; Bernard Hoekman and Douglas Nelson, 'Subsidies and SOEs: Specific vs. Systemic Spillovers' in Chia-Jui Cheng (ed), *A New Global Economic Order: New Challenges to International Economic Law* (Brill-Nijhoff 2021) 169.

[6] Inu Mandy Meng Fang and Weihuan Zhou, 'Greening the Road: China's Low-Carbon Energy Transition and International Trade Regulation' (2022) 35(2) *Leiden Journal of International Law* 357; Aaron Cosbey and Petros

This growing tension between the need to balance the potential benefits of government support and the challenges posed by its incompatibility with WTO subsidy rules underscores that the framework embodied in the Subsidies and Countervailing Measures (SCM) Agreement[7] is not fit for purpose to support the green transition and safeguard the rules-based multilateral trade regime.[8]

This chapter argues that if we are to consider how to strengthen international disciplines on subsidies, the discussion cannot be limited to green subsidies alone. It must be a broader discussion, with the issue of green subsidies placed in a wider context. This is because, as seen for example with the Inflation Reduction Act in the US, almost any kind of industrial policy can be labelled as 'green.'[9] Therefore, negotiations should focus on a comprehensive reform of WTO subsidy rules rather than limiting themselves to a sectoral approach, while still giving due attention to environmental challenges.

In particular, the chapter identifies three main issues that need to be addressed in any conversation on how to reform the WTO subsidy discipline. First, the inability of WTO Members through the SCM Agreement to distinguish between 'good' and 'bad' subsidies in relation to their underlying policy objectives.[10] Second, the ineffectiveness of remedies in disciplining subsidies: countervailing duties (CVDs) come with significant limitations as they are often misused for protectionist purposes and fail to address many types of market distortions.[11] Furthermore, the problem with WTO cases is that remedies are only prospective; while this may have worked reasonably well until 2019, we are now in a new era.[12] The third issue concerns the notification process' failure to provide adequate transparency.[13] Due to the lack of penalties for non-notification, WTO Members – despite being obligated under Article 25(2) of the SCM Agreement – often do not fulfil this requirement, which in any event is retrospective (i.e., after 'the horse has left the stable').[14]

Mavroidis, 'Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17(1) *Journal of International Economic Law* 11.

[7] *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement, Annex 1A, 1869 UNTS 14.

[8] Bernard Hoekman and Douglas Nelson, 'Rethinking International Subsidy Rules' (2020) 43(12) *The World Economy* 3104; Chad P Bown and Jennifer Hillman, 'WTO'ing a Resolution to the China Subsidy Problem' (2019) 22(4) *Journal of International Economic Law* 557; Bernard Hoekman and Robert Wolfe, 'Reforming the World Trade Organization: Practitioner Perspectives from China, the EU, and the US' (2021) 29(4) *China & World Economy* 1; Lorenzo Rotunno and Michele Ruta, *Trade Spillovers of Domestic Subsidies* (IMF Working Paper 2024/041, 2024) https://www.elibrary.imf.org/view/journals/001/2024/041/article-A001-en.xml;WTO, *Compilation of Experiences and Consolidations Regarding Subsidy Design* INF/TE/SSD/W/29/Rev.5 (24 October 2024).

[9] Douglas Nelson and Laura Puccio, 'Nihil Novi Sub Sole: The Need for Rethinking WTO and Green Subsidies in Light of United States – Renewable Energy' (2021) 20(S1) *World Trade Review* 491; David Kleimann and others, 'Green Tech Race? The US Inflation Reduction Act and the EU Net Zero Industry Act' (2023) 46(12) *The World Economy* 3420; Giulia Claudia Leonelli and Francesco Clora, 'Retooling the Regulation of Net-Zero Subsidies: Lessons from the US Inflation Reduction Act' (2024) 27(3) *Journal of International Economic Law* 441.

[10] Weihuan Zhou and Mandy Meng Fang, 'Subsidizing Technology Competition: China's Evolving Practices and International Trade Regulation' (2021) 30(3) *Washington International Law Journal* 470, 483; Kyle Bagwell and Robert W Staiger, 'Will International Rules on Subsidies Disrupt the World Trading System?' (2006) 96(3) *American Economic Review* 877; Luca Rubini, *Rethinking International Subsidies Disciplines: Rationale and Possible Avenues for Reform* (E15 Initiative 2015).

[11] Jan Wouters and Dominic Coppens, 'An Overview of the Agreement on Subsidies and Countervailing Measures – Including a Discussion of the Agreement on Agriculture' in George A Bermann, Kyle W Bagwell and Petros C Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (Cambridge University Press 2009) 54; Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures* (Cambridge University Press 2014) 196.

[12] Jennifer Hillman and Inu Manak, *Rethinking International Rules on Subsidies* (Council on Foreign Relations, 2021) <https://www.cfr.org/report/rethinking-international-rules-subsidies> 10.

[13] Hoekman and Wolfe (n 8).

[14] WTO, *Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements,* WTO Doc JOB/GC/204/Rev.2 (27 June 2019).

The chapter suggests that plurilateral solutions could be the most realistic option to pursue – at least in the short term – for reforming international subsidy rules.[15] In this regard, it points out that such an agreement could be negotiated either within the WTO or through alternative frameworks outside it.

As such, this chapter is structured as follows. Section 2 examines the three main concerns that can be raised regarding the effectiveness of the WTO's subsidy discipline. Section 3 discusses the legal techniques that could realistically be explored in the current geopolitical context to reform these rules. Section 4, finally, concludes.

2. The SCM Agreement

2.1. 'Good' and 'bad' subsidies

The WTO discipline on subsidies is mainly contained in the SCM Agreement.[16] Under this agreement, subsidies are generally permitted unless they fall into the specific category of prohibited subsidies. In particular, the SCM Agreement classifies subsidies based on their perceived impact on international trade and competition, following a traffic-light approach: prohibited subsidies (red-light), actionable subsidies (yellow-light), and non-actionable subsidies (green-light). However, since 1 January 2000, only the first two categories remain, as the category of non-actionable subsidies expired.[17]

The SCM Agreement provides for *ad hoc* procedural rules and remedies for each category. Apart from subsidies that are contingent on export performance (export subsidies) or on the use of domestic rather than imported goods (local content subsidies), which are prohibited under Article 3 of the SCM Agreement and must be immediately withdrawn (with no need to prove spillovers or no possibility for the grantor to show that there are actually no spillovers in the specific case),[18] subsidies granted by a WTO Member can only be challenged if they harm another Member's interests. In other words, subsidies that are not prohibited fall into the residual category of actionable subsidies, which can be challenged only if the harm they cause constitutes either injury to the domestic industry in the importing country, as defined by Article 15 of the SCM Agreement, or causes one or more of the adverse effects listed in Articles 5 and 6 of the SCM Agreement. Moreover, unlike prohibited subsidies, when a WTO Member provides actionable subsidies, it can merely eliminate their negative effects without the need to withdraw them.[19] Non-actionable subsidies, including support for regional, environmental protection, and research and development, were permitted under the SCM Agreement (even protected from CVDs) as they were considered to have limited adverse effects on trade.[20] The expiration of this category is believed to be linked to concerns expressed by developing Members regarding the potential misuse of environmental measures by subsidising Members for advancing their industrial policies.[21]

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[15] Hoekman and Wolfe (n 8).
[16] For a general overview of the subsidy discipline under the SCM Agreement see Wolfgang Müller, *WTO Agreement on Subsidies and Countervailing Measures: A Commentary* (Cambridge University Press 2017) 1-50.
[17] WTO, *Minutes of the Special Meeting Held on 20 December 1999*, WTO Doc G/SCM/M/22 (17 February 2000); *Marrakesh Agreement Establishing the World Trade Organization*, List of Annexes. The SCM Agreement is listed under 'Multilateral Agreements on Trade in Goods' (Annex 1A); Alan O Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures* (2003) <http://www.ssrn.com/abstract=415780> 15.
[18] art 4(7) SCM Agreement.
[19] art 7(8) SCM Agreement.
[20] art 8(2) SCM Agreement.
[21] Hoekman and Nelson (n 8) 3111-12.

This implies that under the SCM Agreement there is no distinction between 'good' and 'bad' subsidies based on the policy objectives they pursue.[22] In other words, the SCM Agreement classifies subsidies solely on the basis of the level of trade distortion they are likely to cause, and the rationale behind the subsidy is not taken into account in determining whether it should be permitted or prohibited.[23] Thus, if a green subsidy requires exports or use of local inputs, it would straightforwardly fall within the category of prohibited subsidies and be considered *per se* distortive because it includes a local content or export requirement. Conversely, if green subsidies are not openly discriminatory, they still remain actionable and countervailable if they cause adverse effects – that is, if injury, nullification, or serious prejudice is found.[24]

In addition, the question of whether Article XX of the General Agreement on Tariffs and Trade (GATT) 1994[25] applies to the SCM Agreement remains controversial.[26]

Since *Canada–Renewable Energy/FIT* case,[27] the distinction between 'good' and 'bad' subsidies has received renewed attention within the international economic law community, highlighting the challenges of reconciling WTO subsidy rules with the promotion of renewable energy.[28] One of the key issues it brought to light was the absence of an exemption clause within the SCM Agreement that would, under certain conditions, have allowed the pursuit of legitimate objectives – such as climate change mitigation – through subsidies. While the Appellate Body (AB) ultimately found that the local content requirements imposed under Ontario's feed-in tariff programme violated the national treatment obligation under Article III:4 of the GATT 1994, it did not find sufficient evidence to confirm that the programme conferred a 'benefit' under Article 1(1)(b) of the SCM Agreement (in other words, that electricity was provided to producers on terms more favourable than those available on the market).[29]

Mavroidis and Sapir argued that the idea of 'good' subsidies included under Article 8 of the SCM Agreement 'must be reinstated', as they believe '[i]t makes no sense to presume that all subsidies

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[22] Luca Rubini, 'State Aid and International Trade Law' in Leigh Hancher and Juan Piernas López (eds), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2021) 126.

[23] Cima and Esty (n 3) 11-12; Hoekman and Nelson (n 5) 172.

[24] art 5 SCM Agreement.

[25] *General Agreement on Tariffs and Trade* (GATT 1947) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194.

[26] Article XX of the GATT provides for exceptions to trade policy commitments made in WTO agreements if this is necessary to protect public morals, human, animal or plant life or health, or conserve exhaustible natural resources. It is much less specific than the SCM Agreement; Luca Rubini, '"Ain't Wastin" Time No More: Subsidies for Renewable Energy, the SCM Agreement, Policy Space and Law Reform' (2012) 15(2) *Journal of International Economic Law* 525, 564.

[27] The very first of a series of cases that within the WTO DS system started targeting renewable energy subsidy programs under the SCM Agreement; see Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector – Canada – Measures Relating to the Feed-In Tariff Program* ('*Canada—Renewable Energy/FIT'*), WT/DS412/AB/R and WT/DS426/AB/R and Panel Reports, WT/DS412/R and WT/DS426/R, adopted 24 May 2013; Henok Asmelash, 'The First Ten Years of WTO Jurisprudence on Renewable Energy Support Measures: Has the Dust Settled Yet?' (2022) 21(4) *World Trade Review* 455.

[28] Huaxia Lai, 'The Climate-Trade Conundrum: A Critical Analysis of the WTO's Jurisprudence on Subsidies to Renewable Energy' in Mitsuo Matsushita and Thomas J Schoenbaum (eds), *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy, and the Environment* (Springer 2016).

[29] Appellate Body Reports, *Canada—Renewable Energy/FIT* (n 27) paras 5.172, 5.175, 5.234. Trade experts such as Rubini have criticised the AB's decision for conflating the legal determination of whether a measure constitutes a subsidy with its justification. He argues that whether the WTO regulatory framework takes into account the objectives underpinning subsidies is not a matter for dispute settlement bodies to determine, but rather a question to be resolved by WTO Members through negotiation. See Luca Rubini, '"The Good, the Bad, and the Ugly." Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies' (2014) 48(5) *Journal of World Trade* 895, 916-918, 938; Steve Charnovitz and Carolyn Fischer, 'Canada–Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies' (2015) 14(2) *World Trade Review* 177.

have nefarious effects that outweigh whatever good they produce.'[30] In their analysis they pointed out that the EU, too, in a recent submission to the WTO, 'sided decisively with those calling for exemptions to the current SCM Agreement: "Under certain conditions, well-designed subsidies make an important contribution to achieve the climate transition and other environmental goals."[31]

Thus, for the purposes of the discussion on strengthening international subsidy rules while maintaining a focus on climate issues, 'bad' subsidies could be defined as those that harm both trade and the environment (e.g. subsidies to carbon-intensive industries), while 'good' subsidies could be understood as those that are intended to produce beneficial environmental effects, representing a key component of green policy packages aimed at accelerating the transition to a net-zero global economy.[32]

2.2. Transparency

Transparency is one of the main weaknesses of the current WTO subsidy framework. This is partly due to the difficulty many countries face in determining whether a measure falls within the SCM Agreement's definition of a subsidy, and partly due to the limited central oversight of measures adopted at the sub-national level.[33] The absence of sanctions for failing to notify subsidies further undermines compliance with the subsidy notification obligations.[34]

Article 25(2) of the SCM Agreement establishes that 'any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2',[35] as well as any other subsidy which causes increased exports or decreased imports within the meaning of Article XVI of the GATT 1994, must be notified.[36] Information such as the form of the subsidy, the subsidy per unit or the total amount of a subsidy, its purpose and duration, and statistical data to assess its trade effects is to be included in the notification.[37] Nonetheless, while the purpose of Article 25 is to enhance transparency by requiring Members to notify their subsidies, Article 25(7) explicitly states that such notifications do not prejudge the legal status of those measures (see *Brazil – Aircraft* case).[38]

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[30] Petros C Mavroidis and André Sapir, *Key New Factors Likely to Shape the EU's Trade Agenda in the Next Five-Year Term* (Directorate General for External Policies, European Parliament PE 754.448, April 2024) 13.
[31] WTO, General Council, *Reinforcing the Deliberative Function of the WTO to Respond to Global Trade Policy Challenges*, *Communication from the European Union*, WT/GC/W/864, 22 February 2023, para 9; ibid.
[32] Rubini (n 22) 127; Cima and Esty (n 3) 2.
[33] Rubini (n 22) 124; WTO, Committee on Trade and Development, *WTO Technical Assistance Annual Report*, WT/COMTD/W/290 (2023).
[34] Gary N Horlick and Peggy A Clarke, 'Rethinking Subsidy Disciplines for the Future' (2017) 20(3) *Journal of International Economic Law* 673, 696; David Kleimann and others, *Green Industrial Policy: How G20 Members Can Foster Better Practices through Disclosure, Evaluation, and Dialogue* (T20 Policy Brief 2024) 8.
[35] art 25(2) SCM Agreement.
[36] Panel Report, *United States–Subsidies on Upland Cotton (Recourse to Article 21.5 of the DSU by Brazil),* WT/DS267/RW, adopted 20 June 2008; Panel Reports, *India–Measures Concerning Sugar and Sugarcane,* WT/DS579/R, WT/DS580/R, WT/DS581/R, adopted 14 December 2021; Panel Report, *Canada–Measures Affecting the Export of Civilian Aircraft,* WT/DS70/R, adopted 20 August 1999.
[37] art 25(3) SCM Agreement; see also WTO, Committee on Subsidies and Countervailing Measures, *Questionnaire Format for Subsidy Notifications under Article 25 of the Agreement on Subsidies and Countervailing Measures and under Article XVI of GATT 1994*, WTO Doc G/SCM/6/Rev.1; Ronald Steenblik and Juan Simón, *A New Template for Notifying Subsidies to the WTO* (International Institute for Sustainable Development 2010) <https://www.iisd.org/publications/report/new-template-notifying-subsidies-wto>.
[38] Appellate Body Report, *Brazil—Export Financing Programme for Aircraft* (*'Brazil – Aircraft'),* WT/DS46/AB/R, adopted 20 August 1999, para 149.

This lack of incentives underpinning the notification system means that, in practice, WTO Members almost never fully comply with this obligation.[39] As a result, the effectiveness of the mechanism relies on the vigilance of other Members to ensure compliance with Article 25.[40] Specifically, Article 25(8) articulates that '[a]ny Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member […] or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.'[41] Additionally, Article 25(9) mandates that 'Members so requested shall provide such information as quickly as possible.'[42] It also offers a remedy for Members who believe that the requested information has not been adequately supplied, permitting them to 'bring the matter to the attention of the Committee.'[43] Lastly, Article 25(10) offers a mechanism for Members to act if they believe a subsidy has not been duly notified, stating that '[a]ny Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member.'[44] If the subsidy remains not notified following such a warning, the concerned 'Member may itself bring the alleged subsidy in question to the notice of the Committee.'[45] Despite retaining this power, Members have rarely taken such actions.[46] The reason behind this is that governments are hesitant to disclose information that may be self-incriminating or invite reciprocal scrutiny.[47]

A minor incentive was included in the draft of Article 8 of the SCM Agreement, which referred to a Permanent Group of Experts tasked with offering advisory opinions on the compatibility of non-actionable subsidies, including those for environmental purposes. This provision, however, was watered down in the final version to a point where it was never used.[48]

2.3. Remedies

The SCM Agreement provides for two distinct options when prohibited or actionable subsidies are granted. The first mechanism operates on a unilateral basis, allowing WTO Members to adopt CVDs to counteract the adverse effects of subsidised imports on domestic industries. To impose such

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[39] Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) 9(4) *World Trade Review* 551; Various proposals have been made, notably by the EU, US, and Japan, to establish rebuttable presumptions of inconsistency for non-notified subsidies, but (so far) none of them have been adopted; Hoekman and Nelson (n 8) 3123-24; see WTO, General Council, *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, WTO Doc JOB/GC/204/Rev.3 (27 June 2019).

[40] Rubini (n 22) 124; Vincent Verouden, 'EU State Aid Control: The Quest for Effectiveness' (2015) 14(4) *European State Aid Law Quarterly* 459; Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing 2008) 399.

[41] art 25(8) SCM Agreement.

[42] art 25(9) SCM Agreement.

[43] ibid.

[44] art 25(10) SCM Agreement.

[45] ibid.

[46] Rubini (n 22) 124; Elettra Bargellini, 'How the SCA 2022 Shapes the Effectiveness of the TCA: Lessons from EU State Aid and WTO' (2025) 59(2) *Journal of World Trade* 213, 216.

[47] ibid.

[48] Another way to strengthen transparency would be to rely on data produced by the International Monetary Fund (IMF), World Bank and OECD, as well as independent monitoring platforms like the Global Trade Alert; see e.g., International Monetary Fund, Organization for Economic Cooperation and Development, World Bank, and World Trade Organization, *Subsidies, Trade, and International Cooperation (22* April 2022) http://wto.org/english/news_e/news22_e/igo_22apr22_e.pdf; Jennifer Hillman, Inu Manak and Mario Osorio, *Trade Tools for Climate Action* (Centre on Inclusive Trade and Development, December 2024) https://www.law.georgetown.edu/iiel/wp-content/uploads/sites/8/2025/03/25_CITD_REPORT-FINAL.pdf 16-17 18.

measures, Members must demonstrate the existence of subsidised imports, prove that these imports are causing injury to the domestic industry, and establish a causal link between the subsidy and the injury suffered.

The second mechanism operates on a multilateral basis. When a WTO Member suspects that another Member is granting subsidies that do not comply with the obligations outlined in the SCM Agreement, it can initiate proceedings under the WTO's dispute settlement mechanism (DSM). While CVDs can only be imposed if the prejudice occurs within the market of the importing country, the multilateral DS system can cover all subsidies, regardless of where the trade-distorting effects occur. This mechanism provides a framework for resolving disputes through consultations, mediation, and, if necessary, adjudication through a panel, and the AB.[49] Compliance may be achieved either by withdrawing the subsidy or by eliminating its adverse effects.[50] If a Member fails to comply, the main recourse is trade retaliation. This allows the affected party to temporarily suspend its treaty obligations as a countermeasure to enforce the rules.

Furthermore, private operators directly affected by inter-state disputes are not granted any *locus standi* within the multilateral DSM. As a result, the protection of their rights and interests relies entirely on the actions of individual WTO Members.[51]

Under the SCM Agreement, remedies are only prospective: although both CVDs and DSM addressing adverse effects allow for the consideration of ongoing consequences arising from non-recurring subsidies, neither mechanism permits action for harm already suffered, nor do they provide for the recovery of subsidies that have been previously disbursed. However, this principle is not absolute, as shown in the *Australia – Automotive Leather* case, in which the panel concluded that Article 4(7) of the SCM Agreement mandates a retroactive remedy, obliging the recipient of a one-time prohibited subsidy to repay it to the subsidising Member. The panel reasoned that, without such an interpretation, WTO Members could bypass the disciplines on prohibited subsidies by providing non-recurring subsidies. This ruling was met with substantial criticism from WTO Members due to its retrospective nature and its perceived deviation from the general principle under Article 19(1) of the DSU. To date, no subsequent panel has adopted this approach.[52]

More generally, the SCM Agreement offers only skeletal guidance in Article 4 and Annex I for the scores of possible methodological issues, opening up the possibility of national authorities adopting protectionist devices in CVD cases.[53]

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[49] The current functioning of the WTO's AB faces challenges, as the terms of its Members have ended and vacant positions remain unfilled. In response, a group of 19 (now 27) Members created an alternative temporary mechanism for resolving disputes in the absence of the AB, namely the Multi-Party Interim Appeal Arrangement (MPIA); Multi-Party Interim Appeal Arbitration Arrangement (MPIA) (30 April 2020) WTO Doc JOB/DSB/1/Add.12.

[50] arts 4(7) and 7(8) SCM Agreement.

[51] Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?* (Institute of International Economic Law 2018) https://georgetown.app.box.com/s/966hfv0smran4m31biblgfszj42za40b.

[52] Debra P Steger, 'The Subsidies and Countervailing Measures Agreement: Ahead of Its Time or Time for Reform?' (2010) 44(4) *Journal of World Trade* 779; Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States,* WT/DS126/RW, adopted 11 February 2000.

[53] Horlick and Clarke (n 34).

3. Legal techniques for reform

In the face of these challenges, a critical question arises: how should the international economic system approach these issues?[54] First, it is important to underline that the goals one seeks to achieve are closely linked to the context in which they are implemented. In this regard, the legal dimension of these issues is deeply connected to procedural and institutional aspects. With 166 Members and a high degree of internal diversity, the WTO faces considerable difficulties in advancing complex reforms through full consensus. Should negotiations be launched to amend the SCM Agreement, both the decision to open and to conclude such negotiations would require consensus, and any resulting amendments would only enter into force once accepted by two-thirds of the Members.

Therefore, if an amendment to the SCM Agreement is not considered a politically viable option, at least in the short term, that path may reasonably be set aside in favour of exploring alternative approaches.

Some scholars suggest that a more flexible interpretation of existing rules could offer greater policy space for subsidies. For instance, it has been argued that all environmental subsidies that are not 'specific' – that is, not limited to an enterprise, industry, or region within the jurisdiction of the granting authority, as defined in Article 2 of the SCM Agreement – could be deemed acceptable. Possible examples include subsidies aimed at supporting the production of green technologies or renewable energy, which may be considered non-specific, provided they are not restricted to certain beneficiaries.[55]

However, if the SCM Agreement remains unchanged, this is likely to result in an increasing reliance on DSM to clarify whether and how environmental subsidies could be considered as WTO compatible. In practice, countries adopt policy measures that are subsequently reviewed at the WTO. A notable example is the *Canada–Renewable Energy/FIT* case mentioned above, where the dispute concerned facts that were not foreseen when the agreement was drafted. This approach implies that a significant part of rule development takes place through case-by-case interpretation. In other words, when the legal text remains unchanged, interpretation by adjudicative bodies becomes the primary tool for adaptation.

Another possible path is the conclusion of a plurilateral agreement.[56] One option would be to develop such a model within the WTO; another would be to conclude a standalone agreement outside the WTO framework; a third option would be to negotiate a sectoral agreement on climate change that includes provisions on subsidies alongside other policy measures. The hope is that, in the future, it will evolve into a multilateral agreement.[57]

The WTO structure allows for plurilateral agreements, provided that they are open to accession by any Member, do not harm the interests of other Members, and can ultimately be integrated into

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[54] Bernard Hoekman and Petros C Mavroidis, 'WTO Reform: Back to the Past to Build for the Future' (2021) 12(S3) *Global Policy* 5; Cecilia Malmstrom and others, 'Joint Statement by the United States, European Union and Japan at MC11' (12 December 2017) <http://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states>.

[55] See Panel Report, *United States – Subsidies on Upland Cotton,* WT/DS267/R, adopted 21 March 2005, para 7.1143; Hillman, Manak and Osorio (n 48) 17.

[56] Bernard Hoekman and Charles Sabel, 'Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time' (2021) 12(S3) *Global Policy* 49; Bernard Hoekman, Petros C Mavroidis and Douglas Nelson, *Noneconomic Objectives, Globalization and Multilateral Trade Cooperation* (CEPR Press 2023).

[57] Zhou and Fang (n 10) 536; 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' (2023) 24(S1) *German Law Journal* 72.

the multilateral trading system.[58] This already happened in 1979 where certain countries (mostly developed economies) concluded plurilateral agreements under the GATT, creating an advanced code to regulate subsidies: the Tokyo Round Subsidies Code (Tokyo Code).[59] The Tokyo Code was eventually replaced by the SCM Agreement.

Currently, reaching consensus to integrate a new agreement into the WTO legal framework, even though this option is less ambitious than the previously discarded amendment of the SCM Agreement, also seems unlikely. This could change in the future, particularly in the context of a broader WTO reform. But for now, a standalone agreement that maintains a connection to the WTO while remaining outside its formal legal architecture appears to be the most realistic option to pursue.

This plurilateral agreement should involve the three major players – the US, the EU, and China – in order to effectively attenuate trade tensions. On the one hand, while China's economic system remains difficult to reconcile with existing WTO rules, the country has nonetheless reaffirmed its commitment to multilateralism, most recently through its active engagement at the WTO's 13th Ministerial Conference.[60] On the other hand, the situation in the US is also complex. The Trump administration significantly reduced US involvement in the WTO. Nevertheless, this should not lead the EU to abandon efforts to establish new international rules on subsidies. On the contrary, other WTO Members are likely to expect the EU to show leadership in advancing this reform.[61]

While countries such as Australia, Canada and Japan have been actively participating in discussions on subsidies in the WTO,[62] the majority of developing countries (with the exceptions of India and Brazil) do not even take part in the conversation. Due to their lack of funds to allocate to subsidies, they perceive these issues in a very different way. For instance, in 94% of cases in which China favours a domestic firm, it does so through some form of subsidy. In contrast, in countries with more limited fiscal capacity, such as Argentina or Indonesia, this percentage drops below 40%.[63] This highlights a crucial point regarding asymmetries in the ability to use subsidies, which should be central to the debates in Geneva. In light of this, it is essential to include both developed and developing countries in the negotiations to reform subsidy rules. If developed and high-income developing countries have the fiscal space to subsidise and thereby support key industries, while others lack the resources to do so and risk being left behind in the creation of green industries, this poses a serious challenge not only for global equity but also for climate change goals.[64]

4. Conclusion

This chapter has pointed out that there is an urgency to address the lack of effectiveness of the WTO subsidy control discipline for both trade and climate. Subsidies are happening now, and in the absence of international cooperation on subsidy control, three main risks arise, some of which are

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[58] Takemasa Sekine, 'Possibility of Developing and Expanding the Regulation of Subsidies through Free Trade Agreements (FTAs): Analysis Focusing on a Trend in FTAs Concluded by the EU' (2020) 16(5) *Policy Research Institute, Ministry of Finance, Japan, Public Policy Review* 1.

[59] *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (adopted 12 April 1979, entered into force 1 January 1980) BISD 26S/56.

[60] Mavroidis and Sapir (n 30) 15.

[61] ibid; Petros C Mavroidis, and André Sapir, *China and the WTO, Why Multilateralism Still Matters* (Princeton University Press 2021).

[62] Hoekman and Nelson (n 8) 3124.

[63] Simon J Evenett, *Corporate Subsidies & Global Trade Rules: Findings for Researchers & Officials* (10 March 2025) https://www.econ.uzh.ch/dam/jcr:cdafdf69-e1a1-4405-8430-9628685310e5/S43%20SS%20UZH%20Subsidy%20Measurement%20Session%2010%20March%202025%20Evenett%20GTA.pdf 4.

[64] Cima and Esty (n 3).

already occurring. First, tensions over subsidies are triggering copycat behaviour among countries. [65] Second, in order to counteract the harmful effects of these subsidies, there is an increase in the use of CVDs. Third, the climate objectives that these subsidies aim to achieve could be undermined. For example, subsidies designed to support the transition to a net-zero economy or other environmental goals might be met with retaliatory tariffs or CVDs from other countries. If such actions occur, the cost of achieving a global transition to net-zero emissions could increase, potentially slowing down progress and causing disparities in how quickly different countries can implement necessary changes.[66]

As a result, cooperation on rules and/or techniques for the evaluation (including measurement) of subsidies' effects (positive or negative) and their effectiveness on the environment is necessary. Achieving this depends on the political will of the Members to engage in these reforms. Therefore, Members must understand the negative consequences these issues pose, not just for individual countries, but for the entire global trading system.

[65] There is a 92% chance that when China introduces a subsidy, the EU introduces a subsidy within 12 months; Simon J Evenett and Fernando Martin, *Carbon Copies? Suspicious Patterns of Commercial and Industrial Policy Response by the Behemoths of World Trade* (ZEITGEIST Series, Briefing 40, 31 October 2024).

[66] Anabel González, 'Five Reasons to Fear a Global Subsidy Race and What to Do about It' (WTO Blog, 2023) https://www.wto.org/english/blogs_e/ddg_anabel_gonzalez_e/blog_ag_27jun23_e.htm

Identifying Key Gaps in the Current WTO Subsidies Transparency Regime[1]

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Keywords: National administrations – Notification – Trading system – Transparency – WTO law.

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1. Introduction

Transparency in subsidies is foundational to the multilateral trading system, yet the current World Trade Organization (WTO) regime falls short in several respects.

This brief chapter identifies key gaps in the WTO's subsidy transparency mechanisms, explores why transparency is crucial, assesses current challenges, and proposes pathways for reform grounded in best practices from other WTO disciplines.

The chapter will also consider what, beyond the WTO, could be reliable information sources for state subsidies. In so doing, it will explore the objectives, incentives and challenges of all these other information sources. The final step of the analysis will sketch the course of conduct that could be adopted to improve the current situation.

2. The GATT/WTO subsidy transparency mechanism

Transparency is a long-standing tenet of the GATT/WTO framework. Already in 1947 Article X of the GATT provided for a general obligation of publication of "Laws, regulations, judicial decisions and administrative rulings of general application … promptly in such a manner as to enable governments and traders to become acquainted with them." This broad transparency obligation extended to "trade agreements" between different governments. Crucially, publicity was a condition of enforceability of the domestic policy.

More specifically, with respect to subsidies, the very first obligation of the world trading system was one of transparency. Thus, Article XVI of the GATT (which became XVI:I only after the 1955 review) included as discipline a basic obligation of transparency, coupled with an obligation to enter into consultations should a subsidy cause serious prejudice to another contracting party. In particular,

> If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to

[1] This brief chapter is based on the presentation given by the author for an informal discussion on transparency in industrial subsidies organized by the EU, Japan and Kenya in Geneva at the WTO premises in early February 2025.

> increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Going beyond the textual element, transparency in subsidies encompassed three dimensions which replicate the common input-process-output policy cycle. First, the system focuses on gathering *information* about subsidies. As GATT Article XVI:I provides, the main tool to gather information relies on governments' notifications. Since the beginning, the GATT could not actively seek information, and prompt notification, on subsidy programmes. The only source of information was governmental, and this has essentially been the case ever since.

The information on subsidies is then subject to a process of *deliberation.* In other words, the information is functional and necessary to enable peer review, i.e. to allow other governments to get to know about others' subsidies and if appropriate to question them, in particular should they cause, or be liable to cause, serious prejudice. This questioning is supposed to take place in the specific Committee on subsidies. It can be immediately noted that the effectiveness of this Committee in discussing subsidies has varied through time (with a peak just after the Tokyo Round of negotiations and during the Uruguay Round, and a dismal performance in the WTO era) but, overall, the broad assessment is negative. There is quite simply not enough deliberation on subsidies in the house.

The textual reading of the original GATT transparency obligation, which has simply been detailed through – but certainly not superseded by – the WTO Agreement on Subsidies and Countervailing Measures (WTO ASCM), includes one interesting nuance. Not only the provision sets out a clear notification obligation to the Contracting Parties (the reader should know that the use of capital initials, or better capital letters for the full name, indicates an obligation towards the GATT constituency as a whole, to the institution), but it also notes that, following a complaint of serious prejudice, the obligation to discuss the possibility of limiting the subsidization is owed *alternatively* to the parties concerned (which is obvious) *or* (and this is the very interesting part) to the Contracting Parties as a whole. This seems to highlight the "community dimension" of the GATT and suggest, once again, that subsidies may generate obligations towards the whole constituency. This, for now, preliminary observation will be picked up again later on, when discussing about possible solutions to the current transparency problems.

Finally, deliberation generated through information should lead to an output in terms of *use* of the knowledge generated – both for the benefit of WTO Members and the business community, international stakeholders and civil society at large.

As noted, the WTO ASCM builds on the basic obligations of GATT Article XVI:I, and the experience generated through the GATT practice, to develop the WTO mechanism, which does not add significant innovations in the key elements of the system.

The very first innovation is not directly related to transparency and notifications. It is a matter of substantive law and in particular it relates to the very first innovation of the WTO system, i.e. the introduction of the very first formal definition of subsidy in Article 1 ASCM. Despite its uncertainties,

and the inherent difficulties with the definition exercise, this is a fundamental starting point for governments in understanding what they have to notify.

The WTO also makes it clear that only specific subsidies should be notified. Once again, as seasoned trade lawyers know, to determine whether a subsidy is specific or not may not always be easy. But the constitutional value of this specification cannot be passed unnoticed. By determining that only subsidies that are also specific are subject to notification, the intention is to significantly limit the number of policies that should be notified.

The WTO ASCM gives specific indications of the key information notifications should include (and in particular the form of the subsidy, its financial value, objective, duration and "statistical data permitting an assessment of" its trade effects). In so doing, it builds on previous practice (the questionnaire used today is essentially the one set up in 1961).[2] In addition, there is a specific array of measures that should be notified, certainly subsidies but also countervailing duties actions. Notifications should be done regularly, and this regularity changes according to category of country.

Most significantly, while underlining the centrality of the Committee on Subsidies, where representatives of governments sit, the WTO ASCM includes two key institutional innovations, which are certainly based on the GATT experience, especially after the Tokyo Round of Negotiations, and in particular on the Expert Group on the Calculation of Subsidies. The ASCM provides for the creation of a 5-Member Permanent Group of Experts, which should give various types of assistance to it, also in the context of dispute settlement. In particular, this group may assist Panels "with regard to whether the measure in question is a prohibited subsidy" (see Article 4.5) and may provide the Committee and Members with "an advisory opinion on the existence and nature of any subsidy" (see Article 24.3 and 24.4).

Very much on the basis of the awareness that more complex institutional structures, and expertise, are needed when one talks of transparency and governance of subsidies, the ASCM gives the Committee the power to create any appropriate subsidiary bodies. There is no indication of the scope and purpose of these subsidiary bodies but one can easily guess that, while not wanting to tie their hands, negotiators were conscious of how subsidies and their assessment may be intractable and leaving it all to the work of the Committee -which, it bears repeating, is not normally constituted of experts but diplomats coming from the capitals- was not enough. It may be useful to repeat a point just made, i.e. that this provision may well have been made on the basis of the experience of the GATT with the very interesting and useful work done by Group of Experts on the Calculation of the Amount of a Subsidy which was set up by the Committee on subsidies in May 1980.

One final, and difficult to apply, express provision is that notifications are "without prejudice." Article 25.7 ASCM reads:

Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

In other words, governments should notify their subsidy measures and programmes in confidence, without any fear that any information they submit to the peer-control of other governments may be used for a formal challenge in dispute settlement. This is the idea.

But it is easily said, and put down in legal language, than easily done. It is a fact that, in addition to the technical difficulties and capacity-constraints, the biggest obstacle to transparency in subsidies in the WTO rests in the fear of self-incrimination.[3] This fear is particularly vivid because of the strong

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[2] As contained in BISD 9S/193-194.

[3] The language itself of Article 25 WTO ASCM may create concerns in this direction. Soon after saying that the notification is without prejudice, in paras. 25.7, para. 25.9 makes it clear that responses to other Members' questions should be quick and comprehensive and "in particular, they shall provide sufficient details to enable the other Member to assess *their compliance with the terms of this Agreement*." (emphasis added).

dispute settlement system introduced by the WTO, which, interestingly, was not fully anticipated by subsidy disciplines negotiators.[4] Paradoxically, or perhaps not, this legalistic innovation *did* reduce transparency – so one argument goes.

As noted, despite widespread recognition of its importance, transparency in subsidies remains weak. To appreciate both the importance and predicaments of transparency in subsidies, suffice mentioning the extremely pivotal Subsidy Transparency Initiative, an official inter-institutional programme aimed at improving transparency in subsidies which was launched in 2022 by the Secretariats of the IMF, OECD, World Bank, and WTO. With hindsight, this very promising initiative has not generated much change yet, essentially not going beyond the initial report manifesto of April 2022.

But why does transparency in subsidies matter?

3. Why Transparency Matters

The very first step of the analysis must be an evaluation of the value of transparency in subsidies in the context of the world trading system. Why does transparency in subsidies matter?[5]

3.1 Transparency, fair competition in the market and better policy-making

Subsidies may be a major irritant in trade relations and cause distortions in the market. Their transparency can thus ease the functioning of markets and the competitive process. Subsidy transparency builds mutual trust and reduces trade tensions. The knowledge of foreign subsidies programmes may enhance policy understanding. Especially if this understanding leads to an evaluation of subsidies and their effects vis-à-vis their policy objectives, combined with an assessment of their costs, it can also lead to an improvement of policies and to the development of best practices. A public good without any doubt.

3.2 Transparency, the cost of information and developing countries

Transparency in subsidies is especially critical for developing countries and least developed countries (LDCs), which often face significant informational and administrative barriers, normally much higher than developed economies.[6] From an informational perspective, which, as seen, is key for properly competing in international markets, the lack of transparency is a cost. But also the generation of transparency is a cost. These costs can be particularly high and, in relative terms, they are very high for developing economies which have to invest their scarce resources.

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[4] See the contributions of Jan Woznowski, a key GATT Secretariat figure in the Uruguay Round Negotiations, and Gerard Depayre, lead of the EEC negotiating team in the Uruguay Round subsidy negotiations, in Luca Rubini and Jennifer Hawkins (Eds), *What shapes the law? Reflections on the history, law, politics and economics of international and European subsidy disciplines* (2016, European University Institute, Global Governance Programme). See also their interviews conducted by the author. The transcripts are available at https://lucaslaws.com/oral-history-project/.

[5] See the seminal article of Terry Collins-Williams and Robert Wolfe, "Transparency as a trade policy tool: the WTO's cloudy windows" (2010), World Trade Review, 551–581.

[6] See in particular, Chad Bown and Bernard Hoekman, *Developing countries and enforcement of trade agreements: why dispute settlement is not enough* (2007), World Bank Policy Research Working Paper 4450; Robert Wolfe, "Transparency matters for LDCs too: the relevance of current debates on WTO reform" in LDCs and the Multilateral Trading System, WTO/EIF (2023) 10–15.

3.3 Transparency, developed economies and the 'domestic problem'

But – it bears highlighting – the lack of transparency in subsidies is a problem that plagues developed countries too. And, perhaps counterintuitively, the lack of transparency in subsidies cuts both ways. Not only does it obviously concern the subsidies granted by other countries, but it also regards one's own subsidies! It is a fact that subsidies can be granted by all levels of government, which may make, in particularly large and constitutionally complex countries, it difficult to know at the federal level what lower levels of government do.

An effective supranational system of subsidies governance, especially if centred on transparency, can thus also come to the aid of central governments, solving a domestic political problem.

3.4 Transparency, and the legitimacy and trust in the trading system

Effective transparency, especially if it concerns troublesome measures like subsidies, contributes not only to fairness but also to the legitimacy and functionality of the trading system.

While transparency has been described as "perhaps the best tool for disciplining subsidies",[7] its potential remains largely unrealized. Unlike the successful models seen in the WTO's Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) Agreements[8], the subsidies regime suffers from systemic issues across all transparency levels.

In the following two sections I will concentrate on two types of challenges that subsidy transparency faces in the WTO.

4. Notification Challenges

It is notorious that the problems of subsidy transparency begin with the notification process.

First, there are significant (and perennial) conceptual and practical difficulties in defining and measuring subsidies. There is no need here to devote much energy in addressing this point. Already in the early GATT years, there was an understanding that providing for a precise legal definition was almost impossible because any attempt would have resulted in over -or under- inclusion. Obviously, these issues that pertain to the substance of the law directly affect the procedural obligation of notification of "subsidies." Various actions can ameliorate the situation here, for example, the clarifications coming from the rich case-law of Panels and the Appellate Body. Even the important role of literature should not be discounted so easily, although scholarship does operate at a subterranean level and is rarely mentioned in decisions. In other words, it is there and there is ample anecdotal evidence that both secretariat and Panellists and Members of the Appellate Body have resorted to the clarifications in the literature. This engagement, however, very rarely makes its appearance in decisions through explicit references. What should be lamented though is the virtual lack of deliberation and clarification in the Committee and in the other bodies referred to in the WTO ASCM.

Secondly, there is administrative fragmentation across government levels. This is an issue which specifically characterises subsidies. Unlike other measures such as tariffs or quotas, or indeed regulation, which are constitutional competence of given bodies and institutions within the jurisdiction of WTO Members, the same does not hold true for subsidies. The definition of subsidy is broad enough to encompass financial contributions coming from "the government or any public body" as well as government-mandate actions through "private bodies." The mechanisms of transfer

[7] Collins-Williams and Wolfe, cit.

[8] See Marianna Karttunen, *Transparency in the WTO SPS and TBT Agreements* (2020) Cambridge University Press.

of economic resources that can legally constitute subsidies, and are therefore subject to the notification obligation, are thus extremely varied and may find their origin in different governmental entities and actions. We have noted already the rather counter-intuitive reality that sometimes central government is not even aware of subsidies granted by the lower levels, and this happens across the board, also for important developed economies.

Thirdly, in some cases, poor transparency may be conducive to capacity constraints. As a corollary to the previous comment, it may be clear that this difficulty for the central government (which is usually responsible for notifications) to track down and identify subsidies and subsidy programmes may be particularly acute for those Members that face significant capacity constraints. The WTO Secretariat plays an important role in addressing these issues, but its intervention is only partial.

Fourthly, as noted in the previous section, there is reluctance to self-report due to legal or reputational concerns, mostly represented by fear of self-incrimination. The practical experience of 30 years of WTO Committee work has shown how the incentive structure underlying the notification system is defective. As advanced, the dismal record in notifications may be one of the unintended consequences of the emergence of a strong dispute settlement.

Already in 1961, a GATT Report on "Operation of the Provisions of Article XVI" singled out the fear of self-incrimination as a key obstacle to the effectiveness of the system: [t]he role of Article XVI in providing the CONTRACTING PARTIES with accurate information about the nature and extent of subsidies in individual countries has been partly frustrated by the failure of some contracting parties to notify the subsidies they maintain. To the extent that this is based on the reluctance of contracting parties to expose themselves to charges of non-conformity with the Agreement, it reflects a misinterpretation of Article XVI. Moreover, a contracting party can be required to consult concerning a subsidy, whether or not it has been notified. There seems, therefore, no advantage to a contracting party in refraining from notifying its subsidies; on the contrary, notifications may dispel undue suspicions concerning those subsidies not previously notified.[9]

As experience has abundantly shown, the final observations of the Panel did not really influence the future conduct of governments, incentivizing them to notify.

Fifthly and finally, there are substantially no consequences for non-compliance. To be sure, non-compliance with an obligation is a breach of WTO law. But there are *de facto* no legal consequences for this breach. If claims are raised, they normally focus on the breach of other substantive obligations, related to the grant or maintenance of prohibited or actionable subsidies, or to the lack of compliance with CVD substantive or procedural provisions. No Member will simply complain about the lack of notification. It is difficult to legally conceive this lack of compliance as an issue of "nullification or impairment of benefits."

Most significantly, perhaps, at least at a hypothetical level, the WTO Secretariat itself has its hands completely tied and cannot identify or even assess any subsidy *ex officio*. This lack of power does not only come from the silence of the law but, most radically, from the deeply entrenched (but never legally uttered) mantra that the WTO is Member-driven. Enforcement is in the hands of governments, not the Organisation.

As a consequence of all the factors addressed below, the practical result is that government notifications, if present, are often incomplete or vague.

While the diagnosis may be easy, what is certainly not easy is the prognosis. What cure can remedy this problem? It is difficult to definitely say, but probably a mix of actions may be what should be considered. On the one hand, one can think of relying on different sources of information. The

[9] L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 206, para. 19.

government-only-notification route should be only one of the sources of information. Other sources one can hypothetically think of relate to business (i.e. the ones that actually operate in markets), other governments (i.e. so-called "cross-notifications", albeit this tool, already provided for in Article 25.10 of the WTO ASCM, has largely being unutilized and made effective only in show-off cases) and/or other international organisations, public or private. As is known, there are various institutions that have been carrying out interesting empirical research and analysis of subsidies in the last decades. Suffice it to mention the private initiative of the Global Trade Alert (GTA) of Professor Simon Evenett or the "Magic" database of the OECD, which even identifies subsidisation at the firm level. There are several issues, however. First, there is not necessarily a complete overlap in definitions, i.e. not all subsidy transparency initiatives share the same scope, and even less adopt the specific legal definition of subsidy of the WTO ASCM. Secondly, each and every organisation and transparency mechanism has its own objectives which significantly shape the whole process, and, once again, these objectives are not necessarily the same underlying the WTO system. Thirdly, very much like in the current WTO systems there are disincentives that bar notifications, the same applies with other hypothetical sources of information. For example, the private sector may be reluctant to come out for fear of retaliation. Finally, whenever the relevant source of information does not use data directly provided by the relevant government, there is obviously an issue of verification.

While, therefore, there are many stakeholders and institutions dealing with transparency, what may be difficult is to "interface" them all into a comprehensive "transparency eco-system" which would end up in a true public good for both government and business communities. This would need aligning objectives, definitions, and incentives, which is clearly not an easy venture.

On the other hand, aside from considering other sources of information, one important factor to work on in the specific WTO mechanism could be to decouple the transparency mechanism from dispute settlement. This, too, is not an easy task, and a great deal of institutional and legal imagination may be required. One could think, for example, of introducing some type of protection from dispute settlement for those subsidies that have been notified (or, vice-versa, some type of pejorative substantive/procedural regulatory treatment for those that have not been notified; the use of presumptions may come to aid here).

In sum, while one may be aware of the broad type of solutions to deploy, how to make these broad observations operational, i.e. what specific types of mechanisms and actions to take, what specific legal provisions to include, is a conundrum.

5. Deliberation and participation deficits

It is now obvious that any problem at the level of notifications – which, it bears repeating, are the only source of subsidy information for the WTO Committee – inevitably translate in a sub-optimal activity of the same Committee which is notoriously characterised by very low levels of participation and deliberation.

Beyond notification issues, participation in subsidy-related deliberation is hindered by various other factors. The poor organization of the information, the limited resources and coordination, especially in developing countries, the absence of structured analysis of "subsidy trade concerns" (as compared for example to what happens for the SPS and TBT Committees), and, finally, the limited understanding and appreciation of the broader purpose of transparency.

6. Reform strategies

Hypothetically, two types of strategies may be considered.

First, action may be introduced to improve practice. First, inspiration can be drawn from the best practice of the SPS / TBT Committees. Secondly, the Secretariat may be involved to give more support and technical assistance to any Member needing it. Thirdly, a more leverage of digital tools (e.g., e-Agenda, hybrid meetings, annotated agendas). Finally, since these are already options envisaged by the Uruguay Round negotiations and explicitly provided for in the ASCM, make use of the Permanent Group of Experts and set up any appropriate subsidiary bodies (per ASCM Articles 24.2 and 24.3). This has happened only twice, in 1995, when the Committee created an Informal Group of Experts to deal with a specific issue[10] and a Working Party on Subsidy Notifications.[11] More recently, interestingly (and promisingly!), Brazil suggested the creation of a Working Group on Implementation,[12] and a group of Members[13] suggested the creation of an "informal technical discussion group."

The adoption of any of these actions by the Committee would require an immediate appreciation and self-awareness by the Committee itself of its central role in sustaining transparency and deliberation in subsidies. In other words, the Committee should realise that it is not simply a place for the activity of governments and, as practice has shown, essentially of certain Members only. But it is a collective body of the WTO, surely populated by government officials, but still a collective body that has a specific collective interest in subsidy transparency and specific prerogatives, besides and in addition to those of governments. This constitutional interpretation finds some support in our reading of the very first transparency obligation of the world trading system which is Article XVI:I of the GATT, which the ASCM develops in the WTO era. This is what you find in other Committees, such as the SPS and TBT Committees. This sense of community is, however, largely lacking in the Subsidy Committee. Even in those – rare – cases where the language of the law seems to offer some power of initiative to the Committee (not the Secretariat), this seems to have been unused. See, for example, Article 24.5 which reads:

In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate

While all the best practice actions sketched above do not require any formal law reform and may be triggered at once, the issue is once again with the lack of specific incentives to do so (or, building on the interpretation just developed, the lack of sense of community).

If the transparency problem is to be solved, it may therefore be necessary to change gear and consider law reform. In descriptive and broad terms, this would mean considering revising the legal framework to institutionalize improved transparency obligations and mechanisms. As noted, beyond very general statements and suggestions, what has proved difficult so far (and, even assuming an appetite for investing political capital in reform, which is probably not present) is to identify specific reform actions. The ultimate goal should be the rejuvenation of the Subsidies Committee as a centre

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[10] The terms of reference were: "To examine matters which are not specified in Annex IV to the Agreement [calculation of the total ad valorem subsidization] or which need further clarification for the purposes of paragraph 1(a) of Article 6, and to report to the Committee such recommendations as the Group considers could assist the Committee in the development of an understanding among Members, as necessary, regarding such matters." G/SCM/5. For reports of the IGE, see documents G/SCM/W/415/Rev.2; G/SCM/M/16, item H; G/SCM/W/415/Rev.2/Suppl.1; and G/SCM/M/24 item E.

[11] G/SCM/M/1, item P. The text of the decision can be found in G/SCM/1. The Chair's report on the discussions in the Working Party at the October 2003 meeting can be found in G/SCM/M/48, paras. 210-220.

[12] See G/SCM/W/567-G/SG/W/236, G/SCM/W/568-G/SG/W/237, G/SCM/W/567-G/SG/W/236 and G/SCM/W/568-G/SG/W/237.

[13] Canada, the Republic of Korea, Japan, New Zealand, Norway, the United Kingdom, and the United States. See RD/SCM/63/Rev.2, for the relevant discussion in the Committee. See also G/SCM/M/125, paras. 150-185. Also see G/SCM/M/127, paras. 242-246.

for deliberation and chambers of conciliation. Ultimately, the biggest conundrum is to align governments' incentives with the institutional ones.

7. Conclusions

Transparency in subsidies remains an unmet promise. Drawing on cross-committee best practices and committing to both procedural and legal reforms can revitalize the WTO's subsidy regime and contribute to a more equitable and effective multilateral trading system. For now, much of the work still focuses on analysing the problems and sketching the possible solutions, thinking out-of-the-box. This chapter is a first attempt in doing so.

Subsidies and the Environment: A New Regime to Empower Sustainable Development and Economic Resilience

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Keywords: Subsidies – Subsidies and Countervailing Measures Agreement – Multilateral agreements – Plurilateral agreements – WTO law – Article XX GATT – Environmentally harmful subsidies.

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1. Introduction

State intervention through subsidies has become an increasingly necessary tool for addressing global crises – ranging from climate change and the COVID-19 pandemic to energy security challenges – while also fostering development and innovation. However, subsidies often have a protectionist effect. For resource-limited countries, competing with foreign firms backed by subsidies presents significant challenges, exacerbating existing economic inequalities.

The issue of subsidies is deeply intertwined with North-South dynamics in global trade. A common narrative portrays industrial subsidies as emblematic of 'State capitalism' in the Global South, challenging the 'true' free-market economies of the Global North. On the other hand, the majority of subsidies litigated under the WTO framework are granted by wealthier G20 economies[1]. This 'dissonance' is caused by the fact that the notion of 'public body' in the SCM Agreement fails to encompass these forms of State capitalism.[2] Another division between WTO Members is posed by

[1] Simon J. Evenett and Johannes Frtiz, Subsidies and Market Access. Towards an Inventory of Corporate Subsidies by China, the European Union and the United States (CEPR Press, 2021) 12-19.

[2] Jan Blockx and Pierfrancesco Mattiolo, 'The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?' (2023) 28 European Foreign Affairs Review 53, 60–61; Weinian Hu, 'Industrial Subsidies, State-Owned Enterprises and Market Distortions: Problems, Proposals and a Path Forward' (Institute for International Trade, University of Adelaide 2019) Policy brief 5 5 <https://iit.adelaide.edu.au/ua/media/441/IIT%20PB05%20Industrial%20Subsidies.pdf> accessed 18 February 2023.

the split between countries which subsidise their agriculture, mostly in the Global North, and the ones that could provide cheaper agricultural products, mostly in the Global South. This has led to divergent approaches to industrial and agricultural subsidies, with different Members advocating for reforms in one sector while resisting them in the other.

Recognising the urgent need for a broader reform of WTO subsidy rules, this contribution explores ways to allow subsidies that promote sustainable development and economic resilience. Such subsidies should address both long-term challenges (*e.g.*, climate change, poverty) and sudden shocks (*e.g.,* financial crises, pandemics). Its focus is limited to industrial subsidies, even if agricultural subsidies rules are also briefly described, and environmental concerns.

Two key solutions are examined. The first is the introduction of a new Article 8 within the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), complementing the existing categories of prohibited and actionable subsidies, which would incorporate some elements from Article XX of the General Agreement on Tariffs and Trade (GATT). The second is to prohibit environmentally harmful subsidies through the adoption of a new agreement on subsidies and the environment, on the model of the WTO Agreement on Fisheries Subsidies (AFS).

In addition to WTO multilateral rules, this research also briefly examines the opportunity of plurilateral solutions, such as the Agreement on Climate Change, Trade and Sustainability (ACCTS), and how subsidies have been disciplined by bilateral trade agreements between Members. Countries could agree on plurilateral and bilateral tools while they seek a solution at the multilateral level. Finally, some initiatives at the unilateral level are described: while a subsidy race should be avoided – especially if countries compete in granting environmentally harmful subsidies, but also if they fund green technologies –, it may be useful to look at the balancing between economic distortion and policy goals, *inter alia* environmental policy, performed under the EU Foreign Subsidies Regulation (FSR). By considering these perspectives, this short study aims to contribute to the ongoing debate on reforming WTO law to better align with global sustainability and resilience objectives.

2. Multilateral level

The current WTO SCM Agreement framework does not appear adequate to discipline environmental subsidies, as many scholars agreed since *Canada-Renewable Energy.*[3] The decision embodied the Appellate Body's inability to adjudicate in a manner that did not require 'legal acrobatics' – between a rigorous interpretation of the SCM Agreement and acknowledging the meritorious goal of the contested measure – and the need for a 'rethinking' of the Agreement.[4] Critics of the decision called for the introduction of specific rules to govern environmental and energy-related subsidies, instead of resorting to jurisprudential creativity.[5] In the following paragraphs, some proposals on how to reform the WTO framework for subsidies are discussed. The SCM Agreement could be amended in a manner which is more sensitive to the establishment of sustainable development as a universal commitment by the international community.[6] The basic architecture of

[3] Aaron Cosbey and Petros C Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO' (2014) 17 Journal of International Economic Law 11.
[4] ibid 1.
[5] Alice Pirlot, 'The Inadequacy of EU State Aid Law and WTO Law on Subsidies to Regulate Energy Tax Reliefs' (2017) 16 European State Aid Law Quarterly 25, 31–32.
[6] Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Bloomsbury Academic 2017) 31–35.

the SCM Agreement could be retained, while its three categories updated.[7] Such a reform of the SCM Agreement should be negotiated as part of a broader revamping of WTO rules that affect climate and environmental policy, so as to avoid the fragmentation that hindered previous reform efforts – *e.g.*, the Doha Round negotiations that focused on tariffs on 'environmental' goods and services, without addressing the matter of subsidies.[8]

2.1 Taking stock of the problem: the different fate of subsidies on renewable energy and fossil fuel under the current WTO framework

The Appellate Body may have felt the need to look for a solution on renewable energy subsidies also due to the fact that WTO disputes target them way more than they target fossil fuel subsidies, which are basically ignored, despite the environmental harm they produce. This is not just a consequence of the political considerations of the Members. The structure of energy subsidies plays a role: fossil fuel subsidies are often non-specific and on the consumption side, making them difficult to challenge under the current SCM Agreement, which focuses on trade-distorting, specific subsidies. Additionally, renewable energy subsidies often include local content requirements which are explicitly prohibited under the SCM Agreement.[9] De Bièvre, Espa and Poletti tested this explanation based on the legal design of subsidies and other potential justifications, finding that the former is the most convincing, and concluding that a reform of the Agreement is desirable if this outcome – no litigation of fossil fuel subsidies v. frequent litigation of renewable energy subsidies – is to be changed.[10] But how to?

2.2 A new Article 8 SCM Agreement, inspired by Article XX GATT

The SCM Agreement originally envisaged some narrowly defined exceptions to both actionable and prohibited categories of subsidies – the non-actionable subsidies of Article 8 SCM Agreement. These, however, have become inapplicable in 2000, after the failure to arrive at a consensus to extend them. Scholars have repeatedly urged policy-makers to reintroduce some form of exception in the SCM Agreement, in particular to the benefit of environmental subsidies, which have started to be challenged before WTO dispute settlement bodies.[11] Many scholars suggested the 'reactivation' of the old Article 8, while also stressing the need for adjustments.[12] Due to its statutory caps and narrow scope,[13] Cosbey and Mavroidis recommended 'a hybrid approach that incorporated elements of

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[7] Filippo Bizzotto and others, 'Restructuring the WTO Regulatory Framework on Industrial Subsidies: Sustainability, Free Trade and Prosperity' [2021] T20 Italy 2021 Policy Briefs <https://www.t20italy.org/wp-content/uploads/2021/09/TF3_PB11_LM04.pdf>.

[8] Robert Howse, 'Climate Mitigation Subsidies and the WTO Legal Framework: A Policy Analysis' (International Institute for Sustainable Development 2010) 22–23 <https://www.iisd.org/system/files/publications/bali_2_copenhagen_subsidies_legal.pdf>.

[9] Dirk De Bièvre, Ilaria Espa and Arlo Poletti, 'No Iceberg in Sight: On the Absence of WTO Disputes Challenging Fossil Fuel Subsidies' (2017) 17 International Environmental Agreements: Politics, Law and Economics 411, 422–423.

[10] ibid.

[11] Robert Howse, 'Do the World Trade Organization Disciplines on Domestic Subsidies Make Sense? The Case for Legalizing Some Subsidies' in George A Bermann, Kyle W Bagwell and Petros C Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (Cambridge University Press 2009) 85–102 <https://www.cambridge.org/core/books/law-and-economics-of-contingent-protection-in-international-trade/do-the-world-trade-organization-disciplines-on-domestic-subsidies-make-sense-the-case-for-legalizing-some-subsidies/1E66DDDA7FDAADABAD3F934B8BCA5A99>; Cosbey and Mavroidis (n 3) 11–47.

[12] Cosbey and Mavroidis (n 3) 24–27; Howse (n 8) 20; Lauren Henschke, 'Going It Alone on Climate Change A New Challenge to WTO Subsidies Disciplines: Are Subsidies in Support of Emissions Reductions Schemes Permissible under the WTO' (2012) 11 World Trade Review 27, 51.

[13] Cosbey and Mavroidis (n 3) 24.

Article XX GATT and Article 8' SCM Agreement. This renewed Article 8 should set a list of broad objectives similar to Article XX GATT, including the provision's chapeau, with some restrictions on the design of subsidies (*e.g.*, subsidies should address one specific market failure and could incorporate a sunset clause).[14] These objectives may include subsidies that 'pursue global public goods', with positive, cross-border, spillovers, including the promotion of R&D, basic research or public health; subsidies may 'internalize externalities' that affect these public goods.[15]

This reformed Article 8 should exonerate subsidies that pursue environmental and social goals, even if they would fall under the current prohibited or actionable categories, due to trade-distorting effects. For example, when they support the production of green goods or the development of depressed areas of a country.[16] There are some positive arguments in favour of the proposal's viability. This 'Article XX-like' justification for 'sustainable subsidies' is somewhat coherent in the system of WTO law, if we consider that Article XX may justify GATT violations that sometimes have more distortive effects than subsidies.[17] Some Members have been discussing and advocating in favour of a reform in a similar direction.[18] An amendment to the SCM Agreement appears preferable to jurisprudential solutions, so as to avoid the controversial matter of the applicability of Article XX GATT to cases brought under the SCM Agreement,[19] and ensure the acceptance of the new set of rules by the Members.

Justifying subsidies with positive environmental effects presents yet some risk. States may use the environment as a justification to enable trade-distortive subsidies and penalise other Members, gaining an advantage in the development of the key technologies that are becoming increasingly essential. One thing is to ease the economic and social costs of the energy transition: in this case, a public policy justification should be relevant under a reformed SCM Agreement, contributing to a public good. Another thing is to subsidise to outcompete other countries in the production of green technologies (*e.g.*, electric batteries, solar panels, wind turbines), or gain a strategic advantage.[20] The participation of more companies, and more countries, in these sectors is in the general interest, and ensures that dependency on a few manufacturers does not constitute an economic security risk, or become a geoeconomic tool of pressure. Horlick and Clarke suggested addressing such challenges via a hybrid governance model that combines hard and soft law. [21] Hard law to ensure certainty and enable enforcement; soft law to foster cooperation among countries and avoid litigation when possible.[22]

2.3 Looking into the Agreement on Agriculture for inspiration and similar challenges

We have been talking about industrial subsidies, until now. Another possibility to reframe their discipline under WTO would be to adopt a classification system similar to the one used for agricultural subsidies. The Agreement on Agriculture categorises domestic support measures in different 'boxes.' Subsidies with an environmental impact could also be qualified in a green, amber

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[14] ibid 26–27.
[15] ibid 27.
[16] Bizzotto and others (n 7) 7–8.
[17] Henschke (n 12) 51.
[18] Marios Tokas, 'Looking Back into the Future: The Legal Standard of Prohibited Subsidies in SCM Agreement through WTO Case Law, Ahead of Reforms' (2022) 14 Trade, Law and Development 290, 304.
[19] Luca Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform' (2012) 15 Journal of International Economic Law 525, 562–564; Howse (n 8) 17–19.
[20] Gary Horlick and Peggy A Clarke, 'Rethinking Subsidy Disciplines for the Future: Policy Options for Reform' (2017) 20 Journal of International Economic Law 673, 679–680.
[21] ibid.
[22] ibid.

or red box. Environmentally beneficial subsidies would fall under the green box and presumed to be not harmful, unless proven disproportionate or not aligned with sustainability goals. Red box subsidies would be presumed harmful, while amber box measures would be assessed on a case-by-case basis, without presumption.[23] A Development Box could be envisioned to provide differential treatment to the least developed countries. even if this contribution does not discuss agricultural subsidies, Members should also consider the necessity to reduce environmentally harmful subsidies in this category and favour subsidies that promote sustainable agriculture and access to food.[24]

2.4 Bridging WTO Law and International Climate Law

An alternative, and broader, perspective is to clarify the relationship between WTO law and international climate law. Such an exercise could yield benefits beyond the issue of subsidies, for example, by helping settle the question of the compatibility of carbon border adjustment measures with international law. Looking at the debate generated by the EU CBAM, recently rekindled by the dispute started by Russia in May 2025,[25] it is surprising to see that the matter is discussed mostly exclusively from the lens of WTO law compatibility, with limited space given to international climate law.[26] Interestingly, Russia disputes that the EU CBAM violates, *inter alia*, the SCM Agreement.[27]

Returning to the issue of subsidies, their discipline could be linked with international climate law. A measure could be anchored to the obligations contracted by a country under the Paris Agreement and notified to an UNFCCC body tasked with reporting and monitoring on the subsidy and its results, ensuring also more transparency. [28] In exchange, the subsidy could be granted a conditional waiver from the SCM Agreement, in line with some precedents.[29]

2.5 A new ad hoc Agreement to prohibit environmentally harmful subsidies – the lesson from the Agreement on Fisheries Subsidies

Another lesson could be learned from the WTO AFS. The Agreement introduced binding rules to prohibit subsidies for illegal, unreported and unregulated fishing, fishing overfished stocks and fishing on the unregulated high seas. The Agreement left the advocates of a more stringent ban dissatisfied, yet it may give an impulse for the negotiations of other agreements to regulate specific

[23] Douglas Nelson and Laura Puccio, 'Nihil Novi Sub Sole: The Need for Rethinking WTO and Green Subsidies in Light of United States – Renewable Energy' (2021) 20 World Trade Review 491, 503–505.
[24] For an analysis of the matter, see Sachin Kumar Sharma and others, 'WTO Negotiations and Repurposing Agriculture Subsidies for a Sustainable Future' (2024) 24 International Environmental Agreements: Politics, Law and Economics 349, in particular 353-354 for an overview of the Agreement and its boxes.
[25] WTO, 'Russia Initiates WTO Dispute Regarding EU's Carbon Border Adjustment and Emissions Trading' (*www.wto.org*, 19 May 2025) <https://www.wto.org/english/news_e/news25_e/ds639rfc_19may25_e.htm> accessed 24 May 2025.
[26] The reader can fortunately rely on the essential and complete analysis of Gracia Marín Durán, 'Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes' (2023) 72 International & Comparative Law Quarterly 73.
[27] Delegation of the Russian Federation to the WTO, 'European Union and Its Member States – Carbon Border Adjustment Mechanism. Request for Consultations by the Russian Federation' (WTO 2025) Request for consultations G/L/1573; G/LIC/D/55; G/SCM/D142/1; WT/DS639/1 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20(wt/ds639/1%20))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#>.
[28] Howse (n 8) 24.
[29] ibid.

subsidies that are harmful to the environment.[30] For the first time, subsidies were considered for both their trade-distorting and environmental effects.

The choice of discussing fisheries protection at the WTO, instead of other fora, and from the specific angle of subsidies, seemed to certain analysts a mistake,[31] as the WTO did not have much experience on environmental issues, nor seemed to offer the most favourable negotiating table to reduce the economic exploitation of marine resources. Yet, this alleged mistake proved 'constructive' as it allowed for the environment to be brought into the Organisation's agenda, alongside the usual considerations on trade distortions.[32] Differently from the SCM Agreement, the AFS only defines prohibited subsidies on the basis of their environmental impact.

At an early stage of the AFS negotiation process, it was argued that the matter could have been addressed by adding an annex to the SCM Agreement, while other Members called for the adoption of a separate agreement, as it happened in the end. Perhaps, departing from the SCM Agreement and its pure 'trade logic' allowed the AFS, as a standalone agreement, to better focus on its environmental and sustainability goals, in line with the path set by the 2017 Buenos Aires MC11.[33] A subsidy could fall under the scope of both the AFS, for its harmful effects on the marine environment, and the SCM Agreement, for its trade distortions; consequently, it could be incompatible with and find a remedy under both the AFS and the SCM Agreement.[34] The two Agreements overlap and complement each other: their two notions of 'prohibited' subsidies differ; yet, a subsidy may be hypothetically challenged under both.[35]

Learning from the AFS, Members could join in an agreement to prohibit subsidies that are particularly harmful to the environment. There are different options to tackle harmful subsidies, for example by establishing measure-based, presumptive, prohibitions.[36] Given the weight of the public good pursued by the prohibition, it would be justifiable to prohibit a subsidy regardless of its impact on trade[37] – again, in a similar manner to the AFS. For example, subsidies to fossil fuels or that lead to the depletion of non-renewable resources. Fossil fuel subsidies, especially those on the consumption side, may be quite ingrained in national economies and their removal may impact low-income citizens in particular; therefore, a ban on such subsidies could foresee a phase-in period and be flanked by cooperation efforts. Nevertheless, the remedies introduced by the new agreement should be effective in de-incentivise these measures. Other, less environmentally harmful, subsidies could become actionable when another Member can demonstrate the (environmental) harm.[38]

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[30] Julien Chaisse, Debashis Chakraborty and Animesh Kumar, 'Sustainable Seas? Assessing Commitments and Implications of the WTO Fisheries Subsidies Agreement Special Issue: The Architecture of the 2022 Fisheries Subsidies Agreement: Sustainability, Faithful Implementation and Beyond' (2024) 19 Asian Journal of WTO and International Health Law and Policy 27, 32–43.

[31] Chang-fa Lo and Tang-Kai Wang, 'From Addressing Trade Distortion to Correcting Environmental Distortion: The Fisheries Subsidies Negotiation as the Turning Point of the WTO's Task' (2021) 16 Asian Journal of WTO and International Health Law and Policy 153, 157–163.

[32] ibid.

[33] ibid.

[34] ibid.

[35] ibid 172–174.

[36] Jelena Bäumler, 'Implementing the No Harm Principle in International Economic Law: A Comparison Between Measure-Based Rules and Effect-Based Rules' (2017) 20 Journal of International Economic Law 807, 807–828.

[37] Horlick and Clarke (n 20) 678–688.

[38] ibid 684–685.

2.6 Bundling subsidies with broader WTO reform: the example of the Agreement on Climate Change, Trade and Sustainability

The proposed ACCTS may offer another venue to introduce a discipline for subsidies that are harmful to the climate, in particular fossil fuel subsidies. The initiative was launched in 2019 by New Zealand, Iceland, Costa Rica, Switzerland, Fiji and Norway, building on earlier efforts by informal WTO-based groups. These first four countries have signed the Agreement, which remains open to all WTO Members. Chapter 4 of the ACCTS provides a definition of fossil fuel subsidies for the Agreement, while specifying that it addresses 'harmful' fossil fuel subsidies.[39] This formula links the provisions to the SCM Agreement's notion of harm.[40] Additionally, Chapter 4 also provides for transparency measures, exceptions and a list of the relevant subsidies. What is important to notice is that the signatories deemed preferable to conclude an agreement addressing many facets of the 'trade and environment' question: subsidies, but also trade in environmental goods and services and ecolabelling. While it may be easier to negotiate on different tables, the WTO would benefit from a general, coherent vision on the relationship between trade and the environment.

2.6.1 Interim conclusions on multilateral subsidies rules: the need for reform, determination and legal creativity

While the need for a reform of the SCM Agreement is clear, to account for environmental considerations, it is less clear how to achieve this. The previous paragraphs suggested that the WTO framework should evolve to justify subsidies that pursue meritorious, environmental goals – by creating a new Article 8 inspired by Article XX GATT – and prohibit subsidies that harm the environment – via a new *ad hoc* agreement that complements the SCM Agreement. A similar asset has been suggested by Horlick and Clarke, with the admonition that it should remain both rigorous and flexible.[41]

Rubini too stressed how the introduction of 'hard law' should be paired with 'soft governance' to foster transparency and understanding of subsidy policies, which are necessary to strengthen compliance and ensure legal certainty while preserving the policy space of Members.[42] The reform process cannot be hasty, and can be successful only if it is gradual, transparent and inclusive, based on factual elements and data.[43]

3. Plurilateral and bilateral level

3.1 The opportunity offered by plurilateral agreements

We discussed the merits of the ACCTS in proposing a regime for harmful fossil fuel subsidies. The Agreement, as mentioned, was signed by four countries, but it is open to all WTO Members. Plurilateral agreements rooted in the WTO offer a way forward for like-minded countries to address the limits of the current legal framework, without dealing with the complexities (and paralysis) of

[39] Agreement on Climate Change, Trade and Sustainability 2024 ch 4 available here.
[40] Henok Asmelash, 'The Regulation of Environmentally Harmful Fossil Fuel Subsidies: From Obscurity to Prominence in the Multilateral Trading System' (2022) 33 European Journal of International Law 993, 1012–1023.
[41] Horlick and Clarke (n 20) 684–685.
[42] Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform' (n 19) 577–579.
[43] Luca Rubini, 'SCM Agreement Disciplines and Recent WTO Case Law Developments: What Space for "Green" Subsidies?' (RSCAS, January 2015) 14 <https://papers.ssrn.com/abstract=2553912>.

multilateral rulemaking.[44] Engaging in plurilateral initiatives requires some caution and flexibility, as it may be perceived as a shortcut to avoid the needed multilateral reform. Other Members interested in joining may be dissuaded by the fact that the initial parties to the agreement have already set the rules, and their interests cannot be accommodated. Given the urgency of climate change, though, the haste (and example) of the four ACCTS Members is commendable. The ACCTS addresses some of the objectives set by this contribution; but it cannot answer the call for exempting subsidies with a positive effect on the environment from the scrutiny of the SCM Agreement. Such arrangement would require intervening at the multilateral level. Yet, at least on banning environmentally harmful subsidies, Members should already join in a plurilateral agreement – such as, but not limited to, the ACCTS.

3.2 Preferential trade agreements: the example of the EU-Singapore Free Trade Agreement (EUSFTA)

It is quite common that countries agree bilaterally on rules on subsidies in their Preferential Trade Agreements (PTAs). As shown by the empirical analysis of Rubini, conducted in 2020, on 283 PTAs, 59 have provisions on subsidies with an environmental impact – not the most common concern for subsidies chapters in PTAs, if we consider that matters such as transparency and enforcement are much more common, as they are present in 243 over 283 PTAs.[45]

Most PTAs basically mirror the SCM Agreement. Nevertheless, the EU pushes for the inclusion of more categories of prohibited subsidies, coherently with its reform platform for the WTO framework. These prohibited subsidies address trade distortions, in line with the spirit of the SCM Agreement, and are presumed distortive, but the partner can rebut such presumption.[46] The EU-Singapore Free Trade Agreement (EUSFTA) follows a 'WTO+' blueprint, while striving for adopting a clearer language, compared to previous EU PTAs. The categories of prohibited subsidies are increased to cover unlimited guarantees and aid to ailing undertakings without a credible restructuring plan;[47] two types of subsidies that are considered highly distortive also in the EU FSR, which we will discuss later.[48] Subsidies to services are also considered,[49] again similarly to the FSR.

Additionally, the Agreement acknowledges justifications for these prohibited subsidies, based on two types: certain subsidies are exempted in general, when they remedy a serious disturbance in the economy or when they are destined to the coal industry.[50] This exclusion in favour of coal is justified by the Parties based on the need to gradually accompany the energy transition and ease its social costs.[51] Other subsidies, listed in Annex 11-A, are justified if (i) 'they are necessary to achieve an objective public interest', (ii) they are limited 'to the minimum needed to achieve this objective' and (iii) 'the effect on trade of the other party is limited.'[52] While the list does not feature subsidies with positive effects on the environments, it justifies aid given for social aims – *e.g.*, economic development in underdeveloped regions, the execution of major regional or bilateral projects, support

[44] Asmelash (n 40) 1012–1023.
[45] Luca Rubini, 'Subsidies' in Aaditya Mattoo, Nadia Rocha and Michele Ruta (eds), *Handbook of Deep Trade Agreements* (World Bank 2020) 446 <https://hdl.handle.net/10986/34055>.
[46] Tokas (n 18) 306.
[47] Free Trade Agreement between the European Union and the Republic of Singapore 2019 (OJ EU) art 11.7(2).
[48] Regulation 2022/2560 on foreign subsidies distorting the internal market 2022 (OJ L330/1) art 5.
[49] EUSFTA 11.5.
[50] ibid 11.7.
[51] ibid 12.11(3).
[52] EUSFTA, Annex 11-A.2.

for SGEI undertakings.[53] It would be possible to use a similar arrangement to justify environmental subsidies.

On the compliance and enforcement side, the EUSFTA does not provide for an institutional mechanism or procedure to examine these justifications – in this regards, willing countries should keep in mind the recommendation advanced when discussing multilateral solutions: rules should always be paired with a governance system, if they want to be effective. The Agreement still contains strong transparency provisions, which again are an essential element for an effective mechanism.[54] While the subsidies chapter of the EUSFTA does not deal in-depth with the environmental issue, it still offers an interesting model for future PTAs.

4. The unilateral level

4.1 Subsidy for subsidy? Avoiding an expensive race

If no solution is found at the multilateral level, some Members may look for unilateral solutions to deal with the countries that are not willing to engage in a plurilateral agreement or bilaterally. Again, the urgency of climate change requires for a swift transformation of economic policies: trade and industrial policies are not an exception. The most 'unilateral' answer to a subsidy given by another country is perhaps to give a subsidy yourself, as this may affect also third countries that do not have the resources to join the subsidy race. When it comes to the environment, this may play out in two different, undesirable, outcomes. If the subsidies aim to support a green industry, this may be expensive for countries and cut off the governments with less fiscal space, while at least fostering environmental goals. If the subsidies are environmentally harmful, the subsidy race may damage the climate alongside the budget of the countries. This 'offensive' approach to foreign subsidisation[55] results in more protectionism and geoeconomic tensions, as already briefly described in section II.2 of this paper. Yet, countries may have no other way to support their struggling economies. The EU scrambled to find an answer to the US Inflation Reduction Act:[56] on the one hand, it tried to cooperate with Washington;[57] on the other, it devised a 'matching aid' scheme in its revised Temporary Crisis and Transition Framework, to ensure that investments in those key sectors were not diverted from the bloc.[58] Again, agreeing on rules and cooperation on subsidies at the multilateral and plurilateral level is preferrable.

4.2 Balancing distortions and meritorious policy goals: Article 6 of the EU Foreign Subsidies Regulation

An alternative way to tackle with the lack of progress at the multilateral and plurilateral level is to create 'autonomous' mechanisms that aim to complement WTO law and pursue similar objectives.

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[53] Leonardo Borlini and Claudio Dordi, 'Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements' (2016) 23 Columbia Journal of European Law 551, 572–574.

[54] ibid.

[55] Blockx and Mattiolo (n 2) 61–64.

[56] Public Law 117-169 – An act to provide for reconciliation pursuant to title II of S. Con. Res. 14 (Inflation Reduction Act) 2022 (Public Law).

[57] European Commission, 'Launch of the US-EU Task Force on Inflation Reduction Act' (2022) Statement STATEMENT/22/6402 <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_6402> accessed 13 February 2023.

[58] European Commission, Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2022 [OJ C426/1] para 86; Blockx and Mattiolo (n 2) 66–68.

To address the perceived 'regulatory gap' in WTO subsidy law,[59] the EU adopted the FSR in 2022.[60] While the FSR pursues a purely economic goal – removing the distortions caused by subsidies given by third countries,[61] as the EU Member States are prohibited to give State aid under Article 107 of the Treaty on the Functioning of the European Union –, it may be relevant for the present contribution to look at its approach to subsidies that may have a meritorious goal, such as supporting the green transition. The key provision is Article 6 FSR, which allows the European Commission to conduct a 'balancing test' between the negative (distortive) and positive effects of the subsidy. The Commission must take into account these positive effects if it wants to accept commitments from the undertaking or adopt redressive measures,[62] and the balancing can only result in a more favourable treatment for the undertaking.[63]

The positive effects that the Commission may consider are, in first instance, of economic nature (the 'development of the relevant subsidised economic activity on the internal market').[64] Then, 'other positive effects' related to 'relevant policy objectives, in particular those of the Union' may be considered.[65] These positive effects may be linked to the environment and social protection or the promotion of research and development,[66] and the Commission may further clarify the matter with its statutory Guidelines by early 2026. The balancing is linked to the similar exercise conducted under EU State aid, with the objective of avoiding any risk of discrimination.[67] The EU should perhaps go beyond looking 'in particular' to the policy objectives 'of the Union', and consider global objectives and national goals of third countries that are aligned with environmental protection and climate action.[68]

If other WTO Members will follow the EU example and adopt their own subsidies rules to complement the WTO framework, they should feature a similar balancing test, or other grounds of justification, for foreign subsidies which support the green transition. This set of provisions would achieve, at the autonomous level, the same objective that the proposed reform of Article 8 SCM Agreement would achieve at the multilateral one.

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[59] Pierfrancesco Mattiolo, 'Concordia Discors? The Foreign Subsidies Regulation and Increased Subsidization in the EU under the Open Strategic Autonomy Model' in Jonas Fechter and Janosch Wiesenthal (eds), *The Age of Open Strategic Autonomy* (Nomos 2025) 162–165.

[60] FSR.

[61] Lena Hornkohl and Pierfrancesco Mattiolo, 'The Concept of "Distortion in the Internal Market" in the Foreign Subsidies Regulation – From the Legacy of State Aid Law to the First Case Practice' (SSRN, 2025) <https://www.ssrn.com/abstract=5247472>.

[62] FSR art 6(2).

[63] FSR, Recital 21.

[64] ibid 6(1); Lena Hornkohl, 'The EU Foreign Subsidy Regulation – What, Why and How?' in Jens Hillebrand Pohl and others (eds), *Weaponising Investments*, vol II (Springer Nature Switzerland 2024) 13–14 <https://doi.org/10.1007/17280_2023_15>.

[65] FSR art 6(1).

[66] FSR, Recital 21; European Commission, 'Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market' (2024) Commission Staff Working Document SWD(2024) 201 final.

[67] Pierfrancesco Mattiolo, 'Competition Law as "a Continuation of Policy with Other Means"? The Application of the Foreign Subsidies Regulation to Concentrations' in Ranjana Andrea Achleitner and others (eds), *Think Big: Questioning the Role of Competition Law in the 21st Century* (2025) 275–277.

[68] ibid 276; Magali Eben and others, 'Guidelines for the EU Foreign Subsidies Regulation: ASCOLA Comments for the 2025 Call for Evidence by the European Commission' (Academic Society for Competition Law 2025) para 21 <https://ascola.org/wp-content/uploads/2025/04/EU-FSR-Guidelines-Submission-2025-1.pdf> accessed 15 April 2025.

5. Conclusion

The contribution has briefly presented what pathways the WTO Members have to update the SCM Agreement and its framework to address the urgent environmental and developmental challenges. Current WTO law and jurisprudence are unable to answer to these challenges, as shown, *e.g.*, by the unequal treatment of renewable energy and fossil fuel subsidies. The proposed introduction of a reformed Article 8 SCM Agreement, incorporating some elements from Article XX GATT, would create an exception to justify environmentally and socially meritorious subsidies. Complementarily, a new *ad hoc* agreement targeting environmentally harmful subsidies, inspired by the WTO Agreement on Fisheries Subsidies, could serve as a tool to ban the most damaging practices regardless of their trade effects.

The study further recognises the value of plurilateral and bilateral approaches, including initiatives such as the ACCTS and enhanced provisions in PTAs like the EUSFTA. Moreover, it considers autonomous instruments, notably the EU FSR, as an example of how domestic tools should balance the goal of addressing the trade distortions caused by subsidies with their eventual positive effects on the environment. Overall, WTO law must evolve to integrate sustainability more coherently, through a combination of hard legal reform, soft governance mechanisms, and complementary national and regional initiatives, ensuring equitable participation in the green transition and safeguarding global public goods.

The contribution offers a rather concise description of the possible way forwards. One question which is not discussed here is the challenge of balancing the environmental, social, and economic dimensions of sustainable development when it comes to subsidies. For instance, a subsidy for transport fuel may enhance social welfare and help the poorer citizens but have adverse environmental consequences. Alongside the environmental question, the social role of subsidies and industrial policy should be considered by anyone willing to reform WTO rules. Further research, and policy discussions, is required on this area.

SECTION TWO

The Quest for a Multilateral Approach to New Sustainability Policies

From Protection and Liberalisation to Facilitation: The WTO IFD Agreement, the EU-Angola SIFA, and Shifting Paradigms in International Investment Law

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

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

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1. The WTO and International Investment Law

Although modern international legal frameworks governing trade and investment originated around the same period in the immediate post-World War II decades (1947 for the *General Agreement on Tariffs and Trade* (GATT)[1] and 1959 for the first Bilateral Investment Treaty (BIT) between West Germany and Pakistan[2]), their distinct historical trajectories have led to notable differences in the development of legal sources (for example, the significant role of customary international law in investment law compared to international trade law), treaty structures (multilateral in trade vs bilateral or regional in investment), institutional cultures (such as the contrast between State-to-State dispute settlement and Investor-State Dispute Settlement (ISDS) mechanisms), and levels of centralisation.[3]

These divergences may help explain why, despite the 'importance of investment for promoting development in connection to trade'[4] – an interconnection increasingly reflected in new-generation Preferential Trade Agreements (PTAs),[5] which typically include a chapter on investment protection – the WTO has not traditionally been regarded as the appropriate forum to develop international rules on foreign investment.

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[1] (Adopted 30 October 1947, entered into force 1 January 1948 (on a provisional basis)) 55 UNTS 194.
[2] (Adopted 25 November 1959, entered into force 28 April 1962) 457 UNTS 24.
[3] See, in general, Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) 1-2. For a further historical overview of the commonalities and differences between the two branches of international economic law, especially when it comes to dispute settlement systems, see Giorgio Sacerdoti and Niall Moran, *International Trade and Investment Dispute Settlement: From Rise to Crisis and Reform* (Routledge 2025) 28-36.
[4] Rodrigo Polanco and Cristián Rodríguez-Chiffelle, 'Investment Facilitation at the WTO: What's Old? What's New? What's Missing?' in Julien Chaisse and Cristián Rodríguez-Chiffelle (eds), *The Elgar Companion to the World Trade Organization* (Edward Elgar 2023) 301, 302.
[5] These agreements, 'in addition to the classical provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services', contain 'provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development', Court of Justice of the European Union, Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017, para 17. For an overview of deep economic integration at the 'mega-regional' level, see Thilo Rensmann (ed), *Mega-Regional Trade Agreements* (Springer 2017). For a focus on the 'new-generation' PTAs negotiated and concluded by the European Union (EU), see Giovanna Adinolfi (ed), *Gli accordi preferenziali di nuova generazione dell'Unione europea* (Giappichelli 2021).

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

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

Investment was initially included in the Doha Round agenda launched in 2001,[15] but was later dropped.[16] Amid the general stalemate in WTO negotiations,[17] new momentum has been found in plurilateral initiatives – agreements pursued by a subset of WTO Members. At the 11th WTO Ministerial Conference in Buenos Aires in 2017 (MC11), various countries launched the so-called Joint Statement Initiatives (JSIs), that is 'plurilateral negotiations among self-identified groups of WTO Members to produce new rules on particular subject areas',[18] including one focused on

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

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

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

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

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

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

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

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

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

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

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

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

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

Investment Facilitation for Development.[19] This initiative, supported by 70 WTO Members at its inception, aimed to start structured discussions to develop a multilateral framework on investment facilitation.[20]

After more than two years of preparatory work, formal negotiations began on the Agreement on Investment Facilitation for Development (IFD Agreement).[21] The text was officially finalised in February 2024 at the 13th WTO Ministerial Conference in Abu Dhabi (MC13).[22] At that time, the initiative – now supported by over 120 WTO Members – formally requested the incorporation of the IFD Agreement into Annex 4 of the Marrakesh Agreement as a Plurilateral Agreement[23] (meaning it will apply only to those WTO Members who expressly accept it).[24] Notable proponents of incorporating the IFD Agreement include Brazil, Cameroon, Canada, Chile, China, the EU, Saudi Arabia, Singapore and South Korea, among others.[25]

2. Investment Facilitation and the IFD Agreement

It is worth stressing – as the very name suggests – that the IFD Agreement focuses specifically on investment facilitation, rather than *investment liberalisation* or *investment protection*. While the distinctions between these categories of investment regulation are not always entirely clear – there is no universally accepted definition; international organisations and legal scholars use the terms inconsistently, and certain State measures and treaty obligations may overlap these categories –,[26] it is nonetheless possible to offer a meaningful differentiation.

In particular, the United Nations Conference on Trade and Development (UNCTAD) defines *investment facilitation* as 'the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries.'[27] By contrast, *investment liberalisation* concerns a State's power to allow, restrict, or place

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[19] Joint Ministerial Statement on Investment Facilitation for Development, Doc WT/MIN(17)/59 (13 December 2017).
[20] Ibid, para 4 (calling for 'beginning structured discussions with the aim of developing a multilateral framework on investment facilitation').
[21] For an overview of the negotiation process, see Axel Berger and Manjiao Chi, 'Introduction: Law, Politics, and Economics of International Disciplines on Investment Facilitation for Development' in Id (eds), *The Making of an International Investment Facilitation Framework: Legal, Political and Economics Perspectives* (Cambridge University Press 2025) 1, 3-7 and Rashmi Jose, 'Investment Facilitation for Development Agreement: Why does it matter?' In *International Institute for Sustainable Development* (17 July 2023), available at www.iisd.org/articles/policy-analysis/investment-facilitation-development-agreement.
[22] Joint Ministerial Declaration on the Investment Facilitation for Development Agreement, Doc WT/MIN(24)/17/Rev.1 (29 February 2024).
[23] Ibid, para 4.
[24] Article II(3) of the the *Marrakesh Agreement Establishing the WTO* (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3.
[25] See Polanco and Rodríguez-Chiffelle (n 4) 304.
[26] 'For example, discussions of investment screening have highlighted that such measures may raise questions of investment liberalization and investment protection and may also raise difficulties in drawing the exact distinction between the pre- and post-establishment phases', Joshua Paine, 'Beyond Investment Protection and ISDS: Towards an Investment Law Research Agenda Focusing on Investment Facilitation and Liberalization Commitments' (2025) *World Trade Review* 1, 5-6. See also Polanco and Rodríguez-Chiffelle (n 4) 305 (arguing that 'the lines among attracting, facilitating, and retaining are sometimes unclear because investing is a continuum rather than discrete phases').
[27] UNCTAD, *Global Action Menu for Investment Facilitation* (UNCTAD-DIAE 2017) 4. The World Bank defines investment facilitation as 'the stage of investment promotion which seeks to convert investor interest into an investment decision', *Investment Regulation and Promotion: Can They Coexist in One Body?* (World Bank Group 2018), 1. For a further discussion, see Jesse Coleman et al, 'What Do We Mean by Investment Facilitation?' in *Columbia Center on Sustainable Development* (21 February 2018), available at https://ccsi.columbia.edu/news/what-do-we-mean-investment-facilitation.

conditions on new foreign investments entering its territory.[28] *Investment protection*, on the other hand, 'is concerned with the safeguarding of foreign investments against interference by the host State … once the investor has sunk in its resources',[29] that is, after an investment has been admitted by the host State.

This distinct focus of the IFD Agreement, when compared to traditional BITs, is evident in its content.[30] While this brief contribution does not aim to provide a detailed analysis of the IFD Agreement's provisions,[31] a quick overview is warranted.

The IFD Agreement applies to foreign direct investments (FDIs) across all economic sectors (Articles 2(1), 3(a) and 3(b)),[32] and explicitly excludes provisions on market access, investment protection, and ISDS (Article 2(1)), as well as on government procurement and subsidies or grants of a party, which under that party's laws and regulations are not available to an investor of another Member (Article 2(5)).

The Agreement contains a number of provisions designed to insulate it from existing IIAs. Article 2(2) states that the IFD Agreement cannot be construed as to create new or modify existing commitments relating to market access, nor to create new or modify existing rules on the protection of investments or ISDS.[33] Article 4, another 'firewall provision',[34] further 'ring-fences' the scope of the Agreement by making clear that it cannot be used to interpret or apply any provision of an IIA, nor can it serve as the legal basis for an investment claim under investor-State arbitration procedures.[35] Conversely, IIAs are not to be used in the interpretation or application of the IFD Agreement (Article 4(1)).

Following a 'normative' rather than a 'functional' approach,[36] the key pillars of the IFD Agreement include: commitments on transparency (Section II); streamlining and speeding up administrative procedures (Section III); establishment of focal points and promotion of regulatory coherence and cross-border cooperation (Section IV); special and differential treatment for developing and least-developed countries (Section V); provisions on international cooperation, information exchange, and sharing of best practices (Section VII); and commitments on sustainable

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[28] Jonathan Bonnitcha, 'Investment Wars: Contestation and Confusion in Debate about Investment Liberalization' (2019) 22 *Journal of International Economic Law* 629, 630, quoted in Paine (n 26) 5.

[29] Christoph Schreuer, 'Investments, International Protection' in Anne Peters (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2013) para 1.

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

[31] For such analysis, see Rodrigo Polanco, 'Investment Facilitation Provisions in International Investment Agreements and the Multilateral Framework on Investment Facilitation for Development' in Axel Berger and Manjiao Chi (eds), *The Making of an International Investment Facilitation Framework: Legal, Political and Economics Perspectives* (Cambridge University Press 2025) 46, 72-80.

[32] Thus, 'any government measure that directly relates to the FDI activity, spanning across its life cycle, of a foreign investor would need to be consistent with the rules set out in the agreement', Rashmi Jose, *Investment Facilitation for Development Agreement: A Reader's Guide* (International Institute for Sustainable Development 2024) 3.

[33] Article 2(2) of the IFD Agreement.

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

[35] Even though 'a WTO agreement cannot necessarily impose interpretive obligations on panels or tribunals constituted under IIAs and, as such, the IFDA has no real control over how such a panel or tribunal may interpret any overlap between these agreements and the IFDA', Jose (n 32) 3-4.

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

investment (Section VI).[37] Within the latter category, participating WTO Members have agreed to encourage investors and enterprises to adopt responsible business conduct principles and standards (Article 37), and to take measures to combat corruption (Article 38). As will be discussed later, however, this section on sustainability remains modest,[38] especially when compared to the EU-Angola Sustainable Investment Facilitation Agreement.

The only standard typically found in traditional IIAs that appears in the IFD Agreement is the Most-Favoured-Nation (MFN) treatment. In particular, Article 5(1) states that each party 'shall accord to investors of another Member and their investments treatment no less favourable than that it accords, in like circumstances, to investors of any other [WTO] Member and their investments, in applying the provisions set out in th[e] Agreement in its territory.' The function of this Article is to ensure non-discrimination among the investors of different WTO Members and their investments in the territory of the parties to the Agreement.[39] As has been observed, this standard of protection is 'realistic' insofar as 'implementation of investment facilitation provisions, which are mostly procedural improvements, can only be applied generally, making it difficult to exclude non-participants from benefits.'[40] Article 5(2)(a)-(b) clarifies that Article 5(1) shall not be construed as requiring a party to extend to investors of another Member or their investments the advantage of any treatment resulting from separate IIAs or investment-related chapters or any other relevant provision in PTAs. Letter (c) extends the carve-out to any measure providing for recognition, including the recognition of the standards or criteria for authorization, licensing or certification of a natural person or an enterprise to carry out an economic activity, or the recognition of prudential measures as referred to in paragraph 3 of the Annex on Financial Services of the GATS. Taken together, Articles 5(1) and 5(2) mean that 'a Party to [the IFD A]greement must treat investors of IFDA Parties equally when implementing the obligations of this agreement, but they can continue to provide additional benefits under other investment and trade agreements to Parties to those other agreements.'[41] Finally, Article 5(3) states 'for greater certainty' that provisions of any other international agreement entered into by a party do not in themselves constitute 'treatment' as referred to in Article 5(1) and thus cannot be taken into account when assessing a breach of the Agreement. This clause seems intended to prevent the importation of standards of protection from other treaties, insofar as their existence in another IIA could be seen as a form of 'treatment.'[42]

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[37] For an in-depth analysis, see Jose (n 32) 6-30.

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

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

[40] Jose (n 32) 4.

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

[42] With reference to an almost identical provision contained in the EU-Angola SIFA, see Nathalie M-P Potin, 'EU-Angola Sustainable Investment Facilitation Agreement: Key Features, Benefits, and Impact' (2024) 9 *European Investment Law and Arbitration Review* 245, 254. See also, in the same vein, Rebekka Monico, 'The Role of the EU-Angola Sustainable

The incorporation of the IFD Agreement into the WTO's legal architecture is currently formally opposed – and thus effectively blocked –[43] by some Members, most notably India, Namibia and South Africa. The objections raised by these countries are based mainly on two grounds. First, they argue that investment facilitation lies outside the WTO's core mandate, which is trade-focused.[44] Moreover, the Doha Mandate no longer includes investment as a negotiating item.[45] Second, they criticise the JSI format itself, arguing that it poses systemic risks for the WTO. According to this view, JSIs undermine the consensus-based and inclusive nature of the WTO rule-making process, marginalising the priorities of developing countries and allowing developed economies to advance their own agendas outside the multilateral framework.[46] These criticisms are made despite a growing number of developing countries have in fact joined the JSIs in recent years – particularly the investment facilitation initiative – driven by economic considerations, direct pressure from a key trading or investment partner, and the fear of being left out of a potentially impactful process.[47] Meanwhile, more powerful developing countries, such as India and South Africa, retain strong negotiating capacity regardless of their formal participation. This explains why they can pursue high-stakes negotiating tactics.[48]

3. The EU-Angola SIFA

While the establishment of a multilateral system for investment facilitation remains blocked at the WTO, significant developments have taken place in regional and bilateral settings.[49] Notable examples of the first kind include: the 2017 *Intra-MERCOSUR Protocol on Investment Cooperation and Facilitation*,[50] the (non-legally binding) 2019 *ASEAN Investment Facilitation Framework*,[51] and the 2023 *Protocol on Investment to the African Continental Free Trade Area*.[52] At the bilateral level, apart from efforts by Canada, China, the Netherlands, and particularly Brazil, through its model

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Investment Facilitation Agreement in the International Investment Law Landscape' (2025) 79 *Rivista della cooperazione giuridica internazionale* 77, 85 and Nicolò Andreotti, 'Is EU Investment Policy Fit for Promoting Sustainable Development? Insights from the EU-Angola SIFA' (2024) 9 *European Papers* 229, 239.

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

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

[45] Ibid. See also above.

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

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

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

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

[50] *Protocolo de Cooperación y Facilitación de Inversiones Intra-MERCOSUR* (adopted 7 April 2017, entered into force 30 July 2019) Doc MERCOSUR/CMC/DEC Nº 03/17.

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

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

Agreement on Cooperation and Facilitation of Investments (ACFI),[53] the *EU–Angola Sustainable Investment Facilitation Agreement* (SIFA),[54] stands out.

Over the past decade, the EU has successfully established itself as a powerful and influential global actor in shaping international investment frameworks.[55] The EU-Angola SIFA can be seen as an example of this trajectory. In particular, the Agreement is noteworthy for several reasons: it is the first IIA concluded by the EU with an African country,[56] and the first explicitly framed as a 'sustainable investment facilitation Agreement.'[57] It could set a precedent for future agreements, particularly in Africa,[58] aligning with the European Commission's 2021 *Trade Policy Review*, which emphasises the EU's role as Africa's largest trading partner and calls for deeper engagement and closer economic integration between the continents.[59] The EU-Angola SIFA also fits within the EU's broader strategy to promote sustainable investment, diversify value chains, and advance trade in sustainable goods, particularly in support of the green and energy transition.[60] It represents a concrete example of how the EU's common commercial policy can be leveraged to facilitate responsible investment, particularly in the natural resources sector, in a manner consistent with the strategic objectives of the 2024 *Critical Raw Materials Act*.[61]

While FDIs are essential to mobilise the financial resources needed to meet sustainability goals, international investment rules have sometimes been criticised for limiting public policy space through rigid neoliberal disciplines that prioritise the interests of foreign investors.[62] Be that as it may, similar to the IFD Agreement, the SIFA provides for a 'firewall clause' clarifying that it does not create or modify commitments on investment liberalisation, investment protection, or ISDS (Article 2(3)). Moreover, Article 55 expressly bars investors from invoking the Agreement before the domestic courts of the Parties.[63] By contrast, the EU-Angola SIFA proposes a facilitation framework explicitly

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[53] As has been pointed out, Brazil's ACFI 'have … innovated by emphasizing and solidifying the concept of "facilitation" as the driving force behind investment regulation', Michelle R. Sanchez-Badin and Manu Misra, 'Domestic Governance and Treaty Practice of Brazil's Investment Cooperation and Facilitation Agreements' in Axel Berger and Manjiao Chi (eds), *The Making of an International Investment Facilitation Framework: Legal, Political and Economics Perspectives* (Cambridge University Press 2025) 291, 292. For an overview on Brazil's ACFI practice, see ibid, 293-304.

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

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

[56] Monico (n 42) 80.

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

[58] See Iveta Alexovičová, 'European Union's Approach to Reforming International Investment Law' (2024) 21 *Indonesian Journal of International Law* 65, 91.

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

[60] For instance, European Commission, *Trade for All: Towards a more responsible trade and investment policy*, COM(2015) 497 final, 14 October 2015. For an analysis, se Andreotti (n 42) 238.

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

[62] Andreotti (n 42) 236.

[63] See Monico (n 42) 87.

oriented toward sustainable development and, therefore, a more balanced approach to investment governance.[64]

Following Opinion 2/15 on the EU-Singapore Free Trade Agreement of the Court of Justice of the European Union, it is now settled that provisions on non-direct investment and ISDS, falling within the mixed competences, require ratification by both the EU and its Member States.[65] By focusing exclusively on investment facilitation, the EU-Angola SIFA allows the EU to bypass these hurdles and operate entirely within the scope of its exclusive competence under the EU common commercial policy.[66] This facilitates faster implementation and avoids the political risks often associated with investment protection/liberalisation policies.

Like the WTO IFD Agreement, but differently from other investment facilitation instruments,[67] the EU-Angola SIFA contains only one 'classic' investment standard: the MFN clause. In particular, Article 4(1)) states that 'each Party shall accord immediately and unconditionally to investors of the other Party and their investments treatment no less favourable than that it accords, in like situations, to investors of any other country and their investments, with respect to the application of this Agreement in its territory.' The formulation closely mirrors that of Article 5(1) of the IFD Agreement, and the observations made above in relation to that provision are equally applicable here. The same goes for Article 4(2)(a), establishing that the MFN clause does not require either Party to extend benefits from recognition measures given to third countries, including the recognition of the standards or criteria for the authorisation, licencing, or certification of a natural person or enterprise to carry out an economic activity, or the recognition of prudential measures as referred to in paragraph 3 of the Annex on Financial Services to the GATS. Article 4(2)(b) also excludes coverage of agreements that remove substantially all barriers to investment or require legal harmonisation, an exclusion which was presumably meant to carve out the EU-United Kingdom *Trade and Cooperation Agreement*.[68] Finally, analogously to Article 5(3) of the IFD Agreement, Article 4(3) specifies 'for greater certainty' that provisions included in other international agreements concluded by a party do not in themselves constitute 'treatment' as referred to in Article 4(1) and thus cannot be taken into account when assessing a breach of the Agreement.[69]

Following the WTO IFD Agreement's 'normative' approach, the EU-Angola SIFA introduces a set of procedural obligations aimed at enhancing transparency, predictability, and regulatory coherence.[70] These include: reasonable, objective, and impartial administration of general measures (Article 6); publication and public availability of relevant laws and regulations (Article 7); opportunities for stakeholder consultation (Articles 7-8); creation of public websites with legal information and contact points (Article 9); fair, impartial, and transparent authorisation procedures for investment (Articles 19 and 21); establishment of investment facilitation focal points to support and assist investors (Article 22).

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[64] See Preamble and Article 1 of the EU-Angola SIFA.
[65] Opinion 2/15 (n 5) para 305.
[66] See Articles 3(1)(e), 206 and 207(1) of the consolidated version of *Treaty on the Functioning of the European Union* (adopted as part of the Treaty of Libson 13 December 2007, entered into force 1 December 2009) OJ C202/47.
[67] Encompassing, for example, provisions relating to access to justice, due process, non-discrimination, and direct expropriation, see Monico (n 42) 84.
[68] In this sense, Filipe Vaz Pinto and Joana Granadeiro, 'The Sustainable Investment Facilitation Agreement Between the EU and Angola: A New Model for Investment Agreements?' in *Kluwer Arbitration Blog* (23 September 2024), available at https://arbitrationblog.kluwerarbitration.com/2024/09/23/the-sustainable-investment-facilitation-agreement-between-the-eu-and-angola-a-new-model-for-investment-agreements/.
[69] See above, Section 2.
[70] For an in-depth analysis, see Potin (n 42) 245 ff.

Unlike the IFD Agreement – which would fall under the WTO's dispute resolution framework (Article 44) – the EU-Angola SIFA establishes its own 'multi-tier dispute avoidance/resolution system'[71] (Chapter VI). Dispute resolution includes initial consultations in good faith (Articles 36-37) and *ad hoc* inter-State arbitration (Article 38). The parties' consent to inter-State arbitration needs to be given separately for each specific dispute.[72] However, the text contains no reference to arbitration institutions or rules, which could raise practical challenges (e.g., if the arbitrators fail to agree on a chairperson, a scenario not addressed by Article 38).[73] In case one of the parties rejects the request for arbitration or does not comply with the award, the other party may adopt proportionate measures within the scope of the Agreement that are proportionate to the failure to fulfil the specific obligations (Article 38(4)).

Both the IFD Agreement and the EU-Angola SIFA express the goal of facilitating investment in support of sustainable development,[74] but the latter goes further than the former in this regard. The purpose of promoting sustainable development and its direct linkage with (the facilitation of) foreign investments is emphasised both in the Preamble and the provision concerning the objective of the SIFA.[75] Article 28(1), which opens the chapter on investment and sustainable development, highlights the three-dimensional nature of sustainable development and states that:

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

Article 29(1) further strengthens the connection between the parties' right to regulate, already recalled under Article 2(2),[76] and the pursuit of sustainable development.[77] It recognises each party's right to define its own sustainable development policies and priorities, to establish domestic environmental and labour protection levels as it deems appropriate, and to adopt or amend relevant laws and policies accordingly. The parties' right to regulate is reinforced through Article 47,

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[71] Monico (n 42) 86.
[72] See Articles 37(4) and 38(4) of the EU-Angola SIFA.
[73] Vaz Pinto and Granadeiro (n 68).
[74] Article 1 of the IFD Agreement states that: 'The purpose of this Agreement is to improve the transparency of measures, streamline administrative procedures, adopt other investment facilitation measures and promote international cooperation, as a means of facilitating the flow of foreign direct investment between the Parties, particularly to developing and least-developed country Parties, with the aim of fostering sustainable development'). See also the Preamble and Section VI.
[75] See Preamble, Recitals 1 and 5 and Article 1 ('This Agreement aims at facilitating the attraction, expansion and retention of foreign direct investment between the Parties for the purposes of economic diversification and sustainable development').
[76] 'The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment, including climate change, public morals, social protection, consumer protection, privacy and data protection, and the promotion and protection of cultural diversity.'
[77] For an analysis of the right to regulate in the EU-Angola SIFA, see Monico (n 42) 82-83 (concluding that 'by combining the flexibility to regulate in the public interest of the Parties … with their commitment to facilitate investment in a manner consistent with the economic, social and environmental dimension of sustainable development … the EU-Angola SIFA is significantly beneficial for host States and allows them to implement the SDG of the UN 2030 Agenda'). See also Luís Heleno Terrinha, 'The Right to Regulate in the EU-Angola Sustainable Investment Agreement: What Lessons for Investment Protection?' in *Kluwer Arbitration Blog* (1 January 2025), available at https://legalblogs.wolterskluwer.com/arbitration-blog/the-right-to-regulate-in-the-eu-angola-sustainable-investment-agreement-what-lessons-for-investment-protection/.

establishing a public policy exception.[78] It is perhaps worth noting here that in the IFD Agreement this right is referenced only in the preamble and not in such emphatic terms.[79]

Subsequent paragraphs require that the parties shall not weaken, reduce, waive, or derogate from their environmental and labour legislation to encourage investment, nor shall they fail to effectively enforce such laws, which must conform to internationally recognised standards.[80] However, Article 29(6) specifies that environmental and labour laws must not be used as a means of arbitrary or unjustifiable discrimination or a disguised restriction on international investment.[81] Finally, in addition to recognising the importance of corporate social responsibility**,** responsible business conduct,[82] and gender equality[83] as means of contributing to sustainable development, the EU-Angola SIFA provides that:

> In accordance with their commitment to enhance the contribution of investment to the goal of sustainable development, the Parties shall facilitate and encourage investment in sustainable production and consumption, in environmental goods and services, and investment of relevance for climate change mitigation and adaptation.[84]

Numerous other international instruments concerning labour protection, environmental safeguarding, and the fight against climate change are expressly invoked to underscore the importance of these commitments in facilitating investment in a manner consistent with environmental, social, and development objectives.[85] Overall, the Agreement has been described as 'embod[ying] the pillars of ESG in seeking to "promote sustainable growth"' within the parties thereto.[86]

4. Conclusions

For many years, States have not extensively utilised IIAs to address investment facilitation. A 2018 survey of nearly 3,000 IIAs revealed that only 35 included explicit provisions on investment facilitation.[87] In fact, investment facilitation has been identified by scholars as a 'systemic gap' in national and international investment policies.[88] However, in recent years, both States and international organisations have shown a growing interest in 'closing the gap' and developing deeper

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

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

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

[81] And see Article 45, fn. 46 of the IFD Agreement.

[82] Article 34 of the EU-Angola SIFA.

[83] Article 35 of the EU-Angola SIFA.

[84] Article 33(1) of the EU-Angola SIFA.

[85] See Articles 30, 31 and 32 of the EU-Angola SIFA. For an analysis, see Monico (n 42) 88-90.

[86] Mélida Hodgson et al, 'The Dawn of a New Era: Advancing ESG Obligations in Arbitration through Plurilateralism' (2025) 26 *Journal of World Investment & Trade* 301, 218.

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

[88] Pitschas (n 17) 229.

and more comprehensive legal norms in this area.[89] Indeed, in a 2023 survey, UNCTAD noted that 'investment facilitation features in recent international investment governance instruments are more common, more diverse and are increasing in depth and specificity, with examples existing across all continents.'[90]

Although the IFD Agreement has not (yet) been incorporated into Annex 4 of the WTO Agreement, it clearly signals a broader trend that has also emerged at the regional and bilateral levels: a shift in the focus of international investment law from *liberalisation and protection* to facilitation. This trend appears to serve a twofold purpose. On the one hand, it likely reflects an attempt to circumvent the current impasse on ISDS reform and alternatives to ISDS.[91] As an example, the Investment Court System (ICS) – proposed with great ambition by the European Commission and incorporated into agreements like the EU-Canada Comprehensive Trade and Economic Agreement,[92] the EU-Singapore Investment Protection Agreement,[93] and the EU-Vietnam Investment Protection Agreement[94] – has never been fully implemented due to the lack of ratification by national parliaments.[95] On the other hand, the shift toward facilitation represents an effort to more explicitly align the flow of FDIs with the objective of sustainable development.[96] Indeed, as has been noted, 'facilitating cross-border investment is considered crucial for increasing FDI flows, in particular to developing countries and LDCs, as a precondition for achieving the SDGs.'[97] Overall, this marks a movement away from a decentralised, investor-driven governance model toward one that is more public, centralized, and State-oriented in its approach to international investment governance.[98]

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

For now, the apparent rise of investment facilitation – not merely as a complementary mechanism but increasingly as a potential alternative to traditional liberalisation and protection – deserves closer academic scrutiny, as it is likely that future challenges in investment facilitation will not fit neatly

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[89] Polanco (n 31) 80.
[90] UNCTAD, 'Investment Facilitation in International Investment Agreements: Trends and Policy Options', *Issue Note No 3* (September 2023), 2.
[91] See Monico (n 42) 87 and Andreotti (n 42) 243.
[92] *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part* **(**adopted 30 October 2016, provisionally entered into force 21 September 2017) *OJ L 11/23.*
[93] *Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part* (adopted 30 June 2019, not yet in force) OJ L186/3.
[94] *Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part* (adopted 19 October 2018, not yet in force) OJ L267/3.
[95] The EU's pursuit of investment facilitation agreements does not necessarily signify an implicit rejection of the ICS model *tout court* as the European Commission's continued support for the establishment of a Multilateral Investment Court (MIC) within the framework of the UNCITRAL reform process also indicates. On this last point, see Ivana Damjanovic, 'The EU and UNCITRAL: A Multilateral Investment Court' in Id, *The European Union and International Investment Law Reform: Between Aspirations and Reality* (Cambridge University Press 2023) 349. And see Sacerdoti and Moran (n 3) 242-244.
[96] Potin (n 42) 257-259.
[97] Pitschas (n 17) 229.
[98] See Polanco Lazo (n 87) 15.

within the existing conceptual categories mainly drawn from the investment protection vocabulary that have dominated investment law scholarship in recent decades.[99]

[99] Paine (n 26) 3.

Women's Economic Empowerment in the WTO New Joint Initiatives

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Keywords: Women's Economic Empowerment – SDG n. 5 – Women entrepreneurship – Joint Initiative on Investment Facilitation for Development – Joint Initiative on Micro, small and medium-sized enterprises – Joint Initiative on Electronic Commerce – Joint Initiative on Services Domestic Regulation.

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1. Introduction

Amidst the current geopolitical and economic crisis, which emphasized the urgent demand to reform the WTO,[1] women are facing a momentum and playing an active and transformative role within the Organization. Indeed, the landscape is very optimistic, as for the first time in history, the Director General of the WTO,[2] the Executive Director of the International Trade Center[3] and the Secretary General at the United Nations Conference on Trade and Development (UNCTAD)[4] are all women, and together with State's representatives and non-State actors they are successfully advancing in a soft but empowered way policies to reshape international trade, lifting the barriers that have impeded women to participate and reap the economic prosperity provided by free trade.

The inclusion of women's empowerment in the WTO reform has been done in an informal way, mainly due to the activist role of the Secretariat in collaboration with the ITC, the UNCTAD and NGOs.[5] The main document that has led to the inclusion of women's economic empowerment in the

[1] Still in 2000, International Economic Law experts already observed the need to adopt WTO rules for the challenges of the new Millenium. In that occasion, John J. Jackson wisely observed that "Perhaps almost every human institution has to face the task of how to evolve and change in the face of conditions and circumstances not originally considered when the institution was set up. This is most certainly true of the original GATT and now of the WTO. Jackson J. John. Dispute Settlement and the WTO: Emerging Problems. In *From GATT to the WTO: The Multilateral Trading System in the New Millennium*. Kluwer law international, World trade organization, 2000, p.74.

[2] Mrs. Ngozi Okonjo-Iweala (Nigeria) was appointed as the Director General of the WTO in 2021. In 2024 she was reappointed by the General Council for a new mandate that starts on September 2025.

[3] Mrs. Mrs. Pamela Coke-Hamilton (Jamaica), Executive Director of the International Trade Center (2020).

[4] Mrs. Rebeca Grynspan (Costa Rica) Secretary General at the United Nations Conference on Trade and Development (2021).

[5] Anoush der Boghossian, 'Gender-Responsive WTO: Making Trade Rules and Policies Work for Women, in *Trade Policy and Gender Equality*, ed. by Amrita Bahri, Dorotea López, and Jan Remy (Cambridge University Press, 2023), p. 31, doi:10.1017/9781009363716.004.

WTO is the Declaration on Women's Economic Empowerment[6] presented at the 11th WTO Ministerial Conference in Buenos Aires. From then on, concern with women's economic empowerment has been gradually acknowledged and acquiesced by WTO Members, as the last Ministerial Declaration reveals, spanning diverse fronts in the Organization and resonating with other plurilateral initiatives. In fact, with the increasing difficulty to reach consensus in the Organization, plurilateral initiatives have been the greater alternative to negotiate WTO *plus* and WTO *extra* rules.[7] Among those plurilateral tools there are the Joint Initiative on Investment Facilitation for Development – from which was drafted the Investment Facilitation and Development (IFD) Agreement[8] –, the Joint Initiative on Micro, Small and Medium-sized Enterprises (MSMEs), from which an Informal Working Group for MSMEs was established; the Joint Initiative on Electronic-Commerce, from which a stabilized text on the first ever global agreement on e-commerce was reached in July 2024; and the Joint Initiative on Services Domestic Regulation (SDR), which concluded a *Reference Paper* on December 2021 with additional commitments to the GATS, which has been incorporated in the GATS schedule of commitments of 53 WTO Members (including the EU)[9] in February 2024.[10] This last initiative is of considerable importance not only because it has been successfully concluded, but because for a very first time in the WTO legal framework it included explicit provisions to impair discrimination related to women,[11] in accordance with the provisions of Art. 4 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[12] In light of this brief introduction, the paper is divided into two parts. The first one provides an overview of how the Women's Economic Empowerment Declaration has been introduced to the WTO, the main protagonists involved, and the initiatives that have been implemented therefrom. In the second part,

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[6] WTO Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017. [hereinafter Women's Economic Empowerment Declaration].

[7] "[WTO plus rules] are meant to include obligations relating to policy areas that are already subject to some form of commitment in the WTO agreements. (…) A WTO-X [extra] designation is, on the other hand, meant to capture an obligation in an area that is 'qualitatively new', relating to a policy instrument that has not previously been regulated by the WTO. In Horn, Henrik, et al. "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements." *World Economy*, vol. 33, no. 11, 2010, pp. 1751. On WTO plus and extra rules related to gender, see Der Boghossian, Anoush, et. al. Gender Equality in Trade Agreements: The Old, the New, and the Future. In: Claussen K, Elsig M, Polanco R, eds. *The Concept Design of a Twenty-First Century Preferential Trade Agreement: Trends and Future Innovations*. Cambridge University Press; 2025, p. 348-350.

[8] At the WTO's 13th Ministerial Conference (MC13) in Abu Dhabi in February 2024, the finalization of the IFD was officialized and the Agreement made available to the public. Available at: https://www.wto.org/english/tratop_e/invfac_public_e/2024_09_24_ifd_factsheet_english.pdf

[9] According to Art. 3 (3) of the Treaty on the Functioning of the European Union (TFEU), the EU has exclusive competence in the Common Commercial Policy (CCP), which comprises tariff and trade agreements relating to trade in goods and services, to commercial aspects of intellectual property and to foreign direct investments. Hence, the disciplines of the SDR were added to the EU Schedule of Specific Commitments (GATS/SC/157/Suppl.1 27 February 2024). Although Croatia, Bulgaria and Romania formally have separated GATS schedule of commitments, because they joined the WTO and negotiated commitments before their accession to the EU, their schedules were effectively superseded to include EU's overall commitments, comprising the new disciplines on SDR. On the CCP, see Hahn, Michael J., and Guillaume Van der Loo. *Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon*, 2021.

[10] Services Domestic Regulation Good regulatory practice for services markets enters WTO rulebook. Available at: https://www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm

[11] According to the SDR, when a member adopts or maintains measures relating to the authorization for the supply of a service, including a financial one, it shall ensure that "such measures do not discriminate between men and women", taking into consideration that "differential treatment that is reasonable and objective, and aims to achieve a legitimate purpose, and adoption by Members of temporary special measures aimed at accelerating de facto equality between men and women, shall not be considered discrimination for the purposes of this provision."

[12] *Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

the paper gives an overview of the WTO plurilateral initiatives undergoing and their relation to the women's economic empowerment agenda in international trade. Special attention will be devoted to the Services Domestic Regulation (SDR). The paper concludes assessing that women's economic empowerment within the WTO reform process is undergoing in an informal and soft way.

2. The WTO Women's Economic Empowerment Declaration and its following initiatives

The awakening of the WTO to women's economic empowerment started almost ten years ago, after the adoption of the UN 2030 Agenda[13] which devoted goal number 5 to "achieve gender equality and empower all women and girls through the active protagonism of the WTO Secretariat together with non-State actors committed to promoting gender equality.[14] It was in 2016, during the mandate of the Brazilian Director General Mr. Roberto Azevêdo, who joined the network *International Gender Champions*,[15] that the WTO Secretariat started its journey for the inclusion of women's economic empowerment into the WTO agenda.[16] By June 2017 the Secretariat published its first *Gender Aware Trade Policy*,[17] and Director General Mr. Roberto Azevêdo appointed the first WTO *Trade and Gender Focal Point* to lead this work on trade and gender in the WTO, launching the first WTO Trade and Gender Action Plan 2017–2019,[18] now in its second period (2021-2026).[19]

It's noteworthy to highlight that the first *Gender Action Plan* finishes with a "long-term objective" suggesting WTO Members to give the Secretariat a mandate to work on gender issues, using the NGO model (Ministerial Declaration followed by a General Council Decision)[20]. This formal mandate has not been done as expected, but "in an unusual way: from total informality to institutionalization and driven by one NGO."[21] It was in December 2017 that the Declaration on

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[13] United Nations General Assembly Resolution of 25 September 2015, *Transforming Our World: the 2030 Agenda for Sustainable Development*, A/RES/70/1.

[14] Anoush der Boghossian, 'Gender-Responsive WTO: Making Trade Rules and Policies Work for Women*', in *Trade Policy and Gender Equality*, ed. by Amrita Bahri, Dorotea López, and Jan Remy (Cambridge University Press, 2023), pp. 21–43 (p. 31), doi:10.1017/9781009363716.004.

[15] The initiative created in 2015 aims to bring together decision-makers is opened to heads of organizations, permanent missions, or institutions based in one of our six hubs (Geneva, New York, Vienna, Nairobi, The Hague or Paris) **"**to break down gender barriers and make gender equality a working reality in their spheres of influence." Available at: https://genderchampions.com/about

[16] By June 2017 the Secretariat published its first *Gender Aware Trade Policy*, acknowledging the benefits of integrating women into the international trading system and the main barriers women face. As the former WTO DG Roberto Azevedo stated in that occasion: "i*nvesting in women – and empowering women to invest in themselves – is a risk-free venture. What society gives them, they give back ten times over."*

[17] WTO Gender Aware Trade Policy, 2017. Available at https://www.wto.org/english/news_e/news17_e/dgra_21jun17_e.pdf At that opportunity he stated that "i*nvesting in women – and empowering women to invest in themselves – is a risk-free venture. What society gives them, they give back ten times over."*

[18] Text of the WTO Action Plan on Trade and Gender 2017-2020, available at: https://www.wto.org/english/tratop_e/womenandtrade_e/action_plan_17-19.pdf

[19] The text of the WTO Action Plan on Trade and Gender 2021-2026 is available at: https://www.wto.org/english/tratop_e/womenandtrade_e/action_plan_21-26.pdf

[20] In 1996, a General Council decision expressly gave a mandate to the Secretariat work with NGOs, stating that "The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO." WT/L/162 23 July, 1996, para. 4.

[21] Anoush der Boghossian, 'Gender-Responsive WTO: Making Trade Rules and Policies Work for Women*', in *Trade Policy and Gender Equality*, ed. by Amrita Bahri, Dorotea López, and Jan Remy. Cambridge University Press, 2023, p. 31.

Women's Economic Empowerment (WEE)[22], which was not drafted by WTO Members, but by participants of the International Gender Champions Trade Impact Group[23], was presented at the 11th WTO Ministerial Conference in Buenos Aires, and was endorsed by 117 WTO.

By endorsing the declaration, WTO Members agreed to collaborate on making trade and development policies "more gender responsive", i.e., by identifying and addressing the different needs, barriers and interests faced by men and women when trading, having agreed to work together in the WTO to remove barriers for women's economic empowerment and increase women participation in trade. Among the non-exhaustive list within this collaboration, the Declaration includes the share of experiences, information and best practices on policies and programs for women's economic empowerment, as well as the sharing of methods and procedures for the collection of gender-disaggregated data. It also emphasizes the need to analyze, design and implement 'gender-responsive' trade policies under the Aid for Trade initiative – the WTO development policy devoted to developing and least developed countries[24]. The Declaration is currently endorsed by 127 WTO Members, more than two-thirds of WTO Members[25], and has informally empowered the Secretariat to advance initiatives and policies towards women's economic empowerment.

Indeed, although the Declaration is a soft-law instrument with soft language based on a collaborative approach, it has promoted very fruitful outcomes. From then on, initiatives strongly guided and supported by the WTO Secretariat, which is the WTO institution with higher representation of women (55,6% considering all staff by December 2023), have popped up and joined by WTO Members on a voluntary basis. In September 2020 a group of WTO Members, co-chaired by Cabo Verde, El Salvador and the United Kingdom established the Informal Working Group (IWG) on Trade and Gender – today composed by 130 WTO Members[26] – with the objective to "institutionalize trade and gender related issues"[27] in the WTO based on four pillars which are also referred to in the WEE Declaration: review and discussion of gender-related analytical work produced by the WTO Secretariat; the sharing of best-practices; identification of WTO rules through a "gender-lens"; enhancement and the integration of gender in the Aid for Trade initiative. The topic of Trade and gender has also been voluntarily included in the Trade Policy Reviews of WTO Members[28].

In fact, the main actor in developing practical instruments to promote women's economic empowerment in the WTO has been from the very beginning the Secretariat, demonstrating that even though it is a WTO institution formally deprived of policy-making powers, what has been criticized by some feminist scholars[29], it has been in practice a major actor in bringing and advancing the issue

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[22] WTO Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017. [hereinafter WTO Buenos Aires Declaration].

[23] "Led by the Executive Director of the International Trade Centre, Arancha González, the Permanent Representative of Sierra Leone, Yvette Stevens, and the Permanent Representatives of Iceland, Högni Kristjánsson and Harald Aspelund, the group worked for a year on drafting and advocating the first ever Declaration on Trade and Women's Economic Empowerment." Available at: https://genderchampions.com/impact/trade

[24] The trade-related development initiative was launched by WTO Members in the Ministerial Conference of Hong Kong in 2005 and operationalized in 2006 by the Aid for Trade Task Force composed by WTO Members. It is devoted to support developing countries, including leas developed ones (LDCs) to overcome internal barriers, specially related to trade capacity and infrastructure, that impede them to participate in international trade. More information on the Initiative at: https://www.wto.org/english//tratop_e/devel_e/a4t_e/aid4trade_e.htm

[25] The WTO is currently formed by 166 Members.

[26] Informal Working Group on Trade and Gender. Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/iwg_trade_gender_e.htm

[27] Op. cit, der Boghossian, 'Gender-Responsive WTO', p. 22.

[28] As it had been suggested in the first WTO Action Plan on Trade and Gender 2017-2020.

[29] Judit Fabian, 'Global Economic Governance and Women: Why Is the WTO a Difficult Case for Women's Representation?', in *Trade Policy and Gender Equality*, ed. by Amrita Bahri, Dorotea López, and Jan Yves Remy, 1st edn (Cambridge University Press, 2023), pp. 65–94, doi:10.1017/9781009363716.006. See also Elsig, Manfred, and

of women's economic empowerment at the WTO. Indeed, with endorsement of the WEE Declaration by 127 WTO Members, the Secretariat took for itself a greater margin of maneuver to advance instruments and initiatives that advance women's economic empowerment within the organization, since the WEE Declaration states that one of the ways its signatories agreed to make trade more gender-responsiveness is by "working together in the WTO." The activism of the Secretariat in the WTO – not specifically regarding the topic on women's economic empowerment, but concerning activities related to the Council for Trade in Goods – has been recently criticized by the United States in a communication circulated on 25 March 2025[30], in which the US stated that "the Secretariat is moving away from its Member-driven purposes, and is attempting to re-invent itself into a resource to be provided to the public, regardless of Members' views or the impact that such activities may be having on Members' interests or budget contributions."[31] The Communication concludes proposing Members to "create formal guidance and procedures" to the Secretariat. In the other hand, on its *concept paper* on the WTO Reform[32], the EU suggests to "put forward a proposal for a Ministerial Decision which strengthens the role of the WTO Secretariat in support of various negotiating processes as well as in the implementation and monitoring functions." However, the question of whether the Secretariat could have been acting *ultra vires* in advancing women's economic empowerment initiatives in the Organization has not been specifically raised.

With the 'informal mandate' given by the WEE Declaration, the Secretariat established a specific department – the *Trade and Gender Office* – devoted to carry out the analysis, studies and initiatives on women and trade, creating a specific data base to track gender-related provisions in RTAs[33], and a research data base to share studies on trade and gender[34]. Furthermore, the Secretariat devoted a platform to gathering experts on the matter, the *WTO Gender Research Hub*, which in 2022 organized the first ever *World Trade Congress on Trade and Gender*, which was scheduled to have it second

Debra P. Steger. "WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?" *Redesigning the World Trade Organization for the Twenty-First Century*, Wilfrid Laurier Press, 2009, pp. 67–90, doi:10.51644/9781554581740-007.

[30] Communication from the United States to the Council for Trade in Goods Regarding Systemic Concerns About the Secretariat Properly Informing and Consulting with Members Prior to Undertaking Certain Activities, G/C/W/860, 25 March 2025. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/C/W860.pdf&Open=True
In the Communication the USA asserts lists five specific categories of concerns regarding the activities undertaken by the Secretariat: "(1) not coordinating outward facing activities, such as seminars, with all relevant Committees with functional knowledge of a topic; (2) not informing Members or seeking their approval, where appropriate, via relevant Committees before drafting and issuing reports covering a specific functional area; (3) creating substantive databases, in particular for outside use, that were not requested by or previously discussed with or approved by Members; (4) Secretariat staff participating as panelists at outward facing events without clearly stating that any comments made do not represent the views of the WTO or WTO Members; and (5) a lack of transparency concerning how Secretariat activities and research not approved by Members utilize WTO budget resources that are provided by Members."

[31] Regarding budget implications, it is public that the US have not paid its contribution to the organization regarding the years of 2024 and 2025. See WTO aims to reduce staffing costs after US funding pause, by Emma Farge, 08.05.2025, Available at: https://www.reuters.com/world/europe/wto-aims-reduce-staffing-costs-after-us-funding-pause-2025-04-08/

[32] European Commission, EU concept paper on WTO reform, UFT-8, 22.10.2024. Available at: https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/42115f40-e2ba-4a49-9162-de92098f15bd/details

[33] Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/gender_responsive_trade_agreement_db_e.htm

[34] Research database on trade and gender available at: https://www.wto.org/english/tratop_e/womenandtrade_e/research_database_women_trade_e.htm

edition in June 2025[35], among other workshops and events[36]. Another relevant front is devoted to capacity-building on trade and gender for public officials of WTO Members[37]. Moreover, based on the results of the main studies on the barriers that impede women to enter into export sector, the WTO Secretariat together with the ITC launched at the WTO's 13th Ministerial Conference (MC13) in Abu Dhabi in February 2024 a programme to offer technical, financial and networking support for women MSMEs in developing countries, the *Women Exporters in the Digital Economy* (WEIDE) fund, that had as first donor the government of the United Arab Emirates (who hosted the MC 13th) and later received the financial support the FIFA World Cup Qatar 2022 Legacy Fund and the Government of Bahrain[38]. Although the programme is an initiative from the WTO Secretariat, and not WTO Members, on the website of the WTO, it is displayed as an initiative launched "by the WTO and the ITC"[39]. The economic and political support to the initiative by Arab countries reinforces the idea that women's economic empowerment at the WTO has become a goal that transcends cultural divergencies, since it does not exactly imply the objective to promote gender equality, but to empower women to trade.

Although not all WTO Members have endorsed the WEE Declaration and do not participate in the Informal Working Group (IWG) on Trade and Gender, the concern with women's economic empowerment has been gradually acknowledged on a multilateral basis, as the Declarations of the last two Ministerial Conferences demonstrate. At the MC 12th in Geneva, WTO Members devoted a paragraph to recognize "women's economic empowerment and the contribution of MSMEs to inclusive and sustainable economic growth, acknowledge their different context, challenges and capabilities in countries at different stages of development, and we take note of the WTO, UNCTAD and ITC's work on these issues." In 2024, during the 13th MC in Abu Dhabi, WTO Members also devoted a paragraph to acknowledge that "women's economic empowerment and women's participation in trade contributes to economic growth and sustainable development. We take note of WTO work, including in collaboration with other relevant international organizations, through activities such as capacity-building initiatives and sharing experience to facilitate women's participation in trade."[40] Hence, although a formal mandate has not been given to the Secretariat to advance women empowerment in the organization, the declarations of the Ministerial Conferences – which formally are not legal decisions under the Marrakesh Agreement[41] – demonstrate the acquiescence of WTO Members to the insider reform in WTO policy for the promotion of women's economic empowerment in the organization and in international trade.

It is noteworthy to emphasize that when addressing the issue, WTO Members have employed the term "women's economic empowerment", rather than term "gender" or the expression "gender equality", as these terms carry different and broader meanings. While the term 'women' is considered

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[35] Although the event was scheduled to June 2025, by 17 July 2025 there are no information about its occurrence in the WTO website. Instead, a Symposium on Trade and Women's Economic Empowerment "Growing economies through trade – empowering women" took place on 2 July. Information available at: https://www.wto.org/english/tratop_e/womenandtrade_e/women_0207202510_e/women_0207202510_e.htm

[36] In 2023 it also organized "The Youth Trade Summit on Gender", sponsored by Spain and the World Bank. Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/women_1311202309_e/women_1311202309_e.htm#:~:text=The%20Youth%20Trade%20Summit%20on,the%20field%20and%20global%20stakeholders.

[37] Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/ta_trade_and_gender_e.htm

[38] Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/weide_funding_e.htm

[39] Idem.

[40] Abu Dhabi Ministerial Declaration, 02 March 2024, WT/MIN(24)/DEC.

[41] Art. IV:1 of the Marrakesh Agreement establishes that The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, and art. VI: 2 establishes that The Ministerial Conference shall adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

under the binary men and women, in which human beings are identified by their biological sex at birth, gender "refers to socially constructed identities, attributes and roles for women and men"[42], which make possible individuals to identify themselves as belonging to the other sex or even with no-one, the so called non-binary gender, a vision that is not accepted in many countries and even criminalized in few ones[43].

Due to the non-unanimous acceptance of the term 'gender'[44] or 'gender equality'[45] – expression that also differs from 'gender equity'[46] in which the roles of women and men in society and family can be seen in a complementary, and not materially equal[47] – among all WTO Members, advancing women's economic empowerment became an easier path. Moreover, since women's economic empowerment is an important tool to promote sustainable economic development and contributes to the rise of the State's GDP, it has not suffered resistance, but rather has been generally encouraged. A clear example is the aforementioned WEIDE fund launched at the MC 13 in the United Arab Emirates (UAB) in 2024, which has on its board the representative of the UAB[48], Mr. Abdelsalam Al-Ali, and received from the UAB its first donation. Moreover, because of its more pragmatic economic nature,

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[42] Although the term gender has been included in the Beijing Declaration and Platform of Action in the Report of the Fourth World Conference on Women (1995), it was not defined in that occasion (reason why the Holy See made an statement given its interpretation for the term, kink it to biological sex: "In accepting that the word "gender" in this document is to be understood according to ordinary usage in the United Nations context, the Holy See associates itself with the common meaning of that word, in languages where it exists. The term "gender" is understood by the Holy See as grounded in biological sexual identity, male or female. Furthermore, the Platform for Action itself clearly uses the term "Both genders." The Holy See thus excludes dubious interpretations based on world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes." In Report of the Fourth World Conference on Women, Beijing, 4-15, September 1995, Sales No. E.96.IV.13. Annex I and II [hereinafter *BDPA*], p. 162. It was only in 2010 that the term "gender" was defined by the Committee of the Convention on the Elimination on all Forms of discrimination against Women [hereinafter CEDAW Committee] in its General Recommendation n. 28, in contraposition to the word sex "The term "sex" here refers to biological differences between men and women. The term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women" *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*. UN Doc. CEDAW/C/GC/28. Adopted at the 47th session, 16 December 2010, para.5

[43] According to the NGO Human Rights Watch (HRW), the countries that criminalize forms of gender expression are: Brunei, Malawi, Malaysia, Oman, Saudi Arabia, South Sudan, Tonga, United Arab Emirates. Available at: https://features.hrw.org/features/features/lgbt_laws/index.html#type-of-laws

[44] For example, Turkey, which was the first signatory of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) withdrawal from it denouncing that the use of the term gender it employs is "an attempt by the LGBT community to impose their ideas about gender on the entire society." Statement regarding Türkiye's withdrawal from the Istanbul Convention available at: https://www.iletisim.gov.tr/english/haberler/detay/statement-regarding-turkeys-withdrawal-from-the-istanbul-convention On contested cases regarding use of the term "gender" in a legal instrument see Schultz, Patricia, et. al. The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, A Commentary, Second Edition, Oxford, p. 24-28.

[45] See the definition of gender equality at the Gender Equality Glossary of the UN Women Training Centre eLearning Campus. Available at: https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=G&sortkey&sortorder=asc&fullsearch=0&page=0

[46] "Islamic States, along with the Holy See and certain other States, proposed using 'equity' instead of 'equality' in the Beijing Platform for Action." Op. Cit., Shultz Patricia, et. al., p. 32.

[47] The Committee of the Convention on the Elimination on all Forms of discrimination against Women (CEDAW), in its General Recommendation n. 28 called States parties "to use exclusively the concepts of equality of women and men or gender equality and not to use the concept of gender equity in implementing their obligations under the Convention. The latter concept is used in some jurisdictions to refer to fair treatment of women and men, according to their respective needs. This may include equal treatment, or treatment that is different but considered equivalent in terms of rights, benefits, obligations and opportunities." Op. Cit, n. 32.

[48] Board of WEIDE Fund, available at: https://www.wto.org/english/tratop_e/womenandtrade_e/weide_board_e.htm

women's economic empowerment is less likely to be perceived as a form of western "cultural imperialism"[49], because it does not directly attack cultural and religious values of non-western WTO Members that do not embrace gender equality as a fundamental principle. In fact, it was visible the shift in the terminology at the WTO website, that until 2024 used the expression "Trade and Gender" to display the initiatives under the WEE Declaration, and shifted it to "Women and Trade", confirming that while there is no consensus on the use of the terminology 'gender' among WTO Members, the economic empowerment of women seems to be positively accepted by all of them.

Regarding the participation of women at the WTO, the numbers presented by the head of the WTO Trade and Gender Office, Mrs. Anoush der Boghosian in a meeting of the IWG on Trade and Gender in July 2024 is optimistic. According to her presentation, 36% of WTO Ambassadors are female, and between 1 January 2022 and October 2023, in 10 WTO panels, out of the 30 panelists appointed, 40% were women. The presentation also highlighted that on average, 37% of the Members of the National Trade Facilitation Committees (NTFCs) established by WTO Members in implementation of the Trade Facilitation Agreement (TFA)[50] are women, and that 40% of NTFCs are chaired or co-chaired by women[51]. Furthermore, the concern to encourage the participation of women as panelists have been made by the informal Dispute Settlement Reform Process[52], that have been facilitated by Mr. Marco Molina of Guatemala. In the consolidated text of the Report presented by him there is a specific provision addressed to achieve a "gender balance" in the composition of the panels, together with other criteria, such as geographical representativeness, and a diverse range of legal backgrounds[53].

3. WTO Plurilateral Initiatives and Women's Economic Empowerment

In parallel to the presentation of the Women's Economic Empowerment Declaration during the 11th Ministerial Conference in Buenos Aires, groups of WTO Members launched on that same occasion relevant plurilateral initiatives that interact with the concerns related to the participation of women in international trade. They are the Joint Initiative on Investment Facilitation for Development – from which was drafted the Investment Facilitation and Development (IFD) Agreement[54] -; the Joint initiative on Micro, small and medium-sized Enterprises (MSMEs), establishing an Informal Working Group for MSMEs[55], sector important to women, since the main women-led and women-

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[49] Bahri, Amrita, and Daria Boklan. "Not Just Sea Turtles, Let's Protect Women Too: Invoking Public Morality Exception or Negotiating a New Gender Exception in Trade Agreements?" *European Journal of International Law* 33.1 (2022), p. 243.

[50] World Trade Organization. (2017). *Trade Facilitation Agreement*. Annex 1 of the Protocol of Amendment to insert the Trade Facilitation Agreement into the Marrakesh Agreement Establishing the World Trade Organization (WT/L/940).

[51] Presentation in pdf available at: Available at: https://www.wto.org/english/tratop_e/womenandtrade_e/250724_Item6b_adb.pdf.

[52] About the Dispute Settlement Reform Process, see the chapter written by Davide Grespan in the e-book.

[53] According to Chapter II, 'Panel Composition', of the proposed draft text "2. In order to support the maintenance of an indicative list that supports panel Members being selected with a view to ensuring a sufficiently diverse background and a wide spectrum of experience, as provided for in Article 8.2 of the DSU, Members should promote gender balance and geographic representation in making nominations to the indicative list." World Trade Organization, General Council, Special Meeting of the General Council, Report by H.E. Mr. Petter ØLBERG, Chairman of the DSB, Annex I, Consolidated Text Referred to in Mr. Molina's Report, 14 February 2024, JOB/GC/385, p. 20. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/385.pdf&Open=True.

[54] At the WTO's 13th Ministerial Conference (MC13) in Abu Dhabi in February 2024, the finalization of the IFD was officialized and the Agreement made available to the public. Available at: https://www.wto.org/english/tratop_e/invfac_public_e/2024_09_24_ifd_factsheet_english.pdf.

[55] From the Joint initiative on Micro, small and medium-sized enterprises (MSMEs), it established an Informal Working Group (IWG) to support and facilitate the inclusion of MSMEs in international trade, since they participate way less in

owned business are MSMEs[56]; the Joint initiative on Electronic Commerce, in which the 82 participants reached a stabilized text on 26 July 2024 [57]; and the Joint Initiative on Services Domestic Regulation (SDR), in which the Members agreed in a final text on December 2021, enabling WTO Members to include it in their GATS schedule of specific commitments from February 2024[58]. Noteworthy to mention that the EU, through DG Trade, has played an active role in the negotiations of all the aforementioned plurilateral initiatives, and has also contributed to the ITC, funding studies to understand its impact on women[59]. In its concept paper on the WTO reform, the EU reinforced that "In areas where multilateral consensus is unattainable, [the EU will] actively support and pursue plurilateral negotiations which should remain open to all Members to join and whose results will be applied on an MFN basis."[60] Without touching on the aspect of the legitimacy of these initiatives under the WTO institutional and decision-making framework, we will briefly consider aspects of these joint initiatives regarding the women's economic empowerment dimension.

3.1 Joint Initiative on Investment Facilitation for Development

This Joint Initiative was launched by 70 WTO Members at the MC 11 in Buenos Aires in 2017, and it is coordinated by female ambassadors and permanent representatives of Chile and Korea at the WTO, respectively, Mrs. Sofía Boza and Ms. Sung-yo Chof[61]. In July 2023, the WTO Members joining the initiative successfully reached an agreement on Investment Facilitation for Development Agreement (IFD), which was officially finalized and displayed to the public in February 2024[62] during the MC 13, with 123 WTO Members joining it.

However, the IFD agreement can be considered "gender blind", expression that has been used to denote the absence of explicit provision that relates to women, its preamble makes explicit reference to the SDGs when underlying "the importance of investment in the promotion of sustainable development (…) as well as for the achievement of the United Nations 2030 Sustainable Development Goals."[63] Considering that the preamble[64] is crucial for the contextual and teleological

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the export sector when compared to large firms, face different barriers, such as de the difficulty to access to credit and obstacles to obtaining information and distributional costs that dialogue with other WTO bodies, including the working group on Trade and Gender, with who it launched an specific database on financial services for women-led business. See Compendium of Financial Inclusion Initiatives for Women Entrepreneurs (INF/TGE/W/7/Rev.3).

[56] According to the World Bank, "Yet women entrepreneurs own 22% of micro-enterprises and 32% of small and medium enterprises (SMEs)." Available at: https://www.weforum.org/stories/2023/10/women-entrepreneurs-finance-banking/#:~:text=Yet%20women%20entrepreneurs%20own%2022,same%20economic%20rights%20as%20men.

[57] WTO Information on the Agreement on Electronic Service https://www.wto.org/english/tratop_e/ecom_e/information_on_agreement_ecom.pdf.

[58] Services Domestic Regulation Good regulatory practice for services markets enters WTO rulebook. Available at: https://www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm

[59] See International Trade Centre. *E-commerce Negotiations at the WTO: A gender lens for action*. ITC, Geneva, 2023; International Trade Centre. *WTO Investment Facilitation for Development Negotiations: A gender lens for action.* ITC, Geneva, 2023.

[60] Idem, n. 32.

[61] Information available at: https://www.wto.org/english/tratop_e/invfac_public_e/invfac_participation_list_e.htm

[62] Investment Facilitation for Development Agreement, WTO INF/IFD/W/55 13 February 2024. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W55.pdf&Open=True About the IFDA, see the chapter of Dr. Lanzoni in this e-book.

[63] In Bahri, Amrita. *Trade Agreements and Women: Transcending Barriers.* Oxford Scholarship Online, 1st ed., 2025, p. 64.

[64] About the functions of the Preamble, see Mbengue, Makane Moïse. Preamble. In Max Planck Encyclopedias of International Law [MPIL], module Max Planck Encyclopedia of Public International Law [MPEPIL], 2006; Hulme, Max H. "Preambles in Treaty Interpretation." *University of Pennsylvania Law Review*, vol. 164, no. 5, 2016, pp. 1281–344; Klabbers, Jan. "Treaties and Their Preambles." *Conceptual and Contextual Perspectives on the Modern Law of Treaties*. Ed. Michael J. Bowman and Dino Kritsiotis. Cambridge: Cambridge University Press, 2018. 172–200.

interpretation of an international agreement, in light of art. 31 (1) and (2) of the VCLT[65], and that the UN 2030 Agenda comprises a specific goal related to women – the 5th SDG is devoted to women empowerment – it is possible to conclude that women's economic empowerment is an implicit objective of the IFD. Even though, the ITC in a Report produced with financial support from the EU Directorate-General for Trade (DG Trade), identified how WTO Members could mainstream gender considerations, suggesting that the preamble of IFD agreement could incorporate "explicit gender equality objectives"[66], including gender equality as a legitimate policy objective and could even reaffirm the Parties commitments to effectively implement the CEDAW, the ILO Conventions relevant to women, and the UN Women's Empowerment Principles of the UN Global Compact. In fact, such an inclusion would make the Agreement more responsive for women and could promote harmonization in relation to the specific international instruments for women's rights followed by its Members.

Moreover, according to Art. 1 of the IFDA, the purpose of the Agreement "is to improve the transparency of measures, streamline administrative procedures, adopt other investment facilitation measures and promote international cooperation, as a means of facilitating the flow of foreign direct investment between the Parties, particularly to developing and least-developed country Parties, *with the aim of fostering sustainable development*" (our emphasis). As it has been commonly accepted, sustainable development is not an static concept, but an "evolutionary" one[67]- such as the term "natural resources", as interpreted by the WTO Appellate Body in the *US – Shrimp* case[68], which has evolved through time to embrace in its social aspect the object to promote women's empowerment[69], that from 2015 is enshrined in the goal n. 5[70] of the UN 2030 Agenda[71].

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[65] *Vienna Convention on the Law of Treaties*. 23 May 1969. United Nations Treaty Series, vol. 1155, p. 331. United Nations.

[66] International Trade Centre (2023). *WTO Investment Facilitation for Development Negotiations: A gender lens for action.* ITC, Geneva, p. 11.

[67] On the evolution of the concept of sustainable development see Ebbesson, Jonas, and Ellen Hey. The Cambridge Handbook on the Sustainable Development Goals and International Law. 1st ed.., 2022, p. 2-40; Nico J. Schrijver, "The Evolution of Sustainable Development in International Law: Inception, Meaning and Status", in Collected Courses of the Hague Academy of International Law. Martinus Nijhoff, 2008; Voigt, Christina. Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law. Martinus Nijhoff, 2009; Alan Boyle & David Freestone (eds.), International Law and Sustainable Development: Past Achievements and Future Challenges. Oxford University Press, 1999, ICJ case Gabcíkovo-Nagymaros Project (Hungary v Slovakia), ICJ Reports (1997), 7, para. 140; and case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, ICJ Reports (2010), 14, para. 177.

[68] Appellate Body Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998) (adopted 6 November 1998), para. 130.

[69] There is no conventional definition of "women empowerment" in international law, although the term is mentioned in many soft law instruments as the Beijing Declaration and Platform of Action and the UN 2030 Agenda. In 2001, the Office of the Special Adviser on Gender Issues and the Advancement of Women of the United Nations in a document entitled "Important Concepts Underlying Gender Mainstreaming" defined "Empowerment of Women" as: "The empowerment of women concerns women gaining power and control over their own lives. It involves awareness-raising, building self-confidence, expansion of choices, increased access to and control over resources and actions to transform the structures and institutions which reinforce and perpetuate gender discrimination and inequality. (…)" Available at: https://www.un.org/womenwatch/osagi/pdf/factsheet2.pdf.

[70] Goal n. 5 underlines in its targets the need to "undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws."(5.a), "enhance the use of enabling technology"(5.b), and "Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels"(5.c), in a way that target 5.c, interacts with targets 5.a and 5.b to encourage States to adopt legislation that guarantee women's economic and technological empowerment.

[71] Highlighting the evolution in the inclusion of women's economic empowerment within the concept of sustainable development, the UN 2030 Agenda makes reference to all major United Nations conferences and summits, such as the Beijing Platform for Action, which is "an agenda for women's empowerment." Report of the Fourth World Conference on

The section on Sustainable Development (Section VI) brings also rules on responsible business conduct that are relevant to women. According to Art. 37, "with a view to promoting sustainable development, each Party shall encourage investors and enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their business practices and internal policies internationally recognized principles, standards and guidelines of responsible business conduct that have been endorsed or are supported by that Party." Here for example, are relevant for women the application of UN Guiding Principles on Business and Human Rights (UNGPs)[72], the OECD Guidelines for Multinational Enterprises (updated in 2023)[73], that includes specific guidance on gender equality, non-discrimination, and inclusive business practices, and the Women's Empowerment Principles (WEPs)[74] developed by UN Women and the UN Global Compact. More recently, the International Organization on Standardization (ISO) published guidelines for the promotion and implementation of gender equality and women's empowerment (ISO 53800:2024)[75], having 38 States participating[76] and 24 observers. At this point, the ITC Report also suggests that among the provisions on responsible business, the agreement should make explicit reference to gender equality standards. In fact, making explicit reference to WEPS or to the new ISO guideline on women's empowerment would be quite positive in making its observance mandatory.

Although the agreement makes no reference to women, it makes important ones related to indigenous people at Art. 37 (2), stating that the Parties should encourage investors "to undertake and maintain meaningful engagement and dialogue (…) with Indigenous Peoples, traditional communities and local communities" regarding the application of business conduct principles, standards and guidelines of responsible business conduct. More precisely, in the final provisions, a footnote (n. 47) provides for preferential treatment to indigenous people in a form of a general exception, following the two-tier test of GATT Art. XX, but related to investments. According to the provision, "for greater certainty, and for the purposes of this Agreement, provided that such measures are not used as a means of arbitrary or unjustifiable discrimination against investors of another Party or as a disguised restriction on investment, nothing in this Agreement prevents the adoption by a Party of measures it considers necessary to accord more favorable treatment to Indigenous Peoples in its

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Women, Beijing, 4-15, September 1995, Sales No. E.96.IV.13. Annex I and II [hereinafter *BDPA*] Available at: https://documents.un.org/doc/undoc/gen/n96/273/01/pdf/n9627301.pdf

[72] According to UNGPS, the guiding principles shall be implemented "in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men."
the guidance to business enterprises on respecting human rights shall consider, among others, issues on gender, and recognize "the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families." United Nations Human Rights Council. (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* United Nations, Office of the High Commissioner for Human Rights (OHCHR). HR/PUB/11/04, p. 06.

[73] OECD. (2023). *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*. OECD Publishing, Paris. https://doi.org/10.1787/81f92357-en.

[74] UN Women & UN Global Compact. (2011). *Women's Empowerment Principles: Equality Means Business*. United Nations Entity for Gender Equality and the Empowerment of Women. Available at: https://www.unwomen.org/en/digital-library/publications/2011/10/womens-empowerment-principles-equality-means-business

[75] Available at https://www.iso.org/standard/84591.html.

[76] They are the technical agencies of Argentina, Austria, Belgium, Bolivia, Brazil Cameroon, China, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cyprus, Ecuador, Egypt, El Salvador, France, Gabon, Germany, India, Ireland, Italy, Japan, Kazakhstan, Kenia, Korea, Mexico, Marocco, Panama, Peru, Portugal, Rwanda, Spain, Sweden, Switzerland, Trinidad and Tobago, Uganda, United Kingdom and United States.

territory in respect of matters covered by this Agreement, including in fulfilment of its legal, constitutional or treaty obligations to those Indigenous Peoples. (…)"

Section IV devoted to 'domestic regulatory coherence' also does not refer to women, but to MSMEs, stating that when preparing major regulatory measures, the parties to the agreement are encouraged to carry out an impact assessment (art. 23), and when doing so shall "offer reasonable opportunities, on a non-discriminatory basis, to any interested person to provide comments, and should take into consideration the potential impact of the proposed measures on investors, including MSMEs." The reference to MSMEs is quite relevant, considering that the majority of women-led and owned business are MSMEs, and so measures that benefit MSMEs, indirectly benefit women's entrepreneurs in the sector.

Although the very important advancements in the IFDA to facilitate trade, cut red-tapes, improve transparency and encourage better business conducts, explicit provisions underlining the importance of the agreement to promote women's economic empowerment, such as the one provided for in Art. 35[77] of the Sustainable Investment Agreement between the EU and Angola[78], would be very positive to women. In fact, the absence of an explicit provision devoted to women has raised concern among trade scholars and specialists, reason why the ITC, in a Report convened by the European Commission, drafted a number of recommendations[79] to make the agreement more 'gender-responsive.' It suggests that besides making reference to the CEDAW, to the International Labour Organization (ILO) Conventions relevant to women[80], and to the WEEs, the Agreement could include the duty of transparency and information disclosure, a provision related to the communication of relevant women's economic empowerment policies and gender-disaggregated data, and even create a "gender subcommittee/ working group" to monitor the "gender impacts" of the implementation of the Agreement. Considering the issue with the terminology of gender and gender equality described in the first part of the chapter, we consider that using the expression 'women's economic empowerment' to include explicit provision in benefit to women in the IFD agreement would be easier to be accepted by a higher number of WTO Members. Currently, 127 WTO Members have joined the Agreement, without any explicit women-provisions. On 14 October 2024, these Members requested the General Council to add the IFDA to Annex 4 of the WTO Agreement, requiring the consensus of WTO Members, according to the provisions of Art. X.9 of the Marrakesh Agreement. In the last update at the WTO, consensus to add the Agreement to Annex 4 of the Marrakesh Agreement was not reached by the 9th time[81].

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[77] According to the provision "1. The Parties recognize that inclusive investment policies can contribute to advancing women's economic empowerment and gender equality, in line with Sustainable Development Goal 5 of the UN 2030 Agenda. They acknowledge the important contribution by women to economic growth through their participation in economic activity, including investment. The Parties underline their intention to implement this Agreement in a manner that promotes and enhances gender equality. 2. The Parties shall work together bilaterally and in relevant fora, as appropriate, to strengthen their cooperation on investment-related aspects of gender equality policies and measures, including activities designed to improve the capacity and conditions for women, including workers, businesswomen and entrepreneurs, to access and benefit from the opportunities created by this Agreement.

[78] Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola, ST/10941/2023/REV/1**,** *OJ L, 2024/830, 8.3.2024, ELI: http://data.europa.eu/eli/agree/2024/830/oj* [hereinafter SIFA]

[79] International Trade Centre, *WTO Investment Facilitation for Development Negotiations: A gender lens for action.* ITC, Geneva, 2023, p. 22.

[80] As ILO Equal Remuneration Convention (No. 100); ILO Discrimination (Employment and Occupation) Convention (No. 111); ILO Workers with Family Responsibilities Convention (No. 156); ILO Maternity Protection Convention (No. 183); ILO Convention Eliminating Violence and Harassment in the World of Work (No. 190); and the UN Women's Empowerment Principles.

[81] Available at https://www.wto.org/english/news_e/news25_e/gc_23jul25_e.htm.

3.2 The Joint Initiative on Micro, small and medium-sized enterprises (MSMEs)

According to a joint Report of the WTO and the World Bank, in 2021, 59 per cent of employed women worked in the services sector, and 9 out of 10 services firms were MSMEs. The same Report stated that the share of women employed in the services sector has increased substantially in all economies since 2000 from high to low-income ones[82], with women-led firms having more success in the services sector – "in particular for services delivered remotely over digital platforms"[83], reason why addressing women necessities in the initiatives devoted to MSMEs, services domestic regulation and e-commerce are paramount for the participation and success of women in international trade.

The Joint Initiative on MSMEs also launched at the MC 11 in Buenos Aires led to the creation of an Informal Working Group (IWG) in 2018 to explore ways in which WTO Members could better support MSMEs' participation in international trade[84]. In December 2020 the IWG on MSMEs, adopted a package of recommendations[85], in which its Members endorsed recommendations and declarations on the collection and maintenance of MSME-related information (Annex I); on the access to trade-related information for MSMEs (Annex II), also calling WTO Members to contribute to the operationalization of the Global Trade Helpdesk (GTH)"[86], a platform that support companies to access markets, providing all the necessary information they need to trade; on the implementation of the Trade and Facilitation Agreement (Annex 3); on the promotion of MSMEs inclusion in regulatory development, considering their particular needs (Annex 4); on the inclusion of information related to MSMEs in a WTO Integrated Database (IDB) "as the official source of tariff and other trade-related information" (Annex 5); and in addressing the trade-related aspects of MSMEs' access to finance and cross-border payments, especially through the exchange of best practices and information sharing. Furthermore, WTO Members were encouraged to include in their Trade Policy Reviews MSME-related information, comprising available statistics (overall or by sector) on MSME ownership by diverse groups, such as women. In 2021, the MSME Group met several times to monitor implementation of the Package, concluding the work to develop a database[87] listing references related to MSME information in the WTO Trade Policy Reviews of WTO Members.

By June 2024, 103 WTO Members are part of the IWG on MSMEs, with the EU playing a leading role[88], giving active support in advancing the EU's 'think small' principle[89] and advancing best

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[82] "The share of women employed in the services sector has increased in all economies since 2000. Services now account for 87 per cent of total female employment in high-income countries (up from 80 per cent in 2000), 62 per cent in upper middle-income countries (up from 40 per cent), 43 per cent in lower middle income countries (up from 29 per cent), and 30 per cent in low-income countries (up from 19 per cent)." p.17.

[83] Idem, p. 19.

[84] Informal Working Group on Micro, Small and Medium-sized Enterprises (MSMEs). Available at: https://www.wto.org/english/tratop_e/msmes_e/msmes_e.htm.

[85] Informal Working Group on MSMEs Declaration on Micro, Small and Medium-Sized Enterprises (MSMEs), WTO INF/MSME/4/Rev.2 6 October 2021.

[86] The Global Trade Helpdesk (GTH) defines itself as "a multi-agency initiative jointly led by ITC, UNCTAD, and the WTO that aims to simplify market research for companies, and especially Micro, Small and Medium Enterprises (MSMEs), by integrating trade and business information into a single online portal." It comprises modules with information about markets, applicable tariffs a non-tariff barriers, supporting companies, especially MSMEs, to trade. Available at: https://globaltradehelpdesk.org/en/about/the-initiative.

[87] Database on MSME references in trade policy reviews available at: https://www.wto.org/english/tratop_e/msmesandtra_e/msmesdatabase_e.htm.

[88] See European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation and Enforcement of EU Trade Policy* COM(2023) 740 final, SWD(2023) 740 final, Brussels, 15 November 2023, p.21.

[89] The Think Small First" principle was enshrined in the "Small Business Act" for Europe adopted by the European Commission on 25 June 2008, containing a set of common principles in ten different areas to make policies more SME friendly, i.e., adequate to adapt the regulatory framework to needs and interests of MSMEs. See Communication from the

practices in a multilateral basis. More specifically, the EU has contributed in facilitating the use of the *Global Trade Helpdesk* to MSMEs, and in developing two compendia; one gathering information for MSMEs in Authorised Economic Operator (AEO) Programmes[90] developed under Art. 7 (7) of the Trade and Facilitation Agreement[91], and the other on access to finance by women-led MSMEs launched at the WTO MC13 in February 2024[92]. This last works as a compendium of financing programs for women-owned and women-led MSMEs offered by financial institutions, governmental regional and international organizations. In the last meeting of the IWG on MSMEs held on 5 March 2025[93], the topic of women business was highlighted, with WTO Members sharing the advancements they have made in the sector for women entrepreneurs.

3.3 The Joint Initiative on Electronic-Commerce

The WTO was born in the middle of the technological revolution that would transform the way people live and trade through the use of digital devices and the internet. Still in 1996, a small number of 29 WTO Members (now 84 WTO Members, representing 97 per cent of world trade in Information Technology (IT) products)[94], concluded the Information Technology Agreement (ITA)[95] to eliminate tariff barriers for certain ICT products[96]. Later in 1998, at the 2nd Ministerial Conference in Geneva in May 1998, WTO Members adopted a Declaration on Global Electronic Commerce[97], establishing "a comprehensive work program on all trade-related issues relating to global electronic commerce." At that time, the WTO Work Programme on Electronic Commerce, supervised and coordinated by the General Council, defined electronic commerce as the "production, distribution, marketing, sale or delivery of goods and services by electronic means." By 2019 it took place at the WTO the first workshop raising the concern of the participation of "Women in Digital Trade"[98], hosted by the European Union and Trinidad & Tobag, opportunity in which the then Director General Roberto Azevedo recognized the great potential digital trade has for women entrepreneurs, however highlighting that this potential depends on appropriate and harmonized regulatory tools[99]. Given the absence of sufficient regulatory instruments to regulate essential aspects of e-commerce – such as information flows, e-signatures, e-payments, privacy, consumer protection and cybersecurity – during

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Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – "Think Small First" – A "Small Business Act" for Europe [SEC(2008) 2101] [SEC(2008) 2102] COM/2008/0394 final *.

[90] The AEO Programmes are developed under the Trade Facilitation Agreement.

[91] Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization. Agreement on Trade Facilitation, WT/L/940, 28 November 2014.

[92] Database available at: https://www.wto.org/english/tratop_e/womenandtrade_e/financial_inclusion_initiatives_e.htm.

[93] Communication of the Informal Working Group on MSMEs Open-Ended Meeting of 5 March 2025, circulated on 24 June 2025, INF/MSME/R/48. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/INF/MSME/R48.pdf&Open=True.

[94] Available at: https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm

[95] Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16 13 December 1996.

[96] Although the ITA is not a multilateral agreement, by incorporating it into their schedules of concessions, it is applied to all WTO Members on a most-favoured nation (MFN) basis.

[97] Declaration on Globe Electronic Commerce, Adopted on 20 May 1998 WT/MIN(98)/DEC/2.

[98] Available at: https://www.wto.org/english/tratop_e/devel_e/a4t_e/womenindigitaltrade1719_e.htm.

[99] "There is no doubt about the potential of these new technologies to promote economic benefits, when accompanied by appropriate complementary policies. But on the flipside, this potential can only be fully realized if we are prepared to agree on new rules and practices for the digital economy. If we do not, then the outcome could be fragmentation and a proliferation of technological regulations. This would mean higher costs and higher barriers to entry. And this would also mean that many, including women entrepreneurs, could be excluded from the opportunities that the digital economy offers." Full speech available at: https://www.wto.org/english/news_e/spra_e/spra268_e.htm.

the MC 11 in Buenos Aires 71 WTO Members issued a joint statement to 'reinvigorate' the exploration of trade-related aspects on e-commerce.

In January 2019, a group of 86 WTO Members co-convened by Australia, Japan and Singapore launched the Joint Initiative on Electronic Commerce addressing WTO plus rules necessary to guarantee security, predictability, non-discrimination, transparency, cooperation and development on e-commerce. The first consolidated text of the Agreement on Electronic Commerce (AEC) circulated on 7 December 2020.[100] By 26 July 2024, a stabilized text was concluded and published[101], comprising 38 Articles divided into 8 Sections (named from A to G) and an Annex on regulatory framework for basic telecommunications services. Although the preamble of the agreement mentions important concepts such as the objective to promote economic growth and sustainable development and to further narrow the digital divide, which can be systematically interpreted to include the objective of women's economic empowerment, the text is also "gender blind" inasmuch there are no explicit provisions devoted to women.

Even though, in the preamble the parties recognize "the potential of electronic commerce as a social and economic development tool and the importance of enhancing interoperability, innovation, competition, and access to information and communications technologies for all peoples, particularly underrepresented groups, and MSMEs." In fact, in STEMs areas, women are still an underrepresented group in its majority[102]. Furthermore, the vast majority of women-owned and led businesses are MSMEs, which is why provisions dedicated to MSMEs have a special potential to benefit women entrepreneurs. Since the text is not definitive, there is some expectation on the inclusion of an explicit provision on women's economic empowerment, especially at 'Section E' devoted to 'transparency, cooperation and development', where a provision devoted to indigenous people was included to guarantee more favorable treatment to them[103].

Thystrup suggests that gender equality provision could be injected, for instance, in Article 2, by obliging Members to ensure that there is no discrimination based on gender when issuing licenses and authorizations, and in Article 3.6 addressing prescriptive measures to close the gender gaps.[104] For the same reasons highlighted in the previous topic, we consider using the terminology 'women' is more appropriate and likely to be accepted by WTO Members. Moreover, although the Agreement could make an explicit reference to measures that promote women's economic empowerment, impose a most-favorable treatment based solely on sex/gender could create an unreasonable discrimination, since in the digital environment it is well known that women do not face the same prejudices and barriers that normally they face when trading in the borders due to cultural and social norms that tend to discriminate against women. The almost 'no gender' environment promoted by the digital world, or 'anonymizing the exporter's gender online' is in fact one of the reasons that makes the digital

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[100] See Joint Statement Initiative on E-Commerce: co-conveners' update, December 2020. Available at: https://www.wto.org/english/news_e/news20_e/ecom_14dec20_e.pdf

[101] Joint Statement Initiative on Electronic Commerce, INF/ECOM/87, 26 July 2024. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/87.pdf&Open=True.

[102] According to World Economic Forum research, "women's share in the STEM workforce is only just over 28% – compared to more than 47% among non-STEM workers. What is more, women make up more than a third of STEM graduates but only just over 12% of STEM executives." Available at: https://www.weforum.org/stories/2025/03/ai-stem-women-gender-gap/#:~:text=The%20entrenched%20STEM%20gender%20gap,in%20the%20years%20since%20then.&text=Adding%20to%20this%20is%20the,in%20career%20progression%20and%20seniority.

[103] According to Art. 26.1, AEC: "nothing in this Agreement shall preclude a Party from adopting or maintaining measures it considers necessary to accord more favorable treatment to Indigenous Peoples in its territory in respect of matters covered by this Agreement".

[104] Thystrup, Amalie Giodesen. "Gender-Inclusive Governance for E-Commerce." *Journal of World Investment and Trade*, vol. 21, no. 4, 142.

environment so positive for women's business to trade[105], In addition to the impersonal environment, one other reason for the lower costs of trading digitally, is the absence of tariffs on electronic commerce, the so called moratorium on electronic transmissions, which has been periodically renewed since 1998 by WTO Members, who renewed if for the last time in February 2024 at the Ministerial Conference in Abu Dhabi for more two years[106] (until the 14th Ministerial Conference or by March 31, 2026, whichever comes earlier). The AEC also maintains a quasi-permanent ban on tariffs on e-transmissions.

Indeed, the absence of custom duties on e-commerce has been essential for the boom of digital trade[107] and its widespread dissemination and diversification in international trade providing for lowers costs for producers, traders and consumers, proving to offset possible State's revenue loss. In fact, e-commerce allows a unique form of women's inclusion in the economy, enabling the expansion of women's network and market access without the need for physical premises that would demand additional costs. Moreover, as already mentioned, the digital environment favors women that normally face barriers and prejudice in trading in the borders[108]. No less important, digital trade provides for more flexible forms of work and working-hours enabling women to better combine paid with unpaid work and reach a work-life balance according to their personal necessities and preferences. Indeed, reports show that women are more likely than men to integrate selling on e-commerce platforms with social media platforms.[109] In fact, it was also through social media platforms that women innovated a new form of making business, which is currently booming[110], the one of 'influencers'[111], by sharing content and making advertising online.

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[105] In other hand, Thystrup argues that anonymization does not remedy other issues such as limited access to financing or the persistent structural differences faced by women, concluding that the anonymization allowed online does not serve to consolidate a gender-inclusive trade policy. In Op. Cit, *Thystrup, Amalie Giodesen*, p. 132. Although we agree anonymization it is not enough for a trade policy that benefit women, we recognize it is a very positive factor since it deconstructs considerable prejudicial barriers women face when trading.

[106] The renewal followed the proposals presented by Switzerland and Canada (WT/GC/W/909.Rev3) and by Samoa on behalf of the African, Caribbean and Pacific Group (WT/GC/W/916). Available at: https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/ecommerce_e.htm.

[107] In 2012, digitally deliverable services represented 48 per cent of global exports of services, a share that increased to 52 per cent in 2019 and jumped to 63 per cent in 2021[107], with the main highest share of firms engaged in e-commerce purchasing sited in New Zealand (89.6 per cent), Australia (80.7 per cent), Sweden (78.4 per cent) and Brazil (75.0 per cent), followed by Canada (74.9 per cent) and the Netherlands (66.1 per cent), and the highest share of firms engaging in e-commerce sales in Australia (63.3 per cent), New Zealand (60.3 per cent) and India (60.2 per cent).

[108] "Cross-border women traders experience economic coercion at borders. Women face economic coercion in various forms; these range from gender-based discrimination in the processing of documentation, delays in releasing consignments, and unwarranted impounding of goods, to bribery and corruption including demands for informal fees." In "Barriers that Impede Women's Economic Empowerment" in Bahri, Amrita, *Trade Agreements and Women: Transcending Barriers*, First Edition, Oxford Academic, 2025, p. 37.

[109] "Informal e-commerce seems to be creating economic opportunities and new incomes for women, which, in turn, often lead to financial freedom and empowerment. In Southeast Asia and Africa, for example, women small-scale entrepreneurs are more likely than their male counterparts to use social media platforms for business purposes." In UNCTAD. (2023a). *E-commerce from a Gender and Development Perspective*. Geneva, UNCTAD, p. 18 See also UNCTAD, *Technical and Statistical Report, The impact of non-tariff measures on women's e-commerce businesses in developing countries*, United Nations, 2024, p. 8

[110] According to the Statista Research Department, "The global influencer marketing market size has more than tripled since 2020. In 2025, the market was estimated to reach a record of approximately 33 billion U.S. dollars." Available at: https://www.statista.com/statistics/1092819/global-influencer-market-size/.

[111] Actually, the first wave of 'influencers' of modern area are considered to have started by sharing motherhood tips in *TheMommyBlog.com* with Melinda Roberts in 2002. Available at: https://hireinfluence.com/blog/history-influencer-marketing/ The countries which higher number of influencers are the United States, Brazil and India. According to a Report of the "Creators & Business" in Brazil women are the great majority in the influencer profession, representing 70,73% of respondents, while men represent only 24,93%, however they are concentrated in fields traditionally devoted to women, such as life-style, fashion and beauty, fact that has faced critics, since women influencers in 'hard fields' such

However, in order to have access to electronic commerce, some prerequisites[112] are necessary. First of all, the country shall provide the necessary infrastructure and connectivity to internet, which is a problem especially in developing and least developed countries[113]. This issue has been addressed in the AEC, which devoted in 'Section E' rules to support developing and least-developed countries "to effectively participate and tap into growth opportunities in electronic commerce and the digital economy, including by supporting better access to digital ecosystems and infrastructure as well as supporting their people and MSMEs."[114] Moreover, as a form of special and differential treatment (SDT) to least developed countries, the AEC provides them extra time to implement their rules[115]. Secondly, women shall have the financial capacity to have an electronic device equipped with internet, and at this point, the digital divide tends to be in prejudice to women, especially in African and Arab countries, and in low-income and lower-middle-income countries[116].

Third, women need to be literate in IT skills, which is normally easier for young generations. For this reason, capacity building programs in STEAMs, specially related to the digital skills, are paramount to enable women to join the digital market. Moreover, besides digital skills, women producers, sellers, and traders need to have the necessary financial skills to start an online business. Indeed, non-access to financial resources is one of the main barriers women entrepreneurs faces, comprising biases to get access to financial resources from financial institutions and lenders[117]. At this point, it is paramount that WTO Members adopt domestic legislation ensuring women's access to financial services without discrimination. Moreover, initiatives such as the WEIDE fund shall be widespread in WTO Members.

Not least important are the technical skills women as all traders need to acquire to comply with requirements and standards in the market of destination. At this point, non-tariff measures (NTMs) that impact the flow of electronic commerce represent a barrier for many women to participate in e-commerce, especially for MSMEs, to which trade costs have a higher impact. Studies suggests that NTMs affect women entrepreneurs more severely than men, considering also that women tend to own and run MSMEs, which make them suffer more with NTM-related trade costs than men.[118] In addition, one of the main challenges women face regarding NTMs are due to the lack of necessary education and skills needed for recognizing and complying with them, especially in lesser developed countries, problem that is exacerbated due to the 'greater time poverty' women tend to experience because of the double burden of combining paid work with unpaid work.[119]

Overall, it would be auspicious to have the provisions in the AEC encouraging WTO Members to enact policies that guarantee proper infrastructure and address the main challenges women face in

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as economics and financial matters tend to be lower when compared to men. Available at: https://ecommerceupdate.org/en/noticias/mulheres-sao-maioria-entre-influenciadores-mas-ganham-menos-que-os-homens-aponta-pesquisa/#.

[112] Op. Cit., Thystrup, p. 127-128.

[113] "In 2023, Africa lagged behind other global regions regarding internet penetration rate, as only 37 percent of the continent's population accessed the web. In contrast, around 91 percent of Europe's population were internet users. This is heavily influenced by the infrastructure development in the region." Available at: https://www.statista.com/statistics/1155552/countries-highest-number-lacking-internet/.

[114] AEC, Art. 20.2.

[115] AEC, Art. 20.6 and 20.7.

[116] In International Telecommunication Union (ITU), The world is slowly moving towards gender parity in Internet use, Facts and Figures 2024, Available at: https://www.itu.int/itu-d/reports/statistics/2024/11/10/ff24-the-gender-digital-divide/.

[117] Op. Cit., Gender-Inclusive Governance, p. 132.

[118] UNCTAD, *Technical and Statistical Report, The Impact of Non-Tariff Measures on Women's E-Commerce Businesses in Developing Countries*, United Nations, 2024, UNCTAD/DITC/2024/1, ISBN: 978-92-1-106531-2

[119] Idem, p. 26.

joining digital platforms to participate on e-commerce, as well as provisions committing the parties to collaborate by sharing sex-disaggregated data, best practices, such as capacity-building programs, and information related to women in e-commerce[120], reinforcing the objectives of the WEE Declaration. This is especially important in developing and least developed countries, and concerning the Aid for Trade initiative, considering the great potential e-commerce has in promoting women's economic empowerment. However, as acknowledged by the Report of the ITC on "E-commerce Negotiation at the WTO- A gender lens for action"[121] sponsored by the Directorate-General of the European Commission, although e-commerce plays an increasingly important role in global commerce, policy enforceable measures and consistent data collection are paramount to ensure that the expansion of e-commerce will not widen the "gender divide", and require not only the inclusion of explicit women provisions in the AEC, but also the development by WTO Members of consistent domestic policies that support the inclusion of women in e-commerce.

3.4 The Joint Initiative on Services Domestic Regulation (SDR)

The SDR can be considered the most successful of all the plurilateral initiatives just mentioned. It is also of great importance, since the services sector accounts for around half of global trade, being the one that most employs women as workers and entrepreneurs[122], even if they are not usually concentrated in the export sector[123]. The Joint Initiative on Services Domestic Regulation (SDR) was launched at the 11th Ministerial Conference in Buenos Aires in 2017, having the objective to facilitate the liberalization of trade in services by regulating the procedures for authorization and licensing of services and service providers in a way to make it more transparent, predictable, non-discriminatory and efficient. According to a WTO research paper[124], the implementation of the SDR indicates "substantial reductions in trade costs ranging between 8.5% in high-income countries, 10% in lower-middle-income countries and 14% in upper-middle-income countries", resulting in trade cost reductions in dollars of about $127 billion.[125]

The Initiative is based on Article VI:4 of the GATS, which gives to WTO Members, through the Council for Trade in Services[126], i.e., on a multilateral basis, the mandate to develop any necessary disciplines. Indeed, on 26 April 1999, the Council for Trade in Services adopted a Decision on Domestic Regulation, which established the *Working Party on Domestic Regulation* (WPDR)[127]. The

[120] Op. Cit., *E-commerce from a Gender and Development Perspective*, p. 21/22.
[121] International Trade Centre. *E-commerce Negotiations at the WTO: A gender lens for action*. ITC, Geneva, 2023.
[122] ITC, 'From Europe to the World: Understanding Challenges for European Businesswomen' p. XVII.
[123] "The gender gap is largely due to the concentration of women's employment in less export-oriented sectors, notably in services" ITC, 'From Europe to the World: Understanding Challenges for European Businesswomen' p. 3.
[124] So, Roger Yu & Bekkers, Eddy. (2024). *The Trade Effects of a New Agreement on Services Domestic Regulation*. WTO Staff Working Paper ERSD-2024-02. World Trade Organization. Available at: https://www.wto.org/english/res_e/reser_e/ersd202402_e.htm.
[125] Idem, p. 34.
[126] According to the main clause of ar. VI.4 of the GATS "With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service."
[127] WTO Trade in Services Decision on Domestic Regulation, S/L/70**,** 28 April 1999.

WPDR last discussed a proposal to develop new disciplines on SDR in 2019. From then on, meetings to negotiate new rules on GATS Article VI:4 have been held through the Joint Initiative on SDR[128].

At the MC11, a group of 59 WTO Members[129], mostly developed OECD countries and emergent economies such as Brazil, China and Russia, issued a joint statement calling all Members to intensify their work after the MC11 towards the conclusion of the negotiations on disciplines on SDR[130]. In a second statement issued in 2019, the Members of the Joint Initiative, recognizing "the multilateral mandate of Article VI:4 of GATS", encouraged "all WTO Members to participate in order to improve the regulatory environment for trade in services globally." The discussion and negotiations on the new rules continued in a plurilateral way, and by December 2021, after five years of negotiations, the WTO ambassadors of Costa Rica (Gloria Abraham Peralta), Australia (George Mina) and the European Union (João Aguiar Machado), which were the main supporters of the initiative from the beginning[131], led the finalization of the negotiations, and the 67 WTO Members joining the initiative adopted a declaration containing the *Reference Paper on Services Domestic Regulation*[132]. In February 2024, during the MC13 in Abu Dhabi, following the conclusion of certification procedures under the General Agreement on Trade in Services (GATS), the disciplines entered into force for 53 WTO Members (including the EU)[133] who added the new disciplines in their additional commitments to the GATS[134].

This is because the text of the SDR is not formally a WTO plurilateral Agreement but can be incorporated as additional commitments to WTO' Members schedule of commitments under GATS Article XVIII. This is because under the GATS, WTO Members shall specify which sectors they want to liberalize. Under Article XVIII of GATS, WTO Members can make "additional commitments" that go beyond the core obligations applied to their "specific commitments", i.e., market access[135] and national treatment[136], as specified by GATS Art. XX[137]. Since the schedules of commitments annexed

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[128] In the WPDR Report of the Meeting held on 20 March 2019, raised a concern related to the circulation of correspondence related to the joint statement initiative on domestic regulation through the Secretariat. They asked to "In order to avoid any confusion or ambiguity for Members, she requested that the Secretariat was clear in identifying correspondence that was being forwarded in relation to the informal process as opposed to that which was being circulated in relation to the multilaterally mandated work under GATS Article VI:4 in the WPDR. She expressed the willingness and readiness of the ACP Group to engage in the work of the Working Party and looked forward to continued discussions in the multilateral forum." S/WPDR/M/75, 30 April 2019, para. 1.30. Up to moment, the ACP countries are not part of the Join Initiative.

[129] Albania; Argentina; Australia; Brazil; Canada; Chile; China; Colombia; Costa Rica; the European Union [28 Members before 'Brexit']; Hong Kong, China; Iceland; Indonesia; Israel; Japan; the Republic of Kazakhstan; the Republic of Korea; Liechtenstein; Mexico; the former Yugoslav Republic of Macedonia; the Republic of Moldova; Montenegro; New Zealand; Norway; Peru; the Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; and Uruguay.

[130] Joint Ministerial Statement on Services Domestic Regulation, WT/MIN(17)/61 13 December 2017, para. 4.

[131] They were also parties in the negotiations of the Trade in Services Agreement (TISA), suspended in 2016, before the launch of the Joint Statement Initiative on Services Domestic Regulation in 2017 at the MC11 in Buenos Aires. On 29 September 2021, the European Services Forum, and the Australian Services Roundtable organized a Public Forum Session to discuss the Joint Initiative on SDR.

[132] Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WT/L/1129 2 December 2021.

[133] Information and WTO Members' schedules of specific commitments on services domestic regulation available at: https://www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm.

[134] "The European Union [had] proposed a modular approach for inserting new rules into Members' schedules as 'understandings' or 'reference papers' pursuant to GATS Art XVIII Additional Commitments, similar to what is advocated for the JSIs." In Op. Cit., Kelsey, Jane, p. 20.

[135] GATS, Article XVI.

[136] GATS, Article XVII.

[137] Art. XX (1) "Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify: (a) terms, limitations and conditions on market access; (b) conditions and qualifications on national treatment; (c) undertakings

by WTO Members to the GATS are considered an integral part of the GATS[138], once added they become part of the WTO legal framework and are bidding to WTO Members on a most-favored-nation (MFN) basis, which means that WTO Members that added the SDR to their GATS schedule, cannot discriminate between WTO Members when giving authorization for services and services providers, in the way they specified in their schedule of commitments.

The SDR covers in general licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services, and trade in financial services. However, the commitments regarding financial services can be detached, since the SDR gives WTO Members the option to choose whether to inscribe or not in their schedule of commitments to Section III of the SDR, regarding financial services. It is important to bear in mind that the SDR does not try to impair Members' right to regulate, but to guarantee transparency, predictability, non-discrimination and efficiency in the procedures.

A very relevant point of the SDR to the goal of women's economic empowerment is due to the fact that the SDR is the first binding instrument in the WTO framework to include explicit women-provisions. The provision prohibits discrimination against women regarding the procedures relating to the authorization for the supply of a service. In fact, the original text, as it was proposed by Canada[139], prohibited the discrimination "against individuals on the basis of gender"[140], including in the footnote of the provision according to which "[f]or greater certainty, legitimate differentiation, which means differential treatment that is reasonable and objective, and aims to achieve a legitimate purpose, and adoption by Members of temporary special measures aimed at accelerating de facto *gender equality*, shall not be considered discrimination for the purposes of this provision." (our emphasis).

In a second draft of the SDR, the prohibition of gender-based discrimination, was substituted by discrimination "between men and women", which was maintained in the final text, and the same provision was added in the Section related to financial services. Also, the footnotes of the provisions were modified to state that "differential treatment that is reasonable and objective, and aims to achieve a legitimate purpose, and adoption by Members of temporary special measures aimed at accelerating de facto equality *between men and women*, shall not be considered discrimination for the purposes of this provision." (our emphasis).

Thystrup criticized the modification of the language of the text, stating that the new version "employs a binary, biological identification of sex as a man or a woman and locks in a binary wording that contrasts women and men" [and so] fails to protect from discrimination those that are deemed outside the scope of 'women', in the sense of the sex."[141] However, as we have highlighted, "gender" is a controversial concept not accepted by all WTO Members. In case a gender-language were to be imposed, an agreement would probably not have been reached, and women would ultimately lose out. Moreover, even if the sex-based approach is deemed less inclusive than the "gender-inclusive language", as a matter of fact, all individuals, except for intersex people[142], independent of the genders

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relating to additional commitments; (d) where appropriate the time-frame for implementation of such commitments; and (e) the date of entry into force of such commitments."

[138] GATS, Art. XX, 3.

[139] "In 2016, Canada had previously included the exact provision in the DR text during negotiations on the Trade in Services Agreement (TiSA)." In Op. Cit., Thystrup, p. 144.

[140] Idem.

[141] Ibid., p. 147.

[142] "Intersex people are born with sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit typical binary notions of male or female bodies." In Intersex people OHCHR and the human rights of LGBTI people. Available at:

that they can identify with, or their sexual orientation, biologically are or men or women when providing services.

Apart from this issue, it is important to highlight that the footnotes of the women-provisions in the SDR[143]provide for two exceptions to the general rule on non-discrimination between men and women, based on Art. 4 of the CEDAW. It states that "Differential treatment that is reasonable and objective, and aims to achieve a legitimate purpose, and adoption by Members of temporary special measures aimed at accelerating de facto equality between men and women, shall not be considered discrimination for the purposes of this provision." The first exception can be understood as the "special measures" provided for Art. 4 (2) of the CEDAW[144], for instance, measures to protect maternity[145] related to specific conditions shared by women, since they are "reasonable and objective, and aims to achieve a legitimate purpose. The second one regards the "temporary special measures"[146] provided in Art. 4 (1) of the CEDAW[147], which are intended to be used to accelerate de facto equality in a sector where women are underrepresented, for example through quotas or other preferential treatment to women.

Indeed, this provision regarding financial services is even more relevant due to the fact that one of the main barriers faced by women's entrepreneurs is discrimination in accessing credit and financial services[148]. At this point, it is paramount that WTO Members enact legislation prohibiting discrimination to get access to financial services, otherwise they could risk being denied access to the financial infrastructure needed or have denied authorization to supply a given service.[149] However, one negative point of the text is that the rules on financial services can be detached and so not included in the schedule of commitments of the WTO Members joining the initiative.

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https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people#:~:text=Experts%20estimate%20that%20up%20to,as%20heterosexual%20(sexual%20orientation).

[143] Section II paragraph 22 (d) and Section II (financial services) paragraph 19 (d).

[144] According to Art. 4 (2) of the CEDAW: "Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

[145] According to the General Recommendation n. 25 "Article 4, paragraph 2, provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature, at least until such time as the scientific and technological knowledge referred to in article 11, paragraph 3, would warrant a review." *General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women: Temporary Special Measures*. Thirtieth session, 2004. United Nations document A/59/38, annex I, para 16.

[146] "Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women." United Nations Committee on the Elimination of Discrimination against Women**.** Idem, para. 8.

[147] According to Art. 4 (1) of the CEDAW, "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

[148] "Recent economic modeling shows that where legal protections are in place preventing providers from discriminating against women (in the form of broad anti-discrimination clauses in the constitution or explicit prohibitions against gender-based discrimination in access to credit in legislation), women are more likely to ask for credit, except in Muslim-majority countries. However, such legal protections do not make providers more likely to grant women the credit they seek, except in high-income countries (Bertrand and Perrin 2022)." In World Bank Group, Global Indicators Briefs No. 16, p.3, Box 2. Available at: https://documents1.worldbank.org/curated/en/099400003082361874/pdf/IDU15eec2c4f127b91446b19954105faa70906f9.pdf.

According to a World Bank Working Paper "Worldwide, in 2021, only 74 percent of women had an account at a formal financial institution compared with 78 percent of men. This gender gap of 4 percent in financial access is systematic and persistent" In Perrin Caroline, Hyland Marie. Policy Research Working Paper 10282, Gendered Laws and Women's Financial Inclusion. World Bank Group, January 2023.

[149] Op. cit., *Amalie Giødesen Thystrupin*, p. 135.

4. *Conclusion*

The moment of the deepest crisis at the WTO has revealed to be also the moment of greatest transformation towards an objective that has not been explicitly acknowledged in the Marrakesh Agreement, although it is implicitly comprised in the objective of sustainable development: women's economic empowerment. Once the Nobel Prize Malala said that "Education is neither Eastern nor Western, it is human."[150] Now the WTO is also putting on the table that trade is neither eastern nor western, male nor female, but human, and apart from multicultural divergencies within WTO Members, all women have the right to trade and should have the necessary means for it.

The advancement of women empowerment policies and programs within the WTO has been done in an informal and 'female'[151] way, through diplomacy, cooperation and dialogue, gaining space gradually mainly due to the protagonist role of the WTO Secretariat (whose staff's majority is female) the participation of non-State actors, and the use of soft language and soft instruments, such as the Declaration on Women's Economic Empowerment presented during MC11 and currently endorsed by 127 WTO Members. From this soft law instrument, several policies and initiatives have been promoted in the WTO, encouraging WTO Members to adopt domestic policies devoted to women's economic empowerment, and the goal of women's economic empowerment has been acknowledged multilaterally by all WTO Members, as the Ministerial Declarations of the last Ministerial Conferences revealed, but always using the term 'women', and the expression women's economic empowerment, and avoiding the use of the 'gender' terminology, not accepted by all WTO Members.

Moreover, due to the difficulty of reaching consensus in the WTO, and the necessity to develop WTO plus and extra rules, the MC 11 was also marked by the launch of Joint Initiatives, as the Joint Initiative on Investment Facilitation for Development, the Joint initiative on Micro, small and medium-sized enterprises (MSMEs), the Joint initiative on Electronic-Commerce; and the Joint initiative on Services Domestic Regulation (SDR). Among all of the them, the last one is of great relevance, not only because it has been successfully concluded with an agreed text – the Reference Paper on Services Domestic Regulation – but because for a very first time in the WTO legal framework explicit provisions related to women were included, aiming to impair discrimination between women and men[152] in procedures relating to the authorization for the supply of services, and financial services. The provisions bring two exceptions in which differential treatment for women is allowed based on Art. 4 of the CEDAW, in case of measures that are reasonable, objective, and aim to achieve a legitimate purpose, and in case of temporary special measures aimed at accelerating de facto equality between men and women.

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[150] Malala Yousafzai, in her book I Am Malala: The Girl Who Stood Up for Education and Was Shot by the Taliban.

[151] The term is not used to reinforce a stereotype, but to make reference to the gendered binary dichotomy framed by feminist international legal scholars, according to which international law, the use of force, and the idea of State is constructed as 'male', and one of the feminist strategies is "to undermine the centrality of the state in international law." Charlesworth, Hilary, and Christine Chinkin. *The Boundaries of International Law: A Feminist Analysis with a New Introduction*. Manchester university press, 2022, p. 125-169.

[152] According to the SDR, when a member adopts or maintains measures relating to the authorization for the supply of a service, including a financial one, it shall ensure that "such measures do not discriminate between men and women", taking into consideration that "differential treatment that is reasonable and objective, and aims to achieve a legitimate purpose, and adoption by Members of temporary special measures aimed at accelerating de facto equality between men and women, shall not be considered discrimination for the purposes of this provision."

Furthermore, as acknowledged by the last WTO World Trade Report[153], "[t]he decision of whether and how to address inclusiveness rests with each government"[154], reason domestic laws and policies are central to guarantee that women have access and means to enter and compete in international trade. In this aspect, capacity-building programs, technical assistance and financial incentives to women-entrepreneurs are among the measures that WTO Members have highlighted to encourage women's economic empowerment, considering the main barriers faced by women. In this regard we take note of the policies adopted by the Italian government to support women entrepreneurs, such as the Women's Business Fund[155] – *Fondo Impresa Femminile* – offering to women-business financial and technical support, and the new certification on gender equality[156], a certification that a company can obtain in a voluntary basis and is encouraged to do by receiving tax incentives.

Although the many barriers still to be overcome, the numerous initiatives that have flourished since the presentation of the Women's Economic Empowerment Declaration, the progressive acknowledgement by WTO Members of the goal of promoting women's economic empowerment, and the increasing participation of women in the organization as Ambassadors, State representatives and Panelists, as well as the reappointment of the Director-General Ngozi Okonjo-Iweala, suggest that the outlook for women in the WTO is very auspicious and that a real reform to empower women in the WTO and in international trade is already underway.

[153] World Trade Report 2025. Trade and inclusiveness. How to make trade work for all.
[154] Idem, p. 13.
[155] The fund was established by article 1, paragraph 97, of Law n. 178 of 30 December 2020. With a budget of 400 million euros, aims to increase the level of women's participation in the labour market and, in particular, to support their participation in entrepreneurial activities by providing subsidized financing and non-repayable grants to women's businesses that are newly created or already active on the market. The policy also provides support for management activities (planning, investigation, disbursement and post-disbursement) and technical support through an agreement with *Invitalia SpA*, an Italian national agency for development controlled by the Italian Ministry of Economy and Finance, Information available in Italian at https://www.mimit.gov.it/index.php/it/pnrr/progetti-pnrr/pnrr-creazione-di-imprese-femminili.
[156] The company may demonstrate it ensure greater quality for women's work, such as growth opportunities and inclusion of women in the company, equal pay for men and women, and protection of motherhood/parenthood and work-life balance. The introduction of the Gender Equality Certification System implements the National Strategy for Gender Equality 2021-2026 National Strategy for Gender Equality 2021-2026, which aims to achieve, by 2026, an increase of five points in the ranking of the gender equality index developed by the European Institute for Gender Equality (EIGE), which currently sees Italy in 14th place in the ranking of EU countries.

The World Trade Organisation Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP/DPP) & the Global Plastic Treaty

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Keywords: Informal Dialogue on Plastics Pollution (IDP/DPP) – Global Plastics Treaty – Trade and Environment – European Union – World Trade Organisation.

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1. Introduction

Plastic pollution has become one of the most pressing environmental issues of our time. With over 400 million tons of plastic produced globally each year, much of which is used for single-use applications, the resulting waste has generated widespread ecological, health, and economic consequences[1]. Marine ecosystems are particularly at risk, with an estimated 11 million tons of plastic entering the oceans annually, disrupting biodiversity and compromising food chains[2]. In response, national regulations and voluntary corporate initiatives have multiplied. However, their fragmented and uneven implementation has revealed substantial governance gaps, highlighting the need for more coordinated international action[3].

Against this background, the international community has begun to seek more coherent, multilateral approaches. In addition to negotiations under the United Nations Environment Assembly (UNEA) to develop a legally binding instrument to end plastic pollution[4], other international organisations have explored complementary roles. Among them, the World Trade Organisation

[1] Borrelle, S. B., Ringma, J., Law, K. L., Monnahan, C. C., Lebreton, L., McGivern, A., Murphy, E. L., Jambeck, J., Leonard, G. H., Hilleary, M. A., Eriksen, M., Possingham, H. P., Frond, H. D., Gerber, L. R., Polidoro, B., Tahir, A., Bernard, M., Mallos, N. J., Barnes, M., & Rochman, C. M. (2020). *Predicted growth in plastic waste exceeds efforts to mitigate plastic pollution.* Science, 369 (6510), 1515; UNEP, From Pollution to Solution: A Global Assessment of Marine Litter and Plastic Pollution, 2021; Lyu, Xianyao (2024). *Study on the Path of Building the WTO Trade Rules Under the Urgent Need to Tackling Plastic Pollution.* Journal of WTO & China, 14(1), 6-51.

[2] Tibbetts, J. (2015). *Managing Marine Plastic Pollution: Policy Initiatives to Address Wayward Waste*. Environmental Health Perspectives, 123(4); Jenna R. Jambeck et al. (2015), *Plastic waste inputs from land into the ocean*. Science 347,768-771. See also OECD, *Global Plastics Outlook: Economic Drivers, Environmental Impacts and Policy Options*, 2022.

[3] See Tibbets, J. *op.cit.*

[4] UNEA Resolution 5/14, End Plastic Pollution: Towards an International Legally Binding Instrument, 2 March 2022.

(WTO) has positioned itself as a potential forum to address the trade-related dimensions of the plastics crisis. While the Geneva trade system has no specific competence to develop environmental policies, there is a growing willingness within the WTO to engage with sustainability issues through informal mechanisms and plurilateral formats.

One of the most significant initiatives in this context is the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP) – now called Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (DPP) – launched at the WTO in November 2020. Spearheaded by a diverse group of Members – including both developed and developing countries – the IDP/DPP seeks to explore how trade policy and cooperation can contribute to reducing plastic pollution and promoting sustainable trade in plastics and substitutes[5]. Unlike formal negotiations, the IDP/DPP is not aimed at producing binding rules or agreements. Instead, it functions as a platform for knowledge sharing, capacity building, and consensus-building on potential trade-related responses to plastic pollution.

Since its inception, the IDP/DPP has grown significantly in scope and membership. From an initial limited number of co-sponsors, participation expanded to 83 WTO Members as of February 2025, representing a broad geographical and economic spectrum[6]. This demonstrates a shared recognition of the urgency to tackle plastic pollution and the importance of trade policy tools in addressing the issue.

However, the informal nature of the dialogue and the absence of negotiating mandates raise questions about the effectiveness, legitimacy, and inclusiveness of such initiatives within the WTO's institutional framework.

This chapter examines the evolution, contents, and implications of the WTO's Informal Dialogue on Plastics. It explores the intersection between trade and environmental objectives, the roles and interests of key stakeholders, and the relationship between the IDP/DPP and the ongoing process to develop a UN Global Plastics Treaty. The chapter argues that while the dialogue remains non-binding and exploratory, it represents a potentially significant step toward integrating environmental sustainability into global trade governance.

2. The WTO institutional framework and the birth of the Informal Dialogue on Plastics (IDP/DPP)

The WTO[7], established in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT)[8], is fundamentally designed to regulate international trade by promoting non-discrimination,

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[5] WTO, Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade: Ministerial Statement, 15 December 2021 (WT/MIN(21)/8/Rev.2). Coordinators: Australia, Barbados, China, Ecuador, Fiji and Morocco. Co-sponsors: 72 Members, representing more than 75% of global plastics trade Albania; Angola; Australia; Austria; Barbados; Belgium; Bolivia, Bulgaria; Cabo Verde; Cambodia; Cameroon; Canada; Central African Republic; Chad; Chile; China; Colombia; Costa Rica; Croatia; Cyprus; Czech Republic; Denmark; Ecuador; Estonia; European Union; Fiji; Finland; France; Gambia; Germany; Greece; Honduras; Hong Kong, China; Hungary; Iceland; Ireland; Italy; Jamaica; Japan; Kazakhstan; Korea, Republic of; Latvia; Lithuania; Luxembourg; Macao, China; Maldives; Malta; Morocco; Netherlands; New Zealand; Norway; Panama; Paraguay; Peru; Philippines; Poland; Portugal; Romania; Russian Federation; Saudi Arabia, Kingdom of; Singapore; Slovak Republic; Slovenia; Spain; Suriname; Sweden; Switzerland; Thailand; Tonga; United Kingdom; Uruguay; Vanuatu.

[6] WTO, Plastic Pollution and Environmentally Sustainable Plastics Trade: Updates on the IDP Work Plan, 2024.

[7] See Marrakesh Agreement Establishing the WTO, 1994, in particular Preamble and Art. III, UNTS 1868.

[8] See General Agreement on Tariffs and Trade (GATT), 55 UNTS 194. *Ex multis* Van den Bossche, P., & Zdouc, W. (2021). The Law and Policy of the World Trade Organization: Text, Cases, and Materials (5th ed.). Cambridge: Cambridge University Press; Cottier, T., & Delimatsis, P. (Eds.). (2011). *The Prospects of International Trade Regulation: From Fragmentation to Coherence*. Cambridge: Cambridge University Press; Matsushita, Mitsuo; Schoenbaum, Thomas J.;

transparency, and the reduction of trade barriers.

While the WTO's core agreements make limited direct reference to environmental issues, its preamble explicitly acknowledges the objective of sustainable development and the need to protect and preserve the environment[9]. However, the operationalisation of environmental concerns within the WTO has long remained a matter of contention, partly due to fears that environmental measures might serve as disguised protectionism.

Despite these constraints, the interface between trade and environment has become increasingly relevant in recent decades, culminating in establishing specialised mechanisms within the multilateral trading system, such as the Committee on Trade and Environment (CTE), set up by the Uruguay Round Agreements[10].

In this context of limited formal progress, WTO Members have increasingly turned to plurilateral and informal mechanisms to address urgent sustainability challenges. One such initiative is the Trade and Environmental Sustainability Structured Discussions (TESSD), launched in 2020, which provided the broader umbrella under which the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP/DPP) was conceived[11]. The IDP/DPP was officially launched in November 2020 by 7 WTO Members (Australia, Barbados, Canada, China, Ecuador, Fiji, and Morocco) to foster collective action to reduce plastic pollution through trade-related approaches[12].

The IDP/DPP is not a formal negotiating group under the WTO. Instead, it operates as a voluntary, Member-led platform with flexible participation and consensus-oriented processes. Its founding statement emphasised three core aims[12]: (1) improving transparency on trade flows and policies related to plastics; (2) identifying trade-related solutions to support the reduction, reuse, and recycling of plastics; and (3) strengthening cooperation, particularly for developing and least-developed countries, in transitioning to environmentally sustainable plastics trade.

From a procedural standpoint, the IDP/DPP is coordinated by co-convenors who rotate periodically and organise thematic meetings, working groups, and capacity-building activities. Participation in the dialogue has grown steadily, with several Members of the WTO, including the European Union, joining the initiative and contributing to its evolving work plan.

Importantly, the IDP/DPP has maintained a clear distinction from formal WTO negotiations, which allows it to experiment with multi-stakeholder engagement and knowledge sharing, including through workshops with representatives from academia, civil society, and industry[13].

This format reflects a broader trend in global governance: the rise of informal, soft-law mechanisms to address complex, cross-cutting issues that elude rigid treaty-based solutions. This

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Mavroidis, Petros C.; and Hahn, Michael, "The World Trade Organization: Law, Practice, and Policy" (2015). Faculty Books. 131; Rieder, L., LL. M. Eur. (2020). The Relationship between Trade-Related Environmental Measures in Multilateral Environmental Agreements and the WTO Law (1ª ed., Vol. 79). Nomos Verlagsgesellschaft mbH & Co. KG.

[9] Ibid., Preamble: "[…] allowing for the optimal use of the world's resources in accordance with the objective of sustainable development [...]." See Persaud, B. (2010). Environment and the WTO, https://www.tandfonline.com/doi/abs/10.1080/0035853032000150636.

[10] As explicitly indicated in the official website "The Committee Trade and Environment (CTE) is the standing forum dedicated to dialogue amongst the entire WTO membership on the impact of trade policies on the environment and of environment policies on trade. Since its creation in 1995, the Committee has followed a comprehensive work programme." For more details, please see https://www.wto.org/english/tratoP_e/envir_e/wrk_committee_e.htm.

[11] WTO, Trade and Environmental Sustainability Structured Discussions: Launch Statement, 17 November 2020. See the official website https://www.wto.org/english/tratop_e/tessd_e/tessd_e.htm.

[12] See note 5.

[13] See for example the workshop focused on "Sustainable and Effective Substitutes and Alternatives for Plastics" organized by the WTO and UNCTAD in December 2022.
The main activities will be discussed in the next section.

development is particularly noteworthy within the WTO, given the organisation's current impasse in formal rule-making and the erosion of its dispute settlement mechanism[14]. The IDP/DPP represents an attempt by Members to reclaim agency and relevance by engaging in pragmatic, solution-oriented dialogues on a non-binding basis.

Nevertheless, the informal character of the IDP/DPP also raises critical institutional questions. How do such dialogues relate to the WTO's formal architecture? Do they risk creating a two-tier Membership structure, privileging countries that can afford to participate actively in multiple processes? And to what extent can voluntary commitments influence or prepare the ground for future binding rules?

3. Contents and developments of the Informal Dialogue on Plastics (IDP/DPP)

Since its establishment in late 2020, the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP/DPP) has steadily evolved in scope and ambition. While initially focused on the general exchange of views and confidence-building among participants, the dialogue has gradually consolidated into a more structured platform to deliver practical contributions to reducing plastic pollution through trade-related measures. This evolution has been marked by successive ministerial statements, thematic work streams, and a growing emphasis on coordination with international processes, including the United Nations-led negotiations for a legally binding instrument on plastic pollution[15].

One of the key features of the IDP/DPP has been the publication of joint Ministerial Statements during WTO Ministerial Conferences and other high-level meetings[16]. The first statement, issued in December 2021[17], identified three core pillars of the dialogue: transparency and cooperation, trade policies to reduce plastic pollution, and capacity building and technical assistance for developing and least-developed countries (LDCs)[18]. It emphasised the need to explore how trade can support circular economy approaches, including reducing, reusing, and recycling plastics.

Later in 2022, these commitments were confirmed. In particular, in the June 2022 declaration[19] there is the important affirmation of the willingness to continue to work effectively with other international processes and organisations.

Few months later, at the 13th Ministerial Conference in February 2024, the Dialogue coordinators prepared a Ministerial Declaration[20] containing a set of principles and actions to ensure that trade forms part of the solution to the growing challenge of plastic pollution[21].

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[14] See *ex multis* Baroncini E. (2018). *Attacco ai magnifici sette: il blocco nella composizione dell'organo d'appello dell'OMC genesi e possibili soluzioni.* Archivio Giuridico, 2018, (1), 35-123; Elisa Baroncini (2018). *Il funzionamento dell'Organo d'appello dell'OMC: bilancio e prospettive.* Bologna: Bonomo*;* Pennisi, G. (2022). *Gli sviluppi del commercio mondiale e la crisi da sovraccarico dell'OMC*. GeoTrade, 132–135.

[15] By 2025, the IDP/DPP had reached 83 WTO Members, including major economies and small island developing states disproportionately affected by marine plastic pollution. This diversity in participation underscores both the global nature of the problem and the variety of national interests involved in addressing it.

[16] The expression *"other high-level meetings"* refers primarily to events such as the WTO's *Trade and Environment Week*, as well as special high-level sessions of the Committee on Trade and Environment (CTE).

[17] See note 5.

[18] *Ibidem*.

[19] See WTO, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 13 June 2022 (WT/MIN(22)/12).

[20] WTO, Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade, 23 February 2024 (WT/MIN(24)/14).

[21] E.g. among others: improve transparency, monitoring and understanding of trade flows, address trade-related capacity building and technical assistance needs of developing Members, least-developed Members, SVEs and SIDS, Promote trade-related cooperation to contribute to the control of transboundary movement of plastic pollution.

The IDP/DPP's central focus has been increasing transparency in plastics and plastic substitutes trade flows. This involves mapping the movement of raw plastic materials, plastic products, and waste through global value chains. The dialogue has acknowledged significant information gaps in this area, which hinder the design of effective policy interventions. Through collaboration with the WTO Secretariat, United Nations Commodity Trade Statistics Database (UN Comtrade), and the Organisation for Economic Co-operation and Development (OECD), the IDP/DPP has sought to improve the collection and classification of trade-related data, including through more granular use of Harmonised System (HS) codes.

Another crucial thematic area is the promotion of sustainable and circular trade practices. This includes examining trade-related measures that can incentivise the reduction of virgin plastic production, support recycling infrastructure, and facilitate the adoption of biodegradable or compostable alternatives. However, discussions have also revealed potential trade-offs and regulatory divergences, particularly concerning definitions, standards, and certification schemes for "sustainable plastics." Some Members – like Africa, Asia, Latin America – have expressed concerns that uncoordinated regulatory measures – such as import bans on certain plastic items or the imposition of environmental standards – could result in unnecessary trade barriers or discrimination against developing-country exporters.

To address such concerns, the IDP/DPP has encouraged dialogue on regulatory coherence and developing internationally recognised standards, working with organisations like the International Organisation for Standardisation and UNEP.

Another pillar of the IDP/DPP is providing capacity building and technical assistance, particularly for developing countries and LDCs. These Members often face disproportionate challenges in managing plastic waste, meeting new regulatory requirements in export markets, or transitioning toward more sustainable production models. The IDP/DPP has recognised the need to ensure that special and differential treatment is effectively integrated into any trade-related response to plastic pollution.

Several proposals have been made to support this goal, including establishing financing mechanisms, technology transfer platforms, and targeted training for customs officials on plastic classification and environmental standards. For instance, Ecuador and Fiji, co-convenors of the IDP/DPP, have highlighted the importance of South-South cooperation and regional partnerships to disseminate best practices and scale up locally adapted solutions.

Moreover, the dialogue has increasingly sought to connect with the Intergovernmental Negotiating Committee (INC) process under UNEP, which aims to produce a global treaty on plastic pollution by 2025. While the WTO is not a party to this treaty negotiation, many of its Members participate in both fora. This overlap creates opportunities for cross-fertilisation, particularly on issues such as trade in plastic waste, extended producer responsibility, and harmonised labelling schemes.

That said, participants have been careful to avoid the impression that the IDP/DPP is pre-empting or duplicating the work of the INC. The co-convenors have repeatedly stated that the WTO dialogue is complementary to the UN process and focused on trade-related aspects where the WTO has a comparative advantage – namely, transparency, technical cooperation, and facilitation of trade in environmentally sustainable goods and services.

The Informal Dialogue on Plastics (IDP/DPP) is not merely a technical forum for trade-environment discussions – it is also a space where national interests, development priorities, and geopolitical alignments are negotiated and expressed. While the dialogue is framed as cooperative and non-binding, the positions taken by participating WTO Members reflect deeper structural divides concerning trade, environmental governance, and the distribution of burdens and benefits in transitioning to sustainable plastics economies.

Several Members have played a prominent role in shaping the IDP/DPP, both politically and substantively. The European Union, Ecuador, Fiji, Australia, and China stand out as consistent co-convenors and contributors to agenda-setting within the group.

The European Union has long championed the integration of environmental objectives into trade policy, both unilaterally and multilaterally. Its support for the IDP/DPP aligns with broader initiatives under the European Green Deal[22] and the Circular Economy Action Plan[23], including domestic measures to restrict single-use plastics and enhance producer responsibility. By promoting similar objectives within the WTO, the EU seeks to externalise its regulatory model and level the playing field for European exporters facing green standards at home.

Ecuador and Fiji, on the other hand, illustrate the role of norm entrepreneurship from the Global South. These countries have emphasised the existential threat plastic pollution poses to coastal and marine ecosystems, particularly in small island and biodiversity-rich states. Their leadership in the IDP/DPP demonstrates that environmental ambition does not necessarily correlate with economic size or institutional capacity. For them, the IDP/DPP is a vehicle to advocate for international support, recognition of differentiated responsibilities, and greater participation in standard-setting processes[24].

China has taken a strategic and pragmatic approach as the world's largest plastic producer and a key actor in global supply chains. After banning plastic waste imports in 2018 under its "National Sword" policy, China has repositioned itself as a proponent of global sustainability standards while simultaneously seeking to avoid fragmentation in trade rules that could harm its exporters[25]. Its participation in the IDP/DPP reflects a balancing act between environmental diplomacy, industrial competitiveness, and trade predictability.

While participation in the IDP/DPP has expanded steadily, many developing countries have expressed scepticism or outright reluctance to engage. For many, the primary concern is that sustainability-related trade measures – however well-intentioned – may become a new form of non-tariff barrier that disadvantages low-income exporters. Several African, Asian, and Latin American Members have voiced concerns that evolving environmental standards, particularly for packaging, product content, and biodegradability, may be challenging to meet without substantial investment and technology transfer[26]. These concerns are not unfounded. Past experiences with sustainability standards in sectors like agriculture suggest that the cost of compliance can be prohibitive, especially when international support is insufficient or fragmented[27]. As a result, many developing Members in the WTO have adopted a wait-and-see approach, monitoring the IDP's evolution while refraining from formal endorsement.

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[22] For details, please see Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, Brussels, 11.12.2019 COM (2019) 640 final.

[23] Please see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A New Circular Economy Action Plan For A Cleaner And More Competitive Europe,* COM/2020/98 final.

[24] See note 19.

[25] See Lyu, Xianyao (2024), *op. cit.*

[26] For further details see the statements uploaded online in the website https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_statements_e.htm.

[27] For example, agricultural certification schemes such as GlobalG.A.P. and Fairtrade have been shown to impose significant auditing and compliance costs on smallholders, limiting their ability to access export markets. See Henson, S., & Humphrey, J., "The impacts of private food safety standards on the food chain and on public standard-setting processes", *UNIDO Working Paper* (2010); Oya, C. et al., *Effects of certification schemes for agricultural production on socio-economic outcomes in low- and middle-income countries: A systematic review*, *Campbell Systematic Reviews* (2017).

In response, co-convenors have repeatedly emphasised that the dialogue is voluntary, inclusive, and oriented toward capacity-building. Including Special and Differential Treatment in the IDP's work plan addresses the asymmetries in resources and regulatory readiness among Members. However, the effectiveness of these provisions remains contingent on the availability of funding, technical assistance, and sustained political commitment.

4. The relationship between the IDP/DPP and the Global Plastics Treaty (INC Process)

The emergence of the Informal Dialogue on Plastics (IDP/DPP) within the WTO coincides with a parallel, and potentially more impactful, international process: the negotiation of a legally binding Global Plastics Treaty under the auspices of the United Nations Environment Programme (UNEP). The process, led by the Intergovernmental Negotiating Committee (INC) established by UNEA Resolution 5/14 in March 2022[28], aims to produce an international agreement by the end of 2024 to stop plastic pollution across the full life cycle of plastics[29]. The convergence of these two initiatives – one formal and treaty-based, the other informal and trade-oriented – raises both opportunities for synergies and risks of institutional fragmentation.

The INC was launched with the mandate to develop an instrument that addresses plastic pollution "including in the marine environment" and considers "the full life cycle of plastics", from production and design to waste management and disposal[30]. From its inception, the INC has included trade-related aspects among the areas for potential regulation, particularly regarding plastic waste exports, extended producer responsibility, sustainable product design, and financial mechanisms.

As of mid-2025, the INC process had completed five negotiation rounds, with a draft treaty text under discussion and several contentious unresolved issues. Key points of debate include whether the Treaty should impose binding global targets, how to differentiate obligations between developed and developing countries, and whether trade measures – such as bans or restrictions on specific polymers or products – should be permitted or encouraged under the agreement[31].

Many WTO Members participating in the IDP/DPP are also active in the INC negotiations, including the EU, China, Ecuador, and several Small Island Developing States (SIDS). This overlap of actors provides a natural bridge for aligning efforts, though the legal and institutional frameworks remain distinct.

4.1 Potential areas of convergence

Despite their differences in formality and scope, the IDP/DPP and the INC process share several objectives that create opportunities for mutual reinforcement. First, both processes aim to enhance transparency in plastic flows. The IDP/DPP's work on improving trade data, customs classifications, and monitoring tools could inform the implementation mechanisms of a future plastics treaty. In particular, the WTO's expertise in technical infrastructure and trade statistics could be leveraged to support compliance monitoring and reporting obligations under the Treaty.

Second, both initiatives emphasise the importance of capacity building, particularly for developing countries. The IDP/DPP's voluntary technical assistance components and commitment to Special and Differential Treatment could complement the Treaty's financial and institutional support mechanisms, especially in contexts where trade policy reform is a prerequisite for treaty compliance.

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[28] See paragraph 1.
[29] Although the deadline has passed, negotiations on this Agreement have not yet concluded.
[30] UNEP, *Terms of Reference of the Intergovernmental Negotiating Committee*, UNEP/PP/INC.1/4, December 2022.
[31] INC Secretariat, Zero Draft of the Global Plastics Treaty, UNEP/PP/INC.4/3, 2024.

Third, the IDP/DPP and INC recognise the need for standardisation and regulatory coherence. Trade in recycled materials, sustainable alternatives, and biodegradable plastics will likely increase under a global plastics treaty, and consistent standards will be essential to avoid technical trade barriers. The IDP's informal setting may serve as a pre-normative space for discussing best practices and identifying regulatory convergence pathways, without prejudging the treaty outcomes[32].

Finally, the IDP/DPP and the INC have expressed openness to multi-stakeholder engagement, including civil society, academia, and the private sector. Lessons from the WTO's dialogue with industry actors – on harmonised labelling, certification, and traceability – could inform the governance architecture of the plastics treaty, particularly in promoting voluntary compliance schemes and product stewardship initiatives[33].

Nevertheless, the coexistence of these two parallel processes also presents challenges. One key risk is the fragmentation of international legal regimes. While the IDP/DPP remains informal and non-binding, its influence on trade-related practices could affect how certain WTO Members interpret their obligations under a future treaty. Conversely, suppose the plastics Treaty includes provisions that restrict or condition trade in plastics or substitutes. In that case, these may become in tension with WTO rules.

Furthermore, the fact that the IDP/DPP is not a universal forum[34] – only 83 out of 164 WTO Members currently participate – raises concerns about institutional exclusivity. Suppose trade-related best practices or soft law principles emerge from the IDP/DPP but are not endorsed multilaterally or embedded in the Treaty framework. In that case, this may lead to a patchwork of norms that vary in legitimacy and application.

Another source of tension relates to governance authority. The plastics Treaty is expected to establish its own implementation body, possibly with supervisory and compliance-monitoring powers. It remains unclear how this body would interact with the WTO in the event of conflicts or overlapping competences. While the WTO's dispute settlement mechanism is currently under strain, it retains the formal authority to adjudicate trade disputes, including those arising from environmental measures that may be considered trade-restrictive.

Both processes need transparent coordination and legal clarity to mitigate these risks. For instance, references to WTO rules and principles could be included in the final text of the plastics Treaty, in ways that preserve policy space while ensuring compatibility with international trade law. Similarly, the IDP/DPP could incorporate periodic consultations with the INC Secretariat or designate focal points to relay outcomes and priorities across forums.

5. The role of the European Union in the Informal Dialogue on Plastics (IDP/DPP)

Among the participants in the WTO's Informal Dialogue on Plastics (IDP/DPP), the European Union (EU) has emerged as one of the most active and norm-shaping actors. Its engagement reflects broader efforts to align trade policy with the European Green Deal and its commitment to leadership in global environmental governance.

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[32] WTO, *IDP Roundtable on Harmonised Standards for Biodegradable Plastics*, Geneva, May 2023.

[33] For more details please check the website https://www.wto.org/english/news_e/news22_e/ppesp_07dec22_e.htm?utm_source and https://www.unep.org/inc-plastic-pollution/media?utm_source.

[34] In March 2022, at the conclusion of the United Nations Environment Assembly (UNEA-5.2), heads of state, environment ministers and other representatives from 175 nations agreed to create a legally binding international instrument to end plastic pollution.

The EU's support for the IDP/DPP is rooted in its broader strategy to integrate sustainability into trade, as set out in the *Trade Policy Review* of 2021[35] and its *Circular Economy Action Plan* of 2020.

More recently, the Commission's efforts have been directed at containing the problem of pellet dispersion in the environment through a specific regulation.

On this issue, the Council and the European Parliament reached a provisional agreement in April 2025[36].

These policy frameworks emphasise the role of trade in supporting environmental objectives, particularly through market incentives for circular business models, green technologies, and sustainable product design.

The EU has supported the Trade and Environmental Sustainability Structured Discussions (TESSD) and the IDP/DPP in WTO fora. It has actively contributed to work streams related to standards harmonisation, transparency, and support for the circular economy. In particular, the EU has proposed strengthening trade classification systems for recycled plastics and substitutes, facilitating trade in environmentally sustainable goods and services, and promoting due diligence frameworks in global supply chains.

The EU's participation in the IDP/DPP also reflects its strategic interest in regulatory alignment. As the Union introduces stricter domestic legislation – such as the Single-Use Plastics Directive[37], the Packaging and Packaging Waste Regulation[38], and the Sustainable Products Initiative[39] – it seeks to prevent regulatory divergence that could disadvantage EU producers abroad. By promoting its norms multilaterally, the EU aims to "export" its standards and ensure that foreign suppliers comply with similar sustainability criteria.

Furthermore, the EU has called for greater coordination between the WTO dialogue and the ongoing UN Plastics Treaty (INC) negotiations to avoid legal conflicts and enhance synergies. In this regard, the EU has emphasised the importance of coherence between multilateral trade and environmental regimes, advocating a complementary relationship between WTO soft law processes and UN-based treaty obligations[40].

Despite the EU's leadership, challenges remain. First, the informal nature of the IDP limits its ability to produce binding outcomes or guarantee follow-up by non-participating WTO Members. This creates uncertainty for businesses seeking clarity on international sustainability requirements[41]. Second, some developing countries view the EU's approach as overly prescriptive or normatively intrusive, particularly when it comes to aligning with EU environmental standards without adequate support[42].

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[35] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM/2021/66 final.

[36] This provisional agreement will have to be approved by the Council and Parliament and then formally adopted by both, followed by publication in the Official Journal of the EU.

[37] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019, p. 1–19.

[38] Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, OJ L, 2025/40, 22.1.2025, p. 1-124.

[39] For more details see the sustainable products initiative at the link https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12567-Sustainable-products-initiative_en.

[40] See https://environment.ec.europa.eu/news/eu-calls-agreement-conclude-global-plastics-treaty-2024-11-25_en and https://www.wto.org/english/news_e/news25_e/ppesp_14feb25_e.htm?utm_source.

[41] See Pauwelyn J., Wessel R., Wouters J. (edited by), *Informal International Lawmaking*, Oxford University Press, (2012).

[42] For example, South Africa highlighted the economic impact of CBAM in an official working paper by the Presidential Climate Commission, raising concerns about the choice of approach. See

Nonetheless, the IDP/DPP presents a strategic opportunity for the EU to shape the global governance of plastic pollution in ways that align with domestic policy priorities and support innovation in green technologies. Participation in the IDP/DPP allows these actors to anticipate regulatory developments, influence the design of future international rules, and strengthen cooperation with like-minded partners.

Importantly, as the IDP/DPP deepens its collaboration with the INC process, the EU can act as a bridging actor between trade and environmental communities, promoting legal coherence and ensuring that trade-related aspects of the future plastics treaty are designed in ways compatible with WTO disciplines and supportive of circular economy goals.

5.1 Italy's position on plastics

Italy is a leading player in plastic recycling, making the issue of plastic pollution particularly sensitive at a domestic level. Although Italy has participated in various international initiatives as an EU Member state, it has sometimes taken a critical stance on certain EU legislative proposals, particularly those relating to plastic packaging[43] and air quality[44]. However, these divergences have not undermined Italy's overall dedication to advancing multilateral solutions. This commitment was reaffirmed at the G7 meeting[45] in Turin in April 2024, where the agenda focused heavily on plastics. The final communiqué[46] underscored the need for a binding international instrument to address all stages of the plastic life cycle, and reiterated strong support for the ongoing INC negotiations.

Italy's broader approach to international negotiations on plastic pollution reveals a careful balance between its European obligations and domestic policy priorities. In the WTO IDP/DPP, Italy has not articulated an independent position, instead aligning itself with the European Union. By contrast, in the context of the Global Plastics Treaty (INC process), Italy has shown a more nuanced trajectory. Initially, alongside other cautious Member states[47], such as Spain, it supported less ambitious objectives than those championed by the EU's "high ambition" group.

This hesitation was largely due to concerns about the cost of adjustment and the protection of domestic industries specialising in biodegradable and compostable plastics. However, over time, Italy has progressively aligned with the EU mainstream by endorsing the Union's participation in the High Ambition Coalition to End Plastic Pollution[48] and supporting the call for a comprehensive, legally binding treaty that covers the entire plastic life cycle. This evolution culminated in June 2025, when

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https://pccommissionflow.imgix.net/uploads/images/PCC-CBAM-PAPER.pdf?utm_source=chatgpt.com; India also highlighted concerns about the growing use of the environment as a non-tariff measure; for further details, see the Report of the meeting of 17 and 21 October 2022 (WT/CTE/M/76) p. 45.

[43] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019, pp. 1–19.

[44] Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe, OJ L, 2024/2881, 20.11.2024, pp. 1-70.

[45] The Group of 7 (abbreviated to G7) brings together the heads of state and government of the world's seven most industrialised nations. Its Members are: Canada, France, Germany, Japan, Italy, the United Kingdom and the United States.

[46] See the text of the communiqué https://www.g7italy.it/wp-content/uploads/G7-Climate-Energy-Environment-Ministerial-Communique_Final.pdf.

[47] As reported by Il Fatto Quotidiano, for details visit https://www.ilfattoquotidiano.it/2022/12/13/il-trattato-globale-sulla-plastica-spacca-lue-litalia-e-tra-i-paesi-meno-ambiziosi-insieme-a-spagna-e-agli-stati-delleuropa-dellest/6903111/.

[48] As stated on the website, Members of the High Ambition Coalition (HAC) to End Plastic Pollution are committed to pursuing a global policy vision to end plastic pollution by 2040, as well as the three global strategic objectives and seven outcomes to be achieved for success in this regard. Italy participates as a member of the EU, which is part of the coalition. However, there are other member states whose commitment is stronger and which also participate as nations, such as France, Germany and Belgium. For details visit https://hactoendplasticpollution.org/.

Italy joined 95 other countries in signing the Nice Call for an Ambitious Treaty on Plastic Pollution[49]. This marked a significant shift, moving from an initial stance of caution to one of active and constructive engagement in shaping the global governance of plastics.

6. Future prospects and critical assessment

As the Informal Dialogue on Plastics (IDP/DPP) approaches its fifth year, it has grown into a notable experiment in how environmental sustainability can be addressed within the framework of the WTO. With 83 participating Members, a broad agenda, and thematic alignment with the ongoing UN Intergovernmental Negotiating Committee (INC) process on plastics, the IDP/DPP now stands at a crossroads: it must transition from dialogue to delivery if it wishes to remain a relevant and credible mechanism within global trade governance.

While, as already stated, the IDP/DPP was initially conceived as a non-binding and flexible platform, increasing calls are for it to deliver more concrete outputs. Potential avenues for institutionalisation include: the drafting of best practices or guidelines on environmentally sustainable plastic trade; the promotion of a plurilateral commitment or ministerial declaration; or the development of voluntary sustainability standards[50]. These instruments would not be legally binding, but could serve as stepping stones toward future disciplines or facilitate implementing the plastics Treaty under the INC process.

The IDP/DPP has produced ministerial statements, technical workshops, and draft working documents, but no formal WTO text has emerged. There is also no clear plan for mainstreaming the IDP/DPP into the WTO's formal architecture, such as the Committee on Trade and Environment, nor for linking it to the WTO's notification and transparency mechanisms in a binding form. As such, a key question for the coming years is whether the IDP/DPP will institutionalise within the WTO, remain informal and parallel, or evolve into a plurilateral initiative.

Another open issue is whether the IDP/DPP will become a vehicle for concrete technical cooperation, including financial and logistical support for developing countries. For this to happen, enhanced collaboration with international donors, development banks, and environmental agencies (e.g., UNEP, UNCTAD, and the World Bank) will be necessary[51].

The IDP/DPP represents a strong case of bottom-up multilateralism within the WTO. Unlike traditional negotiations, which often follow rigid procedural paths and require consensus from all the WTO Members, the IDP/DPP allows for differentiated participation and thematic experimentation. This flexibility has allowed Members with diverse capacities and environmental priorities to engage constructively without the fear of being bound by premature commitments.

Furthermore, the IDP/DPP has helped to depoliticise sensitive trade-environmental issues by focusing on technical cooperation, transparency, and shared learning. In contrast to the sometimes-

[49] For more details see the text of the Nice Call for an Ambitious Treaty on Plastic Pollution here https://www.ecologie.gouv.fr/sites/default/files/documents/The%20Nice%20wake%20up%20call%20for%20an%20ambitious%20plastics%20treaty.pdf.

[50] See WTO, Dialogue On Plastics Pollution And Environmentally Sustainable Plastics Trade Plenary Meeting Held on 13 March 2023, *Informal Summary by the Coordinators*, where Ambassador Li Chenggang (China) said that the Dialogue demonstrated that the WTO could play its role in the global response to pressing environmental challenges. Furthermore, the Dialogue worked closely with more than 40 stakeholders, p. 2.

[51] As stated in the official website "At a meeting of the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP) on 30 March, participants were updated on the first workstream meeting, which looked into international efforts to reduce plastics waste. Deputy Director-General Xiangchen Zhang urged the IDP to deepen its collaboration and cooperation with other international organizations and work towards concrete and pragmatic solutions for tackling plastics pollution", please see https://www.wto.org/english/news_e/news22_e/ppesp_31mar22_e.htm.

adversarial tone of formal WTO debates, the IDP/DPP has fostered a more pragmatic and solutions-oriented atmosphere, with meaningful participation from developing countries and small States.

Importantly, the IDP/DPP has also created a valuable platform for multi-stakeholder dialogue. The involvement of businesses, NGOs, researchers, and regional organisations has enriched the debate and helped bridge the gap between policy and implementation[52]. This collaborative ethos could be a model for other WTO initiatives addressing non-traditional trade concerns, such as biodiversity, food security, or labour rights.

Despite these achievements, the IDP/DPP faces several structural limitations. Most notably, its informality is both a strength and a constraint[53]. While flexibility has encouraged participation and experimentation, it limits the dialogue's ability to generate enforceable outcomes, allocate resources, or resolve disputes. Without an explicit institutional mandate, the IDP/DPP may eventually lose momentum or be sidelined by more formal processes such as implementing the INC Treaty.

Another limitation concerns the uneven participation among WTO Members. Although 83 countries have joined the IDP/DPP, half of the WTO Membership is outside the process. This raises concerns about legitimacy, especially if the IDP/DPP begins to shape de facto trade norms without universal backing. Some developing countries have expressed fear that the dialogue may result in a two-tier system, where a "coalition of the willing" sets standards that others are pressured to follow.

Moreover, the IDP/DPP remains vulnerable to geopolitical tensions and shifting global priorities. The uncertain future of WTO reform, the paralysis of the Appellate Body, and growing trade frictions among major economies could spill over into sustainability-related discussions and erode the trust necessary for continued dialogue. Environmental issues may also become politicised in trade negotiations, especially if perceived as protectionist tools or disguised market access barriers.

The IDP/DPP could serve as a template for thematic cooperation on other sustainability challenges within the WTO. The experience gained – procedurally and substantively – could inform future initiatives on climate-related trade measures (e.g., carbon border adjustment mechanisms), sustainable agriculture, or biodiversity conservation.

To achieve this, the IDP/DPP must consolidate its gains by formalizing key outputs, expanding its Membership base, and strengthening institutional links with other WTO bodies and UN environmental fora. Leadership by committed Members, especially the EU and key developing countries, will be crucial in maintaining political momentum and ensuring that the IDP/DPP contributes meaningfully to implementing the forthcoming global plastics Treaty.

In particular, the IDP/DPP could evolve into a support platform for treaty implementation, offering tools, training, and trade facilitation services aligned with global commitments. Alternatively, it may serve as an early-warning system to identify potential conflicts between trade rules and environmental measures, enabling preventive coordination and mutual accommodation.

The IDP/DPP also has the potential to redefine how soft law and informal processes interact with hard law in multilateral settings. If successful, it would demonstrate that WTO Members can innovate institutionally and respond to global challenges without overhauling the organisation's treaty base.

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[52] For example, in the MC12 briefing note, the WTO Secretariat listed a broad range of contributors, including the UNEP, the WCO and the OECD, who took part in the IDP/DPP meetings.

[53] Ecuador and China highlighted the importance of engaging with leading organisations. This allows IDP/DPP participants to continue their work between formal meetings and make progress towards achieving concrete outcomes. For more details visit the website https://www.wto.org/english/news_e/news22_e/ppesp_21mar22_e.htm.

7. Conclusion

The Informal Dialogue on Plastics (IDP/DPP) at the WTO has evolved into a significant platform for addressing one of the most pressing environmental challenges of our time: plastic pollution. Since its launch in 2020, the IDP/DPP has provided a rare space within the multilateral trading system to explore how trade rules, policies, and cooperation mechanisms can contribute to global efforts to reduce plastic pollution and promote sustainable plastics economies.

This dialogue has offered several advantages. It has enhanced transparency in plastic-related trade flows, fostered cross-sectoral engagement, and created opportunities for technical cooperation. It has allowed Members to explore solutions outside the constraints of formal negotiation processes, making it a flexible instrument for innovation and confidence-building. It has also succeeded in bringing together developed and developing countries, small island developing states, and major trading powers around a shared environmental agenda, albeit with differing motivations and expectations.

The alignment between the IDP/DPP and the United Nations' plastics Treaty negotiations has further raised the stakes of the WTO initiative. By contributing trade-related insights, data, and proposals, the IDP/DPP may play a complementary role in implementing the future legally binding instrument on plastic pollution. At the same time, the coexistence of both processes reveals a growing interdependence between trade and environmental governance, and highlights the need for legal and institutional coordination across regimes.

The European Union has emerged as a key driver of the IDP/DPP, using its regulatory expertise and policy leadership to shape discussions on circular economy, standardization, and sustainable trade practices. In this context, Italy stands out as an example of change and ability to adapt global and European needs to the domestic context. In fact, while initially a more rigid stance was maintained in order to safeguard the industry, which is widespread throughout the country, it was subsequently decided to soften this position, as highlighted in the paragraph dedicated to this issue.

Yet the IDP/DPP is not without its shortcomings. It remains informal, lacks enforcement power, and has yet to produce tangible outcomes in the form of WTO texts or disciplines. Its Membership does not include all WTO Members, raising legitimacy concerns. Moreover, the risk that trade-related environmental standards may be perceived as protectionist – especially by developing countries – could undermine trust and cooperation if not managed carefully.

Looking ahead, the IDP/DPP's success will depend on its ability to institutionalize without rigidifying, to expand inclusively, and to coordinate effectively with global treaty-making efforts. It must also demonstrate concrete value to its participants, particularly by enabling developing countries to access new markets, technologies, and financial resources to support their transition toward sustainable plastic use and waste management.

The IDP/DPP may also serve as a laboratory for broader trade-environment integration. As global concerns about climate change, biodiversity loss, and environmental degradation intensify, the WTO will increasingly be called upon to reconcile trade liberalization with environmental protection. The IDP's experience could offer valuable lessons on navigating this complex interface through dialogue, cooperation, and soft law instruments, without necessarily waiting for formal consensus.

To conclude, the IDP/DPP has laid the groundwork for a more environmentally responsive multilateral trading system. Whether it becomes a cornerstone of future WTO reform or remains a complementary process to external treaty regimes will depend on political will, resource allocation, and institutional innovation. What is clear, however, is that the fight against plastic pollution has entered the realm of trade policy, and the WTO, through the IDP/DPP, has begun to respond.

The EU Digital Trade Instruments and the WTO System

Susanna Villani*

Summary: 1. Introduction. – 2. Placing Artificial Intelligence in the EU digital trade strategy. – 3. Regulating Artificial Intelligence through bilateral trade instruments: Digital partnerships and (new) digital trade agreements. – 4. Conclusive remarks: What contribution of the EU digital trade to the multilateral context?

Keywords: Artificial Intelligence – International trade – Open strategic autonomy – WTO law – EU law – Digital trade.

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1. Introduction

In response to the digital transformation and the governance challenges it triggers, the regulatory landscape for digital trade has profoundly changed in the last two decades.[1] In particular, Artificial Intelligence (AI) is widely agreed to be a key element in the development and reshaping of the current and future global economy. [2]

As stressed in the first WTO report on trade and AI released in 2024,[3] the relationship between AI and international trade is defined in two dimensions. On the one hand, AI has the great potential to fundamentally change international trade and business models by reducing costs and logistics and creating new pathways for economies to develop expertise and business efficiency in areas that were out of reach. According to the WTO Director-General "[t]he digital transformation driven by AI is poised not only to boost services trade; it may also create whole new categories of tradable AI-powered goods, from autonomous vehicles to robotics and beyond. If we successfully harness its potential, AI can also support greener trade by optimizing resource use and reducing the carbon footprint of supply chains."[4] On the other hand, the increasing use of AI requires to regulate some sensitive questions related to access to data, intellectual property and copyright, proscriptions against localized storage requirements, and stipulations on source code governance and cybersecurity. Besides, AI poses new ethical, social, and human rights concerns that may require new norms and standards to ensure responsible and trustworthy development and use of AI.

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* Research also partially supported by the PNRR programme – M4C2 – Investment 1.3, Extended Partnership PE000013 – 'FAIR – Future Artificial Intelligence Research' – Spoke 8 'Pervasive AI', funded by the European Commission under the NextGeneration EU Programme.

[1] There is no accepted international definition of digital trade; the main difference with traditional trade in goods and services is the importance of cross-border data flows. In general, trade is considered to be digital if part of the transaction is carried out by digital means. Digital trade is often equated with e-commerce; however, e-commerce, usually defined as the delivery of goods ordered online, is part of the larger category of digital trade. For insights, see M. Burri, A. Chander, *What Are Digital Trade and Digital Trade Law?*, in *AJIL Unbound*, 2023, p. 99 ff.; M. Burri, M. Vásquez Callo-Müller, K. Kugler, *The Evolution of Digital Trade Law: Insights from TAPED*, in *World Trade Review*, 2023, p. 190 ff.

[2] J. Ferencz et al., *Artificial Intelligence and International Trade: Some Preliminary Implications*, OECD, 2022, Available at: https://www.oecd-ilibrary.org/docserver/13212d3e-en.pdf.

[3] World Trade Organization, *Trading with Intelligence: How AI Shapes and is Shaped by International Trade*, 2024.

[4] Ibid., p. 4.

In view of the incorporation of this new technology into an increasing number of goods and services with far-reaching implications for trade, the adoption of new instruments to support (even if indirectly) the regulation of AI in international trade has been examined in the WTO. Of particular note is the moratorium on the imposition of customs duties on electronic transmissions[5] and the conclusion of a plurilateral agreement to facilitate cross-border electronic transactions, reduce barriers to digital trade and promote innovation in e-commerce.[6] According to the text agreed on 26 July 2024, the latter covers digital trade facilitation, cross-border data flows, consumer protection, the facilitation of electronic transactions (e.g. e-signatures, e-contracts) and the protection of software source code. Although such an agreement is noteworthy for regulating digital trade in general terms, controversial issues like AI systems and forced transfer of source code have been excluded from the scope of the agreement.

Despite the achievement of these important milestones, the WTO legal framework is not currently adequate to meet the new challenges posed by AI systems. For this reason, discussions are taking place outside the WTO, in other multilateral and bilateral contexts, of formal or informal nature, on the possibility of converging on common standards to facilitate the introduction of AI systems in trade relations. In this regard, the European Union (EU) is trying to carve out for itself a leading role in defining appropriate instruments to regulate digital and technological trade, including AI systems.

The EU is currently engaged in an internal and external digital transformation, driven by the affirmation of the so-called 'EU technological (or digital) sovereignty.'[7] It reveals the Union's intention to overcome its dependence on foreign subjects and to contribute to the shaping of international rules in the digital/technological domain.[8] This perspective shall then be combined with the paradigm of 'open strategic autonomy': [9] the Union's general intention to make its own decisions and shape its trade strategies to protect and promote core EU interests and values, while achieving broader competitiveness and assertiveness within the international trade law context.[10] In parallel, it is worth recalling that EU primary law requires the Union to promote multilateral solutions to common problems (Article 21 TEU). With specific regard to global trade, it shall contribute to the harmonious development of world trade (Article 206 TFEU) and "encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade" (Article 21(2)(e) TEU).

Against this background, this paper aims to reflect on the exercise of the Union's Common Commercial Policy (CCP) competence to contribute to the international regulation of AI in line with

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[5] The text of the moratorium is available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN98/DEC2.pdf&Open=True.

[6] For insights on the negotiations of the E-commerce agreement, see https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm. For comments, see M. Burri, *A WTO Agreement on Electronic Commerce: An Inquiry into Its Legal Substance and Viability*, in *Georgetown Journal of International Law*, 2023, p. 565 ff.

[7] European Commission, *Shaping Europe's Digital Future*, COM(2020) 67 final, 19 February 2020. For insights, S. Poli, E. Fahey, *The Strengthening of the European Technological Sovereignty and Its Legal Bases in the Treaties*, in *Eurojus.it*, 2022, p. 147 ff.

[8] G. De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society*, Cambridge University Press, 2022.

[9] For insights, Editorial Comments, *Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem*, in *CMLR*, 2022, p. 313 ff.; D. Broeders, F. Cristiano, M. Kaminska, *In Search of Digital Sovereignty and Strategic Autonomy: Normative Power Europe to the Test of Its Geopolitical Ambitions*, in *JCMS*, 2023, p. 1261 ff.; S. Poli, *Reinforcing Europe's Technological Sovereignty Through Trade Measures: The EU and Member States' Shared Sovereignty*, in *European Papers*, 2023, p. 429 ff.; C. Beaucillon, *Strategic Autonomy: A New Identity for the EU as a Global Actor*, in *European Papers*, 2023, p. 417 ff.

[10] E. Fahey, *The European Union as a Digital Trade Actor: the Challenge of Being a Global Leader in Standard-Setting*, in *International Trade Law and Regulation*, 2021.

the EU value-based digital trade agenda, while examining the coherence of this strategy with the primary law requirement of supporting multilateral trade. It also intends to address some reflections on the contribution of the EU's trade instruments to the potential renewal of the WTO legal system in the digital domain.

2. Placing Artificial Intelligence in the EU digital trade strategy

The European Commission has declared the years 2020-2030 to be the 'Digital Decade' and set the objective of achieving the digital transformation to empower a more digitally sovereign, resilient, and competitive EU. The strategic Communication on *Shaping Europe's digital future* was further complemented by the 2021 *Digital Compass: the European way for the digital decade*, which sets out the Commission's vision for the EU's digital transition by 2030 and the specific actions it will undertake to aid the creation of safe and secure digital services and markets.

As of the AI, the 2020 *White Paper on Artificial Intelligence*[11] presented by the European Commission outlined a two-pronged strategy. On the one hand, it emphasises the need to promote the Union's competitiveness at global level by stimulating public and private investment in the AI sector and promoting the creation of an innovation-friendly ecosystem, especially in the industrial sector. On the other hand, there is a commitment to the development of a European digital ecosystem based on legality, ethics and robustness (from a technical and social point of view) and able to guarantee, first and foremost, the protection of human dignity, human rights and the other EU founding values set in Article 2 TEU, that ultimately constitute its constitutional identity.[12]

Such a perspective is also projected beyond the Union's territory through the promotion of a rules-based global AI trade. The need to integrate AI systems into the EU trade policy emerged in the 2021 Communication entitled *Trade Policy Review – An Open, Supportive and Assertive Trade Policy*, [13] where the Commission emphasised that the implications of new digital technologies need to be addressed globally through more ambitious global standards and rules. For this reason, "supporting Europe's digital agenda is a priority for EU trade policy."[14] To this end, the Union should pursue the objective of ensuring a leading position in digital trade, while supporting multilateral negotiations to liberalise trade in services in sectors going beyond e-commerce.[15] At the same time, the digital transformation and emergence of AI technologies have an important security and values dimension for the EU and require a carefully calibrated policy approach internally and externally. This implies that the EU digital trade agenda shall be based upon the EU core values.

This perspective of value-based digital trade is further underlined in the *European Declaration on Digital Rights and Principles for the Digital Decade*, jointly adopted by the European Parliament,

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[11] European Commission, *White Paper on Artificial Intelligence. A European approach to excellence and trust*, COM (2020) 65 final, 19 February 2020.

[12] For insights, E. Sciso, R. Baratta, C. Morviducci, *I valori dell'Unione europea e l'azione esterna*, Giappichelli, 2016; P. Mori, *Il primato dei valori comuni dell'Unione europea*, in *DUE*, 2021, p. 73 ff.; L.S. Rossi, *Il valore giuridico dei valori. L'Articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell'UE e rimedi giurisdizionali*, in *Federalismi.it*, 2020; L. D. Spieker, *EU Values Before the Court of Justice*, Oxford University Press, 2023.

[13] European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final, 18 February 2021.

[14] For comments, E. Fahey, *The European Union as a Digital Trade Actor: the Challenge of Being a Global Leader in Standard-Setting*, in *International Trade Law and Regulation*, 2021, p. 155 ff.; H. Roberts, J. Cowls, F. Casolari, J. Morley, M. Taddeo, L. Floridi, *Safeguarding European Values with Digital Sovereignty: an Analysis of Statements and Policies*, in *Internet Policy Review*, 2021, p. 1 ff.

[15] COM(2021) 66 final, cit., point 3.2.3.

the Council and the Commission.[16] It calls for the necessary measures to guarantee the values of the Union and the rights recognised in supranational law, both online and offline. The external scope of the Declaration is made explicit in the document itself, which states that "the EU should promote the Declaration in its relations with other international organisations and third countries, *including by reflecting these rights and principles in its trade relations*, with the ambition that the principles guide international partners towards a digital transformation that puts people and their universal human rights at the centre throughout the world" [emphasis added]. Moreover, the document recalls that the responsible development of digital culture can be a driving force for achieving the sustainable development goals of the 2030 Agenda, thus complying with the principle laid down in Article 11 TFEU. In this regard, the Declaration is aligned with the EU trade policy strategy in recognising that digital transformation represents a key enabler of sustainable development, and not only a space of competition and multilateral governance.

In June 2023, the European Council adopted its own *Conclusions on EU digital diplomacy* in which it emphasised the need for a stronger, strategic, coherent and effective supranational policy and action in global digital issues to confirm the Union's commitment in this field.[17] The digital diplomacy described in the conclusions also includes digital and technological trade to strengthen cooperation in and with relevant multilateral and multistakeholder fora by exploring the possibilities of burden-sharing for better coordination on digital issues. Lastly, this approach has been reiterated in the recent Communication on *A Competitiveness Compass for the EU*,[18] where the EU stresses its intention to expand its trade agreements network and ensure greater market access for European companies, while promoting open, rules-based global trade.

In order to achieve this objective, the EU has traditionally adopted a twofold strategy aimed at combining the multilateral and the bilateral approach. On the one hand, the EU is committed in building alliances in international organisations and actively supporting the efforts of the WTO for advancing digital inclusion in trade. On the other hand, it intends to strengthen its relations with *like-minded partners* through digital partnerships and dedicated agreements to advance cooperation in several crucial areas – including AI, secure international connectivity, cybersecurity, digital economy, trusted data flows and standards.

3. Regulating Artificial Intelligence through bilateral trade instruments: Digital partnerships and (new) digital trade agreements

Bilateral cooperation instruments with like-minded partners largely stem from informal forums designed to foster enhanced dialogue. Rather than imposing obligations, these platforms aim to build consensus on a broad range of technical and strategic issues, including AI. Notably, they include high-level dialogues with the United States and several Asian countries, which serve as key reference points in the development of AI and represent major competitors of the EU in this domain.[19]

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[16] European Declaration on Digital Rights and Principles for the Digital Decade, 2023/C 23/01, 23 January 2023. For comments, E. Celeste, *Towards a European Declaration on Digital Rights and Principles: Guidelines for the Digital Decade*, in *dcubrexitinstitute.eu*, 7 February 2022; C. Cocito, P. de Hert, *The transformative nature of the EU Declaration on Digital Rights and Principles: Replacing the old paradigm (normative equivalency of rights)*, in *Computer Law & Security Review*, 2023, p. 1 ff.

[17] Council conclusions approved by the Council at its meeting on 26 June 2023, doc. 11088/23.

[18] European Commission, *A Competitiveness Compass for the EU*, COM(2025) 30 final, 29 January 2025.

[19] Since 2021, the EU-US Trade and Technology Council (TTC) has been responsible for the political settlement of trade-related disputes and for conducting specific dialogues to address key issues related to trade in goods and services. Following the example of the TTC with the United States, the EU-India Trade and Technology Council was launched in 2022 with the aim of intensifying the already consolidating bilateral relationship through the negotiation of a free trade

The Union's regulatory toolbox then is increasingly characterised by far more significant bilateral instruments in terms of scope and potentialities, i.e. the Digital Partnerships and the Digital Trade Agreements.

Digital Partnerships, currently concluded with Japan, the Republic of Korea, Singapore, and Canada, are adopted by the parties to feed into the interpretative framework of existing or future bilateral relations.[20] As explicitly stated in all text versions, "the Digital Partnership is not legally binding and is not intended to supersede national law or international obligations by which the sides are bound. It does not have any financial implications on either side." In fact, they essentially intend to provide a framework for advanced cooperation across the entire spectrum of digital issues, including the development of AI, which is currently not explicitly covered by FTAs. Indeed, if these technologies are part of a traded service, they are at most covered by the rules on cross-border trade in goods and services, which include rules on the transfer of and access to software source codes.

Although the Digital Partnerships do not establish binding obligations, they are explicitly aimed at fostering regulatory alignment in the field of AI. The parties commit to sharing information and coordinating their approaches to AI governance at the international level. In particular, they pledge to work together on practical initiatives that support the development of trustworthy and responsible AI, including within the *Global Partnership on Artificial Intelligence* (GPAI) [21] and other relevant international fora.

One of the most significant aspects of the Digital Partnerships is the focus on identifying standards for the development of AI systems. The parties highlight the importance of converging around common ethical and technical criteria to facilitate trade and lower barriers to market access for AI-driven products and services.[22] As an alternative, they express openness to exploring mutual recognition of conformity assessment procedures and results – an approach that effectively aligns with the principle of mutual recognition of standards, as outlined in the WTO Agreement on Technical Barriers to Trade (TBT).[23]

Starting from these *soft law* instruments, the EU has recently concluded negotiations of self-standing bilateral Digital Trade Agreements (DTAs) with Singapore and Korea, aimed at amending and supplementing the provisions already enshrined in existing bilateral FTAs.[24]

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agreement. For insights, visit the following webpages: https://digital-strategy.ec.europa.eu/en/factpages/eu-us-trade-and-technology-council-2021-2024; https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreement_en

[20] A. Ott, *Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges*, in *YEL*, 2020, p. 569 ff. For further information on the Digital Partnerships, please refer to the dedicated page: https://digital-strategy.ec.europa.eu/it/factpages/international-partners.

[21] The *Global Partnership on Artificial Intelligence* (GPAI) is an integrated partnership that brings together OECD Members and GPAI countries to advance an agenda for the implementation of AI to be human-centric, safe and trustworthy, as well as hinged on the principles of the OSCE Recommendation of the Council on Artificial Intelligence, Council at Ministerial Level (22 May 2019).

[22] C. H. Hofmann, *The Integration of Global Standards into the EU as regulatory Union*, Luxemburg, 7 October 2022.

[23] Agreement on Technical Barriers to Trade (TBT Agreement II), 15th April 1994 (1868 UNTS 120, LT/UR/A-1A/10).

[24] Following the conclusion of negotiations with Singapore in July 2024, the European Commission formally requested the authorisation of the Council to proceed with the signing of the aforementioned DTAs on 5 February 2025 (European Commission, Proposal for a Council Decision on the conclusion, on behalf of the Union, of the Digital Trade Agreement between the European Union and the Republic of Singapore COM(2025) 23 final). On 10 March 2025, the EU and the Republic of Korea have concluded the bilateral negotiations. For insights, G. M. Ruotolo, *The EU Data Protection Regime and the Multilateral Trading System: Where Dream and Day Unite*, in *Questions of International Law*, 2018, p. 5 ff.; M. Burri, R. Polanco, *Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset*, in *Journal of International Economic Law*, 2020, p. 187 ff.; D. Collins, M. Geist (eds.), *Research Handbook on Digital Trade*, Edward Elgar, 2023.

In general, the parties are committed to fostering an open, secure, and efficient digital trade environment by removing barriers that may hinder online commerce and by ensuring fair, non-discriminatory treatment for businesses operating in the digital sphere. These agreements address both current digital policy priorities and emerging challenges, such as AI which calls for deeper international cooperation in the digital domain.

Apart from these commitments of a programmatic nature, a noteworthy element is the inclusion of provisions on *Standards, Technical Regulations and Conformity Assessment Procedures,*[25] which, although not explicitly referring to AI systems, are inherently applicable to them. Despite minor differences in wording between the two agreements, the parties consistently commit to promoting international standards in digital trade by supporting cooperation and active participation in global fora. They also acknowledge the value of mechanisms that enable cross-border recognition of conformity assessment results and express a willingness to explore such mechanisms, in line with the principles of the WTO TBT Agreement. Furthermore, the agreements emphasize the importance of joint initiatives in the areas of standards, technical regulations, and conformity assessment. Transparency and the exchange of information are also highlighted as essential elements, with both parties reaffirming their commitment to share relevant data – particularly in emerging areas of the digital economy.

Notwithstanding the considerable cooperation and mutual recognition endeavors in both the DTAs, an 'exception clause' has been included that explicitly applies to the AI systems – in addition to the classical 'right to regulate' clause.[26] The 'exception clause' allows the parties to adopt or maintain measures that restrict or prohibit cross-border data transfers where necessary to achieve a "legitimate public policy objective."[27] The footnotes offer an expansive interpretation of this notion, referencing established exceptions under GATT and GATS – such as those for public security (Article XXI GATT and Article XIV bis GATS), public morals, and the protection of human, animal, or plant life or health (Article XX GATT and Article XIV GATS) – while also extending it to more contemporary concerns. These include public order, social cohesion, online safety, cybersecurity, the promotion of safe and trustworthy artificial intelligence, the fight against disinformation, and other comparable public interest objectives, with explicit consideration of the evolving nature of digital technologies and their related risks.

While the inclusion of such a clause is consistent with WTO principles – which permit trade restrictions via technical regulations only where necessary and proportionate to the risks involved – the breadth of the definition raises important questions. If virtually any digital risk can be framed as a "legitimate public policy objective", the effectiveness of the agreement could be undermined. In practice, this could allow parties considerable leeway to impose discretionary restrictions on cross-border data flows that are essential to the development and deployment of AI systems, potentially limiting the very openness and regulatory alignment the agreements seek to promote.

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[25] Article 22 for the EU-Korea agreement and Article 23 of the EU-Singapore Agreement.

[26] For insights, C. Titi, *The Right to Regulate in International Investment Law*, Nomos, 2014; B. Rigod, *Optimal Regulation and the Law of International Trade: The Interface between the Right to Regulate and WTO Law*, Cambridge University Press, 2015; A. D. Mitchell, *The right to regulate and the interpretation of the WTO Agreement*, in *Journal of International Economic Law*, 2023, p. 462 ff.

[27] Article 5 for the EU-Korea agreement and Article 5 of the EU-Singapore Agreement. For comments on data transfer, S. Yakovleva, *Privacy and Data Protection in the EU- and US-led Post-WTO Free Trade Agreements*, in R. T. Hoffmann, M. Krajewski (eds), *Coherence and Divergence in Services Trade Law*, Springer, 2020, p. 95 ff.; G. M. Ruotolo, *The EU data protection regime and the multilateral trading system: Where dream and day unite*, in *Questions of International Law*, 2018, p. 5 ff.; F. Velli, *The Issue of Data Protection in EU Trade Commitments: Cross-border Data Transfers in GATS and Bilateral Free Trade Agreements*, in *European Papers*, 2019, p. 881 ff.

The Digital Trade Agreements thus intend to give binding force to those commitments of a programmatic nature already introduced in the Digital Partnerships.[28] In this way, as AI is a new area of intervention at the global level, the Union has framed these commitments within the formal EU institutional framework, by resorting to the procedure indicated in Article 218 TFEU. This notwithstanding, it is also evident that the normative strength of the provisions relating to AI remains relatively weak. The choice to characterise DTAs with a 'soft legal register' is striking for two main reasons, from the EU side.

First, it reflects the Union's decision to pursue a promotional, rather than assertive, strategy in advancing its non-trade values in this regulatory domain. This approach appears even more deliberate given that high technical and ethical standards are already expected to be upheld extraterritorially through the recently enacted Regulation (EU) 2024/1689 on Artificial Intelligence (*AI Act*), which entered into force on 1 August 2024.[29] Moreover, the inclusion of the 'exception clause' is functional to balance the commitment for an open digital trade with the need to guarantee its (self-proclaimed) sovereignty[30] against exogenous influences that could undermine human rights, democracy and the rule of law, as the basis of the EU constitutional system.

Second, this regulatory posture must also be understood in light of the Union's broader strategic aim: to foster international trade and promote technological development through a flexible, cooperative model. By privileging soft law instruments and encouraging dialogue over strict regulatory imposition, the EU signals its intent to stimulate deeper international engagement and consensus-building in the governance of AI. While this approach might seem to dilute the normative ambition of the EU, it represents a strategic calibration: binding and far-reaching standards are pursued through internal legislation such as the *AI Act*, while Digital Trade Agreements adopt a more adaptable framework to foster international alignment and trust.

4. Conclusive remarks: What contribution of the EU digital trade to the multilateral context?

The adoption of recent bilateral and plurilateral instruments in the field of digital trade reflects a broader international trend toward regulatory convergence. While containing some precautionary clauses, these agreements play a pivotal role in encouraging the uptake of international standards by trading partners and fostering cooperation among standard-setting bodies. In doing so, they aim to prevent the emergence of technical barriers and facilitate the development of interoperable and trustworthy digital ecosystems.

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[28] R. A. Wessel, *Normative transformations in EU external relations: the phenomenon of 'soft' international agreements*, in *West European Politics*, 2020, p. 72 ff.

[29] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828, OJ L, 2024/1689, 12.7.2024. According to the *AI Act*, both deployers and suppliers of IA systems established in third countries will have to comply with the obligations laid down here and with the technical and ethical standards set by the European standardisation organisations in order to be able to sell their products and services on the European market. For comments, P. Dunn, G. De Gregorio, *The European Risk-based Approaches: Connecting Constitutional Dots in the Digital Age*, in *CMLR*, 2022, p. 473 ff.; C. Jasserand, *The Future AI Act and Facial Recognition Technologies in Public Spaces*, in *European Data Protection Law Review*, 2023, p. 430 ff.; N. Th Nikolinakos, *EU Policy and Legal Framework for Artificial Intelligence, Robotics and Related Technologies – The AI Act*, Springer, 2023; P. Hacker, *Sustainable AI Regulation*, in *CMLR*, 2024, p. 345 ff.; C. Novelli et al., *AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act*, in *Digital Society*, 2024, p. 1 ff.; C. Necati Pehliva, *Report: The EU Artificial Intelligence (AI) Act: An Introduction*, in *Global Privacy Law Review*, 2024, p. 31 ff. For an overview on the *AI Act*, see F. Ferri (a cura di), *La nuova disciplina UE sull'intelligenza artificiale*, *Quaderni AISDUE*, 2024.

[30] On the emerging broader concept of 'European sovereignty', see S. Barbou des Places, *Taking the Language of "European Sovereignty" Seriously*, in *European Papers*, 2020, p. 287 ff.

This evolving landscape invites deeper reflection on the implications for the multilateral trading system, particularly the WTO which has witnessed a significant slowdown in normative progress.[31] Even aside from geopolitical tensions, WTO Members remain divided on fundamental trade policy issues, and mutual trust is waning. These dynamics have made consensus-based decision-making increasingly unworkable, especially in sensitive and fast-moving areas such as Artificial Intelligence.

Given the disruptive nature of AI and the divergent regulatory preferences among States, it seems increasingly unrealistic to expect traditional WTO processes to produce timely and meaningful outcomes in this field. As such, alternative governance models are emerging – ones based on informal rule-making and consensus among like-minded Members. This shift echoes developments in other international fora, such as the Council of Europe, where flexible coalitions have succeeded in advancing shared regulatory values. In this regard, the WTO could reposition itself not as the exclusive regulator of AI-related trade, but as a platform for promoting common principles on sound regulation, regulatory cooperation, and international standard-setting in the digital domain. [32]

At the same time, the rise of AI also prompts a re-examination of WTO law itself, particularly the general exceptions under the GATT and the GATS. While these provisions – covering public security, morality, health, and environmental protection – were conceived in a different era, they may not be sufficient to address the novel risks posed by AI. Updating or clarifying the scope of these exceptions, especially to prevent abuse or overreach under the guise of 'public morality', could be essential to safeguard both regulatory autonomy and the integrity of the multilateral system. This balance between moral and ethical imperatives and the foundational principles of non-discrimination and market access is one of the most pressing legal challenges in AI-related trade.

In this context, the EU's active engagement in bilateral digital agreements appears as a strategic response to the paralysis of the WTO. Through such instruments, the Union seeks not only to reduce digital trade barriers but also to project its regulatory values and technical standards abroad. However, while these agreements are important tools for advancing EU interests, their proliferation risks contributing to the fragmentation of the international legal landscape in digital trade. As a result, what emerges is a complex, multi-layered regulatory environment, where bilateralism and multilateralism coexist, but not always coherently.

The regulation of AI is still in its early stages and remains fluid. Against this backdrop, the EU will need to reflect carefully on how to reconcile its strategic interests in technological leadership with its foundational legal commitments, including the principles enshrined in Article 21 TFEU.[33] This includes considering how best to align its internal regulatory frameworks, such as the AI Act, with its external trade policy. Ultimately, if the WTO is to remain relevant in the era of AI-driven global commerce, it must not only reinterpret existing rules but also innovate structurally. A renewed multilateral trade framework should be able to accommodate the specificities of AI, providing legal certainty while allowing for regulatory diversity. The future of international trade depends on the ability of global institutions to adapt, cooperate, and embrace change in a way that fosters inclusive, responsible, and sustainable digital transformation.

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[31] M. Burri, R. Polacco, *Digital Trade Provisions in Preferential Trade Agreements. Introducing a New Dataset*, in *Journal of International Economic Law*, 2020, p. 1 ff.

[32] S. J. Evenett, J. Fritz, *Emergent Digital Fragmentation: The Perils of Unilateralism*, CEPR Press, 2022, p. 46; F. De Ville, S. Happersberger, H. Kalimo, *The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments*, in *European Foreign Affairs Review*, 2023, p. 15 ff.

[33] A. Asteriti, *Article 21 TEU and the EU's Common Commercial Policy: A Test of Coherence*, in M. Bungenberg, M. Krajewski, C. Tams, J. P. Terhechte, A. R. Ziegler (eds), *European Yearbook of International Economic Law*, Springer, 2017, p. 111 ff.; M. Manchin, L. Puccio, A. B. Yildirim (eds), *Coherence of the European Union Trade Policy with Its Non-Trade Objectives*, Cambridge University Press, 2023, p. 236 ff.; G. Kübek, I. Mancini, *EU Trade Policy between Constitutional Openness and Strategic Autonomy*, in *European Constitutional Law Review*, 2023, p. 518 ff.

The EU Digital Policy for Africa's Development Potential in the WTO Framework

Federico Ferri

Summary: 1. Introduction. – 2. Key gaps: Free Trade Agreements, Digital Agreements and Partnerships. – 3. The (Missing) baseline: Economic Partnership Agreements with African countries. – 4. The way forward: The 2023 Samoa Agreement. – 5. Further initiatives of a different nature: Soft law and financial instruments. – 6. Conclusive remarks.

Keywords: EU-Africa relation – Digital trade – Trade policy – Open strategic autonomy – African regional organisations – Global Gateway – WTO – Digital development – Digital policy.

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1. Introduction

This paper starts from a consideration that is as obvious as timely: digital trade is increasingly at the center of legal relations developed within the international community, especially within the United Nations (UN) and with particular reference to the typical dynamics of the World Trade Organization (WTO)[1]. The negotiations of an E-commerce Agreement, involving a high number of parties within the WTO, further confirm this aspect[2]. The European Union (Union or EU), which has identified its digital transition as a core mission, is trying to be an influential actor in this regard[3]. Just for the record, in a recent communication on the evolution of the external dimension of the EU's digital policy, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy submitted that Digital is a core element of the Union's external action[4].

Among the envisaged benefits of digital trade is the potential development of many countries, above all in the African continent[5]; that may also be partly determined by the EU's activity as an international trade actor.

Now, the relationships between the European Union and Africa are generally underestimated. This is all the more true in this period, as the attention of European policy and decision-makers, as well as the European society, is directed towards influential international actors such as the United

[1] See, for example, some relevant Resolutions of the UN General Assembly (A/RES/79/194, 19 December 2024; A/RES/78/132, 19 December 2023). See also M. Smeets (ed.), *Adapting to the Digital Trade Era: Challenges and Opportunities* (WTO Publications, 2021), available here https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf.

[2] See here https://www.wto.org/english/tratop_e/ecom_e/information_on_agreement_ecom.pdf. See also M. Burri, *A WTO Agreement on Electronic Commerce: An Inquiry Into Its Legal Substance and Viability* (Trade Law 4.0 Working Paper Series, Working Paper No. 01/2021), p. 1-41, available here https://www.queensu.ca/sps/sites/spswww/files/uploaded_files/Events/Trade/Working%20paper%20%201_Burri.pdf.

[3] M. Jutte, *The EU's Digital Trade Policy* (European Parliamentary Research Service, 2024), available here https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/757615/EPRS_BRI(2024)757615_EN.pdf.

[4] Joint Communication to the European Parliament and the Council, An International Digital Strategy for the European Union, JOIN(2025) 140 final, 5 June 2025, p. 1.

[5] Turning Digital Trade into a Catalyst for African Development (Joint World Bank Group – World Trade Organization Policy Note, 2022), available here https://www.wto.org/english/thewto_e/minist_e/mc13_e/policy_note_digital_trade_africa_e.pdf.

States (US), Russia, China, and some Middle-East states. However, it seems worth noting at least three aspects that are expected to increase interest in (digital) trade relations between the EU and Africa.

To start with, it should be recalled that Africa was a "target" of the European integration process from the beginning. Interestingly, a passage of the 1950 Schuman Declaration reads as follows: "With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent. In this way, there will be realised simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions"[6]. Accordingly, the 1957 Rome Treaty establishing the European Economic Community clarified that its fourth Part had to apply to the overseas territories, many of which were African countries. Furthermore, the Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community (which was not ratified by Norway in the end) contained several provisions on the "associated" African (and Malagasy) states.

Secondly, from an international law perspective, Africa is to be seen as something more than a continent with numerous states. Indeed, various international organizations were established by different groups of African states. In particular, it is worth recalling the African Union (AU), a continental organization tasked with promoting Africa's growth and economic development, which recognizes (and partly rests on) eight previously established Regional Economic Communities[7]. Within this context, an African Continental Free Trade Area (AfCFTA) was established. It was approved by Assembly of Heads of State and Government of the African Union in 2012, together with an Action Plan for Boosting intra-African trade. The AfCFTA is the world's largest free trade area, bringing together the AU's Members and some Regional Economic Communities (RECs). This means that trade relationships between the European Union and Africa are inescapably dependent on the interconnections between the Union's internal market and the AfCFTA.

Finally, the evolution of the digital sectors is key to African development. Whereas the African continent has a high volume of inhabitants and the youngest population in the world, the practice is showing interesting trends in this respect[8]. For example, mobile penetration is to be emphasized as Africa is a world leader in mobile payments; the increase in mobile and digital banking allowed millions of Africans to access to finance.

It thus seems that the digital transition of the EU, condensed in particular in the archetype of the digital single market, has to deal with the African continent somehow. Against this background, the question is: how is this trend evolving from an EU law perspective? In other words, it is of particular significance to take stock, with a view to clarifying, even in light of the abovementioned WTO-driven developments, which legal initiatives put in place by the EU may be relevant to foster digital trade in the relationships with Africa.

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[6] Schuman Declaration May 1950 (https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en).

[7] The Arab Maghreb Union (UMA), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel–Saharan States (CEN–SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), the Southern African Development Community (SADC).

[8] See, for example, the information provided here https://www.worldbank.org/en/results/2024/01/18/digital-transformation-drives-development-in-afe-afw-africa.

2. Key gaps: Free Trade Agreements, Digital Agreements and Partnerships

It is believed that the first layer of the analysis should be represented by instruments to which the European Union usually resorts in order to bring about tailor-made legal frameworks for trade-related issues on the international plane.

The baseline consideration is that trade policy is evolving at the EU level, especially due to geopolitical instability. This shift is mainly reflected in the "open strategic autonomy" doctrine[9]. In any event, digital issues have gained momentum in the EU's narrative in terms of international trade, to the point that Africa is meant to be key to the pursuit of many Union's goals. As pointed out by the European Commission: "it will be important for the EU to reinforce relationships with countries in and around Europe and to deepen engagement with the African continent and African states (…). Stability and prosperity in Africa are critical for the EU's stability and prosperity and need to be supported by closer economic integration of the two continents, driving the green and digital transitions jointly with Africa"[10].

Having made these assumptions, the EU's policy area to look at first is, for obvious reasons, the Common Commercial Policy (CCP). And as is well known, the main primary law references for this realm are to be found in the Treaty on the Functioning of the European Union (TFEU), especially Art. 207, concerning the CCP, and Art. 218, laying down the rules that the EU must follow when it intends to negotiate and conclude international agreements with third countries or other international organizations. A major example of EU agreements produced in the realm of the CCP is the category of the Free Trade Agreements (FTAs), including those of new generation[11]. In a nutshell, the main feature of FTAs is that they are designed to enable reciprocal market opening with developed countries and emerging economies, with the intent of granting preferential access to markets.

Step by step, the European Union has intensified its work on concluding FTAs: some of these agreements are already in force, others have at least been adopted, and still others are under negotiation. However, Africa is the only continent with respect to which the Union has not yet planned to "activate" FTAs[12]. Conversely, the header "Free Trade Agreement" has been used, on an exclusive basis or together with other expressions, for various agreements (finalized or just attempted) of a

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[9] On this concept, see – among others – N. Helwig, V. Sinkkonen, *Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term,* in *European Foreign Affairs Law Review*, 2022, p. 1-20; D. Broeders, F. Cristiano, M. Kaminska, *In Search of Digital Sovereignty and Strategic Autonomy: Normative Power Europe to the Test of Its Geopolitical Ambitions,* in *Journal of Common Market Studies*, n. 5/2023, p. 1261-1280; F. Casolari, *Supranational Security and National Security in Light of the EU Strategic Autonomy Doctrine: The EU-Member States Security Nexus Revisited*, in *European Foreign Affairs Law Review*, n. 4/2023, p. 323-240; P. De Pasquale, F. Ferraro, *L'autonomia strategica dell'Unione europea: dalla difesa…alla politica commerciale c'è ancora tanta strada da fare,* in *Diritto Pubblico Comparato ed Europeo*, n. 2/2023, p. 5-14; A. Miglio, G. Perotto, L. Grossio, *I meccanismi di finanziamento del settore difesa nell'Unione europea e il loro contributo al rafforzamento dell'autonomia strategica*, (Research paper, Centro Studi sul Federalismo, January 2024, p. 9, https://www.csfederalismo.it/it/pubblicazioni/research-paper/imeccanismi-di-finanziamento-del-settore-difesa-nellunione-europea-e-il-loro-contributo-alrafforzamento-dellautonomia-strategica).

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final, 18 February 2021, p. 9.

[11] I. Bosse-Platière, C. Rapoport (eds.), *The Conclusion and Implementation of EU Free Trade Agreements. Constitutional Challenges*, Cheltenham; Northampton, Edward Elgar, 2019; G. Adinolfi (ed.), *Gli accordi preferenziali di nuova generazione dell'Unione europea*, Torino, Giappichelli, 2021.

[12] More information can be found here https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.

manifest commercial nature with many third countries. So, already at a first glance it is clear that this type of agreements is not relevant for the purposes of the analysis that is to be carried out.

This sort of "black hole" inevitably prevents any possibility of bringing about digital free trade legal regimes linking the EU and African countries at this stage. Such circumstance is important if one considers the evolving approach of the EU with regard to some FTAs elaborated over the last few years. For example, in some cases, the Union has opted to include provisions or even a specific chapter on digital trade in the text of the agreements concerned: the case of the agreement with New Zealand is emblematic[13]. What is more, the EU concluded some digital partnerships and opened negotiations for new and modern digital agreements to ensure a more consistent implementation of the Digital Compass strategy, which aims to make Europe a digitally connected continent by 2030[14]. The idea is to reproduce, at least in part, the structure of the chapters concerning digital trade, as included new-generation FTAs (such as the one with New Zealand), particularly to amend and supplement rather old provisions on electronic trade that would be inadequate to meet the new challenges inherent in the expansion of international digital trade[15]. However, that approach refers to selected countries, that is to say, Japan, the Republic of Korea, Singapore, and Canada[16].

3. The (Missing) baseline: Economic Partnership Agreements with African countries

As regards Africa, the European Union's trade policy mainly rests on Economic Partnership Agreements (EPAs)[17]. The EU has concluded numerous EPAs with African states over the last two decades. The point is that EPAs and FTAs are not just different expressions to label the same category of legal instruments, as EPAs' purpose is to support the development of trade partners from the African, Caribbean and Pacific (ACP) area.

More to the point, EPAs were presented as key steps for the EU-Africa relationships under the 2000 Cotonou Agreement, the partnership agreement between the EU and ACP countries[18]. Pursuant to this agreement (Arts. 36 and seq.), the Parties agreed to conclude new WTO-compatible trading arrangements, removing progressively barriers to trade and enhancing cooperation in all areas relevant to trade[19]. Regarding the content of EPAs, Art. 37 of the Cotonou Agreement anticipates that trade liberalization, on the EU side, "shall build on the acquis and shall aim at improving current market access for the ACP countries through inter alia, a review of the rules of origin." Art. 37 added that negotiations of EPAs had to be as flexible as possible "in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement." Indeed, considering the potential impact

[13] Free Trade Agreement between the European Union and New Zealand, OJ L 2024/866, 25 March 2024. See Chapter 12.

[14] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en. Crucial issues are at the heart of this strategy; e.g., skills, infrastructures, transformation of business and of public services.

[15] On this topic, see V. Remondino, *Gli accordi sul commercio digitale tra liberalizzazione degli scambi e protezione dei dati personali e della privacy: implicazioni per la politica commerciale comune dell'Unione europea,* in *Quaderni AISDUE*, 2/2024, p. 210-213.

[16] More information can be found here https://digital-strategy.ec.europa.eu/en/policies/partnerships.

[17] See also D. P. Chimanikire, *EU-Africa and Economic Partnership Agreements (EPAs)–Revisited,* in *L'Europe en formation*, n. 388, 2019, p. 51-67.

[18] Partnership agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 317, 15 December 2000.

[19] However, Art. 37, para. 5, of the Cotonou Agreement clarified that EPAs' negotiations had to be undertaken with ACP countries which considered themselves "in a position to do so."

of trade measures, the EU was aware of the varying levels of development of all these countries, as well as their capacity to adapt and adjust their economies to the liberalization process. A similar (prudent) approach also was followed with reference to services (Art. 41)[20] and investment (Art. 78)[21].

Against this background, two major remarks need to be made in terms of digital trade and Union's competences.

The first is that going through the texts of these EPAs, one common element stands out: the absence of chapters or provisions dealing with digital trade or, more simply, specific digital-related aspects. On the one hand, this is not surprising, since the baseline framework – the Cotonou Agreement – was adopted at a time when the transition from analog to digital was still far from being completed. On the other, it cannot be underestimated that there is no trace of "digital" provisions even in the EPAs that the Union concluded with some African states after the launch of the first strategy on the Digital Single Market[22], which in turn paved the way for many legislative procedures leading to a considerable number of Regulations and Directives in the digital sector; reference could be made, for example, to the EU's EPAs with some states of the South African Development Region (Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland)[23], Ghana[24], and Kenya[25]. In practice, when it comes to the projection of the Union's digital objectives on the African continent, these agreements do not constitute a relevant benchmark, either. At most, more specific provisions, even in the form of commitments, will be discussed in the framework of the so-called "modernization negotiations" launched by the EU with regard to some existing agreements with third countries; this is the case, for example, of the EU-Eastern and Southern Africa EPA (and with a focus on Comoros, Madagascar, Mauritius, Seychelles and Zimbabwe)[26].

The second remark is that EPAs, having been defined and adopted to implement the Cotonou Agreement, do not appear to be fully-fledged common trade policy instruments. Essentially, the Cotonou Agreement was seen as an expression of another area of the Union's external action, namely development cooperation (Art. 208 TFEU). This connection is very visible not only in the practice of the EU's institutions but also in the works of various scholars[27]. Moreover, one only has to read Article

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[20] Based on Art. 41, para. 4, of the Cotonou Agreement, "The Parties further agree on the objective of extending under the economic partnership agreements, and after they have acquired some experience in applying the Most Favoured Nation (MFN) treatment under GATS, their partnership to encompass the liberalisation of services in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalisation agreements."

[21] This provision refers to the introduction of "general principles" on protection and promotion of investments in the EPAs.

[22] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM(2015)192 final, 6 May 2015.

[23] Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, OJ L 250/3, 16 September 2016.

[24] Stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part, OJ L 287, 21 October 2016.

[25] Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part, OJ L, 2024/1648, 1 July 2024.

[26] https://ec.europa.eu/commission/presscorner/detail/en/ip_19_5951.

[27] P. Hipold, *EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance*, in *European Foreign Affairs Review*, n. 1/2002, p. 53-72; S. Bartlet, *ACP-EU Development Cooperation at a Crossroads? One Year after the Second Revision of the Cotonou Agreement,* in *European Foreign Affairs Review*, n. 1/2012, p. 1-25; P. Leino, *Administering EU Development Policy: Between Global Commitments and Vague Accountability Structures,* in *European Papers*, n. 2/2017, p. 617-648; M. Furness, L. A. Ghica, S. Lightfoot, B. Szent-Iványi, *EU Development Policy: Evolving as an Instrument of Foreign Policy and as an Expression of Solidarity,* in *Journal of Contemporary European Research*, n. 2/2020, p. 89-100.

19 of the Agreement to see that its central objective "is poverty reduction and ultimately its eradication", which corresponds to the mission of the EU's development cooperation policy. This finding is certainly not marginal, because while in the area of the CCP the European Union has exclusive competence (Art. 3 TFEU), development cooperation depends on a parallelism of competence between supranational and national levels (Art. 4, para. 4, TFEU)[28].

With these aspects in mind, it now seems useful to turn our gaze to the most significant updates concerning the EU's approach to development cooperation, in an attempt to ascertain whether, through this channel, there is at least the possibility of implementing initiatives aimed at developing the digitalization process on the African continent.

4. The way forward: The 2023 Samoa Agreement

On November 15, 2023, a new partnership agreement was signed in Samoa by the EU and its Member States, of the one part, and the Members of the Organization of African, Caribbean and Pacific States, of the other part[29]. This treaty has been provisionally applied since January 2024 and is set to constitute the post-Cotonou regime for two decades, thereby becoming the ongoing overarching framework for EU relations with ACP countries.

Even if the Samoa Agreement is mainly based on Art. 217 TFEU, which refers to the EU's competence to conclude treaties establishing associations involving reciprocal rights and obligations, its center of gravity keeps being development cooperation. And in line with the Cotonou Agreement, the new EU-ACP legal framework requires the parties to build on their existing preferential trade arrangements and EPAs as core instruments of their trade cooperation[30].

Unlike the agreements mentioned in the previous paragraphs, this instrument paves the way for a new approach of the EU towards digital-related issues as cornerstones of ACP countries' development, with an emphasis on African states. Some provisions of the agreement provide a better understanding of this trend.

The Preamble, for example, underlines "the important role of science, technology, research and innovation in accelerating the transition to knowledge-based societies, facilitated through the use of digital tools in pursuit of sustainable development."

In the agreement's body, digitalization is first presented as a tool for the development of inclusive and pluralistic societies; the Parties (Art. 11) agreed to endeavour to make full use of the potential of digital solutions to promote democratic goals such as equal public access to information at all levels and participatory decision-making. Then, it is referred to as a driver to promote economic transformation, private sector development and industrial advancement for inclusive and sustainable growth (Arts. 43 and 44), as he Parties recognized "the central role of the digital economy as an amplifier and accelerator for change that can drive significant economic diversification, create jobs and enable leapfrog growth" (Art. 48). In addition, the Agreement contains a number of connections between digitalization and the pillars of sustainable development. Among the baseline sectors are

[28] It was also affirmed that "development cooperation is carved out as what could be called a 'non-principal' area of shared competence. This apparent lower ranking of development cooperation contributes to its 'low politics' status among the other policy areas of EU external relations." See P. J. Cardwell, D. Jančić, *The European Parliament and Development Cooperation: Democratic Participation in the 'Low Politics' of EU External Relations,* in *Journal of European Integration*, n. 3/2019, p. 369.

[29] Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part, in OJ L 2023/2862, 28 December 2023. See also M. Langan, S. Price, *The Frustrations of Free Trade and the Africa–European Union Samoa Agreement,* in *Journal of Developing Societies*, n. 1/2025, p. 7-34.

[30] Art. 50 of the Samoa Agreement (and Art. 16 of its Africa Regional Protocol).

public administration (Art. 13), education (Art. 28), health (Art. 29), and participation of young people in society (Art. 35).

There is also a specific provision on ICT and the digital economy – Art. 48 – contained in Chapter 3, on science, technology, innovation and research. The goals identified in Art. 48 are, in particular, reducing the digital divide, enabling easy access to ICT, ensuring greater complementarity and harmonization of communication systems and their adaptation to new technologies, promoting and supporting digital entrepreneurship, developing and managing privacy and data protection policies, promoting measures to facilitate data flows, and supporting the regulatory framework to promote the production, sale and delivery of digital products and services.

As regards the Africa Regional Protocol to the Agreement, Art. 25, on ICT and the digital economy, enshrines the Parties' duty to increase access to open, affordable and secure ICT, primarily by supporting private and public investments and establishing competent regulatory institutions. This provision adds that the Parties shall improve (also by means of regulatory tools) access to digital technologies and services, establish affordable digital connectivity, improve the business environment, and facilitate access to finance and business support services.

It must be said that many of the relevant provisions are not characterized by truly prescriptive obligations, much less justiciable ones, always remembering that the Samoa Agreement defines a general frame of reference: it is enough to read a few textual references (the parties, "affirm", "endeavour", "shall work towards", "cooperate"). to understand that the Samoa Agreement will not be independently decisive for the change of pace in legal relations between the EU and Africa in the digital field. However, this instrument is the precondition for major developments, if any; therefore, it will be important to monitor its implementation, especially through the interpretation and possible updating of current EPAs or the conclusion of more modern EPAs.

5. Further initiatives of a different nature: Soft law and financial instruments

Even though the EU-Africa relationships concerning digital serve to foster cooperation between the two continental markets, it appears that they are not being developed by prioritizing typical trade legal instruments. On the contrary, the most significant aspects can be found in strategies and policy documents and related initiatives of a financial nature. Some examples are discussed below.

To begin with, an EU-AU Digital Economy Task Force was launched at the end of 2018 to establish a platform of partnership for the private sector, donors, international organizations, financial institutions and civil society[31]. The idea was to promote a shared vision, a set of common agreed principles and a list of policy recommendations and actions focusing on core digital-related objectives. Among the main outcomes of the Task Force's work is a set of policy recommendations about four principal axes: accelerating the achievement of universal access to affordable broadband, guaranteeing essential skills for all (in education and vocational education and training) to enable citizens to thrive in the digital age, improving the business environment and facilitating access to finance and business support services to boost digitally enabled entrepreneurship, and accelerating the adoption of e-services and the further development of the digital economy for achieving the SDGs.

Next to this, the Union has intensified the promotion of soft cooperation patterns of this kind. That is in line with Ursula von der Leyen's proposed program in 2019, where Africa is described as

[31] For more information see here https://digital-strategy.ec.europa.eu/it/node/1744.

a core target for political, economic and investment opportunities[32]. Chiefly, with the 2020 Comprehensive Strategy for Africa, the Commission announced the intention to build a partnership for digital transformation with a view to stimulating adequate reforms and investments to support the establishment of a Single African Digital Market[33]. Soon after, other political institutions of the EU took action to reiterate the point. The Council released its conclusions on a stronger partnership for Africa, where it proposed its vision of an inclusive digital economy resulting (among other things) from the EU support to Africa's ambition for digital. The conclusions stress the centrality of cooperation on cyber security and democratic integrity, as well as the importance of participating in digital trade[34]. Instead, the European Parliament emphasized the link between digitalization, inclusion and development: in a resolution adopted in 2021, the subject at hand was put into a wider context, which basically reflects the main pillars of sustainable development[35]. Even if the nexus with trade is not openly spelt out in the report's section on Africa's digitalization, the fact remains that the European Parliament urged the EU to contribute to this transition in an attempt to bring added value to African countries (and people).

A key step was the launch of the Global Gateway Strategy at the end of 2021[36]. The Global Getaway paved the way for the mobilization of €300 billion of investments around the world through the European Union, its Member States – including their implementing agencies and public development banks – as well as the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD). Under this premise, it was announced that the inaugural milestone would be the Africa-Europe Investment Package, providing about €150 billion for investment in African countries. Accordingly, the Global Getaway could be seen as a conjunction ring between the Comprehensive Strategy for Africa and its operational dimension, characterized by the provision of EU-driven economic resources to support relevant projects in Africa. Digital is a top priority of the Global Getaway[37]. In particular, the strategy announces that "the EU will offer digital economy packages that combine infrastructure investments with

country-level assistance on ensuring the protection of personal data, cybersecurity and the right to privacy, trustworthy AI, as well as fair and open digital markets"[38].

Further initiatives operating under the aegis of the Global Gateway deserve to be mentioned. For instance, the Digital for Development (D4D) Hub[39], a strategic platform set up to foster digital cooperation between the EU (and its Member States) and ACP partners, with the mission of promoting a human-centric approach to the digital transformation. Additionally, an administrative arrangement and a grant agreement were signed by the EU and the Smart Africa Alliance (a network

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[32] *A Union that strives for more. My agenda for Europe*, 2019, available here https://commission.europa.eu/document/download/063d44e9-04ed-4033-acf9-639ecb187e87_en?filename=political-guidelines-next-commission_en.pdf.

[33] Joint Communication to the European Parliament and the Council, *Towards a comprehensive Strategy with Africa*, JOIN(2020) 4 final, 9 March 2020. In particular, the strategy indicates the need to elaborate a robust regulatory framework in areas such as data and consumer protection, digital financial services, cybercrime and e-governance.

[34] Council conclusions (30 June 2020), 9265/20.

[35] European Parliament resolution of 25 March 2021 on a new EU-Africa Strategy – a partnership for sustainable and inclusive development (2020/2041(INI)), 25 March 2021.

[36] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, *The Global Gateway*, JOIN(2021) 30 final, 1 December 2021.

[37] See also C. Teevan, E. Domingo, *The Global Gateway and the EU as a Digital Actor in Africa* (ECDPM, Discussion Paper n. 332, 2022), available here https://ecdpm.org/application/files/9316/6962/8500/Global-Gateway-EU-digital-actor-Africa-ECDPM-Discussion-Paper-332-2022.pdf.

[38] JOIN(2021) 30 final, cit., p. 4

[39] For more information please access this link: https://d4dhub.eu/.

of African countries, international organizations and global private sector players)[40] to design and implement initiatives aimed at bridging the digital divide in Africa[41] (e.g., by deploying digital networks, advancing e-governance services, exploring the potential of AI). Moreover, for several years, the EU contributed to the "Policy and Regulation Initiative for Digital Africa" (PRIDA), a joint initiative carried out with the African Union and the International Telecommunication Union, addressing key priorities like broadband demand and supply and the Internet governance space in Africa[42].

6. Conclusive remarks

The analysis carried out in the preceding paragraphs shows that the European Union is certainly aware of the importance of fostering the development of a digital policy at the international level and adhering to the foundations of the WTO. However, this approach is still in its infancy when looking at the legal relations between the Union and third states. Something can be glimpsed especially in some relevant trade agreements and partnerships concluded or under negotiation with certain third countries, with the understanding that the rules of reference tend to be limitedly prescriptive.

These limitations are even more evident in the context of the relations between the European Union and Africa. Given that economic partnership instruments are primarily relevant in this regard, the most recent EPAs are characterized by shortcomings in terms of governance and digital development in African countries. Some changes may occur in the future, because the underlying framework for partnership with ACP countries, represented by the new Samoa Agreement, gives digital a far greater importance than the previously applicable legal regime.

Therefore, the most interesting EU's insights can be found in soft law acts (in principle, policy and programmatic strategies) and related financial tools. It must be said, however, that these initiatives have taken on, at least on paper, progressively broader coverage; they also seem to assume the mobilization of increasing resources to foster widespread investment.

From a European Union law point of view, some issues then remain. In particular, it does not appear so clear the extent to which relations concerning digital trade in Africa are actually governed by common commercial policy dynamics, given the prominent role of development cooperation; and this is, in turn, likely to stimulate reflection on the EU's external competence. In the second place, it is quite hard to accurately identify the main "counterparts" of the EU in this landscape: at times some Single African countries, other times the African Union, in certain situations further regional entities in the African continent. Last, given the pivotal role of investments and the flow of economic resources coming from the EU sphere, it could be asked whether the EU is pursuing a sort of indirect and external integration through funding with respect to the subject at hand. And in any case, the dilemma arises as to how the resources are and will be transferred: in a multilevel scenario with multiple actors of a different nature playing a role, where do these resources come from and who does what as regards their management in view of the objectives to reach[43]? These are all expected to

[40] For more information please access this link https://smartafrica.org/.

[41] https://smartafrica.org/global-gateway-eu-and-smart-africa-strengthen-partnership-for-africas-digital-transformation/ ; https://digital-strategy.ec.europa.eu/en/news/eu-and-africa-strengthen-cooperation-digital-transformation.

[42] https://international-partnerships.ec.europa.eu/policies/programming/programmes/policy-and-regulation-initiative-digital-africa-prida_en.

[43] These questions appear even more urgent because of the controversial issues raised from a major instrument like the 2015 EU trust fund for Africa. See, for example, European Court of Auditors, *The EU Trust Fund for Africa Despite New Approaches, Support Remained Unfocused*, 2024, accessible here https://www.eca.europa.eu/ECAPublications/SR-2024-17/SR-2024-17_EN.pdf.

become further lines of analysis as the-state-of the-art keeps evolving and the EU's contribution to digital trade – or, more in general, digital transition – in Africa goes on.

SECTION THREE

The EU Green Deal and WTO Law

The Unilateral Turn of European Union Trade Policy in the Light of Open Strategic Autonomy: The Case Study of the New Carbon Border Adjustment Mechanism

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Keywords: CBAM (Carbon Border Adjustment Mechanism) – EU Trade Policy – Open Strategic Autonomy – Carbon Leakage – WTO Compatibility – Unilateral trade instruments.

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1. Introduction

In recent years, the European Union (EU) has undergone a significant shift in its trade policy, increasingly relying on unilateral instruments to safeguard its economic interests and values. The adoption of unilateral measures represents a significant and largely unprecedented shift in and for the EU's trade policy, posing major challenges in terms of regulatory coherence and compatibility with international obligations, in particular with reference to WTO law.

This paper analyses this transition through the lens of Open Strategic Autonomy (OSA), a framework that seeks to balance the EU's commitment to multilateralism with the necessity of defending strategic interests in a fragmented global order. The study examines the Carbon Border Adjustment Mechanism (CBAM) as a paradigmatic example of this new approach, demonstrating how the EU is deploying trade policy not only as a defensive tool but also as an instrument for advancing its values, notably sustainable development, and its global regulatory influence. Against this backdrop, the paper will be structured as follows. The second section explores the reasons behind the emergence of the unilateral turn in EU trade policy along with the concept of OSA, outlining its evolution and rationale in response to growing geopolitical tensions, the crisis of multilateralism, and the need to secure key economic sectors from dependencies on third countries. The third section presents CBAM as a case study of this unilateral evolution, discussing both its background and functioning. The fourth section will discuss the most recent developments of CBAM, reviewing the latest amendments proposed by the Commission under the impulse of concerned member States. Finally, the last sections will assess CBAM compatibility with international law, in particular with obligations arising from WTO Membership and the principles of international environmental law. The fifth section will focus on potential violations of non-discrimination principles and challenges under GATT Article XX environmental exceptions, proposing a range of legal and procedural adjustments to improve its compliance with WTO law as well as its fairness and transparency. In this respect, the sixth section will highlight the need for multilateral engagement to avoid fragmentation of the global trade system. It advocates for institutional innovations such as WTO-based climate

clubs, structured dialogue through the Committee on Trade and Environment, and deeper integration between trade and environmental regimes.

2. The unilateral turn of EU trade policy within the OSA framework

How and why EU trade policy has undergone this unilateral stance? Over the last years, external pressures have increasingly challenged the EU traditional commitment to multilateral trade governance. The emergence of a multipolar world characterized by a state of endemic crisis has led to the development of a multi-tools trade policy, where unilateral instruments are used in parallel with multilateral, plurilateral, and bilateral mechanisms.

Several international crises like the Russian war on Ukraine and the pandemic together with the growing competition between democracies and autocracies have contributed to fading the international liberal order premised under US power, under which the EU project has developed and thrived. Such crises have contributed to shaping a new multipolar world order, also provoking a disruptive impact on global trade, triggering a resurgence of protectionism and economic nationalism. This trend is currently evidenced by the latest trade war launched by the Trump's administration, which seriously risks blowing up the entire multilateral trade system. The current situation, defined as polycrisis, has shown the vulnerability of European industry and the lack of autonomy in strategic sectors. The 'geopoliticization of trade' has exposed the fragility of European global value chains and the EU's dependence on key sectors related to the production of strategic goods for the green and digital transition. In this scenario, the EU has been forced to reorganize its internal and external policies, as well as its approach to globalisation. This new attitude has been encapsulated in the concept of "open strategic autonomy" (OSA), establishing itself as a fundamental principle justifying EU-level state intervention. It aims to combine the objective of strengthening the EU's strategic autonomy, intended as the capacity to act autonomously in a range of critical sectors, with a commitment to multilateralism, international cooperation and openness to global partners and allies. The concept of strategic autonomy gained increasingly widespread prominence in EU policy discussions, extending beyond the realm of security to encompass areas such as trade, economic policies, advanced technologies, energy security, climate change, financial governance, digital sovereignty, telecommunications, external action, and diplomacy.

In particular, EU trade policy has undergone a transformative journey. Since the 1990s, EU trade policy has been anchored in a persistent neoliberal belief in the benefits of openness, albeit with some concessions to socially oriented concerns around fairness and non-economic goals. However, the recent adoption of OSA involves a significant departure from traditional neoliberal ideas: while not completely discarding the principles of open markets, it presents the most significant challenge to these ideas to date. OSA introduces a nuanced approach, containing fewer references to 'free trade' and a notable emphasis on 'trade as foreign policy' and 'fair trade.' The new trade policy based on qualified openness aims to remain as open as possible while becoming as autonomous as necessary. This involves a more defensive trade posture through the acquisition and utilization of new autonomous tools to assertively protect and promote European interests and values in a dynamically changing world. The EU has been using this new trade policy to safeguard its economic interests and values. Beyond its direct economic aims, trade policy assumes a multidimensional scope, pursuing a wide range of objectives, including advancing sustainability (in its environmental, social, and economic dimensions), strengthening democracy and the rule of law, and ensuring respect for human rights. In this respect, the significance of trade policy has been authoritatively emphasized by the Court of Justice of the European Union in Opinion 2/15, stating that <<*the objective of sustainable development has now become an integral part of the common commercial policy*>>. Finally, the new

approach has been elaborated in the latest trade policy review of the Commission, aptly named as an "*open, sustainable and assertive trade policy*." The trade strategy underlines how the promotion of sustainable development and the strengthening of free, fair, and harmonious trade are thus two interconnected objectives of the Union's external action, emphasising their complementarity. Afterwards, the 2023 strategic foresight report has underscored the connection between the advancement of sustainability and OSA. As intended in the title of the report, «*Sustainability and people's wellbeing at the heart of Europe's Open Strategic Autonomy»*, the two goals are strictly intertwined in EU policy. According to the report:

> "The European Union is forging ahead with unprecedented action to achieve climate neutrality and sustainability. A successful transformation will limit the existential risks of climate change and the environmental crisis while strengthening the EU's open strategic autonomy and economic security. To succeed in this transformation, it is essential to recognize the links between the environmental, social, and economic dimensions of sustainability. This will enable Europe to pursue a forward-looking geopolitical strategy that successfully leverages its most valuable assets – namely, its unique social market economy and its position as the largest trading block in the world."

As a consequence, the EU legislator began to adopt unilateral instruments, among which the CBAM represents a paradigmatic example, reflecting the EU's dual strategy of addressing global climate change and advancing sustainable development while securing its internal industrial competitiveness, in alignment with the broader geopolitical agenda of OSA. This unilateral turn is also closely linked to the European Green Deal, which sets ambitious climate targets and imposes stringent environmental obligations on private actors within the EU. To preserve the competitiveness of EU industries subject to these demanding standards – and to prevent a large-scale deindustrialisation of the continent – the EU has found it necessary to ensure that equivalent requirements apply to non-EU competitors accessing the internal market. Hence, a series of unilateral measures have been adopted to implement the Green Deal externally, projecting EU standards beyond its borders. These measures, while aiming to level the playing field, have sparked significant criticism from third countries, which often perceive them as extraterritorial or protectionist. Through the adoption of such instruments, the EU is demonstrating how it is deploying trade policy not only as a defensive tool but also as a proactive instrument for advancing sustainability and asserting its global regulatory influence.

3. An overview of the Carbon Border Adjustment Mechanism (CBAM)

Introduced under Regulation (EU) 2023/956, CBAM is a cornerstone of the EU's evolving climate and trade policy. As a novel environmental instrument and a key component of the EU Green Deal and the "Fit for 55" legislative package, CBAM aims to ensure that the EU's ambitious decarbonisation efforts are not undermined by the import of high-emission goods from jurisdictions with less stringent environmental policies. CBAM reflects the EU's dual strategy of addressing global climate change while securing its internal industrial competitiveness, aligning with the broader geopolitical agenda of OSA.

At its core, CBAM imposes a carbon price on certain high-carbon-intensity imported goods that is equivalent to the price paid by EU producers under the EU Emissions Trading System (EU ETS).

The rationale behind this mechanism is to prevent 'carbon leakage' – a scenario in which European businesses relocate their production to countries with laxer climate rules, or the EU market becomes flooded with cheaper, carbon-intensive products from abroad. Such a situation would not only erode the EU's industrial base but also sabotage global emissions reduction goals. The mechanism follows the principle of "the polluter pays", ensuring that embedded emissions in imported goods are adequately priced. CBAM essentially mirrors the EU ETS, where domestic industries are required to purchase allowances for their greenhouse gas emissions. However, unlike the ETS, CBAM is not a cap-and-trade system; it does not impose quantitative limits on imports but instead ensures that foreign products bear a comparable cost for their carbon footprint.

Under CBAM, importers – referred to as authorised CBAM declarants – must purchase CBAM certificates reflecting the carbon content of their imported goods. These certificates are priced according to the average weekly auction price of EU ETS allowances. Importers must declare the quantity of goods imported, the associated embedded emissions, and the number of certificates to be surrendered annually, beginning in 2026. These emissions must be verified independently, and any carbon price paid in the country of origin can be deducted from the final obligation to avoid double carbon taxation. The regulation applies to imports of goods deemed most at risk of carbon leakage. The initial scope of CBAM includes cement, electricity, iron and steel, aluminium, fertilizers, and hydrogen. These sectors were selected based on three primary criteria: their high emissions intensity, significant exposure to international competition, and the need to ensure administrative feasibility in the early stages. The selection reflects the sectors already covered under the EU ETS, thereby maintaining consistency in climate obligations. CBAM will be implemented in two main phases. The transitional phase, which began on 1 October 2023 and will end on 31 December 2025, is designed as a learning period for authorities, importers, and third-country producers. During this phase, no financial payments are required, but importers must submit quarterly reports detailing the type and quantity of goods imported, embedded emissions (both direct and indirect), and any carbon price paid in the country of origin. This information must be collected from foreign producers and verified where possible, although temporary use of default values is permitted when primary data is unavailable. The definitive phase will commence on 1 January 2026. From that point onward, authorised CBAM declarants must annually surrender certificates corresponding to the carbon emissions embedded in their imports. This marks the point at which CBAM becomes financially operational. Importers will be obligated to maintain records of emissions data, undergo verification procedures, and engage in certificate trading with national authorities. Non-compliance, such as failure to surrender the correct number of certificates, will result in penalties analogous to those under the EU ETS. The scope of CBAM is expected to expand progressively. By 2034, the list of covered goods is likely to encompass all sectors under the EU ETS, including both direct and indirect emissions. This gradual expansion reflects the EU's ambition to create a comprehensive and robust carbon pricing framework across its internal and external markets. Exemptions exist for goods with negligible value (below €150), personal items, and military equipment. Moreover, countries with carbon pricing systems equivalent to the EU's – such as Norway, Switzerland, and Iceland – or those linked to the EU ETS, are excluded from CBAM's scope. This exemption underscores the regulatory objective of incentivizing foreign jurisdictions to adopt similar climate pricing policies.

4. Recent developments and commission's amendments to CBAM implementation

CBAM's design highlights the EU's attempt to leverage its economic weight to influence global environmental standards, asserting that market access to the EU should come with climate responsibility. By aligning its trade policy with climate goals, CBAM epitomizes a new frontier in

EU external action-blending environmental leadership with strategic economic autonomy. However, the measure's complexity, reporting burdens, and implications for trade partners – particularly in the developing countries – entailed significant implementation challenges. As a consequence, since the launch of CBAM's transitional phase in October 2023, numerous operational and compliance hurdles have emerged, prompting extensive feedback from both EU Member States and external stakeholders. In late 2024, a coalition of Member States – l ed by Italy, Poland, Austria, and Bulgaria – submitted a joint non-paper, advocating for the recalibration of CBAM's reporting obligations and timelines. They expressed concern over the administrative burdens imposed on energy-intensive industries, such as steel and aluminium. These countries warned that the current structure risked undermining EU industrial competitiveness, especially in sectors facing high international exposure.

In response, the European Commission initiated a review process aimed at easing CBAM's burden while maintaining its environmental objectives. In February 2025, the Commission released a package of legislative proposals, which encompasses broader simplification measures across EU sustainability regulations, including CBAM. The key objective of the proposal amending CBAM is to simplify and strengthen its functioning without compromising its core environmental goals. Drawing from lessons learned during the transitional phase, the Commission aims to streamline compliance for importers, enhance legal certainty, and prepare the groundwork for future expansion of the mechanism.

A key reform in the updated CBAM regulation is the introduction of a mass-based de minimis threshold of 50 tonnes per year. Importers below this threshold are exempt from reporting and surrendering CBAM certificates, a change expected to relieve approximately 90% of importers while still covering over 99% of embedded emissions. This streamlines compliance and eases enforcement challenges for national authorities. For larger importers, the revised rules introduce several procedural simplifications, such as longer deadlines for submitting CBAM reports, the option to delegate the technical submission of data to third parties (while retaining legal responsibility), and the expanded use of default values for calculating embedded emissions – especially when verified data from third-country producers is unavailable – as well as the possibility to deduct average carbon prices paid in the country of production, based on estimates provided by the European Commission.

Verification requirements now apply only when actual emissions are used, reducing reliance on third-party certifiers. Additionally, the start of CBAM certificate sales has been postponed to February 2027 for goods imported in 2026, meaning that importers will begin to financially comply with CBAM obligations only from that point onward. As a result, while 2026 marks the first year in which emissions will generate a financial obligation, the actual purchase and surrender of CBAM certificates corresponding to those emissions will take place in 2027. The financial compliance threshold has also been reduced from 80% to 50%, offering businesses more flexibility in managing their CBAM obligations.

These changes, framed within the EU's broader 'simplification revolution' for competitiveness, reflect a nuanced recalibration of CBAM. It illustrates the EU's recognition of the practical challenges facing industry and international partners. While the core philosophy of aligning trade and climate policy remains intact, the implementation trajectory is now more attuned to economic realism and sectoral flexibility. These ongoing adjustments suggest that CBAM is not a fixed instrument, but rather a dynamic policy tool subject to iterative refinement through regulatory feedback and stakeholder dialogue.

5. CBAM and the challenges of WTO compatibility

Though ostensibly an environmental measure, CBAM functions as a trade-related mechanism and as such raises significant legal and normative questions concerning its compatibility with the rules and principles of the World Trade Organization (WTO). This section delves into three key issues: whether CBAM aligns with WTO obligations, what revisions might render it more WTO-compatible, and how multilateral engagement could offer a path forward for integrating non-trade values into global trade governance.

One major point of contention concerns the principle of non-discrimination under the General Agreement on Tariffs and Trade (GATT). Article I (Most-Favoured Nation) and Article III (National Treatment) prohibit discriminatory treatment between like products based on their origin or the methods of production. CBAM could be seen as violating these principles by treating foreign products less favourably than their EU counterparts, especially if it does not fully account for differing regulatory approaches or carbon pricing mechanisms in exporting countries. More critically, even if CBAM is found to violate core GATT obligations, the EU may seek justification under Article XX of GATT, which provides exceptions for environmental measures. Specifically, paragraph (b) allows measures necessary to protect human, animal, or plant life or health, and paragraph (g) permits measures relating to the conservation of exhaustible natural resources. CBAM could plausibly fall under both categories. Yet, to successfully invoke these exceptions, the EU must satisfy the chapeau of GATT Article XX, which requires that the measure not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Scholars and previous WTO jurisprudence suggest that CBAM, in its current form, may struggle to meet the requirements of the chapeau for several reasons. First, the reliance on default values when emissions data from third countries are unavailable risks penalizing exporters unfairly, especially in developing countries with limited monitoring capacity. Second, the mechanism does not credit non-price-based climate policies, such as regulatory standards or subsidies, even if these policies result in equivalent emissions reductions. Third, the phased removal of free allowances within the EU ETS, which is intended to accompany CBAM's implementation, may not be rapid or complete enough to eliminate concerns about differential treatment between EU and foreign producers. In addition, concerns about extraterritoriality and regulatory overreach are frequently raised, particularly by developing countries. These nations argue that CBAM unilaterally imposes EU standards and fails to respect the Paris Agreement's principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC). The fact that CBAM does not currently provide exemptions or flexibilities for Least Developed Countries (LDCs) or recognize the legitimacy of alternative development pathways exacerbates perceptions of inequity. In addition to concerns about extraterritoriality and regulatory overreach, Russia formally requested WTO consultations on the EU CBAM in May 2025. The EU declined to participate, citing Russia's ongoing war of aggression against Ukraine and stating that meaningful dialogue under WTO auspices is not feasible in the current geopolitical context. Despite the refusal, the Russian Federation may still pursue WTO proceedings, including the possible request for the establishment of a dispute settlement panel should the mandatory consultation period expire without resolution.

While the WTO consistency of CBAM is uncertain, the EU could undertake several revisions to enhance its legal defensibility and mitigate accusations of protectionism. First, the EU could enhance fairness and reduce the risk of discrimination by refining its default emissions value methodology. Instead of relying on the worst-performing EU installations as benchmarks, the mechanism could adopt regionally adjusted or global averages or offer technical assistance to third countries in building emissions reporting capacity. Secondly, it could broaden the scope of recognition for carbon

reduction policies in exporting countries. Currently, only explicit carbon pricing mechanisms – such as carbon taxes, which directly impose a fixed price per ton of CO_2 emitted, and cap-and-trade systems (also known as emissions trading schemes), which set a total limit on emissions and allow companies to buy and sell emission allowances within that cap – are accepted. Including non-price-based climate actions – such as energy efficiency standards or renewable energy subsidies – would better reflect the diversity of global climate strategies and align CBAM with the spirit of multilateral environmental agreements. Thirdly, it could accelerate the phase-out of free allowances – emission permits currently granted at no cost to certain EU industries under the ETS as a transitional measure to mitigate the risk of carbon leakage. However, maintaining such preferential treatment while imposing CBAM obligations on foreign producers could be perceived as discriminatory and undermine the EU's position before the WTO. A full and timely phase-out is therefore critical to uphold the internal consistency of the EU's carbon pricing architecture and to ensure equal treatment between domestic and imported products.

Furthermore, the EU may enhance procedural fairness and transparency by issuing clear guidelines for emissions reporting, appeals mechanisms, and stakeholder consultations, so as to strengthen the procedural legitimacy of CBAM. These features are indeed often emphasized in WTO jurisprudence as indicators of good faith and non-discrimination. Finally, the EU could introduce transitional exemptions or financial assistance mechanisms for LDCs and other vulnerable economies. This would demonstrate adherence to the CBDR – RC principle and reduce the burden on countries with limited capacity to implement comparable climate measures.

6. Addressing CBAM's legal and equity challenges: Multilateral solutions

Despite its unilateral structure, CBAM raises global issues that require multilateral dialogue. At the heart of CBAM lies the tension between trade liberalization and the promotion of non-trade values, such as environmental sustainability and climate justice. Rather than resolving these tensions through litigation or reciprocal protectionism, the international community could pursue institutional innovations that embed environmental norms within the global trade architecture.

One option is to revive discussions within the WTO's Committee on Trade and Environment (CTE). This committee has a mandate to examine the relationship between trade measures and environmental policies. The EU, along with like-minded partners, could table a proposal to initiate structured discussions on carbon pricing equivalency, emissions accounting standards, and climate policy benchmarking. By providing a forum for technical exchange, the CTE could build shared understandings and reduce the risk of conflict.

Another promising avenue is the establishment of a plurilateral 'climate club' under WTO auspices, as already envisioned in the recitals of the regulation[1]. Such a club would allow countries with ambitious climate policies to agree on common rules and mutual recognition of climate

[1] According to recital 72 of the Regulation, <<*The establishment of the CBAM calls for the development of bilateral, multilateral and international cooperation with third countries. For that purpose, a forum of countries with carbon pricing instruments or other comparable instruments ('Climate Club') should be set up, in order to promote the implementation of ambitious climate policies in all countries and pave the way for a global carbon pricing framework. The Climate Club should be open, voluntary, non-exclusive and directed in particular at aiming for high climate ambition in line with the Paris Agreement. The Climate Club could function under the auspices of a multilateral international organisation and should facilitate the comparison and, where appropriate, coordination of relevant measures with an impact on emission reduction. The Climate Club should also support the comparability of relevant climate measures by ensuring the quality of climate monitoring, reporting and verification among its Members and providing means for engagement and transparency between the Union and its trade partners*>>.

measures, including carbon pricing. This would reduce the need for unilateral border adjustments and create incentives for broader participation in climate action.

Further, linking the Paris Agreement and WTO frameworks more explicitly could help bridge the gap between trade and climate governance. This might involve creating a joint WTO–UNFCCC task force to assess the compatibility of trade measures like CBAM with national climate commitments. The task force could issue guidelines that clarify how trade-related climate policies can be designed to respect both environmental integrity and trade fairness. In addition, new dispute resolution mechanisms could be designed to handle trade-environment conflicts outside the traditional WTO system. For example, a specialized body composed of trade and environmental law experts could be empowered to adjudicate cases involving climate-related trade measures, offering more nuanced and context-sensitive rulings than a purely trade-based forum.

Finally, engaging the developing and least developed countries is essential. The EU should actively support capacity-building initiatives and technology transfers that enable developing countries to implement their own climate measures. A multilateral agreement that integrates differentiated obligations, just transition principles, and shared climate finance commitments would go a long way in making trade instruments like CBAM more equitable and effective.

7. Conclusion

This article has examined the EU's strategic shift toward a more assertive, unilateral trade policy within the framework of Open Strategic Autonomy, using the Carbon Border Adjustment Mechanism as a case study. It began by contextualizing the EU's turn to unilateralism as a response to a more fragmented global order, characterized by geopolitical tensions, declining multilateralism, and increasing global competition. The concept of OSA and its influence on the renewed EU trade policy were explored as a normative and policy framework through which the EU seeks to reconcile openness and cooperation with resilience and regulatory sovereignty. The paper then analysed CBAM as both a climate policy and a trade instrument, designed to prevent carbon leakage and ensure a level playing field between EU and foreign producers. It detailed the functioning of the mechanism, its alignment with the EU ETS, its phased implementation, and its scope of application. Thereafter, the paper discussed the recent 2025 developments prompted by the European Commission in response to member state concerns, emphasizing regulatory simplification, delayed financial obligations, and enhanced procedural flexibility. Then the compatibility of CBAM with WTO law was assessed, highlighting key challenges under the principles of non-discrimination, its potential exemption under the chapeau clause, and possible solutions to make the instrument more WTO-compatible. Finally, it proposed ways forward through multilateral engagement, including WTO dialogue, climate clubs, and closer integration of trade and environmental governance. Beyond summarizing the instrument and its challenges, CBAM invites broader reflection on the evolving nature of global economic governance. It signals the EU's ambition not merely to respond to climate change, but to reshape the rules of international trade in ways that embed sustainability as a core value. In doing so, the EU assumes a quasi-legislative role on the global stage – one that inevitably raises questions about legitimacy, inclusiveness, and power asymmetries. The mechanism's future will thus depend not only on legal fine-tuning or administrative efficiency but also on the EU's capacity to legitimize its actions through dialogue, cooperation, and solidarity with developing countries. Ultimately, CBAM may serve as a template for how economic power can be mobilized in support of global public goods. But this potential can only be realized if unilateral ambition is matched by multilateral responsibility. The EU must therefore continue to invest in diplomatic efforts, technical assistance, and inclusive rule-

making to ensure that CBAM contributes not only to carbon pricing but to a fair and sustainable international order.

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The WTO Compatibility of the EU Deforestation Regulation

Carla Gulotta

Summary: 1. Introductory remarks. – 2. Origin and structure of the measure. – 3. Analysis of the EUDR under WTO law. – 4. Problematic aspects with the WTO rules. – 5. Challenges of implementation: The need for a preventive and cooperative approach towards economic operators and third countries. – 5.1. The net of technical measures and supportive tools for economic operators. – 5.2. The external relation component of the EUDR. – 6. To conclude: A suggested method to hinge the discussion of agreed rules against deforestation within the multilateral trading system.

Keywords: EU Deforestation Regulation – Non-product-related process – Production method – GATT Article XX – Legitimate objectives under Article 2.2 of the WTO TBT Agreement – Multilateral cooperation method for sustainability measures.

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1. Introductory remarks

The EU Deforestation Regulation[1] (hereinafter EUDR or the Regulation) is part of a broader ecosystem of rules adopted by the European Union to transition towards a more sustainable economy[2] and to fulfill its international obligations to fight climate change and slow down the deforestation process[3].

The aim of the Regulation is to minimize the contribution of the Union to deforestation and forest degradation globally, thus reducing greenhouse gas emissions and biodiversity loss. To reach these objectives, the Regulation requires companies importing or exporting certain commodities – cattle, cocoa, coffee, oil palm, rubber, soya and timber – and the by-products listed in a specific annex, to establish and implement a due diligence system in order to ensure that only commodities and products not originating from deforested areas enter or are processed on the EU internal market.

The chosen strategy raises questions about the compatibility of the Regulation with WTO law, its coherence and coordination with other EU sustainability measures, and the legality of its indirect extraterritorial effects. After a brief overview of the general structure of the EUDR and of its integration in the EU normative ecosystem on sustainability, the paper will first analyze the Regulation in the light of the obligations of the EU and of its Member States within the multilateral trading system. It will then be argued that the main challenges of the measure stem from the risk of an uneven and discriminatory implementation and that effective engagement of the Union and of its Member States with the countries of origin of the relevant products can ensure a WTO-compliant application. The final section will propose a possible method to bring the discussion of trade-related

[1] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (*O.J.* L 150, 9 June 2023, 206 ff.).

[2] See the Communication of the Commission *The European Green Deal*, COM(2019) 640 final, Brussels, 11 December 2019.

[3] Obligations originating, for instance in the Paris Agreement and commitments taken to pursue the Sustainable Development Goals of the UN Agenda 2030, more specifically its Goal 15.

climate, environmental and social sustainability measures (TrCSMs) under the aegis of the WTO in a way that draws on the praxis of the Committees of the Organization to overcome concerns and reach multilateral consent on differentiated national/regional approaches.

2. Origin and structure of the measure

A brief outline of the origin of the Regulation may provide context for understanding the debate which ran parallel with its normative process and final adoption in June 2023. In 2019, the European Commission formalized the Union's commitment to take action in protection of the environment, reduce greenhouse gases and fight climate change through the adoption of a series of initiatives. Alongside with the European Green Deal, such measures encompassed the Communication "Stepping up EU Action to Protect and Restore the World's Forests", proposing to promote deforestation-free supply chains as a possible means to lessen the awfully high impact of EU consumption on global deforestation rates[4]. With a legislative own initiative based on Article 225 of the Treaty on the Functioning of European Union (TFEU), in 2020, the European Parliament (EP) called on the Commission to adopt a legislative proposal introducing mandatory due diligence on economic operators intending to place or export from the internal market commodities frequently associated with deforestation[5]. The approach of the EP was broad, extending the environmental aim from the protection of forests to ecosystems and adding as a second objective of the initiative the protection of human rights and land rights of indigenous peoples and local communities. Moreover, the EP envisaged civil liability as a sanction "for harm arising out of human rights abuses or damage to natural forests and natural ecosystems (…) that has been caused, aggravated, contributed by or linked to controlled or economically dependent entities" and for harm "directly linked to their products, services or operations through a business relationship" unless operators could prove "that they took all due care to identify and avoid the damage"[6].

The regulation proposal adopted by the Commission in 2021 focused the initiative on preventing deforestation, removing most references to human rights protection. The latter issue was soon addressed through a separate proposal, which ultimately led to the adoption of the Corporate Sustainability Due Diligence Directive (CSDDD) in 2024[7].

Decoupled from its 'social sustainability' content, the proposal on deforestation-free products underwent the ordinary legislative procedure, which allowed the Parliament to reintroduce the effective enforcement of human rights and the rights of indigenous peoples in the countries of origin of the relevant commodities, at least as part of the criteria for their classification as low, standard, or

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[4] Communication of the Commission *Stepping up EU Action to Protect and Restore the World's Forests*, COM(2019) 352 final, Brussels, 23 July 2019, 6.

[5] European Parliament Resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)), P9_TA(2020)0285, available at the following link: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0285_EN.html. The EP had already released, on the 22 July 2020, a *Report on the EU's role in protecting and restoring the world's forests* (2019/2156(INI)), A9-0143/2020, available at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0212_EN.html. See also the in depth-analysis requested by the EP Committee on International Trade: *How can international trade contribute to sustainable forestry and the preservation of the world's forests through the Green Deal?*, EP/EXPO/A/INTA/FWC/2019-01/Lot5/2/C04 EN, October 2020- PE 603.513, doi: 10.2861/510269.

[6] European Parliament Recommendations as to the content of the proposal requested, para. 5.2, 33, Annex to the Resolution of 22 October 2020, P9_TA(2020)0285, cited in the previous note.

[7] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, (*OJ* L, 2024/1760 5 July 2024), ELI: http://data.europa.eu/eli/dir/2024/1760/oj. The complementary relationship between the two acts is made clear in the Proposal of the Regulation by the Commission (COM(2021) 706 final of 17 November 2021, at 4.

high risk. The strengthening of the external relations dimension of the Regulation is also attributable to the amendments introduced by the EP. For instance, these amendments include the Commission's commitment to engage in specific dialogue with all countries that are, or risk being, classified as high-risk, with the objective of reducing their level of risk (EUDR Art. 29(5))[8].

The draft Regulation never stopped to raise concerns about its direct effects on economic operators and traders – both EU and non-EU based – and about its indirect ones on producers, especially smallholder farmers and small companies in the countries of origin of the relevant commodities. The complexity of the organizational restructuring of businesses and the resources needed to comply with the regulation brought polarized positions both in civil society and on the political stage. The situation resulted in a tug-of-war between the EP and the Council regarding the amendment of the proposal. The political pressure at the international level, expressed directly through diplomatic intercourse[9] or within internal bodies of intergovernmental organizations such as the World Trade Organization (WTO)[10], convinced the Commission to accept the request – coming also from EU businesses – to postpone the date of implementation by one year.

Therefore, on October 2, 2024, the Commission presented a proposal to postpone entry into force from December 2024 to 30 December 2025. On November 14, the European Parliament approved, by a large majority, the postponement, but also, with a narrower one, eight amendments that substantially altered the framework by introducing a fourth class of "zero deforestation risk" countries. For products imported from these countries, the requirement to be "deforestation-free" would no longer apply, and the due diligence obligation would be significantly reduced. On November 20, the Council did not approve of the text as amended by Parliament, accepting only the postponement and not the additional changes. Such a position finally prevailed[11], setting the Regulation's applicability for December 30, 2025, and June 30, 2026, for micro and small enterprises.

Let's briefly examine how the measure is structured. The core idea behind the EU Deforestation Regulation is to prevent commodities and products resulting from deforestation or forest degradation from entering the internal market. The pivotal provision is the one in Article 3, that prohibits to place, make available or export from the internal market seven categories of products which may be more likely at risk (cattle, cocoa, coffee, oil palm, rubber, soya and wood) – unless: (a) they are deforestation-free (commodities and products do not originate in a plot of land that has been deforested after the 31 of December 2020); (b) they have been produced in accordance with the relevant legislation of the country of production; and (c) they are covered by a due diligence statement.

The obligation to exercise due diligence[12] is borne by operators and by traders that are not small and medium enterprises (SMEs), while SME traders must only gather and keep relevant information.

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[8] For a further discussion on the role of the EP in emphasizing the relevance of human rights and land tenure rules within the context of the EUDR, see below, section 5.2.

[9] In a letter dated 30 May 2024, U.S. Trade Representative Katherine Tai, U.S. Agriculture Secretary Thomas Vilsack and U.S. Commerce Secretary Gina Raimondo wrote to the European Commission that U.S. producers were struggling to prepare to comply with the rules and expressly asked "to delay the implementation and subsequent enforcement penalties until these substantial challenges have been addressed." See the news reported by REUTERS on the web at the following link: https://www.reuters.com/markets/commodities/united-states-asks-eu-delay-deforestation-law-letter-shows-2024-06-20/.

[10] See the Reports of Meetings of the Committee on Trade and Environment cited below, note 37.

[11] Regulation (EU) 2024/3234 of the European Parliament and of the Council of 19 December 2024 amending Regulation (EU) 2023/1115 as regards provisions relating to the date of application (*O.J.* L, 23 December 2024).

[12] In the field of environmental and social sustainability, due diligence can be conceived as a tool designed to guide businesses toward appropriate conduct translating it into a series of obligations structured within a procedure that simultaneously serves as both the measure and evidence of the company's responsible behavior. The EU has endorsed the model of due diligence prevailing at international level and embodied by the Guiding Principles of the United Nations on

The difference between the two roles is that the former (operators) are responsible for the first placement of the product on the internal market or for its exportation from it. Such a position – that normally coincides with that of the producer or big import-export firm – should correspond to a situation of stronger economic stance and organization. In other words, non-SME operators are better off to bear the burden of compliance compared to a possibly small trader further down the chain of distribution. If goods are placed on the internal market by a foreign operator, their obligations are automatically transferred to the first person within the Union who makes the relevant products available on the market (Article 7). Anchoring the duty to comply within the jurisdiction of an EU Member State ensures the enforcement of the Regulation while avoiding the pretence of a direct extraterritorial effect, which could be of questionable international legitimacy[13].

According to the EUDR, the due diligence system consists of a set of information requirements, risk assessment, and risk mitigation measures, supplemented by reporting obligations[14].

The procedure described in the Regulation focuses on the collection of information and documents proving the geographical origin of the raw materials and products in question, relying heavily on the Commission's cooperation. In order to graduate the intensity of the due diligence obligation and to organize a proportionate oversight by Member State authorities, the EUDR provides for the classification of countries into three categories (low, standard and high risk).

By classifying countries of origin based on their deforestation risk, the Commission enables economic operators to meet their obligations – accordingly graduated – by referring to its conclusions[15].

If, in fact, the origin of the commodities/products concerned is located in a low-risk country, the due diligence procedure will take place in a simplified form, as a result of a self-assessment of the risk of non-compliance of the products carried out by the operator with reference to its own supply chain, excluding the risk assessment and mitigation stages (see Article 13 of the Regulation).

In addition to the Commission's (and Member States') collaboration with operators and traders subject to the EUDR's obligations[16], the Regulation's implementation relies on two further levels of cooperation i) among Member States' authorities – including customs officials[17] and competent authorities – as well as with the Commission; and ii) of Member States and the Commission with third countries. To facilitate the former[18], the Commission is responsible for establishing a digital

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Business and Human Rights (UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 21 March 2011) and by the OECD *Guidelines for Multinational Enterprises on Responsible Business Conduct*, last reviewed in 2023, mneguidelines.oecd.org. See: J. Bonnitcha, R. McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, *The European Journal of International Law,* 28, 2017, 899 ff.

[13] See: N. Boschiero, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, *Diritti Umani e Diritto Internazionale*, 3/2023, 661ff.

[14] These three constituent elements of the due diligence system, outlined in Article 8, are specifically addressed in Articles 9 through 11 of the EUDR. Article 12 clarifies that in order to comply with the due diligence obligation, operators must establish an internal procedure, which is further complemented and finalized by a reporting requirement.

[15] The provision for cooperation between the Commission and national competent authorities with private entities subject to particularly burdensome regulations appears to be the most suitable model for managing the transition toward a more sustainable economy. Such a shift necessarily requires market changes that may prove significantly challenging for businesses and citizens. The mechanism envisaged for implementing the EUDR makes extensive use of this framework, providing for both technical and financial assistance (see Section 5); if properly implemented, it could serve as a reference model for the undergoing double transition (green and digital).

[16] As for Member States, see Art. 15, discussed below.

[17] The division of roles between competent authorities and customs authorities in carrying out checks on relevant products subject to the customs regimes of "release for free circulation" or "export" is established by Article 26 of the Regulation.

[18] The latter will be examined below in section 5.2.

information system (Article 33) and ensuring its interoperability with the European Union Single Window Environment for Customs via an electronic interface.

Once fully operational[19], the EUDR information mechanism will enable real-time information exchange on the conformity of relevant commodities and products among the networks of authorities responsible – both at the national and European levels – for enforcing the EUDR (Commission and competent authorities), the Union Customs Code, and the surveillance of the internal market[20].

The partnership and cooperation mechanism with third countries is a fundamental pillar of the implementation of the EUDR. Both the Commission and the Member States are mandated to develop the mechanism under Article 30 of the Regulation. Such cooperation, if properly structured and supported by adequate investments, provides the means to apply the EUDR in compliance with the rules of international trade.

Coming to the enforcement of the measure, it is primarily entrusted to the authorities that Member States are required to designate under Article 14. National competent authorities are responsible for conducting checks to ensure that operators and traders comply with their obligations, applying a risk-based approach that mandates intensified controls on entities whose products originate from countries more prone to deforestation risks. They can adopt interim measures and require operators and traders to take corrective actions in case of non-compliance. Member States will set out effective sanctions systems, encompassing fines reaching 4 % of the operator's or trader's total annual Union-wide turnover and confiscation measures (EUDR Chapter 3).

It is worth mentioning that the Regulation vests civil society with the power to signal a violation of the EUDR to the competent authorities of the Member States. To this effect, any natural or legal person can submit a substantiated concern, as provided under Art. 31. A "sufficient interest, as determined in accordance with the existing national systems of legal remedies" is required, instead, to access other administrative or judicial procedures (Art. 32). The involvement of citizens in ensuring businesses' proper compliance with the Regulation should be seen in connection with the Union's political choice to assign citizens – particularly in their role as consumers – an active role in the transition to a more sustainable economy, in line with Goal 12 of the United Nations Sustainable Development Goals[21]. Besides, the involvement of civil society as a support for the Commission in the implementation phase and in the monitoring of the Regulation is assured through the participation of trade and business associations and non-governmental organizations in the Multi-Stakeholder Platform on Protecting and Restoring the World's Forests, whose tasks have been coherently extended[22].

Finally, to fully understand the EU's approach to its policy against deforestation, the EUDR must be considered in the context of the broader EU strategy to transition towards a more sustainable economy. With the other measures set up to achieve this aim, the Regulation shares two key features: (i) the risk-based approach, and (ii) the requirement for due diligence, as outlined in the UN Guiding

[19] By 30 June 2028, according to EUDR Art. 28.

[20] Notably, through an implementing regulation adopted on 6 September 2024, the Union took a significant step to facilitate the sharing of information between the network of customs authorities and the Information and Communication System for Market Surveillance.

[21] Think of the Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information (*OJ* L, 2024/825, 6 March 2024), ELI: http://data.europa.eu/eli/dir/2024/825/oj, and of the Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (*Green Claims Directive*) COM (2023) 166 of 22 March 2023.

[22] More information on the Platform and the list of its member organizations are available at the following link: https://environment.ec.europa.eu/topics/forests/deforestation/regulation-deforestation-free-products_en.

Principles, to encourage businesses to internalize the impact of their activities on the environment and human rights.

While the risk-based approach has been familiar to businesses since the adoption of the Framework Directive on workers' safety and health in the 1980s, the introduction of due diligence obligations to address environmental goals dates back to 2010, with the EU Timber Regulation (EUTR), which is set to be replaced by the EUDR.

The international *consensus* on due diligence as the preferred tool for ensuring responsible business conduct has been embraced with conviction by the EU. Since 2010, this framework has been applied to specific sectors – such as with the 2010 Timber[23] and 2017 Conflict Minerals Regulations – and is at the core of broader measures that aim to transform the business models of European companies. Notably, these include the Corporate Sustainability Reporting Directive (CSRD, EU 2022/2464) and the Corporate Sustainability Due Diligence Directive (CSDDD, EU 2024/1760), adopted respectively on December 13, 2022, and June 13, 2024. More recently, the Regulation that will prohibit the placing, making available on, and exporting from the EU market of any product that is made using forced labor[24].

Legal uncertainty arising from the potential cumulative applicability of the above-mentioned regulations has been resolved by applying the principle *lex specialis derogat legi generali*. This principle, explicitly stated in Article 1(3) of the CSDDD – which holds the status of *lex generalis* – serves as a mechanism to address any potential rule conflicts within the field of EU legislation on human rights and environmental due diligence.

To address the separate issue of excessive bureaucratic burdens on businesses, Article 12(3) of the EUDR, for the sake of simplification, allows companies required to submit due diligence reports on the value chain under other Union acts to include the information that would otherwise need to be provided in a due diligence report under paragraph 2 of the same provision[25].

3. Analysis of the EUDR under WTO law

In order to assess the compatibility of the EUDR with the WTO system, a few facts must be premised: i) the direct impact of deforestation on climate change has been ascertained by scientists, who estimate that around 90% of deforestation is driven by the conversion of land for agricultural purposes, with 10% of these agricultural products destined for the internal market of the European Union; ii) the EU and its Member States are under the international obligation to take action to fight climate change (*e.g.* under the Paris Agreement) and are specifically called to slow down the deforestation process (*e.g.* Goal 15 of the UN Agenda 2030).

Given these premises, the Regulation was, to some extent, necessary, and this must be taken into account when assessing its appropriateness from a legal and economic perspective (specifically regarding the burden on European businesses and the effects on the countries of origin of the relevant products).

From a WTO law perspective, the EUDR can be classified as a non-product-related process and production method (NPR PPM) sustainability measure. This extensive term conveys two main ideas: (i) the measure is designed to reduce the EU's impact on climate change and biodiversity loss, while

[23] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (EUTR), (OJ L 295, 12.11.2010) 23-34.
[24] Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937 (*OJ* L, 2024/3015, 12 December 2024).
[25] See also EUDR Art. 15(1), discussed below in section 5.1.

promoting sustainable production and consumption within the EU[26], and (ii) the sustainability requirement it imposes cannot be assessed at customs "at sight", as it does not alter the appearance of the goods in question, but depends on their geographical origin. Moreover, (iii) the EUDR is undeniably a unilateral measure with trade-restrictive effects[27].

All these aspects must be considered when assessing the regulation's consistency with WTO law. Starting with a combined discussion of the first and the latter, the measure's evident trade-restricting nature places it squarely within the scope of WTO illegality: the limited access to the EU internal market can imply a violation of GATT Article XI, but also the infringement of the national treatment rule could be envisaged, for instance striking a comparison between ethanol soybeans (grown in a third country) and ethanol by sugar beets grown in Northern Europe.

The restrictive effect on international trade flows that the EUDR might produce would conflict with WTO law, unless it can be justified under one of the derogatory provisions of GATT. Such exception is – and we come to the first of the three aspects initially mentioned – Article XX(g), that expressly permits measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." Forests – and even more so, primary forests – can undoubtedly be classified as exhaustible natural resources, and the Regulation clearly applies to relevant products originating within the territory of EU Member States.

Given that the effects of deforestation on climate change and ecosystems are so severe that they threaten humanity's survival and endanger the lives of all living beings on the planet, Article XX, subparagraph (b) – which permits measures aimed at protecting the life and health of humans, animals, and plants – can also be invoked to assert the Regulation's compliance with WTO law.

The reports recently released by a WTO Panel in the disputes on the EU biofuels regime confirm the possibility of invoking both exceptions[28]. As for the justification under Article XX(g), the Panel acknowledges that with the measure at stake (high ILUC (indirect land use change)-risk cap and phase-out), the EU pursued the aim to limit GHG emissions "associated with crop-based biofuels, which would arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes requiring the extension of agricultural land into areas with high-carbon stock, including forests, wetlands and peatland." Therefore, it explicitly states that the objective of the measure "*prima facie relates to the conservation of an "exhaustible natural resource", namely high-carbon stock land (forests,* wetlands and peatland)."[29]

Coming to the second exception, the Panel recalls that "in *Brazil – Taxation*, the Panel found that the reduction of CO2 emissions is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range of policies that protect human life or health." It then explicitly

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[26] The Commission intention to use trade policy in order to "transform the EU's economy in line with the green and digital transitions" was expressed in the 2021 Trade Policy Review (European Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, 6, COM(2021) 66 final. For an extensive discussion of the relationship between trade and environmental policies in the EU, see: S. Gstöhl, J. Schnock, *Towards a Coherent Trade-Environment Nexus? The EU's Critical Raw Materials Policy*, *Journal of World Trade* 2024, 58, 1, 35–60.

[27] See: G.C. Leonelli, *Anti-deforestation npr-PPMs and Carbon Border Measures: Thinking About the Chapeau of Article XX GATT in Times of Climate Crisis, Journal of International Economic Law*, 2023, 26, 416–434. Doi: https://doi.org/10.1093/jiel/jgad016. An interesting legal analysis of the WTO coherence of a yet non-existent EU measure against deforestation has been conducted by E. Partiti, *Regulating Trade in Forest-Risk Commodities, Journal of World Trade*, 2020, 54, 31–58, at 39.

[28] *European Union—Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia)* (*EU—Palm Oil (Indonesia)*), DS593; *European Union and Certain Member States—Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia)* (*EU—Palm Oil (Malaysia)*), DS600.

[29] See: Panel Report, *EU-Palm Oil (Indonesia)*, 10 January 2025, WT/DS593/R, para. 7.1084. Emphasis added. See also: Panel Report, *EU—Palm Oil (Malaysia),* 5 March 2025, WT/DS600/R, para. 7.1289.

affirms "that it sees no reason to disagree, considering that global warming and climate change pose one of the greatest threats to life and health on the planet", concluding that "the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels therefore *prima facie* relates to the protection of human, animal or plant life or health"[30].

The importance of the common interests and values protected by the EUDR and its capacity to contribute effectively to reduce (even eliminate) the participation of the EU consumption to the deforestation indirectly led by the extension of agricultural areas induce to affirm that the additional tests developed by WTO jurisprudence for the applicability of the mentioned exception (necessity test, trade restrictiveness and the measure's contribution to the pursued objective) would also be satisfied[31].

The arguments discussed above do not contradict the strong belief that a revision of the GATT treaty to specifically address the effects of international trade on sustainability and climate change would be highly advisable. While an update to WTO law to address climate change is still underway – currently represented by four Working Groups advancing structured discussions on trade and environmental sustainability (TESSSD) – the broad applicability of Article XX to measures targeting climate change is supported by the principle of sustainable development outlined in the Preamble of the Treaty establishing the World Trade Organization.

Supporting international trade flows that contribute to deforestation and, indirectly, exacerbate global warming is, in fact, inconsistent with the "optimal use of the world's resources", a concept intrinsic to sustainable development as articulated in the Preamble[32].

However, the Regulation's consistency with WTO law is also justified by its *sustainability* goal – an independent normative objective distinct from the fight against climate change. In this regard, one could argue for the introduction of more specific derogatory clauses in the GATT – potentially by adding new subparagraphs to Article XX – to explicitly recognize the two dimensions of sustainability (social and environmental) and the need for WTO Members to take action to prevent or at least slow the progression of climate change.

Finally, it must be reported that, according to the United States, the EUDR constitutes a technical regulation, "as it regulates product characteristics for derived products and it includes conformity assessment procedures in its due diligence requirements"[33]. This view is shared by other WTO Members[34]. Considered the symmetry between the general exceptions in GATT Article XX and the "legitimate objectives" – among which "protection of human health or safety, animal or plant life or health, or the environment" – that justify technical regulations under TBT Article 2.2, the previous arguments could cover the EUDR if it had to be assessed under the TBT Agreement.

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[30] Panel Report, *EU-Palm Oil (Indonesia)*, para. 7.1093. See also: Panel Report, *EU—Palm Oil (Malaysia)*, para. 7.1284.
[31] See: J. Pauwelyn, A.T. Guzman, J.A. Hillman, *International Trade Law*, 3rd ed., 2016, 381 ff.
[32] On the interpretative role of the Preamble to the WTO Agreement see the comment of E. Baroncini, C. Brunel, *A WTO Safe Harbour for the Dolphins: The Second Compliance Proceedings in the US-Tuna II (Mexico) Case*, *World Trade Review*, 19, 2020, 196-215, at 206.
[33] The statement, provided by the United States representative at the TBT Committee meeting of November 2023 is included in the specific trade concern (STC) EUROPEAN UNION – REGULATION (EU) 2023/1115 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE MAKING AVAILABLE ON THE UNION MARKET AND THE EXPORT FROM THE UNION OF CERTAIN COMMODITIES AND PRODUCTS ASSOCIATED WITH DEFORESTATION AND FOREST DEGRADATION AND REPEALING REGULATION (EU) NO 995/2010 (ID 807), 30. The same position was confirmed by the United States representative at the meeting of November 2024: *ibidem*, 1.
[34] See, in the STC cited in the previous note, the statements by Canada, Costa Rica, India, Mexico, Peru. In doctrine: Bernard M. Hoekman & Charles F. Sabel, *Managing the Trade-Climate Policy Interface Through Open Plurilateral Agreements: Learning from the EU Deforestation Regulation Experience*, 2025, 20. Available at: https://scholarship.law.columbia.edu/faculty_scholarship/4614.

4. Problematic aspects with the WTO rules

Full justification of the EUDR under Article XX requires compliance with the introductory part of the provision, known as the "*chapeau*." To meet this requirement, it is necessary to demonstrate that the measure is not driven by protectionist objectives and is not applied in a discriminatory manner to countries with similar conditions.

While the first requirement may be easier to satisfy, given the widespread scientific *consensus* on the risks associated with climate change and the exacerbating effect of deforestation, the second condition may prove more challenging.

The EUDR applies to all goods placed in and exported from the EU internal market, regardless of the nationality or location of the companies involved, and "it has been designed to ensure equal treatment under WTO rules"[35]. Therefore, the framework appears to be non-discriminatory in its treatment of both European and foreign operators.

However, although the regulation may seem non-discriminatory "on its face", it could lead to discriminatory application in practice. It comes as no surprise that among the main critics moved to the EUDR are those concerning its anticipated discriminatory implementation. This may result from its "one size-fits all approach" that would ignore the needs of developing countries (most of the countries of origin of the relevant commodities) and unjustifiably requires them to adopt the EU's method of fighting deforestation[36].

A risk of discrimination arises because the enforcement of the EUDR lies with the competent authorities of the Member States, meaning that the point at which goods enter the EU internal market could result in different treatment. This is due to the policy flexibility granted to Member States by the Regulation (e.g., Article 25, Penalties). Therefore, reducing the discretion of Member States' authorities in determining sanctions through an amendment of the mentioned provision could prevent this risk of uneven application of the measure.

Another potential avenue for discriminatory treatment is the classification of the countries of origin of the relevant goods as either low- or high-risk. The opacity of this classification process has been raised as a concern in WTO Committees (e.g. the Committee on Trade and Environment – CTE[37] and the Committee on Technical Barriers to Trade – TBT Committee).

Perhaps prompted by these appeals[38], the Commission has anticipated the general principles of the benchmarking methodology[39], that is now the object of an *ad hoc* implementing act[40]. The

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[35] Communication from the Commission on the *Strategic Framework for International Cooperation Engagement in the context of Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation* (C/2024/6604), *OJ* C series C/2024/6604, 7 November 2024, 2.

[36] For instance, see Indonesia's statement that 'it is imperative that the EU discusses a tailored approach with its partners for each country' (STC ID 807), cited *supra* note 33, 4. Further objections to the Regulation relate to the burden it places on businesses, especially smallholders and family businesses in developing countries, the limited financial resources the Union has allocated to support the adjustment process and the overly short implementation timeframes.

[37] Committee on Trade and Environment, REPORT OF THE MEETING HELD ON 24 AND 25 APRIL 2024, WT/CTE/M/80, 19 June 2024, 16.

[38] The significant role that direct confrontation and discussion of unilateral measures among government representatives within structured dialogues, committees, or other treaty bodies can play in preventing or resolving trade issues is highlighted by G. Messenger., *Mitigating the rise of unilateralism: lessons from forestry management*, in *Journal of International Economic Law*, 2024, 27, 223–240, https://doi.org/10.1093/jiel/jgae018.

[39] Communication from the Commission on the Strategic Framework for International Cooperation Engagement in the context of Regulation (EU) 2023/1115, Annex, 15, *supra* note 35.

[40] Commission Implementing Regulation (EU) 2025/1093 of 22 May 2025 laying down rules for the application of Regulation (EU) 2023/1115 of the European Parliament and of the Council as regards a list of countries that present a low

transparency of the classification is enhanced by the publication of a working document explaining how it was conducted[41]. The short list of high-risk countries (only four: Belarus, the Democratic People's Republic of Korea, Myanmar and the Russian Federation) reveals the Commission's cautious approach. Interestingly, this has resulted in the selection of countries whose undemocratic governments preclude the trustworthiness of data on the local situation, as well as the possibility of engaging in effective negotiations.

A particularly sensitive issue concerns cooperation with third countries, as mandated by Article 30 of the Regulation. The obligation to establish partnerships or other forms of collaboration with producer countries introduces another risk of discriminatory implementation of the EUDR. This could arise from those who engage in the negotiations (whether it is the Commission on behalf of the Union or an individual Member State), the type of cooperation proposed, or even the failure to initiate diplomatic discussions on facilitating the transition to sustainable commodity production. Additionally, there is the potential for uneven financial support to ensure the effective implementation of agreed-upon commitments[42].

Finally, the second aspect mentioned at the beginning of this section concerns the criticism that effective enforcement of the Regulation may be difficult, if not impossible, due to challenges in verifying compliance by economic operators. This issue arises from the fact that the sustainability requirement introduced by the EUDR – the fact that relevant products or commodities are "deforestation-free"- cannot be assessed through a physical examination of the products themselves. Some have argued that this requirement constitutes, in effect, a legally mandated "characteristic" of the goods, thereby bringing it under the scope of the TBT Agreement[43]. From a different perspective, it has been pointed out that, as with sustainability requirements imposed by other measures, verifying product conformity at customs will be nearly impossible, necessitating controls at the firm level instead[44].

In this context, the EUDR's enforcement mechanism – heavily reliant on technological tools and collaboration between customs authorities and specially designated competent authorities – may serve as a valuable test case for assessing the conformity of products with social and environmental sustainability standards. Such standards are increasingly being adopted by WTO Member States.

5. Challenges of implementation: The need for a preventive and cooperative approach towards economic operators and third countries

The EUDR is undoubtedly a complex normative measure. This complexity arises from the regulation's objective: to prevent the use of deforestation-risk products within the Union in order to tackle the global challenges of environmental sustainability and climate change. Achieving such an ambitious goal requires the Union to act on two distinct levels.

First, to enable economic operators to meet due diligence obligations and implement the necessary organizational changes, the EU Legislator has established an *ad hoc* administrative

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or high risk of producing relevant commodities for which the relevant products do not comply with Article 3, point (a), OJ L, 2025/1093, 23.5.2025 and related Annex, C(2025) 3279 final, Brussels, 22.5.2025.

[41] COMMISSION STAFF WORKING DOCUMENT On the methodology used for the benchmarking system Accompanying the document COMMISSION IMPLEMENTING REGULATION (EU) 2025/1093, SWD(2025) 129 final, Brussels, 22.5.2025, available at https://environment.ec.europa.eu/publications/commission-implementing-regulation-laying-down-rules-application-deforestation-regulation_en.

[42] For a discussion of these aspects, see section 5.2.

[43] See the statement by Costa Rica in the Report cited in the note 37, at 18.

[44] J. Pauwelyn, *Twenty-first century customs fraud: how to effectively enforce EU sustainability requirements on imports*, *Journal of International Economic Law*, 2024, 27, 203–222.

framework at both the EU and Member State levels, aimed at supporting private companies' compliance efforts.

Second, to ensure that the Regulation's global scope is achieved without infringing on the sovereign prerogatives of the countries of origin of the relevant commodities and without causing adverse effects for foreign smallholders and businesses in developing countries, the Regulation provides for specific actions in the field of external relations policy.

These lines of intervention acknowledge the need for EUDR implementation to respect two principles: the well-established principle of Common but Differentiated Responsibilities and Respecting Capabilities for the environmental and climate crisis, but also an emerging principle which requires the provision of favourable treatment to micro, small and medium enterprises.

The following subparagraph will address these two aspects.

5.1. The net of technical measures and supportive tools for economic operators

The implementation of the Regulation requires a series of preliminary actions by the Commission. From this perspective, the process is advancing swiftly. At the beginning of October 2024, the Commission published the draft of a Guidance Document[45]; an updated version of the Frequently Asked Questions (FAQ) previously released and a Communication outlining the Union's strategic framework[46] to implement international cooperation with the countries of origin of raw materials, as provided for in Article 30(1) of the Regulation.

Further clarification of the EUDR requirements and scope of application was provided in April 2025 in response to issues raised by stakeholders in the EU and third countries. This took the form of an updated version of the Guidance Document, a fourth edition of the FAQs and the draft of a delegated regulation intended to simplify the implementation process for products that have a minimal impact on the fulfilment of the EUDR's aims[47].

As for the technical aspects of the implementation mechanism, we are also at an advanced stage: tools to support operators in gathering geolocalization data shall be available on an EU dedicated platform (EU Forest Observatory[48]) and the registration of operators to digitally submit due diligence statements has been active since December 5, 2024. The platform will serve as the single interface for creating and transmitting due diligence declarations to the authorities for EUDR purposes[49].

On the Member State side, competent authorities have been identified. The Italian Government has assigned the responsibility for EUDR implementation on the national territory to the Ministry of Agriculture, Food Sovereignty, and Forests (MASAF). More specifically, the DIFOR (Directorate

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[45] The possibility for the Commission to issue a guidance document, potentially in cooperation with Member States, is provided under EUDR Art. 15(1). Paragraph 5 of the same article further encourages the Commission to "facilitate the harmonized implementation of this Regulation by issuing relevant guidelines and promoting the adequate exchange of information, coordination, and cooperation between competent authorities, between competent authorities and customs authorities, and between competent authorities and the Commission." This provision has been identified as the normative basis for the guidance. See: Commission Guidance Document for Regulation (EU) 2023/1115 on Deforestation-Free Products (C/2024/6789), *OJ* C, 13 November 2024.

[46] Communication from the Commission on the Strategic Framework for International Cooperation Engagement in the context of Regulation (EU) 2023/1115, Annex, 15, *supra* note 35.

[47] Links to the updated documents are available at https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1063.

[48] See EUDR Recital (31) and question 9.10 of the FAQ, available at the link in the previous note.

[49] On December 4, 2024, the Commission has published the Implementing Regulation that lays down the rules for the functioning of the Information System. To help operators get familiar with the platform, a replica training platform, called ACCEPTANCE Server has been created and online training session for operators are scheduled on the web: https://green-business.ec.europa.eu/deforestation-regulation-implementation/information-system-deforestation-regulation_en.

General for Mountain Economy and Forests) will be responsible for wood and its derivatives, while the ICQRF (Central Inspectorate for the Protection of Quality and the Repression of Fraud in Agro-food Products) will be responsible for other commodities and products involved (coffee, cocoa, cattle, soy, oil palm, rubber, and their various derivatives)[50].

The Regulation explicitly calls on Member States to bring to the national level the Commission approach, which focuses on assisting operators to help them comply with their obligations under the EUDR. To this effect, Member States have the duty to "facilitate the exchange and dissemination of relevant information, in particular *with a view to assisting operators in risk assessment* as set out in Article 10, and on best practices regarding the implementation of this Regulation" (Art. 15(2))[51].

Member States are also encouraged to "provide technical and other assistance and guidance to operators." In doing so, they must "take into account the situation of SMEs, including microenterprises, and natural persons, to facilitate compliance with this Regulation, including the conversion of data from relevant systems to identify the geolocation in the information system referred to in Article 33" (Art. 15(1)). The activation of adequate financial instruments to support the organizational conversion of European operators at EU and Member State level will be of pivotal importance for the viability of the implementation. Further simplification for operators is expected through the coordination of EUDR implementation with "relevant current and future Union legal acts containing due diligence obligations", as also mandated by the same provision.

The harmonized implementation of the Regulation, supported by the above mentioned soft law documents released by the Commission[52], will be further facilitated by the formal obligation imposed on Member States' competent authorities to collaborate "with each other, the customs authorities from their Member State, the competent authorities and customs authorities from other Member States, the Commission and if necessary, with the administrative authorities of third countries in order to ensure compliance with this Regulation, including as regards the implementation of field audits" (EUDR Art. 21(1)).

5.2. The external relation component of the EUDR

As already noted, the provisions on cooperation with third countries represent a vital component of the overarching architecture of the EU Regulation on deforestation-free products. Notably, the external dimension of the EUDR has been significantly shaped by the EP's amendments to the Commission's proposal. Chapter 5 of the EUDR, entitled Country Benchmarking System and Cooperation with Third Countries, owes much of its overall design and content to the contributions of the EP, particularly the INTA Committee on International Trade.[53].

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[50] See: Decreto del Presidente del Consiglio dei ministri 16 October 2023, n. 178, Regolamento recante la riorganizzazione del Ministero dell'agricoltura, della sovranità alimentare e delle foreste a norma dell'articolo 1, comma 2, del decreto-legge 22 aprile 2023, n. 44, convertito, con modificazioni, dalla legge 21 giugno 2023, n. 74 (*GU* n. 285 of 6 December 2023), Art. 2(4.4) (c). The list of the Member States' competent authorities can accessed on the web at the following link: https://environment.ec.europa.eu/topics/forests/deforestation/regulation-deforestation-free-products_en.

[51] Italic emphasis added.

[52] For an informed discussion on the tendency of the Commission's soft law acts to 'harden' and the argument that, on the contrary, they should rely on the strength of their content to ensure application by addressees, see: C. Andone, F. Coman-Kund, *Persuasive rather than 'binding' EU soft law? An argumentative perspective on the European Commission's soft law instruments in times of crisis*, *The Theory and Practice of Legislation*, 2022, 10:1, 22-47, doi: 10.1080/20508840.2022.2033942.

[53] See: FERN, *European Parliament Champions Indigenous Peoples' rights in landmark deforestation law.* Published on 13 September 2022. Available at: fern.org, accessed on 28 January 2025. Although some substantial amendments proposed by the Committee on International Trade in its Opinion of 17 December 2022, (COM(2021)0706 – C9-0430/2021 – 2021/0366(COD)) for the Committee on the Environment, Public Health and Food Safety did not make it into the final version of the Regulation, a confrontation of the adopted text of the EUDR with the position at first reading

In both the Articles completing the Chapter – Article 29 on the country assessment mechanism and Article 30 on cooperation with third countries – the EP's intervention introduced essential elements to eliminate potential discriminatory aspects of the Regulation and to reshape the Commission's original design, which was primarily unilateral, into a model based on participatory management and collaboration with third countries.

Regarding the first of the aforementioned provisions, the amendments introduced by the EP enhanced the country classification system by defining high-risk and low-risk countries[54]. They also introduced a minimum period of 18 months from the Regulation's entry into force for the adoption of the related list[55] and established that the classification by the Commission must be carried out objectively and transparently, considering "the most recent scientific evidence and internationally recognized sources of information" (Art. 29(3)). Most notably, the EP is responsible for the addition of paragraph 5 to Article 29, which requires the Commission to "engage in a specific dialogue with all countries that are, or risk being classified as, high risk, with the objective of reducing their level of risk."

Another significant contribution of the EP's amendments is the introduction, as the primary criterion for assessing the level of risk, of the information provided by the country itself and other stakeholders, including civil society organizations, in the nationally determined contribution submitted to the UNFCCC Secretariat (Art. 29(5)(a))[56]. Additionally, they introduced the criterion regarding the existence and enforcement of laws 'protecting human rights, the rights of indigenous peoples, local communities, and other customary tenure rights holders' (second phrase of Art. 29(5)(e)).

Redesigned as outlined above, the country assessment -significantly referred by the EP, in the opening paragraph of Article 29, first to the Member States of the Union and then to third countries- becomes a necessary step in the procedure established in the EUDR to fulfill the EU obligations in order to reduce its contribution to climate change.

Also with regard to Article 30, the EP amendments reintroduced into the cooperation mechanisms with third countries the themes of respecting the needs of local communities and indigenous peoples, promoting national processes of legal reform and territorial governance, and safeguarding human rights[57]. The limited attention given to these topics in the EUDR, which has drawn strong criticism from some authors[58], can be understood in light of the complex EU framework of sustainability-

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of the EP shows that the Parliament approach has deeply shaped the EUDR. See: European Parliament legislative resolution of 19 April 2023 on the proposal for a regulation of the European Parliament and of the Council on making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (COM(2021)0706 – C9-0430/2021 – 2021/0366(COD)), P9_TA(2023)0109, available on the web at the following link https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ep:P9_TA%282023%290109.

[54] Countries, or parts thereof, are defined as high-risk when a "high risk is identified of producing (...) relevant raw materials for which the relevant products do not comply with Article 3(a)."

[55] The date has been postponed by other six months (to 30 June 2025) by Regulation 2024/3234 in December 2024.

[56] Article 4 of the Paris Agreement requires each country to outline and communicate its post-2020 climate actions, known as nationally determined contributions (NDCs). NDCs, therefore, represent a highly reliable source of information, as they are prepared by each country to fulfill treaty obligations and are shared at the international level with the aim of progressively reducing greenhouse gas (GHG) emissions.

[57] See, respectively, the amendments to paragraph (1), (2) and (4) of Article 30 in the position at first reading of the EP of 19 April 2023, cited above in note 53.

[58] See: A. Schilling-Vacaflor, M.T. Gustafsson, *Integrating human rights in the sustainability governance of global supply chains: Exploring the deforestation-land tenure nexus*, 2024, at 6. The article is available on the web at the following link: https://doi.org/10.1016/j.envsci.2024.103690.

related acts. The social dimension of the issue is now primarily addressed by the CSDDD, which complements the Regulation under examination as a *lex generalis*[59].

The cooperation with third countries outlined in Article 30 is broad in scope and aims to enable the Union to jointly address with them the root causes of deforestation. This approach implies a more urgent engagement with countries of origin for raw materials at higher risk of being sourced from illegally deforested areas, but it does not limit itself to those nations. In fact, thanks once again to the initiative of the EP, the Union and its Member States are also called upon to initiate dialogues and partnerships with other major consumer countries of deforestation-risk products. The goal is to involve them in reducing deforestation globally while pursuing an additional economic objective – creating a level playing field on a global scale (Art. 30(5)).

Regarding forms of collaboration, the Regulation seeks to enhance existing initiatives, referring not only to "existing partnerships" – many of which are connected to the Forest Law Enforcement, Governance, and Trade (FLEGT) Action Plan[60] – but also future partnerships and other cooperation mechanisms. These include structured dialogues, administrative agreements, and joint roadmaps aimed at achieving agricultural production that complies with the Regulation.

The intention is to build on the experience of Voluntary Partnership Agreements and the provisions already included in the Union's trade agreements to develop a genuinely shared effort to combat climate change. It is no coincidence that paragraph 3 of Article 30 commits the Commission and Member States to engage in bilateral and multilateral discussions to agree on policies and actions to combat deforestation, including within international forums "such as CBD, FAO, UN Convention to Combat Desertification, UN Environment Assembly, UN Forum on Forests, UNFCCC, WTO, G7, and G20."

To accomplish the objectives set out in Article 30, the Commission has developed a Strategic Engagement Framework that, aligning with the tried and tested Global Gateway Strategy, will team up EU and its Member States "to deploy necessary support and coordination to ensure an inclusive and just transition to deforestation-free and legal supply chains to and from the EU"[61].

In this framework, a prominent role is to be played by the trade agreements signed by the Union with third countries. Sustainable forest management provisions may be included in the trade and sustainable development (TSD) chapters of new trade agreements, while TSD chapters of agreements in force should be revised accordingly. Such initiatives must provide for the appropriate involvement of local stakeholders – producers, landowners, farmers. Financial support could be provided through the Global Gateway Strategy (EU investment banks and Member States' export credit agencies).

In the trade and sustainable chapter of the agreement recently reached with four Mercosur countries (Argentina, Brazil, Paraguay and Uruguay) Article 8 expressly deals with "Sustainable Forest Management" and a specific Annex to the Chapter draws the features of an enhanced cooperation among the Parties and their authorities in the compliance procedure provided for by their respective climate and sustainability laws[62].

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[59] On the relationship between the two acts see above, note 7.

[60] While under the EU Timber Regulation importers must undertake due diligence to demonstrate that their timber products are legal, products with FLEGT licenses can automatically enter the EU market.

[61] Communication from the Commission on the *Strategic Framework for International Cooperation Engagement in the context of Regulation (EU) 2023/1115*, 4, *supra*, note 35.

[62] The political agreement was reached on 6 December 2024. The text of the EU-Mercosur Partnership Agreement can be read at the following link: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en. A critical assessment of the role that the EU-Mercosur agreement and bilateral trade agreements in general may have in the drawing of shared climate /sustainability measures, is expressed by Hoekman and Sabel, who propose instead the recourse to the joint negotiation of plurilateral agreements, open to the participation of further countries: B. M. Hoekman, C. F. Sabel, *Managing the Trade-Climate Policy Interface*

Central to the success of the strategy is the mobilization of adequate resources to support the transition. The key priority areas of intervention have been identified as follows: support for smallholders, transition to sustainable commodity production and land use, engagement on regulatory measures and standards at the global level, development of traceability schemes, and fostering knowledge and innovation.[63]. The above-described involvement of third countries in the implementation mechanism of the EUDR and in a broader international coalition to achieve its goals plays a decisive role in the assessment of the EUDR's compatibility with the obligations undertaken by the Union within the multilateral trading system[64].

6. To conclude: A suggested method to hinge the discussion of agreed rules against deforestation within the multilateral trading system

Besides the general call of EUDR Article 30(3) to enhance cooperation in international fora to seek a shared consensus on a global strategy to halt deforestation, the EU could foster a more structured proposal to bring the discussion of trade-related aspects of such policy under the aegis of the WTO.

Realistically, the outcome should be a mechanism that fulfils the principle of transparency and allows well-grounded concerns expressed at the multilateral level to be adequately addressed before the formal adoption of any national/regional trade-related climate and sustainability measures (TrCSMs).

In light of the EU's firm stance in denying that the EUDR falls within the scope of the TBT Agreement and the opposing view expressed by other WTO Members, a potential solution could be to establish a new WTO body that builds upon existing committees and the tools developed through their work.

Furthermore, given that climate and sustainability measures encompass human rights and the rights of indigenous peoples, while the WTO's remit is limited to trade, organizations qualified to protect these values, such as the FAO and the UNDP, should be permitted to participate in the mechanism in a consultative capacity.

Without abandoning the Trade and Environmental Sustainability Structured Discussions (TESSD), which constitute the forum for confrontation between government representatives and private stakeholders, the strategy can develop along two parallel lines.

Firstly, the potential of the Committees – particularly the Committee on Trade and Environment (CTE) and the Committee on Market Access (CMA) – can be enhanced – going beyond the already convened thematic sessions – in order to pursue a sustained and regular dialogue on TrCSMs.

This can be achieved by establishing a permanent Joint Working Group for discussion among Members across both Committees. The Working Group's remit should include examining relevant measures before adoption and discussing possible amendments. It should also be responsible for mediating trade-specific concerns regarding climate and sustainability measures, similar to the role of the TBT Committee and the 2006 Transparency Mechanism within the Committee on RTAs.

Through Open Plurilateral Agreements: Learning from the EU Deforestation Regulation Experience, (2025). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/4614.

[63] Communication from the Commission on the *Strategic Framework for International Cooperation Engagement in the context of Regulation (EU) 2023/1115*, 4, *supra*, note 35.

[64] As noted, this approach has been promoted by the EP and characterizes all the initiatives and documents adopted by this institution on deforestation. See the *Report on the EU's Role in Protecting and Restoring the World's Forests* (2019/2156(INI)), A9-0143/2020, cited above in note 5.

Alternatively, the same functions can be entrusted to a Joint Meeting of the CTE and the CMA Committee to be convened periodically and at the request of either of the Chairs, when needed.

At the same time, given the request expressed by several Members for some guidance on how to structure WTO-compliant climate measures[65], a twofold response can be provided to meet this need. First, the above-mentioned new structure can be entrusted with adopting technical tools (for instance, providing guidance on WTO-compliant methodologies on embedded emissions[66] or on international certification schemes and standards).

Furthermore, the EU can be the promoter of a Declaration/Statement aimed at establishing a common interpretation of the applicability to TrCSMs of the relevant GATT Article XX exceptions (the symmetry with the legitimate objectives under the TBT could overcome the disagreement among Members on the qualification of specific measures). Such a Declaration/Statement should include the conditions to be met and the procedural steps that WTO Members should take before introducing relevant measures, including prior trade impact assessment, consultation and a mandatory period between their adoption and applicability to allow stakeholders to make the necessary adjustments. In analogy with the Declaration on the strengthening of regulatory cooperation[i], the document could be adopted at a Ministerial Conference and serve to publicly prove the non-conflictual relationship between the multilateral trading system and the efforts of the United Nations and the international civil society to address climate change and promote environmental and social sustainability.

The EUDR is a highly ambitious instrument within the European economy's transition plan toward greater sustainability, particularly in its efforts to combat climate change. From this perspective, the measure is justified not only in light of the Union's objectives but also on the international stage, as it serves as a tool for implementing Goal 15 of the United Nations' 2030 Agenda and the specific anti-deforestation commitments made during COP 26 in Glasgow.

By integrating into a network of regulatory tools aimed at achieving the Union's sustainability objectives through a shared approach, based on risk assessment and the proceduralization of due diligence by businesses, the adjustment effort required by the EUDR of economic operators is made less burdensome. The organizational requirements introduced (due diligence performance and related information obligations) align with the organizational transformation processes that have long been underway in businesses within the Union. Furthermore, they are consistent with the United Nations-led approach prevailing at the international level, which seeks to engage businesses in pursuing objectives that States alone can no longer achieve, such as addressing rising inequality within and between nations and combating climate change. This coherence should be considered when assessing the international legitimacy of the measure.

The EU is making good use of the one-year postponement of the entry into force of the Regulation to address issues and complaints raised by third countries and private stakeholders. The response given to the requests and objections raised in WTO committees proves the efficacy of these dialogues and confrontations, confirming the important role that the multilateral trading system can play in smoothing contrasts and bridging national interests.

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[65] See, for instance, the Communication of Japan proposing the "WTO to play a distinctive role, not just in terms of information sharing, but also by setting out guidance that methodologies on embedded emissions should follow." According to Japan, "Guidance formulated at the WTO on embedded emissions could have unique value by confirming commitments on certain issues where appropriate, providing clarity and predictability for the private sector, in addition to more general expressions of intent." See: *Addressing Trade-related Climate Measures at the WTO*, WT/CTE/W/264 of 25 September 2024, 1, 2.

[66] STRENGTHENING REGULATORY COOPERATION TO REDUCE TECHNICAL BARRIERS TO TRADE, MINISTERIAL DECLARATION adopted on 2 March 2024, WT/MIN(24)/35, WT/L/1190, Ministerial Conference, Thirteenth Session, Abu Dhabi.

At the present stage, assessed as a whole, together with its implementing acts, guidance documents and open digital/technical tools to simplify implementation, the unilateral character of the EUDR seems to be losing intensity.

The time remaining for the effective implementation of the Regulation should therefore be seen as an opportunity if it is utilised effectively. This would require EU Member States to undertake coordinated and intensive efforts to establish the auxiliary tools necessary to support businesses, while also committing to negotiating international technical cooperation agreements at the EU level to assist the production sector in countries of origin.

If these distinct yet interconnected processes were to receive adequate financial support – through partnerships involving the Union, multilateral development banks and the ECAs of Member States – the implementation of the EUDR could become one of the most valuable global laboratories for transitioning to a sustainable economic model. It is hoped that this much-needed adjustment process will involve the WTO, offering an opportunity to make the organizational changes necessary to establish effective relationships between international trade, climate and sustainability policies.

In Pursuit of Decarbonization: The European Union Batteries Regulation and the World Trade Organization Law

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Keywords: Batteries Regulation – European Union – Decarbonization – World Trade Organization.

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1. Introduction

The European Union (EU) has long pursued an ambitious approach to decarbonize its economy and contribute to global climate action.[1] In recent years, the EU has adopted and unleashed a whole barrage of unilaterally applied decarbonization regulations and directives.[2] The unilateral extension of European environmental and sustainability-related rules and standards beyond its territory can be acutely felt by foreign producers, given the large size of the EU's market power.[3] Notable examples, such as the carbon border adjustment mechanism (CBAM) and the Regulation on Deforestation-Free Products (RDFP), have received increasing scholarly discussions.[4] Apart from the bloc's frustration with slow progress at the multilateral level to reduce emissions, the objective to create a level playing field between European and non-European producers has also fostered the EU's rising unilateralism to apply its regulations extra-territorially.[5] Otherwise, failing to export the same restrictions to other countries would put European firms at a competitive disadvantage.

The EU's increasing reliance on unilateral measures to achieve its decarbonization goals has sparked considerable controversy and opposition from a growing number of countries, as exemplified

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* This book chapter is an updated version of an article published by the author in 2023: Mandy Meng Fang, 'Regulating EV Batteries' Carbon Footprint: EU Climate Ambition or Green Protectionism?' (2023) 53 Environmental Law Reporter 10590. The author thanks Elisa Baroncini, Jan Bohanes, Davide Grespan and other participants for helpful discussions at the UNIBO-MAECI Workshop, University of Bologna, April 2025.

[1] See, Claire Dupont and Sebastian Oberthur (eds) *Decarbonization in the European Union* (Springer, 2015).

[2] See, Akim van der Voort, 'Green-taping the Single Market: Walling-off or Gates to Sustainable Globalization?' (Friedrich Naumann Foundation, April 2024).

[3] For discussions on the EU's unilateral climate-related regulations, see, Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) European Journal of International Law 469; Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62(1) American Journal of Comparative Law.

[4] For scholarly discussions on the two regulations, see, Alice Pirlot, 'Carbon Border Adjustment Measures: A Straightforward Multi-Purpose Climate Change Instrument?' (2022) 34(1) Journal of Environmental Law 25; Gregory Messenger, 'Mitigating the Rise of Unilateralism: Lessons from Forestry Management' (2024) 27(2) Journal of International Economic Law 223.

[5] Ferdi De Ville et al., 'The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments' (2023) 28 European Foreign Affairs Review 15.

by the backlash against the CBAM and RDFP.[6] Given the intersectional nature of the transition into a low-carbon economy, a multitude of environmental, social, economic, and, increasingly so, geopolitical interests are at stake. It is essential to holistically assess the evolving landscape of the EU's rising unilateralism in pursuing decarbonization to understand the underlying dynamics that shape the design and implementation of its regulatory measures. This Chapter selects the EU regulation on batteries and waste batteries as a case study to delve into the EU's unilateral approaches to decarbonization for two reasons.[7] To begin with, as the first law to regulate the entire value chain of batteries to improve product sustainability and safety throughout the life cycle, the Batteries Regulation has received scant academic discussions in legal scholarship.[8] Second, the Batteries Regulation presents a distinct lens from which the complexity of the EU's environmentally oriented regulatory unilateralism in decarbonization can be critiqued. In particular, the EU attempts to shape the regulatory standard-setting with its market power in areas where internationally agreed-upon rules and methods are absent, such as calculating battery carbon footprint, which can be novel yet controversial.

It is noted that the Batteries Regulation regulates different categories of batteries, including portable batteries, starting, lighting, and ignition batteries (SLI batteries), light means of transport batteries (LMT batteries), electric vehicle (EV) batteries, and industrial batteries.[9] This article does not aim to exhaustively cover all the categories of batteries without appreciating the Batteries Regulation's regulatory distinctions. Instead, it focuses on the requirements for EV batteries. The remainder of the Chapter is structured as follows. Section Two sets the scene for the discussion of the EU's evolving unilateralism in the pursuit of decarbonization and its regulation of EV batteries. Section Three examines the interface between the Batteries Regulation's requirements for EV batteries' carbon footprint and the WTO Technical Barriers to Trade (TBT) Agreement and critiques potential inconsistencies. Section Four concludes.

2. The EU's unilateral pursuit of decarbonization and its Regulation of EV Batteries

2.1 The climate impacts of EV batteries

Making a few points about the battery industry and the scale of batteries' environmental and social challenges is important.[10] This is not to deny the global battery industry's contribution to facilitating decarbonization, which is integral for steering the world away from disastrous impacts induced by climate change. Instead, this is an acute warning that a well-informed system for regulating batteries is essential.

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[6] Joe Lo, 'Emerging Economies Share 'Grave Concern' over EU Plans for A Carbon Border Levy' (Euractiv, 12 April 2021) <https://www.euractiv.com/section/energy-environment/news/emerging-economies-share-grave-concern-over-eu-plans-for-a-carbon-border-levy/>; Martina Igini, 'Brazil Urges EU to Postpone and Reassess 'Unilateral' Anti-Deforestation Law over Fears It Will Affect Trade Relations' (Earth Org, 13 September 2024) <https://earth.org/brazil-urges-eu-to-postpone-and-reassess-unilateral-anti-deforestation-law-over-fears-it-will-affect-trade-relations/>.

[7] See, Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC [hereinafter EU – Batteries Regulation].

[8] See, Mandy Meng Fang, 'Regulating EV Batteries' Carbon Footprint: EU Climate Ambition or Green Protectionism?' (2023) 53 Environmental Law Reporter 10590.

[9] See, Article 1.3 of the Batteries Regulation.

[10] See, Kara Anderson, 'The Harmful Effects of Our Lithium Batteries' (Greenly, 24 July 2024) <https://greenly.earth/en-gb/blog/industries/the-harmful-effects-of-our-lithium-batteries>.

EV manufacturing generally produces more emissions than a similar internal combustion engine vehicle.[11] This is mainly because the making of lithium-ion batteries and their components can be carbon-intensive, constituting the most significant source (approximately 40% to 60%) of embedded emissions for EVs.[12] The heavy carbon footprint of battery manufacturing due to the materials and energy needed for the process is well-documented.[13] The mining and refining of raw materials, key inputs for batteries, such as nickel, manganese, cobalt, lithium, and graphite, can emit substantial amounts of greenhouse gases.[14]

Estimates of carbon emissions from battery manufacturing vary widely depending on different factors such as battery size, chemistry, production technology, and especially the energy sources used in manufacturing.[15] The concentration of battery mineral materials in the Global South – countries such as the Democratic Republic of the Congo, Zimbabwe, Indonesia, Argentina, and Chile – can exacerbate the carbon intensity of battery production due to their reliance on fossil fuel-powered electricity grids.[16] In addition, producing anode and cathode active materials relies on high temperatures that require sizable energy consumption and, therefore, can be carbon-intensive if the electricity used for the processes is not sourced from renewable energy.[17] As a result, the production site is an essential factor in determining the carbon footprint of batteries due to the electricity source.[18] The carbon footprint of a lithium-ion battery with the same chemistry and capacity can vary up to three times depending on the production process used.[19]

Besides using electricity from clean energy resources, research shows that using recycled materials to make batteries can reduce carbon emissions by more than 25% per kilowatt-hour (kWh) of battery cell capacity produced compared to newly mined materials.[20] However, the current rate of battery metals being recycled and reused remains low, primarily due to the higher costs of recycled materials compared to virgin resources.[21] Attracting investors to the recycling business is difficult without economies of scale that provide a large amount of input. The prevailing linear approaches of 'take-make-discard' have hindered the circularity of battery manufacturing to the detriment of material efficiency and environmental integrity. Unlocking the full climate potential of electrification requires further decarbonization of battery manufacturing.[22]

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[11] 'The Race to Decarbonize Electric-vehicle Batteries' (McKinsey & Company, 23 February 2023) <https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/the-race-to-decarbonize-electric-vehicle-batteries>.

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] See, Evangelos Kallitsis et al., 'Think Global Act Local: The Dependency of Global Lithium-ion Battery Emissions on Production Location and Material Sources' (2024) 449 Journal of Cleaner Production 141725.

[16] See, Mandy Meng Fang, 'Climbing Up the Critical Mineral Value Chains: The Global South and Green Industrialization in an Era of Disruption' (2024) 57(3) Vanderbilt Journal of Transnational Law 795, 823-825.

[17] For instance, Indonesia relied on fossil fuels for 80% (over 62% of coal and 18% of natural gas) of its electricity. See, 'Indonesia Power Sector Snapshot' (SIPET, 2022) <https://www.sipet.org/power-sector-snapshot-indonesia.aspx>.

[18] Kallitsis et al., *supra* note 15.

[19] Hughes-Marie Aulanier and Alexandre Huon de Kermadec, 'Increase the Accuracy of Carbon Footprint for Li-ion Battery' (Carbone4, 2023) <https://www.carbone4.com/publication-liion-battery-carbon-footprint>.

[20] 'Battery Recycling Takes the Driver's Seat' (McKinsey & Company, 13 March 2023) <https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/battery-recycling-takes-the-drivers-seat>.

[21] The cost of metal recycling can be particularly high when virgin metal prices are low and recycling volumes are small. See, Monkgogi Buzwani et al., 'Battery Recycling: How Accounting for Social and Environmental Benefits Boosts Returns' (RMI, 5 June 2024) <https://rmi.org/battery-recycling-how-accounting-for-social-and-environmental-benefits-boosts-returns/>.

[22] Evangelos Kallitsis et al., 'Think Global Act Local: The Dependency of Global Lithium-ion Battery Emissions on Production Location and Material Sources' (2024) 449 Journal of Cleaner Production 141725.

2.2 EV batteries value chains and the EU

As key components for EVs, batteries have experienced a staggeringly rapid global demand, predicted to increase 14-fold by 2030.[23] Recognizing the battery industry's potential to promote decarbonization, economic growth, and energy security, an increasing number of countries have implemented various green industrial policies to foster more competitive domestic manufacturing in the sector.[24] The battery value chain – spanning upstream activities such as mining and raw material extraction, midstream processes including refining and producing cathode and anode materials for battery cells, and downstream assembly of battery cells into modules and packs – has expanded significantly in recent years.[25]

With a large domestic market and ambitious targets to reduce emissions, including in the transportation sector, the EU's demand for EV batteries will steadily grow in the coming years and decades. The EU has been boosting the manufacturing capacity of batteries over the years, reaching 110 GWh in 2023, with the largest producers in Poland and Hungary.[26] Nevertheless, the EU's EV battery manufacturing capacity remains short of its demand, leading to a heavy dependence on imports, particularly from Asian producers.[27] Meanwhile, the cost competitiveness of EV batteries produced in Europe remains lagging behind its counterparts in China and the US.[28]

The lack of industrial competitiveness in the EU's EV battery manufacturing sector is primarily attributed to two factors.[29] First, the EU's heavy reliance on imported raw materials remains a major strategic challenge.[30] The extraction, mining, and processing of battery materials in Europe only exist on a small scale. The accelerated global race for key battery materials will lead to supply shortages and price increases that would undermine the competitiveness of EU battery production. Second, the EU's financial support for battery manufacturing has been fragmented without coherent coordination or adequate targeting.[31] The absence of an EU-wide monitoring of the overall subsidies allocated to the EV battery manufacturing industry obstructs the efficiency of financial support. Without addressing such barriers, it is challenging for the EU to scale up its battery manufacturing capacity to be internationally competitive. The recent bankruptcy filed by the European EV battery poster child, Northvolt, despite substantial government support to the company, is an illustration.[32]

The EU policymakers have increasingly recognized the risk of Europe falling behind in the global battery race as a strategic threat to the bloc's (re)industrialization, technological sovereignty, and climate ambitions.[33] From the European perspective, regulating the EV batteries involves not only

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[23] 'Batteries' (European Commission) <https://environment.ec.europa.eu/topics/waste-and-recycling/batteries_en>.
[24] For a discussion of green industrial policies on the clean energy sector, including battery manufacturing, see Mandy Meng Fang, 'Multi-Purpose Green Industrial Policy and the WTO: An Unavoidable Clash?' 24(2) World Trade Review 153.
[25] Alessandra R. Carreon, 'The EV Battery Supply Chain Explained' (RMI, 5 May 2023) <https://rmi.org/the-ev-battery-supply-chain-explained/>.
[26] 'Global EV Outlook 2024: Trends in Electric Vehicle Batteries' (IEA, 2024) <https://www.iea.org/reports/global-ev-outlook-2024/trends-in-electric-vehicle-batteries>.
[27] Ibid.
[28] Ibid.
[29] See, 'The EU's Industrial Policy on Batteries: New Strategic Impetus Needed' (European Court of Auditors, 2023).
[30] Ibid.
[31] Ibid, 38-39.
[32] 'Northvolt's Collapse Dents Europe's Battery Ambitions' (Energy Institute, 19 March 2025) <https://knowledge.energyinst.org/new-energy-world/article?id=139478>.
[33] At the level of the EU Member states, there is an increasing emphasis on boosting clean energy technologies as a way to reverse deindustrialization and promote decarbonization simultaneously. see, Mandy Meng Fang, 'When Electrification Meets Reindustrialization: The First EU Green Electric Vehicle Subsidies and the WTO Consistency (2025) 35 Duke Journal of Comparative & International Law (77).

environmental considerations but also critical industrial and geopolitical dimensions.[34] The EU's approach to battery value chains exhibits integrated efforts to advance the dual objectives of decarbonization and industrialization.[35]

3. The Batteries Regulation's requirements on EV batteries' carbon footprint and the WTO law

3.1 The Batteries Regulation's requirements on EV batteries' carbon footprint

Unlike the CBAM, which aims to export the EU carbon pricing to its trading partner countries in certain goods, the Batteries Regulation represents an arguably even more forceful form of the EU's decarbonization-related regulatory unilateralism. The Batteries Regulation takes a non-pricing approach by setting specific product standards related to carbon footprint, recyclability, due diligence, and other factors. The failure to meet the EU standards will eventually prevent battery producers from placing their products in the European market. The equality of competitive opportunity between European and non-European battery producers under the Batteries Regulation would be maintained in non-pecuniary terms.

The Batteries Regulation sets forth a three-stage approach with progressive requirements to promote the production of low-carbon EV batteries. Failure to comply with these requirements will effectively bar market access within the EU.[36]

- Stage One: the mandatory declaration of the carbon footprint of batteries put into the EU market (applicable as of 18 February 2025 or 12 months after the date of entry into force either of the delegated act or the implementing act)
- Stage Two: the creation of carbon footprint performance classes as labeling criteria (applicable as of 18 August 2026 or 18 months after the date of entry into force of the implementing act)
- Stage Three: the setting of maximum life cycle carbon footprint thresholds for batteries (applicable as of 18 February 2028 or 18 months after the date of entry into force of the delegated act)

The enforcement measures increase in stringency across the three stages, beginning with carbon footprint declaration and labeling, and culminating in the imposition of maximum carbon footprint limits. The regulation extends beyond the EU's territorial boundaries at each stage by regulating carbon emissions generated abroad when the batteries are imported into the EU internal market. Manufacturers producing EV batteries with high carbon emissions will face penalties upon export to the EU, particularly at Stage Three, when numeric limits on carbon emissions will be enforced.

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[34] Adrien Beaufils et al., 'EU Battery Strategy' (European Chair for Sustainable Development and Climate Transition, 26 May 2025) <https://www.sciencespo.fr/psia/chair-sustainable-development/2025/05/26/eu-battery-strategy/>.

[35] The dual objective of decarbonization and industrialization has received increasing political momentum and fostered various trade-related measures implemented in the clean energy sector. See, Mandy Meng Fang, ''When Decarbonization Meets Industrialization: The First WTO Dispute Between the EU and U.K.' (2023) 63(2) Virginia Journal of International Law 165.

[36] It is noted that several of the requirements will be further specified via EU 'secondary legislation', or known as delegated acts. These acts will be drafted and adopted by the European Commission in the years to come. The carbon footprint targets, as well as the methodologies to calculate the specific material recovery and recycled content targets, are just three examples of key aspects that will be defined in the subsequent EU secondary legislation.

3.2 Are the Batteries Regulation's carbon footprint requirements consistent with the WTO TBT Agreement?[37]

The TBT Agreement establishes a specialized legal regime that moves beyond the negative integration legal instruments, such as national treatment, and incorporates positive integration instruments, such as harmonization, mutual recognition, and equivalence.[38] A key preliminary question is whether the EU Batteries Regulation's carbon footprint requirements for EV batteries fall within the scope of the TBT Agreement. This threshold issue determines whether the Agreement applies at all. If a measure lies outside the scope of the TBT Agreement, it will not be subject to scrutiny under its provisions.

(1) Are the EU Batteries Regulation's Carbon Footprint Requirements a Technical Regulation?

Annex 1.1 defines a 'technical regulation' as follows:

> [D]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

The Appellate Body in *European Communities—Asbestos* clarified the scope of technical regulation: (1) the measure must apply to identifiable products; (2) the measure must lay down products' characteristics or their related processes and production methods, including applicable administrative provisions (or else it must be about labeling and identification); and (3) compliance with the measure must be mandatory.[39] The Appellate Body interpreted the term 'product characteristics' as including any objectively definable features or qualities intrinsic to the product, such as its composition, size, shape, color, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.[40] The decision that the 'characteristics' subject to the TBT Agreement are not limited to those intrinsic to the product itself was reaffirmed in *European Communities—Sardines*, which suggests that the term 'characteristics' carries a potentially broad scope.[41] Since the amount of carbon emissions emitted during the EV battery manufacturing process can be measured, the carbon footprint can be "objectively" established and thus deemed a 'product characteristic' of EV batteries.[42]

Since the Batteries Regulation mandates that EV batteries comply with specific carbon footprint requirements to be sold in the EU market, it clearly constitutes a mandatory requirement as defined in Annex 1.1 of the TBT Agreement. Therefore, the carbon footprint requirements for EV batteries

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[37] The legal analysis in the parts 3.2.1 and 3.2.2 is substantially based on the author's another article, see, Fang, *supra* note 8.
[38] Ming Du, 'What is A 'Technical Regulation' in the TBT Agreement?' (2015) 6(3) European Journal of Risk Regulation 396, 397.
[39] Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, para. 66, WTO Doc. WT/DS135/AB/R (adopted 5 April 2001).
[40] Ibid, para. 67.
[41] Appellate Body Report, *European Communities—Trade Description of Sardines*, para. 6, WT/DS231/AB/R (adopted 23 October 2002).
[42] Charles Owen Verrill, 'Maximum Carbon Intensity Limitations and the Agreement on Technical Barriers to Trade' (2008) 2(1) Carbon & Climate Law Review 43, 46-47.

under the EU Batteries Regulation fall within the scope of technical regulations governed by the TBT Agreement.

(2) Are the EU Batteries Regulation's carbon footprint requirements consistent with the TBT Article 2.1?

The TBT Agreement Article 2.1 states as follows:

> Members shall ensure that, concerning technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

The analysis of the compatibility of the EU's Batteries Regulation's carbon footprint requirements with the TBT Agreement Article 2.1 starts with examining whether domestic and imported EV batteries are like products. The difference in treating the EU's domestic and imported EV batteries is based on the embedded carbon emissions in batteries. The case law and existing scholarship imply that production processes do not assume a decisive role in assessing product likeness.[43] Instead, various factors influencing markets' operations must be considered when determining likeness. Therefore, characterizing products that bear identical or similar physical characteristics but vary in carbon emissions as 'unlike' seems unconvincing, unless consumers' preferences suggest otherwise. Although there is evidence that some consumers are willing to pay premiums for less carbon-intensive goods, this is not widely representative of consumers in the EU market.[44] Otherwise, EU lawmakers would not need to impose regulatory distinctions on batteries with different carbon footprints. In this vein, EV batteries produced in both carbon-intensive and carbon-efficient ways are directed at the same consumers and are thus competitive. Therefore, based on the competition-based approach, EV batteries that are high and low in carbon emissions will be considered like products.

The next step is to examine whether the EU Batteries Regulation treats foreign-made EV batteries less favorably. A regulation applying indistinctively to domestically manufactured and imported batteries, regardless of the origin, can still constitute a form of *de facto* discrimination if it leads to less favorable competition conditions for foreign manufacturers. Therefore, it is necessary to examine whether the EU Battery Regulation modifies the conditions of competition in the relevant market to the detriment of the group of imported products compared with the group of domestic like products. As discussed above, the EU has competitive advantages in the carbon-efficient production of EV batteries due to its higher share of clean electricity in the power mix. Assuming that EU-produced EV batteries have lower carbon footprints than foreign-produced ones, enacting the Battery Regulation will lead to an increasingly unfavorable treatment of foreign like products.

Nevertheless, the mere existence of a detrimental impact on imports is not dispositive of 'less favourable treatment' under the TBT Agreement Article 2.1, given the additional requirement to demonstrate that such a damaging impact does not stem exclusively from a legitimate regulatory distinction. In other words, there is a need to consider whether the detrimental effect caused by a regulation can be reconciled with or is rationally related to the policy objective sought by the

[43]See, Reinhard Quick and Christian Lau, 'Environmentally Motivated Tax Distinctions and WTO Law', 2003 6(2) Journal of International Economic Law 419.

[44] Natalie L. Dobson, 'The EU's Conditioning of the 'extraterritorial' Carbon Footprint: A Call for An Integrated Approach in Trade Law Discourse' (2018) 27 (1) Review of European, Comparative & International Environmental Law 75, 80.

regulation. This requires designing and applying the regulatory distinction in an even-handed manner. Therefore, the burden placed on the EU is to ensure that the regulatory distinction the technical regulation draws between EV batteries based on their carbon footprints is legitimate. Making a regulatory distinction based on the production process regarding embedded carbon emissions is generally oriented toward tackling climate change and is thus legitimate. Even if foreign-produced EV batteries were subject to less favorable treatment because of the EU Battery Regulation, this does not breach the TBT rules as long as the distinction is based on the regulatory aim to abate carbon emissions and facilitate the transition to a low-carbon economy.

Therefore, the EU Batteries Regulation has a good chance to pass scrutiny under the TBT Article 2.1, provided it strictly follows the objective to minimize the carbon footprint of EV batteries. Nevertheless, it is worth emphasizing the importance of meeting the 'even-handedness' requirement. Given the increasingly globalized EV battery value chain and the large number of countries that will likely be subject to the Batteries Regulation, it presents a challenge for the EU to treat affected countries even-handedly. The experience of countries enacting trade-related environmental measures testifies to the hurdle of satisfying the 'even-handedness' requirement.[45] There is a risk that a regulating state might adopt different procedural and/or substantial requirements for other countries and fail to meet the requirement of being evenhanded. If EV-batteries producing countries exporting to the EU are subject to differential requirements regarding carbon emission calculation, reporting, and verification with no strong justification, the EU Batteries Regulation would be deemed as not stemming from a legitimate regulatory distinction and breaching TBT Article 2.1.

(3) Are the EU carbon footprint requirements consistent with Article 2.2 of the TBT Agreement?

The TBT Agreement Article 2.2 further provides the following:

> Members shall ensure that technical regulations are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology, or intended end-uses of products.

The article requires technical regulations to be no more trade-restrictive than necessary to fulfill a legitimate objective to avoid creating unnecessary obstacles to trade. A regulatory measure that neither explicitly restricts nor allegedly discriminates against imports can still violate Article 2.2 of the TBT Agreement if it unreasonably burdens international trade to attain a legitimate policy

[45] For instance, in *US – Shrimp*, the defending member (United States) failed to treat affected countries in an even-handed manner and thus could not meet the Chapeau requirements of the GATT Article XX. See, WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted on 6 November 1998); In *US – Gasoline*, the defending member (United States) also favored some affected countries over others in the policy implementation and failed to satisfy the Chapeau requirements of the GATT Article XX. See, WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted on 20 May 1996).

objective.[46] Nevertheless, Members still retain policy space to impose stricter regulations than other Members if the regulating Member can demonstrate that more stringent regulation is necessary to avoid risks posed by less strict regulation. Unlike the necessity test under the General Agreement on Tariffs and Trade (GATT) Article XX, which is to exempt a measure from being deemed as WTO-inconsistent, Article 2.2 sets out a positive obligation to prevent Members from instituting a TBT measure that unreasonably burdens international trade for the attainment of a legitimate policy objective.[47]

In determining whether a measure is more trade-restrictive than necessary to fulfill a legitimate objective under Article 2.2 of the TBT Agreement, the Appellate Body has adopted a test similar to the necessity test under the GATT Article XX. The assessment of 'necessity' involves 'a relational analysis' of three factors: trade-restrictiveness of the technical regulation, the degree of its contribution toward a legitimate objective, and the risks non-fulfillment would create.[48] In case of a provisional conclusion that the measure is 'necessary', an additional step would be to consider whether any less trade-restrictive alternatives that would make an equivalent contribution to the objective are reasonably available to the responding party, accounting for the risks of non-fulfillment of the relevant objective.[49] The concerns that Article 2.2 might be interpreted to constrain WTO Members' right to regulate severely have not materialized, considering that in all the TBT Agreement decisions, the Appellate Body did not find any defending party's violation of Article 2.2.[50] Nevertheless, the fact that no breach of the TBT Article 2.2 was ever found in the WTO case law does not give Members a blank check to design technical regulations without considering the 'necessity' requirement.

This part focuses on the recently released draft setting methodological guidelines for calculating the EV carbon footprint of batteries and critiques its compatibility with Article 2.2.[51] According to the draft, the host country's national average electricity consumption mix, rather than the actual power sources used at a given production location, determines a battery's carbon footprint, except when there is directly connected electricity.[52] Directly connected electricity refers to electricity supplied to the process from a production asset within the same installation or via a direct line. Specifically, an electricity line linking an isolated generation site with an isolated customer or an electricity line linking a producer and an electricity supply undertaking to supply their own premises, subsidiaries, and customers directly qualifies as a 'direct line.'[53]

The two recognized methods in the EU's proposal for calculating battery carbon footprints – the national average electricity consumption mix and directly connected electricity – are not without challenges. First, relying on national rather than regional or local electricity mixes can lead to

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[46] Jan Neumann and Elisabeth Turk, 'Necessity Revisited: Proportionality in World Trade Organization Law After *Korea – Beef*, *EC – Asbestos* and *EC – Sardines*' (2003) 37 Journal of World Trade 199, 217; Robert Howse and Philip Levy, 'The TBT Panels: *US – Cloves, US – Tuna, US – COOL*' (2013) 12(2) World Trade Review 327, 350.
[47] Neumann and Turk, ibid, 217.
[48] Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna* Products, WT/DS381/AB/R, para 318 (adopted on 13 July 2012).
[49] Ibid, para. 320.
[50] Ming Du, 'The Necessity Test in World Trade Law: What Now?' (2016) 15(4) Chinese Journal of International Law 817, 841-842.
[51] Susanna Andreasi Bassi et al., 'Rules for the Calculation of the Carbon Footprint of Electric Vehicle Batteries: Final Draft' (JRC, 2023) <https://eplca.jrc.ec.europa.eu/permalink/battery/GRB-CBF_CarbonFootprintRules-EV_June_2023.pdf>.
[52] Ibid.
[53] Article 2, point (41) of the Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ L 158, 14.6.2019, p. 125, ELI: http://data.europa.eu/eli/dir/2019/944/oj).

inaccurate carbon footprint measurements in large countries with significant regional variations. For example, some Chinese provinces like Qinghai, Sichuan, and Yunnan have a high share of renewable energy and a much lower carbon footprint than the national average.[54] However, under the EU's proposed methodology, battery manufacturers in these provinces cannot use their local electricity mix for carbon footprint calculations. In a recent WTO TBT Committee meeting, China expressed concerns that the EU's carbon footprint rules overlook substantial regional differences in energy structures and renewable resources within countries, potentially undermining decarbonization efforts.[55]

Second, the EU's draft proposal offers only one alternative to the national average electricity consumption mix: the use of directly connected electricity. This excludes widely used market-based mechanisms for promoting renewable energy, such as power purchase agreements (PPAs) and green electricity certificates (GECs), from qualifying as proof of zero-carbon electricity consumption.[56] The EU's skepticism toward PPAs and GECs is understandable since these mechanisms do not guarantee entirely clean, carbon-free electricity due to grid operation realities.[57] However, completely rejecting them without allowing market participants to substantiate their claims seems overly restrictive. In countries with limited grid connectivity that prevents direct delivery of renewable electricity to end-users, instruments like GECs often represent viable, and sometimes the only, means for companies and consumers to support decarbonization efforts.

Even within the EU, the narrowly defined carbon footprint calculation methodology has sparked controversy. Some member states, such as France and Sweden, would benefit from relatively clean electricity grids primarily powered by renewables and nuclear energy, resulting in lower carbon footprint scores under the proposed methodology.[58] In contrast, countries like Germany and Poland, which still rely heavily on coal and gas for power generation, face significantly higher battery carbon footprints based on the national average electricity consumption mix.[59] Germany has strongly opposed this approach in an informal letter to the European Commission, arguing that the methodology is too restrictive.[60] The German government and automotive industry advocate using company-specific datasets for individual measurements through PPAs. They contend that without this flexibility, relying solely on national averages or directly connected electricity sources will be too time-consuming and resource-intensive for companies.[61]

A review of the proposed methodology for calculating the carbon footprint of batteries reveals a high degree of trade restrictiveness, which is likely to increase following the implementation of the Batteries Regulation. While regulating the carbon footprint of batteries to decarbonize their

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[54] Evangelos Kallitsis et al., 'Think Global Act Local: The Dependency of Global Lithium-ion Battery Emissions on Production Location and Material Sources' (2024) 449 Journal of Cleaner Production 141725.

[55] See, June 2024 WTO TBT Committee Meeting (G/TBT/M/93) <https://tradeconcerns.wto.org/en/stcs/details?imsId=685&domainId=TBT>.

[56] See, 'Julia Hung, 'Strategies for Scope 2 Decarbonization: RECs, PPA, VPPA and More' (Reccessary, 15 April 2024) <https://www.reccessary.com/en/research/strategies-for-scope-2-decarbonization-recs-ppa-vppa-and-more>.

[57] Enzo Bergamo, 'Renewable Energy Credits: Decarbonizing the Grid or Just a Corporate Messaging Tool' (Kleinman Center for Energy Policy, 15 June 2023) <https://kleinmanenergy.upenn.edu/commentary/blog/renewable-energy-credits-decarbonizing-the-grid-or-just-a-corporate-messaging-tool/>.

[58] Peter Judge, 'France and Sweden Have Cleanest EU Power, Says Report' (Data Center Dynamics, 17 October 2022) <https://www.datacenterdynamics.com/en/news/france-and-sweden-have-cleanest-european-power-says-report/>.

[59] Gavin Maguire, 'Europe's Clashes over Coal May Extend Well Beyond Poland' (Reuters, 20 June 2023) <https://www.reuters.com/markets/commodities/europes-clashes-over-coal-may-extend-well-beyond-poland-2023-06-20/

[60] 'Germany Criticises the Draft EU Batteries Regulation Carbon Footprint Calculation Methodology' (HKTDC, 6 November 2024) <https://research.hktdc.com/en/article/MTg0NTg1NjA3OQ>.

[61] Ibid.

manufacturing process is a legitimate and important objective, especially given the urgent scientific warnings about global warming,[62] there remains a critical question: are there less trade-restrictive alternatives available to the EU that could achieve an equivalent contribution to decarbonization, while managing the risks of non-fulfillment?

Several less restrictive alternatives could be considered under the proposed methodology. For example, allowing producers – both inside and outside the EU – to submit regional or local average electricity consumption mixes when these are lower than the national average would reduce trade restrictiveness without compromising decarbonization goals. Additionally, company-specific data sets for individual measurements should be accepted, provided producers supply reliable and verifiable information about their electricity sources. In this context, PPAs and GECs should not be categorically excluded if supported by authentic, verifiable data.[63] By relaxing the criteria for zero- or low-carbon electricity and offering more options to battery producers, the Batteries Regulation can reduce its trade restrictiveness without undermining its core decarbonization objective. Otherwise, the proposed carbon footprint calculation methodology risks being more restrictive than necessary to fulfill a legitimate objective, potentially conflicting with Article 2.2 of the WTO TBT Agreement.

4. Conclusion

As a critical sector integral to the EU's decarbonization agenda, EV battery manufacturing is a cornerstone of the bloc's industrial future and strategic autonomy. The Batteries Regulation, particularly its carbon footprint requirements, reflects the EU's multi-dimensional strategy to achieve climate targets, strengthen technological leadership, and ensure supply chain resilience in a rapidly evolving global energy landscape. While the EU's efforts to "clean up" battery manufacturing are commendable and much-needed, the specific design and implementation of these rules may conflict with the WTO rules. If challenged in the WTO dispute settlement system, the EU might face difficulties meeting the 'necessity' standard under Article 2.2 of the TBT Agreement. As analyzed above, the proposed methodology for calculating and verifying battery carbon footprints appears unduly restrictive, if not potentially impractical.[64] From a decarbonization perspective, overly stringent carbon footprint requirements may not yield net climate benefits; instead, they risk increasing the cost of climate-friendly technologies and slowing their deployment. Although the delegated act defining the battery carbon footprint methodology is yet to be finalized, the EU must ensure that these requirements are WTO-compliant to achieve a balanced synergy between decarbonization, industrialization, and trade liberalization.

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[62] Susan Solomon et al., 'Irreversible Climate Change Due to Carbon Dioxide Emissions' (2009) 106(6) PNAS 1704.

[63] For instance, the 24/7 hourly or sub-hourly matching GECs, or known as time-stamped GECs, which require a given volume of electricity demand to be matched with an equivalent volume of carbon-free energy generated and injected at the same time, represents a much more credible option to prove the consumption of carbon free electricity. See, Katie Soroye, 'How Granular Certificates Can Bridge the Gap to 24/7 Clean Energy' (Level Ten Energy, 29 April 2025) <https://www.leveltenenergy.com/post/bridge-the-gap-to-a-robust-clean-energy-portfolio>.

[64] Similar criticism from a scientific angle can be found, Vasileios Rizos and Hien Vu, 'Compliance with the EU's Carbon Footprint Requirements for Electric Vehicle Batteries: An Overview of Challenges' (Centre for European Policy Studies, 15 December 2024).

SECTION FOUR

The Mattei Plan and Developing Countries in the WTO System

Il Piano Mattei per lo sviluppo del Continente africano quale promotore di inclusività dei Paesi a basso reddito nell'OMC

Giulia Bortino

Parole chiave: Africa – Piano Mattei – Cooperazione internazionale – Sviluppo sostenibile – Migrazione – Politica estera – G7 – Diplomazia – Cambiamento climatico – Obblighi internazionali – *Capacity building* – Infrastrutture – *Global Gateway* – Commercio internazionale – Crescita economica.

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1. Introduzione

Il Piano Mattei per l'Africa riguarda una strategia di ampio respiro con un duplice obiettivo: supportare lo sviluppo sostenibile in Africa e contenere i flussi migratori provenienti dal continente. Essa caratterizza principalmente la politica estera italiana e allo stesso tempo coinvolge numerosi ministeri per la sua implementazione, costituendo un'iniziativa di primaria importanza per il Governo italiano. Con una durata iniziale quadriennale, la strategia del Piano Mattei viene definita un "documento vivente"[1], suscettibile di modifiche e ricettivo di stimoli esterni.

Il presente contributo intende fornire una descrizione del Piano Mattei per l'Africa, affrontandone le origini, gli sviluppi e gli sforzi finora messi in campo, al fine di farne emergere le caratteristiche fondamentali e quindi proporre ulteriori spunti di riflessione per la sua evoluzione.

2. La genesi del Piano Mattei: radici e obiettivi

L'anno della Presidenza italiana del G7 – da gennaio a dicembre 2024 – si è aperto il 29 gennaio con il Vertice "Italia-Africa. Un ponte per una crescita comune" che ha visto la partecipazione di numerose delegazioni di paesi africani (46), organizzazioni internazionali e regionali, e banche multilaterali di sviluppo[2]. In questa occasione, il Presidente del Consiglio dei Ministri, Giorgia Meloni, ha annunciato un ambizioso piano d'azione interamente dedicato al continente africano: il Piano Mattei per l'Africa. L'iniziativa porta il nome di una figura di spicco della storia repubblicana italiana, fondatore dell'Ente Nazionale Idrocarburi (ENI), ma anche attore e promotore di un modello di cooperazione a cui il rinnovato interesse italiano verso l'Africa si ispira. In particolare, lo schema

[1] Senato della Repubblica, XIX Legislatura, *Relazione sullo stato di attuazione del Piano Mattei (Aggiornata al 10 ottobre 2024)*, Doc. CCXXXIII n. 1, 11 novembre 2024, p.2.
[2] Governo Italiano. Presidenza del Consiglio dei Ministri, *Italia-Africa. Un ponte per una crescita comune*, Partecipanti, 29 gennaio 2024.

di Mattei si distingueva per il trattamento riservato ai Paesi partner, in quanto più vantaggioso e volutamente in controtendenza rispetto alle condizioni offerte dalle altre compagnie del settore[3].

Allo stesso modo, il Piano Mattei vuole "imprimere un cambio di paradigma"[4], rifiutando un approccio definito "paternalistico", "caritatevole" e "predatorio"[5] e promuovere uno schema di collaborazione "su base paritaria", ovvero edificato su condivisione e collaborazione[6]. La presentazione del Piano Mattei in questi termini ha suscitato alcune critiche, poiché sembrerebbe un'iniziativa slegata da quelle preesistenti, o che, se vi sono state, il Piano se ne distingue poiché non "predatorio" o "caritatevole"[7]. Questa interpretazione tuttavia è difficilmente conciliabile con l'intenzione di legare il Piano Mattei con il passato italiano dandogli il nome di una figura rilevante proprio sotto questo aspetto. Massimo Zaurrini propone una lettura diversa: egli individua un cambio di paradigma nelle relazioni con il continente africano nel 2013, quando la Farnesina, e l'allora Ministro degli Esteri Emma Bonino, ha lanciato "Iniziativa Italia-Africa", un programma volto a intensificare il partenariato con l'Africa con particolare attenzione all'economia e alla cooperazione culturale[8], sulla scia dei dati africani che già all'epoca promettevano crescita demografica, aumento del ceto medio e in generale una trasformazione sociale. Zaurrini inserisce il Piano Mattei nel quadro dell'evoluzione dei rapporti Italia-Africa e aggiunge che il Governo Meloni ha il merito non solo di aver dato nuovo slancio, ma di aver dato centralità all'iniziativa con il Vertice Italia-Africa e coinvolgendo altri Ministeri[9].

Riguardo il contesto attuale, il Piano Mattei per l'Africa si inserisce all'interno del più ampio "processo di Roma", avviato nel luglio 2023 in occasione della "Conferenza internazionale su sviluppo e migrazioni", vale a dire un percorso che prevede di affrontare le "grandi crisi del nostro tempo"[10] attraverso la cooperazione internazionale, implementata attraverso logiche paritarie. Sono questi, infatti, i pilastri su cui si erge il Piano Mattei: sviluppo e migrazione. Il d.l. n. 161 del 15 novembre 2023, con cui l'esecutivo adotta il "Piano strategico Italia-Africa: Piano Mattei", menziona in prima battuta l'urgenza e la necessità di intensificare la cooperazione con i Paesi africani per un duplice obiettivo: da un lato promuovere lo sviluppo economico e sociale, dall'altro quello di intervenire sulle "cause profonde" delle "migrazioni irregolari"[11]. Il d.l., nel descrivere le finalità della misura, prevede che il Piano contribuisca alla sicurezza nazionale economica, energetica, climatica, alimentare e al contrasto alla migrazione irregolare[12]. Durante il Vertice Italia-Africa, il Presidente del Consiglio dei Ministri ha anticipato alcuni elementi cardine del piano. In particolare, attraverso gli ambiti di intervento – istruzione e formazione; salute; agricoltura; acqua ed energia –

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[3] CERAMI C., *Could the 'Mattei Plan' be reinvented for Africa? A historical perspective*, in Il Politico, vol. 89, no. 2(261), 2024, p. 102-105.

[4] Presidenza del Consiglio dei Ministri, *Piano Mattei per l'Africa*, p. 3, disponibile nel sito: https://www.governo.it/sites/governo.it/files/Piano_strategico_Italia-Africa_Piano_Mattei.pdf

[5] *Ibidem*.

[6] *Ibidem*, p. 4.

[7] "Le dichiarazioni della presidente del Consiglio danno spesso l'impressione che prima del Piano Mattei non ci fosse nulla o esistessero solo «rapporti predatori» dell'Italia con i Paesi africani e che non sia mai esistita la vocazione a costruire rapporti di partenariato a reciproco beneficio e pari dignità." Queste le parole di SERGI N., *Piano Mattei: una pagina nuova?,* in GIRO M. (a cura di), *Piano Mattei. Come l'Italia torna in Africa*, Milano, 2024, p. 83-101.

[8] Ambasciata d'Italia Addis Abeba*, Il Ministro deli esteri Emma Bonino presenta la "Iniziativa Italia-Africa"*, 23 gennaio 2014, disponibile nel sito www.ambaddisabeba.esteri.it/it/news/dall_ambasciata/2014/01/iniziztiva-it-af/

[9] ZAURRINI M., *Piano Mattei: il futuro dell'Italia passa per l'Africa*, in GIRO M. (a cura di), *Piano Mattei. Come l'Italia torna in Africa*, Milano, 2024, p. 133-135.

[10] Giorgia Meloni, Presidente del Consiglio, *Conferenza internazionale su sviluppo e migrazioni, punto stampa finale*, 23 luglio 2023.

[11] Decreto-legge 15 novembre 2023, n. 161 "Disposizioni urgenti per il «Piano Mattei» per lo sviluppo in Stati del Continente africano", G.U. n. 10 del 13 gennaio 2024.

[12] *Ibidem*.

vengono presentati diversi progetti, ma il Premier mette l'accento sulla natura dinamica del piano, suscettibile di modifiche grazie al dialogo e al confronto con i partner. Significativo in questa occasione è l'intervento di Moussa Faki, Presidente della Commissione dell'Unione Africana[13]. Faki esprime apprezzamento da parte della comunità africana per l'ambiziosa iniziativa italiana e si sofferma sulle sfide più importanti che il continente si trova ad affrontare, rinvenibili nell'Agenda 2063[14], e che in larga misura combaciano con gli ambiti di intervento elencati dal Premier italiano[15]. Il Presidente della Commissione dell'Unione Africana conclude quindi esprimendo apertura al confronto e al dialogo per la sua implementazione, sottolineando la necessità di previa consultazione[16] e soffermandosi sulla necessità di un cambio di paradigma profondo nella definizione della cooperazione allo sviluppo e della gestione dei flussi migratori, nelle sue parole a "structural amendment of the development model, including a new approach to the management of migratory flows"[17]. Su questi due punti sollevati da Faki, occorre qui evidenziare che in quel momento il Piano Mattei non era ancora stato definito: erano chiari i suoi obiettivi e l'implementazione della fase pilota, che ha consistito perlopiù in una prosecuzione di progetti già in essere o previsti dalla cooperazione italiana in Africa. Inoltre, l'dea del Piano Mattei come "documento vivente" nasce proprio dall'ambizione di orientarlo sulla base di un partenariato paritario e dal dialogo.

3. Il Piano Mattei: funzionamento, struttura e ambiti di intervento

Il Piano Mattei trova la sua base giuridica nel d.l. n. 161 del 15 novembre 2023 poi convertito in legge con modificazioni l'11 gennaio 2024. Il d.l. modificato è composto da sette articoli, che definiscono nel dettaglio la *governance* del piano e gli ambiti di intervento, mentre la prima fase di implementazione è stata oggetto di un documento successivo fornito al Parlamento nel luglio 2024.

Come sopra ricordato, il Piano Mattei origina come strumento per perseguire obiettivi di sviluppo e per contrastare il fenomeno della migrazione irregolare, inserendosi così nell'ampia strategia nazionale italiana di sicurezza nazionale e ha una durata di quattro anni rinnovabili[18]. Per questo motivo, l'articolo 1 comma 2 del d.l. n. 161 individua una moltitudine di aree di intervento (17), che spaziano dalla cooperazione allo sviluppo, alle infrastrutture digitali, istruzione e formazione, contrasto al cambiamento climatico, fino alle risorse naturali come quelle idriche ed energetiche.

Per quanto riguarda la governance del piano, vengono istituiti due organi: la Cabina di regia e la Struttura di missione. La prima è presieduta dal Presidente del Consiglio dei Ministri ed è composta a livello ministeriale dal Ministro Affari Esteri e Cooperazione Internazionale (MAECI), dai Ministri coinvolti nel piano[19], dal Vice Ministro del MAECI, del Ministero delle Imprese e del Made in Italy e quello dell'Ambiente e la Sicurezza Energetica (MASE) e dai delegati dei tre ministeri nelle rispettive materie di interesse. Partecipano inoltre un rappresentante, rispettivamente, per la Cassa

[13] Non più in carica, nel marzo 2025 è stato eletto Mahmoud Ali Youssouf.
[14] African Union Commission, *Agenda 2063. The Africa we want*, 2015.
[15] Presidente della Commissione dell'Unione Africana, Moussa Faki, *Discorso di apertura del Vertice Italia-Africa*, 29 gennaio 2024.
[16] Queste le parole del Presidente della Commissione dell'Unione Africana: "I understand that the Mattei Plan, proposed by Madam President of the Council, about which we would have liked to have been consulted, is consistent with this. Africa is prepared to discuss the aspects and modalities of its implementation."
[17] *Ibidem*.
[18] Decreto-legge 15 novembre 2023, n. 161 "Disposizioni urgenti per il «Piano Mattei» per lo sviluppo in Stati del Continente africano", G.U. n. 10 del 13 gennaio 2024, articolo 1, comma 4.
[19] Definiti nel documento strategico i "Ministri competenti."

depositi e prestiti, Simest S.p.A[20] e SACE S.p.A[21], il Presidente della Conferenza delle regioni e delle province autonome, il Direttore di ICE[22] e il Direttore dell'Agenzia Italiana per la Cooperazione allo Sviluppo (AICS). Infine, partecipano alle riunioni anche rappresentanti del terzo settore, delle imprese a partecipazione pubblica e delle università.

Mentre la Cabina di regia prende la forma di un organo dedicato all'implementazione del Piano Mattei, la Struttura di missione è istituita all'interno della Presidenza del Consiglio dei Ministri e funge da supporto al Presidente del Consiglio dei Ministri e al Ministro degli Affari Esteri. Pertanto, spetta alla Cabina di regia l'onere del coordinamento delle attività per l'implementazione del piano, sia a livello interno che con i partner africani, l'apertura dei canali di dialogo con le controparti e della partecipazione della società civile. In ultimo, spetta alla Cabina di regia la responsabilità di monitoraggio dell'implementazione del piano. Il monitoraggio è un aspetto fondamentale, l'articolo 5 del d.l. prevede che ogni anno sia fornita una Relazione di aggiornamento al Parlamento predisposta dalla Struttura di missione e approvata dalla Cabina di Regia. Quest'ultima è anche responsabile per la finalizzazione del Piano Mattei e, sulla base delle attività di monitoraggio, anche del suo aggiornamento.

Il documento finale che delinea in concreto il Piano Mattei per l'Africa è un documento di circa cento pagine che approfondisce le motivazioni alla base del piano, i suoi obiettivi, le sei "direttrici di intervento", le risorse finanziarie, i progetti pilota selezionati in nove Paesi africani per la prima fase ed infine le sinergie con il contesto europeo e internazionale. Di seguito si propone una breve sintesi dei contenuti del documento in oggetto.

La sezione "Inquadramento e obiettivi" riprende in larga misura il "Discorso di apertura del Vertice Italia-Africa" sopra richiamato e parte dal presupposto che l'Africa sia un continente ricco di materie prime e di opportunità, soprattutto alla luce delle prospettive demografiche[23]. In questo scenario, l'Italia vuole assumere un ruolo più rilevante nel continente e nel processo di sviluppo. Per la prima fase di implementazione vengono quindi individuate sei direttrici di intervento: istruzione/formazione, sanità, acqua, agricoltura, energia e infrastrutture, e nove Paesi africani[24], di cui quattro nel Nord Africa, dove condurre dei progetti pilota, anche sulla base delle iniziative già in corso o programmate da AICS.

Con riguardo ai fondi a cui attinge il Piano Mattei, esso viene dotato di una somma iniziale di 5 miliardi e 500 milioni, di cui 3 miliardi dal Fondo Italiano per il Clima (FIC) o "Fondo Clima" e 2,5 provenienti dai fondi stanziati per la Cooperazione allo sviluppo.

Il Fondo Clima è un fondo rotativo istituito con la legge di bilancio n. 234 del 30 dicembre 2021 presso il MASE, in coordinamento con il MAECI e il Ministero dell'Economia e delle Finanze (MEF), ed ha una dotazione totale di 4,4 miliardi di euro. Il FIC è stato adottato precedentemente al Piano Mattei per ottemperare agli obblighi internazionali derivanti dalle convenzioni sul clima di cui l'Italia è parte, come l'Accordo di Parigi. Criteri e modalità per l'impiego del Fondo Clima sono delineati nel decreto interministeriale del 21 ottobre 2022[25], mentre per la sua gestione sono stati

[20] Società del Gruppo CDP che supporta le aziende italiane nel processo di internazionalizzazione delle attività.
[21] Gruppo assicurativo-finanziario per il sostegno alle imprese italiane partecipato al 100% dal MEF.
[22] Agenzia italiana per la promozione all'estero e l'internazionalizzazione delle imprese italiane
[23] Le prospettive di crescita demografica indicano che la popolazione africana raddoppierà entro il 2050. Si veda la sezione "Infografiche" del Piano Mattei per l'Africa a pagina 95.
[24] Costa d'Avorio, Algeria, Egitto, Mozambico, Tunisia, Etiopia, Repubblica del Congo, Kenya Marocco.
[25] G.U. n.37 del 14 febbraio 2023 / Ministero della transizione ecologica, DECRETO 21 ottobre 2022, Condizioni, criteri e modalità per l'utilizzo delle risorse del «Fondo italiano per il clima." (23A00878).

predisposti un comitato di indirizzo, un comitato direttivo[26] e un comitato tecnico. Il primo "definisce l'orientamento strategico e le priorità di investimento del Fondo" e individua gli obblighi internazionali relativi al clima e alla tutela dell'ambiente, per orientare la strategia del fondo. Dunque, esso detiene una funzione di indirizzo strategico del fondo, mentre il secondo detiene un incarico operativo, per cui delibera sugli interventi proposti, individua canali di finanziamento e monitora il Fondo Clima. Infine, il comitato tecnico viene istituito esclusivamente per la valutazione dei progetti a valere sul Fondo che perseguono gli obiettivi del Piano Mattei, quindi destinati al continente africano. Esso è composto complessivamente da sette membri, di cui tre appartenenti ai ministeri (rispettivamente MAECI, MASE e MEF), mentre quattro membri rappresentano la Presidenza del Consiglio dei Ministri, presieduto dal Ministro Plenipotenziario – e consigliere diplomatico – Fabrizio Saggio.

La legge di bilancio istituente il Fondo Clima prevede inoltre che "[g]li interventi […] sono realizzati, in conformità alle finalità e ai principi ispiratori della l. 11 agosto 2014, n. 125." Quest'ultima rappresenta la legge a carattere generale che regolamenta la cooperazione internazionale per lo "sviluppo sostenibile, i diritti umani e la pace"[27]. Considerata parte integrante della politica estera della Nazione, la cooperazione allo sviluppo italiana è ispirata da valori internazionali, europei e nazionali: l'articolo 1 comma 1 richiama infatti la Carta delle Nazioni Unite, la Carta dei diritti fondamentali dell'Unione europea e l'articolo 11 della Costituzione italiana, dedicato alla risoluzione pacifica delle controversie, al ripudio della guerra e alla promozione della pace attraverso il sostegno alle organizzazioni internazionali istituite a tale scopo. Dunque, la cooperazione allo sviluppo intende armonizzarsi con la strategia internazionale ed europea, ponendo al centro la persona, verso un triplice obiettivo: sviluppo sociale, tutela dei diritti umani e promozione della pace[28]. Particolare attenzione è riservata agli interventi umanitari, che debbono ispirarsi ai principi del diritto internazionale, rispettivamente al principio di "imparzialità, neutralità e non discriminazione"[29]. Un secondo elemento di particolare importanza della l. 11 agosto 2014 n.125, ai fini di un adeguato inquadramento del Piano Mattei, è l'articolo 17 istituente l'Agenzia italiana per la cooperazione allo sviluppo[30] (AICS), d'ora in poi l'Agenzia, sotto la direzione del MAECI. L'Agenzia costituisce il braccio operativo del ministero, poiché assolve alle "attività a carattere tecnico-operativo connesse alle fasi di istruttoria, formulazione, finanziamento, gestione e controllo delle iniziative di cooperazione"[31] anche grazie alla presenza di uffici regionali dislocati sul territorio di intervento. Essa, infatti, opera attraverso le sue sedi estere sulla base della propria programmazione strategica, delineata nel "Documento Triennale di Programmazione e di Indirizzo della politica di cooperazione allo sviluppo."

Per quanto riguarda i fondi provenienti dalla cooperazione allo sviluppo, essi fanno parte del budget stanziato per il MAECI, pertanto, allo stesso modo del Fondo Clima, sono regolati dalla legge sulla cooperazione allo sviluppo e ne perseguono obiettivi e finalità. A questo punto è interessante chiedersi quale rapporto esista tra il Piano Mattei e la cooperazione allo sviluppo del MAECI, ed in particolare l'azione portata avanti sul campo da AICS. Nel più recente "Documento Triennale di Programmazione e di Indirizzo" dell'Agenzia, la strategia della cooperazione internazionale per gli

[26] G.U. n.37 del 14 febbraio 2023 / Ministero della transizione ecologica, DECRETO 21 ottobre 2022, Modalità di funzionamento del comitato di indirizzo e modalità di composizione e funzionamento del comitato direttivo del «Fondo italiano per il clima». (23A00875).
[27] L. 11 agosto 2014, numero 125, G.U. n.199 del 28 agosto 2014, art. 1 comma 1.
[28] *Ibidem*, art. 1 comma 2.
[29] *Ibidem*, art. 1 comma 3.
[30] Si veda *ibidem*, Capo IV, articoli da 17 al 21.
[31] *Ibidem*, art. 17 comma 3.

anni 2024–2026 si presenta come un vero e proprio pilastro del piano. È infatti evidente come essa vi si allinei: in primo luogo vengono dati maggiore attenzione e spazio al continente africano[32]. Oltre alle regioni di intervento, la programmazione stabilisce i Paesi prioritari: su un totale di 38 paesi, 23 si trovano in Africa[33]. Come sopra menzionato, l'Agenzia possiede degli uffici dislocati nei territori di intervento attraverso i quali porta avanti la sua *mission*. Attualmente sono attive 20 sedi estere, di cui dieci si trovano in Africa, anche grazie alla recente apertura di due nuove sedi, una a Kampala, in Uganda, e responsabile anche per Ruanda e Burundi[34] e una ad Abidjan in Costa d'Avorio, responsabile anche per la Repubblica del Congo[35]. Questa scelta denota certamente una crescente attenzione per il continente africano con il preciso obiettivo di – con le parole di Marco Riccardo Rusconi, Direttore di AICS – "consolida[re] il contributo dell'Agenzia all'attuazione del Piano Mattei" rafforzando la capillarità delle sedi[36].

Relativamente ai settori di intervento, l'Agenzia opera in tutti gli ambiti previsti dalla prima fase del Piano Mattei per l'Africa, ed oltre a essi, opera anche nel settore umanitario – a cui dedica una parte sostanziosa delle risorse – non previsto invece dal Piano Mattei[37]. Secondo il Direttore di AICS, questo aspetto del piano contribuisce a superare la frammentarietà degli interventi dell'Agenzia, poiché concentrando le risorse è possibile creare un impatto maggiore. Inoltre, sempre secondo il Direttore, il Piano Mattei costituisce l'opportunità per l'Italia di assumere un ruolo protagonista nello sviluppo del continente africano, facendosi lei stessa promotrice di progettualità invece che limitandosi al ruolo di co-finanziatore[38]. Ciò è tanto più importante considerando la necessità di uno sforzo congiunto internazionale per risultati efficaci e sostenibili nel tempo e quindi è auspicabile che gli sforzi italiani siano affiancati da numerosi partner che perseguono le stesse finalità.

In riferimento alla relazione tra il Piano Mattei e altri attori della cooperazione internazionale, esso ambisce a creare sinergie con il piano europeo e quello internazionale. Nella strategia vengono considerati due principali strumenti: il *Global Gateway*[39] e la *Partnership for Global Infrastructure and Investment* (PGII)[40]. Il primo consiste in una strategia dell'Unione europea volta a investire in infrastrutture fisiche per garantire maggiore connettività in ambito digitale, energetico e dei trasporti[41]. Il secondo è un'iniziativa promossa dal Governo italiano in ambito G7, durante la presidenza tedesca

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[32] Le altre regioni di intervento sono Europa orientale, Balcani, Medio Oriente, Asia, America latina e i piccoli stati insulari in via di sviluppo. Ministero degli Affari Esteri e Cooperazione Internazionale, Documento Triennale di Programmazione e di Indirizzo della politica di cooperazione allo sviluppo 2024-2026, p.12.

[33] *Ibidem*, p. 17.

[34] Agenzia Italiana per la Cooperazione allo Sviluppo, *Inaugurata la nuova sede AICS a Kampala*, 3 marzo 2025, disponibile nel sito https://www.aics.gov.it/news/inaugurata-la-nuova-sede-aics-a-kampala/

[35] Agenzia Italiana per la Cooperazione allo Sviluppo, *Cresce la presenza AICS in Africa: attivate due nuovi Sedi in Costa d'Avorio e Uganda*, 3 dicembre 2024, disponibile nel sito https://www.aics.gov.it/news/cresce-la-presenza-aics-in-africa-attivate-due-nuovi-sedi-in-costa-davorio-e-uganda/

[36] Da notare che, contemporaneamente all'apertura delle sedi estere a Kampala e Abidjan è stata anche chiusa la sede a Khartoum (Sudan), si veda la Delibera n. 64/2024 Chiusura della sede estera AICS di Khartoum – Sudan e apertura delle sedi AICS di Abidjan in Costa d'Avorio e di Kampala in Uganda.

[37] Non vi è menzione nel documento relativo alla sua prima fase di implementazione, come neppure nel D.L. 15 novembre 2023, n. 161, G.U. n. 10 del 13 gennaio 2024.

[38] Camera dei deputati, Piano Mattei – Audizioni – Marco Riccardo Rusconi, AICS e Dario Scannapieco, Cassa Depositi e Prestiti (Atto n. 179), 31 luglio 2024, disponibile nel sito https://webtv.camera.it/evento/26001

[39] JOIN/2021/30 final, Il Global Gateway, Comunicazione congiunta al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo, al Comitato delle regioni e alla Banca europea per gli investimenti, Bruxelles, 1 dicembre 2021.

[40] Governo Italiano. Presidenza del Consiglio dei Ministri, *G7 Partnership for Global Infrastructure and Investment Side Event Co-Chair Statement*, 13 giugno 2024.

[41] JOIN/2021/30 final, Il Global Gateway, Comunicazione congiunta al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo, al Comitato delle regioni e alla Banca europea per gli investimenti, Bruxelles, 1 dicembre 2021, p. 2.

nel 2022, che interessa egualmente gli investimenti in infrastrutture, in particolare quelle fisiche, digitali e energetiche. Entrambi intendono implementare un'azione a livello globale, ma presentano una significativa differenza in termini di fondi: il *Global Gateway* prevede uno stanziamento di 300 miliardi di euro, mentre il PGII di 600 miliardi di dollari[42].

Il Piano Mattei fin dall'inizio guadagnato numerosi riscontri positivi. In fase preliminare e precedente alla pubblicazione del piano dettagliato, il Senato della Repubblica – in particolare all'attenzione della Commissione competente (Affari esteri e difesa) – ha accolto delle memorie da parte di enti di natura diversa. Tra le più significative si menziona qui l'audizione informale della *United Nations Refugee Agency* (UNHRC) che si è espressa a favore dell'iniziativa, in quanto considerata tempestiva e necessaria data l'instabilità in cui riversa il continente, auspicando che il piano sia in grado di contribuire allo sviluppo sostenibile attraverso *partnerships* solide e paritarie. Lo UNHCR pone anche particolare attenzione alla "migrazione forzata", suggerendo di inserire questa dicitura del d.l., proposta che però non viene accolta, preferendo attenersi ad una puntuale qualificazione giuridica del fenomeno migratorio che il Piano Mattei si prefigge di contrastare e superare, ossia la migrazione "irregolare." In ultimo, lo UNHCR si propone come potenziale partner per l'implementazione dei progetti data la corrispondenza delle aree d'intervento trattate e suggerisce l'inclusione nella Cabina di Regia del piano di "organismi internazionali", al fine di farne parte, tuttavia, anche questa proposta di emendamento del d.l. non viene accolta nel testo finale[43].

Similmente, il *think tank* italiano dedicato al cambiamento climatico, ECCO, conferma la necessità delle iniziative previste dal Piano Mattei, soprattutto per quelle relative all'energia, in quanto il tema dell'accessibilità in Africa è di estrema importanza[44]. Essa propone diverse modifiche, la più rilevante che si riporta è quella di limitare l'area di intervento in materia energetica solo alle risorse di energia rinnovabili, per dare maggiore rilievo alla transizione verde[45]. In ultimo, entrambe le memorie considerate auspicano che il Piano Mattei sviluppi un meccanismo di partecipazione e consultazione sia per i partner africani che per la società civile africana.

In questa fase preliminare non sono mancate le critiche. Un gruppo ristretto di sei senatori[46] ha fornito un parere sfavorevole, le critiche più rilevanti concernono le aree di intervento del piano, i fondi, l'analisi condotta per la definizione del piano e l'inadeguatezza della rete diplomatica italiana in Africa. Nello specifico, il piano viene considerato eccessivamente improntato sul settore commerciale, un approccio ritenuto non adeguato alle sfide che presenta il continente, dove invece, sostengono essere necessaria maggiore attenzione alla tutela delle libertà fondamentali, le istituzioni e al consolidamento delle democrazie. In merito ai fondi, i senatori sottolineano – e considerano un punto di debolezza – che non è previsto lo stanziamento di nuove risorse economiche, essendo il Piano Mattei incentrato nel reindirizzamento di fondi già esistenti, che vengono dunque orientati verso gli obiettivi del piano. Inoltre, con riguardo all'utilizzo del FIC, viene evidenziato che non vi è menzione delle *Nationally*

[42] Factsheet on the G7 Partnership for Global Infrastructure and Investment (PGII), Pescara, 22-24 October 2024.
[43] Rappresentanza UNHCR per l'Italia, la Santa Sede e San Marino, *Audizione informale dell'UNHCR nell'ambito del procedimento di conversione del decreto-legge n.161/2023 (A.S. 936) recante disposizioni urgenti per il "Piano Mattei" per lo sviluppo in Stati del Continente africano*, 29 novembre 2023.
[44] Mentre nel Nord Africa il 100% della popolazione ha accesso all'energia, nell'Africa sub-sahariana la percentuale scende drasticamente fino a circa il 20%. Per maggiori dettagli, si visiti la pagina dedicata *dell'International Energy Agency* disponibile nel sito: www.iea.org/reports/sdg7-data-and-projections/access-to-electricity
[45] ECCO The Italian Climate Change Think Tank, Relazione scritta – Audizioni informali nell'ambito del disegno di legge n. 936 (d-l 161/2023 – Piano Mattei), 29 novembre 2023.
[46] Legislatura 19ª – 3ª Commissione permanente – Resoconto sommario n. 93 del 05/08/2024. Schema di parere proposto dai Senatori Alfieri, Casini, Delrio, Francesca La Marca, Enrico Borghi E Spagnolli sull'atto del Governo n. 179.

Determined Contributions (NDCs)[47] e di come gli interventi del piano dovrebbero contribuirvi[48]. In terzo luogo, sostengono che la strategia delineata per una delle finalità del piano, quella di disincentivare la migrazione dai paesi africani grazie allo sviluppo locale, non è adeguatamente supportata e informata da attente indagini sui flussi migratori. In ultimo, i senatori considerano gli obiettivi del Piano Mattei troppo ambiziosi rispetto alla reale capacità di implementazione, dovuta a una rete diplomatica – comprese le sedi estere di AICS – insufficiente[49]. Le critiche riportare, però, non si soffermano su quello che è uno dei punti di forza trasversalmente riconosciuto al Piano Mattei, ossia quello di mettere a sistema e coordinare fra loro le diverse risorse, finora separate, destinate ad affrontare le esigenze di aiuto allo sviluppo, cooperazione e collaborazione con il Continente africano. Riguardo all'insufficienza della rete di sedi dell'AICS, si ricorda qui la recente apertura delle sedi AICS a Abidjan e Kampala[50].

Le osservazioni, positive e negative, sopra riportate appartengono alle primissime fasi del Piano, ovvero alla sua ideazione e alla stesura della prima fase nel 2024. Passiamo ora invece a considerare la prima relazione sullo stato di implementazione dello stesso.

4. La prima relazione sullo stato di attuazione del Piano Mattei

La prima relazione sullo stato di implementazione del Piano Mattei è stata consegnata al Parlamento nell'ottobre del 2024, dopo sei mesi dalla creazione della Cabina di regia. Il documento prevede una visione d'insieme sugli sviluppi e i progressi, raggiunti e pianificati. La relazione annuale viene predisposta dalla Struttura di Missione e approvata dalla Cabina di regia[51].

In questa sede viene ribadito il carattere evolutivo del documento strategico del piano, concepito come un "documento vivente", suscettibile di recepire modifiche e migliorie. Successivamente, la prima fase di implementazione viene presentata come dispiegata lungo quattro direttrici: a) istituzione della governance del piano, b) interlocuzioni con i rappresentanti africani nei paesi dove hanno luogo i progetti pilota, c) creazione di collaborazioni con Stati terzi e organizzazioni internazionali, e d) realizzazione di nuovi strumenti finanziari.

Il primo punto si riferisce alla concreta istituzione della Struttura di missione e della Cabina di regia. La prima conduce una valutazione sia dell'impatto socio-ambientale che dell'efficacia dei progetti; la seconda, si è occupata di organizzare tavoli tematici, per approfondire temi d'interesse, di cui uno operativo, il Tavolo Tecnico di coordinamento per la Sicurezza Energetica, e due aggiuntivi, sull'agricoltura e la formazione, in via di definizione[52].

Sul tema generale dei partenariati, la relazione dedica un paragrafo alle controparti africane e un secondo separato a Stati terzi e organizzazioni internazionali. In riferimento ai primi, il documento è molto sintetico e rinvia alle singole schede progetto, menzionando brevemente che le interlocuzioni si sono svolte con le Nazioni africane, l'Unione Africana e l'Unione europea, grazie alla rete diplomatica nel continente africano e le sedi estere di AICS. Con riguardo invece ai partner

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[47] Rapporti quinquennali sulle politiche nazionali adottate per raggiungere gli obiettivi dell'Accordo di Parigi.
[48] Si noti che nel registro delle NDCs sul sito United Nations Climate Change (https://unfccc.int) si trova solo una singola NDC dell'Unione europea per tutti gli Stati membri.
[49] Legislatura 19ª – 3ª Commissione permanente – Resoconto sommario n. 93 del 05/08/2024. Schema di parere proposto dai Senatori Alfieri, Casini, Delrio, Francesca La Marca, Enrico Borghi E Spagnolli sull'atto del Governo n. 179.
[50] Agenzia Italiana per la Cooperazione allo Sviluppo, *Cresce la presenza AICS in Africa: attivate due nuovi Sedi in Costa d'Avorio e Uganda*, 3 dicembre 2024, disponibile nel sito https://www.aics.gov.it/news/cresce-la-presenza-aics-in-africa-attivate-due-nuovi-sedi-in-costa-davorio-e-uganda/
[51] D.l. 15 novembre 2023, n. 161 "Disposizioni urgenti per il «Piano Mattei» per lo sviluppo in Stati del Continente africano", G.U. n. 10 del 13 gennaio 2024, articolo 3 e 4.
[52] *Ibidem*, p.4.

internazionali, viene menzionato un avanzamento nella collaborazione con l'UE e il *Global Gateway*, senza particolari dettagli sul coinvolgimento della commissione nei singoli progetti o di iniziative *Team Europe*[53]. Più incisiva risulta la collaborazione in ambito G7, con la partecipazione dell'Italia in un importante progetto infrastrutturale promosso dagli Stati Uniti, il Corridoio di Lobito. Quest'ultimo consiste in un'infrastruttura transnazionale che interessa l'Angola, lo Zambia e la Repubblica Democratica del Congo. L'obiettivo è quello di ottimizzare e ridurre i costi di trasporto di minerali e prodotti agricoli in quest'area, a tal fine è prevista una nuova linea ferroviaria, l'ammodernamento delle infrastrutture già presenti e interventi volti a rafforzare la connettività digitale ed energetica[54].

Da ultimo, sono stati creati strumenti finanziari per facilitare lo stanziamento dei fondi a disposizione del Piano Mattei. Per il settore pubblico si tratta del "Mattei Plan and Rome Process Financing Facility", un fondo multi-donatori da 120 milioni di euro, e il "Piano Mattei co-financing and technical assistance arrangement", un fondo bilaterale istituito presso la Banca Africana di Sviluppo[55]. Per il settore privato vengono invece istituiti il "Plafond Africa" e il "Growth and Resilience Platform for Africa" (GRAf) presso Cassa Depositi e Prestiti, e la "Misura Africa"[56] che abilita Simest a fornire finanziamenti a tassi agevolati alle imprese italiane per progetti d'investimento nel continente africano.

Infine, la relazione riporta le schede dei singoli progetti, sia per quelli già avviati sia per alcuni in via di pianificazione. In totale si contano 22 progetti, di cui sei coinvolgono due o più Stati africani. Molti di essi consistono nei progetti pilota previsti nella strategia del piano, e quindi sono implementati nei nove paesi identificati sempre nella strategia. Altri invece sono previsti in nuovi paesi africani, infatti nell'ottobre 2024 erano già previste delle iniziative in Ghana e Angola[57], mentre a gennaio 2025 il Presidente del Consiglio dei Ministri ha annunciato che i nuovi paesi interessati saranno Mauritania, Tanzania e Senegal[58].

La prima relazione del Piano Mattei, come già indicato, fornisce una panoramica generale dei suoi primi sei mesi di vita. Nonostante si tratti comunque di una fase preliminare di implementazione, sono già disponibili alcune osservazioni e spunti di riflessione. L'Osservatorio sui conti pubblici italiani (OCPI) dell'Università Cattolica, da un'analisi preliminare dei progetti di cui nella relazione, trae due conclusioni. In primo luogo, considerando i progetti per cui sono stati definiti i fondi, stila una classifica in termini di impegno finanziario. Al primo posto vi è il Corridoio di Lobito, già brevemente descritto, si tratta si un progetto transazionale e multilaterale definito in ambito G7 e PGII, al quale l'Italia contribuisce con 320 milioni di euro. Al secondo e terzo posto vi sono due progetti in Kenya, il primo in ambito energetico, dedicato alla produzione di biocarburanti e il terzo, in ambito agricoltura, complementare a un progetto di AICS, vuole rafforzare la sicurezza alimentare. Questi due progetti hanno rispettivamente un peso finanziario di 210 milioni di dollari e 50 milioni di euro. Solo questi tre progetti ammontano a più della metà della somma totale di spesa già definita, ovvero 600 milioni[59]. La seconda statistica individuata dall'OCPI riguarda l'ambito di intervento dei progetti: su 22 progetti, considerando anche quelli con una matrice d'intervento "ibrida", ovvero che

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[53] Si veda Commissione europea, *International Partnerships – Iniziative Team Europa*, disponibile nel sito www.international-partnerships.ec.europa.eu/policies/team-europe-initiatives_it#what-is-team-europe

[54] *Ibidem*, p.30, scheda 20.

[55] *Ibidem*, p.8.

[56] Decreto-legge 29 giugno 2024, n. 89 (convertito da l. 8 agosto 2024 n. 120), G.U. n. 194 del 20 agosto 2024.

[57] Senato della Repubblica, XIX Legislatura, *Relazione sullo stato di attuazione del Piano Mattei (Aggiornata al 10 ottobre 2024)*, Doc. CCXXXIII n. 1, 11 novembre 2024, p.2.

[58] INFO Cooperazione, *Meloni svela i 5 nuovi Paesi del Piano Mattei,* 9 gennaio 2025, disponibile nel sito https://www.info-cooperazione.it/2025/01/meloni-svela-i-5-nuovi-paesi-del-piano-mattei/

[59] Nel documento non viene specificato se si tratta di euro o dollari.

coinvolgono più ambiti, dieci riguardano l'ambito della formazione, sia professionale che scolare, seguono nella classifica l'agricoltura, con sei progetti e l'energia, quattro progetti[60].

Un secondo aspetto merita particolare attenzione. Il Piano Mattei è stato presentato fin dall'inizio come un'iniziativa che portava in sé un cambio di paradigma, rifiutando un approccio sbagliato, definito come "caritatevole" e "predatorio." Dal documento strategico e dalla prima relazione emerge chiaramente che esso benefici della rete diplomatica e delle sedi estere -in espansione- di AICS in Africa per l'interlocuzione con le controparti africane. In particolare, la prima relazione rimanda alle singole schede progetto, dove sono riportate le controparti africane, nella sezione "Soggetti istituzionali" come Ministeri locali, Università e partner privati[61]. Per illustrare il cambio di passo del Piano Mattei nella definizione di una relazione costruttiva e paritaria con il Continente africano, occorrerebbe che la documentazione predisposta per illustrare il lavoro svolto riportasse anche la metodologia usata per superare gli schemi di cooperazione del passato, spesso di natura solo formale-istituzionale, per coinvolgere e collaborare, efficacemente e pienamente, con gli attori locali, pubblici e privati.

5. La seconda relazione sullo stato di attuazione del Piano Mattei

Nel luglio 2025 è stata pubblicata la seconda relazione sullo stato di attuazione del piano, a circa nove mesi dalla prima. Il documento alcuni importanti sviluppi. Ad un livello più alto, la strategia si inserisce in un momento storico caratterizzato da molteplici conflitti regionali[62], un contesto che rende certamente più difficile mantenere la centralità dell'Africa nella politica estera. La relazione attribuisce al contesto storico anche una maggiore difficoltà nel continuare a lavorare a progetti concreti che portino crescita a entrambi i lati del mar Mediterraneo[63]. In tale contesto, l'implementazione del piano si è dispiegata lungo tre assi: espansione; internazionalizzazione e la gestione del debito dei Paesi africani.

In riferimento all'espansione, dai nove Stati africani iniziali della fase pilota[64], il piano è stato esteso in altri cinque, – ovvero Angola, Ghana, Mauritania, Tanzania e Senegal – portando le iniziative del Piano Mattei in totale in quattordici Stati africani. Riguardo all'internazionalizzazione, questa è stata perseguita con diversi partner. Si è già parlato delle iniziative nella cornice del G7, in particolare del progetto del Corridoio di Lobito; un ulteriore strumento promosso dall'Italia, in collaborazione con UNDP, è il *G7 Adaptation Accelerator Hub*[65], nato con l'obiettivo di rendere operative le misure di adattamento dei piani nazionali nei paesi maggiormente vulnerabili al cambiamento climatico[66]. La seconda strategia di internazionalizzazione ha visto coinvolti i Paesi del Golfo, in particolare l'Arabia Saudita e gli Emirati Arabi Uniti. La stipulazione di intese con quest'ultimi riguarda progetti nei settori dell'acqua e l'energia. Da ultimo, merita particolare

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[60] CAPACCI A., *A che punto è il Piano Mattei?*, Osservatorio conti pubblici italiani, 9 maggio 2025, disponibile nel sito https://osservatoriocpi.unicatt.it/ocpi-pubblicazioni-a-che-punto-e-il-piano-mattei

[6161] Senato della Repubblica, XIX Legislatura, Relazione sullo stato di attuazione del Piano Mattei (Aggiornata al 10 ottobre 2024), Doc. CCXXXIII n. 1, 11 novembre 2024, scheda 19, pag. 29. Il progetto è intitolato "AI Hub for Sustainable Development."

[62] Il documento fa particolare riferimento al Medio Oriente: il cambio di regime in Siria, il conflitto nella Striscia di Gaza, gli attacchi tra Israele e Iran e lo Yemen.

[63] Struttura di missione, *Piano Mattei per l'Africa. Relazione annuale al parlamento sullo stato di attuazione*, 1° luglio 2024 – 30 giugno 2025, p.3.

[64] I nove Stati africani della fase pilota sono: Egitto, Tunisia, Marocco e Algeria, Kenya, Etiopia, Mozambico, Repubblica del Congo e Costa d'Avorio.

[65] Per maggiori dettagli si veda il sito www.g7italy.it/en/the-g7-countries-join-forces-to-strengthen-adaptation-actions-in-support-of-the-most-vulnerable-countries/

[66] Non vi sono riferimenti a progetti nello specifico in questa cornice.

attenzione l'"europeizzazione" del Piano Mattei per l'Africa: già promosso e auspicato, il governo italiano ha tenuto nel mese di giugno un Vertice co-presieduto dalla Presidente della Commissione europea, Ursula Von der Leyen, dal titolo *"*The Mattei Plan for Africa and the Global Gateway: A common effort with the African continent*."* L'obiettivo è precisamente inserire il Piano Mattei all'interno del Global Gateway per accrescerne l'impatto e per il quale la Nazione si è impegnata a investire insieme alla Commissione europea 1,2 miliardi di euro[67]. In questa occasione, hanno assunto particolare rilievo alcuni progetti infrastrutturali: il già menzionato Corridoio di Lobito, le iniziative nell'ambito dell'agricoltura e del digitale – si è ricordata l'apertura dell'*AI Hub for Sustainable Development*[68] a Roma – e il *Blue Raman Cable*, un'infrastruttura di interconnessione digitale intercontinentale in cui l'Italia gioca un ruolo da protagonista[69] e che è stato presentato come un esempio del potenziale tra Piano Mattei e *Global Gateway* ed un beneficio per il continente africano[70]. In ultimo luogo, l'Italia ha messo a punto un piano che prevede la conversione del debito per dieci anni dei Paesi africani, in percentuali diverse a seconda delle condizioni economiche degli Stati[71].

La seconda relazione sullo stato di attuazione vede in generale una prosecuzione e portata a termine degli impegni intrapresi, diventano operativi gli strumenti finanziari predisposti e sopra menzionati, come anche il Comitato tecnico del Fondo Clima, che ha portato a termine diverse decisioni per l'impiego di una somma totale di 265 milioni di euro[72].

In linea con gli obiettivi di espansione e internazionalizzazione del piano, alcuni sviluppi interessanti riguardano la possibilità di nuovi canali di lavoro esplorati dalla Struttura di missione – nell'ambito della formazione professionale, insieme a Confindustria, e nel coinvolgimento delle diaspore con il Coordinamento Italiano delle Diaspore (CDICI)[73] –, e la partecipazione dei fondi italiani a nuove iniziative insieme alla Banca Mondiale, viene citato il progetto ASCENT ("Accelerating Sustainable and Clean Energy Access Transformation in Mozambique") che ha come obiettivo quello di incrementare l'accesso all'energia sostenibile[74].

Viene dedicato un paragrafo alle interlocuzioni con le autorità dei nuovi paesi del piano, dal quale emerge un vero e proprio dialogo e la centralità delle necessità dei partners, seppure presentato in modo sintetico e considerando solo i nuovi cinque Stati del piano.

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[67] Sull'approccio dell'Unione europea allo sviluppo sostenibile si veda BARONCINI E., CASOLARI F., MANZINI P., TANZI A.M., TELLARINI G. (editors), *Sustainable Development as Fundamental Pillar of Economic Governance and Public Affairs. The EU Approach and International and Domestica Perspectives*, Bologna, 2025; e BARONCINI E., DE STEFANO C., RUBINI L. (editors), *New Institutional Architectures and Substantive Rules in International Economic Law – The EU and the UN Sustainable Development Goals*, Bologna, 2025.

[68] Presidenza del Consiglio dei Ministri, Struttura di missione per l'attuazione del Piano Mattei, *Relazione sullo stato di attuazione del Piano Mattei*, scheda n. 19, p. 29, disponibile nel sito: www.governo.it/it/articolo/piano-mattei-lafrica-la-relazione-annuale-al-parlamento/28746; si veda anche TSHUMA D., *Digital Transformation: Aligning Italy's Piano Mattei with African Development Priorities*, in *IAI Papers*, 2025.

[69] ROSSITTO S., *«Italia centro di gravità per le comunicazioni digitali internazionali»*, in *Il Sole 24 Ore*, 30 settembre 2022.

[70] Joint Press Release by the Presidency of the Council of Ministers of Italy and the European Commission, Roma, 20 giugno 2025, disponibile nel sito: www.governo.it/sites/governo.it/files/20250620_JointPressReleasePianoMatteiGlobalGateway.pdf

[71] Struttura di missione, *Piano Mattei per l'Africa. Relazione annuale al parlamento sullo stato di attuazione*, 1° luglio 2024 – 30 giugno 2025, p.4.

[72] *Ibidem*, p.8.

[73] A proposito del ruolo delle diaspore si veda DIOMA C.A., *Il ruolo delle diaspore africane nel Piano Mattei*, in GIRO M. (a cura di), *Piano Mattei. Come l'Italia torna in Africa*, Milano, 2024, pp. 119-131.

[74] Il progetto in questione si inserisce nel quadro della strategia "Mission 300" della Banca Mondiale, ovvero l'obiettivo di incrementare l'accesso all'energia in Africa fino ad arrivare a garantire l'accesso a 300 milioni di utenti africani entro il 2030.

L'ambito della formazione si riconferma il più esteso in quanto trasversale, prevista in diverse delle aree tematiche affrontate: dall'agricoltura, all'energia, fino al digitale; oltre a costituire un ambito di intervento a sé stante insieme alle iniziative culturali.

La seconda relazione sullo stato di attuazione del Piano Mattei riporta, quindi, l'importante stato di avanzamento dei lavori: le misure previste sono state perfezionate e rese operative e le aspettative di internazionalizzazione e europeizzazione del piano mantenute.

6. L'OMC e il potenziale del commercio come motore dello sviluppo

Un aspetto interessante che emerge in diverse analisi[75] è l'accento posto dal Piano Mattei sul commercio. Sebbene anche criticato per l'eccessiva attenzione agli scambi commerciali, è opinione di alcuni che la cooperazione economica sia una possibile chiave di volta per il successo della strategia italiana[76]; oltre, certamente, ad altri aspetti, come ad esempio l'efficace inclusione delle controparti africane. Gli studi sullo sviluppo e la crescita economica sono molteplici e hanno fornito tantissime teorie su come gli Stati "sviluppati" siano diventati tali[77]. Attualmente vi è consenso sulle ricadute positive derivanti dal commercio internazionale, poiché in grado di aumentare la ricchezza. Tuttavia, la redistribuzione delle risorse non è equa e con la crescita della ricchezza si è anche ampliato il divario che separa i paesi più ricchi da quelli più poveri[78]. Pertanto, nonostante gli effetti positivi che il commercio internazionale è in grado di ottenere, diviene necessario modificare e pensare a un'architettura globale in grado di favorire una più equa redistribuzione delle risorse[79]. L'utilizzo del commercio come *driver* per lo sviluppo sostenibile è anche riconosciuto dall'Agenda 2030, dove il *trade* viene considerato a più riprese in connessione con gli obiettivi riguardanti la sconfitta della fame nel mondo (SDG 2), la salute e il benessere (SDG 3), il lavoro dignitoso e la crescita economica (SDG 8), la riduzione delle disuguaglianze (SDG 10), la tutela delle risorse marine e degli oceani (SDG 14), ed infine le *Global Partnerships* (SDG 17). In particolare, l'obiettivo di sviluppo sostenibile numero 8 "Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all" fa riferimento all'*Aid for Trade* e all'*Enhanced Integrated Framework for Trade-related Technical Assistance,* iniziative nate e promosse in seno all'Organizzazione Mondiale del Commercio (OMC) di cui ora si presenteranno brevemente i meccanismi per il sostegno ai paesi e basso reddito.

L'OMC[80] nasce con l'obiettivo di fungere da foro internazionale in materia di scambi[81], stabilendo che le relazioni economiche e commerciali devono essere condotte in modo da raggiungere degli obiettivi diversi dalla liberalizzazione degli scambi in sé. Il preambolo dell'Accordo di

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[75] A proposito si veda ASCARI R., *Crescita economica e aiuto allo sviluppo in Africa: il tempo di sperimentare*, in GIRO M. (a cura di), *Piano Mattei. Come l'Italia torna in Africa*, Milano, 2024, p. 33-53; CARBONE G., RAGAZZI L., *Il Piano Mattei: verso nuove relazioni Italia-Africa?*, Policy Paper, 2025; Piano Mattei – Audizione – Pasquale De Muro, Stefano Manservisi, Action Aid, ReCommon, Greenpeace, Centro Internazionale Crocevia, Giovanni Carbone, Vittorio Colizzi, Fairwatch (Atto n. 179), 29 luglio 2024, disponibile nel sito https://webtv.camera.it/evento/25999

[76] ASCARI R., *ibidem*, p. 48 e ss.

[77] Si veda RIST G., *The History of Development. From Western Origin to Global Faith*[3], London and New York, 2008; e HIRSCH M., *Developing Countries,* Max Planck Encyclopedia of International Law, 2017.

[78] Per uno studio sull'inuguaglianza globale si veda POGGE T., *Povertà mondiale e diritti umani. Responsabilità e riforme cosmopolite*, Bari, 2008, p. 121 e ss.

[79] MANZINI P., *L'Organizzazione mondiale del commercio quale sistema di diritto*, in ROSSI L.S. (a cura di), *Commercio internazionale sostenibile? Wto e Unione europea*, Bologna, 2003, p. 27-29.

[80] Istituita con l'Accordo di Marrakesh il 15 aprile 1994 ed entrato in vigore il 1° gennaio 1995.

[81] Si veda l'articolo II(1): "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement."

Marrakesh identifica chiaramente lo scopo del commercio internazionale nello sviluppo economico sostenibile[82], in cui vi sono inclusi la piena occupazione, il miglioramento della qualità della vita, e l'opportunità, specificatamente per i paesi in via di sviluppo e i paesi meno sviluppati, di beneficiare del commercio internazionale ai fini dello sviluppo economico. Vediamo quindi che il rapporto virtuoso tra commercio e sviluppo economico era già stato teorizzato in questa sede. L'OMC ha adottato diverse misure per questo fine: in primis le così dette *S&D* (*special and differential treatment*) *provisions*, che prevedono una serie di agevolazioni per i paesi in via di sviluppo[83]. Oltre alle suddette clausole, integrate nei singoli accordi, nel 2001, l'OMC si è dotata di ulteriori meccanismi volti a supportare gli stati a basso reddito – questi ultimi sono rilevanti ai fini della trattazione sul Piano Mattei.

In occasione della prima conferenza interministeriale a Singapore, nel 1996, erano emerse le complicazioni e le difficoltà legate all'implementazione e al rispetto degli obblighi derivanti dagli accordi per i paesi a basso reddito[84]. Per questo motivo, l'anno seguente venne istituito il "Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries" (IF), il cui obiettivo è quello di supportare i paesi meno sviluppati a trarre beneficio dal sistema multilaterale degli scambi attraverso adeguata implementazione degli accordi. L'IF ha ricevuto sostegno da alcune istituzioni finanziarie internazionali: il Fondo monetario internazionale, il Centro per il commercio internazionale, Conferenza delle Nazioni Unite sul commercio e lo sviluppo (UNCTAD), il Programma delle Nazioni Unite per lo sviluppo (UNDP) e la Banca mondiale. Oggi l'IF ha preso il nome di *Enhanced Integrated Framework* (EIF) e costituisce l'unica *partnership* multilaterale dedicata a questo scopo[85].

Durante la quarta conferenza ministeriale a Doha, in Qatar, l'OMC si è dotata di strategie supplementari a favore dei *developing* e *least-developed countries*[86] per favorirne lo sviluppo attraverso il commercio. In particolare, si tratta dell'assistenza tecnica e del *capacity-building*. Le attività previste in questa cornice hanno lo scopo di supportare i paesi affinché siano in grado di beneficiare delle ricadute positive del commercio internazionale, esercitando i diritti in capo ai membri dell'organizzazione e implementando in modo efficace gli accordi sugli scambi[87]. L'assunto alla base della strategia presuppone che a tal fine sia necessario possedere *asset* infrastrutturali, umani e istituzionali. L'assistenza tecnica dell'OMC mira proprio a rafforzare questi aspetti. La conferenza ministeriale a Doha ha riservato particolare attenzione al tema dello sviluppo, sfociando nella *Doha Development Agenda* (DDA) o *Doha Round*, un ciclo di negoziati volti a raggiungere il consenso su temi legati allo sviluppo. Sebbene ci siano stati dei passi avanti in questa direzione le conferenze ministeriali successive non hanno mai dato tanta importanza ai temi legati allo sviluppo come nel 2001[88].

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[82] Si veda anche LONGO N., *The Evolution of Sustainable Development from Brundtland Report to the UN Agenda 2030*, in BARONCINI E., DE STEFANO C., RUBINI L. (a cura di), *New Institutional Architectures and Substantive Rules in International Economic Law. The EU and the UN Sustainable Development Goals*, Bologna, 2025.

[83] Special and differential treatment provisions in WTO agreements and decisions, Doc. WT/COMTD/W/271 (16 March 2023).

[84] SHAFFER G., *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, in *Wisconsin International Law Journal,* vol.23(4), 2005, p. 643-686.

[85] World Trade Organization, *Enhanced Integarted Framework*, disponible nel sito: www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm

[86] Doha Ministerial Declaration, Doc. WT/MIN(01)/DEC/1 (14 November 2001), paragrafi 38 – 43, "Technical assistance and capacity building."

[87] Doha Ministerial Declaration, Doc. WT/MIN(01)/DEC/1 (14 November 2001), paragrafo 38.

[88] FLENTØ D., PONTE S., *Least-Developed Countries in a World of Global Value Chains: Are WTO Trade Negotiations Helping?* in *World Development*, vol. 94, pp. 366–374, 2017; WILKINSON R, HANNAH E, SCOTT J., *The WTO in Nairobi:*

Considerando il documento per la programmazione dell'assistenza tecnica per il biennio 2024-2025[89], il WTO predispone moltissime opportunità di apprendimento in diverse modalità, corsi in presenza, una piattaforma di e-learning, workshops, sessioni di esercitazione in vista degli incontri multilaterali. Queste attività ricadono quindi perlopiù nell'ambito della formazione, attraverso l'impiego di diverse metodologie.

L'impatto che le attività mirano a raggiungere[90] consiste nel permettere ai paesi a basso reddito di beneficiare della Membership presso l'OMC, e quest'ultime sono implementate in modo da agire su quattro "Key Results": implementazione degli accordi multilaterali e esercizio dei diritti dei membri dell'OMC da parte delle autorità pubbliche, partecipazione ai negoziati, incremento dello studio dell'OMC da parte dell'accademia e dei contatti tra quest'ultimi con *policymakers* e, infine, maggiore conoscenza dell'OMC da parte dei legislatori e degli attori non governativi[91].

Alla luce di questi aspetti della strategia per il supporto allo sviluppo in seno all'OMC, si possono individuare importanti punti di contatto con le iniziative promosse dal Piano Mattei. Infatti, le iniziative dell'OMC possono costituire un esempio per lo sviluppo di progetti complementari, che vanno a rafforzare ed incrementare l'internazionalizzazione del Piano Mattei e le sinergie con iniziative già esistenti, obiettivo prefissato dal governo italiano per le successive fasi del piano[92]. In tale ottica, sarebbe utile avviare una mappatura delle iniziative di *technical assistance* dell'OMC nei 14 paesi del Piano Mattei, per individuarne le attività che possono essere rese maggiormente sinergiche.

Data l'importanza che ricopre il commercio internazionale nel perseguimento dello sviluppo sostenibile e del miglioramento dello stile di vita, il Piano Mattei può quindi configurarsi come strumento di realizzazione degli obiettivi individuati nella DDA[93], sia in qualità di finanziatore di iniziative dell'OMC sia come promotore di progetti complementari ad essi. Questo è particolarmente significativo dal momento che un punto critico delle iniziative dell'OMC in questo ambito è la scarsità delle risorse messe a disposizione. La *technical assistance* viene finanziata dal budget ordinario dell'OMC, con circa 4,5 milioni di franchi svizzeri all'anno[94], mentre ricoprono una fetta più sostanziosa della spesa gli "*extra budgetary funds*", ovvero fondi non stanziati dal budget centrale e finanziati invece da donazioni volontarie.

Dall'analisi della letteratura esistente, si evince la presenza di molte proposte per influenzare la strategia – il "documento vivente" – del Piano Mattei[95]. In quest'ottica si supporta qui l'individuazione e approfondimento di possibili sinergie con gli obiettivi dell'assistenza tecnica e del *capacity building* dell'OMC. All'interno di diverse opinioni sul Piano Mattei si è fatto leva sulla necessità per l'Africa di sviluppare il settore manifatturiero – obiettivo condiviso dall'Agenda 2063[96]

The Demise of the Doha Development Agenda and the Future of the Multilateral Trading System, in *Global policy*, vol. 7(2), 2016, pp. 247–55.

[89] Biennial Technical Assistance and Training Plan 2024-2025, Doc. WT/COMTD/W/273 (26 June 2023).

[90] Nei *Logical Frameworks* l'impatto è il risultato più ampio e generale a cui l'interezza delle attività contribuiscono, che ad un livello inferiore vengono implementate con singole iniziative e indicatori specifici.

[91] *Ibidem*.

[92] Si veda Governo italiano, *Conferenza stampa di inizio anno del Presidente Meloni*, 9 gennaio 2025.

[93] Si veda DESTA MG, HIRSCH M., *African Countries in the World Trading System: International Trade, Domestic Institutions and the Role of International Law*, in *The International and Comparative Law Quarterly* 2012 61(1):127-170.

[94] Si fa riferimento al biennio 2024-2025.

[95] Si cita qui a titolo di esempio Cléophas Adrien Dioma, membro del Consiglio nazionale della cooperazione allo sviluppo e esperto di migrazione, che propone di coinvolgere le diaspore africane in Italia, si veda DIOMA C.A., *Il ruolo delle diaspore africane nel Piano Mattei*, in GIRO M. (a cura di), *Piano Mattei. Come l'Italia torna in Africa*, Milano, 2024, pp. 119-131.

[96] African Union Commission, *Agenda 2063: The Africa we want*, 2015, p.5 e 15.

–, un ambito in cui sono riconosciuti l'importante patrimonio e la tradizione italiani, che quindi può ricoprire un ruolo rilevante, come anche ritenuto da de Muro[97], che, nella sua audizione presso la camera dei deputati, sostiene la necessità di sviluppo delle competenze manifatturiere e della diversificazione economica[98].

In quest'ottica il Piano Mattei, anche grazie al coinvolgimento del settore privato, può diventare un piano strategico per la cooperazione economica al fine di supportare la diversificazione economica del continente[99]: un aspetto carente in Africa e che in altri casi ha rappresentato un elemento fondamentale di sviluppo[100].

7. Osservazioni conclusive

La breve ricognizione sul Piano Mattei sopra proposta intende configurarsi come un punto di partenza per individuare le colonne portanti della strategia, nella speranza che una visione d'insieme sia di aiuto per individuarne punti di forza e debolezza. Nato con l'obiettivo di supportare lo sviluppo nel continente africano e di contenere i flussi migratori irregolari, soprattutto alla luce dei prospetti demografici sopra ricordati, il Piano Mattei è una strategia che riporta l'Africa al centro della politica estera italiana. Essa affonda le radici nella storia italiana e affronta sfide attuali, la prima di tutte il cambiamento climatico, con i finanziamenti derivanti dal Fondo Italiano per il Clima, dedicato al perseguimento delle attività di adattamento e mitigazione.

Un primo elemento di distinzione del piano è l'approccio, così definito, "concreto." Ancor prima della stesura del documento strategico, durante il Vertice Italia-Africa nel gennaio 2024, erano stati individuati gli interventi sul campo, alcuni dei quali sulla scia di iniziative già esistenti. Questo approccio ha certamente il pregio di rendere il Piano Mattei velocemente implementabile e di restituire in breve tempo prove di efficacia. A questo tratto dinamico e concreto del Piano Mattei può essere affiancato uno studio strategico per l'individuazione di nuovi interventi, in particolare nella prospettiva della ulteriore internazionalizzazione del Piano Mattei, e sempre nell'ottica di pianificare e collaborare su base paritaria con il Continente africano. L'Agenda 2063, la strategia pan-africana per lo sviluppo sostenibile, costituisce un ottimo punto di partenza in questo senso, poiché sistematizza e identifica i settori d'intervento, ma nonostante la sua rilevanza per il continente non viene menzionato nei documenti del Piano Mattei[101]. Identificare le sinergie sia con l'Agenda 2063 e con altre iniziative che mirano allo sviluppo sostenibile, come la *Technical Assistance* dell'OMC sopra richiamata, significherebbe armonizzare il Piano Mattei con il livello continentale africano e quello internazionale, e possibilmente anche moltiplicarne le ricadute positive. Se è vero che il Piano Mattei non viene finanziato da fondi stanziati *ad hoc*, ma dalla concentrazione di risorse già stanziate – si ricorda il FIC e i fondi per la cooperazione allo sviluppo, reindirizzate e concentrate verso gli obiettivi del piano, – la stessa strategia può essere trasposta ad un livello più alto per cui le risorse italiane possono unirsi a quelle stanziate da attori internazionali e locali che perseguono gli stessi obiettivi e aumentarne l'efficacia e l'impatto. In questo senso vanno gli sforzi italiani per la realizzazione del Corridoio di Lobito di cui si è detto sopra, un progetto imponente finanziato da un

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[97] Professore associato di Politica economica presso l'Università di Roma Tre; si veda anche ASCARI R., *ibidem*, p.33.
[98] Piano Mattei – Audizione – Pasquale De Muro, Stefano Manservisi, Action Aid, ReCommon, Greenpeace, Centro Internazionale Crocevia, Giovanni Carbone, Vittorio Colizzi, Fairwatch (Atto n 179), 29 luglio 2024.
[99] ASCARI R., *ibidem*, p. 47.
[100] Piano Mattei – Audizione – Pasquale De Muro, Stefano Manservisi, Action Aid, ReCommon, Greenpeace, Centro Internazionale Crocevia, Giovanni Carbone, Vittorio Colizzi, Fairwatch (Atto n 179), 29 luglio 2024.
[101] STILLI S., *La nuova partnership Italia-Africa come opportunità nell'APS: il punto di vista delle organizzazioni sociali*, in GIRO M. (a cura di), *ibidem*, pp. 103-117.

partenariato creato dal G7. Allo stesso modo, le sinergie con il Global Gateway dell'Unione europea costituiscono un'opportunità per l'Italia di intensificare l'efficacia dei propri sforzi in Africa, ed è proprio in questa direzione che vanno gli ultimi sviluppi. Nel gennaio 2025 era stato anticipato che l'obiettivo della nuova fase del piano risiede nell'internazionalizzazione e nell'elevazione al piano europeo[102]. Tale evoluzione sta infatti prendendo forma.

[102] Governo italiano, *Conferenza stampa di inizio anno del Presidente Meloni*, 9 gennaio 2025.

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