

Multilateralism in an era of Trade Wars: Examining the  
Present and Future of the WTO

Moni Owoade, Olivia Bisbee, Ella Jones, Varvara Vassilieva, Yang Zuo



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Editor: Moni Owoade

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## ABSTRACT

The World Trade Organisation (WTO) aims to facilitate the negotiation, implementation and enforcement of trade rules that govern the multilateral trading system. While the creation of the WTO represented ground-breaking progress, the organisation has failed to deliver on much of its mandate. The dispute settlement system has been the subject of significant criticism from WTO members, in particular the U.S., who has now blocked the functioning of the Appellate Body. In addition, the WTO has failed to conclude a successful round of trade negotiations since 1994. The organisation is thus clearly in need of reform as its rules no longer appear suitable to a trading system that has changed significantly over the past two decades, particularly with China's emergence as a major trading power. Changes in U.S. trade policy have resulted in increased unilateral action from the U.S. which undermines the legitimacy of the WTO. Finally, the COVID-19 pandemic has forced countries to adopt more protectionist policies, adding further strain to the system. This paper explores the challenges facing the WTO and suggests measures to guide conversations around WTO reform and help restore consensus, credibility and legitimacy to the organisation, and more broadly the multilateral trading system.

## EXECUTIVE SUMMARY

Over the past several years, the rules based multilateral trading system has come under increasing strain, as key trading blocs have turned away from multilateralism and towards unilateral action. Under President Trump’s “America First” policy, the United States has sought to fundamentally restructure its bilateral trading relations, in particular with China, and also to force change in the WTO which it sees as unable to cope with China’s economic model and growing influence over global trade. The U.S.’ frustrations with the WTO are not unique to the Trump administration and to a large extent are not unique to the U.S. Rather, the tensions underlying the U.S.-China trade war are indicative of broader concerns with the WTO’s credibility and legitimacy as a forum for trade negotiation and dispute settlement.

This paper explores four key challenges facing the WTO and its members: **the paralysis of the dispute settlement system, the stagnation of WTO negotiations, the emergence of China and its state-led economic model and finally, the increasing trade tensions between key WTO members.**

- 1. The Paralysis of the WTO Dispute Settlement System:** The WTO Dispute Settlement System is an integral aspect of the WTO’s role as a forum for global trade negotiation. However, as the system has come under increasing strain due to the large number of trade disputes, members have become frustrated with the ability of the dispute settlement system. As a result of delays in resolving disputes, harmful practices are allowed to persist and large economies such as the U.S. and China have chosen to bypass the dispute settlement process and instead resort to unilateral action. In addition, members have also argued that WTO rules do not adequately police different trade regimes, in particularly China’s regime. The Appellate Body has become the focal point of much of the U.S.’ criticism and as a result the U.S. blocked the AB’s functioning by refusing to allow new members to be appointed. Although the WTO’s Dispute Settlement Mechanism was once hailed as the WTO’s crown jewel, the extended paralysis of the WTO’s dispute settlement seriously threatens the WTO’s credibility. The underlying issues that have led to its paralysis must be addressed in order to restore this credibility.
- 2. Stagnation of the WTO Negotiations:** The WTO has also failed to deliver on its other key mandate, which is to serve as a forum for trade negotiations. The Doha

Development Agenda (DDA), which was launched in 2001, remains incomplete and is now widely regarded as having failed. The failure of the DDA is attributable to both substantive and procedural issues. Regarding the former, there is significant divergence between developing countries and developed countries as to how developing countries should be treated. There is also a growing discontent as to WTO rules' perceived inability to adequately accommodate increasing variation in levels of development. This divergence is best illustrated in the debates surrounding agriculture and developing country status, which proved to be sticking points during the Doha round. More broadly however, the divergence between developing and developed countries' views is further evidence of how much the global trading system has changed, and how WTO rules have lagged behind. Given the substantive divergence, the decision to adopt a single undertaking approach during the Doha round merely added an additional hurdle to consensus. The consequence of stalled negotiations has been increased strain on the DSU, as well as a marked shift towards trade negotiations outside of the WTO, both of which have negative consequences for WTO legitimacy.

- 3. The Emergence of China and its State Led Economic Model:** China's emergence as a key trading bloc has significantly changed trade dynamics. Moreover, many, in particular the U.S., thought that the Chinese accession to the WTO would lead it to transition to a market-based economy. Instead, China's economic model is characterized by a high degree of state regulation and guidance. This model has made it difficult to apply WTO rules to China, who has been accused of violating the 'spirit of the WTO' despite generally complying with existing WTO rules. Members have been particularly concerned with the WTO's ability to police China's use of state subsidies and forced technology transfer. Some WTO members, the U.S. in particular, have also criticised China for failing to assume more responsibility and continuing to claim special and differential treatment. Over the past several years, tensions between China and other WTO members have increased, as is demonstrated by the many dispute settlement claims that have been brought against China. Tensions reached a peak in 2016, when the Trump administration resorted to unilateral action in order to force China to the negotiating table. Nevertheless, the U.S. has not been the only critic of

Chinese policies, and any path forward for the WTO must contend with whether or not the current rules are truly applicable to all economic models.

- 4. The Effect of Increasing Trade Tensions on the WTO:** Trade wars pose a significant risk to the WTO, especially when led by the world's two largest economies. The use of unilateral actions undermines the dispute settlement process and can lead to the destabilisation of multilateral efforts. The U.S.-China trade war has had a profound economic impact on the U.S. and China but has also had a significant impact on the WTO. This is because many of the actions taken by the Trump administration have been unilateral interpretations of what is considered "fair trade" under WTO rules. The U.S.' actions suggest that multilateral methods have outgrown their usefulness in the eyes of the world's largest economy, which may set a dangerous precedent. A proliferation of trade wars would not only destabilise the multilateral trading system but may also prove economically dangerous. This is particular concerning for smaller countries that cannot easily withstand the economic impact of trade wars. The WTO therefore has an interest in avoiding recourse to trade wars, not only to maintain its credibility as an organisation, but also to protect the economic interests of many of its members. The COVID-19 pandemic has compounded the contraction in global trade that began as a result of the U.S.-China trade war, and given the need for transparent trade facilitation in the current climate, protectionism is a significant concern. The pressure on global supply chains increases the need for cooperation and for the WTO to take a proactive approach to reform.

In response to these issues, the paper provides several recommendations, which the authors consider essential to reforming the WTO and addressing the challenges discussed above.

- 1. Reform the WTO Dispute Settlement System by reviving and reforming the Appellate Body:** By slowing, and in some cases halting, the impartial settlement of trade disputes between Members, the paralysis of the Appellate Body undermines the credibility and efficacy of the WTO. The authors recommend that WTO Members take decisive action to restart the Appellate Body's processes by adopting

the Walker draft decision and by altering organisational features including the composition of the Appellate Body Secretariat and the terms of service for AB members. These recommendations are a response to the pressing need for a fully-operational Dispute Settlement System, proposing measures which the authors believe would restore Members' faith in the AB in the short-term and open the way for further reforms to be enacted in the long-term. Similarly, the authors briefly outline recommendations for the reform of the panel and consultation stages of the Dispute Settlement System, recognising that while the AB is the most pressing current issue, for the WTO's legitimacy as a rules-based organisation to be maintained, broad reforms of its Dispute Settlement processes are necessary. These recommendations emphasise the need for efficient and timely proceedings at every level of the Dispute Settlement process, proposing that excess processes beyond panel hearings be removed and the creation of a standing body of panellists, in line with practices being tested under the MPIA presently. WTO Members must commit to reviving the AB process, and to undertaking long-term and broad reforms of the Dispute Settlement System to bolster its flexibility and durability in response to rapid global technological and economic changes.

2. **Reform the WTO negotiation function through increased use of Plurilateral and Critical Mass Agreements and abandonment of the Single Undertaking approach.**

As this paper has shown, the WTO's failure to conclude a trade negotiation round threatens its credibility as a forum for multilateral trade negotiations. The authors therefore recommend that WTO members introduce more flexibility into the negotiation process by encouraging the use of plurilateral and critical mass agreements. Although the plurilateral approach is often seen as second best, the authors consider it to be a much-needed pragmatic solution, given the fact that members are increasingly engaging in negotiations outside of the WTO. The authors recommend that the Ministerial Conference formally adopt a framework decision providing guidelines for plurilateral agreements that can be added to Annex 4 of the WO agreements. However, the MC should also emphasize that approval or rejection of PAs will ultimately be on a case by case basis. Increased flexibility through PAs and CMAs would be supported by moving away from the

single undertaking approach. WTO members should engage in more focused negotiations, such as the current negotiations on fisheries, and participate in “mini-rounds” in order to improve efficiency and avoid unproductive linkages.

3. **Modernise WTO Rules by developing a more nuanced approach to Developing Country status and modernising the rules on subsidies and countervailing measures.**

Given the lack of consensus around the self-designation approach to developing country status, the authors recommend that WTO members move away from the current block-based classification approach towards a more nuanced case by case approach to special and differential treatment (SDT). A more nuanced approach would require a clear identification of development aims and require more detailed analysis of different stages of development using economic indicators. In addition, WTO members should implement a “graduation scheme” which would lay out the approximate period of time during which a given member can benefit from SDT. The authors also recommend that the WTO should also create a more comprehensive subsidy notification mechanism, which includes incentives such as a rebuttable presumption. However, given the likely opposition to such a reform proposal, it would be crucial that reform proposals are accompanied by studies determining the impacts of subsidies and state-owned enterprises on different economic models.

4. **Reforming and Empowering the WTO Secretariat by expanding its role to be an active participant in the negotiation process.** The WTO has traditionally been a member driven organisation, and as a result the WTO secretariat has typically taken a backseat role in negotiations. However, WTO negotiations have become politicised and as a result have stagnated. The authors therefore recommend that the WTO secretariat be empowered to become more of an intellectual leader in the organisation. This may be achieved by having Secretariat members structure and direct negotiations, issue proposals for rules reform based on expert analysis, and engage in more constructive dialogue with members regarding the drafting of texts. This expansion of the Secretariat’s role should be accompanied by specific

functional guidelines that outlined the nature of the Secretariat's enhanced participation. In order to implement these recommendations, WTO members would need to increase the budget and human capital of the Secretariat. Finally, such an expansion in the Secretariat's role would not undermine the member-driven nature of the WTO as the adoption and implementation of proposals would remain in the purview of WTO members.



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## I. INTRODUCTION

By the end of 2019, it was clear that the multilateral trading system was in a serious moment of crisis. Geopolitical tensions, largely centred around trade and technology, had resulted in a “trade war” between the world’s two largest economies, the United States and China.<sup>1</sup> Specifically, under President Trump’s “America First” policy, the U.S., the world’s largest economy, has sought to fundamentally restructure bilateral trading relations, force China into restructuring its economic model and force change in the WTO.<sup>2</sup> However, the U.S.-China trade war is in many ways indicative of a broader crisis of legitimacy within the multilateral trading system, which as this paper will show, has been brewing for some time. In addition to existing tensions, the COVID-19 pandemic has strained global supply chains and also forced countries to look inward to address domestic crises, and specifically to impose export restrictions on certain materials.<sup>3</sup>

Amidst these tensions, the World Trade Organization, which emerged in 1994 as the cornerstone of a multilateral rules-based trading system, has been largely paralysed.<sup>4</sup> The WTO and its predecessor, GATT, have helped to contribute to massively increased global trade, which has increased 50% faster than global GDP since the end of the Second World War.<sup>5</sup> However, increasing global trade tensions have exposed many of the underlying issues that have plagued the WTO over the past few decades. The organisation has yet to conclude a successful round of comprehensive negotiations since 1995 and the very existence of Dispute Settlement Mechanism has been called into question, thus casting doubts on the WTO’s efficacy as a settler of trade

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<sup>1</sup> Ignacio Garcia Bercero, ‘What Do We Need a World Trade Organization for? - The Crisis of the Rules Based System and WTO Reform’ (Bertelmann Stiftung 2020).

<sup>2</sup> Mireya Solis, ‘Reinventing the Trading Nation: Japan, the United States, and the Future of Asia-Pacific Trade’ (The Brookings Institution) <<https://www.brookings.edu/research/reinventing-the-trading-nation-japan-the-united-states-and-the-future-of-asia-pacific-trade/>> accessed 27 August 2020; Caleb Silver, ‘The Top 20 Economies in the World’ (*Investopedia*) <<https://www.investopedia.com/insights/worlds-top-economies/>> accessed 27 August 2020.

<sup>3</sup> Ignacio Garcia Bercero (n 1).

<sup>4</sup> *ibid.*

<sup>5</sup> Kemal Derviş and Caroline Conroy, ‘What’s behind Trump’s Trade War?’ (*Brookings*, 9 October 2018) <<https://www.brookings.edu/opinions/whats-behind-trumps-trade-war/>> accessed 27 August 2020.

disputes.<sup>6</sup> In addition, the organisation has become a direct target of the Trump administration, which has openly criticised the WTO and has chosen to adopt a unilateral approach to addressing trade policy concerns. The WTO thus faces a difficult combination of institutional challenges and larger systemic factors that are changing the landscape of global trade. Garcia Bercero has noted that the current crisis gives rise to four risks to the viability of the rules-based trading system, and by consequence, the future WTO: the use of tariffs or quotas as a geo-economic instrument, increased recourse to protectionist policies, the erosion of third party adjudication and the fragmentation of the global trading system.<sup>7</sup>

Simply put, the current trends of increased recourse to unilateral action and stagnation within the WTO threaten the organisation's legitimacy and the current rules-based trading system. However, the authors of this paper believe that WTO members can and should capitalise on the majority of members' commitment to the multilateral trading system in order to reform the WTO. The rules-based trading system continues to contribute global economic growth and a trading system without a functioning WTO is likely to "unleash great power trade conflicts" which would be detrimental for many, if not all trading nations<sup>8</sup>

This paper seeks to analyse some of the current challenges facing the WTO with a view to providing recommendations as to how WTO members can begin to address these challenges and restore legitimacy to the organisations. The paper first offers a brief introduction into the history of the WTO, its creation and its functioning, before analysing the current challenges facing its two primary arms: the dispute settlement mechanism and the negotiation function. In particular the authors seek to highlight the variety of substantive and procedural factors that have

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<sup>6</sup> David Fickling, 'The WTO Is Dead. Long Live the WTO' *Washington Post* <[https://www.washingtonpost.com/business/energy/the-wto-is-dead-long-live-the-wto/2020/05/14/53aa5f4a-95b8-11ea-87a3-22d324235636\\_story.html](https://www.washingtonpost.com/business/energy/the-wto-is-dead-long-live-the-wto/2020/05/14/53aa5f4a-95b8-11ea-87a3-22d324235636_story.html)> accessed 9 September 2020.

<sup>7</sup> Ignacio Garcia Bercero (n 1).

<sup>8</sup> Peter Draper, 'How Should Africans Respond to the Investment, Technology, Security, and Trade Wars?' (*Brookings*, 30 September 2019) <<https://www.brookings.edu/blog/africa-in-focus/2019/09/30/how-should-africans-respond-to-the-investment-technology-security-and-trade-wars/>> accessed 27 August 2020.

slowed decision making and led to increased tensions between members and increased strain on both the dispute settlement and negotiation functions. The paper then goes on to consider the effect of China's accession to the WTO as well as the effect of increasing trade tensions on the organisation, with a particular focus on the effect of current US policy. Finally, the paper offers some recommendations as to how WTO members may look to overcome this moment of paralysis by restoring the organisation's legitimacy and implementing reforms that will support more efficient and effective decision making.

## I.I. A BRIEF HISTORY OF THE WTO AND THE MULTILATERAL TRADING SYSTEM

When it was founded in 1994, the WTO promised to serve as a facilitator of trade negotiations and as a forum for dispute settlement in order to promote improved international trade and cooperation<sup>9</sup>. Yet 25 years after the WTO's establishment, it is distinctly apparent that the institution is in crisis.<sup>10</sup>

### i. The GATT Years

Neither the nature nor 'crisis' of the WTO can be understood independently from the political and economic context in which the organisation was established. The international political environment in the aftermath of the Second World War was characterised by profound uncertainty, mistrust, and economic devastation. Nations sought to increase trust and enhance cooperation by improving international trade, with the hopes of stimulating post-war economic recovery and avoiding the repetition of such a crisis.<sup>11</sup> In an attempt to alleviate these concerns,

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<sup>9</sup> 'WTO | Understanding the WTO - What Is the World Trade Organization?' <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm)> accessed 9 September 2020.

<sup>10</sup> Fickling (n 6).

<sup>11</sup> Douglas A Irwin, 'The GATT's Contribution to Economic Recovery in Post-War Western Europe' (National Bureau of Economic Research 1994) Working Paper 4944 <<http://www.nber.org/papers/w4944>> accessed 10 September 2020.

23 nations signed the General Agreement on Trade and Tariffs (GATT) in 1947 and the agreement came into effect in 1948. This legal agreement represented an initial attempt at institutionalising a meaningfully multilateral system of trade – one that would aid post-war economic recovery by reconstructing and liberalising global trade through the reduction or elimination of barriers to trade and disincentivise unilateral, protectionist policies.<sup>12</sup>

However, some countries remained notoriously reluctant to subordinate themselves to such a multilateral system. The United States’ Trade Act of 1974, was a notable hurdle to the success of GATT. Section 301 of this act specifies that the U.S. has the capacity to unilaterally impose sanctions on foreign countries that it deems to have violated U.S. trade agreements or have acted in an ‘unjustifiable’ or ‘unreasonable’ way that has burdened U.S. commerce.<sup>13</sup> This provision excuses the U.S. from complying with the requirements of international organisations and incentivises unilateral and parochial behaviour. Although S301 was usually invoked in areas where there were no existing GATT rules to govern the practices, its invocation was perceived as evidence of U.S. exceptionalism which undermined the role and importance of the GATT and instead promoted bilateral approaches to international trade.<sup>14</sup> As a result, there were calls to abolish Section 301 and create *truly multilateral* system of international during multiple ‘trade round’ discussions held under the auspices of the GATT.<sup>15</sup>

While each round of GATT negotiations was important for the liberalisation and reconstruction of global trade and made notable progress in various trade sectors, the Uruguay Round (1986-1994) was arguably the most important. This round was crucial because it determined the

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<sup>12</sup> ‘WTO | Understanding the WTO - The GATT Years: From Havana to Marrakesh’ <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm)> accessed 10 September 2020.

<sup>13</sup> ‘Trade.Gov - Trade Disputes & Enforcement–Section 301’ <[https://legacy.trade.gov/mas/ian/tradedisputes-enforcement/tg\\_ian\\_002100.asp](https://legacy.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002100.asp)>; Office of the US Trade Representative, ‘Special 301 | United States Trade Representative’ <<https://ustr.gov/issue-areas/intellectual-property/Special-301>> accessed 4 July 2020.

<sup>14</sup> Elizabeth K King, ‘The Omnibus Trade Bill of 1988: “Super 301” and Its Effects on the Multilateral Trade System Under the Gatt’ (1988) 12 29; Alan O Sykes, ‘Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301.’ 30; A Lynne Puckett and William L Reynolds, ‘Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?’ (1996) 90 *The American Journal of International Law* 675.

<sup>15</sup> ‘WTO | Understanding the WTO - The GATT Years: From Havana to Marrakesh’ (n 12).



framework of the contemporary international trade regime by establishing the World Trade Organisation via the Marrakesh Agreement.<sup>16</sup>

## ii. Creation and Expansion of the WTO

The WTO was established to ‘*provide the common institutional framework for the conduct of trade relations among its Members.*’<sup>17</sup> Members hoped that the newly established organisation would serve to improve living standards, guarantee full employment, expand production in goods and services, expand and improve the scope and quality of international trade, and assist developing countries in stimulating economic growth.<sup>18</sup> To this end, the organisation has two core functions- facilitating trade negotiations and settling trade disputes, as well as several secondary functions, such as administering the Trade Policy Review Mechanism and cooperating with other international economic organizations.<sup>19</sup> In establishing these functions, the organisation codified itself as a member-driven, non-discriminative organisation that operates according to the principles of consensual decision making alongside a ‘one nation, one vote’ voting principle.<sup>20</sup>

However, in order to be a truly intergovernmental organisation and to realise a meaningfully multilateral approach to international trade, the WTO needed broad, diverse and equal membership. While the WTO was established with the nominal intention to integrate both developing and developed countries, and while about two-thirds of the WTO’s members are developing countries, integration has not been always effectively executed and has sometimes strained the organisation’s foundations.<sup>21</sup> The rapid rise of some developing countries, such as Brazil, India, and China - have created new opportunities for the multilateral trading system,

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<sup>16</sup> ‘Marrakesh Agreement Establishing the World Trade Organization’ <[https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)> accessed 10 September 2020.

<sup>17</sup> *ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> [12/02/2021\\_20:33:00](#)

<sup>20</sup> *Ibid.*

<sup>21</sup> Aileen Kwa, ‘WTO and Developing Countries’ (*Institute for Policy Studies*, 1 November 1998) <[https://ipsdc.org/wto\\_and\\_developing\\_countries/](https://ipsdc.org/wto_and_developing_countries/)> accessed 22 September 2020.

whilst also creating novel challenges for the WTO with regard to the organisation's ability to accommodate the unprecedented power and influence exerted by these countries.<sup>22</sup>

In this regard, China's accession to the WTO in 2001 is particularly relevant. By the turn of the century, China had already recorded rapid economic growth and had firmly established itself as one of the largest and most important trading countries, external investors, and recipients of foreign direct investment.<sup>23</sup> Yet its functional capacities as an economic powerhouse were restricted by shallow integration into the international trading arena.<sup>24</sup> China was thus driven to accede to the WTO in the hope of gaining new trading partners, better trading conditions, and greater opportunities to engage with the international trading community and bring about domestic reform.<sup>25</sup> Conversely, the absence of Chinese membership in the WTO ailed the organisation, as it could not claim to be a meaningfully global and intergovernmental organisation if it failed to integrate such an economically powerful country.<sup>26</sup> The U.S. was a strong supporter of Chinese accession and there was an important sense of optimism among the U.S. business community that China's accession would put trade on a more secure footing, and there was also broader optimism that accession would lead China to embrace the U.S.-led liberal global order and would stimulate its transition to democracy and a market economy.<sup>27</sup>

Upon acceding to the WTO, China agreed to a package of trade liberalisation commitments. These included commitments to reduce tariffs (particularly in agriculture), to gradually eliminate quotas and licenses, to open critical service sectors and to respect international standards, among

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<sup>22</sup> Brendan Vickers, 'The Role of the Brics in the WTO: System-Supporters or Change Agents in Multilateral Trade?' (*The Oxford Handbook on The World Trade Organization*, 31 May 2012)  
<<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199586103.001.0001/oxfordhb-9780199586103-e-13>> accessed 22 September 2020.

<sup>23</sup> Nicholas R Lardy, 'Issues in China's WTO Accession' (*Brookings*, 30 November 1AD)  
<<https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/>> accessed 5 July 2020.

<sup>24</sup> Ibid.

<sup>25</sup> 'What Happened When China Joined the WTO?' (*World101 from the Council on Foreign Relations*)  
<<https://world101.cfr.org/global-era-issues/trade/what-happened-when-china-joined-wto>> accessed 10 September 2020.

<sup>26</sup> Ibid.

<sup>27</sup> 'Trump's Trade War With China Actually Started at the WTO in 2001 - The Atlantic'  
<<https://www.theatlantic.com/international/archive/2018/08/china-trump-trade-united-states/567526/>> accessed 7 August 2020.

others.<sup>28</sup> However, at the time of its accession, China submitted to a set of rules it had not helped to create. By consequence, the rules were not created with China's unique economic model in mind and many WTO members now feel that WTO rules do not sufficiently address aspects of the Chinese economic model which lend themselves to unfair trading practices.

On a more fundamental level, the WTO has struggled to fulfil its core purposes. It has been paralysed as a forum for trade negotiations, which is demonstrated by the failure of the Doha Round to reach a satisfactory conclusion after 15 years.<sup>29</sup> While the organisation has been rather successful in settling some trade disputes and the Dispute Settlement Mechanism is routinely heralded as the organisation's 'central pillar', the U.S.' recent blocking of new appointments to the Appellate Body alongside the natural expiration of judges' terms has paralysed the process of trade dispute resolution.<sup>30</sup> These functional concerns exist in the broader context of rising tensions and the trade war between the U.S. and China, which is underscored by concerns about China's position as a strategic challenger to the West.

## II. AN ERA OF TRADE WARS?

### II.I The potential effects of Trade Wars

While the WTO has at times succeeded in facilitating global trade through rules and co-operation, it has naturally, not always been able to prevent conflict among its members. Since its inception in 1995, the WTO Dispute Settlement Body has heard 596 trade disputes and issued rulings for 350 of them. The dispute settlement mechanism exists to reduce international trade

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<sup>28</sup> *ibid*; 'What Happened When China Joined the WTO?' (n 25).

<sup>29</sup> Dr Shamel Azmeh, 'The US-China Trade War: The End of Multilateralism or the Search for a New Bargain?' (*LSE International Development*, 3 March 2020) <<https://blogs.lse.ac.uk/internationaldevelopment/2020/03/03/the-us-china-trade-war-the-end-of-multilateralism-or-the-search-for-a-new-bargain/>> accessed 28 June 2020.

<sup>30</sup> Chad Brown, 'The 2018 Trade War and the End of Dispute Settlement as We Knew It' (*VoxEU.org*, 13 June 2019) <<https://voxeu.org/article/2018-trade-war-and-end-dispute-settlement-we-knew-it>> accessed 10 September 2020; Keith Johnson, 'How Trump May Finally Kill the WTO' (*Foreign Policy*) <<https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/>> accessed 10 September 2020.

tension and avoid serious conflict.<sup>31</sup> As countries can turn to the multilateral system to settle their disputes as objectively as possible. However, trade relations are driven by governments, and the organization can only discourage extreme protectionism.

Trade wars arise when a state takes prolonged unilateral action against another state, by raising tariffs or by imposing trade barriers which discourage or prevent trade with the target state.<sup>32</sup> In contrast to disputes managed entirely within the WTO dispute body framework, trade wars circumvent WTO jurisdiction, with states unilaterally imposing tariffs and other punishments unsanctioned by the body.

Trade wars violate the WTO's underlying principles in 3 ways:

1. Unilateral action foregoes multilateral consultation and negotiation and sets a unilateral precedent for interpreting ambiguous WTO rules.
2. Extreme protectionism is not in the spirit of multilateralism.<sup>33</sup>
3. Imposing unilateral tariffs or subsidies against one member directly violates the Most-Favoured-Nation principle of the General Agreement on Tariffs and Trade.<sup>34</sup>

In addition to these fundamental transgressions, trade wars undermine the dispute settlement process and WTO rules more broadly. As the dispute settlement body is integral to upholding WTO rules, undermining it can have negative consequences: if other members inclined to protectionism see that unilateral tariffs and subsidies in trade wars can have more direct and rapid results compared to waiting for a panel conclusion, there is a danger that they follow suit and ultimately destabilise multilateral efforts. The 'tit for tat' nature of trade wars, when they involve protectionist unilateral actions, can provoke long-term, diplomatically and economically

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<sup>31</sup> 'The WTO Can...Settle Disputes and Reduce Trade Tensions' <[https://www.wto.org/english/thewto\\_e/whatis\\_e/10thi\\_e/10thi02\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi02_e.htm)> accessed 8 February 2021.

<sup>32</sup> Kimberly Amadeo, 'Why Trade Wars Are Bad and Nobody Wins' (*The Balance*) <<https://www.thebalance.com/trade-wars-definition-how-it-affects-you-4159973>> accessed 8 February 2021.

<sup>33</sup> 'Being desirous of contributing to [the GATT's] objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.' Preface to General Agreement on Tariffs and Trade

<sup>34</sup> 'The General Agreement on Tariffs and Trade (GATT 1947)' <[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)> accessed 8 February 2021.

damaging exchanges. The trade war between the U.S. and China demonstrates many of these risks.

## II.II. US-China Trade Relations

The U.S.-China trade war is perhaps the most significant trade dispute in the last several decades, owing to the strength of the two states and the potential implications for global trade. Although at the time of China's accession in 2001, the states were hopeful for a positive partnership, as China has established itself as the world's largest exporter, trade relations between the two nations have soured significantly.

The U.S. supported Chinese accession in the hopes that WTO membership would encourage China to embrace a more liberal economic model.<sup>35</sup> However China has maintained a mixed economy combining a state-led economic model with more market-oriented elements. As a result, it has adopted practices that are perceived as “market-distorting” such as forced technology transfer in joint-venture partnerships and state subsidies.<sup>36</sup> While other mixed economies exist among WTO members, the great scale of China's economy and its position at the forefront of global trade was unanticipated at the WTO's creation.<sup>37</sup> Moreover, many American commentators feel that China has benefitted from WTO accession while still pursuing market distorting policies that have destroyed millions of jobs and decimated key sectors of the U.S. manufacturing industry.<sup>38</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> Tom Hancock and Yizhen Jia, 'China Paid Record \$22bn in Corporate Subsidies in 2018' (27 May 2019) <<https://www.ft.com/content/e2916586-8048-11e9-b592-5fe435b57a3b>> accessed 11 February 2021.

<sup>37</sup> Ibid.

<sup>38</sup> James Steinberg, 'What Went Wrong? U.S.-China Relations from Tiananmen to Trump' (*Texas National Security Review*, 7 January 2020) <<https://tnsr.org/2020/01/what-went-wrong-u-s-china-relations-from-tiananmen-to-trump/>> accessed 11 February 2021.

## i. US-China Relations under the Obama Administration

The U.S. first began to reevaluate its trading relationship with China under the Obama Administration. In 2009, the American and Chinese economies were more integrated than ever, as a result of China's massive purchase of U.S. Treasury bonds after the financial crisis.<sup>39</sup> The U.S. ostensibly viewed China as an amicable partner, with Obama emphasising that 'the United States welcomes the rise of China'<sup>40</sup>. However, as China's influence in the region grew then-Secretary of State Hillary Clinton announced a 'pivot to Asia'. Beijing was strongly opposed to the policy, viewing it as an effort to contain China's influence as a leader in the region.<sup>41</sup> The U.S. hoped to forge itself a leadership role in Asia through this new diplomatic focus.<sup>42</sup>

China's suspicion of U.S. interference stemmed from its belief that the U.S. was acting on a motivation to protect and expand its own global dominance in the face of China's rise, rather than to ameliorate issues affecting the Asia Pacific region.<sup>43</sup> This perceived interference intensified when the U.S. accelerated Trans-Pacific Partnership negotiations – which excluded China.<sup>44</sup> While the U.S. pursued TPP negotiations, China initiated negotiations on the Regional Comprehensive Economic Partnership, which some have argued was intended as a potential rival to a U.S. trading bloc, to defend the Asia Pacific from US trade domination.<sup>45</sup>

Diplomatic negotiations were strained during TTP negotiations and American businesses were 'growing increasingly frustrated and impatient with the state of change in China's economic

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<sup>39</sup> Cheng Li, 'Assessing U.S.-China Relations under the Obama Administration' (*Brookings*, 30 August 2016) <<https://www.brookings.edu/opinions/assessing-u-s-china-relations-under-the-obama-administration/>> accessed 11 February 2021.

<sup>40</sup> Carrie Grace, 'Collision Course? Rise of China a Stress for the US' *BBC News* (26 September 2015) <<https://www.bbc.com/news/world-asia-china-34368249>> accessed 11 February 2021.

<sup>41</sup> Keith B Richburg, 'U.S. Pivot to Asia Makes China Nervous' *Washington Post* (16 November 2011) <[https://www.washingtonpost.com/world/asia\\_pacific/us-pivot-to-asia-makes-china-nervous/2011/11/15/gIQAsQpVRN\\_story.html](https://www.washingtonpost.com/world/asia_pacific/us-pivot-to-asia-makes-china-nervous/2011/11/15/gIQAsQpVRN_story.html)> accessed 11 February 2021.

<sup>42</sup> Kenneth G Lieberthal, 'The American Pivot to Asia' (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/articles/the-american-pivot-to-asia/>> accessed 11 February 2021.

<sup>43</sup> *ibid.*

<sup>44</sup> Richburg (n 41).

<sup>45</sup> Lily Kuo, 'How Rival Trade Blocs between the US and China Could Be Good for Free Trade in Asia' *Quartz* <<https://qz.com/63491/how-rival-trade-blocs-between-the-us-and-china-could-be-good-for-free-trade-in-asia/>> accessed 11 February 2021.

policy'.<sup>46</sup> China's currency undervaluation, weak intellectual property regime and support for domestic companies, were viewed as competition distorting policies.<sup>47</sup> During early negotiations for the Trans-Pacific Partnership in 2011, Obama warned China that it must 'play by the rules' of international trade.<sup>48</sup> It was China's unwillingness to 'play by the U.S.' rules' as well as the U.S.' increased targeting of the Asia Pacific nations through Trans-Pacific Partnership negotiations, that caused tensions to rise under the Obama administration.

Under the Obama administration, the U.S. initially sought to leverage the WTO dispute settlement mechanism to tackle its grievances with China's policies. The U.S. brought more WTO dispute challenges in the 8 years of the Obama administration than any other country; it won every challenge, including 7 against China.<sup>49</sup> The challenges against China included disputes against tariff-rate quotas for agricultural products, disputes against Chinese 'market price support' programs for agricultural goods and export duties and quotas on several raw materials.<sup>50</sup> The WTO dispute settlement system thus served as an important recourse for the Obama administration to challenge China's policies. Yet from the U.S perspective, the WTO rules remained inadequate and unable to address some of China's more complex policies around steel and technology transfer.

## ii. US Policy under The Trump administration

Tensions have reached a critical point in the last 2 years, as the U.S. has imposed significant unilateral tariffs on China, while utilising the national security exception, a WTO rule which allows members to breach usual trade restrictions to protect their national security, as

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<sup>46</sup> David Nakamura, 'Obama at APEC Summit: China Must "Play by the Rules"' *Washington Post* (12 November 2011) <[https://www.washingtonpost.com/world/obama-at-apec-summit-china-must-play-by-the-rules/2011/11/12/gIQALRu2FN\\_story.html](https://www.washingtonpost.com/world/obama-at-apec-summit-china-must-play-by-the-rules/2011/11/12/gIQALRu2FN_story.html)> accessed 11 February 2021.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> 'WTO | Dispute Settlement - Disputes by Country/Territory' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)> accessed 11 February 2021.

<sup>50</sup> 'FACT SHEET: The Obama Administration's Record on the Trade Enforcement' (*whitehouse.gov*, 12 January 2017) <<https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/fact-sheet-obama-administrations-record-trade-enforcement>> accessed 1 July 2020.

justification.<sup>51</sup> The policy grievances of the Obama era remained largely unresolved when President Trump took office as perceived market distorting practices, most notably industry subsidies, remain prevalent in China's economy.<sup>52</sup> In 2018, U.S. Trade Representative Robert Lighthizer summarised U.S. grievances by stating: "It seems clear that the United States erred in supporting China's entry into the WTO on terms that have proven ineffective in securing China's embrace of an open, market-oriented trade regime."<sup>53</sup>

Under President Trump, opposition to China's economic model and trading practices adopted a more political dimension when compounded with the administration's protectionist America First policy. This policy led to the acceleration of unilateral retaliation from the U.S., constituting a great danger to the WTO given that unilateral tariffs undermine WTO rules and philosophy.<sup>54</sup> In 2017, as one of the Trump administration's first foreign policy actions, the U.S. withdrew from Trans-Pacific Partnership negotiations – signalling a shift towards a more unilateral trade strategy.<sup>55</sup> America First has proven inimical to the multilateral trade dispute settlement system – since 2018, the U.S. has imposed tariffs on more than \$360bn of Chinese goods, and China has retaliated with tariffs on more than \$110bn of U.S. imports.<sup>56</sup> When combined with other protectionist elements of Trump-era foreign policy such as America First and disputes regarding NAFTA<sup>57</sup>, it is clear that its unilateral disputes with China represent another symptom of shift away from the WTO and the multilateral trading system.

The U.S.' unilateral actions have violated WTO rules, most notably the Most-Favoured-Nation article of the General Agreement on Tariffs and Trade, which states:

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<sup>51</sup> 'Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade' (*Cato Institute*, 25 June 2019) <<https://www.cato.org/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale-restricting-trade>> accessed 11 February 2021.

<sup>52</sup> Eliana Raszewski Cohen Luc, 'U.S., EU, Japan Slam Market Distortion in Swipe at China' *Reuters* (13 December 2017) <<https://www.reuters.com/article/us-trade-wto-idUSKBN1E62HA>> accessed 11 February 2021.

<sup>53</sup> United States Trade Representative, '2017 Report to Congress on China's WTO Compliance' (2018).

<sup>54</sup> *Ibid.*

<sup>55</sup> 'The United States Officially Withdraws from the Trans-Pacific Partnership | United States Trade Representative' <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>> accessed 11 February 2021.

<sup>56</sup> 'A Quick Guide to the US-China Trade War' *BBC News* (16 January 2020) <<https://www.bbc.com/news/business-45899310>> accessed 11 February 2021.

<sup>57</sup> Kimberly Amadeo, '6 Ways Trump Changed NAFTA' (*The Balance*) <<https://www.thebalance.com/donald-trump-nafta-4111368>> accessed 11 February 2021.



any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.<sup>58</sup>

The trade war is also circumventing the dispute settlement system, as tariffs are the product of states' own whims rather than panel findings. Such transgressions can make the multilateral systems appear impotent in the face of economic or political superpowers. As was mentioned earlier, this has potentially harmful consequences for the existence of multilateralism and the WTO. Given that China and the U.S. are hugely influential superpowers, there is also a danger of smaller states perceiving their rejection of multilateralism in trade as a legitimate means of resolving dispute. If other members were to mimic their actions, the dispute resolution system and the spirit of multilateralism could unravel.

The WTO has refuted the U.S. claim that the national security exception is non-justiciable; in a previous panel resolution concerning the national security exception, 'political or economic differences between Members' was deemed insufficient justification for its invocation.<sup>59</sup> It is arguable that U.S. grievances with China's trade practices are merely a matter of economic differences rather than a foreign policy emergency, in which case the United States' invoked justification is incompatible with the WTO rules despite. If the WTO is able to adequately sanction the U.S. and highlight the incompatibility of its actions while resolving issues relating to the scope of WTO rules and China's complex economic structure, it will likely be successful in maintaining the primacy of multilateralism and the dispute settlement mechanism.

The Trump administration has argued that the multilateral approach, symbolised by the WTO, has failed to discourage market distorting policies. Despite the fact that China has generally complied with WTO rules, the U.S. argues that China has been able to benefit from the WTO

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<sup>58</sup> 'The General Agreement on Tariffs and Trade (GATT 1947)' (n 34).

<sup>59</sup> 'The WTO's First Ruling on National Security: What Does It Mean for the United States?' <<https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states>> accessed 11 February 2021.

membership while still violating the “spirit” of free trade.<sup>60</sup> Moreover, the U.S. has expressed the view that current WTO rules are inadequate to capture and prevent China’s practices and this justifies punitive unilateral action.<sup>61</sup> In China’s view, these accusations are merely a means for the U.S. to accelerate its attempts to curb the rise of China; China has attempted to become more open as it transitions out of its developing country status, while the U.S. is using the WTO as a ‘battlefield’ against this progress.<sup>62</sup>

Although China’s unique economic model does present a unique challenge, the debate over China’s compliance is indicative of the broader issue that the global trading system has changed significantly since 1994 and modernisation of WTO rules is necessary in order resolve new tensions and changing practices.

The U.S. has also imposed tariffs on several other WTO members, citing national security concerns when placing tariffs on E.U. steel and aluminium, of 25% and 10% respectively.<sup>63</sup> In May 2019, the U.S. also threatened unilateral tariffs on cars and auto parts, suggesting that they also jeopardise national security.<sup>64</sup> These actions have jeopardised trade diplomacy between the U.S. and E.U. In March 2020, the European Parliament rejected a draft resolution proposing bilateral trade talks on industrial goods, highlighting the E.U.’s unwillingness to settle trade issues under American threats.<sup>65</sup> This further highlights the diplomatically damaging nature of American unilateral action – progress through negotiation cannot be made when aggressive protectionism is presenting a threat to the other party, whether it is the E.U. or China.

In order to mitigate further escalation of the trade war and the use of unilateral action by key members, the WTO must move to restore its legitimacy as a forum for trade negotiation and

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<sup>60</sup> ‘Disciplining China’s Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented’ (*Cato Institute*, 15 November 2018) <<https://www.cato.org/publications/policy-analysis/disciplining-chinas-trade-practices-wto-how-wto-complaints-can-help>> accessed 14 August 2020.

<sup>61</sup> ‘US-China Trade War: New Tariffs Come into Force’ *BBC News* (23 August 2018) <<https://www.bbc.com/news/business-45255623>> accessed 11 February 2021.

<sup>62</sup> Antara Singh, ‘What Does China Want From WTO Reforms?’ (*The Diplomat*) <<https://thediplomat.com/2019/05/what-does-china-want-from-wto-reforms/>> accessed 11 February 2021.

<sup>63</sup> Bernd Lange, ‘Legislative Train Schedule: EU-US Trade Talks on an Agreement on Industrial Goods and Conformity Assessment’.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

dispute settlement, by considering key reforms, including changes to the rules on subsidies and countervailing measures. The upcoming change in U.S. administration may reduce the risk of unilateral action as the Biden administration has named greater engagement with WTO dispute settlement systems as a priority of its trade strategy in order to mitigate the noxious effects that the Trump government has had on the United States' reputation within the multilateral system.<sup>66</sup> However, more broadly, WTO members must consider what structural changes are needed to rebuild trust in its key functions so that it may begin the process of modernisation.

### III. CRITICISMS AND PARALYSIS OF THE WTO DISPUTE SETTLEMENT MECHANISM

As the WTO considers a path for reform, the Dispute Settlement Mechanism, which has been a key target of U.S. criticisms, will likely be a high priority. The WTO's Dispute Settlement System is an integral aspect of the WTO's role as a forum for global trade negotiation. Resolving trade disputes is a core activity of the WTO and it has long been lauded for its active and effective dispute settlement system which helps maintain a rules-based standard for global trade, ensuring it is more secure and predictable.<sup>67</sup> However, this system has come under increasing strain in the past decade as the number of trade disputes have risen. In addition, some members have become frustrated with the ability of the dispute settlement system to provide prompt and fair rulings. It has become clear that reforms is necessary to ensure the system's continued efficacy and to improve its efficiency. The paralysis of the WTO Appellate Body, since 2019, has added further urgency to proposals for reform, with many fearing that this moment is key to determining the organisation's future.<sup>68</sup>

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<sup>66</sup> Aime Williams, 'Joe Biden to Remain Tough on Trade While Re-Embracing Partners' (16 November 2020) <<https://www.ft.com/content/c4e1c0e3-ba5b-46f8-87c7-9a56ca7a0a1a>> accessed 11 February 2021.

<sup>67</sup> 'WTO | Understanding the WTO - A Unique Contribution' <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)> accessed 10 September 2020.

<sup>68</sup> Ignacio Garcia Bercero (n 1).

## III.I WTO DISPUTE Settlement Overview

Under the DSU, WTO members follow a formal three-stage process of dispute settlement<sup>69</sup>:

1. **Consultations:** Under Article 4 of the DSU, members who lodge a formal complaint must attempt to resolve this issue through consultation with the other party, which may be mediated by the WTO Director-General if requested. More than half of disputes are settled at this stage, however if within 60 days the dispute is ongoing, the complaining party may request the formation of a panel.
2. **Dispute Panel:** Under Articles 6-16 of the DSU, three specialist panellists are selected by the WTO Secretariat, with the agreement of involved parties to investigate and report on disputes, presenting a majority or unanimous report with their findings and ruling.
3. **Appellate Body:** Under Article 17 of the DSU, if the Dispute Panel ruling is appealed by either party, the dispute is referred to the Appellate Body (AB). The AB is a standing body of seven members who serve for 4-year terms (renewable once), of which three are selected to consider each case. The AB may uphold or overturn panel rulings. It is important to note that the DSB cannot adopt a panel report until the resolution of a pending appeal, hence enforcement of rulings can be delayed until the AB ruling is issued.<sup>70</sup>

While many countries typically choose to follow the formal process of dispute settlement, there are alternative options to the Panel and AB, including Mutually Agreed Solutions; Good Offices,

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<sup>69</sup> 'WTO | Dispute Settlement Understanding - Legal Text' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm#25](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#25)> accessed 9 July 2020.

<sup>70</sup> World Trade Organisation, 'WTO Dispute Settlement: Resolving Trade Disputes Between Members'.

Conciliation, and Mediation (Article 5 of the DSU); and Arbitration (Article 25 of the DSU).<sup>71</sup> These alternatives differ from the formal process as they are less structured and are often arranged either by WTO members themselves or mediated by the WTO Director General.

## III.II Concerns with the Dispute Settlement system

The dispute settlement system of the WTO was negotiated in 1995 as part of the WTO Agreement, but the DSU has not been successfully updated since, despite being the subject of various reviews since the 1990s. Notably, at the 2001 Ministerial Conference in Doha, member states agreed to launch a review on improving and clarifying the DSU, which would be separate from the Doha Development Agenda “single undertaking”. While this review had a deadline of May 2003, it was extended indefinitely after 2004 and is still ongoing: it has been somewhat revitalized since November 2016 when it became clear that the U.S. would continue to oppose nominations to the Appellate Body, and has been operating in a more sequential manner since, albeit without successfully altering any part of the DSU.<sup>72</sup> The failure to successfully improve the dispute settlement system has become particularly acute as trade disputes have increased in quantity and complexity in the past two decades. While the dispute settlement system is still considered a central pillar of the WTO, states have become more concerned with the system’s efficiency and efficacy, eroding its stability.

### i. Delayed resolution of disputes

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<sup>71</sup> *A Handbook on the WTO Dispute Settlement System* (2nd edn, Cambridge University Press 2017) <<https://www.cambridge.org/core/books/handbook-on-the-wto-dispute-settlement-system/5743E5516DD8D7EA498D6DC78F81FB9C>> accessed 9 July 2020.

<sup>72</sup> ‘WTO | Dispute Settlement – Negotiations to Improve Dispute Settlement Procedures’ <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_negs\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm)> accessed 30 August 2020.

As the quantity and complexity of disputes have increased in the past decade, the dispute settlement system has been subjected to more pressure, resulting in a slower dispute settlement process. Under DSU Article 20, DSB decisions from the date of the establishment of a panel until a panel or appellate report should not exceed nine months, or 12 months in the case of an appeal.<sup>73</sup> Prompt settlement of disputes is essential for the efficacy of the WTO, as harmful practices or misinterpretations of WTO regulations must be quickly addressed to maintain states' trust in the institution. While in 90% of cases WTO members comply with rulings, they are given a 'reasonable period of time' to implement them, which in some cases can mean the implementation of rulings is delayed for a number of months or even years.<sup>74</sup> Appeals have become more common than the drafters of the DSU anticipated, with over 70% of panel rulings being appealed, which further prolongs litigation.<sup>75</sup> For example, a dispute between the U.S., New Zealand and Indonesia over the importation of horticultural products, animals and animal products that began in early 2013 did not reach a resolution until the Appellate Body report ruling on the issue was adopted in November 2017.<sup>76</sup> The slow dispute settlement process has frustrated many countries, leading some including the U.S. and China to undertake unilateral action such as imposing tariffs or regulations rather than following the WTO dispute settlement process. This endangers the very foundation of the DSU and the rules-based global trading system.

## ii. Reconciling and policing different trade regimes:

The WTO Dispute Settlement system has been placed under pressure as states question whether the organisation can effectively reconcile and police different trading regimes, notably that of

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<sup>73</sup> 'WTO | Dispute Settlement Understanding - Legal Text' (n 69).

<sup>74</sup> World Trade Organisation, 'WTO Dispute Settlement: Resolving Trade Disputes Between Members' (n 70).

<sup>75</sup> Jennifer Hillman, 'A Reset of the World Trade Organization's Appellate Body' (*Council on Foreign Relations*) <<https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>> accessed 9 July 2020.

<sup>76</sup> 'Statements by the United States at the WTO General Council Meeting' (*U.S. Mission to International Organizations in Geneva*, 15 October 2019) <<https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/>> accessed 14 August 2020.

China. The primary concern is not compliance, but that WTO rules either cannot be consistently and effectively applied, as in the case of rulings that involve determining what constitutes a public body in a state capitalist model, or how to respond to market distortions under antidumping laws. There is also concern that WTO rules fail to address issues that arise from China's particular economic system, such as discriminatory competition law enforcement or restrictions on data flows, or allegations of forced IP transfers.<sup>77</sup> This belief that the WTO is unable to address unfair practices has been a major factor in the Trump administration's decision to cease using the WTO as an intermediary forum and to undertake unilateral action against China. Even some who disagree with current U.S. policy, agree that the WTO is struggling to adapt to China's mercantilist and protectionist practices.<sup>78</sup> This issue is intrinsically tied to that of the time taken to resolve disputes, as many of the complaints against Chinese practices could to some extent be addressed through the WTO, but the time and expense of this has frustrated other Members.<sup>79</sup>

### iii. The Appellate Body

The Appellate Body, as the body with the final say in over 70% of cases, has gained a heightened importance in the WTO Dispute Settlement system and become the most controversial aspect of the WTO dispute settlement system. In particular, the U.S. under the Trump administration has blocked the appointment of Appellate Body members since 2016, citing numerous grievances with the conduct and operation of the AB, some of which will be outlined in this section. This is not an entirely new development, as the U.S. has previously blocked AB appointments under the Obama administration. However, the U.S.' refusal to appoint new members has continued for nearly 4 years, and as of December 2019 the AB had only one member left, and no longer meets the minimum threshold of three required to hear appeals.<sup>80</sup>

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<sup>77</sup> Ignacio Garcia Bercero (n 1) 9.

<sup>78</sup> 'Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented' (n 60).

<sup>79</sup> *ibid.*

<sup>80</sup> Jean Galbraith, 'United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process' (2019) 113 *American Journal of International Law* 822.

While the AB is non-functional, panel findings on disputes that are appealed cannot be adopted under DSU Article 16.4, raising concerns that frustrated members will increasingly resort to unilateral retaliation, creating a series of mini ‘trade wars’.<sup>81</sup> This is particularly concerning given the current global economic downturn and rise in protectionist policies and rhetoric due to disruptions in trade caused by the Covid-19 pandemic. In light of this, it is especially important that the WTO dispute settlement system, including the AB, functions efficiently and effectively to ensure that WTO members do not engage in improper practices to the detriment of other, particularly, smaller members.

### *What are the major concerns raised regarding the AB?*

The U.S. has been the most prominent and vocal critic of the Appellate Body, with its frustrations with the AB culminating in its paralysis since 2019. There are broadly two categories of concerns: procedural concerns and concerns regarding systemic issues of interpretation and jurisdiction.

In terms of procedure, the primary sources of concern are that for the past decade, the AB has recurrently violated its mandatory 90-day deadline (Article 17.5 DSU) for issuing a report and that AB members have continued to issue rulings on cases after their terms end. The AB added a rule to its own Working Procedures (Rule 15) that allows AB members to continue on cases that began before the expiration of their term. The U.S. contends that this authority lies solely with the DSB under Articles 17.1 and 17.2 of the DSU and that this practice enables AB members to continue receiving stipends and daily fees without the consent of WTO member states.<sup>82</sup> This was a concern raised by other countries as early as 1996, when India raised a concern at the DSB that Rule 15 would allow the AB members to continue serving without DSB approval.<sup>83</sup> Regarding the 90-day deadline, the main concern with this violation is that it negatively impacts the rights and confidence of WTO Members by allowing harmful practices to continue

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<sup>81</sup> *ibid.*

<sup>82</sup> United States Trade Representative, ‘Report on the Appellate Body of the World Trade Organization’ (2020).

<sup>83</sup> WTO Dispute Settlement Body, ‘Minutes of Meeting (21 February 1996) WTO Doc. WT/DSB/M/11’ <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=5912&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=5912&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)> accessed 13 August 2020.



for sometimes over a year, reducing the deterrent for member states who do not respect WTO obligations.<sup>84</sup> Indeed, since 2014, no appeal has been completed within the 90-day deadline.<sup>85</sup> While some other countries agree with the U.S. complaints about these practices, most acknowledge that the practices are a result of the increasing quantity and complexity of cases and thus sympathize with the AB. However, as seen in reform proposals such as the Walker proposal which has garnered support from numerous countries, it appears that most are willing to enforce stricter procedural rules within the AB.<sup>86</sup>

The concerns with the AB's conduct extend beyond procedural issues to its treatment of cases. As outlined in the United States Trade Representative's Report on the Appellate Body of the WTO 2020, the U.S. holds that the AB has exceeded its authority in a number of ways:

- (1) by reviewing panel findings of fact in violation of DSU Articles 17.6 & 17.13 and by making factual findings regarding interpretation of Members' domestic laws;
- (2) by issuing advisory opinions not necessary to resolve disputes, violating Article 3.7 of the DSU which states that the dispute settlement process solely seeks to achieve a "positive solution" to disputes, not produce interpretations or law in the abstract;
- (3) by declaring its reports be treated as near-binding precedent for future panels; and
- (4) by attempting to fill 'gaps' in agreements, adding new obligations on Members without their agreement or eroding their rights, for example by disregarding Article 17.6 of the Antidumping Agreement which suggests deference to national authorities.<sup>87</sup>

The common thread is the view that the AB has overstepped its allocated role and authority as laid out in the DSU, violating WTO members' agreed-upon rights and eroding their authority over interpretation and implementation of WTO texts. While there are various concerns with the AB outlined by the Trump Administration, many of which have been longstanding U.S.

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<sup>84</sup> United States Trade Representative (n 82).

<sup>85</sup> Ali Amerjee, 'The Multiparty Interim Appeal Arbitration Arrangement: Will the US Be Missed?' | TradeLinks | Blogs | Insights | Linklaters' (*Linklaters.com*) <<https://www.linklaters.com/en/insights/blogs/tradelinks/2020/july/the-multiparty-interim-appeal-arbitration-arrangement-will-the-us-be-missed>> accessed 11 February 2021.

<sup>86</sup> World Trade Organisation, 'General Council Minutes of Meeting, WT/GC/M/181'.

<sup>87</sup> United States Trade Representative (n 82) 47-70.

policy concerns, the catalyst for the U.S.’ increasingly aggressive stance towards the AB was decisions the AB made regarding trade remedies such as anti-dumping, anti-subsidy and safeguard measures, most notably the AB’s outlawing of the practice of “zeroing” long applied to anti-dumping margins and its interpretation of the WTO Safeguards Agreement.<sup>88</sup>

A further cause of tension within the WTO is the divergence in opinion between the U.S. and E.U., regarding the AB’s methods, conduct and nature. As two of the largest global players in trade and two active and influential WTO members, their differing views on how the AB should operate complicates attempts to reach a compromise and implement reforms. It is often suggested that the U.S. and E.U. have competing visions of law, with the E.U. seeking a more formalized court structure similar to the European Court of Justice, and the U.S. opposing this increased independent authority.<sup>89</sup> Indeed, in a statement in 2019, USTR Ambassador Shea suggested that the AB has been able to stray from its mandate because “some WTO members believe that the Appellate Body is an independent “international court” and its members are like “judges” who inherently have more authority to make rules than the focused review provided in the DSU”, encouraging AB members themselves to take a more expansive view of their role than outlined in the DSU.<sup>90</sup>

The fixed nature of AB membership contrasts sharply with the more ad-hoc nature of panels. Panellists are selected for individual disputes and thus do not necessarily develop a sense of institutional identity. By contrast, the AB has been accused of seeing itself as a court with the power to dictate its own conduct and rules. The U.S. has insisted, in its response to reform proposals generated in an attempt to resume appointments to the AB, that it seeks an explicit political recognition that the AB has overstepped its mandate rather than piecemeal reforms of specific aspects.<sup>91</sup> This complicates efforts to implement reforms, as Members must reach

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<sup>88</sup> Jennifer Hillman, ‘Three Approaches to Fixing the World Trade Organization’s Appellate Body: The Good, The Bad and the Ugly?’ 15, 5.

<sup>89</sup> ‘111:Trade Policy Under Trump’ <<https://www.tradetalkspodcast.com/podcast/111-trade-policy-under-trump/>> accessed 11 February 2021.

<sup>90</sup> Ambassador Dennis Shea, ‘Ambassador Shea: Matters Related to the Functioning of the Appellate Body’ (9 December 2019) <<http://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/>> accessed 11 February 2021.

<sup>91</sup> ‘Statements by the United States at the WTO General Council Meeting’ (n 76).

consensus on what they believe the role of the WTO dispute settlement process, and in particular the AB, should hold, which is in part an ideological political issue that may be subject to changes in political administrations and regimes. Nonetheless, the divergence in countries' perception of the AB does not make reform impossible, as the E.U. and other states including Japan, Australia and China have worked to alleviate U.S. concerns through supporting reform proposals such as the Walker proposals (see below), suggesting that they are willing to come to a compromise. However, until the U.S. shows a willingness to actively engage in this process of generating potential reforms, which it has not since it began blocking AB appointments in 2016, it will be difficult to reach a solution to the paralysis of the AB.

### *Proposed Appellate Body reforms*

While there are numerous proposals on how to reform the Appellate Body and end the deadlock on appointments, the most prominent proposed reform, as of early 2020, is the *Draft Decision on the Functioning of the Appellate Body* (Walker proposal). This draft decision was presented to the WTO General Council in December 2019 by H.E. Dr. Walker of New Zealand, who also served as facilitator of the Informal Process on Matters Related to the Functioning of the Appellate Body. This proposal covers 7 aspects of reform:

- Transitional rules for outgoing Appellate Body members;
- The 90-day rule;
- Scope of appeal;
- Advisory opinions;
- Precedent;
- 'Overreach';
- Regular dialogue between the DSB and Appellate Body.<sup>92</sup>

When the proposal was presented to the General Council, many members such as China, Japan, and the E.U. expressed that they viewed it as a positive addition to discussions that featured numerous 'convergence points', which could provide the foundation for a future agreement on

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<sup>92</sup> WTO General Council, 'Draft Decision: Functioning of the Appellate Body, WTO Doc. WT/GC/W/791'.

reforms. However, despite the proposal addressing most of the specific grievances raised by the USTR, the U.S. rejected the proposal, stating that the core issue of why members had allowed the AB to deviate from the original language of the DSU had not been sufficiently addressed. The U.S. also questioned whether the AB would follow the new guidelines any more faithfully than it did those of the DSU.<sup>93</sup> While the proposal has not been officially adopted and does not completely satisfy most members, it does provide a valuable basis for discussion of reform as it is founded upon points of convergence between Members established through the Informal Process.

The Walker proposal has been used as a basis for further suggestions of AB reform by many parties. Notably, Bruce Hirsh, Terence Stewart, and Jennifer Hillman have proposed improvements or additions to the Walker proposals; all three have experience working on U.S. trade with the U.S. Government as well as within the WTO, with Hillman having served as an AB member. Their suggestions focus on enhancing the terms of the Walker proposal and adding more specific measures. Most of the proposals to be discussed focus on addressing U.S. concerns with the AB, as the U.S. is currently the only WTO Member blocking AB appointments and is regarded as the major party to conciliate.

AB reform, while still widely discussed both within and outside the WTO, appears to currently be on hold as the Trump administration has shown little interest in constructively engaging with these efforts. In June 2020, United States Trade Representative Robert Lighthizer stated to the Senate Ways and Means Committee that he sees no reason for the WTO Appellate Body to ever resume operation.<sup>94</sup> In the absence of U.S. leadership on the issue, other members have sought different avenues to ensure there is a functioning dispute settlement mechanism, most prominently through the *Multi-party interim appeal arbitration arrangement* (MPIA) initiated by the E.U., China, and over 20 other countries in April 2020.

The MPIA establishes a system of arbitration under DSU Article 25 to operate in the absence of the AB and is open to all WTO Members. This arbitration system is based on the core

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<sup>93</sup> World Trade Organisation, 'General Council Minutes of Meeting, WT/GC/M/181' (n 86).

<sup>94</sup> Jennifer A Hillman, 'The United States Needs a Reformed WTO Now' [2020] Council of Foreign Relations 23.

features of appellate review: appeals are to be heard by three arbitrators selected from a standing pool of ten experts unaffiliated with any government, who will be supported administratively and legally by staff separate from the WTO Secretariat. These appeals are to be limited to issues of law in panel reports and are also subject to a 90-day timeline, although the involved parties may agree to an extension of this timeline.<sup>95</sup> The MPIA is viewed as a stopgap measure to be in place only until the AB has again become fully functional, highlighting WTO Members' eagerness to ensure that individual trade disputes do not escalate into trade wars.

If the MPIA proves successful in resolving appealed dispute rulings, it may be useful as a potential model for reform of some aspects of the AB, as it does attempt to address critiques of the AB by not allowing dicta opinions, providing a 90 day time limit (that can be extended with agreement of the involved parties). In addition, since it has a standing body of ten arbitrators, may provide useful insight into whether a larger appeals body can resolve cases more efficiently.<sup>96</sup> However the MPIA's very existence may also decrease the incentive for some WTO members to pursue AB reform, as they may instead rely on the MPIA for all appeals.<sup>97</sup> Nevertheless, the founding members of the MPIA agreement stated clearly in their proposal that it is not intended to replace the AB, but to serve as a temporary measure until the AB becomes functional again. As such, the MPIA does not, currently, herald the permanent eclipse of the AB.

Indeed, a critical weakness of the MPIA is that it cannot fully replicate, nor replace, the AB because as an *ad hoc* arbitration forum, the functionality of the MPIA depends entirely on the willingness of WTO Members to join and to use the arbitration system.<sup>98</sup> As of August 3, 2020, there were 24 signatories to the MPIA, however many prominent WTO Members have not joined, including the U.S., Japan, South Korea, India and South Africa. In the DSB, Japan stated that it did not choose to participate as it was unclear if the MPIA would serve the ultimate purpose stated in the proposal, while South Africa noted its hesitation was due to the possibility of the

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<sup>95</sup> WTO, 'Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes: Addendum' (2020) JOB/DSB/1/Add.12.

<sup>96</sup> Bashar Malkawi, 'MPIA and Use of Arbitration: Bypassing the WTO Appellate Body' <<https://www.jurist.org/commentary/2020/05/bashar-malkawi-mpia-wto-appellate-body/>> accessed 5 September 2020.

<sup>97</sup> Hillman (n 88).

<sup>98</sup> Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' 14.

MPIA becoming permanent.<sup>99</sup> The U.S. based its decision to not join on the grounds that the MPIA perpetuates the ‘failings of the Appellate Body’, as it does not believe the arrangement’s rules go far enough to ensure the AB’s faults are not simply recreated.<sup>100</sup> Furthermore, as the MPIA is voluntary, members who do not believe they have good chances of winning appeals have no incentive to participate and will likely choose to keep panel reports from being adopted by leaving the appeal open in the absence of a functioning AB.<sup>101</sup> A losing party in an appeal settled by the MPIA could also still give notice of a formal repeal, preventing the adoption of the panel report indefinitely.<sup>102</sup>

As the MPIA is still relatively new, it is uncertain if these potential weaknesses will cripple the functioning of this arbitration system in the short-term. Nonetheless, it does not appear to be a viable long-term solution, as even if countries such as Japan or India joined, without the participation of the U.S. a large proportion of appealed disputes would remain unresolved. This is because the U.S. is the most prolific user of the dispute settlement system, both as a complainant and respondent in cases.<sup>103</sup> While the MPIA may provide an opportunity to test different reform proposals, such as those in the Walker Proposals, it cannot be relied upon to resolve the crisis of the WTO dispute settlement system due to the absence of prominent WTO members from the scheme.

## IV STAGNATION OF THE WTO NEGOTIATION FUNCTION

### IV.1 Introduction

In addition to providing a dispute settlement mechanism for international trade disputes, the WTO also seeks to facilitate trade negotiations between its members. The WTO therefore seeks to provide a forum for rulemaking as well as rule enforcement. However, over the past decade,

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<sup>99</sup> ‘Panels Established to Review Indian Tech Tariffs, Colombian Duties on Fries’ <[https://www.wto.org/english/news\\_e/news20\\_e/dsb\\_29jun20\\_e.htm](https://www.wto.org/english/news_e/news20_e/dsb_29jun20_e.htm)> accessed 11 February 2021.

<sup>100</sup> ‘Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva’.

<sup>101</sup> Payosova, Hufbauer and Schott (n 98).

<sup>102</sup> Hillman (n 88).

<sup>103</sup> Ali Amerjee (n 85).

trade negotiations through the WTO have become increasingly stagnant. Moreover, the authors of the paper believe that the stagnation of the WTO negotiations has contributed to the increased pressure and strain on the DSU described in the above section. In an ideal situation, the WTO's negotiation system would be efficient enough to allow for the creation of new rules to address potential dissatisfaction with outcomes of dispute settlement. By contrast, the WTO's failure to complete negotiating rounds aimed at updating rules for 21<sup>st</sup> century business has forced judges to use often outdated guidelines to settle disputes. This has fed complaints that the WTO courts were relying on their own interpretations and engaging in judicial overreach and judicial activism.<sup>104</sup> This section explores some of the institutional factors that have contributed to the stagnation of the WTO negotiation, in particular the Doha round of negotiations, which were launched in 2001 but have yet to be completed.

## IV.II The Doha Development Agenda

During the Uruguay Round, which concluded in 1994, countries signed several key agreements, including agreements regarding reduced tariffs on non-agricultural trade, non-tariff imports barriers in agriculture and a trade liberalisation framework for agriculture.<sup>105</sup> The results of the negotiations were underscored by a broader political trade-off, known as the Uruguay Bargain. The bargain involved developing countries taking on “significant commitments in “new areas” such as intellectual property and services,” while developed countries would reduce import barriers in certain key sectors, particularly textiles and agriculture.<sup>106</sup>

However, despite the perceived success of the round, some have argued that the outcome was unbalanced against developing countries.<sup>107</sup> Specifically, as Finger and Nogués have noted,

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<sup>104</sup> Jacob M Schlesinger, ‘How China Swallowed the WTO’ *Wall Street Journal* (1 November 2017) <<https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308>> accessed 9 August 2020.

<sup>105</sup> ‘WTO | Legal Texts - A Summary of the Final Act of the Uruguay Round’ <[https://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm](https://www.wto.org/english/docs_e/legal_e/ursum_e.htm)> accessed 2 September 2020.

<sup>106</sup> J Michael Finger and Julio J Nogués, ‘The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations’ (2002) 25 *The World Economy* 321, 322.

<sup>107</sup> Finger and Nogués (n 106).

although the reduction of import barriers benefitted both developed and developing countries, the new domestic regulations developing countries were required to adopt imposed significant costs with the benefits being uncertain.<sup>108</sup> At the Seattle Ministerial in 1999, developing countries therefore expressed desires for a negotiation agenda that focused on implementing and rebalancing the Uruguay Round commitments.<sup>109</sup> Although the ministerial conference was unsuccessful, it did lead to the launch of the Doha Development Agenda, which remains incomplete.<sup>110</sup>

The Doha Development Agenda (DDA, or “Doha Round”) was launched in November 2001, based on an ambitious and comprehensive agenda that had to be negotiated as a single undertaking requiring the consensus of all WTO members.<sup>111</sup> The DDA covered about 20 areas of trade, and the stated goal was to “reform the international trading system by introducing lower trade barriers and revised trade rules” and to “improve the trading prospects of developing countries.”<sup>112</sup>

Despite close transatlantic cooperation and efforts to bring developing nations onboard to the negotiations, consensus has proved elusive.<sup>113</sup> Initially, the goal was to finish the talks in 2005, however the deadline was postponed to 2006 after which the talks were suspended because the G-6 (US, EU, Brazil, India, Australia and Japan) were unwilling to compromise on a reduction in agricultural subsidies.<sup>114</sup> By July 2008, the DDA negotiations had all but collapsed and the countries focus has shifted decisively towards bilateral and non-WTO plurilateral agreements.<sup>115</sup> Although countries had been able to reach an agreement on the majority of issues, as a result of

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<sup>108</sup> *ibid.*

<sup>109</sup> Ignacio Garcia Bercero (n 1).

<sup>110</sup> *ibid.*

<sup>111</sup> Kimberly Amadeo, ‘The Real Reason Why the Doha Round of Trade Talks Failed’ (*The Balance*) <<https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365>> accessed 2 September 2020.

<sup>112</sup> ‘WTO | The Doha Round’ <[https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm)> accessed 4 July 2020.

<sup>113</sup> Ignacio Garcia Bercero, ‘What Do We Need a World Trade Organization for? - The Crisis of the Rules Based System and WTO Reform’ (Bertelmann Stiftung 2020) 23.

<sup>114</sup> Amadeo (n 111).

<sup>115</sup> Ignacio Garcia Bercero (n 1) 23.



the single undertaking approach, staunch disagreement on several smaller elements of the package, such as agricultural access, stalled the progress of the negotiations.<sup>116</sup>

In March 2010, countries participated in a stocktaking exercise and met in informal bilateral and plurilateral groups in order to try to find compromise in their varied agendas. However, by 2011, the Doha round was progressing slowly, ambitions had been scaled down, and it was clear that the existing WTO negotiating structure was under a lot of strain.<sup>117</sup> According to Bellman, at this stage “the interests of major trading powers were still not close enough” for an agreement to be found.<sup>118</sup> Efforts were made to create a mini package that focused on concerns of least developed countries, which would focus on duty-free quota-free access for their exports, an LDC services waiver, progress on cotton and improved rules of origin. However, it proved difficult to find consensus on these issues. The package was broadened to include non-LDCs following demands by the U.S., the package was broadened and soon began to unravel.<sup>119</sup>

The Bali Package, specifically the Trade Facilitation Agreement (TFA) which was agreed at the Bali Ministerial Conference in 2013, appeared to provide a glimpse of hope. The TFA focused on “reducing red tape and facilitating customs procedures in an effort to cut down the cost of doing business.”<sup>120</sup> The agreement represented a key milestone as it was the first multilateral agreement ever negotiated under the auspices of the WTO and was perceived as a critical step towards “restoring the credibility” as a form for trade negotiations. In addition to the TFA, WTO members have also been able to conclude the services waiver and the Nairobi package (December 2015), whose centrepiece was a commitment to eliminate subsidies for farm

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<sup>116</sup> Alan Beattie and Frances Williams, ‘Doha Trade Talks Collapse’ *Financial Times* (29 July 2008) <<https://www.ft.com/content/0638a320-5d8a-11dd-8129-000077b07658>> accessed 7 January 2020.

<sup>117</sup> Manfred Elsig and Thomas Cottier, ‘Reforming the WTO: The Decision-Making Triangle Revisited’ in Thomas Cottier and Manfred Elsig (eds), *Governing the World Trade Organization* (Cambridge University Press 2011) 290 <[https://www.cambridge.org/core/product/identifier/CBO9780511792502A029/type/book\\_part](https://www.cambridge.org/core/product/identifier/CBO9780511792502A029/type/book_part)> accessed 26 August 2020.

<sup>118</sup> Christophe Bellmann, Jonathan Hepburn and Marie Wilke, ‘The Challenges Facing the Multilateral Trading System in Addressing Global Public Policy Objectives’ [2012] *International Development Policy | Revue internationale de politique de développement* <<http://journals.openedition.org/poldev/1012>> accessed 27 August 2020.

<sup>119</sup> *ibid.*

<sup>120</sup> Christophe Bellmann, ‘The Bali Agreement: Implications for Development and the WTO’ (2014) 5 *International Development Policy | Revue internationale de politique de développement* <<http://journals.openedition.org/poldev/1744>> accessed 4 July 2020.

exports.<sup>121</sup> The Nairobi package also included an agreement to end export subsidies for agriculture and adopt a special safeguarding mechanism for developing countries which allows them to temporarily increase tariffs on agricultural products in certain situations.<sup>122</sup> Despite these small successes, the Doha round is ‘essentially dead’ and the failure to conclude the broader Doha round has seriously impacted the credibility of the WTO as a negotiating forum. The ongoing paralysis has meant that the “centre of gravity of international trade to bilateral negotiations”.<sup>123</sup> Moreover, the failure of the Doha Round highlights many of the substantive and procedural aspects of negotiations that the WTO will need to address in order to move forward.

## i. Divergence between “Developed” and “Developing” Countries

There are a variety of views as to why the DDA failed. Bellman points to a variety of contributing factors including the failure of the DDA negotiations including the politicisation of negotiations and the global financial.<sup>124</sup> While many factors contributed to the stagnation of the talks, one overarching theme of the DDA appears to have been divergence between “developed” and “developing” countries and a failure to fully address many of the imbalances between them that were unanswered by the Uruguay round. The Doha Round was shaped by increased diversity and varying expectations between members of what WTO membership entailed, as well as the rise of emerging economies such as Brazil, China and India who participated in more assertive developing country coalitions.<sup>125</sup> The demands of these emerging economies, were perhaps most vocal in relation to agriculture, which lay at the heart of the DDA.

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<sup>121</sup> ‘WTO | 2015 News Items - WTO Members Secure “Historic” Nairobi Package for Africa and the World’ <[https://www.wto.org/english/news\\_e/news15\\_e/mc10\\_19dec15\\_e.htm](https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm)> accessed 2 September 2020.

<sup>122</sup> ‘WTO | TENTH WTO MINISTERIAL CONFERENCE, NAIROBI, 2015 - Tenth WTO Ministerial Conference - Nairobi’ <[https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_agriculture\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm)> accessed 2 September 2020.

<sup>123</sup> Ignacio Garcia Bercero (n 1); Antoine Martin and Bryan Mercurio, ‘Doha Dead and Buried in Nairobi: Lessons for the WTO’ (2017) 16 *Journal of International Trade Law and Policy* 49.

<sup>124</sup> Bellmann, Hepburn and Wilke (n 118).

<sup>125</sup> *ibid.*

## *Agriculture*

Agriculture, which is a particularly politically sensitive topic in WTO negotiations and one that is heavily shaped by tensions between developed and developing countries, emerged as the key sticking point of the Doha Round.<sup>126</sup> Agriculture is particularly contentious, partially because protectionist policies remain popular in the sector, both in developing and developed countries and because of the difficult combination of restrictions on market access and incompatible policy interests between major economies.<sup>127</sup> As negotiations progressed, a “consensus emerged among a powerful group of developing countries (including Brazil, China, India South Africa and the G-20)” which centred around delivering tangible results for developing countries.<sup>128</sup> Importantly, this group of members also felt that the nature of a “development round” meant that they shouldn’t be forced to liberalise their own markets.<sup>129</sup>

There was significant contention over the reduction of domestic and export subsidies in agriculture by developing countries, as well as the special sensitivities and special situations that applied to developing countries.<sup>130</sup> The G-33 group of developing countries sought strong safeguard mechanisms that would enable them defend agricultural producers from sudden import surges or price depressions, however the U.S. and other exporting countries were concerned that too many flexibilities for developing countries would undermine the growth of normal trade.<sup>131</sup> In addition, developed countries “showed reluctance to give specific commitments on export subsidies and domestic support measures,” and there was later disagreement as to the level to which the domestic support measures should be reduced.<sup>132</sup>

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<sup>126</sup> ‘WTO | TENTH WTO MINISTERIAL CONFERENCE, NAIROBI, 2015 - Tenth WTO Ministerial Conference - Nairobi’ (n 122); ‘New Focus Needed for Doha Round’ <<http://www.fao.org/newsroom/en/news/2006/1000375/index.html>> accessed 2 September 2020.

<sup>127</sup> Martin and Mercurio (n 123).

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.* 51.

<sup>130</sup> Author Peter Ungphakorn, ‘The 20-Year Saga of the WTO Agriculture Negotiations’ (*Trade & Blog*, 22 March 2020) <<https://tradebetablog.wordpress.com/2020/03/23/20-year-wto-ag-negotiations/>> accessed 2 September 2020; ‘New Focus Needed for Doha Round’ (n 126).

<sup>131</sup> Bellmann, Hepburn and Wilke (n 118).

<sup>132</sup> Fasih Uddin, ‘The Fate of Doha Development Agenda’ (2012) 9 *Policy Perspectives* 87, 90.

The 10<sup>th</sup> Ministerial Conference held in Nairobi, attempted to revive the Doha round by reaching an agreement on key agricultural issues that had previously stalled the round. On one hand, WTO members made some progress, as members committed to abolishing export subsidies for farm exports. Developed countries agreed to immediately remove export subsidies for a handful of agriculture projects and developing countries were given a longer implementation period.<sup>133</sup> WTO members also agreed to continue negotiations on a special safeguard mechanism (SSM) that would enable developing countries to temporarily raise tariffs on agricultural products in exceptional cases<sup>134</sup>. However, the decision regarding the SSM, does little to address the core ongoing debate as to what factors should trigger the SSM and what level of protection would be reasonable.<sup>135</sup> Instead, the ministerial declaration is in some ways an agreement to agree. Similarly, the Nairobi package failed to deliver an actual result in relation to public stockholding for food security purposes, and instead committed to “engaging constructively to negotiate, and make all concerted efforts to agree and adopt a permanent solution on the issue of public stockholding for food security.”<sup>136</sup> Thus, while Nairobi has been hailed as a “historic” deal, it left much to be desired, and did not reinvigorate the Doha round and by contrast left “many decisions for future discussion” including the fate of the Round.<sup>137</sup>

### *Special and Differential Treatment*

Much of the discussion regarding agriculture during the Doha Round is closely connected to the broader debate regarding special and differential treatment, which remains a key source of contention between WTO members. Special and Differential Treatment (SDT), is a widely accepted principle of rules governing international trade and essentially means that developing countries are not obligated to assume the same scope, level or depth of binding commitment as

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<sup>133</sup> ‘WTO | TENTH WTO MINISTERIAL CONFERENCE, NAIROBI, 2015 - Tenth WTO Ministerial Conference - Nairobi’ (n 122).

<sup>134</sup> ‘WTO | Agriculture - Negotiations’ <[https://www.wto.org/english/tratop\\_e/agric\\_e/negoti\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/negoti_e.htm)> accessed 21 July 2020.

<sup>135</sup> Martin and Mercurio (n 123) 52–53.

<sup>136</sup> *ibid* 53.

<sup>137</sup> *ibid* 56–57.

developed countries.<sup>138</sup> For example members that benefit from SDT may have longer time frames for the implementation of commitments and agreements as well as support from the WTO secretariat to help build the capacity to carry out WTO work or implement technical standards.<sup>139</sup> The stated objective of SDT is to ensure that developing countries, especially the least-developed countries “secure a share in the growth of world trade commensurate with their needs.”<sup>140</sup>

The legal basis for SDT is the GATT “Enabling Clause” which allows for non-reciprocal preferential treatment of developing and least-developed countries. In addition, the Agreement establishing the WTO required that all countries joining the WTO be bound by earlier Multilateral and Plurilateral Trade Agreements, including the GATT “Enabling Clause” and all provisions relating to SDT.<sup>141</sup> Special and Differential Treatment, therefore, represents a key part of the Uruguay Bargain, and has also played a significant role in the DDA negotiations.<sup>142</sup>

Although SDT is a widely accepted principle, there remains significant debate as to which countries should still be allowed SDT and the scope of the exceptions that should be applied to countries that qualify for SDT. At the root of this issue, is the fact that there is currently no agreed criteria to define “developed” and “developing” countries or when a country graduates from developed to developing.<sup>143</sup> There is general consensus that countries that are classified by the UN’s Committee for Development Policy as least-developed countries (LDCs) should qualify for SDT to facilitate their economic development.<sup>144</sup> This consensus is supported by the fact that there is a clear and accepted definition of which countries as LDCs. The debate within the WTO is therefore regarding which other developing countries should be allowed to benefit from SDT

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<sup>138</sup> Mike Humphrey, ‘How Can LDCs Continue to Ensure They Benefit from Special and Differential Treatment in the WTO?’ (Institute of International Trade, University of Adelaide 2019) Policy Brief.

<sup>139</sup> ‘WTO | Development - Special and Differential Treatment Provisions’ <[https://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_differential\\_provisions\\_e.htm#legal\\_provisions](https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions)> accessed 19 August 2020.

<sup>140</sup> Paola Conconi and Carlo Perroni, ‘Special and Differential Treatment of Developing Countries in the WTO’ (2015) 14 *World Trade Review* 67.

<sup>141</sup> Humphrey (n 138) 3.

<sup>142</sup> Conconi and Perroni (n 140).

<sup>143</sup> Humphrey (n 138) 3.

<sup>144</sup> Humphrey (n 138).

and is complicated by the fact that countries are allowed to self-designate their status if they are not LDCs.<sup>145</sup>

The self-designation approach has resulted in significant controversy, and some have argued that it is a central reason for the lack of progress in the Doha Round.<sup>146</sup> Currently some countries that are at the high GNI end of the UN's developing countries list continue to claim SDT, including China, Singapore, the UAE, Mexico and South Korea.<sup>147</sup> Some countries, have chosen to "graduate" from SDT, such as Brazil, however these countries remain in the minority.<sup>148</sup> Developed countries have expressed the view that this is untenable and that they have shouldered the burden of trade liberalization for too long and that developing countries should shoulder more obligations, whereas LDCs and low-income developing countries and some middle income countries say WTO rules are hampering their efforts to modernise.<sup>149</sup>

Key WTO members have expressed increased frustration with the current approach to SDT and have called for reform. The E.U. considers the current system to be "an antiquated approach to flexibilities which allows over 2/3 of the membership including the world's largest and most dynamic economies to claim special treatment."<sup>150</sup> The U.S. view on the current approach, as expressed by Ambassador Shea, is that rather than serving as a negotiation tool that is "deployed constructively to ensure successful implementation of multilateral outcomes", special and differential treatment is currently "an obstacle, raised by some to deflect engagement on substance and by others to maintain outdated asymmetries."<sup>151</sup> Moreover, the Trump administration has expressed the view that the perpetuation of the self-designation system has

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<sup>145</sup> *ibid* 3.

<sup>146</sup> *ibid*.

<sup>147</sup> 'Memorandum on Reforming Developing-Country Status in the World Trade Organization' (*The White House*) <<https://www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization/>> accessed 4 September 2020; 'Reforming the Treatment of Developing Countries at the WTO' (*Institute for International Trade / University of Adelaide*) <<http://iit.adelaide.edu.au/research/reforming-the-treatment-of-developing-countries-at-the-wto>> accessed 11 July 2020.

<sup>148</sup> Humphrey (n 138) 4.

<sup>149</sup> Ngozi Okonjo-Iweala, 'Reviving the WTO' (*Brookings*, 22 June 2020) <<https://www.brookings.edu/opinions/reviving-the-wto/>> accessed 6 August 2020.

<sup>150</sup> 'WTO Modernisation: Introduction to Future EU Proposals' (European Commission 2018).

<sup>151</sup> Ambassador Dennis Shea, 'Statements by the United States at the WTO General Council Meeting' mittee - Heads of Delegation Meeting' (*U.S. Mission to International Organizations in Geneva*, 6 December 2019) <<https://geneva.usmission.gov/2019/12/06/ambassador-sheas-statement-at-the-wto-trade-negotiating-committee-heads-of-delegation-meeting/>> accessed 27 August 2020.

“severely damaged the negotiation arm of the WTO by making every negotiation a negotiation about setting high standards for a few, and allowing vast flexibilities or exemptions for the many.”<sup>152</sup>

Despite increased frustration with the current system, there remains divergence on the path forward. The U.S., in early 2019, suggested that countries that are part of the OECD or G20, considered a “high-income” country by the World Bank, or generate more than 0.5% of global merchandise trade should not benefit from self-designating for SDT.<sup>153</sup> In response, China, India, South Africa, Venezuela, and several other developing countries came together to reject the U.S.’ presidential memorandum<sup>154</sup> and affirmed the importance of “self-designation.”<sup>155</sup> China in particular, whose developing country status has been the subject of significant controversy, has sought to safeguard its right to SDT in its reform proposals. The E.U. proposals may, however, provide a helpful starting point. The E.U. has proposed that members should be actively encouraged and incentivised to “graduate and opt-out of SDT,” either on an agreement-by-agreement-basis or horizontally. Importantly, the E.U. has also recommended that for future agreements, the WTO should move away from “open-ended block exemptions” and towards a “needs-driven and evidence-based approach that will ensure that SDT will be as targeted as possible.”<sup>156</sup> The authors of this paper consider this to be crucial in order to make SDT more effective for developing countries and to promote more effective negotiations.

## ii. The Single Undertaking Approach

The de facto failure of the DDA is attributable to both substantive and more structural concerns.<sup>157</sup> Although the WTO agreements allow the use of a voting mechanism, which would

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<sup>152</sup> ‘Reforming the Treatment of Developing Countries at the WTO’ (n 147).

<sup>153</sup> Tom Miles, ‘U.S. Drafts WTO Reform to Halt Handouts for Big and Rich States’ *Reuters* (15 February 2019) <<https://www.reuters.com/article/us-usa-trade-wto-idUSKCN1Q426T>> accessed 11 February 2021.

<sup>154</sup> ‘Memorandum on Reforming Developing-Country Status in the World Trade Organization’ (n 147).

<sup>155</sup> ‘Reforming the Treatment of Developing Countries at the WTO’ (n 147) 4.

<sup>156</sup> ‘WTO Modernisation: Introduction to Future EU Proposals’ (n 150).

<sup>157</sup> Elsig and Cottier (n 117) 300.

allow for decisions to be made by a simple majority vote, voting by consensus has become the de facto method of decision making in WTO negotiations.<sup>158</sup> In addition, during the Doha Round, WTO members adopted a ‘single undertaking’ approach which required that all areas of the package were negotiated and adopted by all parties at the same time. The principle, along with the requirement for consensus, derives from the member-driven nature of the WTO.<sup>159</sup> However, while the single undertaking has on occasion been beneficial in the past, the authors of this paper consider that, during the Doha round, this approach has created an additional barrier to consensus, which given the diversity of WTO members’ interests, is inherently difficult to reach.<sup>160</sup>

The single undertaking approach emerged during the Uruguay Round and was intended to extend disciplines negotiated in earlier rounds to all members of the WTO. The argument was that requiring all agenda items to be decided on collectively was necessary to address free-riding by non-signatories to previously negotiated codes, which operated on a most-favoured-nation (MFN) basis.<sup>161</sup> As a result, during the Uruguay round, the U.S. and E.U. pushed for a single undertaking in order prevent asymmetric obligations. This meant that WTO members were only allowed to abstain from a few sector specific commitments, like the government procurement agreement.<sup>162</sup> As a compromise, developing countries were instead granted longer periods of implementation.

The single undertaking approach works by creating issue “linkages” which are intended to encourage member to make concessions on certain issues in order to make progress on other demands.<sup>163</sup> The idea essentially was to create a basket of issues, with the idea that all WTO

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<sup>158</sup> Alex Ansong, ‘Single Undertaking, Different Speeds: Pliable Models for Decision-Making in the WTO’ (2018) 21 *Journal of International Economic Law* 395, 1.

<sup>159</sup> Bellmann, Hepburn and Wilke (n 118).

<sup>160</sup> *ibid.*

<sup>161</sup> Bernard Hoekman and Petros Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”?’ Assessing the Case for More Plurilateral Agreements’ *European Journal of International Law* <<https://academic.oup.com/ejil/article/26/2/319/423063>> accessed 16 August 2020.

<sup>162</sup> Elsig and Cottier (n 117) 299.

<sup>163</sup> Bellmann, Hepburn and Wilke (n 118).



members would have enough of a stake in at least one or a few of the issues on the table to make significant concessions.

Although the single undertaking approach helped to achieve a significant outcome during the Uruguay round, Elsig and Cottier (2011) note that during the Doha round, WTO members had adjusted to the logics of the single undertaking and had now come to adopt the view that “being a first mover in terms of making a meaningful concession is seen as a disadvantage.”<sup>164</sup> Moreover, during the Doha round, negotiators did not seek to establish linkages in order to create longer term benefits, but instead focused on “achieving short-term gains for tactical reasons.”<sup>165</sup> This results in a situation where rather than creating linkages that foster agreement, linkage creation prevents agreements from moving ahead, because members withhold their support unless, sometimes unrelated demands, are complied with. Thus, during the DDA negotiations contracting parties did not move towards final negotiations and instead faced each other with minor concessions and major demands over the long negotiation cycle.<sup>166</sup>

There is some flexibility in the single undertaking approach which is illustrated by the Trade Facilitation Agreement (TFA) which came into effect on the 22<sup>nd</sup> of February 2017. The Doha Declaration, despite requiring a single undertaking approach, also states that “agreements reached at an early stage may be implemented on a provisional or definitive basis.”<sup>167</sup> This has allowed Ministerial Conference to conclude smaller agreements such as the Bali Package and the Nairobi Package.

The TFA was passed under Article X Paragraphs 1 and 3. Paragraph 1 gives any WTO member the right to initiate proposals and to amend the WTO agreements and the Multilateral Trade Agreements. These proposals must then be submitted to the Ministerial Conference, who can then vote either by consensus or two-thirds majority to accept the amendment.<sup>168</sup> Under Article

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<sup>164</sup> Elsig and Cottier (n 117) 300.

<sup>165</sup> Bellmann, Hepburn and Wilke (n 118).

<sup>166</sup> Elsig and Cottier (n 117).

<sup>167</sup> Rudolf Adlung and Hamid Mamdouh, ‘PLURILATERAL TRADE AGREEMENTS: AN ESCAPE ROUTE FOR THE WTO?’ 23, 4.

<sup>168</sup> ‘WTO | Legal Texts - Marrakesh Agreement’ <[https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm#articleX](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleX)> accessed 2 September 2020.

X:3, amendments accepted by the Ministerial Conference can take effect if at least two-thirds of WTO members accept it and it becomes binding only on the initial two thirds of the members that accept it. At the time of writing, 120 of the WTO's 164 members have accepted the agreement.<sup>169</sup> The passage of the TFA thus demonstrates what Ansong calls “evidence of a flexible and nuanced different speeds approach to the single undertaking.”<sup>170</sup>

However, this process currently only applies to amendments that relate specifically to provisions in a Multilateral Trade Agreement in Annex 1 of the WTO and therefore is of limited application when it comes to issues not currently covered by the agreements in Annex 1. Also, in order, for members to adopt an agreement under Article X:1 and X:3, the provisions of an agreement would have to inspire general support, which is growing increasingly difficult within the WTO.<sup>171</sup> As stated above, the other agreement concluded during the Doha round, Nairobi Package, also left a lot to desire. The authors therefore consider that while there is some flexibility in the single undertaking approach, it does not provide sufficient flexibility to prevent the type of impasse that has characterised the DDA.

## IV.III Members' responses to stalled WTO negotiations

Although WTO negotiations have not yielded many results in the last decade, WTO members have continued to negotiate and conclude, often ground-breaking trade agreements outside of the WTO. The failure of the DDA intensified the perception of the WTO as an organisation that is unable to deliver on its liberation function. As a result, trade policy decisively shifted towards negotiations outside the WTO framework.<sup>172</sup> One such agreement is the Trans-Pacific Partnership, which was concluded in 2016, and is the most comprehensive trade agreement negotiated since the WTO was established. Before the U.S. pulled out, the TPP covered 36%

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<sup>169</sup> 'WTO | Trade Topics - Trade Facilitation - Background' <[https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_agreeacc\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm)> accessed 5 September 2020.

<sup>170</sup> Ansong (n 158) 408.

<sup>171</sup> *ibid* 409.

<sup>172</sup> Ignacio Garcia Berceo (n 1) 7.

of global GDP.<sup>173</sup> ASEAN nations and 5 other major trading partners, China, Australia, New Zealand, Japan, South Korea are also currently negotiating the Regional Comprehensive Economic Partnership (RCEP) which if concluded would comprise 1/3<sup>rd</sup> of world population and would result in the largest free trade agreement.<sup>174</sup> Similarly, the U.S.’ America first policy is explicitly more oriented towards reworking and concluding new FTAs than pursuing solutions through the WTO.<sup>175</sup>

The proliferation of ground-breaking bilateral, regional and multilateral treaties outside of the WTO framework suggests that it is easier of members to agree on deals across a subset of WTO membership.<sup>176</sup> On one hand, this might seem like a better outcome for members engaged in these deals, as they are able to address pressing trade issues more quickly and efficiently. While this may be true, the proliferation of FTAs also risks the fragmentation of the global trading system which the WTO in many ways aims to address and more broadly, “endangers the WTO as a focal point of global trade governance.”<sup>177</sup>

One contributing factor to the fragmentation of the trading system, is the “discrepancy between the subject matter covered by FTAs and that of the WTO rules, both with respect to the subjects discussed as well as with the depth of integration”.<sup>178</sup> The consequence is that the WTO has little engagement with many of the new, often critical issues, that are covered in regional agreements.<sup>179</sup> With the Doha negotiations focused and stalled on “old economy issues”, FTAs proceed “in a more dynamic fashion and encompass “new economy” issues of interest to the advanced economies such as intellectual property, services, competition, investment and e-

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<sup>173</sup> Jeffrey J Schott, ‘Overview: Understanding the Trans-Pacific Partnership’ 13.

<sup>174</sup> Yen Nee Lee, ‘The World’s Largest Trade Deal Could Be Signed in 2020 – and the US Isn’t in It’ (*CNBC*, 11 November 2019) <<https://www.cnbc.com/2019/11/12/what-is-rcep-asia-pacific-trade-deal-slanted-to-be-worlds-largest-fta.html>> accessed 6 September 2020.

<sup>175</sup> “America First” – U.S. Trade Policy under President Donald Trump’ <<https://english.bdi.eu/article/news/america-first-u-s-trade-policy-under-president-donald-trump/>> accessed 25 July 2020.

<sup>176</sup> Bernard M Hoekman and Petros C Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”? Assessing the Case for More Plurilateral Agreements’ (2015) 26 *European Journal of International Law* 319.

<sup>177</sup> Robert Basedow, ‘The WTO and the Rise of Plurilateralism—What Lessons Can We Learn from the European Union’s Experience with Differentiated Integration?’ (2018) 21 *Journal of International Economic Law* 411.

<sup>178</sup> Hoekman and Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”?’ (n 176) 325.

<sup>179</sup> *ibid.*

commerce.”<sup>180</sup> Although the WTO has entertained discussions on these issues, it has made little real progress. This divergence in content is illustrated by the Singapore issues which focused on trade, investment and competition and were removed from the Doha agenda but appear in almost all comprehensive FTAs.<sup>181</sup> In an ideal world, innovative FTAs would serve as a steppingstone to multilateral negotiations within the WTO on new topics, however, the stagnation of WTO negotiations means that FTAs are increasingly viewed as an alternative, rather a precursor to broader negotiations.

Another potential side effect of the proliferation of FTAs is the erosion of the most favoured nation principle which underscores the WTO agreements. The WTO has sought to mitigate against this concern by requiring that countries can only enter into FTAs if the agreements cover all, or virtually all, of trade in goods and services between the parties to the agreement. The WTO has also set up a “transparency mechanism” to ensure that these rules are complied with.<sup>182</sup> However, it is not immediately clear that recently proliferated FTAs comply with these agreements, and it is generally much harder for the WTO to influence agreements concluded outside of the WTO framework.<sup>183</sup>

Finally, the most obvious effect of the stagnation of WTO negotiations has been the increased use of unilateral action by key trading powers, which poses a significant threat to the legitimacy of the rules-based trading system. As has been discussed in the paper, the U.S. in particular has significantly increased its use of unilateral tariffs against China. However, it is not alone in its resort to unilateral action. China, another key WTO member has also resorted to the use of unilateral action by imposing tariffs on Australian barley and curbing beef imports from Australia.<sup>184</sup>

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<sup>180</sup> Martin and Mercurio (n 123) 51.

<sup>181</sup> *ibid.*

<sup>182</sup> ‘WTO | Regional Trade Agreements - the WTO Rules’ <[https://www.wto.org/english/tratop\\_e/region\\_e/regrul\\_e.htm](https://www.wto.org/english/tratop_e/region_e/regrul_e.htm)> accessed 6 September 2020; ‘FTAs and the WTO | European Free Trade Association’ <<https://www.efta.int/free-trade/fta-and-wto>> accessed 6 September 2020.

<sup>183</sup> Bernard Hoekman and Petros C Mavroidis, ‘Burning Down the House? The Appellate Body in the Centre of the WTO Crisis’ [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3424856>> accessed 29 June 2020.

<sup>184</sup> Kazuhito Yamashita, ‘The WTO and TPP amid the U.S.-China Trade War’ (*The Japan Times*, 29 June 2020) <<https://www.japantimes.co.jp/opinion/2020/06/29/commentary/world-commentary/wto-tpp-amid-u-s-china-trade-war/>> accessed 6 September 2020.

Despite the increased use of FTAs and the resort to unilateral action, many WTO members continue to espouse belief in the multilateral system. Major trading blocs like Japan, Canada along with the “Ottawa Group”, China, the European Union and the U.S. have laid out proposals to reform the WTO’s negotiation function and modernise its rules. However, disagreement between members as to if and how WTO rules should be changed to accommodate China’s unique economic model remains a key barrier to consensus.

## V. CHINA’S ECONOMIC MODEL AND ITS RELATIONSHIP WITH THE WTO RULES

### V.I. FEATURES OF CHINA’S ECONOMIC MODEL

Since Deng Xiaoping began implementing massive economic and political reforms in 1978, the Chinese economy has made a gradual transition from a completely planned economy based upon public ownership to a mixed economy which has incorporated significant market oriented mechanisms and that has encouraged private enterprises in addition to existing state-owned enterprises. Therefore, by the time China joined the WTO in 2001, the Chinese economy, officially termed as a ‘socialist market economy with Chinese characteristics’ was by no means a monolithic entity. Instead, the Chinese economy was characterized by multifaceted economic regulations and practices which varied throughout provinces and industries.<sup>185</sup>

On one hand, Chinese accession to the WTO in 2001 signified China’s determination to create a market-based economy, to rein in and reform the state-owned enterprises, and to demonstrate its commitments to globalization and free trade.<sup>186</sup> However, since China did not have any say in the drafting of the WTO rules, it soon came to realize that not all the WTO terms and rules

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<sup>185</sup> Priyanka Pandit, ‘China and the World Trade Organization: Questioning the “Revisionist” Hypothesis’ [2016] *International Studies* <<https://journals.sagepub.com/doi/10.1177/0020881716654412>> accessed 18 August 2020, pp.266 (2013)

<sup>186</sup> ‘WTO | Accessions: China’ <[https://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_chine\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm)> accessed 19 August 2020.

established before its accession were applicable to its quickly evolving economic model.<sup>187</sup> Furthermore, the combination of China's rapid growth and other key features of its economic model has since posed new challenges for both China and the WTO.

## i. State-led economic model

Although China no longer has a completely planned economy, its current economic model is nevertheless still characterized by a high degree of state regulation and guidance as the state retained its influence over macroeconomic management through regulatory committees and state-owned enterprises. However, state involvement in China's national economy does not entirely contradict its commitments to economic reform. For example, by 2003, China had sold off nearly half of its state-owned enterprises (SOE), which constituted an essential part of the government's plan to streamline the SOEs and to encourage competition in the industries.<sup>188</sup>

The state-led economic model is particularly pervasive in a number of essential sectors, such as energy, railways, shipbuilding, steel, and telecommunications, which are supervised by governmental agencies and operated mainly by SOEs.<sup>189</sup> This practice is not unique to China, and countries like France, Germany, Japan and South Korea also seek to ensure state control over essential sectors. However, the scale and size of state involvement sets China apart and leads to concerns that it "challenges the WTO spirit."<sup>190</sup> All of the SOEs are coordinated by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), which remains influential in almost all sectors and is the world's largest controlling shareholder.<sup>191</sup> Furthermore, although some major changes were made to the SOEs after China's accession to the WTO, the dominant role of the SOEs remains a fundamental part of the Chinese economy.

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<sup>187</sup> 'China's Role in the WTO' (*China Business Review*, 1 October 2011) <<https://www.chinabusinessreview.com/chinas-role-in-the-wto/>> accessed 5 July 2020.

<sup>188</sup> Mark Wu, 'The China, Inc. Challenge to Global Trade Governance' (2016) 57 *Harvard International Law Journal* 261.

<sup>189</sup> 'Explained, the Role of China's State-Owned Companies' (*World Economic Forum*) <<https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/>> accessed 18 August 2020.

<sup>190</sup> Wu (n 188).

<sup>191</sup> '国务院国有资产监督管理委员会' <<http://www.sasac.gov.cn/>> accessed 18 August 2020.

The SOEs symbolize an extension of the Chinese state, and thus they are usually given preferential treatment.

The Chinese government's approach to SOEs is driven both by economic concerns as well as broader policy concerns. Some policy-makers fear that if key industries are privatised, working conditions may worsen and many workers will be retrenched.<sup>192</sup> For example, the vulnerable industrial and pharmaceutical enterprises, which are targets of SOE reform, face worsening working conditions and massive retrenchment, and have voiced their concerns about the pace of reform and protection of their interests in the process.

China's accession to the WTO also brought a range of unprecedented trade and commercial challenges such as stricter WTO constraints on government subsidy and increased competition from more efficient foreign enterprises. Since joining the WTO, the Chinese government has consistently altered and streamlined its institutional structure so as to solidify control over the national economy.<sup>193</sup> For example, in addition to the newly created SASAC, the Chinese government also created a new Ministry of Commerce (MOFCOM) in 2003 on the basis of the old Ministry of Trade and Economic Cooperation (MOFTEC) in order to better supervise both foreign and domestic commerce.<sup>194</sup>

## ii. Interdependence between private enterprises and the state

In addition to the direct management of the SOEs by the SASAC, the party-state's involvement in the national economy extends beyond the public sector. Its influence on all enterprises, even private enterprises, is subtle yet pervasive. The state informally supervises the private companies through several channels, leading to a complex relationship of interdependence. For example, Central Huijin Investment Ltd is operated by the State Council of the People's Republic of China

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<sup>192</sup> 'Reform of State-Owned Enterprises in China' (*China Labour Bulletin*, 19 December 2007) <<https://clb.org.hk/content/reform-state-owned-enterprises-china>> accessed 27 September 2020.

<sup>193</sup> Pandit (n 185), 265

<sup>194</sup> 'MINISTRY OF COMMERCE, PEOPLE'S REPUBLIC OF CHINA' <<http://english.mofcom.gov.cn/>> accessed 18 August 2020.

and is a shareholder in the four largest Chinese banks. It invests in major state-owned financial enterprises, and also manages financial assets so as to implement the State Council's economic policy agenda. Under the guidance of Central Huijin Investment Ltd, state-owned banks could be required to give preferential treatment to industries that constitute a key component of the state's economic development agenda.<sup>195</sup> Sometimes, the state also gets directly involved in a particular industry in order coordinate key stakeholders. This is similar to Japan and South Korea's practice of 'picking winners' in the 1960s and 1970s. Furthermore, the state also exerts subtle, yet pervasive influence, over senior management in private companies, through the extensive network of Party membership.<sup>196</sup>

As a result of this complex interdependence between enterprises and the state, it is difficult to adjudicate dumping cases involving Chinese firms under WTO rules which were made without foresight of such nuanced practices. Under WTO rules, dumping occurs when a foreign producer exports goods at a particularly low price, threatening domestic producers. High tariffs are often imposed in response, anti-dumping measures. However, it is often technically very difficult to ascertain whether or not prices are too low and thereby in violation of WTO rules.<sup>197</sup> For example, the National Development and Reform Commission (NDRC) is in charge of pricing a range of commodities that are not yet completely set by the market such as electricity, oil, natural gas, and water, which constitute an essential component of production cost for Chinese firms.<sup>198</sup> Therefore, it becomes especially challenging to ascertain the real price of Chinese products when natural and human resources are particularly abundant in China and the

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<sup>195</sup> Central Huijin Investment Co., Ltd. is a Chinese investment company which supervises the for four largest state-owned banks and acts as a crucial regulator and mediator in the financial industry

'Central Huijin Investment Ltd.' <<http://www.huijin-inv.cn/en/>> accessed 18 August 2020.

<sup>196</sup> 'Politics in the Boardroom: The Role of Chinese Communist Party Committees' <<https://thediplomat.com/2019/12/politics-in-the-boardroom-the-role-of-chinese-communist-party-committees/>> accessed 18 August 2020.

<sup>197</sup> 'WTO | Anti-Dumping - Technical Information' <[https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm)> accessed 18 August 2020.

<sup>198</sup> The National Development and Reform Commission (NDRC) is a successor to the State Planning Commission under the State Council. It is in charge of macroeconomic management through the creation and implementation of the Five-Year Plan, approving large infrastructure projects and allocating investment funds.

Brian Woodall, 'The Development of China's Developmental State: Environmental Challenges and Stages of Growth' (*China Research Center*, 29 May 2014) <[https://www.chinacenter.net/2014/china\\_currents/13-1/the-development-of-chinas-developmental-state-environmental-challenges-and-stages-of-growth/](https://www.chinacenter.net/2014/china_currents/13-1/the-development-of-chinas-developmental-state-environmental-challenges-and-stages-of-growth/)> accessed 18 August 2020.



managed price mechanism through the NDRC is able to maintain the production cost at a very low level by exploiting massive internal economies of scale.<sup>199</sup>

Furthermore, this system allows Chinese producers to coordinate to lower prices either to increase their market share or to increase profits.<sup>200</sup> This also helps Chinese firms to avoid high marketing costs related to unnecessary competition and opt to lower prices in demarcated foreign markets. Since this pricing practice and abundant resources are unique to China, it is almost impossible for importing countries to determine the cost of Chinese exports. These complex dynamics are not adequately captured by current WTO rules which allow importing countries to decide whether China is dumping by comparing exporting prices to a third country instead of using home market prices in China. This alternative methodology of adjudicating dumping cases allows some WTO members to impose high anti-dumping tariffs against Chinese products. It is nevertheless controversial, giving rise to much significant contention between China and countries that import Chinese goods.

### iii. Local content requirements

Another feature of China's economic model, that raises concerns from WTO members, is its stipulated local content requirements. Local content requirements usually require foreign firms to partner with Chinese firms or buy Chinese products. These policies aim to share economic benefits of foreign investment with domestic producers, by creating more jobs and transferring technology. However, local content requirements are considered detrimental to economic development in the long run since they shield inefficient domestic producers from rigorous competition and hinder investment in new technologies to boost productivity. Although the WTO rules discourage strict constraints for local content requirements, this practice is by no means unique to China, and has become more prevalent in recent years due to the rise of protectionism. For example, in 2013 the U.S. challenged India's local content requirement for

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<sup>199</sup> '【Main Functions of the NDRC】-NDRC\_NEW'

<[https://en.ndrc.gov.cn/mfindrc\\_8237/200812/t20081217\\_1193980.html](https://en.ndrc.gov.cn/mfindrc_8237/200812/t20081217_1193980.html)> accessed 18 August 2020.

<sup>200</sup> 'China's Economic Policy Factory: The NDRC' *Bloomberg.com* (21 June 2013)

<<https://www.bloomberg.com/news/articles/2013-06-20/chinas-economic-policy-factory-the-ndrc>> accessed 18 August 2020.

solar cells.<sup>201</sup> In the past decade, Organization for Economic Co-operation and Development (OECD) governments have implemented more than 340 localization measures particularly targeting domestic employment and the protection of domestic producers in the wake of the financial crisis.<sup>202</sup>

#### iv. State-led agricultural policies

Agricultural produce is considered a key strategic resource in China and the agricultural sector has a significant impact on China's general employment as well as urbanization. Therefore, state led agricultural policies constitute an essential component of China's national security and the Ministry of Agriculture supervises the production, distribution, allocation and pricing of agricultural produce.<sup>203</sup> The state-owned enterprise, China Oil and Foodstuffs Corporation (COFCO) also facilitates the protection of soybean, rice, and corn production against foreign competition and also plays a crucial part in controlling the cost of living as well as general inflation level.<sup>204</sup>

Although China's state-led agricultural policies have been criticized by the U.S. and E.U., state-led agricultural policies are not unique to China. The E.U.'s Common Agricultural Policy and Japan's protective agricultural policies include similar measures aimed at protecting domestic producers from heavily subsidized agricultural exports from the United States. Although the Common Agricultural Policy has been criticised for ignoring the rules of supply and demand, unnecessarily wasting budget, and overprotecting the farmers. The E.U. defended this policy on

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<sup>201</sup> 'WTO | Dispute Settlement - the Disputes - DS456' 456  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds456\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm)> accessed 18 August 2020.

<sup>202</sup> 'Local Content Requirements - OECD' <<https://www.oecd.org/trade/topics/local-content-requirements/>> accessed 18 August 2020.

<sup>203</sup> 'Ministry of Agriculture and Rural Affairs of the People's Republic of China' <<http://english.moa.gov.cn/Institutional/>> accessed 18 August 2020.

<sup>204</sup> China Oil and Foodstuffs Corporation (COFCO) covers food processing and manufacturing. Its products include edible oil, wine, dairy, fruit and vegetable juice, chocolate, and meat products.  
'COFCO, IFC Monitor Sustainability of Brazilian Soybean Farms - MacaHub' <<https://macaHub.com.mo/2020/08/05/20200805002/>> accessed 18 August 2020.

the ground of food security as well as the need to protect Europe's rural communities and traditional cultures.<sup>205</sup> Agricultural protectionism is a similarly politicised issues in Japan as farmers make up the power base of the ruling Liberal Democratic Party. Japan spends nearly 1.25 percent of its GDP on agriculture subsidies and provides 56 cents of subsidies to farmers for every dollar of agriculture production. Former prime minister Shinzo Abe defended such subsidies and other barriers to imported agricultural produce in the Trans-Pacific Partnership negotiations with the United States.<sup>206</sup> Although there is hope that E.U. may be decreasing the use of agricultural policies in the coming years, China's use of agricultural policies has increased in recent years.<sup>207</sup> The question is thus whether China should be penalised for adopting similar policies to what the U.S., E.U. and Japan have historically adopted.

## V.II. INCREASING CONTENTION BETWEEN CHINA AND OTHER WTO MEMBERS

Although the number of WTO trade disputes involving China has consistently risen in the past decade, the onset of the U.S.-China trade war started a new wave of unilateral actions targeting China. President Trump has openly criticised WTO rules which have favoured China more than the United States and has claimed on Fox News, "we lose the lawsuits, almost all of the lawsuits in the WTO."<sup>208</sup> Some analysis suggests that the U.S. wins about 90% of cases when it is the complainant and loses about the same percentage when it is complained against.<sup>209</sup> The joint Trilateral Statement issued by the U.S., E.U. and Japan in January 2020 also called for changes to WTO rules on state subsidies, in order to pressure China into curbing the activities of its

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<sup>205</sup> Guy Pe'er and others, 'A Greener Path for the EU Common Agricultural Policy' (2019) 365 *Science* 449.

<sup>206</sup> 'Will Japan Bet the Farm on Agricultural Protectionism?' (*PIIE*, 21 October 2014) <<https://www.piie.com/blogs/realtime-economic-issues-watch/will-japan-bet-farm-agricultural-protectionism>> accessed 27 September 2020.

<sup>207</sup> Sybille de La Hamaide, 'EU Proposes to Cut Farm Subsidies, France Says Unacceptable' *Reuters* (2 May 2018) <<https://www.reuters.com/article/us-eu-budget-agriculture-idUSKBN1I31XB>> accessed 15 January 2021.

<sup>208</sup> Dan Ikenson, 'US Trade Laws And The Sovereignty Canard' (*Forbes*) <<https://www.forbes.com/sites/danikenson/2017/03/09/u-s-trade-laws-and-the-sovereignty-canard/>> accessed 26 August 2020.

<sup>209</sup> *ibid.*

SOEs. The proposal includes tougher global rules on subsidies which would affect companies that have connections to the Chinese government. In addition, the rules include prohibitions on multiple forms of state support, which are considered as ‘some of the fundamental issues distorting global trade’ by E.U. trade commissioner Phil Hogan.<sup>210</sup>

Although China has also acknowledged the need for reform in certain areas, China has defended the existing WTO framework against the Trump administration’s accusations and promises to remain committed to current WTO rules. China has made considerable contributions to the WTO and global trade since its accession in 2001 and is playing an increasingly important role in global production and supply chains. China has fulfilled some of its promises by reducing the average tariff on manufactured goods from 24 percent before China’s WTO accession to 9 percent, and the average tariffs on agriculture imports from 24.6 to 15 percent. China’s continuous economic reform and market liberalization, together with its abundant natural resources and low labour costs have significantly increased global trade.<sup>211</sup> China has also continued to make efforts to reform and harmonise its customs procedures.<sup>212</sup> For example, to make its domestic laws and regulations compatible with the WTO, China has amended and repealed more than 3000 pieces of laws, administrative regulations and departmental rules. To improve transparency, China has also created the website of Central People’s Government, established China WTO Notification and Inquiry Centre, and regularly updated the China Foreign Economic and Trade Gazette.<sup>213</sup>

The SASAC has also significantly reduced the number of centrally owned enterprises by a third from 150 in 2008 to 97 in 2000. In the meanwhile, the SASAC also encourages competition among the SOEs, for instance, by deliberately maintaining rivalry among its three major

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<sup>210</sup> Philip Benkinsop, ‘U.S., EU, Japan Agree New Subsidy Rules with China Trade in Focus’ *Reuters* (14 January 2020) <<https://www.reuters.com/article/us-trade-wto-subsidies-idUSKBN1ZD1RM>> accessed 26 August 2020.

<sup>211</sup> ‘China’s Role in the WTO’ (n 187).

<sup>212</sup> ‘WTO Begins Seventh Trade Policy Review of China - Xinhua | English.News.Cn’

<[http://www.xinhuanet.com/english/2018-07/12/c\\_137317701.htm](http://www.xinhuanet.com/english/2018-07/12/c_137317701.htm)> accessed 27 September 2020.

<sup>213</sup> Karen Halverson, ‘China’s WTO Accession: Economic, Legal, and Political Implications’ (2004) 27, no. 2 *Boston College International and Comparative Law Review* 319.

telecommunication companies (China Telecom<sup>214</sup>, China Unicom<sup>215</sup> and China Mobile<sup>216</sup>) as well as among its three major petrochemical corporations (China Petrochemical Corporation<sup>217</sup>, China National Petroleum Corporation<sup>218</sup> and China National Offshore Oil Corporation).<sup>219</sup> In addition, many of the SOEs were listed on the New York, Shanghai, Shenzhen, and Hong Kong stock exchanges and thereby became subject to regulation by global financial markets. About one third of imports are now declared through single windows, with clearance times of imports reduced from 22 hours in 2016 to 16.7 hours in 2017. The 18th Central Committee meeting of the Chinese Communist Party in 2013 officially prioritised SOE reform as part of the Third Plenum Communiqué. President Xi Jinping reaffirmed China's commitments to factor in price reform and stricter regulation of SOEs in order to create a market economy according to WTO rules in which SOEs do not have an unfair advantage over private enterprises.<sup>220</sup>

On the other hand, in recent years some WTO members have complained about entry restrictions into certain sectors which could be made more transparent and open, and some foreign firms remain concerned about China's protection of intellectual property rights and forced transfer agreements.<sup>221</sup> Furthermore, as for government subsidies, the total subsidy amounts were unclear for most projects and no subsidies were notified for the period between 2015 and 2017. Neither did China successfully provide any information on subsidies that went

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<sup>214</sup> China Telecom is the largest fixed-line service and the third largest mobile telecommunication provider in China. 'China Telecom Corporation Limited - Home' <<https://www.chinatelecom-h.com/en/global/home.php>> accessed 19 August 2020.

<sup>215</sup> China United Network Communications Group Co., Ltd. (China Unicom) is the world's fourth-largest mobile service provider.

'China Unicom (Hong Kong) Limited' <<https://www.chinaunicom.com.hk/en/global/home.php>> accessed 19 August 2020.

<sup>216</sup> China Mobile is the world's largest mobile network operator.

'China Mobile Limited' <<https://www.chinamobileltd.com/en/global/home.php>> accessed 18 August 2020.

<sup>217</sup> China Petrochemical Corporation is the world's largest oil refining, gas and petrochemical company, 'China Sinopec' <<http://www.sinopecgroup.com/group/en/>> accessed 19 August 2020.

<sup>218</sup> The China National Petroleum Corporation is one of the largest integrated energy groups in the world 'About CNPC' <[https://www.cnpc.com.cn/en/aboutcnpc/aboutcnpc\\_index.shtml](https://www.cnpc.com.cn/en/aboutcnpc/aboutcnpc_index.shtml)> accessed 19 August 2020.

<sup>219</sup> China National Offshore Oil Corporation is the third-largest national oil company in the People's Republic of China, '中国海洋石油有限公司 Company Profile' <<https://www.cnooltd.com/col/col7261/index.html>> accessed 19 August 2020.

<sup>220</sup> 'Communiqué of the Third Plenary Session of the 18th Central Committee of the Communist Party of China- China.Org.Cn' <[http://www.china.org.cn/china/third\\_plenary\\_session/2014-01/15/content\\_31203056.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/15/content_31203056.htm)> accessed 19 August 2020.

<sup>221</sup> 'China's Role in the WTO' (n 187).

beyond their notified programmes, including substantial support for intelligent manufacturing, advanced technologies, new energy vehicles and fisheries.<sup>222</sup>

China has expressed concern about the rising risk of politicising WTO trade disputes and interprets the recent increase in the number of cases brought against China as a reflection of the shifting global geopolitical dynamics.<sup>223</sup> It is not uncommon for other nations to ‘violate the spirit of the WTO’. For example, trade disputes were common among major exporters including the U.S., Japan and European countries in the past decades, and compromises and modifications were accordingly made to accommodate these disputes. However, between 2009 and 2015, 90% of the cases brought by the 4 largest economies are related to China, signifying a heightened collective awareness among other key trading powers to seek methods to manage China’s increased role global trade.<sup>224</sup> Key WTO members have at times been seen to act collectively rules in disputes with China. This “collective defence” approach was demonstrated in 2012 when China challenged the E.U.’s local content requirement for renewable energy. Although both Japan and the U.S. shared similar interests in challenging the E.U. and previously filed similar complaints, both countries opted to turn a blind eye and instead to selectively target China’s local content requirements.<sup>225</sup> Importantly, China also asserts that although some countries find it difficult to accommodate the unique features of China’s economic model within the existing WTO frameworks, nevertheless, WTO rules are a set of legal contracts broadly designed to accommodate different types of economies. Thus, China’s ‘alleged violation of the WTO spirit’ is difficult to justify and the central issues should be the legality and adaptation of WTO rules.

### V.III. KEY AREAS OF DISPUTE

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<sup>222</sup> ‘WTO | Trade Policy Review -China2018’ <[https://www.wto.org/english/tratop\\_e/tp\\_r\\_e/tp475\\_e.htm](https://www.wto.org/english/tratop_e/tp_r_e/tp475_e.htm)> accessed 27 September 2020.

<sup>223</sup> ‘Communiqué of the Third Plenary Session of the 18th Central Committee of the Communist Party of China- China.Org.Cn’ (n 220).

<sup>224</sup> Wu (n 188).

<sup>225</sup> ‘WTO | Dispute Settlement - the Disputes - DS456’ (n 201) 452.

The key areas of dispute regarding how WTO rules apply to China are state subsidies, China's market economy status, China's eligibility for special and differential treatment, and the Made in China 2025 policy.

## **i. State subsidies.**

The crux of the issue around state subsidies is how to interpret WTO rules with respect to Chinese companies, particularly those informally linked to the state. Although it is relatively easy to detect subsidies directly given to enterprises, preferential treatments such as particular policies favouring certain industries and generous loans given to certain businesses are harder to detect. This is especially true for companies that are not SOEs or openly linked to the state, but benefit from the government through a complicated network which is legally outside of WTO jurisdiction.

In particular, the United States has accused China of providing export subsidies to its auto and auto parts industries, which are against the WTO rules. The U.S. has claimed that such subsidies are located in government-designated regions known as "export bases" in the form of cash grants for exporting, research and development and preferential tax treatment, therefore creating an unfair advantage to China's auto producers. The U.S. has contended that, China's auto exports increased from \$7.4 billion in 2002 to \$69.1 billion in 2011, as a result of those subsidies.<sup>226</sup> China's largest export market for auto parts, the U.S. auto industry suffered massive unemployment. In addition, the U.S. has complained that the 'non-transparent' nature of China's economy made it very difficult to solicit sufficient and accurate evidence. They also accused China of failing to conform to the system of voluntary subsidy notification.<sup>227</sup>

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<sup>226</sup> 'Fact Sheet: WTO Case Challenging Chinese Subsidies | United States Trade Representative' <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/september/wto-case-challenging-chinese-subsidies>> accessed 27 September 2020.

<sup>227</sup> *ibid.*

## ii. China's market economy status

One of the conditions for China's accession to the WTO in 2001 is China's agreement to being treated as a non-market economy by other WTO members for 15 years, during which those member countries could use surrogate country data to determine whether China is dumping and hence to impose high anti-dumping tariffs on Chinese goods and products. This compromise occurred because other WTO members feared government subsidies and intervention in China might distort costs of production and allow Chinese firms to export at an extremely low price.<sup>228</sup> China's non-market economy status makes it easier for China's trading partners to impose large duties on exports from China that are believed to be sold at unfairly low prices.

However, China contends that this compromise expired in 2016 as it has implemented a series of economic reforms in the past 15 years and therefore should now be viewed as a market economy. Subsequently, since the United States and the European Union refused to recognise China's market economy status, China initiated a case under the DSU against both U.S. and E.U. on December 12, 2016. Under the Trump administration, the United States has adopted a harsher attitude towards China's market economy status and has more frequently criticized the Chinese government's involvement in the economy and alleged 'distortion' of economy. In contrast, the E.U. has become more accommodating. Before 2017, the E.U. treated China as a non-market economy by default and extensively used analogue prices to calculate dumping margin against Chinese exports. However, since December 2017, the E.U. has revised its methodology for calculating dumping margins, acknowledging systemic differences between China's and E.U.'s economic models.<sup>229</sup> China also made a reciprocal compromise by ending its WTO dispute against the E.U. on June 15, 2020.<sup>230</sup>

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<sup>228</sup> 'China and Non-Market Economy Treatment: A Tale of Two Interpretations | TradeLinks | Linklaters' <<https://www.linklaters.com/en/insights/blogs/tradelinks/china-and-non-market-economy-treatment-a-tale-of-two-interpretations>> accessed 27 September 2020.

<sup>229</sup> 'EU-China Trade and Investment Relations in Challenging Times | Bruegel' <<https://www.bruegel.org/2020/06/eu-china-trade-and-investment-relations-in-challenging-times/>> accessed 19 August 2020.

<sup>230</sup> 'China Loses Landmark WTO Dispute Against EU' (*BloombergQuint*) <<https://www.bloombergquint.com/politics/not-with-a-bang-china-loses-landmark-wto-dispute-against-eu>> accessed 19 August 2020.



### iii. China's developing country status

China has self-declared itself a developing country and is therefore entitled to SDT under WTO rules. However, in the absence of clearly defined criteria in WTO agreements, China's developing country status has been challenged by other countries, who argue that the size of China's economy give it a significant advantage in international trade, and it should therefore not benefit from SDT. This allows other countries to justify certain measures against Chinese exports in global trade as well as to protect domestic producers.<sup>231</sup>

In response to those challenges, China has reaffirmed its developing country status by emphasising the gap between China and developed countries in terms of economic and social development levels. For example, according to China, its per capita GDP was less than \$10,000 and its urbanization rate was 59.58 percent in 2018, both of which were far below the world average. In addition, China has justified its developing country status by stressing the huge income inequalities between urban and rural areas and regional disparity in China. In 2018, China had 16.6 million population living in poverty in larger than any other developing country.<sup>232</sup> Thus, China has reasserted its developing country status on the basis of its uneven development and wealth distribution.

### iv. Made in China 2025

Made in China 2025 is a government plan created in 2015 in order to upgrade China's labour-intensive industries into a more technology-intensive powerhouse and to achieve independence from foreign suppliers. It targets 10 high-tech industries, including electric cars,

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<sup>231</sup> 'WTO | Development - Who Are the Developing Countries in the WTO?'

<[https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)> accessed 11 July 2020.

<sup>232</sup> 'China's Status as Developing Country Undeniable - Global Times' <<https://www.globaltimes.cn/content/1173184.shtml>> accessed 27 September 2020.

telecommunications, artificial intelligence, aerospace engineering; new synthetic materials, biopharmaceutical industries and high-speed railways. However, this blueprint has raised suspicion among other countries.<sup>233</sup> Some countries view direct subsidies through state funding, low interest loans and tax breaks for those aforementioned industries as an unfair advantage for Chinese firms, which distorts the market and inhibits free competition.<sup>234</sup> Furthermore, both foreign countries and corporations are also concerned about encouraged acquisitions and forced transfer agreements.

Made in China 2025 also encourages Chinese companies to actively invest in foreign companies and purchase semiconductor technology in addition to investing in R&D.<sup>235</sup> However, foreign firms fear that their sensitive IP might not be protected under, given China's practice of using Forced Technology Transfer.<sup>236</sup> Forced transfer agreements are used to promote joint ownership between local and foreign investors.<sup>237</sup> This practice allows Chinese firms to learn from leading foreign technology firms and to share their intellectual property (IP) and advanced technology.

On 15 June 2018, the Trump administration accused Made in China 2025 of violating the WTO rules by unfairly providing government subsidies to industries, thereby distorting the market and harming foreign firms, and imposed higher tariffs on Chinese goods as a response.<sup>238</sup> The European Union and Japan showed a less hostile reaction. The EU and Japan may stand to benefit as China might increase imports of high-tech equipment from the E.U. and Japan to implement the Made in China 2025 strategy, particularly semiconductor production. However, both also feared that Made in China 2025 might lead to an increase in protectionism and eventually create another strong competitor in high-tech industries.<sup>239</sup> Overall, concern over Made

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<sup>233</sup> 'Made in China 2025' <<https://www.csis.org/analysis/made-china-2025>> accessed 19 August 2020.

<sup>234</sup> Yongnian Zheng, *Contemporary China: A History since 1978* (Wiley-Blackwell 2014).

<sup>235</sup> 'Made in China 2025, Explained' <<https://thediplomat.com/2019/02/made-in-china-2025-explained/>> accessed 19 August 2020.

<sup>236</sup> 'Is "Made in China 2025" a Threat to Global Trade?' (*Council on Foreign Relations*) <<https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade>> accessed 19 August 2020.

<sup>237</sup> 'What Is Made in China 2025 and Why Is the World Concerned about It?' (28 April 2018)

<<https://www.abc.net.au/news/2018-04-29/why-is-made-in-china-2025-making-people-angry/9702374>> accessed 19 August 2020.

<sup>238</sup> 'Is "Made in China 2025" a Threat to Global Trade?' (n 236).

<sup>239</sup> *ibid.*

in China 2025 has merely added to the growing contention between China and other WTO members.

## VI. THE EFFECT OF INCREASING TRADE TENSIONS ON THE WTO

The multilateral trading system has been the target of anti-globalist sentiment for decades and debates, about the WTO are common; for example, the United States House of Representatives voted 338-86 against withdrawal from the WTO in 2005, and 363-56 against in 2000.<sup>240</sup> Yet past instances of opposition have been limited to small anti-globalist sections of society and government. However, in the last several years opposition to multilateralism has reached a crisis point as key trading powers like the US have denounced the WTO's legitimacy.<sup>241</sup> In 2018, President Trump threatened to pull out of the WTO, amid assertions that it infringes upon U.S. sovereignty, the emblem of his America First policy, and treats the U.S. unfairly in dispute settlement cases.<sup>242</sup> While a solid set of rules, negotiation system, and dispute settlement mechanism are highly useful for smaller economies, larger trading powers with significant economic influence are able to resort to unilateral action. The WTO must therefore consider how it can remain a legitimate organisation despite major trading powers' increasing recourse to unilateral action.

### VI.I The United States and China

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<sup>240</sup> Simon Lester, 'Voting on WTO Withdrawal' (*Cato Institute*, 23 June 2020) <<https://www.cato.org/blog/voting-wto-withdrawal>> accessed 12 February 2021.

<sup>241</sup> Jeffrey Kucik, 'Why Trump's Wrong about WTO Treating US Unfairly' (*The Conversation*) <<http://theconversation.com/why-trumps-wrong-about-wto-treating-us-unfairly-102562>> accessed 12 February 2021.

<sup>242</sup> James Politi, 'Donald Trump Threatens to Pull US out of the WTO' (30 August 2018) <<https://www.ft.com/content/32e17984-aca2-11e8-89a1-e5de165fa619>> accessed 12 February 2021.

Given the U.S. and China are at the forefront of global trade as the world's largest economies, their recourse to unilateral action raised questions about the WTO's legitimacy.<sup>243</sup> Since 2018 the U.S. has imposed tariffs on more than \$360bn of Chinese goods; China has imposed over \$110bn in tariffs in retaliation.<sup>244</sup> In addition, the U.S. imposed paralysis of the A.B, uncertainty around the MPIA and increased trade tensions, could also lead to other states circumventing the WTO system in disputes. Overall, U.S policy has undermined the role of the WTO and the danger to multilateralism is greater than ever before.

Aside from the danger to the spirit of multilateralism, if other states follow the U.S.' footsteps in taking unilateral action, the effects could be economically catastrophic. Studies have concluded that the U.S.-China trade war has cost the U.S. anywhere from 0.3% to 0.7% of real GDP.<sup>245</sup> In August 2020, Bloomberg Economics estimated that the cost in lost GDP would rise to a total of \$316 billion by the end of the year.<sup>246</sup> The U.S. trade deficit with the E.U., Mexico and Japan among other states has increased as a result of trade flows diverting away from China.<sup>247</sup> The trade war has also had a harsh impact on China, which suffered \$35 billion in export losses in the U.S. market at the end of 2019. Chinese firms have also reduced the prices of their exports.<sup>248</sup>

The American and Chinese tech sectors, a driving force of their respective economies, are also facing the impact of unilateral protectionism. The U.S. has targeted Chinese global tech firm Huawei, restricting exports of chip components, which it relies on for hardware production.<sup>249</sup> Aggressive policies in response to tech disputes are also putting American companies at risk; in

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<sup>243</sup> Dan Ikenson, 'Let's Have That Much Needed Debate About The World Trade Organization' (*Forbes*, 8 May 2020) <<https://www.forbes.com/sites/beltway/2020/05/08/lets-have-that-much-needed-debate-about-the-world-trade-organization/#2c9cb6dd4626>> accessed 29 August 2020

<sup>244</sup> 'A quick guide to the US-China trade war'

<sup>245</sup> Shawn Donnan and Reade Pickert, 'Trump's China Buying Spree Unlikely to Cover Trade War's Costs' *Bloomberg.com* (18 December 2019) <<https://www.bloomberg.com/news/articles/2019-12-18/trump-s-china-buying-spreed-unlikely-to-cover-trade-war-s-costs>> accessed 12 February 2021.

<sup>246</sup> *Ibid.*

<sup>247</sup> Ryan Hass and Abraham Denmark, 'More Pain than Gain: How the US-China Trade War Hurt America' (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/>> accessed 12 February 2021.

<sup>248</sup> 'Trade War Leaves Both US and China Worse off | UNCTAD' <<https://unctad.org/news/trade-war-leaves-both-us-and-china-worse>> accessed 12 February 2021.

<sup>249</sup> Zak Doffman, 'Has Trump Suddenly Ended Huawei's Smartphone Business?' (*Forbes*) <<https://www.forbes.com/sites/zakdoffman/2020/08/22/end-for-huawei-smartphones-google-android-ban-china-trump-update/>> accessed 12 February 2021.

an effort to increase self-reliance for components in light of such policies, China has accelerated production of semiconductors and other technologies.<sup>250</sup> American suppliers such as Micron, a chip producer with a revenue of over \$20 billion<sup>251</sup>, fear a significant reduction in future exports to China.

The U.S. and China attempted to cool relations and address mutual concerns by signing the Phase One trade deal in January 2020.<sup>252</sup> The deal was initially promising for relations, yet practically unrealistic – it included an ambitious commitment from China to purchase an additional \$200 billion in U.S. goods and services over the next 2 years.<sup>253</sup> The U.S. cut some tariffs on Chinese goods in exchange for pledges to purchase more American goods in the agricultural, energy and manufacturing sectors. China was also compelled to address U.S. complaints regarding intellectual property practices, as the WTO had so far been unable to adequately address them.<sup>254</sup>

Initially, the Phase One trade deal seemed to prove the Trump administrations argument that bilateral trade deals are more effective than multilateral negotiations. Negotiations were not bound by the limitations of the WTO's single undertaking rule, enabling a concise and limited agenda which the failed Doha Agreement lacked. Both the U.S. and Chinese administrations were at first satisfied with the outcome of negotiations, with President Trump naming them a 'step toward a future of fair and reciprocal trade.'<sup>255</sup> One could therefore conclude that unilateral action sometimes provides faster positive outcomes for trading partners – the mutual damage of tariffs exerted pressure on the U.S. and China to achieve a swift conclusion to negotiations. The

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<sup>250</sup> Ana Swanson and Cecilia Kang, 'Trump's China Deal Creates Collateral Damage for Tech Firms' *The New York Times* (20 January 2020) <<https://www.nytimes.com/2020/01/20/business/economy/trump-us-china-deal-micron-trade-war.html>> accessed 24 August 2020.

<sup>251</sup> 'Micron Technology Revenue 2006-2020 | MU' <<https://www.macrotrends.net/stocks/charts/MU/micron-technology/revenue>> accessed 12 February 2021.

<sup>252</sup> James Politi, 'What's in the US-China "Phase One" Trade Deal?' (15 January 2020) <<https://www.ft.com/content/a01564ba-37d5-11ea-a6d3-9a26f8c3cba4>> accessed 12 February 2021.

<sup>253</sup> Mayaz Alam, 'Where the US-China Trade War Should Go From Here' <<https://thediplomat.com/2020/07/where-the-us-china-trade-war-should-go-from-here/>> accessed 12 February 2021.

<sup>254</sup> Politi (n 252).

<sup>255</sup> Donald Trump, 'Remarks by President Trump at Signing of the U.S.-China Phase One Trade Agreement' (White House East Room, 15 January 2020) <<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-u-s-china-phase-one-trade-agreement-2>> accessed 1 September 2020.

U.S.' apparent success also results in the risk that more affluent states may resort to unilateral action as well. However, smaller members of the WTO are less equipped to handle the impact of trade wars; it is thus crucial that the organisation works to minimise protectionist unilateral action and help to ensure the economic health of member states.

However, the Phase One Deal was hasty and overambitious, and improvements in relations were brief. In the first half of 2020, China purchased less than a quarter of its commitment to U.S. goods and services for the year<sup>256</sup>. Importantly, if either state fails to fulfil its commitment, the other party will have limited ways to enforce the deal, outside of the WTO. Given the economic damage of unilateral tariffs on both the U.S. and China so far, it would be punitive retaliation would be economically unwise. Therefore, the unilateral path leaves few options in the case of non-compliance. The U.S.-China trade war and the Phase One deal highlight the necessity of reforming the WTO negotiation system: all states, including large trading powers, can leverage the WTO framework and expertise to reach achievable commitments. The merits of bilateral deals lie in their expediency, however, the disadvantage of reaching deals outside of the WTO is the lack of viable options if a partner fails to reach their commitment.

## VI.II Canada and the U.S.

The United States has also adopted unilateral action in response to a dispute over softwood lumber with Canada. In 2017, the U.S. claimed that Canada was improperly subsidizing production<sup>257</sup>, a claim similar to the one made against Chinese steel. In response the U.S. imposed a 20% tariff on lumber imports. The U.S. and Canada attempted to negotiate a settlement but failed.<sup>258</sup> The U.S. has also imposed a 10% tariff on Canadian aluminium. In August 2020, Canada announced retaliatory tariffs of 2.7 billion USD, after deputy prime

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<sup>256</sup> Yen Nee Lee, '3 Charts Show China Is Far from Meeting Its "phase One" Trade Commitment to the U.S.' (CNBC, 13 August 2020) <<https://www.cnbc.com/2020/08/13/chinas-progress-in-buying-us-goods-under-phase-one-trade-deal-in-charts.html>> accessed 12 February 2021.

<sup>257</sup> Paul Vieira, 'World Trade Organization Sides With Canada in Lumber Dispute With U.S.' *Wall Street Journal* (24 August 2020) <<https://www.wsj.com/articles/world-trade-organization-sides-with-canada-in-lumber-dispute-with-u-s-11598294456>> accessed 12 February 2021.

<sup>258</sup> Ibid.

minister Chrystia Freeland promised a ‘dollar-for-dollar’ fight.<sup>259</sup> The same month, a WTO dispute panel found that U.S. countervailing duties against softwood lumber were wrong, due to erroneous calculations on subsidization.<sup>260</sup> Robert Lighthizer stated that the report “confirms what the United States has been saying for years: the WTO dispute settlement system is being used to shield non-market practices and harm U.S. interests.”<sup>261</sup> The escalating situation with Canada thus provided fodder for Washington’s argument that the U.S. is being persecuted WTO. The use of tariffs and mutual retaliation by the U.S., China could have a domino-effect on conflicts between other nations, destabilising the WTO’s authority in trade disputes and legitimacy as a rule-making body.

## VI.III Trade Wars and the future of the WTO

WTO members responded to US actions by initiating at least 17 dispute proceedings against the state in 2018 – twice the average number of filings over the previous 15 years.<sup>262</sup> Unilateral action is clearly exerting a destabilizing force on multilateral co-operation. Nevertheless, the majority of WTO members remain committed to multilateralism. The E.U. and other states have expressed their commitment to the rules based trading system, citing the 2017 Trade Facilitation Agreement as proof of its commitment to multilateral goals of co-operation among members.<sup>263</sup> It is crucial that the WTO take advantage of some members continued enthusiasm, and work to resolve the fundamental concerns driving the trade war.

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<sup>259</sup> ‘Canada Slaps Retaliatory Tariffs on US Aluminium Goods’ *BBC News* (7 August 2020) <<https://www.bbc.com/news/world-us-canada-53683569>> accessed 12 February 2021.

<sup>260</sup> The Canadian Press · Posted: Aug 24, 2020 4:13 PM ET | Last Updated: August 24, and 2020, ‘WTO Decision on Softwood Lumber Cheered by Canadian Producers, Denounced in U.S. | CBC News’ (*CBC*, 24 August 2020) <<https://www.cbc.ca/news/business/canada-softwood-lumber-1.5698013>> accessed 12 February 2021.

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> European Parliament, ‘The European Union and the World Trade Organization | Fact Sheets on the European Union | European Parliament’ <<https://www.europarl.europa.eu/factsheets/en/sheet/161/the-european-union-and-the-world-trade-organisation>> accessed 12 February 2021.

WTO efforts may be bolstered by the upcoming change in U.S. administration. Under the Biden administration, the U.S. may seek to work within the WTO dispute settlement system. Biden has also not expressed as strong protectionist and economically nationalist sentiments as Trump, which may signify a shift away from politically driven protectionist policies. The incoming U.S. Trade Representative, Katherine Tai, has a history of advocating for a tough stance against China, but has prioritised acting through multilateral means such as joint disputes with other trading powers.<sup>264</sup> However, increased U.S. engagement in the WTO dispute settlement system will require reform so that member states can rely upon to DSU to achieve efficient adjudication of disputes. Moreover, given that many of the U.S.’, and other key members, criticisms of the WTO remain unresolved, modernisation of WTO rules remains crucial to restoring the organisation’s legitimacy.

## VI.IV The effect of Covid-19

The Covid-19 pandemic further highlights the need for multilateralism and co-operation to help companies combat the global economic downturn.<sup>265</sup> Imports to China fell by 7.3% in January 2020 when it became the first country to lock down following the outbreak of the virus, Japan also experienced a significant reduction in imports early on in the pandemic.<sup>266</sup> Western economies, for whom the impact was delayed, were equally impacted: the E.U. Chief Economist estimated that the pandemic would result in a 9.2% decline in E.U. exports, and an 8.8% imports decline in 2020.<sup>267</sup> In the spring of 2020, 46 WTO members (or 72, accounting for individual E.U. states) introduced export prohibitions or restrictions following the pandemic.<sup>268</sup> Former WTO Director-General, Roberto Azevêdo, urged members to exercise as much restraint as

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<sup>264</sup> Yen Nee Lee, ‘Biden’s Pick for Top U.S. Trade Official Will Continue Tough Line on China, Says Ex-Trump Official’ (CNBC, 18 December 2020) <<https://www.cnbc.com/2020/12/18/bidens-ustr-pick-katherine-tai-will-be-tough-on-china-ex-trump-official.html>> accessed 12 February 2021.

<sup>265</sup> Valentina Romei, ‘Global Trade Contracts as Coronavirus Hits World Economy’ (24 April 2020) <<https://www.ft.com/content/db3427f5-5394-4661-8e52-6447fd3d9ae9>> accessed 12 February 2021.

<sup>266</sup> Ibid.

<sup>267</sup> Chief Economist Team, DG Trade, European Commission, ‘The Impact of the Covid-19 Pandemic on Global and EU Trade’ 3.

<sup>268</sup> World Trade Organisation, ‘Export Prohibitions and Restrictions: Information Note’.



possible when implementing export restrictions and other measures disruptive to supply chains, and to be as transparent as possible with regard to the nature of trade related measures.<sup>269</sup> Given the heightened need for transparency, which helps to facilitate trade, during the pandemic unilateral and protectionist policies pose an even greater threat to global trade.

States have responded to this threat and by September 2020, 40 WTO members had temporarily removed or deferred duties, taxes and charges on essential medical goods during the pandemic.<sup>270</sup> Information sharing around medical goods trade has been crucial to a cohesive multilateral strategy.<sup>271</sup> Despite the WTO's encouragement and data collection around these measures, the body has been accused of stagnating under the pressure of unilateral action from the U.S., and Covid-19.<sup>272</sup>

## VII. RECOMMENDATIONS

### VII.I Introduction

As this paper has demonstrated, all of the WTO's key functions are under pressure. Moreover, although there is divergence on what shape reform should take, there is consensus that reform is needed. The goal of WTO reform should be to ensure that the WTO is seen as "fit for purpose" and capable of serving as a focal point in an international trading system that looks very different from when the organisation was first established. Members also need to feel as though they can efficiently conclude agreements and change the rules as the trade environment changes. This will also help to reduce reliance on the dispute settlement system and address the fact that "Geneva

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<sup>269</sup> Ibid.

<sup>270</sup> World Trade Organisation, 'How WTO Members Have Used Trade Measures to Expedite Access to COVID-19 Critical Medical Goods and Services', vol 2020/14 (2020) Covid-19 Reports 2020/14 <[https://www.wto-ilibrary.org/economic-research-and-trade-policy-analysis/how-wto-members-have-used-trade-measures-to-expedite-access-to-covid-19-critical-medical-goods-and-services\\_9b0a96e2-en](https://www.wto-ilibrary.org/economic-research-and-trade-policy-analysis/how-wto-members-have-used-trade-measures-to-expedite-access-to-covid-19-critical-medical-goods-and-services_9b0a96e2-en)> accessed 12 February 2021.

<sup>271</sup> Ibid.

<sup>272</sup> Inu Manak, 'The WTO Needs to Drag Itself into the 21st Century' (*Cato Institute*, 11 May 2020) <<https://www.cato.org/blog/wto-needs-drag-itself-21st-century>> accessed 12 February 2021.

courts are the wrong way to resolve what are ultimately political and economic questions left ambiguous in the underlying rules.”<sup>273</sup> This section offers recommendations on how WTO members may go about reforming the WTO dispute settlement system and negotiation function, as well as modernise its rules and empower the Secretariat in order to achieve those goals.

Although there is consensus as to the need for reform, there remain two key overall hurdles. Firstly, multilateral institutions tend to be “risk averse” when it comes to reform, and consensus based decision making means there are many veto players that expect to lose from governance reform. This both explains why the WTO rules have yet to be modernised and why they may continue to be slow to change.<sup>274</sup> Secondly, the wide divergence between U.S. reform proposals and the proposals made by other WTO members, in particular China, may also be a barrier to any meaningful reform. This divergence is evidenced by the Chinese reaction to the Joint Trilateral Statement proposed by Japan, the U.S. and the E.U. Although China remains open to negotiation, China’s Permanent Representative and Ambassador to the WTO, has expressed that China would rather not see the trilateral statement added to the WTO’s agenda.<sup>275</sup> Ambassador Xiangchen has also expressed the view that the WTO should not be focused on trying to change China’s economic model.<sup>276</sup>

Despite these hurdles, the authors believe that the current strain on the WTO combined with members overall commitment to multilateralism, can still provide the necessary impetus for reform and that the below recommendations provide a helpful starting point.

## VII.II REFORMING THE DISPUTE SETTLEMENT SYSTEM

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<sup>273</sup> Schlesinger (n 104).

<sup>274</sup> Elsig and Cottier (n 117) 290.

<sup>275</sup> Interview with Anabel Gonzalez, Zhang Xiangchen and Chad Bown, ‘Peterson Institute for International Economics: China in the WTO: Current Issues and Prospects for Reform’ (15 July 2020) <<https://www.piie.com/events/china-wto-current-issues-and-prospects-reform>> accessed 10 August 2020.

<sup>276</sup> *ibid.*

As identified earlier in the paper, the WTO Dispute Settlement is no longer trusted by all members to be a timely and impartial process that produces enforceable measures to resolve disputes. Furthermore, it is increasingly utilized as a route for WTO members to gain privileges or concessions without negotiations, undermining the negotiating function of the WTO.<sup>277</sup> This section considers potential changes that could be made to the DSU to improve members' trust in the process and increase efficiency.

The authors of this paper recommend that the Walker draft decision be adopted by the WTO General Council; that the permanent WTO Appellate Body Secretariat staff be replaced by a rotation of staff from the WTO Secretariat; and that AB members' terms of service be limited to one term of 6-8 years on a full-time basis. These proposed reforms are intended to reassert the efficiency and efficacy of the dispute resolution process in order to restore states' confidence in the system and make it an effective complement to the WTO's negotiating function, rather than an alternative. The recommendations focus primarily on the Appellate Body, as this stage of the dispute settlement system is currently inoperative, leaving any appealed disputes unresolved.

All reforms to the DSU require consensus to be enacted. However, not all WTO members engage actively in this process, and the most active participants in dispute settlement are generally the large global trading powers. Hence for reforms to be implementable they must appeal to the major trading powers, in particular the U.S. as it is the most vocal critic of the dispute settlement system.<sup>278</sup> Although the Biden administration may be more willing to negotiate regarding AB reform, dissatisfaction among the American private sector with the WTO is unlikely to change. Thus, while the U.S. may be more receptive to considering reform efforts, the underlying grievances may continue to hinder reform implementation.

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<sup>277</sup> Hillman (n 94).

<sup>278</sup> Bernard Hoekman and Petros C Mavroidis, 'Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?' [2020] SSRN Electronic Journal 5 <<https://www.ssrn.com/abstract=3531704>> accessed 29 August 2020.

## i. Reforming the Appellate Body

Appellate Body reform is the most urgent issue facing the dispute settlement system and the AB remains inoperative. As the U.S. has been the most vocal critic of the AB, most reform proposals are aimed at alleviating these concerns. Although the methods and decisions of the U.S. are potentially administration-specific and could be subject to change, the underlying causes of concern are bi-partisan within the U.S. and thus will need to be addressed even under the Biden administration.

### *Adopting the Walker draft decision*

Firstly, the authors recommend that the WTO General Council approve the Walker Draft Decision which was presented to the GC in late 2019. The draft decision, while not intended to be a final solution, is a valuable starting point for change and discussion. Bercero, suggests that the draft decision could be adopted as an Article IX:2 interpretation of the DSU, which enables binding interpretations of WTO rules to be enacted without members having to undertake negotiations.<sup>279</sup> This may be a helpful approach as in the past negotiations to alter dispute settlement rules were unsuccessful. Indeed, if WTO Members adopt the Walker draft decision, it would be the first time they have provided guidance on how the adjudication function of the WTO should be used.<sup>280</sup>

The Walker draft decision is the result of work done through the Informal Process of Solution-Focused Discussion on matters related to the Functioning of the Appellate Body, which involved consultations and meetings with delegations and coordinators and consideration of twelve proposals submitted by WTO members. The draft decision is built on points of convergence that Ambassador Walker identified through the informal process. At the General Council December 2019 session several members including Japan, Chile (on behalf of itself and 10 other

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<sup>279</sup> Ignacio Garcia Bercero (n 1) 35.

<sup>280</sup> *ibid*

Latin American States), Chinese Taipei, Republic of Korea, the African Group, India, EU, Australia, and China, spoke in favour of the draft decision.<sup>281</sup>

Member support for the proposal suggests it may have a good chance of success. Indeed, the proposal addresses most of the major points of contention raised by the U.S. regarding the Appellate Body, including the timeliness of proceedings, questions of precedence and advisory opinions, and reasserts that WTO members' obligations cannot be added to or diminished by rulings.<sup>282</sup> For example, in points 9 and 14 of the draft decision, it is specified that the AB should address issues raised "in accordance with DSU Article 17.6 only to the extent necessary to assist the DSB in making the recommendations or in giving the rulings."<sup>283</sup> This interpretation of Article 17.6 of the DSU, which restricts matters raised on appeal to issues of law covered in the panel report, gives the AB the authority to exercise judicial economy, rather than address all issues raised by parties.<sup>284</sup> This has multiple benefits, including reducing the length of appeals as assuring states that the AB would only address issues raised by the panel report, not tangential issues. Furthermore, the draft decision establishes a mechanism for regular dialogue between members and the AB, which if developed further, could serve to increase the trust in the AB by making it possible for rulings to be explained in more detail and enhancing accountability. This may alleviate concerns that the AB is eroding WTO members' authority.<sup>285</sup> In these ways, the Walker proposals address members' concerns in a manner that has received approval of many delegations, and thus provides a sound basis for reform of the dispute settlement system.

Furthermore, the Walker draft decision provides a valuable starting point for further reforms, and numerous suggestions have been made on ways to build upon it. Stewart suggests augmenting the Walker proposals with more detailed measures, for example by suggesting a procedure to be followed if an appeal is not completed within the 90-day timeline, or measures that allow parties

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<sup>281</sup> World Trade Organisation, 'General Council Minutes of Meeting, WT/GC/M/181' (n 86).

<sup>282</sup> WTO General Council (n 92).

<sup>283</sup> *ibid*; Ignacio Garcia Bercero (n 1) 32.

<sup>284</sup> *ibid*

<sup>285</sup> Ignacio Garcia Bercero (n 1) 285.

to a dispute to request the removal of information within AB reports that constitute advisory opinions or interpret municipal law, amongst other similar suggestions.<sup>286</sup>

As Hillman has suggested, it may also be prudent to establish an oversight committee to monitor compliance, in conjunction with the Walker proposals.<sup>287</sup> This measure could help restore trust in the AB and alleviate concerns from members like the U.S. who suspect the AB will not change its practices even if the Walker proposals are adopted. However, it could conversely also add an additional layer of bureaucracy to an already bureaucratic institution. Such a committee could be founded on a provisional basis, to allow members to observe its work and determine if it should be made permanent. Prior to the creation of such a committee, however, it is necessary for the Walker proposals themselves to be formally adopted.

There is a significant possibility that the Walker proposals will not be approved in the General Council. The U.S. has rejected the draft decision, removing the possibility of reaching a unanimous consensus. While Ambassador Walker asserted that if the draft decision is adopted, it “would constitute a shared assessment by members that the Appellate Body had, in some respects, not been functioning as it had been intended under the DSU”, the U.S. responded by insisting that the proposal fails to address the fundamental issue of Members tolerating and encouraging the AB to disregard the language of the DSU.<sup>288</sup> Furthermore, the U.S. questioned whether the AB would follow these rules any more strictly, particularly those regarding deadlines, the issuance of advisory opinions, Article 17.6 and review of questions of fact, than they followed the original terms of the DSU.<sup>289</sup> While enforceability is a valid concern, the draft decision is by necessity an outline rather than a detailed proposal with precise details on enforceability, much like the DSU itself. As previously noted, the acceptance of the draft proposal would itself be a major change, as Members would for the first time add to the original rules of the dispute settlement system.

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<sup>286</sup> Terrence Stewart, ‘WTO’s Appellate Body Reform the Draft General Council Decision on Functioning of the Appellate Body’ <<https://www.wita.org/blogs/wtos-appellate-body-reform/>> accessed 12 February 2021.

<sup>287</sup> Jennifer Hillman (n 75).

<sup>288</sup> Ambassador Dennis Shea (n 90); World Trade Organisation, ‘General Council Minutes of Meeting, WT/GC/M/181’ (n 86).

<sup>289</sup> Ambassador Dennis Shea (n 90).

However, U.S. opposition to the proposal does not appear to be softening, and the Trump administration has continued to express hostility toward the AB. Indeed, in June 2020 U.S. Trade Representative Robert Lighthizer stated that he did not see any need for the AB to ever become functional again.<sup>290</sup> It is possible that under the Biden administration the U.S. may become more willing to use the Walker proposals as a starting point, hence the draft decision should not necessarily be dismissed as a defeated project. Instead, improvements could be made to the draft decision to increase its enforceability and efficacy.

### *Reform the Appellate Body Secretariat*

As of late 2020, the AB Secretariat has been effectively dissolved in the absence of an operational Appellate Body. However, in the event that the AB selection process becomes functional, an AB Secretariat will need to be re-established. Changes to the AB's administrative support structure would aid broader reforms: specifically, while the AB Secretariat was formerly a permanent body with a fixed staff, in the event of its re-establishment the authors believe it should operate with a rotating staff.

While the WTO has a permanent Secretariat, the Appellate Body has its own separate secretariat that is only linked to the WTO Secretariat administratively. The AB secretariat is responsible for providing independent, impartial and confidential legal and administrative support to the AB, as established in DSU Article 17.7.<sup>291</sup> Some observers believe that in recent years the AB Secretariat has become overly influential by assuming responsibility for drafting and refining AB decisions, taking an active part in AB decision-making rather than simply providing AB members with legal and administrative advice.<sup>292</sup> To a certain extent, this may not be inherently negative,

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<sup>290</sup> Hillman (n 94).

<sup>291</sup> 'WTO | Disputes - Dispute Settlement CBT - WTO Bodies Involved in the Dispute Settlement Process - Appellate Body - Page 1' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s4p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm)> accessed 12 February 2021.

<sup>292</sup> Bruce Hirsch, 'Resolving the WTO Appellate Body Crisis' (Vol 2): Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators' (Tailwind Global Strategies 2020).

as AB members do not always have a background in trade negotiation whereas much of the AB secretariat staff has extensive experience working on the trade issues raised in disputes. However, some WTO members, like the U.S., take the view that the AB secretariat increasing influence undermines members' power, since the AB secretariat are not selected by WTO members and thus are not accountable to their oversight. Furthermore, as the AB Secretariat staff works full-time on appeals, often over many years, they risk becoming attached to past decisions which increases the AB's tendency to apply past rulings and decisions as precedent.<sup>293</sup> Jennifer Hillman has proposed that AB Secretariat staff could be limited to 8-year terms, the same as AB members themselves and rotated out of the secretariat after this time. This could bring new perspectives into the AB secretariat, reduce the tendency of the AB to view past decisions as precedent, and furthermore could mitigate concerns that the AB secretariat may overly influence AB members' decisions.<sup>294</sup>

Bruce Hirsh suggests a more significant change, proposing that the AB secretariat be replaced with clerks seconded from the WTO Secretariat who would work for an AB member for one or two-year periods. He argues that this could restore the decision-making balance in favour of AB members while still allowing them to receive advice from staff knowledgeable in WTO provisions. Additionally, he notes that panellists at the panel stage are supported by WTO secretariat officials, and that if this staff also worked with the AB, they could bring their institutional knowledge of the negotiating functions of the WTO and perhaps in this way help advise AB members on how to remain within the scope of WTO agreements.<sup>295</sup> This could be beneficial, as AB members sometimes often do not have a background in trade negotiation, whereas panellists are often former or current WTO delegates. As a result, AB members may lack broader knowledge of the WTO as an institution, which may contribute to members' perception that the AB oversteps its role, although the AB does not share the same view.<sup>296</sup> Changes to the AB secretariat could be made by WTO Members without having to amend the DSU, as Article 17.7 only states that "the Appellate Body shall be provided with appropriate

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<sup>293</sup> Jennifer Hillman (n 75).

<sup>294</sup> *ibid.*

<sup>295</sup> Bruce Hirsch (n 292).

<sup>296</sup> *ibid.*



administrative and legal support as it requires”, not that there must be an Appellate Body Secretariat separate from the WTO Secretariat.<sup>297</sup>

While changing the composition of the AB Secretariat may, from one perspective, help integrate the AB more fully into the WTO, curb tendencies towards relying on precedent and increase the trust of WTO Members in the impartial nature of the AB. This reform may face significant opposition from some member states who view a separate AB Secretariat as vital to maintaining the AB’s impartiality. Bercero suggests minor changes in place of an institutional shift, specifically that the director of the AB Secretariat be subject to term limits, or that AB members could choose secretariat lawyers to serve as their clerks.<sup>298</sup> Smaller-scale changes to increase support and resources to the AB Secretariat may be more acceptable to Members; in 2018, the E.U., China and India suggested expanding the resources of the AB Secretariat to ‘facilitate the prompt circulation of Appellate Body reports while safeguarding the quality of the reports.’<sup>299</sup> Members generally do not appear favourable to major changes, however it could be argued that the current situation necessitates some dramatic changes to its composition to restore WTO members’ faith in its efficiency and efficacy.

A viable solution could be a combination of Hillman and Hirsch’s suggestions: WTO Secretariat staff could be selected to serve as AB secretariat staff for terms of 4-8 years before rotating back to the WTO Secretariat. This would fulfil the desire for the AB Secretariat to have an awareness of WTO’s other function and provide context for AB members. Similarly, this would allow for new perspectives to be brought in without a rapid turnover of staff. Furthermore, while this change to the nature of the AB secretariat, does constitute a significant change, it would not require an amendment to the DSU and could perhaps be achieved without the need for significant negotiations.

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<sup>297</sup> ‘WTO | Dispute Settlement Understanding - Legal Text’ (n 69).

<sup>298</sup> Ignacio García Bercero (n 1) 36.

<sup>299</sup> World Trade Organisation, ‘Communication from the European Union, China and India to the General Council, WT/GC/W/753’.

## *Change Appellate Body Members' terms of service*

The functioning of the AB could also be improved by changing AB members' terms of service and allowing them to serve one long term of 8-9 years on a full-time basis. AB members currently serve for four-year terms, with the possibility of a second term. The majority, 19 of 26 past AB members (excluding Hong Zhao, the current sitting AB member, whose first term ended in November 2020), served for two terms.<sup>300</sup> Serving for a longer term would give members time to familiarize themselves with the rules and practices of trade negotiation, which are intrinsically linked to the WTO dispute settlement mechanism.<sup>301</sup>

AB members' lack of WTO law expertise, could be ameliorated by the establishment of a commission of experts, including lawyers, economists, and WTO practitioners to screen panellists and AB nominees to ensure that only those who are experienced and knowledgeable in trade law are appointed. This could reduce the risk of panellists and AB members misinterpreting aspects of the DSU while reassuring member states that reports and rulings are accurate.<sup>302</sup>

In 2018 the E.U., China and India proposed to the General Council that AB members serve for only a single term of 6-8 years in order to "enhance the independence of the Appellate Body and its members."<sup>303</sup> However, this proposal may raise opposition from the U.S. due to fears that it would exacerbate the AB's tendency to assert the precedential value of its rulings and regard its position as somewhat exceptional. This could be addressed by implementing the EU's proposal alongside the Walker proposals, emphasising the need to avoid precedential rulings and advisory opinions, these fears may be alleviated enough to allow the reforms to be enacted.

Any reform to AB members' terms of service would require an amendment to DSU Article 17.2 which provides that AB appointees serve a four-year term with the possibility to be

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<sup>300</sup> 'WTO | Dispute Settlement - Appellate Body Members' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm)> accessed 11 July 2020.

<sup>301</sup> Bruce Hirsch (n 292).

<sup>302</sup> Hoekman and Mavroidis, 'Preventing the Bad from Getting Worse' (n 278) 17.

<sup>303</sup> World Trade Organisation, 'Communication from the European Union, China and India to the General Council, WT/GC/W/753' (n 299).

reappointed once.<sup>304</sup> As past efforts to alter the DSU have not succeeded, DSU alteration presents a significant obstacle to the adoption of this recommendation: it is possible though that if the Walker proposals are adopted and ameliorate the functioning of the AB to the satisfaction of WTO members, they will consider implementing more significant reforms.

The authors recommend that AB members' serve on a full-time basis, as currently AB members work on a part time basis pursuant to DSB decision WT/DSB/1 and hold other positions outside of the WTO.<sup>305</sup> As the number and complexity of appeals has increased significantly in the past decade, this arrangement is no longer practical. At the 2018 General Council, the E.U., China and India additionally proposed that "the membership of the Appellate Body [be] the exclusive occupation of the Appellate Body members".<sup>306</sup> Hoekmann and Mavroidis also recommend this reform in light of the increased case load presented to the AB.<sup>307</sup> This reform would be more easily implemented as the DSU does not specify that AB members have to serve part-time, and only specifies that they "shall be available at all times and on short notice".<sup>308</sup> Bercero notes that in the past, the U.S. supported the full-time dedication of AB members, hence it is possible that the U.S. would approve of this reform if convinced that it would improve the efficiency of appeals and the integrity of AB reports.<sup>309</sup>

Changing the nature of secretariat support and the service of AB members themselves could improve the implementation and efficacy of the Walker proposals, by ensuring that AB members who are provided with impartial advice rooted in institutional knowledge of the WTO, have the necessary experience to properly fulfil their role as well as the opportunity to better understand their role within the broader WTO context.

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<sup>304</sup> 'WTO | Dispute Settlement Understanding - Legal Text' (n 69).

<sup>305</sup> World Trade Organisation, 'Establishment of the Appellate Body WT/DB/1'.

<sup>306</sup> World Trade Organisation, 'Communication from the European Union, China and India to the General Council, WT/GC/W/753' (n 299).

<sup>307</sup> Hoekman and Mavroidis, 'Preventing the Bad from Getting Worse' (n 278) 17.

<sup>308</sup> World Trade Organization, Understanding on rules and procedures governing the settlement of disputes: Annex 2 of the WTO Agreement [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm)

<sup>309</sup> Ignacio Garcia Bercero (n 113).

## ii. **Potential Reforms of the panel and consultation stages of the Dispute Settlement System**

Reforming the AB alone may resolve the current ‘crisis’ the WTO dispute settlement system is facing; however, it would not be sufficient to enact institutional change on a broader scale, which is necessary for the system’s long-term stability and efficacy. While our recommendations have focused on the AB, a brief discussion on how to improve the efficiency of the panel stage is worthwhile. The authors propose the excess processes beyond the panel hearing should be removed in order to reassert the importance of efficient and timely panel proceedings. In addition, a standing body of panellists should be considered to ensure that panellists have the necessary expertise.

Although the AB is currently under criticism for exceeding its 90-day deadline on many rulings, Panels are also culpable for breaking the 6-to-9-month deadlines established in Articles 12.8 and 12.9 of the DSU. Panels regularly incur long delays beyond their established deadlines, and panels reports are, on average, issued 15.5 months after the respective panels are established.<sup>310</sup> This issue must be addressed in order to restore necessary timeliness to WTO dispute settlement proceedings. Garcia Bercero has proposed making changes to the DSU, including removing the possibility of delaying the establishment of a panel to the second DSB meeting, or removing the second oral hearing and interim reviews of panel reports.<sup>311</sup> In order to ensure that this does not result a lower quality of panel reports, it could be paired with the creation a commission of experts to select panellists, as this would ensure that panellists were the most qualified possible for each dispute.<sup>312</sup>

The E.U. has previously proposed that a standing body of panellists be appointed. This proposal was withdrawn in response to other members’ concerns that these standing panellists

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<sup>310</sup> Hoekman and Mavroidis, ‘Preventing the Bad from Getting Worse’ (n 278) 15.

<sup>311</sup> Ignacio Garcia Bercero (n 1) 36.

<sup>312</sup> *ibid*

may be ‘too’ independent.<sup>313</sup> However, Hoekmann and Mavroidis have again proposed a similar scheme, suggesting that a standing group of 15-20 permanent panellists, who would serve for 8-10 years, be created to professionalize the panel stage of the DSU. Importantly, this could reduce the frequency of appeals by improving the quality and consistency of reports.<sup>314</sup> A standing body of panellists would also reduce the WTO secretariat’s influence on selecting panellists which may satisfy certain states, like the U.S.<sup>315</sup>

While the proposal did not succeed in the early 2000s, recent developments suggest it may now be more acceptable to members. The MPIA established by the E.U., China, and over 20 other Members has a similar standing body of adjudicators, suggesting that the participants do not oppose such a body.<sup>316</sup> However, as this proposal would likely require a change to DSU Article 8, it would require U.S. approval. The U.S. may oppose such a measure if they suspected it would encourage panel rulings to be viewed as precedent or lead panellists to ‘misinterpret’ the authority of their role.<sup>317</sup> Nonetheless, proposals intended to streamline the dispute settlement system at the very least merit consideration and may spark discussion on best practices for reform. This is especially important given there has been no such concentrated effort by WTO members.

Reforming the panel stage is a necessary aspect of WTO dispute settlement reform, as the panel stage must be viewed as equally important as the appeal stage. This will dissuade member states from pursuing appeals simply to delay the implementation of unfavourable rulings. The U.S. Trade Representative Robert Lighthizer has suggested replacing the two-tier system with a single-stage process comprised of ad hoc panels with no possibility of automatic appeal.<sup>318</sup> While he did not go into detail on this proposal, and it is unlikely to be brought officially as a proposal to the WTO due to the strong support for the two-tiered system both from the U.S. and amongst other members, Lighthizer’s suggestion does demonstrate that the panel stage is

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<sup>313</sup> Hoekman and Mavroidis, ‘Preventing the Bad from Getting Worse’ (n 278) 8.

<sup>314</sup> *ibid* 16.

<sup>315</sup> *ibid*

<sup>316</sup> WTO (n 95).

<sup>317</sup> ‘WTO | Dispute Settlement Understanding - Legal Text’ (n 69).

<sup>318</sup> Robert E Lighthizer, ‘Opinion | How to Set World Trade Straight’ *Wall Street Journal* (20 August 2020) <<https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341>> accessed 12 February 2021.

still regarded as a vital aspect of the dispute settlement system and should not be ignored in favour of the AB.

Reforming the WTO's dispute settlement system is a complex affair that cannot be accomplished solely through the recommendations above. However, these recommendations serve to establish a foundation for the resolution of the current paralysis of the Appellate Body and as serve as an impetus for further reforms. For the WTO dispute settlement system to maintain its integrity and efficacy it must operate on rules agreed upon by all members, proceed in a timely manner, and serve as a complement to, not an alternative to, the WTO's negotiating function.

### **VI.III Reform of the WTO Negotiation System**

This section considers potential structural reforms to the WTO's negotiation function which, the authors of this paper consider, would improve the efficiency of negotiation, overcome key barriers to consensus and help to restore lost legitimacy.

#### **i. Increased use of Plurilateral and Critical Mass Agreements**

The authors of this paper recommend that WTO members take advantage of the provisions allowing for plurilateral and critical mass agreements, in order to conclude agreements on key issues where there is consensus across a cross-section of members.

Plurilateral agreements (PAs), along with Critical Mass agreements (CMAs), allow likeminded WTO members to broaden WTO rules and commitments for specific issues, while members who do not wish to participate are not required to do so. PAs and CMAs are concluded under Article II.3 of the WTO agreement, which permits subsets of WTO membership to conclude agreements that apply only to their signatories. In contrast to FTAs, they can be issue specific

and need not cover all trade in goods substantially or have substantial sectoral coverage.<sup>319</sup> The main argument for a plurilateral approach is that it proves to be more efficient.<sup>320</sup> In addition, given the current environment of increased polarisation, in particular between a few members states, plurilateral agreements may provide a way for WTO members who are willing to cooperate an avenue through which to make much needed progress on key issues.

Plurilateral agreements would represent a significant shift away from the multilateral approach which has underpinned the global trade system since the inception of the WTO. Nevertheless, the authors consider that given the current issues facing the multilateral trading system it is the more practical and, in many ways, the more effective approach since PAs, as well as Critical Mass Agreements, are “firmly rooted in the legal, political, and institutional setting of the WTO.”<sup>321</sup>

There also appears to be some support for the plurilateral approach among WTO members. Following the “de facto failure” of the Doha Round, many policymakers and WTO members, including the EU, have shifted their focus towards plurilateral trade governance. In many ways, the declarations made at the Buenos Aires Ministerial Conference in December 2017, can be read as “preparing the ground for plurilateral initiatives on new trade rules for MSMEs, E-commerce and Investment Facilitation.”<sup>322</sup> In addition, the E.U. has proposed the creation of a new Annex IV b which would contain a set of plurilateral agreements that are applied on an MFN basis and which could be amended through a simplified process.<sup>323</sup>

Support for the plurilateral approach is a relatively recent trend, as PAs have generally been viewed as the second-best approach to consensus-based multilateralism. However, Basedow has argued that PAs shouldn’t be seen as second best because the “growing complexity of modern trade policy creates new trade-offs between trade gains and intrusive adjustments to regulation and public policy”, that may make PAs an ideal option. Although this remains up for debate, the authors of this paper view that a plurilateral approach is, given the current climate, an

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<sup>319</sup> Bernard Hoekman and Petros Mavroidis (n 161).

<sup>320</sup> Basedow (n 177).

<sup>321</sup> *ibid.*

<sup>322</sup> *ibid* 2.

<sup>323</sup> ‘WTO Modernisation: Introduction to Future EU Proposals’ (n 150).

appropriate option, largely because the failure of the Doha round and the current trade climate demonstrate that an exclusively multilateral approach may result in continued stagnation for quite some time. Moreover, countries are adopting the alternative approach of negotiating bilateral and regional trade agreements, outside of the WTO, which are even less beneficial to the multilateral trading system than plurilateral agreement.

It is also worth noting that although WTO members have primarily adopted the multilateral approach, there is precedent for plurilateral agreements (PAs) under the WTO and critical mass agreements under GATT. In the 1960s and 1970s, the WTO members negotiated a series of PAs which applied on an MFN basis and qualified as critical mass agreements (CMAs). Although most of those agreements, were integrated into the WTO Agreement as part of the Uruguay round, there are still three PAs currently in force: the Agreement on Government Procurement, the Agreement on Trade in Civil Aircraft and the Information Technology Agreement.<sup>324</sup>

### *Plurilateral Agreements*

Plurilateral agreements are permitted under Article II.3 of the WTO agreement. Under Article II.3 a subset of WTO members can negotiate an agreement to deepen or expand their obligations. PAs are open to all WTO members and although all WTO members do not have to enter into these commitments, they must vote by consensus to allow the PA to be appended to WTO law and become legally binding.<sup>325</sup> Such agreements may either be either “WTO+ or WTO X agreements”.<sup>326</sup> WTO+ agreements would deepen existing WTO obligations while WTO X agreements would cover areas that are not currently covered by WTO rules. Typically, PAs tend to be WTO X agreements and focus on relatively narrow issues such as environmental goods or e commerce.<sup>327</sup> Under Article X:9, the Ministerial Conference would then need to vote via consensus to add a PA to the Annex of existing agreements.

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<sup>324</sup> Basedow (n 177) 7.

<sup>325</sup> *ibid* 6.

<sup>326</sup> Hoekman and Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”?’ (n 176).

<sup>327</sup> Basedow (n 177) 8.



Given the current paralysis of the WTO's negotiation function, consensus across 164 members may be an ideal, but impractical, path forward. This is especially true given that the proliferation of FTAs suggests that it is possible and in fact easier, to reach agreements across a subset of WTP members. Plurilateral agreements, may provide a middle ground between the consensus-based approaches and FTA approaches. PAs are particularly helpful because they also help to address the fact that WTO negotiations are often blocked by "a handful of powerful countries that are unable to reach agreement among themselves."<sup>328</sup>

PAs also have the important advantage of being "pareto sanctioned." Nonparticipants will only accept them if they do not view the agreement as being detrimental to their interests, whereas participants take the view that the agreement helps them."<sup>329</sup> Although all members still have to vote by consensus to allow a PA, there is less risk of issue linkage, so that a powerful member has less of an interest in blocking a PA which is not detrimental to their interests, in the hope of gaining a concession on other issues. Similarly, members can abstain from joining the PA and do not need to block it in order to prevent having to assume its obligations. Finally, on a procedural note, PAs are a relatively compelling alternative to the current approach because they do not require reform of WTO law, and would simply require a "reform of practice," which may be easier to achieve.<sup>330</sup>

Plurilateral agreements also have the benefit of being more transparent than FTAs. The transparency of PAs is ensured through by the fact that they must be approved by the WTO General Council. This is arguably more effective than the transparency mechanism in place for reviewing free trade agreements under GATT, which as Hoekman and Mavroidis have noted 'doesn't have any teeth'.<sup>331</sup> PAs would also be associated with WTO bodies such as committees which assist WTO members with the implementation of agreements.<sup>332</sup> In addition to proliferation of FTAs and RTAs, countries are increasingly negotiating plurilateral agreements outside of the WTO framework such as the failed Anti-Counterfeiting Trade Agreement (ACTA)

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<sup>328</sup> Bellmann, Hepburn and Wilke (n 118).

<sup>329</sup> Hoekman and Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"?' (n 176) 326.

<sup>330</sup> Ansong (n 158) 397.

<sup>331</sup> Hoekman and Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"?' (n 176) 328-329.

<sup>332</sup> *ibid* 329.

and more recently the Trade in Services Agreement (TiSA). It should be noted that the 50 countries currently engaged in TiSA negotiations have shown little interest in engaging with the WTO secretariat or other WTO members.<sup>333</sup> Increasing the use of plurilateral agreements would therefore allow such initiatives to be brought into the WTO framework.

Given the growing interest for PAs, the authors of this paper share Bercero's view that the next Ministerial Conference should adopt a framework decision providing guidelines for plurilateral agreements that can be added to Annex 4.<sup>334</sup> Although under Article X9, approval or rejection of a PA will ultimately be on a case by case basis and depend on the negotiated text, the creation of a framework will not only provide some encouragement for those members who are interested in following the plurilateral approach, but also help to streamline future approval processes<sup>335</sup>

Within these guidelines, the authors of this paper recommend that the Ministerial Conference emphasise several key elements of the ideal PA:

- Agreements cannot limit the existing rights of non-participants; however non-participants may not bring claims against participants that are based on the provisions of the plurilateral agreement.<sup>336</sup>
- New PAs should be open to all WTO members at the negotiation stage in order to mitigate against the concerns of bifurcation described above.<sup>337</sup>
- Minimum membership criteria for PAs, as has been recommended by Basedow, who suggests a minimum membership of one third of WTO members.<sup>338</sup> This may also help to improve the political viability of any PAs which would apply on a non-MFN basis.

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<sup>333</sup> Basedow (n 177) 7.

<sup>334</sup> Ignacio Garcia Bercero (n 1).

<sup>335</sup> Hoekman and Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"?' (n 176) 326.

<sup>336</sup> Ignacio Garcia Bercero (n 113).

<sup>337</sup> Hoekman and Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"?' (n 176) 337.

<sup>338</sup> Basedow (n 177) 19.

- WTO secretariat assistance to facilitate the participation of developing countries in plurilateral negotiations. This might take the form of capacity building efforts and negotiating flexible commitments.<sup>339</sup>

In addition, the authors recommend that WTO members seeking to negotiate PAs adopt an open access criteria, even though they have the option not to under Article X.9, as this will lend itself to the idea that incorporated PAs create a win-win situation for all parties and rather than exclusive clubs.<sup>340</sup> Finally, plurilateral agreements should follow the MFN principle where possible (including by use of Critical Mass Agreements) and where necessary make certain commitments conditional on the fulfilment of certain objective conditions.<sup>341</sup>

Despite the benefits described above, there are some concerns with increasing the use of PAs within the WTO. The most common critique of PAs is that they lead to the fragmentation of trade rules and the erosion of the MFN principle which underpins the WTO system. Specifically, there is concern that PAs may create a “multi-tier” system with differentiated commitments.<sup>342</sup> However as Mavroidis and Hoekman have noted, this is less of a concern with the WTO members’ focus on agreements which deal with issues that are not currently addressed by WTO rules, such as e-commerce. In addition where PAs involve “regulatory cooperation and convergence for a policy area that is covered by the WTO or addresses a new issue it is unlikely to have detrimental consequences for the trading system.”<sup>343</sup> Moreover, the high threshold of approval for a new PA guarantees that WTO members have the ability to block PAs that are aren’t in the interests of non-signatories.<sup>344</sup> It is also important to note that in the unlikely event that WTO members were to approve a PA that would make the MFN principle conditional, this would be a more benign erosion of the MFN principle than we would see under FTAs.<sup>345</sup>

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<sup>339</sup> Ignacio Garcia Bercero (n 1).

<sup>340</sup> Hoekman and Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”?’ (n 176) 338.

<sup>341</sup> Ignacio Garcia Bercero (n 1).

<sup>342</sup> Hoekman and Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”?’ (n 176).

<sup>343</sup> Bernard Hoekman and Petros Mavroidis (n 161) 339.

<sup>344</sup> Hoekman and Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”?’ (n 176) 333.

<sup>345</sup> Hoekman and Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”?’ (n 176).

A related concern is that a plurilateral approach would lead to a long-term divergence within the WTO that would create groups of “insiders” and “outsiders”. This is of particular concern to developing countries who fear being relegated to the outsider group, an effect that would undermine the strengths of the WTO’s consensus based approach.<sup>346</sup> However, developing countries would have the power to prevent PAs from being incorporated in this first place, which would help mitigate this concern. Moreover, given the heterogeneity in development, economic structures and priorities, it is inevitable that PAs might focus on issues that are not priorities for all WTO members and therefore would serve to promote efficiency.<sup>347</sup> It is also arguable that negotiating independent regional agreements may be costlier for developing countries that face capacity constraints.<sup>348</sup>

Thirdly, there is some concern that PAs will come to define the rules of the game in a specific area and that countries that opt in will have “first mover advantage”, in particular there is concern that such plurilateral agreements would be dominated by OECD countries and that developing countries would therefore be disadvantaged.<sup>349</sup> However, it is not immediately clear that plurilateral agreements would be dominated by large OECD countries.<sup>350</sup>

Another concern is that plurilateral agreements may reduce issue linkage, which is one of the main rationales of the single undertaking approach. However, this would depend heavily on the subject matter of the PA, as it may be such that countries are not willing to pay much for participation, such that there would be little “linkage downside.”<sup>351</sup> It is also possible that in some circumstances, the absence of linkage i.e the fact that countries do not have to give up much to join may serve as an incentive to join, which would help to mitigate some of the concerns above.<sup>352</sup>

Overall, the biggest hurdle to the implementation of our proposals is also its biggest strength. In order for a PA to be approved, WTO members must vote by consensus. Since participation in

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<sup>346</sup> *ibid* 334.

<sup>347</sup> *ibid*.

<sup>348</sup> *ibid*.

<sup>349</sup> Hoekman and Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”?’ (n 176).

<sup>350</sup> *ibid*.

<sup>351</sup> *ibid* 336.

<sup>352</sup> *ibid*.

PA is optional, it should be easier to reach this consensus. However, there is always the possibility, that negotiations become politicised and members choose to block the acceptance of a PA for political or strategic reasons.

### *Critical Mass Agreements*

Critical Mass Agreements (CMAs) are a variant of exclusive plurilateral agreements and share all the benefits of PAs described above. However, CMAs differ from exclusive PAs in that they often apply on an MFN basis which means that although only a subset of WTO members are bound by CMAs, any commitments made under the CMAs are extended to all WTO members. This is viable when a “critical mass” i.e. WTO members representing a sizable share of world trade, production, and consumption in a concerned domain are party to the document. A critical mass is essential to minimise free riding and also helps to preserve the multilateral character of the WTO, while also supporting “fast-track” and more efficient negotiation.<sup>353</sup> Critical Mass Agreements may not be ideal for especially contentious topics where there are long-standing disagreements between major trading blocs, as it would be difficult to reach the necessary critical mass. However, they may work well for issues affecting a specific subset of countries or topics like e-commerce or digital services or environmental goods where some WTO members are eager to implement at least some high-level rules.

One key concern with critical mass agreements, is that smaller countries may not account for sufficiently significant share of trade a certain sector and would therefore not be critical for achieving a critical mass, but would still be affected by new rules that they may not have had a role in negotiating. However, the authors of this paper consider that this issue is addressed by the fact that critical mass agreements require a consensus vote to be allowed to come into force, which smaller countries who feel they would be severely disadvantaged could block. In addition,

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<sup>353</sup> Bellmann, Hepburn and Wilke (n 118).

the authors of the paper recommend that critical mass agreements should be open to all WTO members at the negotiation stage.

Another potential concern with CMAs that apply on an MFN basis, is that there is no incentive for non-participants to join the agreement after it comes into force and as they are able to take advantage of the benefits without joining. However, this is to some extent addressed by the critical mass nature of the agreements of themselves, since only a small number of relevant countries will be able to become free riders. In addition, even where plurilateral agreements apply on an MFN basis, certain benefits can be made conditional on certain obligations, thus creating an incentive to join even after a CMA has entered into force.<sup>354</sup>

A recent attempt at implementing a CMA is the Environmental Goods Agreement (EGA) which was negotiated between 50 WTO members within the WTO framework between 2014 and 2016. Although the negotiations collapsed after two years when major negotiating parties tabled new demands and as a result of increased tension between the U.S. and China, the success of negotiations prior to 2016 suggest that the CMA structure may be promising for similar agreements.<sup>355</sup>

## ii. Moving away from the single undertaking system

In addition to allowing for more flexible use of plurilateral agreements, WTO decision making could also be made more efficient by moving away from the single undertaking approach. As the Doha round has demonstrated, issue linkage has served as a barrier to, rather than a facilitator of consensus. Moreover, it is crucial that the WTO is able to conclude some agreements in the coming months in order to restore its flexibility. A shift away from the single undertaking approach, especially if combined with increased use of plurilateral agreements, would restore the

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<sup>354</sup> Hoekman and Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"?' (n 176).

<sup>355</sup> Gary Winslett, 'Critical Mass Agreements: The Proven Template for Trade Liberalization in the WTO' (2018) 17 World Trade Review 405, 424.

flexibility needed to do that.<sup>356</sup> Moreover, the shift away from the single undertaking approach is especially important given that WTO negotiation rounds have shifted away from reciprocal lowering of tariffs to increasingly complex conversations about non-tariff barriers and regulations.<sup>357</sup> This shift combined with the fact that more members are in a position to exercise veto powers than before, suggest that a change in decision making processes is needed.<sup>358</sup> As Elsig and Cottier have noted, a shift away from the single undertaking approach is necessary in order for issues to be addressed more quickly.<sup>359</sup>

The authors of the paper would thus recommend that future negotiation rounds, in particular those that look to create new rules, are not structured under the single undertaking approach. This is entirely possible because the single undertaking approach is not mandated by WTO law. WTO members may seek to use “mini rounds”, as suggested by Elsig and Cottier, to address specific, timely issues that have garnered interest from WTO members.<sup>360</sup> WTO members should refrain from broadening negotiations as mini-rounds continue, as this risks creating the sort of negative issue linkages that prevented mini-packages such as the LDC services waiver from being concluded during the Doha Round.<sup>361</sup> Given the current set of topics on the docket, an upcoming mini round might consider e-commerce and digital trade and services issues more broadly.<sup>362</sup> Other potential issues that could be tackled through a mini round are Medical Goods or the extension of the Pharmaceutical Agreement, which would be timely given the strain on medical supply chains caused by the COVID-19 Pandemic.

Finally, although this paper does not specifically recommend increased use of the WTO voting mechanism which is permitted under Article X, it is worth noting that the need for consensus is likely heightened by the use of the single undertaking mechanism.<sup>363</sup> It is therefore possible,

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<sup>356</sup> Ignacio Garcia Bercero (n 1) 23.

<sup>357</sup> Elsig and Cottier (n 117) 301.

<sup>358</sup> *ibid.*

<sup>359</sup> *ibid* 308.

<sup>360</sup> Elsig and Cottier (n 117).

<sup>361</sup> Bellmann, Hepburn and Wilke (n 118).

<sup>362</sup> Elsig and Cottier (n 117) 308.

<sup>363</sup> Ansong (n 158) 396.

though unlikely, that members may be more willing to use a voting mechanism when they are not concerned about the linkages created by the single undertaking system.

## VII.IV. MODERNISATION OF WTO RULES

The current paralysis of the WTO and proliferation of bilateral and regional trade agreements demonstrates the fact that members do not view the organisation as fit for purpose. In addition to the more structural changes needed to reform the dispute settlement system and negotiations, WTO members must also modernise substantive rules through new negotiation rounds. This section provides recommendations as to how WTO members may go about modernising trade rules in order to address the significant changes in the global trading system since the Uruguay round. Specifically, the authors recommend that the WTO should move away from a monolithic view of developing country status as well as modernise the rules on subsidies and countervailing measures.

### i. Moving Away from Developing Country Status

Given the lack of consensus around the self-designation approach to developing country status, the authors recommend that WTO members move away from the current block-based classification approach towards a more nuanced case by case approach to SDT. As stated above, current WTO rules do not provide a set of clearly defined criteria and allow a member country to declare itself as a developing country.<sup>364</sup> Moreover, the current distinction between developed and developing countries does not adequately accommodate all types of economies as well as all stages of economic development.<sup>365</sup> Thus, there is a need to revise the current rules on

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<sup>364</sup> 'WTO | Development - Who Are the Developing Countries in the WTO?' (n 231).

<sup>365</sup> 'WTO | Development - Special and Differential Treatment Provisions' (n 139).



developing country status so as to better cater to demands of different member states and to better help those countries in urgent need of economic assistance and preferential treatment.

The authors recommend that the WTO move away from the traditional hard distinction between developed countries and developing countries and implement a set of more nuanced economic indicators to label a country's stage of economic development. Firstly, this would require WTO members requesting SDT to clearly identify the development aims that necessitate SDT. This should be done on the basis of a case-by-case economic analysis of the impact of SDT rules on WTO economies. The E.U. has also suggested that the WTO should assess the impact of one member states' implementation of SDT policies on other WTO members, and that SDT flexibilities be accompanied by specifically a definite time period and scope of application for SDT provisions.<sup>366</sup> Secondly, the authors also consider that the WTO should implement a "graduation scheme", which would stipulate when and how a countries could graduate from a particular category of SDT and undertake more obligations under the WTO agreement. This mechanism could also be regulated by a more flexible, smaller review system to periodically investigate and determine which part of special and differential treatments could be replaced with full WTO obligations.<sup>367</sup>

However, it is important to keep in mind that SDT has been essential to improving access to agricultural imports in some Sub-Saharan African countries, such as Mozambique, which are largely landlocked and have relatively high trade costs for imports and exports. A drastic shift away from SDT could therefore cause increases in food prices in international markets, thus imposing a financial burden on countries that are reliant on food imports.<sup>368</sup> The graduation scheme thus offers an ideal middle ground, giving both developed countries and developing nations room for manoeuvre in negotiations. Such a scheme could allow developing countries to retain those special and differential treatment provisions essential to their economic development while ceding those which could potentially disadvantage developed nations and hinder global trade. Such practices are also currently feasible. For instance, although South Korea enjoys self-

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<sup>366</sup> Shi Yan, 'The EU's Push for WTO Reform: Proposals, Paths and Impacts' (2019) 76 *China International Studies* 60.

<sup>367</sup> *ibid.*

<sup>368</sup> K Anderson, *Agricultural Trade Reform and the Doha Development Agenda* (Basingstoke 2006).

declared “developing country” status, in practice as one of the “high-income” nations in the world, it only has exercised its special and differential treatment provisions in particularly sensitive areas like agriculture and fisheries.<sup>369</sup> Therefore, the graduation scheme would make it more likely that developed countries and developing nations will reach a compromise.

## ii. Modernising the rules on subsidies and countervailing measures

The current WTO rules on subsidies and countervailing measures (SCM) allow the WTO dispute settlement mechanism to determine whether subsidies in a member country are justified and thereby should be allowed. The rules also allow members to adopt countervailing measures unilaterally, after an investigation of another member’s practices.<sup>370</sup> Some WTO members are particularly concerned about a perceived lack of transparency with regard to subsidies and the role of SOEs as well as lack of compliance with the subsidy notification mechanism. Therefore, in addition to the existing notification regulations, a more comprehensive mechanism is necessary to include clearer and broader requirements for members to notify subsidies.

For example, the EU has identified the low level of compliance with notification process and lack of comprehensive information on subsidies as the main defects of the current rules. Thus, the E.U. has prioritised transparency and notification in WTO reform proposals.<sup>371</sup> Similarly, the U.S. has also complained that it is usually too difficult and too costly to solicit sufficient evidence to challenge subsidies. This could potentially benefit large member countries while disadvantaging those smaller member countries who are unable or unwilling to undergo such

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<sup>369</sup> Wendy Cutler and Kevin Doyle, ‘China’s Developing Country Status in the WTO: Time for an Upgrade?’ (*IPi Global Observatory*, 25 January 2019) <<https://theglobalobservatory.org/2019/01/china-developing-country-status-wto-time-for-upgrade/>> accessed 28 September 2020.

<sup>370</sup> ‘WTO | Subsidies and Countervailing Measures Overview’ <[https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm)> accessed 23 August 2020.

<sup>371</sup> ‘WTO Modernisation: Introduction to Future EU Proposals’ (n 150).

expensive investigations.<sup>372</sup> The authors thus recommend that incentives be created to encourage compliance with notification obligations among member states.

One of the incentives proposed to encourage timely notifications is the creation of a general rebuttable presumption. A rebuttable presumption would allow member countries to automatically treat certain subsidies as causing serious prejudice unless the subsidy has been properly notified or counter-notified.<sup>373</sup> Current WTO rules generally require subsidies to be withdrawn and the negative impacts removed, only after a member country has demonstrated that subsidies are causing serious prejudice to its interests. Under this approach, the remedies available may end up being insignificant relative to the harm caused. The use of a rebuttable presumption could expedite the process to allow member countries to adopt countervailing measures from the onset, thus minimising damage.<sup>374</sup> This approach would also incentivise members states to improve the efficiency in the review system.

WTO members should also aim to better regulate state-owned enterprises and other public bodies in economy. The AB has defined a “public body” as an entity that exercise governmental functions.<sup>375</sup> Under current WTO rules, only public bodies are capable of providing subsidies, however given the narrow definition of public body adopted by the AB, this means that SOEs often escape scrutiny.<sup>376</sup> For example, SOEs may provide assistance to downstream companies in the form of below market inputs, however this would not be captured by current WTO rules.<sup>377</sup> The WTO thus needs to revise the classification of public bodies so as to adequately capture more nuanced forms of preferential treatment. The U.S. in particular has also identified many types government policies that operate as subsidies or preferential treatment in effect, including the differential application of export taxes and differential rebate of value-added taxes for inputs and outputs in an industry’s supply chain, yet a do not necessarily violate the current WTO rules

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<sup>372</sup> ‘WTO’ing a Resolution to the China Subsidy Problem’ (*PIIE*, 22 October 2019)

<<https://www.piiie.com/publications/working-papers/wtoing-resolution-china-subsidy-problem>> accessed 27 September 2020.

<sup>373</sup> ‘WTO Modernisation: Introduction to Future EU Proposals’ (n 150).

<sup>374</sup> *ibid.*

<sup>375</sup> ‘WTO | Subsidies and Countervailing Measures Overview’ (n 370).

<sup>376</sup> ‘WTO | Dispute Settlement - the Disputes - DS437’ <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds437\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds437_e.htm)> accessed 23 January 2021.

<sup>377</sup> ‘WTO’ing a Resolution to the China Subsidy Problem’ (n 372) 7.

on subsidies.<sup>378</sup> The E.U. has proposed a new definition for “public body” to include those state-owned enterprises which could perform a government function or implement state agenda in order to prohibit market-distorting practices by those state-owned enterprises and to improve transparency. The new definition also targets enterprises related to or controlled by government by assessing the extent of actual state influence over the enterprise.<sup>379</sup> However, both proposals are likely to encounter opposition, as member states attempt to find consensus on a new classification system.

Given the diversity of economic systems and variation in economic development, between WTO members, a case-by-case review process may be a more feasible way to assess whether a member country exercises meaningful control over an enterprise. The authors would thus recommend WTO members modernise the rules on SCM by broadening the definition of public body while creating a process that allows members and the Secretariat to take into consideration variation in economic models. This new case-by-case review system may need to tackle subtle differences between commercial and non-commercial operations, to consider nuances between formal direct state ownership and informal state influence through networking and policy guidance.<sup>380</sup> In addition, any new approach to determining whether an enterprise is a public body should measure the impacts of public bodies and preferential treatments on other private competitors in the economy. Therefore, although modernisation of WTO rules on subsidies and countervailing measures is necessary to improve transparency and compliance with notification obligations, a reformed review system with new classification criteria should be prepared to determine the impacts of subsidies and state-owned enterprises in disparate economic systems.

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<sup>378</sup> Philip Benkinsop (n 210).

<sup>379</sup> Yan (n 366).

<sup>380</sup> *ibid.*

## VII.IV REFORMING AND EMPOWERING THE WTO SECRETARIAT

In order to revive to ensure that the WTO remains an effective institution for facilitating international trade, the authors of this paper recommend that the WTO Secretariat be better incorporated and embedded into the practical work of the organisation. The authors consider that increased engagement of the WTO Secretariat will help to depoliticise conversations regarding reform and new initiatives and facilitate more fruitful conversations.

The Secretariat holds the institutional memory of the WTO.<sup>381</sup> It is comprised of approximately 630 highly skilled, expert staff and is led by the Director-General. The stated purpose of the Secretariat is to ‘*provide top-quality, independent support to WTO member governments...to serve the WTO with professionalism, impartiality and integrity*’.<sup>382</sup> To achieve this, the Secretariat is functionally organised into 21 divisions. These include, *inter alia*, the Accessions Division, the Agriculture and Commodities Division, the Economic Research and Statistics Division, the Trade and Environment Division, and the Market Access Division.<sup>383</sup> Each division also has an individual director, who oversees the division’s day-to-day functioning and broader direction.<sup>384</sup> This director remains reports to one of four WTO Deputy Director-Generals. The Secretariat thus uses a multi-level process to provide an array of technical, professional and analytical support to various WTO councils, committees and member-states, and also to provide legal assistance to the dispute settlement process.

However, despite its wealth of expertise and experience, the Secretariat does not exercise much real power and generally remains on the on the side-lines of trade negotiations. Similarly, it has no independent decision-making capacity, and it has a limited ability to take independent

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<sup>381</sup> Ahmad Thougan Hindawi, ‘Strengthening the WTO - An Essay by Ahmad Thougan Hindawi’ (<http://jordanembassyus.org/news/strengthening-wto-essay-ahmad-thougan-hindawi>) accessed 10 September 2020.

<sup>382</sup> ‘WTO | Secretariat and Budget Overview’ <[https://www.wto.org/english/thewto\\_e/secre\\_e/intro\\_e.htm](https://www.wto.org/english/thewto_e/secre_e/intro_e.htm)> accessed 10 September 2020.

<sup>383</sup> Ibid.

<sup>384</sup> Ibid.

initiatives.<sup>385</sup> This restricted role is usually understood to derive from the intrinsically ‘member-driven’ nature of the WTO itself, which requires member states to be the driving force of the organisation.<sup>386</sup> Indeed, any support provided by the Secretariat is provided only at the request of members and only during policy dialogues and deliberations. The functional capacity of the Secretariat is further hindered by budget constraints, as the Secretariat is funded mostly by member-state contributions.<sup>387</sup> However, the current stagnation of the WTO and polarisation of Member States interests, raise questions about the efficacy about the Secretariat’s currently minimal role.

The authors recommend that the WTO Secretariat should be empowered to guide WTO policy as an intellectual leader. This will allow the organisation to increase its functional capacity and help to restore the WTO’s important role in facilitating international trade. In order to achieve this, Secretariat members must be encouraged to use their expertise in trade policy, trade law and economics to provide greater intellectual input into debates about trade policy and WTO reform.<sup>388</sup> The Secretariat’s role should be expanded from simply providing information to taking an active role in the negotiation, and the drafting of texts and rules reform. For example, Secretariat staff could chair the various subgroups that prepare draft texts in negotiations, and use their expertise to help structure and direct negotiations. In addition, the Secretariat could also issue its own proposals for rules reform based on expert-analysis and engage in more constructive dialogue with members regarding the drafting of texts and the potential spill-over effects of various reforms. This is particularly important in ‘new policy areas’ – i.e. novel issues,

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<sup>385</sup> Bernard Hoekman, ‘Revitalizing Multilateral Governance at the World Trade Organization: Report of the High-Level Board of Experts on the Future of Global Trade Governance’ (BertelsmannStiftung 2018) <[https://www.wto.org/english/news\\_e/news18\\_e/bertelsmann\\_rpt\\_e.pdf](https://www.wto.org/english/news_e/news18_e/bertelsmann_rpt_e.pdf)> accessed 10 September 2020; Peter Sutherland and others, ‘The Future of the WTO: Addressing Institutional Challenges in the New Millenium’.

<sup>386</sup> Lisa Toohey, ‘Reinvigorating the WTO from the Inside Out — Revisiting the Role of the Secretariat’ (Social Science Research Network 2014) SSRN Scholarly Paper ID 2586968 385–485 <<https://papers.ssrn.com/abstract=2586968>> accessed 10 September 2020.

<sup>387</sup> Moshe Kao, ‘WTO Reform: Old Debate, New Realities’ (Friedrich Ebert Stiftung 2019) <<http://library.fes.de/pdf-files/bueros/genf/15845.pdf>>.

<sup>388</sup> Peter Sutherland and others (n 385).

such as technological developments, which are relevant to the trading system but have not yet been sufficiently discussed or developed within the WTO framework.<sup>389</sup>

This empowerment should be complemented by the development of specific functional guidelines.<sup>390</sup> These would outline the nature of the Secretariat's enhanced participation, secure the independence and neutrality of the Secretariat, and ensure that the Secretariat is not perceived to be overpowering member states but rather as assisting member states to achieve beneficial outcomes. As such, while the Secretariat would be granted a more prominent role in policy dialogue, negotiations, rules reform and analysis, members would still retain primary discretion over whether and how the Secretariat's contributions can be functionally utilised.<sup>391</sup> These efforts will also help to endow the WTO with a '*convincing and persistent institutional voice*'<sup>392</sup>, which will contribute to addressing some of the pertinent issues faced by the WTO, as well as help to overcome the politicisation of negotiations.

However, in certain structural changes are necessary to implement this proposal. The WTO Secretariat remains notoriously underfunded, in comparison to other intergovernmental organisations, most notably the UN Secretariat. This severely limits its capacity to conduct much-needed data collection and expert research.<sup>393</sup> It is thus imperative that the budget of the Secretariat is expanded, so that it can ultimately expand its functional capacity. While the Secretariat budget is an inherently sensitive and divisive issue, expanding this budget, particularly through greater contributions from member-states, would represent genuine commitment to multilateralism and would likely prove beneficial to member states in the long run.

It is similarly necessary to expand the human capital of the Secretariat, specifically by increasing the number of permanent staff and allowing for more geographically diverse representation among staff members. While the Secretariat is currently composed of staff from 83 nationalities, there is a significantly disproportionate representation of Western countries: nearly 72% of

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<sup>389</sup> Hoekman (n 385).

<sup>390</sup> *ibid.*

<sup>391</sup> *Ibid.*

<sup>392</sup> *Ibid.* pp 77

<sup>393</sup> Christian Bluth, '3 Ideas to Revitalize the Multilateral Trading System' (*GED-Project*, 11 July 2018) <<https://ged-project.de/trade-and-investment/multilateral-trading-system/>> accessed 10 September 2020.

Secretariat staff come from Europe, Canada, the US, Australia, and New Zealand, while only 11% come from Central/ South America, 11% from Asia, and only 6 % from Africa.<sup>394</sup> A more diverse Secretariat would be symbolically significant but would also be beneficial in practice. Increased diversity, would improve the organisation's overall efficiency by encouraging contributions from different intellectual cultures. This will provide for a more meaningful multilateralism across the WTO more broadly. It is further imperative that the Secretariat maintains and continues to emphasise its neutrality as a body that acts in the interests of all its members, rather than in the interests of specific states or groups of states. This is necessary to avoid exacerbating existing divergences between member states.

Nevertheless, expanding the role of the WTO Secretariat is likely to involve certain challenges. Firstly, it would add another layer of bureaucracy to an already-bureaucratic institution. Moreover, in order to be successful, there would need of be an overhaul of member-state perceptions, such that they come to perceive and accept the Secretariat as an intellectual leader as opposed to playing a more subsidiary, reactionary role within the WTO.<sup>395</sup> Some member states may be fearful that it will be more difficult to control an empowered Secretariat and to guarantee that it acts in their best interests.<sup>396</sup> However, in spite of these challenges, expanding the role of the Secretariat remains practically appealing.

The primary appeal of empowering the Secretariat is that it does not require any fundamental restructuring of the WTO itself, and is thus relatively easy to implement.<sup>397</sup> Empowering the Secretariat does not contradict either Article VI of the Marrakesh Agreement Establishing the World Trade Organisation nor §20-26 of the Conditions of Service Applicable to the Staff of

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<sup>394</sup> 'WTO | Secretariat and Budget Overview' (n 382).

<sup>395</sup> Deere-Birkbeck, C. & Monagle, C. (2009) Strengthening Multilateralism: A Mapping of Selected Proposals on WTO Reform and Improvements in Global Trade Governance (discussion draft, November 2009), International Centre for Trade and Sustainable Development, Geneva, Switzerland and the Global Economic Governance Programme, Oxford, UK <https://poseidon01.ssrn.com/delivery.php?ID=221000002093121070120112098111066009026035041077088070077009091068093075121083103113107032044122020126111016112114118080098115022032092079036119102084118113064080017003010026118117066020065067016091007120104115007084119100115015080083097005065068072&EXT=pdf>

<sup>396</sup> Catherine Monagle and Carolyn Deere Birkbeck, 'Strengthening Multilateralism: A Mapping of Proposals on WTO Reform and Global Trade Governance' (Social Science Research Network 2009) SSRN Scholarly Paper ID 1531687 <<https://papers.ssrn.com/abstract=1531687>> accessed 10 September 2020.

<sup>397</sup> Toohey (n 386).



the WTO Secretariat (1998), which outline the nature and functioning of the Secretariat. The former provides that ‘the responsibilities...of the Secretariat shall be exclusively international in character... (the Secretariat) shall not seek or accept instructions from any government or any other authority external to the WTO’. The latter, on the other hand, states that ‘the WTO is composed of its Members, and the Secretariat is there to provide services to the WTO, not to determine its policies’.<sup>398</sup> However, there is a fundamental, ontological difference between determining and guiding policy – empowering the Secretariat to become an intellectual leader who uses their expertise to facilitate better policy dialogue and better policy outcomes would enable it to guide, rather than determine, WTO rules and policy.<sup>399</sup> Under this proposal the Secretariat would also retain its ‘exclusively international’ character as well as its independence from other governments or authorities.

Furthermore, empowering the Secretariat does not contradict the ‘member-driven’ nature of the WTO because the adoption of decisions and reforms would still remain the responsibility of members. The expanded capacity of an empowered Secretariat would simply allow for a more coherent, institutional voice that reflects and defends the core principles of a multilateral trading system. This ‘voice’ can be particularly important to smaller and developing countries, with capacity constraints, who may benefit from additional assistance.<sup>400</sup> An empowered Secretariat could therefore enhance the member-driven nature of the organisation by aiding and supporting the work of member states.

Overall, expanding the role of the WTO Secretariat, would provide greater continuity within the organisation, enhance the organisation’s operational capacity and provide opportunities for consensus-building. These improvements are crucial given the issues outlined in this paper.

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<sup>398</sup> ‘Conditions of Service Applicable to the Staff of the WTO Secretariat’ <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=36930,42138,54512,52245,54513,14037,9029,21959,49115,25954&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36930,42138,54512,52245,54513,14037,9029,21959,49115,25954&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)> accessed 10 September 2020.

<sup>399</sup> Toohey (n 386).

<sup>400</sup> Monagle and Birkbeck (n 396).

Furthermore, an empowered Secretariat would help to facilitate necessary reforms by providing increased institutional capacity and neutrality.

## VIII Concluding Remarks

Earlier this year, Alan Wolff, a Deputy Director General at the WTO, said that the COVID-19 pandemic has exposed and increased the urgent “need to examine the underlying principles and values of the WTO and whether the organization needs change.”<sup>401</sup> As the paper has shown the WTO currently faces a myriad of challenges and strains on all of its key functions. Stagnation in trade negotiations and a failure to modernise rules has led to increased strain on the Dispute Settlement Mechanism. In addition, U.S. frustrations with the current approach to dispute settlement have come to a head and has led to the paralysis of the AB. The inability to find consensus within negotiations stems partially from procedural issues such as the single undertaking approach, as well as more fundamental points of divergence between member states. In addition, there is a general sense that current WTO rules are incapable of dealing with the global trading system that has changed significantly since the rules were created. China’s emergence as a global trading power and its unique economic model is of particular concern to several key members. Finally, changes in U.S. policy and increased tension between the U.S. and its trading partners, in particular the U.S.-China Trade War, have exacerbated existing strains on the WTO system.

Although the WTO has much to address, this is perhaps the ideal moment for the organisation to go undergo a facelift. At the time of writing, the WTO is currently in the process of selecting a new director general. The leading candidate, Ngozi Okonjo Iweala, would be the first African to hold the position, and could potentially bring new ideas and a new perspective to the DG Role. In addition to its internal changes, the global economy is also at a crossroads. As soon as a

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<sup>401</sup> ‘Speech - DDG Alan Wolff - DDG Wolff: This Is the Time to Consider the Future of the Multilateral Trading System’ <[https://www.wto.org/english/news\\_e/news20\\_e/ddgaw\\_27may20\\_e.htm](https://www.wto.org/english/news_e/news20_e/ddgaw_27may20_e.htm)> accessed 27 August 2020.

new DG is elected, the WTO should seek to actively engage members in conversations regarding key policy issues, such as medical goods in light of the COVID-19 vaccination effort, as well as what role international trade will play in the global recovery as economies begin to recover from the ongoing damage caused by the pandemic. Finally, the transition to the Biden administration, may result in the U.S. adopting a pro-WTO stance, which could provide momentum for reform. Overall, it is a crucial moment, and the WTO's response will determine whether it moves out of its current stagnation or continues to remain in the shadows of conversations regarding global trade.

The authors of the paper consider that there is sufficient impetus for reform as evidenced by the various reform proposals that have been produced over the past several years. Moreover, following the Nairobi and Buenos Aires Ministerial Conferences, WTO members acknowledged that “new approaches are necessary to achieve meaningful outcomes in multilateral negotiations.”<sup>402</sup> However, WTO members must now move away from churning out individual reform proposals and focus on creating a mechanism that these proposals can be fed into, so that the organisation can take steps towards building consensus as to what changes are necessary. If WTO members can simply agree to be more flexible on how decisions are made. Then plurilateral agreements, “mini-rounds”, increased engagement from the secretariat and many of the other suggestions made in this paper, will enable the at least parts of the organisation become operative, while members continue to seek consensus on broader issues.

## BIBLIOGRAPHY

*A Handbook on the WTO Dispute Settlement System* (2nd edn, Cambridge University Press 2017) <<https://www.cambridge.org/core/books/handbook-on-the-wto-dispute-settlement-system/5743E5516DD8D7EA498D6DC78F81FB9C>> accessed 9 July 2020

‘A Quick Guide to the US-China Trade War’ *BBC News* (16 January 2020) <<https://www.bbc.com/news/business-45899310>> accessed 11 February 2021

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<sup>402</sup> Adlung and Mamdouh (n 167) 3.

‘About CNPC’ <[https://www.cnpc.com.cn/en/aboutcnpc/aboutcnpc\\_index.shtml](https://www.cnpc.com.cn/en/aboutcnpc/aboutcnpc_index.shtml)> accessed 19 August 2020

Adlung R and Mamdouh H, ‘PLURILATERAL TRADE AGREEMENTS: AN ESCAPE ROUTE FOR THE WTO?’ 23

Aileen Kwa, ‘WTO and Developing Countries’ (*Institute for Policy Studies*, 1 November 1998) <[https://ips-dc.org/wto\\_and\\_developing\\_countries/](https://ips-dc.org/wto_and_developing_countries/)> accessed 22 September 2020

Ali Amerjee, ‘The Multiparty Interim Appeal Arbitration Arrangement: Will the US Be Missed? | TradeLinks | Blogs | Insights | Linklaters’ (*Linklaters.com*) <<https://www.linklaters.com/en/insights/blogs/tradelinks/2020/july/the-multiparty-interim-appeal-arbitration-arrangement-will-the-us-be-missed>> accessed 11 February 2021

Amadeo K, ‘The Real Reason Why the Doha Round of Trade Talks Failed’ (*The Balance*) <<https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365>> accessed 2 September 2020

—, ‘Why Trade Wars Are Bad and Nobody Wins’ (*The Balance*) <<https://www.thebalance.com/trade-wars-definition-how-it-affects-you-4159973>> accessed 8 February 2021

Ambassador Dennis Shea, ‘Statements by the United States at the WTO General Council Meeting’mittee - Heads of Delegation Meeting’ (*U.S. Mission to International Organizations in Geneva*, 6 December 2019) <<https://geneva.usmission.gov/2019/12/06/ambassador-shea-statement-at-the-wto-trade-negotiating-committee-heads-of-delegation-meeting/>> accessed 27 August 2020

—, ‘Ambassador Shea: Matters Related to the Functioning of the Appellate Body’ (9 December 2019) <<http://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/>> accessed 11 February 2021

“America First” - U.S. Trade Policy under President Donald Trump’ <<https://english.bdi.eu/article/news/america-first-u-s-trade-policy-under-president-donald-trump/>> accessed 25 July 2020

Anderson K, *Agricultural Trade Reform and the Doha Development Agenda* (Basingstoke 2006)

Ansong A, ‘Single Undertaking, Different Speeds: Pliable Models for Decision-Making in the WTO’ (2018) 21 *Journal of International Economic Law* 395

Antara Singh, ‘What Does China Want From WTO Reforms?’ (*The Diplomat*) <<https://thediplomat.com/2019/05/what-does-china-want-from-wto-reforms/>> accessed 11 February 2021

Aug 24 TCP· P, August 24 2020 4:13 PM ET | Last Updated:, and 2020, ‘WTO Decision on Softwood Lumber Cheered by Canadian Producers, Denounced in U.S. | CBC News’ (*CBC*,

24 August 2020) <<https://www.cbc.ca/news/business/canada-softwood-lumber-1.5698013>> accessed 12 February 2021

Basedow R, 'The WTO and the Rise of Plurilateralism—What Lessons Can We Learn from the European Union's Experience with Differentiated Integration?' (2018) 21 *Journal of International Economic Law* 411

Bashar Malkawi, 'MPIA and Use of Arbitration: Bypassing the WTO Appellate Body' <<https://www.jurist.org/commentary/2020/05/bashar-malkawi-mpia-wto-appellate-body/>> accessed 5 September 2020

Beattie A and Williams F, 'Doha Trade Talks Collapse' *Financial Times* (29 July 2008) <<https://www.ft.com/content/0638a320-5d8a-11dd-8129-000077b07658>> accessed 7 January 2020

Bellmann C, 'The Bali Agreement: Implications for Development and the WTO' (2014) 5 *International Development Policy | Revue internationale de politique de développement* <<http://journals.openedition.org/poldev/1744>> accessed 4 July 2020

Bellmann C, Hepburn J and Wilke M, 'The Challenges Facing the Multilateral Trading System in Addressing Global Public Policy Objectives' [2012] *International Development Policy | Revue internationale de politique de développement* <<http://journals.openedition.org/poldev/1012>> accessed 27 August 2020

Bernard Hoekman and Petros Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"? Assessing the Case for More Plurilateral Agreements' *European Journal of International Law* <<https://academic.oup.com/ejil/article/26/2/319/423063>> accessed 16 August 2020

Bernd Lange, 'Legislative Train Schedule: EU-US Trade Talks on an Agreement on Industrial Goods and Conformity Assessment'

Bluth C, '3 Ideas to Revitalize the Multilateral Trading System' (*GED-Project*, 11 July 2018) <<https://ged-project.de/trade-and-investment/multilateral-trading-system/>> accessed 10 September 2020

Brown C, 'The 2018 Trade War and the End of Dispute Settlement as We Knew It' (*VoxEU.org*, 13 June 2019) <<https://voxeu.org/article/2018-trade-war-and-end-dispute-settlement-we-knew-it>> accessed 10 September 2020

Bruce Hirsch, 'Resolving the WTO Appellate Body Crisis' *Appellate Body Crisis (Vol 2): Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators* (Tailwind Global Strategies 2020)

'Canada Slaps Retaliatory Tariffs on US Aluminium Goods' *BBC News* (7 August 2020) <<https://www.bbc.com/news/world-us-canada-53683569>> accessed 12 February 2021

Carrie Grace, 'Collision Course? Rise of China a Stress for the US' *BBC News* (26 September 2015) <<https://www.bbc.com/news/world-asia-china-34368249>> accessed 11 February 2021

‘Central Huijin Investment Ltd.’ <<http://www.huijin-inv.cn/en/>> accessed 18 August 2020

Chief Economist Team, DG Trade, European Commission, ‘The Impact of the Covid-19 Pandemic on Global and EU Trade’ 3

‘China and Non-Market Economy Treatment: A Tale of Two Interpretations | TradeLinks | Linklaters’ <<https://www.linklaters.com/en/insights/blogs/tradelinks/china-and-non-market-economy-treatment-a-tale-of-two-interpretations>> accessed 27 September 2020

‘China Loses Landmark WTO Dispute Against EU’ (*BloombergQuint*) <<https://www.bloombergquint.com/politics/not-with-a-bang-china-loses-landmark-wto-dispute-against-eu>> accessed 19 August 2020

‘China Mobile Limited’ <<https://www.chinamobileltd.com/en/global/home.php>> accessed 18 August 2020

‘China Sinopec’ <<http://www.sinopecgroup.com/group/en/>> accessed 19 August 2020

‘China Telecom Corporation Limited - Home’ <<https://www.chinatelecom-h.com/en/global/home.php>> accessed 19 August 2020

‘China Unicom (Hong Kong) Limited’ <<https://www.chinaunicom.com.hk/en/global/home.php>> accessed 19 August 2020

‘China’s Economic Policy Factory: The NDRC’ *Bloomberg.com* (21 June 2013) <<https://www.bloomberg.com/news/articles/2013-06-20/chinas-economic-policy-factory-the-ndrc>> accessed 18 August 2020

‘China’s Role in the WTO’ (*China Business Review*, 1 October 2011) <<https://www.chinabusinessreview.com/chinas-role-in-the-wto/>> accessed 5 July 2020

‘China’s Status as Developing Country Undeniable - Global Times’ <<https://www.globaltimes.cn/content/1173184.shtml>> accessed 27 September 2020

‘Closing Pandora’s Box: The Growing Abuse of the National Security Rationale for Restricting Trade’ (*Cato Institute*, 25 June 2019) <<https://www.cato.org/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale-restricting-trade>> accessed 11 February 2021

‘COFCO, IFC Monitor Sustainability of Brazilian Soybean Farms - Macauhub’ <<https://macauhub.com.mo/2020/08/05/20200805002/>> accessed 18 August 2020

Cohen ER Luc, ‘U.S., EU, Japan Slam Market Distortion in Swipe at China’ *Reuters* (13 December 2017) <<https://www.reuters.com/article/us-trade-wto-idUSKBN1E62HA>> accessed 11 February 2021

‘Communiqué of the Third Plenary Session of the 18th Central Committee of the Communist Party of China- China.Org.Cn’ <[http://www.china.org.cn/china/third\\_plenary\\_session/2014-01/15/content\\_31203056.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/15/content_31203056.htm)> accessed 19 August 2020

Conconi P and Perroni C, 'Special and Differential Treatment of Developing Countries in the WTO' (2015) 14 *World Trade Review* 67

'Conditions of Service Applicable to the Staff of the WTO Secretariat' <[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=36930,42138,54512,52245,54513,14037,9029,21959,49115,25954&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36930,42138,54512,52245,54513,14037,9029,21959,49115,25954&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)> accessed 10 September 2020

Conroy KD and C, 'What's behind Trump's Trade War?' (*Brookings*, 9 October 2018) <<https://www.brookings.edu/opinions/whats-behind-trumps-trade-war/>> accessed 27 August 2020

Cutler W and Doyle K, 'China's Developing Country Status in the WTO: Time for an Upgrade?' (*IPI Global Observatory*, 25 January 2019) <<https://theglobalobservatory.org/2019/01/china-developing-country-status-wto-time-for-upgrade/>> accessed 28 September 2020

Denmark RH and A, 'More Pain than Gain: How the US-China Trade War Hurt America' (*Brookings*, 30 November 2020) <<https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/>> accessed 12 February 2021

'Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented' (*Cato Institute*, 15 November 2018) <<https://www.cato.org/publications/policy-analysis/disciplining-chinas-trade-practices-wto-how-wto-complaints-can-help>> accessed 14 August 2020

Doffman Z, 'Has Trump Suddenly Ended Huawei's Smartphone Business?' (*Forbes*) <<https://www.forbes.com/sites/zakdoffman/2020/08/22/end-for-huawei-smartphones-google-android-ban-china-trump-update/>> accessed 12 February 2021

Donald Trump, 'Remarks by President Trump at Signing of the U.S.-China Phase One Trade Agreement' (White House East Room, 15 January 2020) <<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-u-s-china-phase-one-trade-agreement-2>> accessed 1 September 2020

Dr Shamel Azmeh, 'The US-China Trade War: The End of Multilateralism or the Search for a New Bargain?' (*LSE International Development*, 3 March 2020) <<https://blogs.lse.ac.uk/internationaldevelopment/2020/03/03/the-us-china-trade-war-the-end-of-multilateralism-or-the-search-for-a-new-bargain/>> accessed 28 June 2020

Draper P, 'How Should Africans Respond to the Investment, Technology, Security, and Trade Wars?' (*Brookings*, 30 September 2019) <<https://www.brookings.edu/blog/africa-in-focus/2019/09/30/how-should-africans-respond-to-the-investment-technology-security-and-trade-wars/>> accessed 27 August 2020

Elsig M and Cottier T, 'Reforming the WTO: The Decision-Making Triangle Revisited' in Thomas Cottier and Manfred Elsig (eds), *Governing the World Trade Organization* (Cambridge

University Press (2011)  
<[https://www.cambridge.org/core/product/identifier/CBO9780511792502A029/type/book\\_part](https://www.cambridge.org/core/product/identifier/CBO9780511792502A029/type/book_part)  
> accessed 26 August 2020

‘EU-China Trade and Investment Relations in Challenging Times | Bruegel’  
<<https://www.bruegel.org/2020/06/eu-china-trade-and-investment-relations-in-challenging-times/>> accessed 19 August 2020

European Parliament, ‘The European Union and the World Trade Organization | Fact Sheets on the European Union | European Parliament’  
<<https://www.europarl.europa.eu/factsheets/en/sheet/161/the-european-union-and-the-world-trade-organisation>> accessed 12 February 2021

‘Explained, the Role of China’s State-Owned Companies’ (*World Economic Forum*)  
<<https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/>> accessed 18 August 2020

‘FACT SHEET: The Obama Administration’s Record on the Trade Enforcement’ (*whitehouse.gov*, 12 January 2017) <<https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/fact-sheet-obama-administrations-record-trade-enforcement>> accessed 1 July 2020

‘Fact Sheet: WTO Case Challenging Chinese Subsidies | United States Trade Representative’  
<<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/september/wto-case-challenging-chinese-subsidies>> accessed 27 September 2020

Fickling D, ‘The WTO Is Dead. Long Live the WTO’ *Washington Post*  
<[https://www.washingtonpost.com/business/energy/the-wtois-deadlong-live-the-wto/2020/05/14/53aa5f4a-95b8-11ea-87a3-22d324235636\\_story.html](https://www.washingtonpost.com/business/energy/the-wtois-deadlong-live-the-wto/2020/05/14/53aa5f4a-95b8-11ea-87a3-22d324235636_story.html)> accessed 9 September 2020

Finger JM and Nogués JJ, ‘The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations’ (2002) 25 *The World Economy* 321

‘FTAs and the WTO | European Free Trade Association’ <<https://www.efta.int/free-trade/fta-and-wto>> accessed 6 September 2020

Galbraith J, ‘United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process’ (2019) 113 *American Journal of International Law* 822

Halverson K, ‘China’s WTO Accession: Economic, Legal, and Political Implications’ (2004) 27, no. 2 *Boston College International and Comparative Law Review* 319

Hamaide S de L, ‘EU Proposes to Cut Farm Subsidies, France Says Unacceptable’ *Reuters* (2 May 2018) <<https://www.reuters.com/article/us-eu-budget-agriculture-idUSKBN1I31XB>> accessed 15 January 2021



Hancock T and Jia Y, 'China Paid Record \$22bn in Corporate Subsidies in 2018' (27 May 2019) <<https://www.ft.com/content/e2916586-8048-11e9-b592-5fe435b57a3b>> accessed 11 February 2021

Hillman J, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, The Bad and the Ugly?' 15

Hillman JA, 'The United States Needs a Reformed WTO Now' [2020] Council of Foreign Relations 23

Hindawi AT, 'Strengthening the WTO - An Essay by Ahmad Thougan Hindawi' (<http://jordanembassyus.org>) </news/strengthening-wto-essay-ahmad-thougan-hindawi> accessed 10 September 2020

Hoekman B, 'Revitalizing Multilateral Governance at the World Trade Organization: Report of the High-Level Board of Experts on the Future of Global Trade Governance' (BertelsmannStiftung 2018) <[https://www.wto.org/english/news\\_e/news18\\_e/bertelsmann\\_rpt\\_e.pdf](https://www.wto.org/english/news_e/news18_e/bertelsmann_rpt_e.pdf)> accessed 10 September 2020

Hoekman B and Mavroidis PC, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis' [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3424856>> accessed 29 June 2020

—, 'Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?' [2020] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3531704>> accessed 29 August 2020

Hoekman BM and Mavroidis PC, 'WTO "à La Carte" or "Menu Du Jour"? Assessing the Case for More Plurilateral Agreements' (2015) 26 *European Journal of International Law* 319

Humphrey M, 'How Can LDCs Continue to Ensure They Benefit from Special and Differential Treatment in Teh WTO?' (Institute of International Trade, Univesity of Adelaide 2019) Policy Brief

Ignacio Garcia Bercero, 'What Do We Need a World Trade Organization for? - The Crisis of the Rules Based System and WTO Reform' (Bertelmann Stiftung 2020)

—, 'What Do We Need a World Trade Organization for? - The Crisis of the Rules Based System and WTO Reform' (Bertelmann Stiftung 2020)

Ikenson D, 'US Trade Laws And The Sovereignty Canard' (*Forbes*) <<https://www.forbes.com/sites/danikenson/2017/03/09/u-s-trade-laws-and-the-sovereignty-canard/>> accessed 26 August 2020

Interview with Anabel Gonzalez, Zhang Xiangchen and Chad Bown, 'Peterson Institute for International Economics: China in the WTO: Current Issues and Prospects for Reform' (15 July 2020) <<https://www.piie.com/events/china-wto-current-issues-and-prospects-reform>> accessed 10 August 2020

Inu Manak, 'The WTO Needs to Drag Itself into the 21st Century' (*Cato Institute*, 11 May 2020) <<https://www.cato.org/blog/wto-needs-drag-itself-21st-century>> accessed 12 February 2021

Irwin DA, 'The GATT's Contribution to Economic Recovery in Post-War Western Europe' (National Bureau of Economic Research 1994) Working Paper 4944 <<http://www.nber.org/papers/w4944>> accessed 10 September 2020

'Is "Made in China 2025" a Threat to Global Trade?' (*Council on Foreign Relations*) <<https://www.cfr.org/background/made-china-2025-threat-global-trade>> accessed 19 August 2020

James Steinberg, 'What Went Wrong? U.S.-China Relations from Tiananmen to Trump' (*Texas National Security Review*, 7 January 2020) <<https://tnsr.org/2020/01/what-went-wrong-u-s-china-relations-from-tiananmen-to-trump/>> accessed 11 February 2021

Jennifer Hillman, 'A Reset of the World Trade Organization's Appellate Body' (*Council on Foreign Relations*) <<https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>> accessed 9 July 2020

Johnson K, 'How Trump May Finally Kill the WTO' (*Foreign Policy*) <<https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/>> accessed 10 September 2020

Kao M, 'WTO Reform: Old Debate, New Realities' (Friedrich Ebert Stiftung 2019) <<http://library.fes.de/pdf-files/bueros/genf/15845.pdf>>

Kimberly Amadeo, '6 Ways Trump Changed NAFTA' (*The Balance*) <<https://www.thebalance.com/donald-trump-nafta-4111368>> accessed 11 February 2021

King EK, 'The Omnibus Trade Bill of 1988: "Super 301" and Its Effects on the Multilateral Trade System Under the Gatt' (1988) 12 29

Kucik J, 'Why Trump's Wrong about WTO Treating US Unfairly' (*The Conversation*) <<http://theconversation.com/why-trumps-wrong-about-wto-treating-us-unfairly-102562>> accessed 12 February 2021

Kuo L, 'How Rival Trade Blocs between the US and China Could Be Good for Free Trade in Asia' *Quartz* <<https://qz.com/63491/how-rival-trade-blocs-between-the-us-and-china-could-be-good-for-free-trade-in-asia/>> accessed 11 February 2021

Lardy NR, 'Issues in China's WTO Accession' (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/>> accessed 5 July 2020

Lee YN, 'The World's Largest Trade Deal Could Be Signed in 2020 – and the US Isn't in It' (*CNBC*, 11 November 2019) <<https://www.cnbc.com/2019/11/12/what-is-rcep-asia-pacific-trade-deal-slated-to-be-worlds-largest-fta.html>> accessed 6 September 2020

—, ‘3 Charts Show China Is Far from Meeting Its “phase One” Trade Commitment to the U.S.’ (*CNBC*, 13 August 2020) <<https://www.cnbc.com/2020/08/13/chinas-progress-in-buying-us-goods-under-phase-one-trade-deal-in-charts.html>> accessed 12 February 2021

—, ‘Biden’s Pick for Top U.S. Trade Official Will Continue Tough Line on China, Says Ex-Trump Official’ (*CNBC*, 18 December 2020) <<https://www.cnbc.com/2020/12/18/bidens-ustr-pick-katherine-tai-will-be-tough-on-china-ex-trump-official.html>> accessed 12 February 2021

Li C, ‘Assessing U.S.-China Relations under the Obama Administration’ (*Brookings*, 30 August 2016) <<https://www.brookings.edu/opinions/assessing-u-s-china-relations-under-the-obama-administration/>> accessed 11 February 2021

Lieberthal KG, ‘The American Pivot to Asia’ (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/articles/the-american-pivot-to-asia/>> accessed 11 February 2021

Lighthizer RE, ‘Opinion | How to Set World Trade Straight’ *Wall Street Journal* (20 August 2020) <<https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341>> accessed 12 February 2021

‘Local Content Requirements - OECD’ <<https://www.oecd.org/trade/topics/local-content-requirements/>> accessed 18 August 2020

‘Made in China 2025’ <<https://www.csis.org/analysis/made-china-2025>> accessed 19 August 2020

‘Made in China 2025, Explained’ <<https://thediplomat.com/2019/02/made-in-china-2025-explained/>> accessed 19 August 2020

‘【Main Functions of the NDRC】-NDRC\_NEW’ <[https://en.ndrc.gov.cn/mfindrc\\_8237/200812/t20081217\\_1193980.html](https://en.ndrc.gov.cn/mfindrc_8237/200812/t20081217_1193980.html)> accessed 18 August 2020

‘Marrakesh Agreement Establishing the World Trade Organization’ <[https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)> accessed 10 September 2020

Martin A and Mercurio B, ‘Doha Dead and Buried in Nairobi: Lessons for the WTO’ (2017) 16 *Journal of International Trade Law and Policy* 49

Mayaz Alam, ‘Where the US-China Trade War Should Go From Here’ <<https://thediplomat.com/2020/07/where-the-us-china-trade-war-should-go-from-here/>> accessed 12 February 2021

‘Memorandum on Reforming Developing-Country Status in the World Trade Organization’ (*The White House*) <<https://www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization/>> accessed 4 September 2020

‘Micron Technology Revenue 2006-2020 | MU’ <<https://www.macrotrends.net/stocks/charts/MU/micron-technology/revenue>> accessed 12 February 2021

Miles T, 'U.S. Drafts WTO Reform to Halt Handouts for Big and Rich States' *Reuters* (15 February 2019) <<https://www.reuters.com/article/us-usa-trade-wto-idUSKCN1Q426T>> accessed 11 February 2021

'Ministry of Agriculture and Rural Affairs of the People's Republic of China' <<http://english.moa.gov.cn/Institutional/>> accessed 18 August 2020

'MINISTRY OF COMMERCE, PEOPLE'S REPUBLIC OF CHINA' <<http://english.mofcom.gov.cn/>> accessed 18 August 2020

Monagle C and Birkbeck CD, 'Strengthening Multilateralism: A Mapping of Proposals on WTO Reform and Global Trade Governance' (Social Science Research Network 2009) SSRN Scholarly Paper ID 1531687 <<https://papers.ssrn.com/abstract=1531687>> accessed 10 September 2020

Nakamura D, 'Obama at APEC Summit: China Must "Play by the Rules"' *Washington Post* (12 November 2011) <[https://www.washingtonpost.com/world/obama-at-apec-summit-china-must-play-by-the-rules/2011/11/12/gIQALRu2FN\\_story.html](https://www.washingtonpost.com/world/obama-at-apec-summit-china-must-play-by-the-rules/2011/11/12/gIQALRu2FN_story.html)> accessed 11 February 2021

'New Focus Needed for Doha Round' <<http://www.fao.org/newsroom/en/news/2006/1000375/index.html>> accessed 2 September 2020

Office of the US Trade Representative, 'Special 301 | United States Trade Representative' <<https://ustr.gov/issue-areas/intellectual-property/Special-301>> accessed 4 July 2020

Okonjo-Iweala N, 'Reviving the WTO' (*Brookings*, 22 June 2020) <<https://www.brookings.edu/opinions/reviving-the-wto/>> accessed 6 August 2020

Pandit P, 'China and the World Trade Organization: Questioning the "Revisionist" Hypothesis' [2016] *International Studies* <<https://journals.sagepub.com/doi/10.1177/0020881716654412>> accessed 18 August 2020

'Panels Established to Review Indian Tech Tariffs, Colombian Duties on Fries' <[https://www.wto.org/english/news\\_e/news20\\_e/dsb\\_29jun20\\_e.htm](https://www.wto.org/english/news_e/news20_e/dsb_29jun20_e.htm)> accessed 11 February 2021

Payosova T, Hufbauer GC and Schott JJ, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' 14

Pe'er G and others, 'A Greener Path for the EU Common Agricultural Policy' (2019) 365 *Science* 449

Peter Sutherland and others, 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium'

Philip Benkinsop, 'U.S., EU, Japan Agree New Subsidy Rules with China Trade in Focus' *Reuters* (14 January 2020) <<https://www.reuters.com/article/us-trade-wto-subsidies-idUSKBN1ZD1RM>> accessed 26 August 2020

Politi J, 'Donald Trump Threatens to Pull US out of the WTO' (30 August 2018) <<https://www.ft.com/content/32e17984-aca2-11e8-89a1-e5de165fa619>> accessed 12 February 2021

—, 'What's in the US-China "Phase One" Trade Deal?' (15 January 2020) <<https://www.ft.com/content/a01564ba-37d5-11ea-a6d3-9a26f8c3cba4>> accessed 12 February 2021

'Politics in the Boardroom: The Role of Chinese Communist Party Committees' <<https://thediplomat.com/2019/12/politics-in-the-boardroom-the-role-of-chinese-communist-party-committees/>> accessed 18 August 2020

Puckett AL and Reynolds WL, 'Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?' (1996) 90 *The American Journal of International Law* 675

'Reform of State-Owned Enterprises in China' (*China Labour Bulletin*, 19 December 2007) <<https://clb.org.hk/content/reform-state-owned-enterprises-china>> accessed 27 September 2020

'Reforming the Treatment of Developing Countries at the WTO' (*Institute for International Trade / University of Adelaide*) <<http://iit.adelaide.edu.au/research/reforming-the-treatment-of-developing-countries-at-the-wto>> accessed 11 July 2020

Richburg KB, 'U.S. Pivot to Asia Makes China Nervous' *Washington Post* (16 November 2011) <[https://www.washingtonpost.com/world/asia\\_pacific/us-pivot-to-asia-makes-china-nervous/2011/11/15/gIQAsQpVRN\\_story.html](https://www.washingtonpost.com/world/asia_pacific/us-pivot-to-asia-makes-china-nervous/2011/11/15/gIQAsQpVRN_story.html)> accessed 11 February 2021

Romei V, 'Global Trade Contracts as Coronavirus Hits World Economy' (24 April 2020) <<https://www.ft.com/content/db3427f5-5394-4661-8e52-6447fd3d9ae9>> accessed 12 February 2021

Schlesinger JM, 'How China Swallowed the WTO' *Wall Street Journal* (1 November 2017) <<https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308>> accessed 9 August 2020

Schott JJ, 'Overview: Understanding the Trans-Pacific Partnership' 13

Shawn Donnan and Reade Pickert, 'Trump's China Buying Spree Unlikely to Cover Trade War's Costs' *Bloomberg.com* (18 December 2019) <<https://www.bloomberg.com/news/articles/2019-12-18/trump-s-china-buying-spree-unlikely-to-cover-trade-war-s-costs>> accessed 12 February 2021

Silver C, 'The Top 20 Economies in the World' (*Investopedia*) <<https://www.investopedia.com/insights/worlds-top-economies/>> accessed 27 August 2020

Simon Lester, 'Voting on WTO Withdrawal' (*Cato Institute*, 23 June 2020) <<https://www.cato.org/blog/voting-wto-withdrawal>> accessed 12 February 2021

Solis M, 'Reinventing the Trading Nation: Japan, the United States, and the Future of Asia-Pacific Trade' (The Brookings Institution) <<https://www.brookings.edu/research/reinventing-the->

trading-nation-japan-the-united-states-and-the-future-of-asia-pacific-trade/> accessed 27 August 2020

‘Speech - DDG Alan Wolff - DDG Wolff: This Is the Time to Consider the Future of the Multilateral Trading System’ <[https://www.wto.org/english/news\\_e/news20\\_e/ddgaw\\_27may20\\_e.htm](https://www.wto.org/english/news_e/news20_e/ddgaw_27may20_e.htm)> accessed 27 August 2020

‘Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva’

‘Statements by the United States at the WTO General Council Meeting’ (*U.S. Mission to International Organizations in Geneva*, 15 October 2019) <<https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/>> accessed 14 August 2020

Swanson A and Kang C, ‘Trump’s China Deal Creates Collateral Damage for Tech Firms’ *The New York Times* (20 January 2020) <<https://www.nytimes.com/2020/01/20/business/economy/trump-us-china-deal-micron-trade-war.html>> accessed 24 August 2020

Sykes AO, ‘Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301.’ 30

Terrence Stewart, ‘WTO’s Appellate Body Reform the Draft General Council Decision on Functioning of the Appellate Body’ <<https://www.wita.org/blogs/wtos-appellate-body-reform/>> accessed 12 February 2021

‘The General Agreement on Tariffs and Trade (GATT 1947)’ <[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)> accessed 8 February 2021

‘The United States Officially Withdraws from the Trans-Pacific Partnership | United States Trade Representative’ <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>> accessed 11 February 2021

‘The WTO Can...Settle Disputes and Reduce Trade Tensions’ <[https://www.wto.org/english/thewto\\_e/whatis\\_e/10thi\\_e/10thi02\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi02_e.htm)> accessed 8 February 2021

‘The WTO’s First Ruling on National Security: What Does It Mean for the United States?’ <<https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states>> accessed 11 February 2021

Toohey L, ‘Reinvigorating the WTO from the Inside Out – Revisiting the Role of the Secretariat’ (Social Science Research Network 2014) SSRN Scholarly Paper ID 2586968 <<https://papers.ssrn.com/abstract=2586968>> accessed 10 September 2020

‘Trade War Leaves Both US and China Worse off | UNCTAD’ <<https://unctad.org/news/trade-war-leaves-both-us-and-china-worse>> accessed 12 February 2021

'Trade.Gov - Trade Disputes & Enforcement--Section 301'  
<[https://legacy.trade.gov/mas/ian/tradedisputes-enforcement/tg\\_ian\\_002100.asp](https://legacy.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002100.asp)>

'Trump's Trade War With China Actually Started at the WTO in 2001 - The Atlantic'  
<<https://www.theatlantic.com/international/archive/2018/08/china-trump-trade-united-states/567526/>> accessed 7 August 2020

Uddin F, 'The Fate of Doha Development Agenda' (2012) 9 *Policy Perspectives* 87

Ungphakorn AP, 'The 20-Year Saga of the WTO Agriculture Negotiations' (*Trade  $\beta$  Blog*, 22 March 2020) <<https://tradebetablog.wordpress.com/2020/03/23/20-year-wto-ag-negotiations/>> accessed 2 September 2020

United States Trade Representative, '2017 Report to Congress on China's WTO Compliance' (2018)

—, 'Report on the Appellate Body of the World Trade Organization' (2020)

'US-China Trade War: New Tariffs Come into Force' *BBC News* (23 August 2018)  
<<https://www.bbc.com/news/business-45255623>> accessed 11 February 2021

Vickers B, 'The Role of the Brics in the WTO: System-Supporters or Change Agents in Multilateral Trade?' (*The Oxford Handbook on The World Trade Organization*, 31 May 2012)  
<<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199586103.001.0001/oxfordhb-9780199586103-e-13>> accessed 22 September 2020

Vieira P, 'World Trade Organization Sides With Canada in Lumber Dispute With U.S.' *Wall Street Journal* (24 August 2020) <<https://www.wsj.com/articles/world-trade-organization-sides-with-canada-in-lumber-dispute-with-u-s-11598294456>> accessed 12 February 2021

'What Happened When China Joined the WTO?' (*World101 from the Council on Foreign Relations*) <<https://world101.cfr.org/global-era-issues/trade/what-happened-when-china-joined-wto>> accessed 10 September 2020

'What Is Made in China 2025 and Why Is the World Concerned about It?' (28 April 2018)  
<<https://www.abc.net.au/news/2018-04-29/why-is-made-in-china-2025-making-people-angry/9702374>> accessed 19 August 2020

'Will Japan Bet the Farm on Agricultural Protectionism?' (*PIIE*, 21 October 2014)  
<<https://www.piie.com/blogs/realtime-economic-issues-watch/will-japan-bet-farm-agricultural-protectionism>> accessed 27 September 2020

Williams A, 'Joe Biden to Remain Tough on Trade While Re-Embracing Partners' (16 November 2020) <<https://www.ft.com/content/c4e1c0e3-ba5b-46f8-87c7-9a56ca7a0a1a>> accessed 11 February 2021

Winslett G, 'Critical Mass Agreements: The Proven Template for Trade Liberalization in the WTO' (2018) 17 *World Trade Review* 405

Woodall B, 'The Development of China's Developmental State: Environmental Challenges and Stages of Growth' (*China Research Center*, 29 May 2014) <[https://www.chinacenter.net/2014/china\\_currents/13-1/the-development-of-chinas-developmental-state-environmental-challenges-and-stages-of-growth/](https://www.chinacenter.net/2014/china_currents/13-1/the-development-of-chinas-developmental-state-environmental-challenges-and-stages-of-growth/)> accessed 18 August 2020

World Trade Organisation, 'How WTO Members Have Used Trade Measures to Expedite Access to COVID-19 Critical Medical Goods and Services', vol 2020/14 (2020) Covid-19 Reports 2020/14 <[https://www.wto-ilibrary.org/economic-research-and-trade-policy-analysis/how-wto-members-have-used-trade-measures-to-expedite-access-to-covid-19-critical-medical-goods-and-services\\_9b0a96e2-en](https://www.wto-ilibrary.org/economic-research-and-trade-policy-analysis/how-wto-members-have-used-trade-measures-to-expedite-access-to-covid-19-critical-medical-goods-and-services_9b0a96e2-en)> accessed 12 February 2021

World Trade Organisation, 'Establishment of the Appellate Body WT/DB/1'

—, 'Communication from the European Union, China and India to the General Council, WT/GC/W/753'

—, 'General Council Minutes of Meeting, WT/GC/M/181'

—, 'Export Prohibitions and Restrictions: Information Note'

—, 'WTO Dispute Settlement: Resolving Trade Disputes Between Members'

WTO, 'Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes: Addendum' (2020) JOB/DSB/1/Add.12

'WTO | 2015 News Items - WTO Members Secure "Historic" Nairobi Package for Africa and the World' <[https://www.wto.org/english/news\\_e/news15\\_e/mc10\\_19dec15\\_e.htm](https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm)> accessed 2 September 2020

'WTO | Accessions: China' <[https://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_chine\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm)> accessed 19 August 2020

'WTO | Agriculture - Negotiations' <[https://www.wto.org/english/tratop\\_e/agric\\_e/negoti\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/negoti_e.htm)> accessed 21 July 2020

'WTO | Anti-Dumping - Technical Information' <[https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm)> accessed 18 August 2020

'WTO | Development - Special and Differential Treatment Provisions' <[https://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_differential\\_provisions\\_e.htm#legal\\_provisions](https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions)> accessed 19 August 2020

'WTO | Development - Who Are the Developing Countries in the WTO?' <[https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)> accessed 11 July 2020

'WTO | Dispute Settlement - Appellate Body Members' <[https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm)> accessed 11 July 2020



‘WTO | Dispute Settlement - Disputes by Country/Territory’  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)> accessed 11 February 2021

‘WTO | Dispute Settlement – Negotiations to Improve Dispute Settlement Procedures’  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_negs\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm)> accessed 30 August 2020

‘WTO | Dispute Settlement - the Disputes - DS437’  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds437\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds437_e.htm)> accessed 23 January 2021

‘WTO | Dispute Settlement - the Disputes - DS456’  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds456\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm)> accessed 18 August 2020

‘WTO | Dispute Settlement Understanding - Legal Text’  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm#25](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#25)> accessed 9 July 2020

‘WTO | Disputes - Dispute Settlement CBT - WTO Bodies Involved in the Dispute Settlement Process - Appellate Body - Page 1’  
<[https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s4p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm)> accessed 12 February 2021

‘WTO | Legal Texts - A Summary of the Final Act of the Uruguay Round’  
<[https://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm](https://www.wto.org/english/docs_e/legal_e/ursum_e.htm)> accessed 2 September 2020

‘WTO | Legal Texts - Marrakesh Agreement’ <[https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm#articleX](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleX)> accessed 2 September 2020

‘WTO | Regional Trade Agreements - the WTO Rules’  
<[https://www.wto.org/english/tratop\\_e/region\\_e/regrul\\_e.htm](https://www.wto.org/english/tratop_e/region_e/regrul_e.htm)> accessed 6 September 2020

‘WTO | Secretariat and Budget Overview’  
<[https://www.wto.org/english/thewto\\_e/secre\\_e/intro\\_e.htm](https://www.wto.org/english/thewto_e/secre_e/intro_e.htm)> accessed 10 September 2020

‘WTO | Subsidies and Countervailing Measures Overview’  
<[https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm)> accessed 23 August 2020

‘WTO | TENTH WTO MINISTERIAL CONFERENCE, NAIROBI, 2015 - Tenth WTO Ministerial Conference - Nairobi’  
<[https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_agriculture\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm)> accessed 2 September 2020

‘WTO | The Doha Round’ <[https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm)> accessed 4 July 2020

‘WTO | Trade Policy Review -China2018’  
<[https://www.wto.org/english/tratop\\_e/tp\\_e/tp475\\_e.htm](https://www.wto.org/english/tratop_e/tp_e/tp475_e.htm)> accessed 27 September 2020

‘WTO | Trade Topics - Trade Facilitation - Background’  
<[https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_agreeacc\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm)> accessed 5 September 2020

‘WTO | Understanding the WTO - A Unique Contribution’  
<[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm)> accessed 10 September 2020

‘WTO | Understanding the WTO - The GATT Years: From Havana to Marrakesh’  
<[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm)> accessed 10 September 2020

‘WTO | Understanding the WTO - What Is the World Trade Organization?’  
<[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm)> accessed 9 September 2020

‘WTO Begins Seventh Trade Policy Review of China - Xinhua | English.News.Cn’  
<[http://www.xinhuanet.com/english/2018-07/12/c\\_137317701.htm](http://www.xinhuanet.com/english/2018-07/12/c_137317701.htm)> accessed 27 September 2020

WTO General Council, ‘Draft Decision: Functioning of the Appellate Body, WTO Doc. WT/GC/W/791’

‘WTO Modernisation: Introduction to Future EU Proposals’ (European Commission 2018)

‘WTO’ing a Resolution to the China Subsidy Problem’ (*PIIE*, 22 October 2019)  
<<https://www.piie.com/publications/working-papers/wtoing-resolution-china-subsidy-problem>>  
accessed 27 September 2020

Wu M, ‘The China, Inc. Challenge to Global Trade Governance’ (2016) 57 *Harvard International Law Journal* 261

Yamashita K, ‘The WTO and TPP amid the U.S.-China Trade War’ (*The Japan Times*, 29 June 2020) <<https://www.japantimes.co.jp/opinion/2020/06/29/commentary/world-commentary/wto-tpm-amid-u-s-china-trade-war/>> accessed 6 September 2020

Yan S, ‘The EU’s Push for WTO Reform: Proposals, Paths and Impacts’ (2019) 76 *China International Studies* 60

Zheng Y, *Contemporary China: A History since 1978* (Wiley-Blackwell 2014)

‘中国海洋石油有限公司 Company Profile’  
<<https://www.cnooltd.com/col/col7261/index.html>> accessed 19 August 2020

‘国务院国有资产监督管理委员会’ <<http://www.sasac.gov.cn/>> accessed 18 August 2020

‘111:Trade Policy Under Trump’ <<https://www.tradetalkspodcast.com/podcast/111-trade-policy-under-trump/>> accessed 11 February 2021