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„The Preferential Treatment of Developing Countries within the World Trade Organization and its role in Promoting International Trade"

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## List of Abbreviations

| | |
|---|---|
| ACWL | Advisory Centre on WTO Law |
| AD | Anti-Dumping |
| Art | Article |
| BTA | Bilateral Trade Agreement |
| CDP | Committee for Development Policy |
| CMA | Critical Mass Agreement |
| CP | Contracting Parties |
| CTD | Committee on Trade and Development |
| CVD | Countervailing Duties |
| DC | Developing Country |
| DDA | Doha Development Agenda |
| DFQF | Duty-Free and Quota-Free |
| DFS | Development Facilitation Subsidy |
| DFT | Development Facilitation Tariff |
| DG | Director General |
| DR | Doha Round |
| DSB | Dispute Settlement Body |
| DSU | Dispute Settlement Understanding |
| EC | European Community |
| ECT | The Treaty of the European Community |
| EU | European Union |
| FDI | Foreign Direct Investment |
| FTA | Free Trade Agreement |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GC | General Council |
| GNI | Gross National Income |
| GNI | Gross National Income |
| GPA | Government Procurement Agreement |
| GSP | Generalized System of Preferences |

| | |
|---|---|
| GVC | Global Value Chain |
| IC | Industrialized Country |
| ICSID | International Centre for the Settlement of Investment Disputes |
| IF | Integrated Framework |
| IFD | Investment Facilitation for Development |
| IMF | International Monetary Fund |
| ITA | Information Technology Agreement |
| ITC | International Trade Centre |
| ITO | International Trade Organization |
| IUU | Illegal Unreported and Unregulated |
| JITAP | Joint Integrated Technical Assistance Programme |
| LDCs | Least Developed Countries |
| MC | Ministerial Conference |
| MFA | Multi-Fibre Arrangement |
| MFN | Most Favoured Nation |
| MSME | Small and Medium-Sized Enterprise |
| MTN | Multilateral Trade Negotiation |
| MTO | Multilateral Trade Organization |
| NAFTA | North American Free Trade Agreement |
| NAMA | Non-Agricultural Market Access |
| NGO | Non-Governmental Organization |
| NTB | Non-Tariff Barrier |
| OECD | Organization for Economic Cooperation and Development |
| PA | Plurilateral Agreement |
| PTA | Plurilateral Trade Agreement |
| QR | Quantitative Restrictions |
| ROO | Rules of Origin |
| RTA | Regional Trade Agreement |
| SCM | Agreement on Subsidies and Countervailing Measures |
| SDG | Sustainable Development Goal |
| SDT | Special and Differential Treatment |
| SSM | Special Safeguard Mechanism |

| | |
|---|---|
| TFA | Trade Facilitation Agreement |
| TPP | Trans-Pacific Partnership |
| TPR | Trade Policy Review |
| TPRM | Trade Policy Review Mechanism |
| TRIM | Trade-Related Investment Measure |
| TRIPS | Trade Related Intellectual Property Rights |
| TTIP | Transatlantic Trade and Investment Partnership |
| UK | United Kingdom |
| UN | United Nations |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDP | United Nations Development Programme |
| UR | Uruguay Round |
| URAA/AoA | Uruguay Round Agreement on Agriculture |
| US | United States |
| WTO | World Trade Organization |

## Introduction

From the early days of the Silk Road stretching from Italy to China, to our Modern Era, trade has played a crucial role in the economic development and peaceful relations between nations.

In fact, looking closely at how protectionist policies came into play, one could arrive at the conclusion that failure to negotiate a stable trade agreement between interested parties often leads to escalation in the form of armed conflict and war. And as such, these violent forms of conflict drastically impede trade, not only because governments forbid trade with enemies but also because the risk in lost lives and damaged goods is too great for trade to be profitable.[1]

The multilateral trading system is thus a direct result of the need for an international forum for negotiations and the necessity for a governing body that sets forth the rules of international trade on equal footing between its members. This is why the creation of the General Agreement on Trade and Tariffs (GATT) in the aftermath of World War II marks a turning point in the development of globally recognized trade norms and a leap forward towards the demolishment of trade barriers.

Furthermore, trade and foreign policy have been intertwined throughout history, with foreign policy often tailored to promote trade interests. In the year 30 BC, Rome conquered Egypt in large part to have a better supply of grain. In the 18th century, the British East India Company drove British foreign policy toward South Asia based on British trading interests. In the mid-19th century, trade dominated the thinking of the U.S. government in its relations with East Asia. In each case, foreign policy was enlisted to serve national trade interests.[2]

In particular, trade policies in developing countries have been a focal point of analysis for international economists in the past several decades. A desire for rapid economic growth in developing countries raised many questions about the relationship between trade and growth.[3] This is where the WTO's important role comes into fruition - throughout several Ministerial Conferences over the decades - many of the successful trading policies adopted in developing countries today have been facilitated by its measures for trade without discrimination, gradual market liberation, transparency, and promotion of fair competition.

This approach also suggests that the outcome of international trade negotiations is not pre-determined by the relative bargaining power of countries (economic size; financial strength in a broader context, military strength), and more particularly that developing countries can affect the outcome.[4]

Moreover, all parts of the world are affected by globalization through a number of channels such as migration, development, capital flows, and technological advancements. Most economies are only partially integrated into the global system. While this insulates them to a degree from the risk of turbulence associated with volatile short term capital flows it also prevents these countries from tapping the resources, energy and ideas inherent in globalization.[5]

A globalized international economy has been quite advantageous in the past few decades for developing countries that possess a large working force and an attractive foreign investment policy, which has enabled them to build strong ties with developed industrial countries in order to cultivate their national economies.

And in this regard the WTO facilitates the creation of regional and multilateral trading policies that open up a wide variety of options for developing countries that could benefit growth and serve as a bargaining chip in future trade negotiations making them a force to be reckoned with on the international level.

Beginning with the GATT Uruguay Round of multilateral trade negotiations (1986-1994) many developing countries changed their attitude towards their participation in the GATT and subsequently the WTO significantly. Encouraged by the manifest success of out-ward oriented economies of East Asia, many developing countries began to radically

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[1] Andrew G. Long, 'Bilateral Trade in the Shadow of Armed Conflict' (2008) 83.
[2] WTO 'DDG Wolff: Trade and foreign policy have always been intertwined' <https://www.wto.org/english/news_e/news18_e/ddgra_09feb18_e.htm> accessed August 2019.
[3] Anne O.Krueger, 'Trade Policies in Developing Countries' (1984) 519.
[4] Sheila Page, 'Developing Countries in GATT/WTO Negotiations' (2002) 3.
[5] Shahid Yusuf, 'Globalization and the Challenge for Developing Countries' (2001) 7.

liberalize their trade regimes.[6] Realizing that the effective integration into the world trading system cannot be unilateral, because it involves not only their own trading policies and institutions but also those of developed countries, their main trading partners.[7]

Therefore, such an integration process cannot be successfully executed without the involvement of both developing and developed countries under the rules of conduct that govern the multilateral trading system.

This shift in approach towards more openness and transparency in trading systems was reflected in their active participation and involvement in the formulation of the new trading rules during the Uruguay Round.

However, the case for developing countries has been on the table since the Uruguay Round up until 2001 when WTO members agreed to undertake a new round of negotiations with the developing and least developed countries at its center. This became known as the Doha Development Agenda (DDA or the Doha Round.

Among its grand objectives was the creation of a single undertaking: a comprehensive universal trade agreement that binds all members of the WTO.

In this context, WTO members agreed that the liberalization of global agricultural trade has been an important item on the agenda, and the 2013 MC9 in Bali, Indonesia delivered a significant achievement, the first multilateral trade agreement since the creation of the WTO: the Trade Facilitation Agreement (TFA), expediting the movement, release and clearance of goods, including goods in transit, improving the relevant articles of the GATT and setting out provisions for customs cooperation.[8]The WTO estimates potential export gains stemming from the TFA of between US$ 750 billion and well over US$ 1 trillion dollars per annum.[9]

Furthermore, in Nairobi 2015, WTO members made significant progress on a number of issues including the gradual reduction of agricultural export subsidies and another agreement between some members to cut down tariffs on IT products.

However, the complexity of the negotiations involving a large number of participants, the global financial situation, and the unique circumstances of the global trade giants such as the United States, EU, and China have perhaps led this round of negotiations to a stalemate. The final outcome and the way forward beyond the Doha Round require further examination and analysis of variables within the international trading system.

[6] Will Martin, L. Alan Winters 'The Uruguay Round and the Developing Countries' (1996) Foreword 11.
[7] Constantine Michalopoulos, 'Developing Countries in the WTO' (2001) 1.
[8] WTO, 'The Trade Facilitation Agreement' Section I <https://www.tfafacility.org/trade-facilitation-agreement-facility%20> accessed December 2020.
[9] WTO, 'World Trade Report 2015' <https://www.wto.org/english/res_e/booksp_e/wtr15-2d_e.pdf> accessed January 2021.

# Chapter One

# Overview

### 1.1 History and Development of the Multilateral Trading System

Before looking at the establishment of the WTO, it is important to consider the development stages and the rationale surrounding the creation of its predecessor (The GATT) and how the two are intrinsically linked through the multilateral trading system.

#### 1.1.1 Bretton Woods Conference:

In an effort to rebuild the international economic system in the aftermath of World War II, 730 representatives from 44 countries gathered at Bretton Woods, New Hampshire 1944 to set the rules of the international monetary regime.[10]

Two important institutions were established through the Conference; the International Monetary Fund (IMF) was created to help countries in financial need with short-term monetary aid or short-term balance-of-payments lending; and the International Bank for Reconstruction and Development (World Bank) was established to provide loans and assistance to developing countries.[11]

The Conference was possibly one of the most important events in the development of modern economies, with the US owning roughly two thirds of the world's gold at the time of the Conference[12], it pushed for an internationally excepted exchange system based on both gold and the US dollar.[13]

This made for a crucial bargaining chip — especially when put in conjunction with the Marshal Plan for the reconstruction of Europe— which the US used to strike more favourable conditions under the ITO thereby cementing its role in the future of the international trading regime.

#### 1.1.2 The Atlantic Charter:

To better understand the root of the idea behind what would later be known as the International Trade Organization (ITO) Charter, one must look back in time and consider the state of global economy in the era preceding World War II which has been characterized by what is now commonly known as "Protectionism". Protectionism can be defined as a policy of shielding domestic industries against foreign competition by means of tariffs, subsidies, import quotas, or other restrictions placed on the imports of foreign competitors.[14]

However, despite the general consensus amongst economists that the world economy generally favors free trade, protectionist policies were implemented by many countries during the 1930s that perhaps prolonged the economic depression and possibly deepened it around the world due to a severe lack of competition in the isolated markets, price surges, and an epidemic of unemployment.[15]

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[10] The Bretton Woods Committee, 'BWC Spotlights Risks and Opportunities in Global Economic System on July 1 Anniversary of Famous 1944 Conference' <https://www.brettonwoods.org/article/bwc-spotlights-risks-and-opportunities-in-global-economic-system-on-july-1-anniversary-of> accessed April 2020.

[11] Eric Helleiner, 'Forgotten Foundations of Breton Woods' (2014) 13.

[12] National Mining Association, 'This History of Gold' <https://hascnc.weebly.com/uploads/7/6/8/7/7687070/the_history_of_gold.pdf> accessed April 24, 2020.

[13] US Department of State Archive, 'the Bretton Woods Conference 1944' < https://2001-2009.state.gov/r/pa/ho/time/wwii/98681.htm> accessed December 2020.

[14] Britannica, The Editors of Encyclopedia, 'Protectionism' <https://www.britannica.com/topic/protectionism> accessed August 2020.

[15] Anne O. Krueger, 'International Trade: What Everyone Needs to Know' (2020) 5.

Early during World War II the allied powers shared a strong conviction that never again should protectionist trade policies be allowed to bring the international economy crashing to its knees. This concern was so important that in 1941, off the coast of Newfoundland, Churchill and Roosevelt met secretly and jointly agreed that the principle of multilateralism would be the cornerstone of an emergent international economic system.[16]

This solemn pledge, contained in the Atlantic Charter, may be considered to be the first irrevocable step toward requiring governments to organize trade internationally without sacrificing the prospect for a rising standard of living.[17]

For the British and American governments, the re-establishment of expansionist, universal and multilateral trade was their long-term goal but they were willing consider other alternatives that might form a natural starting point for a restructured international order.[18]

In its generic sense, it referred to policies that governments had to adopt to prevent economic depressions and assure social stability, both nationally and internationally. The experience of the thirties had taught the world an important lesson, namely, that employment was linked, in a variety of ways, with international developments. A decade later, every country acknowledged that unemployment had to be addressed at the interstate level; that unemployment and economic instability could no longer considered a natural phenomenon by governments any longer and that no country on its own could solve these issues without addressing its international relations with other states.[19]

Furthermore, the British and Americans had, perhaps for differing reasons, reached the same conclusion: the world needed a trading system that involved multilateral clearing, a multilateral negotiating mechanism for reducing tariffs, and – crucially for the argument here – multilateral influence over the design and operation of the system's rules and exceptions. They assumed that the creation of an international trade organization, to promote and regulate free trade on a multilateral, non-discriminatory basis would help them reach their goal.[20]

### 1.1.3 The Short Life of the ITO Charter:

Joint Anglo-American proposals were agreed upon and subsequently elaborated in a draft ITO charter put forward by the United States and discussed at the first session of the preparatory committee to the UN conference on trade and employment in 1946, which 18 countries attended.[21]

One of the most important issues that emerged, was the full employment, which was really a way of expressing concern about the stability of international demand.[22] In a liberalized world economy, damaging trends in the United States would rapidly cause disruption elsewhere, in other words the ability of developing countries to maintain markets for their primary products hinged on US willing to keep up its demand for them.[23]

A second important issue was the industrialization of developing countries, where a number of states argued that developing countries should be allowed to impose import quotas to promote industrialization. However those issues were both resolved with the introduction of a chapter IV, articles 10-13) under which members of the ITO would "recognize that special governmental assistance may be required in order to promote the establishment or reconstruction of particular industries and that such assistance may take the form of protective measure.[24]

The United States obtained additional substantive criteria limiting the scope of the exceptions and procedural conditions and requirements designed to limit application of the exception to only the very clear cases[25] where the ITO would be responsible for considering applications from countries to be allowed to take such measures.[26]

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[16] Daniel Drache, 'The Short but Significant Life of the International Trade Organization: Lessons for Our Time' (2000) 8.
[17] Ibid.
[18] Ibid 8-9.
[19] Ibid 9.
[20] Richard Toye, 'Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization 1947–1948' 286
[21] Ibid.
[22] Richard N. Gardner, 'The Sterling-Dollar Diplomacy in Current Perspective' (1985) 271-280.
[23] Toye, 'Developing Multilaterlism' 286.
[24] Ibid 287.
[25] Robert Hudec, 'Developing Countries in the GATT Legal System' (2010) 26-38.
[26] Toye, 'Developing Multilaterlism' 287.

Another issue that arose during the 2nd meeting of the preparatory committee in Geneva was the treatment of private foreign investment in developing countries; there was a general unwillingness to give guarantees to its security and, in some cases, a feeling that such capital in itself was suspect, and a likely tool of foreign exploitation.[27]

Considering that under the Havana charter, foreign investment could not be expropriated or nationalized except under 'just', 'reasonable', or 'appropriate' conditions could be interpreted as weakening the protection that US investments abroad had previously enjoyed.[28]

During the final conference, which was held in the Cuban parliament building in the center of Havana, the negotiations reached a deadlock on the issue of QRs governed by the rule of ' ITO prior approval under article 13 of the draft charter, which was rejected by the block of developing countries, especially in Latin America where many of the industries created during wartime stood little chance of surviving in peacetime without heavy protection.[29]

And in order to reach an acceptable outcome, the US delegation had to make a number of significant compromises (on QRs, new preferences, and in allowing members to appeal to the ITO from decisions by the contracting parties denying admission to the GATT) and had failed to achieve its aim of requiring members to deny most-favoured-nation treatment to non-members.[30]

The final act of the Conference designated the 'Havana Charter', a move calculated to appeal to the Latin Americas, would not see the light of day in the American Congress partly because the ITO lacked powerful advocates in Washington. Not long after, the outbreak of the Korean War in 1950 sealed its fate: in December, the US administration announced that it would not proceed with ratification. On that basis, despite having been signed by 54 countries in 1948 the Charter collapsed due to non-ratification by its signatories.[31]

### 1.1.4 The GATT

The GATT began in 1947 with 23 members[32], perceived at the time of its creation to be an 'interim' agreement through the 'Protocol of Provisional Application' (PPA) to be replaced by a more inclusive, just, and orderly international trade regime under ITO, the GATT survived in the latter's place to be the forerunner of the present-day WTO.

In July 1945 in Washington and in Ottawa, Will Clayton and his deputies met with their Canadian counterparts to discuss the commercial policy options; The Canadians, expressed disappointment with the multilateral-bilateral approach proposed by the United States, and made a suggestion that soon took on immense importance. If the multilateral-bilateral approach had to be taken, the Canadians suggested, it would be undesirable to attempt to negotiate tariff reductions with many countries at the bargaining table.[33]

Therefore, Canadian officials suggested that a small "nuclear" group of eight to twelve nations start things off. This Canadian proposal is the first hint that something along the lines of a GATT might be a useful precursor to an ITO. And Canada's idea had an immediate impact on U.S. policy. As a result of these discussions, in late July 1945, the Executive Committee on Economic Foreign Policy recommended abandoning the multilateral-bilateral approach that had been proposed and instead adopting the "selective nuclear multilateral- bilateral" approach.[34]

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27 Ibid.
28 Anne O. Krueger, 'The WTO as an International Organization' (1998) 186.
29 United Nations, 'UN Economic Survey of Latin America 1948' 183-184 <https://www.un-ilibrary.org/content/books/9789210583053/read> accessed June 2020.
30 Toye, 'Developing Multilaterlism' 282-305.
31 Ibid.
32 WTO, 'WTO/GATT Chronology of Achievements' *On 1 January 1948, GATT entered into force. The 23 founding members were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States*. <https://www.wto.org/english/theWTO_e/minist_e/min96_e/chrono.htm> accessed January 2021.
33 Douglas A. Irwin, Petros C. Mavroidis, and Alan O. Sykes, 'The Genesis of the GATT' (2008) 62-64.
34 Douglas A. Irwin, 'Clashing over Commerce of US Trade Policy' (2017) 472.

The earliest full draft of the GATT can be traced back to the second meeting of the UN drafting committee at Lake Success, New York[35], by drawing on the commercial policy chapters of the draft ITO charter.[36]

They concluded that the GATT was necessary to protect the negotiated tariff concessions, and that it would not include articles involving domestic policy exclusively, which would be included in the ITO charter.[37]

The Second Preparatory meeting of the United Nations Conference on Trade and Employment opened at the Palais des Nations in Geneva to prepare a draft version of the ITO charter for final discussion and ratification at the UN conference at Havana later that year. In addition, the meeting would allow the "nuclear" countries to negotiate tariff reductions and secure those reductions with an interim measure, a General Agreement on Tariffs and Trade.[38]

The higher stakes of the meeting, as well as personnel changes on both sides of the Atlantic, meant that the negotiations lacked the cordiality of previous staff discussions.[39]

By mid-August, the final text of the GATT had been finalized.[40] The purpose of the GATT was to prevent the tariff concessions from unraveling in the period before the ITO Charter took effect.[41]

The outcome of the negotiations was not guaranteed to be a success, as there were fewer tariff reductions to be preserved because the tariff and preference negotiations were in a terrible state.[42]

The negative British attitude toward the elimination of the imperial preference cast a shadow over the negotiations, and by mid-July the preferences negotiations reached its peak[43]; The United Kingdom informed the Geneva participants that it could not put the non-discrimination clauses into force because of its severe balance of payments problems. The U.K. delegation further suggested that it could only apply the agreement "ad referendum" with no definite commitment to its coming into effect. While the Americans held that the agreement should be signed and implemented as planned.[44]

However, Britain's economic weakness was reflected not just in its concerns about the balance of payments, but its role in the world. The strong defense of imperial preferences could be read as reflecting fears about Britain's diminishing role as a world power.[45]

American concerns about the political ramifications of economic weakness in Britain and in Europe played a key role the end-game of the GATT negotiations. In late August, with the GATT text finalized but the tariff negotiations still at an impasse, the US administration decided to go through with the final agreement despite Britain's refusal to reduce its imperial preference over concerns that a failure at the conference would further weaken Britain's economic and political position in the world and strengthen that of the Soviet Union.[46]

The finalization and implementation of the GATT text, the focus of Chapter 2, was a major accomplishment. The actual tariff and preference reductions, as well as the tariff bindings, were symbolically very important of the new direction in postwar commercial policy.[47]

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[35] Lake Success, just outside of New York City on Long Island, was the temporary location of the headquarters of the United Nations
[36] Irwin, and others,'The Genesis of the GATT' 100.
[37] Ibid.
[38] Ibid 84.
[39] Ibid.
[40] United Nations, United Nations Publications 'Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment' *E/PC/T/186* (August 1947) <https://www.wto.org/gatt_docs/English/SULPDF/92290240.pdf> accessed August 2019
[41] Irwin, 'The Genesis of the GATT' 86
[42] Ibid.
[43] Ibid 88.
[44] Ibid 91.
[45] Ibid.
[46] Ibid 92.
[47] Ibid 94.

There are no precise estimates on the depth of the tariff cuts for most of the GATT participants However in the first Geneva round, the 23 participating countries made no fewer than 123 agreements covering 45,000 tariff items related to about one-half of the value of world trade.[48]

The GATT was not a treaty or an organization, but merely a trade agreement put into effect by executive order. As a result, participants were not "members" but "contracting parties", The original Article XXVIII of GATT bound tariff levels for only three years; only in 1958 did the bindings become indefinite.[49]

After this brief overview of the GATT negotiations, it is clear that the GATT would not have come into existence without the leadership of the United States. However, there were many junctures in which the United States and the United Kingdom could have destroyed the plans for a multilateral commercial agreement. In addition, other countries played an important role in shaping the GATT. Britain was responsible for pushing the United States into thinking in terms of a multilateral approach rather than a bilateral one. Canada was responsible for proposing that a small set of nuclear countries negotiate tariff reductions separately, rather than attempt to make reductions and finalize a charter at a large multilateral gathering. It is interesting to note that, despite its overwhelming economic strength in comparison to other countries, the United States could not dominate or dictate the outcome to other countries. Rather, the United States often accommodated the demands for exceptions or weaker language at various points in the negotiations to ensure the continued participation of other countries.[50]

In conclusion, despite the fact that the Havana negotiations failed to establish an international trade organization, the GATT remained in force under the Protocol of Provisional Application.[51] The important factors that led a minimum resistance to General Agreement were:

- that it covers very restricted spheres, relating to tariffs;
- that the commitments in the Agreement were of shorter duration;
- that a contracting party can withdraw by giving sixty days' notice; and
- that the Agreement does not require special legislation by a majority of contracting parties, for it is by executive authority that they continue to be contracting parties.[52]

The contracting parties to the Agreement were forced by practical necessity to carry out, step by step, some of the functions that would have been undertaken by the ITO under the Havana Charter. This factor, along with the need to find coping mechanisms for the problems arising out of the operation of the Agreement, led to its gradual evolution.[53]

#### 1.1.4.1 Structure of GATT 1947

The original agreement consists of 3 parts divided as follows:

**Part I** consists of two articles (I-II) which contains the MFN and the tariff concession obligations.

**Part II** consists of twenty articles (III-XXIII) containing most of the major substantive obligations, including those relating to the customs, procedures, quotas, subsidies, anti-dumping duties and national treatment, etc.

**Part III** consists of twelve articles (XXIV-XXXV) containing mostly the procedural provisions and treaty aspects of the agreement, including territorial application, customs union, frontier traffic, free trade areas, acceptance, entry into force, and registration, withdrawal clause, and amendment procedure etc.

The last formal amendment to the GATT was a 1965 protocol to add Part IV dealing with problems of developing countries.

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[48] Ibid 94.
[49] Ibid 96.
[50] Ibid 96-97.
[51] Through the PPA, these countries would undertake "to apply provisionally on and after 1 January 1948: (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation." WTO, 'Provisional Application of the General Agreement' <https://www.wto.org/gatt_docs/English/SULPDF/92290240.pdf> accessed September 2020.
[52] Muhammad Amir Munir, Nadeem Ahmad Sohail Cheema, 'From GATT to WTO: A Legal Analysis' (2000) 4.
[53] Ibid.

**Part IV** consists of three articles (XXXVI-XXXVIII) containing clauses about trade and development.[54]

### 1.1.4.2 The GATT Trade Rounds Leading up to The Creation of the WTO:[55]

| Year | Place/name | Subjects covered | Countries |
|---|---|---|---|
| 1947 | Geneva | Tariffs | 23 |
| 1949 | Annecy | Tariffs | 13 |
| 1951 | Torquay | Tariffs | 38 |
| 1956 | Geneva | Tariffs | 26 |
| 1960-1961 | Geneva Dillon Round | Tariffs | 26 |
| 1964-1967 | Geneva Kennedy Round | Tariffs and anti-dumping measures | 62 |
| 1973-1979 | Geneva Tokyo Round | Tariffs, non-tariff measures, "framework" agreements | 102 |
| 1986-1994 | Geneva Uruguay Round | Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc | 123 |

The first five of these negotiating rounds concentrated primarily on tariffs. The sixth, the Kennedy Round, undertook to look seriously at non-tariff barriers.

### 1.1.4.3 The Kennedy Round

The Kennedy Round shifted the focus of the negotiations to non-tariff barriers (NTBs), which had begun to be viewed as a formidable obstacle to trade liberalization. Negotiators had originally understood the term NTBs to refer to non-tariff barriers imposed for economic reasons (antidumping, countervailing, safeguards).[56]

Article VI of GATT condemns dumping and sets forth general criteria governing assessment of antidumping duties by an importing country but does not provide any guidance for determining whether such injury exists, and addresses the methodology for establishing the existence of dumping in only the most general fashion.[57]

In 1967, most of the major trading nations announced agreement on an international code dealing with the dumping of goods, one of the most significant non-tariff measures discussed during the Kennedy Round.[58]

The Code was intended to eliminate the unfair trade practice of price cutting by exporters in sales to one country. Dumping, a major problem of international trade, has long been recognized as a cause of distrust and hostility and is a potential cause of great harm to the domestic industry of the importing country.[59]

Each of the 18 countries that concluded the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade[60] – the first 12 articles of which constitute the International Anti-dumping Code – undertook to conform its domestic laws to the provisions of the Code.[61] The United States President's Special Trade Representative signed the agreement unconditionally and without reservation. But since the United States was leading the world in trade at the time, which meant that its participation was vital to the Code's successful

[54] Ibid 5.
[55] WTO, 'The GATT years: from Havana to Marrakesh' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> accessed May 2020.
[56] Bernard M. Hoekman and Petros C. Mavroidis, 'The World Trade Organization' (2007) 12.
[57] WTO, 'Technical Information on Anti-dumping' <https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm> accessed May 2020.
[58] Eugenia S. Pintos, and Patricia J. Murphy, 'Congress Dumps the International Antidumping Code' (1969) 180.
[59] Ibid.
[60] WTO, 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994' <https://www.wto.org/english/docs_e/legal_e/19-adp.pdf> accessed June 2020.
[61] Pintos, and others, 'Congress Dumps the International Antidumping Code' 180.

implementation, when in 1968 The United States Congress made a decision not to proceed with the necessary ratification, other signatories also abandoned its ratification, which consequently resulted in the Agreement having little practical significance in international trade.[62]

### 1.1.4.4 The Tokyo Round

The Tokyo Round was the first major negotiating round to make non-tariff barriers the primary objective of the negotiations.

The Tokyo Round results also included a major agreement on tariff reductions. To put these results in perspective, tariff negotiations were the main item of business in the six multilateral negotiations that were held under GATT auspices through the Kennedy Round of 1967. Tariffs were not the major focus of this negotiation, yet the average reductions of about 35 percent of industrial nations' tariffs achieved at the Tokyo Round were very comparable to the reductions of the Kennedy Round.[63]

Arguably the GATT needed the Tokyo round as the changes of the 1960s and early 1970s had brought considerable pressure for organizational adaptations. For one thing, a rapid growth in membership brought new demands on the organization's legal norms. And with many of its new signatories and participants being developing countries seeking to gain preferential trading arrangements consistent with their development needs. Such demands conflicted with the trading interests of the industrialized nations that had originated the GATT, and thus a fundamental change was established that continues to be central to the politics of the organization.[64]

Another source of pressure on GATT has come ironically from success, and not failure, in the domain over which it exercises some jurisdiction. From the late 1940s to the beginning of the Tokyo Round, the value of world production grew by an annual average of about 5 percent. International trade grew at an even faster 7 percent. Such increase created pressures for adjustment and led national governments to resort to protectionism to insulate their economies against these changes. Also the increase in trade included changes in the nature of trade, generated largely by the operations of transnational corporations, created new problems in trade management for national governments. In sum, then, GATT found itself in an economic environment by the early 1970s that was far removed from the environment faced at its inception.[65]

The Tokyo Round was a turning point in the history of trade relations under the GATT. With success in reducing national tariffs, the GATT members had achieved about all that could be achieved with this particular form of cooperative economic decision-making. The Tokyo Round committed GATT members to a renewed attack on a form of trade restrictions, namely non-tariff barriers, which GATT had had until then little success in controlling. This new commitment could be viewed as an important change in the GATT regime; and certainly it has been viewed as a constitutional reform of the GATT mandate.[66]

Additionally, it was during the Tokyo Round that the enabling clause (differential and more favourable treatment, reciprocity and fuller participation of developing countries) came into existence.[67] This concept was further expanded during the following trade rounds and became an integral part of the WTO regime.

The final act of the Tokyo Round negotiation occurred at a session of the contracting parties in 1979. The task for this meeting was to integrate the Tokyo Round results, which included eleven major international agreements on technical barriers to trade, governmental procurement, trade in civil aircrafts, anti-dumping implementation, and others in the structure of the GATT.[68]

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[62] Russell B. Long, 'United States Law and the International Anti-dumping Code' (1969) 464.
[63] Gilbert R. Winham '*International Trade and the Tokyo Round Negotiation*' (1987) 17.
[64] Ibid 21.
[65] Ibid.
[66] Ibid 57.
[67] WTO, 'Treatment of Developing Countries', Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, *Decision of 28 November 1979 (L/4903)* <https://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf> accessed September 2019.
[68] Winham, 'International Trade and the Tokyo Round' 354.

### 1.1.4.5 The Uruguay Round

At the annual GATT session in November 1984, the United States, with the support of the European Community, suggested that senior trade policy officials from national capitals should meet to explore the possibilities of a new round. The debates following that session were often centered on the question of whether or not the Round should include negotiations on trade in services.[69]

The June 1985 meeting of the GATT Council saw its first full debate on the possibility of a new round of negotiations. India on behalf of 24 Developing countries held that the new round should be confined to trade in goods and focus on the concerns of developing countries, and insisted that prior to the new round a number of confidence-building measures should be introduced to restore credibility to the trading system. Additionally, the delegation pointed out that in parallel to these issues, serious reform was needed in the international financial and monetary system, and that it is closely linked to the international trade regime.[70]

Despite a number of compromise proposals by Sweden, the European Community to win over the India-led group, it was clear that no consensus decision was possible.[71]
The United States, convinced that more than half the GATT membership were in favor of a new round announced that it would request a Session of Contracting Parties, which required the support of at least one half of the GATT membership. By August 1985, the necessary number of countries was reached and from that point onwards, it was certain that the new round of negotiations would take place.[72]

Over nine meetings in 1986, the preparatory committee set up by the GATT contracting parties discussed each of the proposed subjects for the new round of negotiations, prioritizing the concept of standstill and rollback on restrict trade measures, treatment of developing countries, and safeguards. It fixed the place of the Ministerial Conference in Uruguay (Punta del Este) because of the feeling that the new round must have clear developing-country endorsement.[73]

The Ministerial Conference successfully concluded on 20 September 1986 with the adaptation of a substantive declaration that set out the agreed goals and procedures of the coming round of negotiations.[74]

The key to handling the subject of services was found in dividing the negotiations into two parts. Negotiations on trade in goods were placed firmly in the context of GATT, and defined in the first part of Declaration, which was adopted by ministers acting in their capacity of contracting parties to the General Agreement. The coming negotiations on trade in services were defined in Part II of the Declaration which, although it provided for GATT procedures and practices to be applied and for the negotiations to be serviced by its Secretariat, was adopted separately by ministers acting simply as representatives of their governments.[75]
This procedural distinction between the goods and services negotiations was to be maintained throughout the Round. This distinction was never fully understood by the general public and became increasingly artificial as the passionate disagreements over the issue of services faded, and the political reality of the unity of the negotiations became obvious.[76]

Part I of the Punta del Este Declaration, covering the negotiations on trade in goods, consists of a preamble and seven sections.[77]The preamble contains the basic decision to negotiate, as well as the determination of GATT members to halt and reverse protectionism, remove distortions to trade, preserve GATT's principles and forward its objectives, and develop a more open, viable and durable multilateral trading system. It also expresses the ministers'

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[69] John Croome, 'Reshaping the World Trading System: A History of the Uruguay Round' (1987) 16-17.
[70] Ibid 17.
[71] Ibid 18.
[72] Ibid 19.
[73] Ibid 21.
[74] Ibid 24.
[75] Ibid 25.
[76] Ibid 25. *See also* EC Press Release, 'Gatt Ministerial Conference- Punta del Este- September 20, 1986' Memo/86/103/4 <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_86_103_4> accessed January 1986.
[77] Ibid 26.

conviction that such action would promote growth and development, and their consciousness of the Round's relevance to problems of international finance, and debt.[78]

The first operative section, on the Round's objectives, reflects the considerations set out in the preamble. The negotiations are to be aimed at liberalizing and expanding world trade, to the benefit of all countries and especially developing countries, and are to include the improvement of access to markets by reducing and removing trade barriers. GATT's role is to be strengthened, its rules reinforced and given greater coverage, and its responsiveness to the evolving international economic environment improved.[79]

The second section states general principles for the negotiations. They are to be transparent an aim particularly important for the smaller countries which feared that their interests would be affected by deals reached among the larger participants. The negotiations are to be treated from start to finish as a single undertaking.[80]

A statement of the principles that are to govern the participation of developing countries in the Round repeats, almost word for word, the relevant sections of the "enabling clause" drawn up at the end of the Tokyo Round.[81] The next section on "standstill" and "rollback", is intended to prevent participants from taking trade measures to improve their negotiating position against other countries. The rollback calls for the removal of all trade restricting measures inconsistent with the GATT by the end of the Uruguay Round, or for them to be brought into conformity with the post-Uruguay Round rules.[82]

The next two sections set out the specific aims for each area of the negotiations on goods, where 13 subjects for negotiations are identified. A fourteenth negotiating subject is added by a section on "Function of the GATT System".[83]

The last two sections of Part I define participation in the negotiations and organizational matters. It was agreed that the negotiations should be open to GATT members as well as provisional members on equal footing. These conditions effectively set participation in the Round at more than 100 countries even from the beginning. The organizational provisions established the Group of Negotiations on Goods and called on it to set up a mechanism to monitor performance under the standstill and rollback commitments. It was also required to evaluate, at the end of the Round the results achieved for developing countries.[84]

The separate Part II of the Declaration on services is very brief. Like the "subject" sections of Part I, it sets our aims of negotiations on services. It also makes clear that the negotiations form part Of the Uruguay Round, are to be directed by the Group of Negotiations on Services, shall follow GATT procedures and practices, and will be serviced by the GATT Secretariat, with technical support as required from other organizations.[85]

The Uruguay Round was to be the most ambitious and widest-ranging trade negotiation ever undertaken. But ambition and the inclusion of subjects new to the GATT did not mean that the need for renewed efforts to reduce the traditional barriers to international trade could be ignored.[86]

The main focus of the Round during its first two years was the negotiating groups themselves. In most of the groups, work was still at the stage of setting out national proposals and exploring their implications.[87]

Through the wide variety of topics that were being discussed, public interest grew as it became clear that important national policies, and the future of identifiable jobs and industries, were at stake. The first full expression of this worldwide concern with regards to the future of the negotiations, their impact on international relations, economic

[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid 26-27.
[83] Ibid 27.
[84] Ibid.
[85] Ibid.
[86] Ibid 29.
[87] Ibid 136-137.

growth and development came with the mid-term review meeting of the ministers of the participating countries in Montreal 1988.[88]

The earliest outcome of the Montreal meetings would come in the shape of agreements on tropical products, dispute settlement, and other procedural matters.[89]

The package on tropical products was estimated to $20 billion out of total world trade tropical products of some $70 billion. However, beyond its concrete value as stimulus to the trade of some of the least developed countries, was its impact on the Uruguay Round itself. Both developed and developing countries were thereafter to feel greater confidence in one another's seriousness of purpose.[90]

Developing countries had shown the developed countries that they were prepared to be participants in the negotiations, and not just observers; at the same time, they learned that their bargaining power in the negotiations would be greatly increased if they were prepared to make offers as well as requests.[91]

Another breakthrough would come in the form of the Trade Policy Review Mechanism (TPRM), implemented provisionally at first, to ensure adherence to the GATT rules, the TPRM would later become the main transparency instrument of WTO, creating opportunities for a process of collective and systematic evaluation of the trade policies and practices of individual members.[92]

However, these solid achievements, did not mean that success at Montreal was guaranteed. On four subjects – agriculture, textiles and clothing, safeguards, and TRIPS – little progress has been made. On three of the four, given more time, agreement might have been reached. Agriculture however, was an entirely different matter and brought the Montreal meeting to an abrupt and premature end.[93]

The two largest participants in the agriculture negotiations were not ready to shift from their respective, and incompatible positions. The United States continued to insist on complete liberalization of agricultural trade over ten years, while the European Community was prepared to consider only limited and gradual reduction in subsidies to agriculture.[94]

Eventually as the US and EC finally began to seek common ground under pressure from other participants, not to the point of abandoning their original goal, it became obvious that agreement could not be reached before the ministers left Montreal. Although this disagreement in views did not imply that the entire package should be disregarded, and that the ministers would continue working on the agriculture trade agreement in Geneva. This approach was rejected by the five Latin American members of the Cairns Group. They held that until there was an agreement on agriculture, they would accept no agreement at all.[95]

As the GATT required consensus to reach agreements, the immediate effect of this stand by the Latin Americans was to bring the negotiations in Montreal to a halt. With the blockage on agriculture, discussions on the three unresolved subjects were also interrupted.[96]

Not without compromise on general principles, the EC and the United States were eventually able to lift the roadblock and settle most of their differences in a deal that took place later in 1992 informally known as the "Blair House Accord". The US accepted that it could not gain indorsement of its previously sought explicit target of removal of all trade-distorting supports on agriculture. The EC could no longer avoid some broad commitment to

[88] Ibid 140.
[89] Ibid 143.
[90] Ibid 144.
[91] Ibid.
[92] Sam Laird and Raymundo Valdes, 'The Trade Policy Review Mechanism' (2012) Abstract.
[93] Croome, 'Reshaping the World Trading System' 145.
[94] Ibid.
[95] Ibid 146.
[96] Ibid.

liberalization if it were not to wreck the Round. Other countries too had to shift their positions and consent to the objectives of the negotiations that implied future fundamental changes in their domestic agricultural policies.[97]

One set of ideas that was developed inside the European Commission, where proposals were developed for an organizational treaty that would give GATT a proper institutional structure, overcome the fragmentation (and the two-tier system of obligations) introduced by the Tokyo codes, cover all expected results of the Uruguay Round. The first public support for such an organization was voiced by the Italian trade minister in 1990. Two months later, the Canadian trade minister put forward proposals at an informal meeting of ministers held in Mexico.[98]

Soon afterwards, at the meeting of the FOGS group during the Uruguay Round in Brussels, the EC submitted an official proposal for "establishment of a multilateral trade organization (MTO)" on the basis of six main arguments:

- the need for a proper legal basis for the GATT;
- the value of putting the Tokyo Round codes into a common institutional framework;
- the advantages which a single dispute settlement system could provide;
- the fact that GATT was being extended beyond its contractual nature by its new role as the international body for review of trade policies;
- the desirability of finding an integrated system for all the Uruguay Round results; and
- the convenience of giving GATT a strong institutional basis if close cooperation with the World Bank and IMF were to be pursued [99]

This proposal was met with strong opposition from the US, arguing that fragmented nature of the GATT system reflected a political problem – the refusal of some countries to accepted new or clarified obligations – rather than than a legal one, that the unified dispute settlement rules did not require a new organization, and that only political was required to bring a services agreement under the fold of the GATT.[100]

Furthermore, the US had its reservations about the future of such an organization which might become politicized to the point where the influence of the United States would diminish. Additionally, there was always the fear that US Congress which rejected the ITO would do the same with an MTO.[101]

Doubtful of the possibility of establishing a new organization after strong US opposition, many countries were also fearful that putting this proposal on the table of discussion would disrupt the negotiations on the many difficult substantive issues that were still open in the Round. The FOGS group effectively set the issue aside, to be reopened at a later time.[102]

By the end of the Brussels meeting of 1990, it was obvious that there was much work to be done on a number of subjects before the package could be finalized. The Uruguay round was to be re-launched and would continue for another four years.[103]

In 1991, a draft "MTO" agreement of 16 articles had been developed preceded by a preamble based on that of the GATT and included a list of agreements that it would cover, and which were envisaged to become an integral part of the MTO. It made a distinction between "multilateral agreements" which included the GATT, the GATS, and the TRIPS, the agreement on dispute settlement and on trade policy reviews, and all other texts negotiated in the Uruguay Round, to which all members of the new organization would have to subscribe. And "plurilateral agreements" which included only four of the original Tokyo Round agreements which had not been taken up in the Uruguay Round (government procurement, civil aircraft, beef and dairy products) whose acceptance would not be compulsory.[104]

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[97] Ibid 147-148.
[98] Ibid 233.
[99] Ibid 233-234.
[100] Ibid 234.
[101] Mohan Kumar, 'Negotiation Dynamics of the WTO: An Insider's Account' (2018) 59.
[102] Croome, 'Reshaping the World Trading System' 234.
[103] Ibid 246.
[104] Ibid 282.

Since there was such large agreement on the name "Multilateral Trade Organization", it is curious how it changed to the WTO at the very last minute. When the Dunkel Final Draft appeared in the end of 1991, it was still the MTO.[105] The United States delegate held that nobody would know what a "multilateral" trade organization was all about. And since no one wanted to give the US Congress any pretext to reject the MTO, the change was agreed to.[106]

Over the following two years, the negotiations lurched between impending failure, to predictions of imminent success. Several deadlines came and went. New points of major conflict emerged: services, market access, anti-dumping rules, and the proposed creation of a new institution. Differences between the United States and European Union became central to hopes for a final, successful conclusion. By July 1993 the "Quad" (US, EU, Japan and Canada) announced significant progress in negotiations on tariffs and related subjects ("market access"). It took until 15 December 1993 for every issue to be finally resolved and for negotiations on market access for goods and services to be concluded (although some final touches were completed in talks on market access a few weeks later). On 15 April 1994, the deal was signed by ministers from most of the 123 participating governments at a meeting in Marrakesh, Morocco.[107]

#### 1.1.4.5.1 Uruguay Round Results

The Uruguay Round established a single institutional framework encompassing the GATT, as modified by the Uruguay Round, and all other agreements and arrangements concluded during the Uruguay Round. As part of this, the WTO was developed to administer and implement the GATT and other Uruguay Round agreements. Finally, membership in the WTO requires that a state agrees to comply with all agreements falling under the WTO's purview.[108]

**Market Access for Non-Agricultural Goods**

The Uruguay Round reduced tariffs by 40 percent for developed countries on about $787 billion worth of trade in industrial goods. The percent of industrial goods traded by developed countries with zero tariffs rose from 20 percent to 44 percent.[109]
Average tariffs for developed countries fell from 6.3 percent to 3.8 percent. Finally, developed countries increased the level of bound tariffs from 94 percent of all goods to 99 percent of all goods. Developing countries agreed to an average tariff reduction of 20 percent covering more than $300 billion in goods. They also increased the percent of tariff bindings from 14 percent to 59 percent of products exported into their markets. Average tariff levels for developing countries fell from 15.3 percent to 12.3 percent.[110]

**Agricultural Products**

Trade in agricultural products was brought within the GATT for the first time with commitments on internal supports, export subsidies, and market access for imports. Internal support program levels were reduced by 20 percent, and the new levels were bound against future increases. Three categories of supports were created: red, amber, and green. Supports considered green were exempt from Uruguay Round requirements. Export subsidies were reduced by 36 percent in value over a six-year period with 1986–90 set as the base period for determining reductions. Reductions applied only to specific product groups. Finally, market access was improved through tariffication. All nontariff barriers to agricultural trade were to be eliminated, and a single fixed tariff was to be created by WTO members. Overall tariff levels were to be reduced by 36 percent for developed countries and 24 percent for developing countries in ten years from the signing of the agreement.[111]

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[105] Kumar, 'Negotiation Dynamics of the WTO' 59.
[106] Ibid 60.
[107] WTO, 'The Uruguay Round' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed December 2020.
[108] Kevin Buterbaugh, Richard Fulton, 'The WTO Primer, Tracing Trade's Visible Hand Through Case Studies' (2007) 191.
[109] Ibid.
[110] Ibid.
[111] Ibid 191-192.

**Textiles and Clothing**

The Uruguay Round began the integration of textiles into the GATT. Until 1995 trade in textiles fell under the purview of the Multi-Fibre Arrangement (MFA), which set quotas for most types of textile traded in the world. Integration of textiles was completed in four stages, and it meant the elimination of quotas. In 1995 members agreed to eliminate quotas on 16 percent of textiles covered by the MFA. A gradual liberalization from quotas was implanted until eventually all textiles falling under the MFA were freed from quotas. WTO members also agreed to reduce tariffs on textiles by about 20 percent and to bind most tariffs on textiles. Safeguards were included permitting members to reinstate quotas to avoid damaging surges in imports, but there were tight rules for their use.[112]

**Services**

The GATS was a significant outcome of the Uruguay Round. There are three major components to the agreement. The first is the framework agreement that contains the basic obligations applying to all member countries. These include MFN treatment for services, transparency requirements, safeguards, dispute settlement procedures, and the free flow of payments and transfers. The second contains the schedule of national commitments. These lay out exactly what each country has agreed to do in regard to opening access to services trade—they are much like the specific tariff levels countries agree to as part of the GATT. The last section contains annexes to the main agreement and creates rules and exceptions to the main agreement for specific service sectors. Finally, the agreement requires that members meet every five years to discuss expansion of the agreement's coverage.[113]

**Trade Related Investment Measures (TRIMs)**

This agreement recognizes that certain policies or measures created by states to govern investment can distort trade. The agreement prohibits any measure or policy that is inconsistent with Article III of the GATT—this is the norm of nondiscrimination that means that countries should treat foreign and domestic firms the same. It also prohibits any quantitative restrictions on investment. A specific list of measures that are incompatible with the agreement are appended to the text. All developed country members of the WTO agreed to eliminate any incompatible measures by 1997, while developing countries agreed to their elimination by 2000. The least developed members of the WTO were given until 2002 to eliminate these policies. A committee was created to monitor implementation of the agreement.[114]

**Intellectual Property Rights**

The Trade Related Intellectual Property Rights Agreement (TRIPS) was created to reduce the amount of conflict over the protection of the full range of property right by member states due to different standards. The agreement requires that intellectual property receive national treatment by all members. In order to end conflict, minimum standards of protection were included as part of the agreement. The agreement also defines what types of materials members must protect. Finally, the agreement creates "obligations for members to provide procedures and remedies under their domestic laws to ensure that intellectual property can be effectively enforced by foreign right holders as well as their own nationals."[115]

**Other Outcomes of the Round**

The Uruguay Round tightened the procedures and rules concerning antidumping measures and the safeguards that members could use in protecting themselves from surges in imports due to the opening of their markets. An agreement was also added covering government procurement by members. Members of the WTO must create transparent procurement processes and inform losing bidders promptly of their decisions. The procurement agreement also expanded coverage of previous agreements to services. An additional agreement was added covering the sanitary and phytosanitary standards of members.[116]

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[112] Ibid 192.
[113] Ibid.
[114] Ibid.
[115] Ibid 193.
[116] Ibid.

Finally, the agreement expanded or tightened rules dealing with import licensing procedures, customs valuation, pre-shipment inspection, rules of origin, and technical barriers to trade.[117]

## 1.2 Cornerstones of the Multilateral Trading System the WTO

The WTO's creation on 1 January 1995 marked the biggest reform of international trade since the end of the Second World War. Whereas the GATT mainly dealt with trade in goods, the WTO and its agreements also cover trade in services and intellectual property. With the promise of being not just a GATT-replacement but its successor, the establishment of the WTO has been nothing less of a paradigm shift.

Since its inception, international trade law has moved from green room negotiations to the forefront of public and academic interest. The WTO has also become a central forum for political debates of global concern such as economic globalization, sustainable development, and justice in international trade.

The WTO with its some 30,000 pages of trade agreements and over 95% of world trade flow under its belt[118] - hailed today as the pinnacle of the international trade regime - is fundamentally based on a number of principles that are crucial to its existence:

1 Non-discrimination; 2 reciprocity 3 enforcement of obligations; 4 transparency; 5 single undertaking; 6 safety valves.[119]

### 1.2.1 Non-Discrimination

Starting with the most prominent, non-discrimination is a key concept in WTO law, materializing through the derivative most favoured-nation (MFN) treatment and the national treatment obligations. Put into context, the MFN treatment obligation prohibits a country from discriminating *between* other countries; the national treatment obligation prohibits a country from discriminating *against* other countries.[120]

Discrimination in trade matters breeds resentment amongst countries, manufacturers, traders and workers discriminated against. Such resentment poisons international relations and may lead to economic and political confrontation and conflict. In addition, discrimination makes scant economic sense, generally speaking, since it distorts the market in favour of products and services that are more expensive and/or of a lower quality. Eventually, it is the citizens of the discriminating country that end up 'paying the bill' for the discriminatory trade policies pursued.[121]

The importance of eliminating discrimination in the context of the WTO is highlighted in *the Preamble to the WTO Agreement*, where the 'elimination of discriminatory treatment in international trade relations' is identified as one of the two main means by which the objectives of the WTO may be attained.[122]

**1.2.2 Reciprocity** is another important principle that secures equal treatment between WTO members, initially a practice that occurred under the GATT trade rounds, whereby one country offers to reduce a barrier to trade and a second country reciprocates to an equivalent extent by reducing one its own trade barriers. It reflects both a desire to limit the scope of free-riding that may occur because of the MFN rule. And a desire to obtain better access to foreign markets.[123]

The costs of liberalization generally are concentrated in specific industries, which often will be well organized and opposed to reductions in protection. In such a setting, being able to point to reciprocal, sector- specific import gains

[117] Ibid.
[118] WTO, 'The WTO in Brief' <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed December 2020.
[119] Bernard M. Hoekman, Philip English, Aaditya Mattoo, 'Development, Trade, and the WTO' (2002) 42.
[120] Peter Van den Bossche, 'The Law and Policy of the World Trade Organization: Text, Cases and Materials' (2005) 307.
[121] Ibid 308.
[122] Ibid.
[123] Hoekman and others, 'Development, Trade, and the WTO' (2002) 43.

in a foreign trade barrier, may help incentivize export oriented domestic interests to support liberalization in domestic political markets.[124]

A related point, it is necessary for the negotiating parties to secure gains that are greater than the gain that can be accomplished through unilateral liberalization. Reciprocal concessions ensure such gains will materialize.[125]

**1.2.3 Binding and Enforcement commitments:** The trade negotiations have always been bilateral, i.e., between two countries. But, when countries become WTO members the tariff commitments become multilateral. The commitments made by the members are listed in a schedule and the rates become "Bound" meaning committed and difficult to increase. These rates act as the ceiling beyond which the rates cannot be increased according to WTO rules, thus increasing market security for traders and investors.[126]

**1.2.4 Transparency:** Every WTO member may have their own trade regulations however, these regulations are to be published and notified to WTO members and WTO secretariat before its implementation. The members are also required to establish and maintain institutions to facilitate the review of administrative decisions affecting trade, to respond to any requests for information by other trading members. Article X of the GATT, Article III of the GATS, and Article 63 of the TRIPS agreement all require that relevant laws, regulations, judicial decisions, and administrative rulings be made public.[127]

The WTO also maintains that simplification is a prerequisite for transparency. Therefore, in an effort to facilitate trade, all superfluous requirements must be eliminated and the complexity and duplication in trade formalities and procedures must be reduced.[128]

**1.2.5 Single Undertaking:** Joining the WTO comes with a large set of rules and agreements, which apply equally to all the member states and they cannot choose to join selective agreements. The members must join on an 'all or nothing' basis, and are also subject to binding dispute settlement proceedings.[129]

**1.2.6 Safety Valves:** The WTO agreements have measures which enable governments in specific circumstances to restrict trade. This rule goes against the MFN rule we discussed earlier, but under conditions of threat to environment, public, animal and plant health, WTO permits members to take protective action.

There are three types of provisions in this connection:

(a) articles allowing for the use of trade measures to attain non-economic objectives;

(b) articles aimed at ensuring fair competition;

(c) provisions permitting intervention in trade for economic reasons.[130]

The first category includes provisions allowing for policies to protect public health or national security and to protect industries that are seriously injured by competition from imports. The underlying idea in the latter case is that governments should have the right to step in when competition becomes so vigorous as to injure domestic competitors. Although it is not explicitly mentioned in the WTO agreement, the rationale for intervention is that such competition causes political and social problems associated with the need for the industry to adjust to changed circumstances.[131]

Measures in the second category include the right to impose countervailing duties on imports that have been subsidized and antidumping duties on imports that have been dumped (sold at a price lower that that of the domestic market).[132]

Finally, under the third category there are provisions allowing measures to be taken in case of serious balance of payment difficulties or if a government desires to support an infant industry.[133]

[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid 44.
[128] Hao Wu, 'Trade Facilitation in the Multilateral Trading System, Genesis, Course and Accord' (2018) 36.
[129] Hoekman, 'Development, Trade, and the WTO' 45-46.
[130] Hoekman, 'Development, Trade, and the WTO' 44.
[131] Ibid.
[132] Ibid.
[133] Hoekman and others, 'Development, Trade, and the WTO' 44.

### 1.2.2 The Legal Order and Organizational Structure of the WTO:

The WTO legal order is based on the sum of altogether 46 agreements which formally constitute **Annexes** to the WTO Agreement. The essential trade provisions are located in Annex 1, the "Understanding on Rules and Procedures Governing the Settlement of Disputes" is contained in Annex 2, and the "Trade Policy Review Mechanism" is included in Annex 3.[134]
In addition, Annex 4 lists the so-called plurilateral trade agreements. In contrast to the so-called multilateral trade agreements, the membership in these plurilateral agreements is optional. Also, they have a special role with regard to their institutions and decision-making.[135]

In contrast to what the arrangement of the various agreements into the different attachments and sub-sections of the WTO Agreement might suggest, there is no general, constitutive hierarchy between the agreements. Corresponding to the structure of international public law, the agreements of the WTO are of equal rank in relation to each other. The relationship between them is in general determined by the general principles of international treaty law, and therefore, since the rule *lex posterior derogat legi priori* is inapplicable by reason of the simultaneous conclusion of the agreements, primarily the speciality of provisions (*lex specialis*) is the governing principle.[136]

Moreover, explicit regulations on the relationship between the individual agreements have to be considered which, with regard to their content, again boil down to the principle of speciality.[137]

In addition to the individual agreements, interpretations play a significant role in the WTO legal order. They can be adopted by a three-fourths majority of the Ministerial Conference and the General Council, by virtue of their mandate for authoritative interpretation according to Art. IX:2 WTO Agreement. Such interpretations are binding on the WTO, the bodies and its Members, and need to be taken into account especially in the case of dispute settlement.[138]

The WTO has an extensively sub-divided structure, including the following three **main bodies** referred to in the WTO Agreement: the Ministerial Conference, serving as the representative body (Art. IV:1), the General Council as the executive body (Art. IV:2), and the Secretariat in charge of administrative affairs (Art. VI).[139]

**1.2.2.1 The Ministerial Conference (MC)** is the principal organ and the main governing body of the organization and consists of trade ministers from all the member states. They determine the agenda of the organization and the regulation of new subjects (article 3 para.2) and all final decisions on agreements are issued with the consensus of these ministers. They meet at least once every two years. By contrast, under the GATT a decade could pass between ministerial meetings.[140]The more frequent participation by trade ministers under the WTO was intended to solidify the political guidance of the WTO and enhance the prominence and credibility of its rules in domestic political arenas.[141]It further has the authority to set up committees, amongst which are committee on Trade and Development as well as the Committees on Budget, Finance and Administration (Art. IV:7 WTO Agreement).[142]

**1.2.2.2 General Council (GC):** the permanent executive body who in addition to its own special responsibilities, carries out the functions of the MC in the interval between its meetings. The GC consists of senior representatives of WTO members and is the decision-making body of the organization.[143]

The General Council carries out important functions regarding the **settlement of disputes** and the **review of the trade policy** of the Members. These functions are, however, not directly allocated to the Council but are, from a formalistic point of view, rendered institutionally independent: the Understanding on Rules and Procedures

134 Peter-Tobias Stoll, Frank Schorkopf, and Arthur Steinmann 'WTO: World Economic Order, World Trade Law' (2006) 27.
135 Ibid.
136 Ibid 28.
137 Ibid.
138 Ibid.
139 Ibid 16.
140 Ibid.
141 Hoekman and others, 'Development, Trade, and the WTO' 46.
142 Stoll and others, 'WTO: World Economic Order'16.
143 Ibid 17.

Governing the Settlement of Disputes (DSU) and the Trade Policy Review Mechanism (TPRM) provide for **institutional independence** also with regard to the organizational structure, and, as such, provide for a committee for dispute settlement (Dispute Settlement Body, DSB and a body for the review of trade policies (Trade Policy Review Body).[144]

In contrast to the Ministerial Conference, the General Council in accordance with (Art. IV:5) of the WTO has the explicit authority to create its own **subsidiary organs** that act under the guidance of the latter, and can, as necessary, appoint subordinate committees which have the right to set up their own rules of procedure subject to the approval of the respective councils.[145]

- **Council for Trade in Goods:** There are 11 committees that work under goods council that deal with specific subjects among which are agriculture, market access, subsidies, and anti-dumping measures.[146]
- **Council for Trade-Related Aspects of Intellectual Property Rights:** The Council for TRIPS is the body responsible for administering the TRIPS Agreement. In particular, it monitors the operation of the Agreement.[147] In its regular sessions, the TRIPS Council mostly serves as a forum for discussion between members on key issues.[148]
- **Council for Trade in Services:** This council oversees the functioning of the General Agreement of Trade in Services (GATS). A lot of the work of the Services Council is currently focused on the operationalization of the LDC services waiver. Similarly, services-related issues in electronic commerce figure prominently on its agenda.[149]

#### 1.2.2.3 The Institutions of Dispute Settlement

The strength of the dispute settlement system of the WTO lies in the fact that the entire procedure is strictly regulated. This regulation is accompanied by institutionalization, which is provided for in the WTO Agreement. There are many bodies to be consulted in this tightly organized system for the settlement of disputes: the Dispute Settlement Body (DSB), which gives conclusive legally binding rulings, the Panel, the Appellate Body, the Secretariat, the Arbitrator, and the expert institutions. The rules of procedure for dispute settlement, including rules on independence, conflict of interests and impartiality, apply to all these institutions.[150] Originally, the contracting parties, as the main organ of the GATT 1947, were entitled to undertake this task and it was understood to be a largely political course of action. The Dispute Settlement Body insofar represents on the one hand a continuum for the competence of a political main organ.[151]

##### 1.2.2.3.1 Dispute Settlement Body

As regards the competence of the DSB, it has all rights with respect to the organization of the dispute settlement system and its institutions. The typical autonomy in questions of organization and working procedure, that attributes to a classical system of jurisdiction, is not yet in place in the WTO.[152]

[144] Ibid.
[145] Ibid 18.
[146] Ibid 20.
[147] WTO, 'Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)' *Article 68* <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf> accessed October 2020.
[148] WTO, 'Trips Council regular meetings' <https://www.wto.org/english/tratop_e/trips_e/intel6_e.htm> accessed October 2020.
[149] WTO, 'The Services Council, its committees and other subsidiary bodies' <https://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm> accessed October 2020.
[150] Stoll and others, 'WTO: World Economic Order' 75.
[151] Ibid 75-76.
[152] Ibid 76.

Moreover, the DSB is responsible for wide certain guiding decisions at different stages of the dispute settlement procedure which include rulings regarding the establishment, composition and mandate of the Panel, as well as the adoption of its reports of the reports of the Appellate Body.[153]

These wide-ranging rights of the DSB, not only in respect of the organization of the dispute settlement mechanism, but also in the different stages of the procedures, are mitigated by the fact that the DSB decides by negative (or reverse) consensus.[154]

**1.2.2.3.2 Panel**

Panels are appointed on an ad hoc basis by the DSB for each specific case at the request of one party. The DSB must appoint a Panel at the second meeting if the dispute cannot be settled by consultations in accordance with Art. 4 DSU.[155]

Contrary to dispute settlement under GATT 1947, decision-making in the DSB is turned round: while consensus of the contracting parties was formerly necessary for the establishment of a Panel, the DSB is now obliged to establish a Panel at the second meeting if it does not by consensus decide not to do so (negative consensus, Art. 6.1 DSU). This is often called the "right to a Panel".[156]

The Secretariat plays an important role in the composition of individual Panels in accordance with Art. 8.6 DSU: it maintains a list of qualified persons.[157]

Like the composition of the Panel, its mandate is also granted only for a specific case. This shows clearly the historical origin of dispute settlement as a political-diplomatic procedure which should originally merely prepare the political decision. The relevant political organ reserved to itself the decision on who and to what extent should work on and resolve a specific dispute.[158]

**1.2.2.3.3 Appellate Body**

One of the main improvements of the dispute settlement system under the WTO is the introduction of a second decision-making level, which can, on request, review the decision of a Panel. Next to Art. 17 DSU the "Working Procedures for Appellate Review" cover the appeal procedure.[159]

Unlike the Panel process, the appeal process is assigned to a standing organ, the Appellate Body. It is composed of seven persons. The members of the Appellate Body are appointed by the DSB for four years, with the possibility of one re-election (Art. 17.2). They should be known and reputable experts with special knowledge in the areas of law and international trade, and they must be independent of the governments of the states involved. The membership of the Appellate Body should also be representative of the membership of the WTO. The Members of the Appellate Body serve in rotation, i.e., three persons are chosen out of the membership for each individual case.[160]

In a related point, the dispute settlement body of the WTO has a much better framework than what the GATT had earlier which was slower, less automatic, and more susceptible to blockages. Let's take an example in which Venezuela lodged a complaint against the United States for discrimination against gasoline imports. US had set more stringent standards for imported gasoline compared to its domestic refineries. In this regard, Venezuela submitted a complaint in January 1995 and was later joined by Brazil in April. About a year later, the dispute panel came out with its final report suggesting it agreed to Venezuela's grievances, to which the US appealed. Four months later the appellate body also submitted its report upholding the panel's opinion that the US had violated the *national treatment* principle and was given 15 months to make changes to its regulations. Over 6 months later, the US and Venezuela agreed on a new

[153] Ibid.
[154] Ibid.
[155] Ibid 77.
[156] Ibid.
[157] Ibid.
[158] Ibid 78.
[159] Ibid.
[160] Ibid.

regulation. Thus, the dispute was settled in a brisk manner even with a major member like US being on the line of fire.[161]

**1.2.2.4 Trade Policy Review Body:** The WTO General Council meets as the Trade Policy Review Body to undertake trade policy reviews of Members under the TPRM and to consider the Director-General's regular reports on trade policy development.[162]

The trade policy reviews prepared through The Trade Policy Review Mechanism also contribute towards greater transparency and lesser uncertainty both for citizens of the countries concerned and its trading partners. It reduces the scope for countries to circumvent their obligations, thereby reducing uncertainty regarding the prevailing policy stance.[163]

**1.2.2.5 The Secretariat of the WTO** (Art. VI WTO Agreement) works under the guidance of a Director-General who is appointed by the Ministerial Conference that also decides on his powers, duties, conditions of service and term of office.[164]

Since the decision-making power rests exclusively in the hands of the Members, the main task of the Secretariat is the logistic, technical and professional support of the councils and committees, the developing countries, the dissemination of information to the media and the world public as well as the organization of the Ministerial Conferences. In addition to that, the Secretariat gives advice to States interested in acceding to the WTO and it offers its legal expertise in the context of dispute settlement.[165]

**1.2.2.6 Decision-making**

Most decision-making in the WTO follows the GATT practices and is based on consultation and consensus. The consensus practice is of value to smaller countries as it enhances their negotiating leverage in the informal consultations and bargaining that precede decision-making, especially if they can form coalitions.[166]

Although recourse to voting may be had if a consensus cannot be reached, in practice this occurs very rarely and when it does, it is based on the "one member, one vote" principle. Unanimity is required for amendments to general principles, and a two-thirds majority vote is sufficient for amendments to issues other than the WTO general principles. Where not otherwise specified, and where consensus cannot be reached, a simple majority vote is, in principle, sufficient. In 1995, WTO members decided not to apply provisions allowing for a vote in the case of accessions and requests for waivers but to continue to proceed on the basis of consensus.[167]

**1.2.2.7 Objectives:**

The system of the world trade order, as once constituted in the GATT and nowadays in the WTO, is often, and at first sight not surprisingly, associated with the idea of **free trade**. This common attribution however, requires some clarification. While the system of the world trade order as constituted in the WTO may well be understood as aiming at producing prosperity gains through trade liberalization, its policy objectives are far more complex and less strictly connected to concepts which are associated with the term "free trade".[168]

When looking at the preamble in its entirety and bearing in mind that the term "free trade" is not expressly mentioned, it becomes apparent that the policy concepts associated with the term play an altogether limited role in the context of the WTO.[169]

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[161] Bluewhale, 'World Trade Organization (WTO)' <http://www.blue-whale.in/organisations/world-trade-organization-wto/> accessed November 2020.
[162] WTO, 'The Trade Policy Review Body (TPRB)' <https://www.wto.org/english/tratop_e/tpr_e/tprbdy_e.htm> accessed November 2020.
[163] Hoekman and others, 'Development, Trade, and the WTO' 44.
[164] Stoll and others, 'WTO: World Economic Order' 19.
[165] Ibid.
[166] Hoekman and others, 'Development, Trade, and the WTO' 48.
[167] Ibid.
[168] Ibid 33.
[169] Ibid 35.

At the same time, it has to be emphasized that the preamble expressly refers to the **elimination of discrimination** in international trade relations. The issue of non-discrimination is not in any way merely a subordinate side-aspect of trade liberalization. Instead, it has its own significance, as is already demonstrated by the fact that the obligation to non-discrimination applies regardless of whether or not obligations to liberalize exist in the relevant sector. The element of non-discrimination shows that the trade order does not merely pursue the reduction of trade barriers but includes more principled concepts, which, in the case of non-discrimination are those of competitive equality and equity.[170]

As far as the objectives of the WTO are concerned, it can be asserted that according to the relevant provisions of the WTO Agreement **free trade is neither the only nor the overriding purpose**. Incidentally, this term does not appear at all in the preamble to the WTO Agreement. Rather, when looking at the fundamental objectives set out in it, which claims legal force in contrast to a common misconception, other economic policy objectives are mentioned.[171]

The Preamble in its first consideration lists several **overriding and paramount objectives**: raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services. Moreover, it addresses the "optimal use of the world's resources in accordance with the objective of sustainable development", and the aim "both to protect and preserve the environment and to enhance the means for doing so".[172]

These basic objectives exhibit similarities to the language in other instruments such as, for instance, the Treaty of the European Community (Art. 2 ECT) and the founding instruments **of the World Bank, the International Monetary Fund**, and finally **Art. 55 of the Charter of the United Nations**.[173]

In the second recital clause of the Preamble, the WTO Agreement addresses the need for **economic development** and the interest in ensuring that developing countries, and in particular the least developed countries (LDCs), secure their respective share in the growth of international trade.[174]

Only in the third recital clause does the Preamble envisage "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 trade relations." The liberalization of trade therefore does not appear to be an end in itself, but rather a sub-objective or instrument in the pursuit of other, higher-ranking economic policy objectives.[175]

Finally, it must be pointed out that the world trade order, despite its free trade orientation, does not represent an international "*Free Trade* Constitution". Unlike the law of the EU, the GATT contains **no individual guarantee of the freedom to trade**, apart from the insignificant guarantee of the freedom of transit in accordance with Art. V GATT 1994. For the purpose of clarification, it must be mentioned that the system of the world trade order, while lacking individual entitlements concerning the freedom to trade, contains precise rules of non-discrimination in the sense of most favoured nation treatment and national treatment.[176]

Such **individual rights to non-discrimination** have other, but nevertheless very significant, guarantee functions with regard to the safeguarding of unimpeded trade. Their effect is, from a legal point of view, however reduced, owing to the fact that, according to the present state of the law, these provisions are not directly applicable, so that they cannot be directly invoked by individuals at the national level.[177]

Unlike the EU, the WTO thus does not contain individual rights and liberties which can be invoked by the individual and which apply in preference to national law, and which may importantly promote and secure trade liberalization. It is thus distinctly less far-reaching than other trade liberalization regimes, which aim at **economic integration** and include the concept of a common market or even future political integration.

[170] Ibid 35.
[171] Ibid 33.
[172] Ibid 33-34.
[173] Ibid 34.
[174] Ibid.
[175] Ibid 34-35.
[176] Ibid 37.
[177] Ibid.

Therefore, without the driving force of the principle of direct applicability, the liberalization of trade in the context of the WTO when individual trade rights are concerned rests entirely with its Members.[178]

# Chapter Two

# Preferential Treatment: a Call for a Free Market

## 2.1 Definitions and Objectives

There are no WTO definitions of “developed” and “developing” countries. Members announce for themselves whether they are “developed” or “developing” on the basis of self-selection which itself is an expression of the principle of sovereignty. However, other members can challenge the decision of a member to make use of provisions available to developing countries.

That a WTO member announces itself as a developing country does not automatically mean that it will benefit from the unilateral preference schemes of some of the developed country members such as the Generalized System of Preferences (GSP).[179] In practice, it is the preference-giving country which decides the list of developing countries that will benefit from the preferences.[180]

This procedure has resulted in a very heterogeneous grouping of developing countries in the WTO. Accordingly, since the present SDT provisions apply equally to all the self-designated developing countries, a new differentiation between the developing countries in the WTO is a politically very sensitive issue for the larger and more advanced developing countries.[181]

The taboo of opening up the box of “developing countries” is understandable as major emerging countries (such as the BRICS) want the group to stick together in order to limit future commitments, and smaller developing countries, in turn, fear a break-up of the group as it risks reducing their collective bargaining power.[182]

In attempting to classify countries, some analysts, using the U.N. classification system,[183] prefer to distinguish between three categories of development for economies (regions, countries and territories): developing economies, transition economies and developed economies. Each category is further divided by geographical region.

Others follow the classification system established by the Organization for Economic Cooperation and Development (OECD) in Paris, It includes all low- and middle-income countries (as defined by the World Bank except for those that are members of the G-8 or the European Union (including countries with a firm accession date for EU membership). In addition, the list separately includes all Least Developed Countries (LDCs) as defined by the UN.[184]

[178] Ibid.
[179] WTO, ‘Development: Definition Who are the developing countries in the WTO?’ <https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed November 2020.
[180] *The Preference-giving country can also remove countries from its list of beneficiaries, as evident in the removal of Mynamar from the EU GSP Scheme following violations of the International Labour Organization (ILO) conventions on forced labour.* See EC Press Release, ‘EU re-opens its market to Myanmar/Burma’ (2013) <https://ec.europa.eu/commission/presscorner/detail/en/IP_13_695> accessed March 2020.
[181] Jonas Kasteng, Arne Karlsson, and Carina Lindberg ‘Differentiation between Developing Countries in the WTO’ (2004) 3.
[182] WTO, Joost Pauwelyn, Graduate Institute, Geneva ‘The WTO in Crisis: Five Fundamentals Reconsidered, <https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art9.htm> accessed September 2020.
[183] The United Nations Conference on Trade and Development (UNCTAD) maintains a database that is updated every year <https://unctadstat.unctad.org/EN/Classifications.html> accessed April 2020.
[184] OECD, ‘History of Development Assistance Committee (DAC) Lists of aid recipient countries’ <http://www.oecd.org/development/financing-sustainable-development/development-finance-standards/historyofdaclistsofaidrecipientcountries.htm> accessed April 2020.
The list for Official Development Aid (ODA) is revised every three years <http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC-List-of-ODA-Recipients-for-reporting-2018-and-2019-flows.pdf> accessed April 2020.

Finally, the World Bank has its own classification system. It divides the world's economies (both developing and developed) into four categories according to their Gross National Income (GNI) per capita levels into: low-income, middle-income, upper-middle-income, and high-income economies. These classifications change due to factors such as income growth, exchange rates, and population change. To keep the dollar thresholds which separate the classifications fixed in real terms, the World Bank adjusts the classifications for inflation.[185]

Although there are key structural economic differences that set developing countries apart; size of an economy, historical background and the number of years since independence from colonial rule, political stability, access to natural resources, population structure, and other factors. In general, these countries share similar characteristics that can be classified into six broad categories:

1. Low levels of living, comprising low incomes, high inequality, poor health and inadequate education

2. Low levels of productivity

3. High rates of population growth and dependency burdens

4. High and rising levels of unemployment and underemployment

5. Significant dependence on agricultural production and primary product exports

6. Dominance, dependence, and vulnerability in international relations[186]

Despite all the complexity defining developing countries, there is no doubt as to the identity of LDCs, defined as a sub-set of the developing countries group as per article 2 (d) of the Enabling Clause: the WTO recognizes as LDCs those countries which have been designated as such by the UN.[187]

The following three criteria are used by the UN Committee for Development Policy (CDP) to determine LDC status:

- **Per capita income** (gross national income per capita)
- **Human assets** (indicators of nutrition, health, school enrolment and literacy)
- **Economic vulnerability** (indicators of natural and trade-related shocks, physical and economic exposure to shocks, and smallness and remoteness).[188]

**Today**, about two thirds of the WTO's around 164 members are developing countries. There are currently 47 least-developed countries on the UN list, 35 of which to date have become WTO members.[189]

### 2.2 The Legal Status of Preferential Treatment to Developing Countries:

Before looking at the fundamental legal provisions that constitute preferential treatment to developing countries within the WTO regime, its objectives, impact on trade and potential shorting comings, it is important to consider how the story behind its creation unfolds.

Since the early days of the GATT, developing countries realized that the agreement was not designed as a two-tier system as its legal provisions, with very few exceptions, were applicable irrespective of the participants' level of development.

[185] The World Bank, 'World bank national accounts data, and OECD National Accounts data file' <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=XM-XD-XT-XN> accessed April 2020.
[186] Julian West, 'Diverse Structures and Common Characteristics of Developing Nations' (2002) 10.
[187] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, and Michael Hahn, 'The World Trade Organization: Law, Practice, and Policy' (2015) 703.
[188] United Nations, 'UN recognition of the least developed countries'<https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-recognition-of-LDCs.aspx> accessed June 2020.
[189] WTO, 'Least -developed countries' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> accessed June 2020.

Developing countries aimed at changing this picture, first by introducing the possibility of preferential tariffs for their products, and eventually by encouraging the WTO, the successor of the GATT, to take its place in the global inter-institutional dialogue on development.[190]

Developing countries initially felt that they could not equally compete with developed countries for export markets. In their view, the MFN tariff rate amounted to an impediment for their export trade, in that it provided non-discriminatory access to export markets irrespective of the level of development of the exporting county. They requested the establishment of a new mechanism that would allow them to access their export markets at preferential (when compared to developed countries' exports) tariff rates. This is what the GATT Part IV, which was introduced in 1965, and the Enabling Clause enacted in 1979, were supposed to achieve.[191]

Tracing back the various initiatives tackling this problem in the early days of the GATT, we find that the first time a comprehensive discussion on trade and development took place was in 1958 with the circulation of the Harberler report. Gottfried Harberler, Professor of Economics at Harvard was requested by the GATT to examine the validity of claims by the less-developed trading partners that the existing rules on trade liberalization would not necessarily work to their advantage. He ended up concluding that similar claims were not entirely unjustified.[192]

In his report both the short and the long-term trends in commodity prices and the factors influencing them were examined. The report concluded, inter alia, that existing protectionist policies in the agricultural sector by developed industrialized nations, as well as tariff escalation practices by many developed nations were contributing to lack of growth in developing countries.[193]

It is worth recounting in this respect, that the United States had obtained a waiver in 1955, which allowed it to grossly subsidize its agricultural production over the subsequent years and essentially shield domestic producers from the challenge of international competition. The Harberler report made a series of recommendations to address the issue, and reduction of existing protectionism was one of the measures suggested. Importantly, it sensitized the trading partners to the fact that not all gained alike from the existing regime; something needed to be done to address the concerns of those who were being left behind, essentially the producers of labor-intensive goods.[194]

Harberler's report was not, alas, the only game in town. Hans Singer, a German Professor of Economics at Cambridge, and Raoul Prebisch, an Argentinian economist, were advocating industrialization through import substitution policies as the safest way to development. The argument for import substitution was justified as the adequate response to what was termed 'terms of trade pessimism', the idea that exports of developing countries were progressing at a slower pace than total exports. Note that during that time, liberal market economies were discredited in the eyes of many observers, especially in developing countries, and a strong argument in favour of government-driven economies was falling onto fertile ground. Prebisch and Singer had a head start over Harberler in some quarters.[195]

The view that development essentially equaled industrialization (supported by the influence of terms of trade elasticity pessimism) provided developing countries with the necessary impetus to adopt negotiating strategies aimed at achieving preferential access in developed countries' markets: in a nutshell, their request was framed in terms of non-reciprocal preferential access to developed countries' markets. Thanks to economies of scale resulting from non-reciprocal preferential access of their products (so the argument goes), developing countries would gradually become more competitive in the production of industrial goods, which should be their objective anyway.[196]

Harberler lost then and there. Developing countries started submitting their requests for a negotiation on preferential tariff rates for developing countries only and a Working Party on Commodities was established to review trends and

[190] Matsushita, and others 'The World Trade Organization' 695.
[191] Ibid 695-696.
[192] Ibid 696.
[193] Ibid 696-697.
[194] Ibid 697.
[195] Ibid.
[196] Ibid 697-698.

developments in international commodity trade. The Singer-Prebisch thesis was reflected therein, as the quoted passage from the report in 1961 evidences:

*In the long term, only the industrialization of the less-developed countries would enable these countries to overcome the present difficulties in their external trade; in turn, this industrialization and the economic development generally of the less-developed countries would only be achieved through an increase in their exports, including exports of manufactured and semi-manufactured goods. Direct investment and financial aid alone would not solve this problem.*[197]

This victory opened the door to the introduction of GATT Part IV, the effective bifurcation of GATT disciplines.[198]

### 2.2.1 GATT Part IV and the Enabling Clause

#### First a waiver

During the Kennedy Round the Committee on Legal and Institutional Framework of GATT in Relation to Less-Developed Countries (one of the negotiating groups), worked on a chapter on trade and development. The chapter was finalized in a Special Session of the Contracting Parties, held from 17 November 1964 to 8 February 1965. It was annexed to the GATT as an amending protocol. It now appears as Part IV. Part IV came into effect on 27 June 1966, and consists of tree new legal provisions: Principles and objectives (GATT Article XXXVI), Commitments (GATT Article XXXVII), and Joint actions (GATT Article XXXVIII). A look at the working of each provision leaves the reader in no doubt that these were meant to be 'best endeavors' clauses aiming at opening the door to discriminatory (preferential) treatment.[199]

Following this negotiation, the feeling among developing countries was that Part IV had fallen short of substantively contributing to the development policies pursued, and that an additional mechanism was needed, at the very least, to make the language included in the provisions operational. This mechanism was, initially, a ten-year waiver allowing for preferential rates applicable to imports originating in developing countries only.[200]

#### And then the Enabling Clause

Before the ten-year period ran out, the Enabling Clause took center stage. The Enabling Clause reproduces the non-reciprocity idea, first embedded in GATT Article XXXVI 8, and provides for the possibility of making commitments in this vein. The Panel recounts the advent of the Enabling Clause in the following terms:[201]

During the Second Session of UNCTAD, on 26 March 1968, a Resolution was adopted on expansions and Diversification of Exports and Manufactures and semi-manufactures of Developing Countries (Resolution 21 (II). In this Resolution, UNCTAD agreed to the "early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries" and established a Special Committee on Preferences as a subsidiary organ of the Trade and Development Board, with a mandate to settle the details of the GSP arrangements. In 1970, UNCTAD's Special Committee on Preferences adopted Agreed Conclusions which set up the agreed details of the GSP arrangement. UNCTAD's Trade and Development Board took note of the Agreed Conclusions on 13 January 1970. In accordance with the Agreed conclusions, certain developed GATT contracting parties sought a waiver for the GSP from the GATT Council. The GATT granted a 10-year waiver on 25 June 1971. Before the expiry of this waiver, the contracting parties adopted a decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (the Enabling Clause) on 28 November 1979.[202]

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[197] Ibid 698.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Ibid 699.
[202] Ibid.

The Enabling Clause is thus, the decision of the GATT contracting parties, which allowed (enabled) deviations from the MFN rate in favour of goods originating in developing countries to become a permanent feature of the GATT, and now the WTO legal order.[203]

Through the Enabling Clause, WTO members can now legitimately accord tariff preferences to developing countries: national GSP (Generalized System of Preferences) schemes are the vehicle to make this happen. Of course similar treatment is reserved to developing countries that are members of the WTO and not any developing country irrespective whether it has joined the WTO or not.[204]

### 2.2.2 Lack of Reciprocity Underlined

**GATT Article XXXVI** constitutes the formal recognition that market access for products of export interest to developing countries has to be improved. It stops short, however, of prescribing measures that should be adopted to this effect. It does on the other hand, provide the foundation for non-reciprocity, the underlying basis for the Enabling Clause, to come under the aegis of the GATT (8):

The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.[205]

The Interpretative Note to this provision sheds some additional light.

It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.[206]

During the Kennedy Round, this provision was further interpreted as follows:

There will, therefore, be no balancing of concessions granted on products of interest to developing countries by developed participants on the one hand and the contribution which developing participants would make to the objective of trade liberalization on the other and which it is agreed should be considered in the light of the development, financial and trade needs of developing countries themselves. It is, therefore, recognized that the developing countries themselves must decide what contributions they can make.[207]

**GATT Article XXXVII** is a general clause recommending various actions that developed countries should take in order to help promote issues of interest to developing countries: chief among them, the spur to reduce the gap between (high) barriers on processed goods, and (low) barriers on primary products: that is, of course, tariff escalation. The remaining part of this provision deals with issues that were further detailed in other agreements. For example, developed countries, when imposing countervailing duties (CVD) or antidumping (AD) duties, or introducing safeguard measures, were to 'have special regard to the trade interests' of developed countries and 'explore all possibilities of constructive remedies before applying such measures'. In the AD Agreement concluded during the Uruguay Round, WTO members agreed to transform this into a binding legal obligation. It has since been consistently interpreted as an obligation to examine the feasibility of introducing price undertakings on dumped imports originating in developing countries, before AD duties are eventually imposed.[208]

**GATT Article XXXVIII** was meant to provide the institutional vehicle that would make the best endeavours clauses reflected in the two aforementioned provisions operational: institutional arrangements for furthering the objectives of Part IV should be made, collaboration to this effect with the United Nations and its organs and agencies were

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[203] Ibid.
[204] Ibid 699-700.
[205] Ibid.
[206] Ibid.
[207] Ibid. *See Also* GATT, COM.TD/W/37, Committee on Trade and Development 'Report by the Chairman of the Sub-Committee on the Participation of Less-Developed Countries' (1967) 8 <https://www.wto.org/gatt_docs/English/SULPDF/90510161.pdf> accessed December 2020.
[208] Ibid 700-701.

envisaged, and some monitoring of the rate of growth of the trade of developing countries should be introduced. This is where the Enabling Clause comes into play.[209]

### 2.2.2 The Enabling Clause in Practice: The GSP Schemes

**The key elements:**

The most important features of the Enabling Clause may be summarized as follows:

1. It announces the general principle that deviation from the MFN is allowed for products originating in developing countries (§1);
2. Concessions (§2) can be expressed in tariff (§2(a)), as well as non-tariff terms (§2(b));
3. It provides the legal basis for developing countries to form preferential trade agreements between themselves while respecting less onerous requirements than those established by GATT Article XXIV (§2(c));
4. It distinguishes between developing countries and least developed countries (LDCs), the latter being a sub-group of the former, allowing for additional (to those granted to developing countries) preferences for LDCs (§2(d));
5. Measures coming under its purview must be designed to correspond to the 'development, financial and trade needs of developing countries' (§3(c));
6. WTO members that have recourse to measures coming under the purview of the Enabling Clause must notify the WTO membership, and consult with them, whenever appropriate (§4);
7. Donors should not expect reciprocity from beneficiaries (§5);
8. LDCs should not, in general, be expected to make commitments that might jeopardize their development, financial, and trade needs (§8); and
9. Graduation is established in terms of a reflected acknowledgement that the developing countries are expected to participate more fully in the multilateral trading system as long as their economic situation improves (§7).[210]

### 2.2.3 The Enabling Clause in the WTO Legal Order

The WTO Appellate Body in its report on Tariff Preferences, held that the Enabling Clause has become an integral part of the GATT, by virtue of GATT 1994 Article 1(b)(iv), and that since the Enabling Clause permits WTO members to grant tariff preferences to a sub-set of the WTO members (developing countries), it constitutes a legal exception to the GATT Article 1 GATT (§99). The legal implication, in the Appellate Body's view, is that the Enabling Clause takes precedence over GATT Article 1 (§102).[211]

### 2.2.4 Other Provisions on Special and Differential Treatment

There are numerous provisions in other WTO agreements that qualify as special and differential treatment-type of provisions. The WTO Secretariat has classified these provisions as follows:

1. Provisions aimed at increasing the trade opportunities of developing country members;
2. Provisions under which the WTO members should safeguard the interests of developing country members;
3. Flexibility of commitments, of action, and use of policy instruments;
4. Transitional time periods;
5. Technical assistance; and
6. Provisions relating to LDC members.[212]

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[209] Ibid.

[210] Ibid 701-702 *See also GATT,* 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries of November 28, 1979' (GATT Doc L/4903) <https://www.wto.org/gatt_docs/English/SULPDF/90970166.pdf> accessed January 2020.

[211] European Communities, 'Conditions for the Granting of Tariff Preferences to Developing Countries' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm> accessed November 2020.

[212] Matsushita, and others 'The World Trade Organization' 708 *See also* WTO Doc. WT/COMTD/W/77/Rev.1 of 21 September 2001 'Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions' <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006-1.aspx?Id=64560&IsNotification=False> accessed June 2020.

In essence, these provisions aim to improve the position of developing countries within the WTO either by introducing 'lighter' disciplines that are applicable to developing countries only, or by increasing the embedded expertise of developing countries on WTO-related issues.[213]

Various WTO members participate in numerous other initiatives outside the WTO aiming to improve the position of developing countries in the WTO. The Advisory Centre for the WTO Law (ACWL) is the best-known initiative of the sort, and it aims to provide legal expertise to developing countries considering that active participation in the WTO also depends on whether there is embedded expertise in national administrations on WTO-related issues.[214]

**2.2.5 Institutional Provisions**

In 1964, the GATT undertook its first substantive initiative to provide an institutional infrastructure to its provisions regarding special and differential treatment: the GATT contracting parties agreed on the establishment of the Committee on Trade and Development (CTD). Its mandate was to review the application of the provisions of Part IV, Article IV.7 of the Agreement Establishing the WTO.[215]

Eventually, the CTD evolved into the forum where discussion on trade and development in the widest possible connotation of the term takes place under the aegis of the WTO. It is a multi-task institution in which all WTO members participate. It is a depository for all GSP schemes, and also the forum where the notification of and the discussion about preferential arrangements under §2 (c) of the Enabling Clause takes place.[216] It supervises the implementations of provisions favouring developing countries (special and differential treatment), and it issues guidelines for technical cooperation.[217]

The CTD serves as a focal point for consideration and coordination of technical assistance work on development in the WTO and its relationship to development related activities in other multilateral agencies. It further adopts measures aimed at increasing participation of developing countries in the trading system, paying particular attention to the position of LDCs.[218]

At the same time (1964), the International Trade Centre (ITC) was established, with the aim of promoting trade in developing countries. The ITC became later a joint agency of the United Nations Conference on Trade and Development (UNCTAD) and the GATT (and eventually the WTO), In 1998, the WTO together with UNCTAD and the ITC established the Common Trust Fund, meant to finance technical capacity in developing countries.

The WTO now also cooperates with other international organizations in the programmes of common interest. The two most prominent initiative aimed at providing technical assistance to developing countries are the Integrated Framework (IF) and the Joint Integrated Technical Assistance Programme (JITAP).[219]

The IF is an inter-agency coordination mechanism for the delivery of technical assistance, promotion of economic growth and sustainable development, and more generally in helping to lift LDCs from the poverty trap, among six multilateral agencies – the WTO, ITC, IMF, UNCTAD, United Nations Development Programme (UNDP), World Bank, in partnership with bilateral donors and LDC beneficiaries. The WTO acts as coordinator of the IF and accommodates a Secretariat, with a view of taking maximum advantage of each agency's expertise.[220]

The WTO decided to redirect the IF towards the preparation of poverty reduction strategies and the minimization of the implementation gap (between IF prescriptions and follow-up at the national level).[221]

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[213] Ibid.
[214] Ibid 709.
[215] Ibid 709-710.
[216] WTO Docs. WT/L/671 and 672 of 14 Decemeber 2006 'Transparency for Preferential Trade Agreements' < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=106840,71494&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> Accessed June 2020.
[217] Matsushita, and others 'The World Trade Organization' 710.
[218] Ibid.
[219] Ibid 711-712.
[220] Ibid.
[221] Ibid 712.

THE JITAP, on the other hand, is a multi-country capacity building programme implemented jointly by the ITC, UNCTAD, and the WTO, the aim of which is the strengthening the national knowledge base on the multilateral trading system. Its objective is to ensure more effective participation in trade negotiations; better implementation of the WTO agreements; informed formation of trade-related policies; and improved supply capacity and market knowledge of exporting and export-ready enterprises. The original eight African countries that were covered under its first phase have all since graduated. By 2007, the donors felt that the IF and the new Aid for Trade initiative that was successfully negotiated during the Doha Round, would take care of the issues that JITAP was supposed to address.[222]

### 2.3 A Critical Look at the Conflicting Perspectives

Special and differential treatment constitutes a key feature of the WTO System. Its formal goal is to promote export-oriented growth in developing countries. Its theoretical foundations and supporting empirical evidence are however, weak at best. In particular, SDT is in direct conflict with the GATT's two key principles of reciprocity and non-discrimination, undermining the efficiency of the multilateral trading system. Be that as it may, if SDT provisions promote the interests of developing and, more importantly, least developed countries, sacrificing economic efficiency may be justifiable.[223]

Implicit in the liberal international perspective is the assumption that the conditions that gave rise to the demands for preferential treatment in favor of DCs have ceased to exist thus vitiating the need for a principle that undermines the GATT legal system. In the event that these conditions still prevail, liberal internationalists seem to suggest that preferential treatment is not the appropriate antidote. Equitable internationalists, on the other hand, implicitly assume that certain conditions justify the need for preferential treatment and, so long as these conditions persist, preferential treatment remains the only logical and defensible posture the world community can adopt. The following section will proceed to an evaluation of the arguments from those opposed to this viewpoint.[224]

#### 2.3.1 Flaws in the Liberal Internationalist Position

Critics have argued that the greatest need for institutional innovation in the structure of North-South economic relations is in the trade field.[225] This would require among other things revitalizing the role of the WTO which has failed to deal adequately with two major interrelated issues of the present decade: the need to find ways to incorporate the DCs more fully into a global trading system that they accept it as both being responsive to their needs and requiring certain obligations on their part, including the need to cope efficiently with the process of structural change and shifting patterns of international trade and production.[226]

As an organization, the WTO promotes the principles of reciprocity, non-discrimination, and trade liberalism, and views protectionism as the major evil to avoid. This model of international trade draws its theoretical strength from the doctrine of comparative advantage which holds that all nations will benefit if each specializes in producing that which it can produce at a lower opportunity cost (relative advantage) and if it buys from others the things they are in a better position to produce.[227]

All nations benefit when trade is unfettered by non-market forces or politically imposed barriers. If the DC's needs and demand for SDT can be understood under this equation, it falls short in recognizing the gap in market influence between nations and private economic agents which in turn undermines the WTO's capacity as an optimal method in organizing international trade.[228]

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222 Ibid 713.
223 Emanuel Ornelas, 'Special and Differential Treatment for Developing Countries (2016) abstract.
224 Ndiva Kofele-Kale, 'The Principle of Preferential Treatment in the Law of the GATT: Toward Achieving the Objective of an Equitable World Trading Sytem' (1988) 315.
225 Ibid 316.
226 Ibid See also Catherine Gwin and Miriam Camps 'Collective Management: The Reform of Global Economic Organizations' (1981) 140.
227 Ibid See also Adam Smith, 'The Wealth of Nations' (1937) 424.
228 Ibid.

As Grey put it: The conventional trade relations model fails to take properly into account the fact that there are gross differences in market power and in political power as between trading nations. Moreover, the model abstracts from the reality of private economic power; it ignores the differences in power and control of markets as between private entities engaging in international transactions. The model also abstracts from differences in modes of production and their influence on market behavior. Economists have addressed some of these factors as separate realities; nonetheless much of the discussion of trade policy at public and political levels seems to assume that the simplified teaching device embodied in the notion of comparative advantage says all that it is important to say about trade policy.[229]

### 2.3.2 Disregard of Industrialized Countries Non-compliance with GATT

Equally important, but rarely ever addressed by critics of preferential treatment, is the long and distinguished history of continuous disregard and flagrant violations of WTO rules and principles by the very countries that consider themselves the guardians of these principles.[230] As Gwin observed: GATT's effectiveness in handling trade issues has clearly declined since the end of the 1960's, as evidenced by a decline in strict adherence to the rules of GATT and widespread resort to non-tariff measures of various kinds. This trend has reflected, at bottom, a widespread feeling that the rules no longer adequately respond to the situations that were posing the most acute problems for governments — neither those governments that had written the rules nor the members of the WTO who had not shared in the rule making.[231]

### 2.3.3 Tendency to Overlook DCs' Implicit Bargaining Leverage

The criticism that the DCs' insistence on non-reciprocal concessions has cost them whatever bargaining power they might have had in the GATT MTNs is premised on the belief that since DCs have no explicit reciprocity to offer ICs, they therefore have no bargaining leverage. This argument is flawed in two respects. First, it overlooks the implicit reciprocity that DCs continue to offer through their export earnings. Additional export earnings received by DCs as a result of preferential tariffs can be fully reciprocated by increased imports from ICs. A second, and perhaps more fundamental flaw with the loss of bargaining leverage argument is that it underpins the concept of reciprocity and treats it as a *conditio sine qua* of trade relations between DCs and ICs. But the emphasis on strict one-to-one reciprocity can be counterproductive to the goal of a liberal trading order.[232] The raw pursuit of reciprocal exchanges, as Winham discovered in his analysis of the Tokyo Round MTNs, can introduce distortions and lack of coherence into trade policy. Furthermore, he observed, because reciprocity works better between parties that are equal than between those that are unequal, it is not an appropriate vehicle for integrating DCs into the GATT system and for promoting a stable and equitable world trading order.[233]

### 2.3.4 Preferences are inherently unstable and discriminatory

Once a country has specialized and successfully expanded the production of certain goods, preferences may be withdrawn at the discretion of the preference-provider by graduating the country or excluding specific products. Although criteria for graduation are set in advance, there is usually scope for *ad hoc* decisions if either domestic import-competing industries lobby for a ceiling on imports or if it is felt that benefits are mostly appropriated by a limited number of countries. Preference schemes may also provide for nuanced treatment of beneficiaries. If it is understood that poorer countries should benefit most, more lenient rules of origin may be applied to them. If, in addition, those countries have lower labour costs than more advanced beneficiaries, where production has expanded owing to the preference scheme and labour costs have increased, investment may shift. As countries advance or are dropped altogether from the scheme, they may be left with overcapacity and a production structure not based on comparative advantage.[234]

The same may happen when preferences are eroded through tariff reductions on an MFN basis in the context of multilateral negotiations or in regional trade agreements. In recent years, bilateral and regional free trade agreements

[229] Rodney C. Grey, 'Issues in World Trade Policy: GATT at the Crossroads' (1986) 17-20.
[230] Kofele-Kale, 'Preferential Treatment in the Law of the GATT' (1988) 318.
[231] Gwin, 'Global Economic Organizations' 140.
[232] Ibid 318-319 see also Tracy Murray, 'Trade Preferences for Developing Countries' (1977) 9.
[233] Ibid 319; *see also* Gilbert Winham, 'International Trade and the Tokyo Round of Negotiations' (1986) 364.
[234] Patrick Low and Alexander Keck, 'Special and Differential Treatment in the WTO: Why, When and How?' (2004) 12.

among developed and developing countries have flourished. A particular reason why some developing countries may be seeking trade agreements with their larger developed country partners is that they are losing the preferential access to those markets they previously enjoyed, for instance when being excluded from GSP schemes. Another reason may be that the developed country in question is negotiating preferential agreements with other developing countries or that competitors continue to qualify for inclusion under GSP. Governments may simply fear exclusion from markets, and regard participation in RTAs as an insurance policy against being placed at a competitive disadvantage through discriminatory policies.[235]

The more countries move away from unified schemes, the higher the likelihood of overlapping eligibilities. This increases the degree of complexity in determining benefits and increases opacity in trade relationships.[236]

All this led Hudec to believe that an MFN-based regime is the only genuine protection available to developing countries. This is not just an argument he makes for more advanced developing countries who are most susceptible to protection-driven discrimination, but for smaller countries as well that are likely to face more uncertainty and unpredictable elements of discrimination under multiple preferential arrangements.[237]

**2.4 The Impact of Special and Differential Treatment on International Trade**

Empirically, evaluating the impact of SDT in its entirety is challenging, as on the one hand SDT is present in many forms and its influence is spread out over time, and on the hand, disentangling its effects from other policies is typically unfeasible. Another option is to compare the behavior of similar countries that joined the GATT/WTO system before and after the UR, exploring the changes in accession requirements after the UR.[238] Interestingly, the few attempts to explore those differences point toward a clear benefit for developing countries in moving *away* from SDT disciplines.[239]

The effect of "removing" SDT is clear in the analysis of Tang and Wei (2009) where they show that developing countries acceding to the WTO under the stricter accession rules experienced higher growth and investment rates in the 5 years following accession. To explain this result Tang and Wei observe that, to have their membership applications approved after the UR, countries had not only to liberalize trade, but also to implement other market-oriented reforms. Furthermore, and critically to generate such effects, WTO accession is believed by economic actors to confer a permanent character to those reforms. In other words, the WTO accession after the UR has a commitment value strong enough to have a positive growth impact. These effects were found to be particularly large in countries with weak governance, where external policy commitments have a bigger role to play.[240]

One dimension that standard trade agreements literature does not address is the possibility of dynamic benefits stemming from access to foreign markets. It is conceivable that, even without domestic liberalization, better foreign market access may improve productivity and boost growth in developing countries. Although lacking empirical validation, some studies[241] indicate several mechanisms linking economic growth to globalization.[242]

However, the sectors where developing countries would benefit the most from better foreign market access tend to be the least open worldwide. Furthermore, several features of the system of preferences offered by rich economies under GSP tend to neutralize their efficacy. One is the rules for 'graduation,' whereby countries (as a whole or by product) lose preferential access if they export above a certain threshold. A related problem as discussed, is the insecurity of the preferences. The rules can be changed anytime – and in fact they often change – at the discretion of the preference-granting country, making long-run investment planning that relies on preferential foreign market access all but unviable. Finally, intricate rules of origin also get in the way of the efficacy of preferences, creating sourcing distortions and bureaucratic hurdles that can render the preferences useless.[243]

[235] Ibid.
[236] Ibid 13.
[237] Ibid; *see also* Robert E. Hudec, 'Developing Countries in the GATT Legal System' (1987) 216-217.
[238] Emanuel Ornelas, 'Special and Differential Treatment for Developing Countries' (2016) 403.
[239] Man-Keung Tang and Shang-Jin Wei, 'The value of making commitments externally: Evidence from WTO accessions' (2009), 216-229.
[240] Ornelas, 'Special and Differential Treatment' 405.
[241] Gene M. Grossman and Elhanan Helpman, 'Globalization and Growth' (2015) 100-104.
[242] Ibid 395.
[243] Emanuel Ornelas, 'Special and differential treatment for developing countries reconsidered' (2016)

World trade in products of export interest to developing countries remains heavily distorted. Market access barriers and trade-distorting subsidies imposed by industrial countries tend to be skewed toward labor-intensive manufactures and agricultural products. The trade policies of the developing countries themselves target many of the same products, adding substantially to the burden they face in increasing and diversifying their exports. All of this merits the need for greater coherence between trade and development policies, including better market access for exports of developing countries.[244]

### 2.4.1 GSP and Recipients Trade Policies

The line of research began with the the influential, if controversial, contribution of Rose (2004)[245] who estimates a gravity model of bilateral trade to study how membership in the GATT/WTO affects members' trade flows. Observing that membership in the GATT for developing countries came with few strings attached. This changed during the UR, after which accession started to require significant liberalization from entrants. That change can provide indirect evidence on what may be termed the "SDT Trade Effect", which can be inferred by contrasting the WTO trade effect for developing countries before and after the change in accession requirements.[246]

Developing countries have historically not participated in rounds of multilateral liberalization, their formal membership notwithstanding. As a result, sectors like textile and agricultural, where several developing countries possess comparative advantage, have not been liberalized in developed countries as much as other sectors.[247]

Once Subramanian and Wei (2007)[248] account for that asymmetry, they investigate further only to find that membership in the GATT/WTO has a positive and significant effect in promoting trade. Yet as their title stresses these effects are uneven and restricted to industrialized countries that have been consistently participating in multilateral trade negotiations, and particularly to the sectors over which they negotiate reciprocal concessions.[249]

Subramanian and Wei also differentiate between the effects of WTO membership on the import levels of developing countries, which are much more significant and pronounced in countries that joined after the conclusion of UR, than those that joined before or during its course.[250] This reflects one of the central objectives of the UR, namely to reduce the gap of obligations and levels of liberalization between developing and developed countries.[251]

It is important to stress that in their result, Subramanian and Wei indicate that (lack of) SDT seems critical for the WTO effectiveness in promoting trade or in other words, that there are compelling signs of a negative SDT trade effect.[252]

Finally, using a different approach Liu and Ornelas (2014)[253] seek to understand how the formation of FTAs affects the survival of democracy through the destruction of protectionist trends. Their results indicate that unlike the full-fledged FTAs, partial, incomplete processes of preferential trade liberalization have no meaningful effect on the removal of such protectionist trends. More generally, their results provide additional support to the view that commitments in trade agreements are valuable, but that SDT-based trade agreements do not fulfill that role effectively.[254]

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<https://voxeu.org/article/special-and-differential-treatment-developing-countries-reconsidered> accessed December 2020.

[244] International Monetary Fund and the World Bank, 'Market Access for Developing Country Exports – Selected Issues' (2002) 8, < https://www.imf.org/external/np/pdr/ma/2002/eng/092602.pdf> accessed October 2020.

[245] Ornelas, 'Special and Differential Treatment' 403. See also Andrew K. Rose, 'Do we really know that the WTO increases Trade?' (2004).

[246] Ibid.

[247] Ibid 404.

[248] Arvind Subramanian and Shang-Jin Wei, 'The WTO promotes trade, strongly but unevenly' (2007) 151-175.

[249] Ornelas, 'Special and Differential Treatment' 404.

[250] Ibid.

[251] Ibid 404-405.

[252] Ibid 405.

[253] Xuepeng Liu and Emanuel Ornelas, 'Free Trade Agreements and the Consolidation of Democracy' (2014) 29-70.

[254] Ornelas, 'Special and Differential Treatment' 405-406.

### 2.4.2 The Impact of Greater Export Opportunities

As pointed out, the formal goal of SDT is to promote export-led growth. If developing countries acquire better access to large markets, scale economies could spur productivity and lead to economic growth.[255] Although theoretically plausible, identifying such a mechanism empirically is particularly challenging as policies that increase export opportunities are usually implemented together with a number of other economic changes which makes isolating the effects that derive directly from a greater foreign market access exceptionally difficult. In particular, most of the circumstances when foreign markets become more accessible to domestic producers are observed in the context of trade agreements, when the country also opens up to foreign producers, in contrast with the SDT/GSP context. As a result, reliable estimations of the effects of increased export opportunities on growth remain relatively rare.[256]

Now even if better access to the market of developed countries does not have clear effects on the growth of developing countries, it can have similarly worthy benefits. Again, proper identification of such effects is the main difficulty. However, the implementation of the 2001 U.S.-Vietnam Bilateral Trade Agreement (BTA) provides an excellent environment to study the consequences of the effects in question.[257] From a legal perspective the BTA is the most comprehensive trade agreement ever entered into by Vietnam. Investment is a key part of the BTA. The scope of investment covered by the BTA is not limited to direct investment but also includes indirect investment, including equity, bonds and other tangible and intangible assets. As an Agreement modeled on a WTO framework, the BTA includes all WTO commitments related to investment, including:

- Eliminating trade-related investment measures (WTO-TRIMs);
- Opening up goods and particularly service sectors for foreign investment under a schedule;
- Non-discrimination and elimination of dual price systems; and
- Transparency in the promulgation and implementation of investment policies.[258]

However, the BTA contains other provisions that go beyond the WTO Agreements that are related to investment which include commitments such as:

- Eliminating export performance requirements (which are not covered by TRIMs);
- Allowing licensing by registration for those foreign-invested projects not specified as sensitive sectors;
- Removal of restrictions on equity participation and on the consensus principle for corporate governance in joint ventures; and
- Provision of improved investment protection procedures and dispute settlemen mechanisms between investors and the State, including access to international arbitration under the World Bank's International Center for Settlement of Investment Disputes (ICSID).[259]

When analyzing the impact of the BTA on FDI, it is important to take into account the relative competitive advantages of firms in Vietnam, the United States and third countries. The competitive advantage of U.S. companies typically focus on more capital/skill/technology-intensive sectors, such as financial, legal, telecommunications and distribution services, information technology and chemical manufacturers, and oil and gas and other capital-intensive, natural-resource-based production. U.S. firms are typically strong in sectors where intellectual property is important. Vietnam's comparative advantage for exports, on the other hand, leans toward labor-intensive sectors such as clothing, furniture and footwear, and natural-resource intensive sectors such as tropical agricultural production, oil and gas, and mining. While U.S. buyers have an aggressive presence in Vietnam, it is relatively rare for U.S. firms to invest in labor-intensive export production.[260]

Firms also will invest in Vietnam because of opportunities to export to countries other than the United States. To the degree that the BTA improves the business environment in Vietnam, such FDI should increase as well. Probably most importantly, however, opportunities in the domestic economy are increasingly attractive for foreign investors.

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255 Ibid 415.

256 Ibid 415. See also Johannes Van Biesebroeck, 'Exporting Raises Productivity in sub-Saharan African Manufacturing' (2005) 373-391, *provides productivity improvements following export market entry in domestic firms from eight Sub-Saharan African countries.*

257 Ibid 416.

258 Steve Parker, Vinh Quang Phan, and Ngoc Anh Nguyen, 'Has the U.S.-Vietnam Bilateral Trade Agreement Led to Higher FDI into Vietnam?', Development and Policies Research Center (2005) 201.

259 Ibid.

260 Ibid 202.

In this regard, the BTA represents one part of a much broader effort by the Vietnamese government to develop its economy and to improve its business environment. Vietnam's economy has grown by an annual average of around 7 percent over the last decade, is beginning to industrialize quickly, and that combined with strong economic fundamentals, and a widely perceived political stability, create demand for FDI into Vietnam for building all types of infrastructure to support the industrialization process.[261]

The BTA, by conferring the right to export to the U.S. on an MFN basis, has opened up enormous opportunities for expanding exports, especially those exports that were most severely restrained by the high level of non-MFN tariffs that applied prior to the BTA, mainly labor-intensive manufactured products. Moreover, these tariff changes were instantaneous and not phased in over many years as usual.[262]

To put this into perspective, in 2002, Vietnamese exports to the U.S. increased by 128 percent compared to 2001, while over the same time exports to the world as a whole increased by only 10 percent. Not surprisingly, exports of manufactures, which had been most severely restrained by high U.S. tariffs before the BTA, grew disproportionately at an impressive rate of over 500 percent on an annual basis. Within manufacturing, the biggest winner was clothing exports, which increased to around $900 million in 2002, an 18-fold increase over the amount exported in 2001. While clothing became Vietnam's single largest export to the United States, dramatic increases in exports of many other manufactured products were also recorded in 2002, such as electrical appliances (270%), furniture (499%), travel goods (5422%) and miscellaneous manufactures (847%).[263]

Another important point is that all the uncertainties discussed above involving GSP are absent in the BTA. For this reason, while also taking the bilateral nature of the agreement into account — despite the fact that it features several qualitative similarities with liberalization through GSP — its qualitative impact on Vietnamese exports is considerably larger than one would expect to achieve through GSP.[264]

### 2.4.3 Effects of GSP on Recipients' Trade Policies

There is a scarceness of analyses investigating empirically how nonreciprocal preferences affects the trade policy of beneficiary countries.[265] A notable exception is the work of Özden Reinhardt (2005) that includes all 154 countries that benefited from GSP in the United States from 1976 until 2000.[266] The results, corrected for endogeneity and robust to numerous alternative measures of trade policy, indicate that GSP fosters more protectionist policies, and suggest that developing countries may be best served by full integration into the reciprocity-based trade regime rather than continued GSP-style special preferences.[267]

More recently, Crivelli (2015) evaluates how preferential access received under an FTA affects a member's external tariff. Although the data is for reciprocal FTA liberalization, her different perspective can shed some light on the consequences of preferences in non-reciprocal arrangements like GSP. In line with her model, Crivelli finds that high-tariff countries in a bilateral relationship tend to significantly lower their external tariffs after being granted preferences, contrary to the behavior of low-tariff countries that tend to raise their external tariffs after being granted preferences, provided that tariff income is an important source of their governments' fiscal revenues. This raises a concern: the countries that are more likely to increase tariffs because of arrangements like GSP may be precisely the less developed ones, which tend to rely heavily on border taxes as a primary source of fiscal revenue.[268]

### 2.4.4 Effects of GSP on Donors' Trade Policies

Offering preferential access in one's market has theoretically ambiguous effects on the trade barriers that the country imposes on imports coming from non-preferential sources. Many researchers suggest that, as FDI flows increase

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[261] Ibid.
[262] Ornelas, 'Special and Differential Treatment' 416.
[263] STAR- Vietnam, 'An Assessment of the Economic Impact of the United States - Vietnam Bilateral Trade Agreement' 136 <https://pdf.usaid.gov/pdf_docs/Pnadc703.pdf> accessed January 2020.
[264] Ornelas, 'Special and Differential Treatment' 416.
[265] Ibid 418.
[266] Caglar Oezden and Eric Reinhardt, 'The perversity of preferences: GSP and developing country trade policies 1976—2000' (2005) 1-21.
[267] Ibid abstract.
[268] Ornelas, 'Special and Differential Treatment' 419.

overtime, a widening of the product and country GSP scopes are to be expected. Furthermore, such expansion of GSP can be thought of as a substitute for MFN liberalization.[269]

A similar rationale applies to the impact of GVCs (Global Value Chains) on the pervasiveness and on the levels of preferences. Since the tariffs of the largest economies are defined in multilateral negotiations, to test those predictions Blanchard et al. (2016) focus on bilateral tariffs in preferential arrangements. FTAs provide such variation, albeit with a strong emphasis on reciprocity. Moreover, Article XXIV imposes limits on discretion thereby making the implications of GVCs for FTA preferences rather unclear. The other main source of variation, where discretion is more permissible are GSP preferences. Using the data on the value-added contents of 14 major economies from 1995 to 2009, Blanchard et al. (2016) confirm that an increase in the domestic value added of foreign final goods lead to lower GSP preferences. Their results point to interesting trade policy dynamics, where the expansion of GVCs breeds trade liberalization, and yields in particular more generous tariff preferences in nonreciprocal arrangements.[270]

# Chapter Three

## The Development Facilitation Effort in the System of the WTO: The Doha Round

### 3.1 Summary of the Negotiations and Outcome

The Doha Round is the latest round of trade negotiations amongst WTO members that sets out to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The work programme covers about 20 areas of trade. The Round is also known semi-officially as the Doha Development Agenda (DDA) as per its fundamental objective is to improve the trading prospects of developing countries.[271]

The Round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001, following an early meeting of WTO members in Seattle in 1999. The Doha Ministerial Declaration provided the mandate for the negotiations, which included in addition to agriculture and services, an intellectual property topic.[272]

In Doha, ministers also approved a decision on how to address the problems developing countries face in implementing the current WTO agreements.[273]

Before looking at the negotiations, their objectives, how they proceeded and their outcome, it is important to examine the situation post-UR and the cloud of uncertainty that hovered over the international trade regime and perhaps doomed the negotiations to an inevitable outcome.

### The Seattle Ministerial (MC3)

As the transition to a global marketplace proceeded, it was clear that trade liberalization was taking place in the absence of institutions at the global level, which would serve the same purposes that the state undertakes at the national level. In addition, the political environment was not conducive for a new round of multilateral trade negotiation. This was known before the Seattle meeting, but it was hoped that it would have been possible to galvanize member states to abandon some of their fixed positions in favor of an emerging consensus.[274]

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[269] Ibid 421.
[270] Ibid; see also Emily Blanchard, Chad Brown, and Robert Johnson, 'Global Supply Chains and Trade Policy' (2016) NBER (National Bureau of Economic Research) Working Paper No.21883.
[271] WTO, 'The Doha Round' <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed November 2020.
[272] Ibid.
[273] Ibid; see also WTO, 'The Implementation Decision' <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#implementation> accessed November 2020.
[274] Richard L. Bernal, 'Sleepless in Seattle: The WTO Ministerial of November 1999' (1999) 66.

The issues included in the agenda for the proposed new round and which were discussed in the Seattle, were more difficult than in previous rounds mostly due to the fact that such issues required further liberalization in many areas, where the easier phases of liberalization have already been completed, or were complex and new to, and not fully understood by many countries. Another contributing factor to the failure in Seattle resulted from the fact that the preparatory process which in turn was severely hampered by contentions between the EU and US over agricultural trade and subsidies, referred too many unresolved issues to the Seattle Ministerial.[275]

Moreover, the absence of representation by many least-developed countries and inadequate presence, and participation of developing countries, now constituting a vast majority of the WTO membership weakened the preparatory process even further.[276]

Arriving at the meeting itself, the WTO was committed to commence negotiations in 2000 on the "built-in agenda" which consists of agriculture and services. The discussions on services achieved some progress before and during the Seattle Ministerial. However, in agriculture the issues remained very contentious, and the positions taken were in many instances diametrically opposed. The parties were far apart and there was little or no willingness to compromise.[277]

Although the meeting ended in a stalemate without an official ministerial declaration being agreed upon. The large and well-organized demonstrations were able to bring a much-needed global media attention to a wide range of strongly held views emphasizing the contribution that NGOs can make to the WTO's decision-making by providing a mechanism for soliciting and incorporating the view of civil society thereby enhancing the legitimacy of the WTO as a rule-making organization by making its decisions more representative, while at the same time improving its responsiveness to criticisms about the roles of the multilateral trading system.[278]

**The Cancun Ministerial (MC5)**

An important milepost in the Doha Development Agenda round was the 5th Ministerial Conference, which was held in Cancun, Mexico, on September 10-14, 2003. The Cancún Ministerial ended without agreement on a framework to guide future negotiations, and this failure to advance the round resulted in a serious loss of momentum and brought into question whether the January 1, 2005, deadline would be met.[279]

The Cancun Ministerial collapsed for several reasons. First, differences over the Singapore issues (government procurement, trade facilitation, investment, and competition) seemed irresolvable. The EU had retreated on some of its demands, but several developing countries refused any consideration of these issues at all. Second, it was questioned whether some countries had come to Cancun with a serious intention to negotiate. In the view of some observers, a few countries showed no flexibility in their positions and only repeated their demands rather than talk about trade-offs. Third, the wide difference between developing and developed countries across virtually all topics was a major obstacle. The U.S.-EU agricultural proposal and that of the G-20 for example, show strikingly different approaches to special and differential treatment. Fourth, there was some criticism of procedure. Some claimed the agenda was too complicated. Also, the Cancun Ministerial chairman, Mexico's Foreign Minister Luis Ernesto Derbez, was faulted for ending the meeting when he did, instead of trying to move the talks into areas where some progress could have been made.[280]

At the end of their meeting in Cancun, trade ministers issued a declaration instructing their officials to continue working on outstanding issues. They asked the General Council chair, working with the Director-General, to convene a meeting of the General Council at senior official level no later than December 15, 2003, "to take the action necessary at that stage to enable us to move towards a successful and timely conclusion of the negotiations."[281]

[275] Ibid 67.
[276] Ibid 68.
[277] Ibid.
[278] Ibid 79.
[279] Ian F. Fergusson, 'World Trade Organization Negotiations: The Doha Development Agenda' (2011) 3.
[280] Ibid.
[281] Ibid.

The Cancun Ministerial did result in the creation of the so-called Derbez text. Ministerial chairman Derbez invited trade ministers to act as facilitators in Cancun and help with negotiations in five groups: agriculture, non-agricultural market access, development issues, Singapore issues, and other issues. The WTO Director-General served as a facilitator for a sixth group on cotton. The facilitators consulted with trade ministers and produced draft texts from their group consultations. The Ministerial chairman compiled the texts into a draft Ministerial Declaration and circulated the revised draft among participants for comment.[282]

The Derbez text was widely criticized at Cancun and it was not adopted, but in the months following that meeting, members looked increasingly at this text as a possible negotiating framework. On agriculture, the Derbez text drew largely on both the U.S.-EU and Group of 20 proposals, and tariff reductions for improving market access were larger in the Derbez text than in the Uruguay Round Agreement on Agriculture (URAA). The text also included a larger cut from domestic support programs than the U.S.-EU proposal made, contained the blended tariff approach of the U.S.-EU proposal but offered better terms for developing countries, and provided for the elimination of export subsidies for products of particular interest to developing countries. On the Singapore issues, it included a decision to start new negotiations on government procurement and trade facilitation, but not investment nor competition.[283]

**The WTO Framework Agreement**

The aftermath of Cancun was one of standstill and stocktaking. Negotiations were suspended for the remainder of 2003. However, in early 2004, then the U.S. Trade Representative, Robert Zoellick, offered proposals on how to move the round forward. He called for a focus on market access, including an elimination of agricultural export subsidies. He also said that the Singapore issues could progress by negotiating on trade facilitation, considering further action on government procurement, and possibly dropping investment and competition. This intervention was credited at the time with reviving interest in the negotiations, and negotiations resumed in March 2004.[284]

On July 31, 2004, WTO members approved a non-binding Framework Agreement that includes major developments in the most contentious and crucial issue — agriculture. Because of the importance of agriculture to the Round, the Framework, which provides guidelines but not specific concessions, was regarded as a major achievement. With a broad agreement on agriculture and on other issues, negotiators were given a clearer direction for future discussions However, the talks settled back into a driftless stalemate, where few but the most technical issues were resolved.[285]

**The Hong Kong Ministerial (MC6)**

The stalemate in 2005 increased the perceived importance of the 6th Ministerial in Hong Kong as potentially the last opportunity to settle key negotiating issues that could produce an agreement by 2007, the then-*de facto* deadline resulting from the looming expiration of U.S. trade promotion authority. Although a flurry of negotiations took place in the fall of 2005, WTO Director-General Pascal Lamy announced in November 2005 that a comprehensive agreement on modalities would not be forthcoming in Hong Kong, and that the talks would "take stock" of the negotiations and would try to reach agreements in negotiating sectors where convergence was reported. The final Ministerial Declaration of December 18, 2005,[286] reflected areas of agreement in agriculture, industrial tariffs, and duty-free and tariff-free access for least developed countries. Generally, these convergences reflected a step beyond the July Framework Agreement but fell short of full negotiating modalities.[287]

New deadlines were established at Hong Kong for concluding negotiations by the end of 2006. These deadlines included an April 30, 2006, date to establish modalities for the agriculture and NAMA negotiations. Further deadlines set for July 31, 2006, included the submission of tariff schedules for agriculture and NAMA, the submission of revised services offers, the submission of a consolidated texts on rules and trade facilitation, and for

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[282] Ibid 4.
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] WTO, The final Ministerial Declaration (WT/MIN(05)/DEC) of December 18, 2005 <https://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.pdf> accessed January 2020.
[287] Fergusson, 'The Doha Development Agenda' 4-5.

recommendations to implement the “aid for trade” language in the Hong Kong declaration. On April 21, 2006, WTO Director-General Pascal Lamy announced there was no consensus for agreement on modalities by the April 30 deadline.[288]

Trade negotiators likewise failed to reach agreement at a high-level meeting in Geneva on June 30-July 1, 2006. It was agreed at those meetings, however, that Director-General Pascal Lamy would undertake a more proactive role as a catalyst “to conduct intensive and wide-ranging consultations” to achieve agricultural and industrial modalities. Prior to the summit, Lamy for the first time in his tenure suggested the outline of a possible compromise. Known as the “20-20-20 proposal,” the offer (1) called on the United States to accept a ceiling on domestic farm subsidies under $20 billion, (2) proposed the negotiations use the Group of 20 proposal of 54% as the minimum average cut to developed country agricultural tariffs, and (3) set a tariff ceiling of 20% for developing country industrial tariffs. This suggestion was roundly criticized by all sides and was not adopted at the Geneva meetings. At the G-8 summit of leading industrialized nations in St. Petersburg, the leaders pledged a “concerted effort” to reach an agreement on negotiating modalities for agriculture and industrial market access within a month of the July 16 summit.[289]

**Suspension**

Despite the hortatory language of the G-8 Ministerial Declaration, the talks were indefinitely suspended less than a week later by Director-General Lamy on July 24, 2006. The impasse was reached after a negotiating session of the G-6 group of countries (United States, EU, Japan, Australia, Brazil, and India) on July 23 failed to break a deadlock on agricultural tariffs and subsidies. The EU blamed the United States for not improving on its offer of domestic support, while the United States responded that no new offers on market access were put forward by the EU or the Group of 20 to make an improved offer possible.[290]

Following the July 2006 suspension, several WTO country groups such as the Group of 20 and the CRAINS Group of agricultural exporters met to lay the groundwork to restart the negotiations. While these meeting did not yield any breakthrough, Director General Lamy announced that the talks are back in “full negotiating mode” on January 31, 2007.[291]

Key players in the talks, such as the G-4 (United States, European Union, Brazil, India), conducted bilateral or group meetings to break the impasse in the first months of the year. Yet, a G-4 Summit in Potsdam Germany collapsed in acrimony on June 21, 2007, over competing demands for higher cuts in developed country agricultural subsidies made by developing countries and developed country demands for greater cuts in industrial tariffs in developing countries.[292]

Negotiators met again in Geneva between July 21-29, 2008, in what was described as a ‘make-or-break’ summit to reach agreement based on the texts prepared during the spring. Once again, however, trade ministers failed to reach agreement with the talks foundering on a “special safeguard mechanism” (SSM) for agriculture products. In the aftermath of the talks, there was a palpable sense of disappointment as many sticking points reportedly had been resolved. Director-General Lamy claimed after the talks broke up that convergence had been reached on 18 of 20 issues. Summing up this effort, Brazilian President Lula da Silva reportedly said, “We swam an entire ocean only to drown as we were reaching the beach.” However, other obstacles in the agriculture, NAMA (Non-Agricultural Market Access), and intellectual property rights talks may have been raised had the negotiations continued.[293]

In response to the global financial crisis, a summit of G-20 heads of state of leading economic powers meeting on November 14-15, 2008, in Washington, DC, agreed to work to reach an agreement by year’s end on modalities leading to an “ambitious outcome” to the Doha Round and to refrain from raising new barriers to trade and investment. New draft negotiating texts were issued in December 2008 in anticipation of a proposed ministerial to finalize modalities, yet that summit never materialized as differences between the parties remained intractable. Some states called for negotiations based on the December 2008 draft texts.[294]

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[288] Ibid 5.
[289] Ibid.
[290] Ibid.
[291] Ibid 6.
[292] Ibid.
[293] Ibid.
[294] Ibid.

Despite continued exhortations by G-20 leaders to reach agreement on the Round, no breakthrough was achieved in 2009. The Seventh Ministerial Conference **(MC7)** of the WTO was held in Geneva between November 30 and December 2, 2009. Although The Marrakesh Agreement establishing the WTO called for a Ministerial Conference to be held every two years,[295] it had been nearly four years since the last Ministerial at Hong Kong in December 2005.[296]

While previous MCs had negotiations on the Round as their centerpiece, this Ministerial sought to avoid detailed negotiations and was designed to address other concerns facing the WTO system. Yet, ministers "reaffirmed the need to conclude the Round in 2010 and for a stocktaking exercise to take place in the first quarter of 2010."[297] Yet negotiators achieved no breakthrough in 2010, with only technical issues being addressed by the negotiating groups throughout much of the year.[298]

By 2010, there was indeed a sense that time is running out. EU Trade Commissioner Karel De Gucht—while welcoming what he described as renewed U.S. engagement on trade—warned that "if we don't have anything by the summer Doha could be over."[299]

In fact, Geneva negotiators had already begun thinking of a "plan B," focusing on a set of deliverables that could be agreed to by **MC8**, scheduled for December 2011. An LDC "early harvest" proposal for least developed countries (LDCs) which would have included such items as a deal on trade facilitation, duty-free-quota-free market access for LDCs, rules-of-origin proposals, movement on the cotton issue and a waiver to favor services for LDCs. However, this plan reached stalemate and was abandoned at a July 2011 General Council meeting, over the desire by some, including the United States, to capitalize on some LDC provisions including fisheries subsidies and a tariff-free goods and services provision.[300]

Following the July meeting trade ministers at MC8 in Geneva 17 December 2011, adopted a waiver to enable developing and developed-country Members to provide preferential treatment to services and service suppliers of least-developed country (LDC) Members.[301]

Parties to the GPA (the Plurilateral Government Procurement Agreement) also adopted the text of the revised agreements which sets to achieve better market access through the addition of new government entities including local governments and sub-central entities, services, and other areas of public procurement activities to the scope of the agreement.[302]

**Bali 2013 (MC9) and The Trade Facilitation Agreement (TFA)**

The WTO MC9 at Bali in December 2013 marked a turning point in the history of the negotiations of the Doha Development Agenda (DDA) that has the dubious distinction of having been plagued by deadlock after deadlock for over a decade since its launch 2001.[303]

Deadlocks spread over a decade-long period usually have several causes, which operate at different phases of the negotiation. Proximate causes in the case of the DDA show the greatest variation across actors and over time: for example, the final showdown at Cancun in 2003 occurred differing interpretations of the Doha mandate on the inclusion or exclusion of the Singapore issues (trade and investment, trade facilitation, government procurement, and competition policy) whereas the July 2008 meeting in Geneva broke down over agriculture. Impending national

[295] WTO, Marakesh Agreement Establishing the WTO article IV (1) <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm> accessed January 2020.
[296] Fergusson, 'The Doha Development Agenda' 7.
[297] WTO, Seventh Ministerial Conference, Chairman's Summary of Andres Velasco, December 2, 2009, <http://www.wto.org/english/news_e/news09_e/mn09a_02dec09_e.htm> accessed February, 2020.
[298] Fergusson, 'The Doha Development Agenda' 7.
[299] Financial Time, 'EU Official Welcomes U.S. Stance on Trade Policy' December 17, 2010.
[300] Fergusson, 'The Doha Development Agenda' 8.
[301] Ibid 8; see also WTO, WT/L/847 of 17 December 2011, 'Preferential Treatment to Services and Service Suppliers of Least-Developed Countries' <https://www.wto.org/english/thewto_e/minist_e/min11_e/official_doc_e.htm> accessed March 2020.
[302] WTO, 2011 News Items, 'Historic deal reached on government procurement' <https://www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm> accessed March 2020.
[303] Diana Tussie and Amrita Narlikar, 'Breakthrough at Bali? Explanations, Aftermath, Implications' (2016) 210.

elections that rendered it difficult for political leaders to make concessions also intervened periodically to heighten the difficulties of reaching agreement.[304]

These three problems relate to the nature and scope of issues, the changing balance of power, and institutional rigidities within the organization. All three problems, moreover, were united by a strong North vs. South dimension.[305]

Taking a look back, the DDA started out as a round of great ambitions. Its scope ran wide and deep. The previous GATT rounds have already picked the low-hanging fruits of lowering average tariffs on industrial products. The remaining agenda was inevitably going to deal with the more controversial issues.

NAMA negotiations took the WTO into the difficult terrain of further reducing and eliminating tariffs, tariff peaks, tariff escalation, and also non-tariff barriers. Agriculture, historically an issue of great political and cultural sensitivity across developed and developing countries now became a core part of the mandate. Deeper trade liberalization in services was included in the comprehensive agenda, and the DDA also covered for the first time, the controversial Singapore issues. Furthermore, in an unprecedented and crucial move, the crux of the new round came under the rubric of development which was evident in its detailed mandate prioritizing the concerns of developing countries and the Least Developed Countries (LDCs).[306]

This expansive agenda could have created positive issues linkages. But the sensitive nature of most of the issues covered (often fiercely protected by deeply entrenched domestic interests) in fact increased the difficulty of reaching agreement manifold. Moreover, the development-centric framing of this round created perverse incentives; in the North, the round came be regarded as an agenda for charity (rather than mutually beneficial proposals); and in the South, the promise of development seemed to nurture a belief that even large middle-income – due to their self-declared status as developing countries – did not need to engage with the developed countries on a reciprocal basis. This led to an extreme polarization in the overall agenda.[307]

The second contributing factor to the recurrence of deadlocks is the altered balance of power. Before the WTO, GATT Agreements were easier to arrive at when not only membership was smaller, but consensus was built largely via consultations amongst the Quad group of countries (EU, US, Canada, and Japan) and the gains could then be extended to developing countries through the MFN principle. By the time DDA was launched this power was no longer concentrated in a "club" of like-minded countries but rather replaced by the so called "New Quad", Five-Interested Parties, G6, G7, and so forth. The rising powers, now at the core of decision-making in the WTO, were at different levels of development, had different economic structures and visions of global order that they brought to the negotiation table.[308]

These differences also extended to the LDCs that were no longer willing to stand at the margins. For all these reasons the trade regime acquired heavy overtones of a North-South struggle.
Related to the above point, the substantial growth of WTO membership made the negotiations all the more difficult with the larger number of parties involved. Rather, the fundamental problem ironically derived from the very successes of the WTO, which unlike its predecessor, proved to be much more responsive to the voice of inclusiveness and representativeness. But this also means that the WTO had to deal with a greater diversity of views, expressed by countries with different development priorities.[309]

For the first time in the history of the WTO, developing countries began to exercise their veto power – clearly a positive development towards a more pluralistic, accountable, and equitable organization – but the unintended consequence was that agreements were much more difficult to reach. Persistent delay and deadlock damaged the credibility of the organization as a whole, and hurt all members, but they proved to be especially damaging to developing countries that stood to make the greatest from a completed DDA. The new balance of power (by diffusing to the large emerging economies that often work in coalitions with poorer developing countries) allocated

[304] Ibid 211.
[305] Ibid 212.
[306] Ibid.
[307] Ibid.
[308] Ibid 213.
[309] Ibid.

greater power to the poor, but this newfound power paradoxically also reduced their power by making the system more deadlock-prone.

The third factor, which reinforced the above two, relates to institutional rigidities within the organization.[310]

The WTO's decision-making processes were based on the GATT's, and included consensus-based decision-making, which meant that agreement can only be reached if no member objects to the decision. This became a very difficult condition to achieve within the parameters of the Doha Round.[311]

Furthermore, members had to face the dilemma of the "Single Undertaking" that is, the negotiation principle of nothing is agreed until everything is agreed. A mechanism that could have facilitated positive issue linkage and diffused reciprocity, became in fact a means of negative issue linkage whereby countries were able to hold each other's priority areas to ransom. Combine this with the difficult and ambitious nature of the agenda, and we have a classical recipe for the best becoming the enemy of the good.[312]

Caught between these three sets of constraints – contested issues, altered balance of power, and institutional rigidities – it is perhaps not surprising that the DDA languished as it did.

The mandate at Bali was admittedly considerably diminished from the high ambition of Doha. The decisions concluded at Bali cover three major sets of DDA issues: **Development and LDCs, trade facilitation, and agriculture.[313]**

Ironically, development and LDCs was in some ways the least controversial of the Bali issues with negotiators having agreed to "stable" texts in advance of the Bali meeting in Geneva. The package covered four sets of issues:

- Preferential Rules of Origin (RoO) (Preferential Rules of Origin for Least-Developed Countries)
- Operationalization of the Services Waiver (Operationalization of the Waiver concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries)
- Duty-free quota-free (Duty-free and Quota-free Market Access for Least-Developed Countries)
- Monitoring Mechanism (Monitoring Mechanism on Special and Differential Treatment)[314]

The decision on Preferential Rules of Origin provided a set of guidelines to simplify and improve transparency of RoO, and also aimed to minimize threshold requirements thereby enabling LDCs to make the most of the preferential market access schemes available to them. The second decision put in place a process whereby LDCs may actually reap the benefits of the services waiver (that allows them preferential treatment), which was agreed upon in 2011 but had not actually been utilized. The third decision reinforced the provisions of Annex F of the Hong Kong declaration.[315] It required those developed countries which still had not offered DFQF to at least 97% of products originating in LDCs to improve market access prior to the next ministerial conference. The fourth Decision put in place a "Monitoring Mechanism" to assess SDT provisions. Such a mechanism was first envisaged in 2002 but took over a decade to come to fruition. The Bali mechanism provided a platform for members not only to raise concerns regarding SDT implementation, or to make recommendations for improvement, but also put on the table the possibility of renegotiation.[316]

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[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid.
[314] Ibid 215.
[315] WTO, Ministerial Declaration Adopted on 18 December 2015: Annex F Special and Differential Treatment <https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexf> accessed November 2020.
[316] Tussie and Narlikar, 'Breakthrough at Bali' 215.

Driven primarily by the developed countries, the second major issue-area over which an agreement was reached in Bali was trade facilitation. Developing countries had initially maintained a wariness towards this agenda because any move on this front would likely entail internal reforms, and non-trivial financial and institutional commitments on their part. Trade facilitation was one of the Singapore issues, all four of which the majority of developing countries resisted both at the Doha MC in 2001, and at Cancun in 2003.[317]

A compromise was reached in 2004 when it was agreed that only trade facilitation would remain a part of the DDA. Nonetheless, an inclusion of trade facilitation in the narrowed mandate of Bali attracted resentment from many developing countries and given theses contestations a decision on trade facilitation was only reached at the last leg of Bali in the form of an amendment to the General Agreement and was divided into two parts. The second part deals – *through SDT provisions* – specifically with concerns of developing countries, and tackles head on their apprehensions regarding the costs of the implementation of the agreement.[318] It does this via SDT provisions, and also assistance and support for capacity building made available for both developing countries and LDCs.[319] More importantly, the agreement recognizes that as long as developing countries lack implementation capacity, implementation of the provisions concerned *under Section I* of the agreement will not be required until implementation has been acquired.[320]

The agreement also builds in key flexibilities whereby developing countries and LDCs can self-designate various obligations in different categories, and thereby work within different timeframes that are tailored to their individual development needs.[321]

The third subject mandated at Bali was agriculture. Decisions were reached on the following issues:

a) The expansion in the list of "General Services" so that various programs in developing countries (e.g land rehabilitation, rural employment, drought and flood control, etc.) would now be included in the "Green Box" of domestic subsidies (General Services December 7, 2013);
b) The simplification and the establishment of a reallocation mechanism of tariff rate quotas, but with SDT provisions for developing countries (Agreement on Agriculture December 7, 2013: Article 2);
c) A Strong statement of intent to reduce export subsidies and "exercise utmost restraint" on their use (Export Competition December 7, 2013) and;
d) An interim measure to allow developing countries public stockholding for food security over and above the limit established by the Agreement on Agriculture (AoA).[322]

The last issue proved to be the most controversial of the four issues on agriculture, and over which the Bali ministerial very nearly collapsed. The G33 coalition of developing countries had proposed in 2012 amendments to the AoA allowing developing countries to stockpile food commodities to either assist their low-income producers or poor consumers. Under the existing terms of the AoA, government purchase of food products from farmers at supported prices were classified as an Amber Box subsidy, which meant that most developing countries were able to purchase was only up to 10% of the total value of production. The G33 proposed a reclassification of this subsidy into the Green Box, thereby removing the "de minimis" requirement.[323]

Recognizing that an amendment of the AoA was proving to be impossible at the time, the Chair of the agricultural negotiations committee, proposed an interim solution whereby members would exercise "due restraint" should developing countries exceed the Amber Box limit on public stockholding. Even this interim peace clause, however, proved to be controversial in Geneva, and left negotiators with little choice to battle their differences in Bali.[324]

Although Brazil and Argentina as major food exporters were concerned with the long-term effects of stockpiling, the final showdown occurred between the US and India. As mentioned earlier, India threatened to hold up the TFA were its demands on an indefinite peace clause on food security issues not met, and the US in turn would only agree to a

[317] Ibid.
[318] Ibid 216.
[319] Ibid.
[320] Ibid; see also Trade Facilitation Agreement Section II Article 13 <https://tfadatabase.org/tfa-text/section-ii> accessed December 2020.
[321] Ibid.
[322] Ibid 217.
[323] Ibid.
[324] Ibid.

four-year peace clause. This headlock threatened the entire Bali process give that both trade facilitation and agriculture were meant to be part of "the package" under negotiation (which also included the LDC package).[325]

India had originally enjoyed the backing of the G33 but ended up almost isolated in its strict adherence to the hard line. Only after detailed and lengthy negotiations which often continued through the night and into the early hours of the morning, a compromise was finally reached. The decision at Bali established an "interim mechanism" that would remain in place until a permanent solution is found. But it also specified that members would agree to negotiate an agreement for a permanent solution, for the issue of public stockholding for food security purposes for adoption by MC11.[326]

While trying to explain the Bali breakthrough it is important to recognize a crucial element which kept the negotiations going in the first place was that the Bali agenda had become a diminished agenda from the original Doha mandate; this reduction in the number of issues contrary to the traditional institutional approach which suggests that expanding the mandate and creating issue linkage can increase the chances of reaching a breakthrough helped bring the negotiations to a fruitful outcome, recognizing that a decade of negotiation under the single undertaking had failed to generate results, Bali built upon MC9 in Geneva and narrowed down the most pivotal issues of the Doha Declaration thereby allowing Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking. This was an important institutional innovation that allowed members to put the more controversial aspects of the negotiation on hold. Instead, negotiators were able to match ambition with feasibility, and reach for an effective early harvest on a smaller set of issues.[327]

Not only was the issue scope narrowed, but the issues themselves were carefully selected and yet the Bali agenda retained its attraction for all parties including a number of development concerns crucial for the interests of developing countries. The Bali agenda thus allowed for meaningful tradeoffs where all groups of players (developed or developing) had something worth fighting for and more importantly, worth compromising over. There was just enough in the well-balanced package for countries to make tradeoffs over, and yet not so much that a major ideational conflict could occur. The closest we came to such a conflict was over food security, which was resolved via intensive negotiation and clever drafting postponing the major issues.[328]

Equally as important is the change that was made in decision-making by taking into account the altered balance of power and facilitating ownership amongst parties. Unlike previous Doha Round negotiations where the standard practice was to hold key consensus-building meetings amongst the major players, decision-making evolved to become more inclusive in that the high table was no longer restricted to a handful of powers of the developed world, but rather open to coalitions of developing countries thus bringing other developing countries indirectly into the fold of the consultation process.[329]

This process helped in improving ownership of the Bali Process among the members and enhanced their commitment to a successful outcome. It may have also mitigated the polarization that previous meetings had illustrated between the rising powers and the established powers.[330]

Last but not least, the use of different types of formal and informal flexibility mechanisms was very important in facilitating the breakthrough at Bali. The first important step was to disentangle the Bali Package from the onerous demands of the Single Undertaking. Additionally, each one of the agreements had different types of flexibilities built in, which helped ensure that the burdens of commitment would not be too strenuous. The LDC package had potentially a norm-setting agenda and was yet made palatable to the developed countries by limiting itself through best-endeavor clauses (rather than binding commitments).[331] In the same manner, even the controversial food security arrangement got the green light due to an ambiguity that was drafted into the decision and allowed both conflicting parties to emerge as winners. On the one hand, more in keeping with India's demands, the wording with respect to the interim mechanism "until a permanent solution is found' suggested that the arrangement was a long

[325] Ibid.
[326] Ibid 217-218.
[327] Ibid 221-222.
[328] Ibid.
[329] Ibid 223 *Under Pascal Lamy's leadership, this method of decision-making was referred to as "concentric circles".*
[330] Ibid.
[331] Ibid 224-225.

term one. On the other hand, the language also met the US demand that the option was time-bound rather than open-ended by creating a deadline for the establishment of a permanent solution by 2017 (i.e. MC11).[332]

In conclusion, the success of the Bali decisions lay in the fine balance that negotiators found between fulfilling the Doha mandate while simultaneously reducing/qualifying the burdens of mandatory obligation in some of the areas.[333]

**Nairobi 2015 (MC10): Late breakthrough**

In mid-December 2015, WTO members gathered in Nairobi, Kenya for the 10th Ministerial Conference. Their aim was to resolve a stalemate that had emerged over the purpose and focus of the WTO's negotiating function and the continued viability of the DDA. With the help of two through-the-night negotiations the MC10 saw members reach an agreement that marks the beginning of a new phase in the evolution of the multilateral trading system, the role developing countries will play therein, and the likely gains thy will accrue as a result.[334]

There are three defining aspects that make Nairobi different from other MCs. First, the agreement reached transforms fundamentally the framework for conducting trade negotiations for the first time in the WTO's history moving it away from the 'single undertaking' principle to something more lithe and multi-faceted (commonly understood as 'variable geometry'). This transformation is widely seen as rekindling faith in the organization's negotiating function and an important counter to the growing prominence of mega regional trade deals such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). However, reinvigorating the WTO's negotiating function came at the expense of the DDA and a 14-year effort to agree to a wide-ranging multilateral deal on trade measures for development that has been a key demand of developing countries and which has been crucial to securing their participation in the multilateral trading system.[335]

Second, Nairobi saw members utilize a new mode of negotiation. This new mode builds consensus through a complex multi-layered series of bilateral processes in the behind-the-scenes meetings targeting the lease contentious issues first, thereby generating willingness and capital before moving on to thornier topics. Dubbed 'critical mass' because of the broad-based participatory and consultative blockages in negotiations by encouraging counter-proposals and dialogue with opponents. It was universally praised at the meetings and was seen as crucial in helping bridge the significant pre-ministerial gaps that had existed between members as well as to the conclusion of an agreement. As evident in Bali, elements of this approach have been used before, and older more familiar small group and power-political methods were deployed in the closing stages of MC10.[336]

Third, the package of trade measures agreed in Nairobi is not inconsiderable, comprising agreements in agriculture and on least developed country (LDC) issues as well as an expansion in the 1996 Information Technology Agreement (ITA). What is clear, however, is that in keeping with all the previous multilateral trading system and not just the WTO – the balance of these measures clearly favors developing countries.[337]

In combination, these three outcomes mark the beginning of a critical juncture likely to signal a new phase in the evolution of the multilateral trading system. First, the Nairobi package alters fundamentally the likely shape of future WTO deals with significant consequences for developing country trade gains. Second, while the use of a critical mass negotiating mode brought participation and consensus into the core of the Nairobi talks, ironically it resulted in an agreement that enables members to move away from the pursuit of universal agreements wherein a balance of concessions is required that are acceptable to all members to one in which more narrowly focused piecemeal deals can be brokered. Third, the balance of the Nairobi package preserves a longstanding feature of the (GATT)/WTO negotiations which has consistently seen deals struck that favor the organization's developed members. Moreover, the transformation of the WTO's negotiating function into a much lither machinery is likely to preserve rather than

[332] Ibid 225.
[333] Ibid 226.
[334] Rorden Wilkinson, Erin Hannah, and James Scott, 'The WTO in Nairobi: The Demise of the Doha Development Agenda and the Future of the Multilateral Trading System' (2016) 247.
[335] Ibid.
[336] Ibid 247-248.
[337] Ibid 248.

attenuate this pattern. This does not necessarily mean that gains for the least developed countries will be absent from future negotiations; but it does mean that they will almost certainly be of proportionately lesser value.[338]

**The run-up to MC10**

The run-up to the Nairobi ministerial conference did not suggest that a successful conclusion would necessarily be forth coming. While positive signals ahead of the meeting indicated that members would at least try and craft an agreement, a number of negative factors were also evident.[339]
Auguring well for a successful conclusion, the Nairobi meeting sought to build upon a successful Bali ministerial conference (MC9) which had broken with past practice and produced the first multilateral trade deal since the WTO was created. MC10 marked the first time that a WTO ministerial conference had been held in Africa. 'African' issues were at the forefront of the agenda with strong support being shown for the conclusion of a developing country-led ministerial conference comprising a package of trade measures on agriculture and for LDCs. Two new members (Liberia and Afghanistan) were due to be formally welcomed into the organization's ranks. And, more widely, Nairobi sought to capitalize on a newfound momentum evident in global summitry building on deals agreed in Addis Ababa on financing for development (July 2015), in New York on the Sustainable Development Goals (SDGs – September 2015), and in Paris on climate change (December 2015).[340]

Yet, despite a preparatory process that had seen much activity in key areas, the Geneva-based pre-ministerial process had become stuck on several key issues. The United States Trade Representative, appeared to be calling time on the DDA. As Froman put it, the Doha round was 'designed in a different era, for a different era, and much has changed since'. The tenor of practitioner debate wasn't promising either. The Indonesian Minister of Trade Thomas Lembong, also speaking on behalf of the G33, openly complained about the 'the tone of negotiations'. EU Trade Commissioner Cecilia Malmström and Rural Development Commissioner Phil Hogan criticized 'the worrying lack of compromise text on the negotiation table'. The hosts also in the words of the Kenyan Cabinet Secretary for Foreign Affairs warned that the Nairobi meeting was the 'the last chance for some time to come for the WTO to dig itself out of its negotiating stasis'. A successful conclusion to the meeting was thus by no means expected.[341]

**Dynamics of the meeting and critical mass a negotiating mode**

The MC10 unlike the Bali meeting had a more subdued character. The Kenyatta International Conference Centre was relatively calm and peaceful. This appearance of relative calm was, however, the consequence of the employment of a new mode of negotiation rather than absence of hardnosed negotiation or substantive contention. As Members had arrived in Nairobi without a clear consensus and with a full work programme comprising 15 different unsettled texts, a multi-layered process of concurrent bilateral meeting was put in place to build consensus on easier-to-reach areas before tackling the thornier issue of the future of the DDA as a negotiating framework. And because this process was conducted *en masse* and behind-closed-doors often away from the conference venue it lent the ministerial a false appearance of calm. Yet, as long serving WTO staffers put it, Nairobi was somewhat the busiest and most focused ministerial conference to date.[342]
This new mode of negotiation was not, however, a whole-sale departure from the past practice but rather an evolution thereof. Bilateral consultations have always played a significant role during multilateral trade negotiations, but have tended to be held between leading protagonists and always including the US and EU. These bilateral consultations would historically then evolve into larger 'green room' sessions involving a greater number of members but which would remain confined to the leading industrial states, and more recently – in response to the 'emergence' of large developing countries as global economic forces – India, China and Brazil.[343]

As evident in the preceding Bali MC, DG Azevedo sought to move away from this model toward one that was more inclusive in which all member states felt they were being consulted, particularly regarding their positions and red lines. Inevitably some more elitist small group meetings took place and criticisms were levelled at the DG for some

[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] Ibid 248-249.
[342] Ibid.
[343] Ibid.

members believed to be a desperate attempt to find agreement at all costs. Nonetheless, Azevedo's efforts were widely applauded.[344]

Several factors made a noticeable difference to the dynamics of MC10 that combined to produce a new mode of negotiation and which had a significant effect on the outcome of Nairobi. First, the public political theatre acted out by key trade ministered that was a characteristic feature of previous DDA ministerial (particularly, but not exclusively, Cancun, Hong Kong and Bali) was absent from Nairobi.[345]

Second, from the outset there was a clear willingness to try and reach a deal. Hosting the ministerial conference in Nairobi contributed to this willingness, particularly among delegations of developing countries.[346]

Third, it was clear ahead of Nairobi that the status of the DDA was both contested and unsettled. Yet, rather than being the focus of debate from the outset, negotiation commenced on issues where agreement had already been, or almost established before tackling thornier issues. The benefit of this critical mass approach was that that it encouraged proactive dialogue and built consensus and trust among member delegations in areas where agreement could be reached while at the same time buying them into the idea that a Nairobi package could be agreed, thereby enabling them to relatively sanguine about the final stage small group meetings.[347]

Fourth, the grand and multiple coalitions evident during the earlier stages of the Doha negotiations did not have the same salience or traction that they had in previous ministerial conferences. The cohesive bond that they had enjoyed has been eroded by changes in the global economy and a growing acceptance that it no longer makes sense to treat developing countries as one large group.[348]

Fifth, the character of WTO ministerial conferences as important high-level events has been firmly re-established after they were previously and deliberately re-engineered as perfunctory gatherings as a tactic by former DG Pascal Lamy to take some of the heat out of the Doha round following the 2008 collapse in the negotiations. The successful outcome of MC9 began this rehabilitation process and Nairobi cemented it.[349]

Sixth, a clear move to use social media was also evident. Throughout the conference a number of draft texts were made available online immediately after their release. This was accompanied by a conscious call for civil society groups to analyze these texts to help with the process of consideration and fueled the negotiations with a spirit of inclusive and transparency.[350]

Seventh, a conscious effort – both rhetorically and substantively – was made to move beyond the North/South divide that had historically bifurcated trade negotiations.[351]

The move to a critical mass approach did not mean, however, that the practices of the past were entirely absent or the negotiations were unproblematic. In fact, when the talks overran the planned end point of midday 18 December and entered the crunch stage, the mode of negotiation did revert to the more traditional exclusive, small group approach. This irritated other members who felt they should be included and precipitated the small presence of protesting NGOs to highlight the revision back to a more undemocratic and exclusionary methods.[352]

**The Substantive Package**

**The Information Technology Agreement**

[344] Ibid.
[345] Ibid.
[346] Ibid 250.
[347] Ibid.
[348] Ibid.
[349] Ibid.
[350] Ibid.
[351] Ibid 250-251.
[352] Ibid 251.

The most substantive agreement reached in Nairobi – the ITA – also happened to be the first tariff reduction deal achieved in a WTO negotiation. This is a plurilateral agreement signed by 35 members to eliminate tariffs in 201 sector-identified products. Collectively the signatories account for approximately 90 per cent of global trade in products covered. In theory, all other members benefit even if they are not party to the agreement. This is because the tariff cuts are also 'multilateralised', thus granting tariff-free access to the markets of all WTO members. However, this has to placed within the context of the fact that almost all non-signatories do not produce the products covered by the ITA and are therefore being granted trade concessions in areas in which they have no capacity to export. The ITA is undoubtedly economically significant, but any claim that it will benefit those developing countries that are not sector producers and/or exporters must be treated with caution.[353]

**Agriculture**

Agriculture has often been the focus of WTO MCs. The preceding Uruguay round was concluded with an acknowledgement that its AoA had not achieved a sufficient outcome. To overcome this problem the agreement included a 'built-in agenda' mandating new negotiations to begin by 1999 aimed at 'continuing the process of substantial progressive reductions in support and protection'.[354] Over the next two decades, as the weakness of the AoA became more pronounced, MCs became moments wherein entrenched divisions are expressed between (mostly) developed countries wishing to protect their agricultural sectors and domestic support programmes, and those (mostly developing) countries wanting to see reductions therein and rebalance the AoA.[355]

Without the prospect of a significant leap on a comprehensive deal on market access and domestic support, attention in Nairobi was diverted to three elements of agricultural trade: export subsidies; the special safeguard mechanism (SSM); and public stockholding. Within the context of trying to secure a development-focused outcome from the ministerial, there was hope that some agreement could be formed on these areas of particular interest to developing countries.[356]

Nairobi offered an opportunity to lock in US and EU reductions in the use of export subsidies. Reform of agricultural support programmes coupled with historically high food prices seen after the 2008 financial crisis led both the US and EU to all but eliminate their use of export subsidies. As WTO members were looking to deliver on a deal for development, this was considered by many an opportunity to lock this into place. While this drive had relatively broad support, there was a feeling among some members (including the EU that an agreement in this area needed to tackle not just direct export subsidies but also other programmes that have a similar effect – notably food aid and export credit guarantees.[357] Heading to Nairobi, a number of developing countries have recently started to use export subsidies in breach of their WTO commitments and did not appreciate the sudden focus on export competition.[358]

The second pillar of agriculture – the SSM – was pushed most aggressively by India and the G33. The SSM has been presented by its proponents as a measure to correct existing safeguard provisions that allow increased protection when faced with a sudden, disruptive increase in imports and which are available only to those countries that have converted non-tariff barriers into tariffs – a process few developing countries have undertaken. The 2005 Hong Kong MC accepted that developing countries should have recourse to a similar mechanism that was termed the 'Special Safeguard Mechanism'.[359]
In the run-up to Naribi the G33 put forward a new proposal on the SSM but it had little effect as many members had expressed strong opposition to the idea of an outcome on SSM at MC10 in the absence of a broader outcome on agriculture market access.[360] Nonetheless, the G33 continued to consider the SSM to be 'a balancing element relation to other potential outcomes for Nairobi'.[361]

[353] Ibid.
[354] WTO, Agreement on Agriculture Article 20 <https://www.wto.org/english/docs_e/legal_e/14-ag_02_e.htm> accessed November 2020.
[355] Ibid 251.
[356] Ibid.
[357] Ibid 251-252.
[358] Ibid 252.
[359] Ibid 252.
[360] WTO, 'Committee on Agriculture in Special Session, Report by the Chairman, H.E. Mr. Vangelis Vitalis, to the Trade Negotiations Committee', 7 December 2015, TN/AG/32 < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=225551,133652,133627,123467,92189,104116,78445,24432,56981,57310&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed February, 2020.
[361] Wilkinson and others, 'The WTO in Nairobi: The Demise of the Doha Development Agenda' 252.

The third pillar of agriculture discussed was public stockholding. As is the case with the SSM and export competition, the issue made little progress in Geneva and was sent to Nairobi for further consideration. This issued had been the most controversial element of the Bali Package which ended up with a temporary agreement and stipulation that work would be done to find a more permanent solution.[362]

By the emergence of the first draft agriculture text on the 17 December it had become clear that India's demand for an outcome on the SSM was not going to be delivered. The final decision on the SSM dealt with the issue in three lines, stating that 'developing country Members will have the right to have recourse to a special safeguard mechanism (SSM) as envisaged under paragraph 7 of the Hong Kong Ministerial Declaration'. And that negotiations would continue to that effect in the Committee on Agriculture Special Session.[363] Public stockholding was dealt with in a similar fashion, consisting merely of a reaffirmation that the Bali decision would remain in force until a permanent solution was agreed, that negotiations toward that end would continue 'in an accelerated time-frame', and that the General Council would regularly review progress.[364]

Progress was greatest on the export competition pillar, albeit being limited largely to export subsidies. A timetable was set for the elimination of export subsidies – by 2020 for developed and 2023 for developing countries – with an accelerated timescale in cotton. On the broader areas of export competition, the language was primarily of a best endeavor nature. Providing food aid in-kind was allowed to continue, though the agreement encouraged members to provide such aid in cash. Several paragraphs were devoted to providing control guidelines for the monetization of food aid, requiring 'a demonstrable need for monetization' and an analysis of local or regional markets to minimize disruption.[365]

Overall, the package on agriculture made an important step forward in banning export subsidies. The large-scale use of export subsidies has historically had a detrimental impact on domestic markets in developing countries and harmed their long-term food security by undermining domestic production and eliminating damaging policies is certainly welcomed. Beyond this, however, the outcome in Nairobi had little substance. The policy changes demanded by many food importing developing countries relating to protecting their food security - namely the SSM and public stockholding – continue to be parked on the work programme (the DDA) that now looks unlikely to be concluded.[366]

**LDC issues**

In advance of Nairobi, the LDC group had identified four main priority areas – the LDC services waiver; preferential rules of origin; and duty-free, quota-free market access (DFQF). Each of these items were included as a series of non-binding, best endeavor commitments.[367]

In 2013 members promised to expedite the operationalization of the services waiver which allows members to grant preferential treatment to service suppliers from LDCs, something that had been agreed in principle back at MC8 in Geneva. By Nairobi, only 21 members had notified the WTO of their intention to uphold the waiver and LDCs sought to expand the scope of existing notifications and encourage more members to make use of the waiver which was set to expire in 2026, 15 years after its adoption in 2011.[368]

The decision adopted in Nairobi reiterated members' commitment to support the development of services sectors and modes of supply in LDCs and explicitly acknowledged the three-year lag between the adoption of the waiver and the first notification. In response, members extended the waiver until 2030.[369] Beyond this, member simply agreed to 'redouble' efforts to operationalize the waiver, were encouraged to extend technical assistance and capacity building to LDC services providers and committed to the periodic review of the operation of notified preferences. Regulatory issues (such as administrative procedures and recognition of the qualifications of LDC professionals and the

[362] Ibid.
[363] WTO, 'Ministerial Decision on SSM for Developing Country Members', 19 December 2015, WT/MIN(15)/43, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN15/43.pdf&Open=True> accessed February 2020.
[364] WTO, 'Ministerial Decision on Public Stockholding for Food Security Purposes', 19 December 2015, WT/MIN(15)/W/33/ Rev.3 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN15/44.pdf&Open=True> accessed February 2020.
[365] Wilkinson and others, 'The WTO in Nairobi: The Demise of the Doha Development Agenda' 252.
[366] Ibid.
[367] Ibid.
[368] Ibid 253.
[369] Ibid.

accreditation of LDC institutions) were deemed too politically sensitive to be addressed at Nairobi and left out of the final decision. Given the non-binding nature of the decision, realizing these aims depends solely on the good will and initiative of members.[370]

Also included in the LDC list of priorities was simplifying and making more effective the rules of origin used in preference schemes. Though LDCs and other developing countries have a wide range of preference schemes available to encourage exports to the world's major markets, restrictive rules of origin greatly reduce the use of these schemes. At Bali, preference-giving members made only non-binding commitments to adopt more generous rules of origin practices and initiate work to create a more comprehensive and binding future agreement on the issue. Despite US reluctance in the run-up to MC10, this was one of the first issues on which agreement was reached.[371]

A binding agreement delivered rules of origin as the major achievement for LDCs, and indeed, development efforts, at MC10. Most significantly, one component of the agreement saw preference-granting members agree to grant standard (as opposed to variable) preferential treatment for LDC export products and reduce administrative burdens on LDCs. The agreement allows 75 per cent of the final value of export products to contain materials not originating from an LDC to qualify for preferential treatment. Members also agreed to reduce the administrative burdens on LDCs and to implement the new commitments in the agreement very quickly.[372]
While some consider this threshold still to be too restrictive, there is no doubt that this agreement provides LDCs with much greater flexibility. The decision on rules of origin is also now among the small handful of legally binding, multilateral decisions ever taken by the WTO.[373]

Cotton was another perennial LDC issue on the agenda at MC10. The 'Cotton Four' (C4 – Benin, Burkina Faso, Chad and Mali), in particular, have long sought DFQF access for cotton exports from LDCs, the elimination of export subsidies, and the reduction of domestic support, especially by developed countries, in the sector. In the run-up to MC10, the C4 again articulated these demands in an effort to move beyond the weak commitment made at Bali to improve linkages between cotton and the aid for trade agenda.[374]

The decision adopted in Nairobi goes some distance towards fulfilling these demands. Developed and developing countries have both committed to eliminating export subsidies in cotton as well as providing DFQF to LDCs as part of their existing preference trade agreements. However, the most distorting measures – domestic supports – proved too politically contentious to be addressed. What is more, many critics of the view that developing countries should not be required to cut their export subsidies at all, in light of the unfair terms of trade they have contended for many decades. What this means is that, despite a binding decision having been taken for which the C4 text was used as a basis, only small steps were taken to redress the egregious asymmetries in global cotton trade.[375]

Although it falls short in providing meaningful opportunities for services exports and cementing DFQF market access commitments in sectors other than cotton, the LDC package is historic and significant in that legally binding commitments were taken to fulfil longstanding, best endeavor promises made by industrialized countries to the world's poorest.[376]

**Buenos Aires 2017 (MC11)**

In December 2017, WTO members met in Buenos Aires for the organization's MC11 uncertain about what the meeting's conclusion might bring, and for good reason. In the preceding months, the global trade landscape had been thrown into flux by the Trump administration's hawkish stance on trade, its withdrawal from the TPP, and its "request" to renegotiate both the North American Free Trade Agreement (NAFTA) and the US–South Korea

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370 Ibid.
371 Ibid.
372 WTO, 'Draft Decision – Preferential Rules of Origin For LDCs', 16 December 2015, WT/MIN(15)/W/38 <https://www.tralac.org/images/Resources/MC10_Nairobi/Preferential_Rules_of_Origin_for_Least-Developed_Countries_Draft_Ministerial_Decision_Nairobi_19_December_2015.pdf> accessed February 2021.
373 Wilkinson and others, 'The WTO in Nairobi: The Demise of the Doha Development Agenda' 253.
374 Ibid.
375 Ibid.
376 Ibid.

bilateral free trade agreement. And tensions between Canada and the United States were looming in a dispute over the latter's use of anti-dumping and countervailing duties as well as in aircraft, lumber, and paper.[377]

Challenges to the established trade order were not limited to North America alone, however. Significant alterations to the European trade landscape were also in the offing. Theresa May's government had begun the process of withdrawing the UK from the EU, its single market and its customs union. The EU was undergoing a process of reflection, aware that relations among its members as well as with established trading partners would change following the UK's departure. Debate about the shape of future trade relationships, including with the US and developing countries, was in full flow with both the UK and EU seeking to make swift progress on new trade deals in North America, Asia and the Pacific.[378]

These tensions had an inevitable effect on the preconference process—though they do not, in themselves, explain the failure to reach a consensus on either a ministerial declaration or a programme of work in the run-up to MC11. Despite intense discussions in Geneva and an October 2017 preconference mini-ministerial meeting in Marrakesh, members proved unable to bridge divides. Matters were not made any easier when, in the immediate run-up to the ministerial conference, the Argentine government decided to revoke the accreditation of 63 NGOs, frustrating the WTO Secretariat and civil society groups in equal measure.[379]

Yet, as has come to be the case with the recent pattern of WTO ministerials, failure proved not to be the meeting's outcome—though what was produced was not entirely obvious nor its significance clear. Members were unable to reach agreement on a ministerial declaration affirming the continued importance of the WTO to the global trading system or its role in supporting the development of the poorest countries—despite expectations right up until the very last moment that they would.[380]

Extensive discussions among members also failed to produce collective agreement on ways forward in agriculture, e-commerce, services and non-agricultural market access (NAMA), fisheries, and investment facilitation for development, or to make progress on a range of other side issues. Indeed, the only matter of substance to emerge from the formal negotiations was an agreement to renew the twin moratoriums on e-commerce and TRIPS non-violation complaints—though even these looked uncertain for much of the meeting. That said, perhaps the biggest, most celebrated and unexpected outcome of the ministerial conference was the adoption of a declaration on trade and women's economic empowerment by 119 WTO members and observers. While designed to launch a fact-finding initiative intended to bolster the role of women in trade, particularly in new areas such as e-commerce, this is the first time WTO members have signaled a willingness to engage with what had previously been seen as a human rights issue. Although key members—notably India and the United States—remained out-liers, the strength of support and the degree to which the outcome was celebrated during the ministerial conference raised the possibility that it could foreshadow the beginning of an era when the regulation of multilateral trade connects more effectively with global economic and social agendas.[381]

**The elephant in the room**

For all of the debate that took place in each of the negotiating streams, the policy positions of just one country—the United States—framed the meeting. The United States' refusal to reaffirm the "centrality of the multilateral trading system" and the need to support "development"—both in the run-up to the meeting and during its final hours—was the primary reason a ministerial declaration to that effect was not agreed. Such was the strength of US opposition that it proved impossible to adopt even a statement acknowledging a division of opinion—in a similar vein to the ministerial declaration agreed in Nairobi expressing the range of views on the Doha round—on the centrality of the multilateral trading system.[382]

Preconference debate on the content of the proposed ministerial declaration also saw the US press for the inclusion of language "prohibiting the WTO's appellate body from violating the 'sovereignty' of members". While this was

[377] Erin Hannah, James Scott and, Rorden Wilkinson, 'The WTO in Buenos Aires: The Outcome and its Significance for the Future of the Multilateral Trading System' (2018) 2578.
[378] Ibid.
[379] Ibid 2578-2579.
[380] Ibid 2579.
[381] Ibid.
[382] Ibid 2584.

expected given US resolve to block future appointees to the WTO appellate body, it nonetheless casts a shadow over what had previously been held up as the success of the multilateral trading system in the WTO-era and one of the few positive developments that had occurred while the organization's negotiating function had been otherwise inert.[383]

For all the concern expressed about the US position and its potential consequences, the Buenos Aires outcome may be sufficient to ameliorate the situation—at least in the near term. While tensions between the US and China were the most pronounced and attracted the large majority of column inches, for some time now the biggest impediment to securing trade deals has been the profound differences of opinion between the US and India. It was this division that led to the "impasse" in the DDA in 2008 and it has been the predominant feature of recent MCs. What US actions in Buenos Aires do show, however, is that the era of US exceptionalism in trade is far from over, that WTO members are unable and unwilling to reach agreement in its absence, and that the US continues to set the pace in global trade.[384]

**Substantive Issues**

**Micro, Small and Medium-Sized Enterprises (MSMEs)**

The issue of MSMEs in trade and the aim of increasing their involvement therein was placed on the WTO agenda in 2015 by the Philippines. Since then, the issue has grown, both among the membership and within the work of the WTO Secretariat.[385]
In the run-up to MC11, a proposed text for a ministerial decision was circulated, calling for the establishment of a work programme that would address issues pertaining to MSMEs, including access to information, the regulatory environment, access to finance and reducing trade costs for MSMEs. Some members questioned whether the issues faced by MSMEs could be addressed through WTO rule-making processes. India, for instance, in its opening plenary statement sought to refocus attention on the items left over from the DDA, a position supported by the Africa Group and others.[386]

Despite this opposition, the new spirit of plurilateralism led 57 members to issue a joint declaration on the creation of an informal working group for MSMEs. Claiming a "broad and growing consensus that MSMEs require more attention," the declaration committed signatories to discussing a range of issues of relevance to MSMEs, including access to information, promotion of a more predictable regulatory environment, reduction in trade costs, and increasing access to trade finance for MSMEs.[387]

**Investment Facilitation for Development**

Investment Facilitation Development proved to be a very similar issue to that of MSMEs. As with MSMEs, there was a Friends of IFD group which proposed as an outcome to MC11 the pursuit of an agreement facilitating global investment. Noting claims by UNCTAD that the developing world would need an additional $2.5 trillion in investment annually to achieve the SDGs, the Friends of IFD called for an agreement specifically focused on IFD.[388]

Again, critics including India and the African group, opposed moving away from the Doha mandates fearing that an IFD agreement would restrict their policy space and ability to regulate investment entering their markets.[389]

Despite this opposition, a coalition of the willing emerged during MC11 that decided to pursue the issue plurilaterally. On 11 December 2017, Ambassador Chiedu Osakwe of Nigeria held a press conference announcing that 42 members would begin "structured discussions with the aim of developing a multilateral framework on investment facilitation," including on improving transparency, streamlining administrative procedures and

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383 Ibid.
384 Ibid.
385 Ibid 2585.
386 Ibid 2586.
387 Ibid; see also WTO, 'Joint ministerial statement: Declaration on the establishment of a WTO informal work programme for MSMEs', December 13 2017, WT/MIN(17)/58 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=241096,240868&CurrentCatalogueIdIndex=1&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed February 2021.
388 Ibid 2586.
389 Ibid 2587.

facilitating FDI. They made note of some of the objections raised by critics, including in the declaration a statement that "the right of Members to regulate in order to meet their policy objectives shall be an integral part of the framework".[390]

### Agriculture

The agriculture facilitator role was undertaken by Ambassador Amina Mohamed of Kenya, who had chaired the Nairobi MC two years previously and won widespread praise for the job she did corralling members towards an agreement. After holding meetings with members in various configurations over the first two days of the conference, Mohamed invited members to submit a compromise text. The following day she announced that none had been provided and, in a final attempt to salvage a deal, put forward a Chair's text for consideration. Despite the fact that many members welcomed the text as a sound basis for moving forward, the US, in a change of stance from that previously communicated at MC11, made it clear that it would be unable to agree to any outcome on public food stockholding. In turn, India reiterated its position that without movement on this issue it could not envisage an agreement in other areas at the conference. Only at the last minute did India soften its position and accepted the moratoria on TRIPS and e-commerce without a deal on stockholding.[391]

### Fisheries subsidies

The problems of the DDA ensured that progress was slow, but the run-up to MC11 saw hope for movement forward. These hopes, however, were ultimately unrealized. Initial discussions on a range of issues—overfishing, overcapacity and IUU fishing subsidies—were whittled down to a focus only on the latter, but even this proved insufficient to bring about a breakthrough.[392] However, continued opposition by India meant that a deal on IUU subsidies was no longer considered to be deliverable and members opted to kick the proverbial can down the road, agreeing only to work toward a solution by MC12.[393]

Civil society groups concerned with overfishing derided the WTO members' failure to act, singling out India as being irresponsible and citing their opposition as demonstrating that "the Indian government supports the ongoing destruction of the ocean and of artisanal fishers".[394] Their critique was echoed by EU former Trade Commissioner Cecilia Malstroem, who took to Twitter to complain that "members cannot even agree to stop subsidizing illegal fishing. Horrendous."[395]

### Trade and women's economic empowerment

The Joint Declaration on Trade and Women's Economic Empowerment was one of the most significant outcomes of MC11. Signed by 119 WTO members and observers, the declaration marks the first time that a group of members has committed to bringing a human rights issue into the WTO fold.[396]

The gender and trade agenda had gained significant momentum throughout 2017. A number of international organizations had rolled out gender and trade initiatives, such as UNCTAD, the World Bank and the ITC. The Declaration itself is modelled on the gender chapters of the Canada–Chile and Chile–Uruguay FTAs. It explicitly acknowledges an inextricable link between inclusive trade, gender equality, economic growth, and poverty alleviation. It is written in the spirit of Goal 5 of the SDGs and the UN Convention on the Elimination of all Forms of Discrimination Against Women. The Declaration is premised on the idea that 1 billion women are excluded from the global economy.[397]

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[390] Ibid; see also WTO, 'Joint ministerial statement on investment facilitation for development', 13 December 2017, WT/MIN(17)/59 < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240870> accessed February 2021.
[391] Ibid 2589.
[392] Ibid.
[393] Ibid 2590; see also International Centre for Trade and Sustainable Development ICTSD 'WTO members eye post-Buenos Aires work as ministerial talks hit hurdles' 17 December 2017, <https://ictsd.iisd.org/bridges-news/bridges/news/wto-members-eye-post-buenos-aires-work-as-ministerial-talks-hit-hurdles> accessed February 2021.
[394] Ibid.
[395] Ibid; see also Cecilia Malstroem, Twitter, <https://twitter.com/MalmstromEU>.
[396] Ibid.
[397] Ibid.

While the declaration is purely aspirational and non-binding—as are the gender chapters in all existing FTAs—many are hopeful that it signifies the linking of human rights and broader social agendas to the regulation of multilateral trade.[398]

Like the other statements of intent agreed at MC11, the coalition endorsing the Joint Declaration on Trade and Women's Economic Empowerment comprised members from both the Global North and South. Given the stark prospect that no progress would be made in the negotiations, the issue of women's empowerment became low-hanging fruit for many WTO members and observers. Capitalizing on the inclusive and progressive trade narrative and the growing traction of the SDGs was one way to ensure MC11 was not a complete failure for developed and developed countries alike.[399]

**Kazakhstan (MC12)**

MC12 was originally scheduled to take place in the Kazakh capital Nur-Sultan on 8-11 June 2020 but was postponed due to the COVID-19 outbreak. Kazakhstan informed WTO members in late April that it remained ready to host MC12 in June 2021 in Nur-Sultan and asked the General Council chair to consult with WTO members on its proposal.[400]

The Ministerial agenda will include sessions on issues of primary importance (WTO reform; digital trade; trade and investment facilitation; trade and environment and trade for social good). There will also be workshops in smaller rooms on second-order issues (subsidies; WTO accession; intellectual property; financial services; innovation, data and new technologies; and energy).[401]

### 3.2 The Need for a New Approach: The Way Forward Beyond Doha

Given the economic diversity of the WTO's membership and the history of the organization, it makes little sense to expect the Single Undertaking approach to negotiations as it is currently understood to produce good outcomes. Even more important, such an approach does not need to be pursued in order to achieve an outcome with meaningful benefits for the global economy. In fact, insistence on the Single Undertaking approach will likely produce an inferior result in the Doha Round —if a result can ever be achieved on this basis.[402]

The problems with the current approach to the negotiations are particularly acute in the case of trade in agriculture — the sector universally regarded as the most significant element of the Doha Round. We outline a hypothesis that an alternative framework for international trade negotiations for agricultural products may be likely to produce better outcomes for agriculture and for future trade negotiations more generally.[403]

Although The WTO's Single Undertaking is valuable to the extent that it improves the adherence of developing and (especially) developed country members to all of the agreements, It failed to eliminate the contradictory treatment of reciprocal trade liberalization by the GATT and encouraged members to embed the GATT's principle of nonreciprocity for developing countries (including some of the largest trading economies) in a more coherent legal framework ensuring slower, more difficult progress.[404]

Furthermore, agreements that open markets on a reciprocal basis among members are more readily negotiated and are more likely to be robust over time.[405]

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[398] Ibid.
[399] Ibid 2591.
[400] 'WTO members discuss Kazakhstan's offer to host 12th Ministerial Conference in June 2021' <https://www.wto.org/english/news_e/news20_e/gc_29may20_e.htm< accessed February 2021.
[401] United States Council for International Business, WTO Ministerial Conference (MC12) <https://www.uscib.org/event/wto-ministerial-conference-mc12/> accessed February 2021.
[402] Peter Gallagher, Andrew Stoler, 'Critical Mass as an Alternative Framework for Multilateral Trade Negotiations' (2009) 376.
[403] Ibid.
[404] Ibid.
[405] Ibid.

However, the WTO's problem is much deeper than that. It permeates the activities of the organization, at every turn, creating a stultifying tension between its high ambitions, characterized in the Doha ministerial declaration as both liberalizing and distributive, and the reality that no developing country member is obliged to take an action that would secure the benefits of liberalization for themselves or their trading partners.[406]

Recalling the Preamble to the Marrakesh Agreement, *we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.*[407]

After a revision of the WTO's Single Undertaking Principle, the pendulum swung a long way from the 1979 Framework Agreements toward legally binding reciprocal participation by developing countries. On at least one reading, the swing was over the top, binding developing countries to reciprocate more than they received on account of the huge transfers that, in principle, they were debited by their new TRIPS obligations. In any case, a reversion began immediately with the implementation debates that slowed WTO's continuing negotiations procedure to a halt and caused the collapse of the 1999 Seattle ministerial conference in recriminations and confusion. By the time of the Doha ministerial conference in 2001, the language of the pragmatic GATT standoff had returned, as paragraph 50 of the declaration indicates.[408]

*(50.) The negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.*

Although the developed countries' old laissez-faire GATT-style pragmatism could not be maintained in the WTO's more coherent legal framework, the privileges for developing countries under the 1979 Framework Agreements actually gathered new force thanks to the Single Undertaking — they became more effective than they ever had been in the GATT. Until 1994, the agreement on the less-than-complete reciprocity of developing countries affected only the balance of market access concessions. The impact might, at most, be found in the modalities of an agreed tariff-cutting formula. Because, under GATT, developing countries were not obliged to join every agreement (e.g., the Tokyo Round Codes), they had no need to secure the inclusion of framework-type language in every aspect of the legal framework. But under the WTO's Single Undertaking, the terms of the developing country exceptions have assumed a broader sweep. Every agreement must now be capable of attracting every member's participation, which means that the Framework Agreements, that formerly qualified only the expectations of members about the outcome of negotiations, have become an integral "modality" of the negotiations in the WTO.[409]

It is not difficult to see where this has led: to agreements that define non-reciprocity in fine procedural detail. In the May 2008 modalities text proposed by the chairman of the negotiating group on agriculture, (22) developing countries have lower thresholds of achievement that would ensure their less-than-reciprocal obligations. But they also have a broad range of status exceptions and product carve-outs or exemptions that will ensure that more than half of them—not counting the Least Developed Countries who have no market access obligations at all—have still lesser market access obligations. In nonagricultural market access products, the proposed modalities suggest larger absolute cuts in tariffs by developing countries leading, however, to significantly higher final tariff rates. The developing countries will also access broad flexibilities to distribute a range of product exemptions and to employ status exceptions.[410]

Successful negotiating outcomes in the GATT/WTO system have been based not on a Single Undertaking approach, but rather on what has come to be called the critical mass approach. It is important to realize that, over the years, the

[406] Ibid 377.
[407] Ibid 378; see also Marrakesh Agreement Establishing the World Trade Organization <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm> accessed February 2021.
[408] Ibid 381-382.
[409] Ibid 382.
[410] Ibid 382-383.

critical mass approach applied not only to the negotiation of trade liberalization, but also to the negotiation of the GATT system's rules.[411]

Fifty-three years ago, a review session of the GATT CPs reexamined the GATT approach to disciplining subsidies. The 1955 review session eventually led to the incorporation into GATT Article XVI of the rules in paragraphs 2 to 5 (or Section B—"Additional Provisions on Export Subsidies"). New paragraphs 2 and 3 dealt with export subsidies to agriculture, basing new rules on the effects of subsidies in world markets. A different approach was applied to nonprimary (or industrial) product export subsidies in new Article XVI:4, which attempted to prohibit export subsidies on industrial products as from I January 1958.[412]

These examples from the past make clear that a critical mass approach is not limited to a market access framework. Of course, it is true that, in effect, all multilateral trade negotiations on trade liberalization and market access are largely critical mass negotiations. That is because, once a certain degree of success is achieved by way of participation and commitments, participants have repeatedly demonstrated that they are not willing to jeopardize an outcome by insisting that every player in the system has to be a part of the deal.[413]

### 3.2.1 Single Undertaking vs. Critical Mass

Critical mass plurilateral agreements have three special characteristics. First, they have a narrower scope and do not use a single undertaking format, which was traditionally used in the GATT and WTO rounds and involved negotiating across many sectors of economic activity. The idea was that by having these rounds be a single undertaking in which all the issues were on the table and nothing was settled until everything was agreed, concessions in one area could be exchanged for concessions in a different area and thus facilitate compromise.[414]

The second feature of critical mass agreements is that they involve many but not all WTO members. At the other end of the spectrum are bilateral FTAs between two countries. RTAs sit somewhere between these two. Like regional deals, plurilateral negotiations occur between a number of countries but not all WTO members, and unlike regional deals, when plurilaterals like the ITA extend benefits to all members on a MFN basis, they do not discriminate between members.[415]

Third, while many trade agreements deal with a vast array of non-tariff barriers such as subsidies, investment rules, and regulatory differences. These plurilaterals can be constructed to avoid most, if not all, of these issues.[416]

Finally, the way an open plurilateral works is that a 'critical mass' of major producers and importers of a product class agree among themselves to eliminate tariffs and then extend those tariff reductions to all WTO members on a MFN basis. This means that those other members can get access to those major importers' markets without having to lower tariffs themselves and thus effectively free-ride. This is why it is important to get the critical mass as high as possible. Doing so is how the participants keep the free riding to a minimum. The importance of this aspect of these negotiations is why they are referred to as critical mass agreements.[417]

The expansion of the Information Technology Agreement (ITA) in December 2015 marked the most significant leap in trade liberalization over the past two decades, what also makes this agreement an important milestone is the fact that it was a critical mass agreement.[418]

First, by setting aside the single undertaking approach where nothing is agreed until everything is agreed, opportunities for shakedowns of concessions were reduced and negotiations were untethered. This is because in a Single Undertaking approach, even if all parties have agreed to a package of trade liberalization measures, in say textiles, that package is not a done deal until everything else is also agreed to, from agriculture to services. What this means is that a party that

[411] Ibid 384.
[412] Ibid.
[413] Ibid.
[414] Gary Winslett, 'Critical Mass Agreements: The Proven Template for Trade Liberalization in the WTO' (2018) 406.
[415] Ibid 406-407.
[416] Ibid 407.
[417] Ibid.
[418] Ibid 405.

has no substantive issue with the textile package may uphold agreement on that package until it receives a concession in a totally unrelated area.[419]

In 2014, India did this exact kind of concession extortion over an unrelated issue when it refused to accept the TFA under the WTO until it received concessions on support for agricultural production. Because these kinds of critical mass agreements generally deal with just one industry or product, once agreement on that has been found, it cannot be spoiled by demands for concessions on some unrelated matter. In contrast, this was precisely why states parties to the ITA negotiations were adamant to only include items that had clear IT relevance. Keeping the negotiation to those products reduced the room for spoilers.[420]

Relatedly, because critical mass agreements like the ITA focus on only one industry or product class, they reduce the number of societal interests that become politically engaged in the negotiations. Single undertaking negotiations on the other hand, dealing with a variety of products and industries, motivate a vast array of domestic political groups to take an interest in those negotiations. And therefore, by bringing a greater number and variety of societal actors, a single undertaking increases the likelihood that one or more of these actors will act as a veto player and block the deal because it is not to that actor's liking. Critical mass agreements, by eliminating such obstacles, have a better chance of being completed and ratified.[421]

This too helped the ITA. The only major industry involved in the ITA was not surprisingly the IT industry and it wanted an ITA expansion. Other business interests in industries that might have been less enthusiastic about trade liberalization never became involved.[422]

Second, the plurilateral nature of this kind of agreement, i.e. including many but not all WTO members, means that recalcitrant states that are not major producers in the industry in question can be excluded, thus further marginalizing potential spoilers. Developing country opposition to moving forward on the four Singapore Issues was one of the major reasons behind the eventual collapse of the Doha Round. In the case of the ITA by contrast, the sectoral nature of the agreement, combined with the fact that India's production in IT goods was not large enough to jeopardize the 90% critical mass, meant that developing countries that did not want to facilitate IT trade liberalization, and most especially India, could be prevented from derailing the negotiations.[423]

Also as important are the informal agreements between key players that preceded the negotiations and were the building blocks upon which an agreement could be reached. Unlike in the Doha Round when the US and the EU could not find agreement on agricultural proposals, they were able to decide on what the scope of the ITA expansion should be (tariffs only rather than addressing services and NTBs). Furthermore, the informal deal between China and the US was critical to getting the ITA negotiations to move forward. Although the results left some parties such as South Korea and Taiwan disappointed, it did overcome the greater hurdles preventing China from getting to a position that others found acceptable. This suggests that in future negotiations, parties may be better off if key participants such as the US, the EU, and China find informal agreement among themselves first and only then consult more formally with a wider set of negotiating partners.[424]

Third, because they generally only seek to reduce tariffs rather than deal with non-tariff barriers, such as subsidies and regulatory differences, critical mass agreements defuse NGO opposition. This is important. On some occasions, such as in the Anti-Counterfeiting Agreements NGOs have been significant drivers of opposition that ultimately led to its downfall.[425]

By not dealing with regulatory trade barriers at all, plurilaterals do not attract the opposition of NGOs. Relatedly, by not affecting regulations and by being generally lower in salience, these plurilaterals provided NGOs with fewer opportunities to generate attention and resources for themselves via opposition to a trade agreement.[426]

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[419] Ibid 418.
[420] Ibid.
[421] Ibid.
[422] Ibid 418-419.
[423] Ibid.
[424] Ibid.
[425] Ibid 420.
[426] Ibid.

This avoidance was not a foregone conclusion. Had the ITA expansion delved into IT-relevant regulations on a sensitive issue such as data privacy, it would have been easy to imagine NGOs and activists decrying this as a giveaway to big business and a sacrificing of consumers' rights. This is not the only way that including non-tariff barriers in the negotiations could have proved fatal.[427]

Critical mass agreements' relatively narrow focus on tariffs also means that their benefits are quite tangible. It is difficult to explain to the average voters how reducing regulatory trade barriers related to data exclusivity in pharmaceuticals, or to localization requirements regarding e-commerce, affects them. By contrast, it is relatively straight forward to make the case that reducing tariffs on a given product from 25% to 0% will make that product more affordable for consumers. This approach has shown promise before, as it did in the zero-for-zero tariff reductions in the Tokyo and Uruguay Rounds.[428]

### 3.2.2 The Rise of Plurilateralism

Differentiated integration is not a fundamentally new phenomenon in the WTO regime. On the one hand, the WTO Agreement and its annexes provide for a limited degree of differentiated integration *inter alia* through SDT and national schedules of GATT and GATS. SDT provisions grant developing and least developed countries *inter alia* longer implementation periods and special safeguards. National GATT and GATS, moreover, allow countries to commit to different levels of economic integration within the WTO regime. WTO law, on the other hand, provides for the conclusion of three different types of plurilateral agreements to accommodate differentiated integration.[429]

**PAs:** Firstly, WTO members may negotiate under Article II.3 WTO plurilateral agreements. Like-minded countries may get together and enter into new rules and/or market access commitments. PAs may provide for co-called WTO-plus and WTO-extra commitments. WTO-plus PAs deepen existing WTO market access commitments and rules. WTO-extra PAs extend the scope of WTO market access commitments and rules to new areas. Signatory countries may apply PAs on a discriminatory basis. The MFN principle does not cover plurilateral agreements. In other words, non-signatory WTO members cannot demand the same treatment as signatory members under the PA. Yet, most PAs aim for new rules rather than additional market access commitments. Rules are often non-discriminatory by nature. PAs—unlike PTAs—are typically issue- or sector-specific agreements. PAs do not cover the entirety of trade activities between the signatory countries but focus on a rather narrow issue such as environmental goods or e-commerce. It is noteworthy here that PAs require consensus among all WTO members to be appended to WTO law and to become legally binding.[430] Once likeminded WTO members have come to an agreement, they need to submit the text to the WTO's General Council for *ex ante* scrutiny. If non-signatories conclude that a planned agreement goes against their national preferences, they may veto the PA. The *ex ante* consensus rule ensures that PAs are Pareto-efficient. Yet, it may significantly complicate and delay the conclusion of PAs. Finally, it needs to be emphasized that PAs are generally open to all WTO members.[431]

**CMAs:** Secondly, WTO members may negotiate so-called 'critical mass agreements'. Like PAs, they enable a subset of likeminded WTO members to agree on new rules and commitments going beyond their multilateral schedules and commitments. Like PAs, they are seen as legal instruments to deal with specific sectors and issues rather than horizontal matters. CMAs differ in one important aspect from PAs though. They apply on a MFN basis. In other words, a subset of WTO members enters into and is bound by CMAs. Any commitments under CMAs are, however, extended to all WTO members. CMAs are a viable governance approach, if the participating WTO members represent a sizeable share of world trade, production, and consumption in a concerned domain. Such a 'critical mass' ensures that the gains from trade liberalization are significant and compensate signatories for losses due to free-riding of other WTO members.[432]

[427] Ibid.
[428] Ibid.
[429] Robert Basedow, 'The WTO and the Rise of Plurilateralism – What Lessons can we Learn from the European Union's Experience with Differentiated Integration?' (2018) 416.
[430] Ibid 416.
[431] Ibid 416-417.
[432] Ibid 417.

**PTAs:** Finally, WTO members make prolific use of Regional Trade Agreements (RTAs) in accordance with Articles XXIV GATT and III GATS. RTA is the WTO term for PTAs. PTAs may be considered as plurilateral agreements as they increasingly involve not only two but several countries (e.g. NAFTA, European Free Trade Area).[433]

### 3.2.3 Costs of Plurilateralism

**3.2.3.1 Limiting interest in multilateral efforts:** As countries resort to bilateral and plurilateral agreements to attain their trade policy objectives, the relative costs for working towards a multilateral agreement rise. This effect also raises questions over fairness in global trade governance. The DDA was meant to produce more development-friendly trade rules in exchange for developing and least developed countries' acceptance of WTO rules *inter alia* on intellectual property rights or services trade during the Uruguay Round. The current turn from multilateralism to plurilateralism undoes this gentleman's agreement between the developed and developing world.[434] And this stands to be true as Explosive RTA growth has been a recent phenomenon, with the majority As of January 2021, 549 RTAs had been notified to the GATT/WTO in force.[435]

**3.2.3.2 Side-lining developing countries:** Critiques of plurilateralism warn that PAs and CMAs enable rich developed countries to agree among themselves on sectorial rules tailored to their national interests. While developing and least developed countries may *de jure* not be bound by these rules, they may *de facto* have to accept and follow these rules in case they want to take part in relevant global value chains and join a PA in the future. Plurilateralism is thus seen to potentially undermine the legitimacy and accountability of the WTO.[436]

**3.2.3.3 Negative development effects:** A related challenge is the potentially detrimental development impact of Plurilateralism. Trade has been one of the strongest motors of international development over the past decades. Competitive access to global markets was decisive. The rise of plurilateralism may complicate access to global markets. Future PAs and CMAs will, to a large extent, focus on complex regulatory matters. Developing and least developed countries often lack the administrative capacity to enforce complex international regulations. PAs and CMAs risk impeding economic integration for developing countries if not accompanied by capacity building.[437]

**3.2.3.4 Political and legal fragmentation:** PAs were a common feature of the GATT regime after the Tokyo Round. During the Uruguay Round, policy-makers however decided to limit the use of PAs and to largely transpose existing PAs into the WTO Agreement. Policy-makers worried that overlapping and contradictory provisions and interpretations might hinder rather than help world trade; and shift the political momentum out of multilateral discussions. This concern remains valid today. Yet, the much greater heterogeneity of WTO membership has created the impression that 'differentiation' is necessary.[438]

So in other words, although multilateral trade negotiations may well be the best route to international rules governing the reduction of tariffs and non-tariff barriers for agricultural and manufactured goods, increased market access for services and disciplines in new areas affecting trade, among others, in the absence of the collective political will among WTO Members to move forward, other options will continue to become more popular. Most observers would agree that some trade liberalization is better than no trade liberalization or increased protectionism. The evidence is strong that future international trade liberalization is with a few exceptions most likely to result from new or expanded RTAs, plurilateral accords among willing sub-groups of the WTO membership and increased attention as to how members can increase their own competitiveness and trade through unilateral changes in national laws and policies. There are risks in all of these options, but the failure of Doha has given Members who seek expanded trade and the benefits accruing therefrom no other choice; the willing are simply not prepared to have their efforts stymied by WTO Members who seek to block further trade liberalization.[439]

## 3.3 The Way Forward: Reform Proposals

[433] Ibid 417.
[434] Ibid 418-419.
[435] WTO, RTAs currently in force <https://rtais.wto.org/UI/charts.aspx> accessed January 2021.
[436] Ibid 419.
[437] Ibid.
[438] Ibid.
[439] David A.Gantz, 'Liberalizing International Trade After Doha: Multilateral, Plurilateral, Regional, and Unilateral Initiatives' (2013) 347.

### 3.3.1 Tariff Binding

GATT Article II requires WTO Members to "bind" maximum tariff rates through their Schedule of Concessions.[440] While this requirement of maximum tariff binding provides essential stability for the international trading system, it also restrains the ability of developing countries to adopt tariff measures above the maximum bindings to promote domestic industries for development purposes.[441]

Article XVIII addresses the need of developing countries to establish and promote industries for the purpose of economic development by authorizing import restrictions. However, the provisions of this Article also require developing countries to conduct negotiations with other interested Members and to offer reciprocal concessions.[442]

This requirement of consultations and negotiations may cause considerable delays in implementing necessary trade measures for development purposes, and the reciprocal concessions may also burden their economies and prove counter-effective to their development interests. Although it is desirable to allow developing countries additional facilities to have a more flexible tariff structure, as Article XVIII attempts to do, this type of multilateral scrutiny diminishes their effectiveness in assisting with development.[443]

The "Development-Facilitation Tariff" or "DFT" has been proposed to address this issue. The DFT scheme enables developing countries to set the maximum additional tariff rate above the tariff binding under Article II to assist the development of their infant industries. It assigns a different maximum DFT rate to an individual developing country on a sliding scale, to be determined in accordance with its level of economic development measured by relevant economic indicators such as per-capita GNI figures.[444] However, this measure would ultimately have a counterproductive effect without procedural requirements for graduation – such as a report setting forth rationales for the proposed increase in tariffs, a public hearing, notice, and gradual liberalization and elimination of the DFT after a set period of time – that if put in place should reduce the possibility of abuse.[445]

### 3.3.2 Subsidies

A similar type of reform needs to be considered for subsidies. Government subsidies are an important development tool for developing countries, as recognized by the WTO. Yet, some of the key trade-related subsidies, such as export subsidies and import-substitution subsidies, are prohibited by the current WTO rules.[446]

Historically, subsidies have played an important role in the economic development of developed countries today,[447] so developing countries should be able to adopt trade-related subsidies without fear of retaliatory measures by developed countries or prohibition by the WTO.[448]

The concept of the sliding income scale, proposed in the DFT, can be applied to subsidies otherwise prohibited or actionable under the current WTO rule. The "Development-Facilitation Subsidy" or "DFS" can be considered in favor of developing countries under certain per-capita income thresholds. Under this scheme, developing countries are allowed to adopt otherwise prohibited or actionable subsidies in accordance with their per-capita income status.[449]

### 3.3.3 Preference for LDCs

[440] Yong-Shik Lee, 'The Long and Winding Road – Path towards Facilitation of Development in the WTO: Reflections of the Doha Round and Beyond' (2016) 448.
[441] Ibid 449.
[442] Ibid 449-450.
[443] Ibid 450.
[444] Ibid.
[445] Ibid 451.
[446] Ibid.
[447] Ibid. See also Ha-Joon Chang, 'Kicking Away the Ladder: Development Strategy in Historical Perspective' (2002) 19-21.
[448] Ibid 451-452.
[449] Ibid 452.

The DFA may also require DFQF treatment for imports from LDCs. Some developed countries have offered preferential treatment to LDCs. For instance, the EU provides the "Everything But Arms" (EBA) initiative, offering DFQF treatment to products currently exported by LDCs.[450]

Considering the dire economic need of LDCs, an EBA-type of DFQF treatment needs to be implemented by developed countries and participating developing countries in the WTO. A transitional period can be established for the complete removal of trade barriers to sensitive products.[451]

the WTO has issued a Ministerial Decision on DFQF Market Access for Least-Developed Countries, but it does not create a legally binding obligation.[452]

Members would also have to ensure that non-tariff measures do not undermine the trade benefit of these preferences for LDCs. These non-tariff measures include rules of origin, which determine the country origin of a product and, transitively, the applicability of trade preference to it. Each WTO Member has separate rules of origin, and these rules have not yet been harmonized. It has been observed that stringent rules of origin limit exports from LDCs significantly. The recent Bali Decision, which attempts to relax rules of origin for the benefit of LDCs, offers recommended guidelines, rather than enforceable obligations on Members. Applications of administered protection, such as AD measures, countervailing duties, and safeguards, can also diminish the beneficial effect of preference for LDCs. Divergent rules of origin and rampant applications of trade remedy measures substantially interfere with exports from developing countries, including LDCs, against their development interests. Thus if the rules cannot be harmonized in the near future, the WTO could alternatively develop guidelines for the application of rules of origin for exports from developing countries to minimize negative impacts on their trade.[453]

### 3.3.4 DSU

Finally, consideration should also be given to the operation of the dispute settlement mechanism in the WTO and how it may facilitate development.[454]
Developing countries may breach WTO disciplines where it is inevitable to meet their key development interest. An example would be a use of trade-related government subsidies for development purposes, as discussed earlier, which may be either prohibited or actionable under the current WTO disciplines. Another example would be the widespread adoption of local content requirements prohibited under the TRIMs Agreement. Along with other regulatory reforms, a broad "development exemption" has to be considered within the context of the DSU. The proposal is to allow those measures deemed necessary for development purposes that may otherwise be in breach of WTO disciplines, even if they were referred to the DSB for adjudication, and not to require their withdrawal or authorize any sanction. This is indeed a broad exemption, and a question may be raised as to whether this type of broad exemption would dismantle WTO disciplines all together. Adjustment to the DSU, which would allow the WTO DSB to consider development interests, particularly in the consultation process, would be necessary to resolve this issue.[455]

## 3.4 Proposals for a new approach to flexibilities in the context of development objectives

The WTO was founded with development at its center, underpinned by the fact that free rules-based trade contributes to growth and development. However, the current debate promotes the view that global trade rules are somehow an impediment to development and therefore that developing countries need to be exempt from current and future rules; in fact the opposite is true. The current distinction between developed and developing countries, which allows no nuance, no longer reflects the reality of the rapid economic growth in some developing countries. The result is that the developing country group now includes some of the world's top trading nations, who have significant economic differences from other members of this group and who in some cases even present a level of development which

[450] Ibid 456.
[451] Ibid 456-457.
[452] Ibid 457; see also WTO, 'Ministerial Decision on Duty-Free and Quota Free (DFQF) Market Access for Least-Developed Countries, December 7 2013, WT/MIN(13)/44, WT/L/919 < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=121390&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed February 2021.
[453] Ibid.
[454] Ibid 458.
[455] Ibid.

surpasses that of certain Members who are designated as developed in the organization. This lack of nuance and its consequences with regard to the SDT question has been a major source of tensions in the WTO and an obstacle to the progress of negotiations: the demand for blanket flexibilities for two thirds of the WTO membership dilutes the call from those countries that have evident needs for development assistance, leads to much weaker ambition in negotiations and is used as a tool to block progress in, or even at the beginning of, negotiations.[456]

**(a) Graduation:** Members should be actively encouraged to "graduate" and opt-out of SDT, whether horizontally or agreement by agreement. In the interim, Members should be encouraged to clarify in which areas they actually use existing flexibilities and to present roadmaps detailing when they would expect to be able to assume all the obligations stemming from the WTO agreement. This could form an integral part of a Member's TPR process.[457]

**(b) Special and Differential Treatment (SDT) in future agreements:** while acknowledging the need for particularly flexible treatment of LDCs, flexibilities available to other Members should move away from open-ended block exemptions toward a needs-driven and evidence-based approach that will ensure that SDT will be as targeted as possible.[458]

**(c) Additional SDT in existing agreements:** Though existing SDT provisions in current agreements should not be contested, when Members request additional SDT this should be done only on the basis of a case-by-case analysis, on the basis of:

- a clear identification of the development objective that is being affected by the rule in question;
- an economic analysis of the impact of the rule and of the expected benefits of its relaxation;
- an analysis of the impact of the requested flexibility on other WTO Members;
- a specification of the time period for which flexibility is requested and of its scope of application (one Member, a group of Members or all developing country Members).

Depending on the outcome of this analysis, various approaches can be used to consider additional flexibilities.[459]

### 3.5 Proposals to strengthen the procedural aspects of the WTO's rulemaking activities

WTO's most recent MC in Buenos Aires confirms the need for flexibility in negotiating approaches and to that end the following is proposed:

- **Multilateral negotiations**: Maintain support for full multilateral negotiations and outcomes in areas where this is possible.
- **Plurilateral negotiations:** In areas where multilateral consensus is unattainable, actively support and pursue plurilateral negotiations which should remain open to all Members to join and whose results will be applied on an MFN basis. To that end, Members should explore the feasibility of amending the WTO agreement so as to create 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.
- **Building political support:** Members should explore ways of building greater political support and engagement in the WTO, including possible options as to the frequency of MCs as well as ways of intensifying Senior Officials processes.[460]

### 3.6 Proposals for future rulemaking activities in the WTO

#### I. Improve transparency and subsidy notifications

The lack of comprehensive information on subsidies provided by Members is one of the biggest shortcomings in the application of the current system. Although the SCM Agreement already requires Members to notify their subsidies, the level of compliance is poor and has deteriorated in recent years, to the extent that as of end of March 2018 over

[456] European Commission, 'WTO Modernisation – Introduction to future EU Proposals' EU (2018) 6 <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf> accessed January 2021.
[457] Ibid 7.
[458] Ibid.
[459] Ibid.
[460] Ibid 8.

half of the membership (90 Members) had not made any notification. Yet, without transparency in subsidies, Members cannot review each other's actions and face significant obstacles in seeking enforcement of the rules. This greatly weakens the value of the substantive disciplines.[461]

**II. Need to address barriers to digital trade**

Digital trade, or trade enabled by electronic means, is nowadays pervasive throughout the economy, covering both trade in services and in goods and enabling transactions performed completely online as well as facilitating physical transactions. Consequently, establishing disciplines covering digital trade is important to remove unjustified barriers to trade by electronic means, to bring legal certainly for companies, and to ensure a secure online environment for consumers. Crucially, there are important cross-linkages to addressing forced technology transfers (such as disclosure of source code requirements). Again, new disciplines should cover not only trade in services, but apply to all economic sectors[462]

**Conclusions**

Having looked thoroughly at how the Multilateral Trading System came to be, its founding principles, and its pivotal role in international trade, it is crystal clear that the WTO has evolved well beyond its predecessor the GATT not only encompassing both services and intellectual property rights, but also providing for a system of inter-state dispute settlement that is automatic, quick, and effective.

However, considering its recent disappointing track record in the Doha round, spanning over two decades now, the WTO has failed to deliver on its DDA promise to finally put the case for developing countries to rest and find an end to the North-South division amongst its members that has plagued international trade since the Uruguay Round.

In fact, the Doha round has deteriorated so rapidly in the past few years that Ministers at MC11 in Buenos Aires could not even agree on a ministerial declaration. And amidst the breakout of the COVID-19 Pandemic which puts yet another pressing matter on the table, MC12 scheduled to take place in Nur Sultan, Kazakhstan in 2020 was put on hold for another year. All of this begs the question, how will the WTO bring itself out of this dilemma of unending deadlocks that has afflicted its most aspiring agenda?

On the one hand, some might argue that WTO must undertake a reality check and reassess the feasibility of the goals that it had set out to achieve over two decades ago and then decide collectively whether such endeavors are still attainable. And on the other hand, other members still clinging to the DDA promise, are dead set on the belief that a substantive outcome on development is crucial and are willing to hold the future of the WTO to ransom until their demands are met without compromise.

One thing is certain, and that is regionalism or plurilateral is going to coexist with multilateralism for the foreseeable future, however the outstanding issue remains in the creation of a symbiotic relationship between the two. And for the time being, the WTO must reevaluate the flexibility of its rulemaking activities if such a relationship is to exist within the fold of its multilateral trading system.

Returning to the first question of whether SDT is indeed justifiable and whether it has a meaningful impact on international trade, we observed that one of its consequences been the maintenance of relative high trade barriers in developing countries, and a tariff structure in developed industrialized countries that is biased against products in which developing countries possess comparative advantage, although they enjoy (qualified) preferential access in those markets.

On the empirical side, we have also observed that evaluating the impact of SDT by isolating its effects is a strenuous quest and the few attempts that were made to that end point toward a clear benefit in moving away from SDT disciplines.[463]

[461] Ibid 4.
[462] Ibid 6.
[463] Emanuel Ornelas, 'Special and differential treatment for developing countries reconsidered' (2016) 61.

The one dimension of SDT which is more prone to empirical analysis is the Enabling Clause-based preferential arrangements, such as the GSP. The handful of analyses in this field unanimously conclude that nonreciprocal preferences promote exports of the relevant country-product pairs (relative to a control group without preferences). And although better market access may yield potential benefits for developing countries in the form of economic growth, the uncertain nature of the preferences that can be withdrawn at any time at the will of the donor country remains a concern.[464]

Acknowledging that the former goal of SDT is to foster economic growth in developing countries. We observe that the set of rules characterizing SDT compel developing economies to remain relatively closed by letting them stay away from multilateral trade negotiations rather than serving as an incentive for trade policy changes that lead to economic liberalization.[465]

For this reason, stemming from the belief that a one-fits all answer does not exist, SDT has to be treated as a rules-based system rather than a political right or a privilege that is to be granted to members that designate themselves as developing countries. With SDT granted to LDCs set aside, preferences must allow for a greater degree of customizability that allow such targeted preferences to be tailored to a specific evident need, that is to be addressed within a specific timeframe, through a predefined set of conditions for withdrawal or graduation.

Finally, if we are to see the principle of SDT realize its full potential and its underlying goal which is make of developing countries new trade partners that can make trade agreements with industrialized countries on equal terms, both sides of the table, the north and the south, must come together in good faith and rationalize their positions on such controversial topics within but also predating the development agenda.

[464] Ibid 61-62.
[465] Ibid.

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## ANNEX

### ABSTRACT

The World Trade Organization has been the pinnacle of international trade for almost three decades. Since its inception development has been a key item on its agenda especially since the beginning of the Doha round of trade negotiations. This thesis investigates the historical evolution of the multilateral trading system through its various rounds of trade negotiations in the context of development, while giving due considering to the empirical evidence that sheds light on variables surrounding the special and deferential treatment of developing and least-developed countries, today a majority within the World Trade Organization.

Spanning over two decades now, and with only marginal accomplishments the World Trade Organization has failed to deliver on its development goals during the Doha round. This has led many skeptics to question whether the current negotiation model "where nothing is agreed until everything is agreed" is the best approach moving forward. In this regard, this thesis evaluates reform proposals that provide more flexibility to the rule making activities in the context of the development objectives and could potentially save the Organization from unending deadlocks while at the same time contemplating the coexistence of multilateralism with plurilateralism in a manner that could spare the international trading system from further fragmentation.

## ZUSAMMENFASSUNG

Die Welthandelsorganisation ist seit fast drei Jahrzehnten die Spitze des internationalen Handels. Seit ihrer Gründung steht die Entwicklung, insbesondere seit Beginn der Doha-Runde der Handelsverhandlungen, auf ihrer Agenda. Diese Masterarbeit untersucht die historische Entwicklung des multilateralen Handelssystems durch seine verschiedenen Runden von Handelsverhandlungen im Kontext der Entwicklung und berücksichtigt dabei die empirische Evidenz, die die Variablen rund um die besondere und ehrerbietige Behandlung von Entwicklungsländern und am wenigsten entwickelten Ländern beleuchtet, heute eine Mehrheit innerhalb der Welthandelsorganisation.

Die Welthandelsorganisation, die sich nun über zwei Jahrzehnte erstreckt und nur marginale Leistungen erbracht hat, hat ihre Entwicklungsziele während der Doha-Runde nicht erreicht. Dies hat viele Skeptiker dazu veranlasst, in Frage zu stellen, ob das derzeitige Verhandlungsmodell „bei dem nichts vereinbart wird, bis alles vereinbart ist“ der beste Ansatz für die Zukunft ist. In diesem Zusammenhang bewertet diese Masterarbeit Reformvorschläge, die den Regelsetzungsaktivitäten im Kontext der Entwicklungsziele mehr Flexibilität verleihen und die Organisation potenziell vor endlosen Blockaden bewahren könnten, während gleichzeitig die Koexistenz von Multilateralismus und Plurilateralismus in einer Weise in Betracht erwogen wird, die das internationale Handelssystem vor weiterer Fragmentierung bewahren könnte.