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THE FUTURE OF TRADE

A North American Perspective



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11. The WTO as a forum for regulatory cooperation: Transparency and open plurilateral agreements

Padideh Ala'i

The World Trade Organization (WTO) has been unique in its rulemaking and dispute settlement functions. Both functions are currently under strain given lack of progress in multilateral negotiations and the demise of the WTO Appellate Body. Ideas and proposals for reforming the WTO have come from all quarters: its membership (governments), civil society, academics and policymakers. Fundamental institutional reform of the WTO, although necessary, is unlikely in the near future given the global political landscape and lack of strong leadership. The condition of the WTO is a manifestation of a world at crossroads with the rise of nationalism and, to some extent, de-globalization. Therefore, this chapter argues that the focus of near-term WTO reform should be on the role of the WTO in promotion of regulatory transparency and as a forum for regulatory cooperation and, when feasible, rulemaking. These are important roles for protection and promotion of international rule of law and no other international organization is adequately equipped to fulfill it.

The rule-making and convening mandate of the WTO is supported by the extensive transparency and reporting obligations contained in the WTO Agreements, the technical work of the WTO Secretariat through its Trade Policy Review Mechanism (TPRM) and its various technical committees. The transparency obligations that the WTO Agreements impose on Members coupled with the WTO's ability to convene discussions on domestic regulation are crucial to promotion of international regulatory cooperation through recognition (reciprocity) and ultimately harmonization. This regulatory cooperation is vital to addressing global issues such as a pandemic or the overarching problem of climate change. The focus of any reform of the WTO in the near future should be on furthering its capacity and its success as a forum for promotion of transparency of laws, rules, and regulations, and for regulatory cooperation. The technical work that the WTO has undertaken can help address global challenges that require regulatory cooperation, including pandemics and climate change. The first successful multilateral agreement under

the WTO has been focused on transparency: the Trade Facilitation Agreement (TFA). Given its commitment to help Members build capacity to comply with its provisions, the TFA lends support to the arguments in this chapter. The chapter agrees with recommendations made by former WTO Deputy Director General Alan Wolff and others that the near future of the WTO rests on adopting open plurilateral agreements (OPAs) or critical mass agreements (CMAs). As explained here, these agreements were also an outgrowth of the WTO's transparency mandate.

The history of the multilateral system has been tumultuous, and the relevance and importance of the system from the days of the General Agreement on Tariffs and Trade (GATT) have ebbed and flowed with the changing political landscape. The accomplishments and successes of the system take a hiatus but are not forgotten; time and time again they are resurrected with new force and relevance. The Dispute Settlement Body may be at an impasse at this moment, and indeed for an extended period, but the decisions of the WTO Appellate Body from 1995–2019 can never be erased and will continue to be cited. The system is what has been called “anti-fragile.”¹

Finally, a major advantage of the multilateral system over the preferential trading arrangements that have been created through bilateral and regional negotiations is the existence of the WTO Secretariat staff, who have decades of experience in providing technical (and in the case of many, legal) assistance to the committees and whose experience in areas of regulatory cooperation is unique. The WTO Secretariat provides support services for “regular interactions at technical levels between members” as well as in committees and in dispute settlement. The Preferential Trade Agreements (PTAs) concluded outside of WTO cannot compete on this dimension and consequently rely on and build upon the WTO infrastructure.

1. GATT, WTO, AND THE REGULATORY STATE

The peace signed in 1918 after World War I allowed protectionism to grow uncontrolled. In 1930, the U.S. Congress passed the protectionist *Smoot-Hawley Tariff Act*, which raised tariffs and, in turn, deepened and prolonged the Great Depression.² It is generally accepted that such protectionist policies ultimately led to the rise of fascism and World War II. In the aftermath of the war, the mantra was “never again,” referring to the wave of protection-

¹ NASSIM NICHOLAS TALEB, *ANTI-FRAGILE: THINGS THAT GAIN FROM DISORDER* (Random House, 2012).

² See generally DOUGLAS A. IRWIN, *PEDDLING PROTECTIONISM: SMOOT-HAWLEY AND THE GREAT DEPRESSION* (Princeton, 2018).

ism that had preceded the war as well as the penalties that were imposed on Germany after World War I. It was a widely held belief that trade promotes peace and that peace is not possible if there are great economic disparities. The Bretton Woods Institutions (BWIs) originally envisioned were: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank); and the International Trade Organization (ITO).³ The latter did not come into existence because of lack of support by the United States Congress, including concerns that the ITO might interfere in U.S. domestic economic issues. Instead, the United States and 22 other nations entered in 1947 into an international agreement called the General Agreement on Tariffs and Trade (GATT). The GATT was intended to be a *provisional* arrangement until the ITO came into existence. From 1948–1994 the GATT functioned under this provisional constitution and succeeded in significantly reducing tariffs and some nontariff barriers under successive rounds of negotiations that are commonly known as the GATT negotiating rounds.⁴

Finally, in 1986 the GATT launched its last series of negotiations, which became known as the Uruguay Round (1986–1994). This round of negotiations took place during a historical period that saw the collapse of the U.S.S.R., which—along with other factors, such as expanding multilateral trade rule coverage to agriculture, services and intellectual property—led to U.S. leadership and support for the creation of the WTO. The WTO incorporated within it the GATT 1947 with all its interpretations, supplementing it with additional understandings. The WTO Agreements also included a “single undertaking”—which meant all the agreements entered into under successive GATT trade rounds of negotiations, specifically the Kennedy and Tokyo Rounds, became binding on all Members as part of the single undertaking. Prior to this time, contracting parties to the GATT did not have to be part of all the agreements but were bound by those agreements only if they chose to become a signatory to that agreement, e.g., the anti-dumping code. The Uruguay Round of agreements also added, *inter alia*, trade in services and trade-related intellectual property rights to the WTO mandate.⁵

³ Phillip Lipsky, *Explaining Institutional Change: Policy Areas, Outside Opinions, and the Bretton Woods Institutions*, 59 AM. J. POL. SCI. 341 (Sept. 9, 2014).

⁴ See ANWARUL HODA, *TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO: PROCEDURES AND PRACTICES* (Cambridge, 2018).

⁵ General Agreement on Trade in Services (GATS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1986 U.N.T.S. 183 (1994) [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS].

From 1948, when the first Bretton Woods Institutions (IMF and World Bank) were created, to 1995, when the third Bretton Woods Institution (WTO) came into being, the world had changed significantly. One major change was the rise of an administrative state in the United States and Europe, manifested by the proliferation of regulatory bodies coupled with concerns about the environment and sustainable development. These changes are reflected in the text of the agreements and the implementation of the WTO Agreements, specifically the TFA.

Today, increasingly the focus of trade disputes is not only on border measures, but on internal rules and regulations that are made applicable at the border when dealing with an administrative state. The existence of the regulatory state has meant that the multilateral trading system is no longer about removing restrictions to trade, but about maintaining WTO-consistent regulations with an emphasis on transparent and even-handed application of measures and regulatory cooperation, and harmonization with increasingly important international standard-setting organizations and initiatives.

2. INCREASING IMPORTANCE AND PROLIFERATION OF TRANSPARENCY OBLIGATIONS FROM THE GATT TO THE WTO

Transparency is defined as “sharing information or acting in an open manner,” or “a measure of the degree to which information about official activity is made available to an interested party.”⁶ In the WTO context, transparency provisions focus on procedural due process: prompt publication, access to and flow of information, and independent judicial review. Importantly, the transparency provisions reference private traders and their access to information, ensuring more than only government-to-government information-sharing. The oldest transparency provision of the system is Article X of GATT 1994.⁷

2.1 Article X of GATT 1947 and Its Proliferation

Article X of GATT 1994 traces its origin to the 1923 International Convention Relating to the Simplification of Customs Formalities, but it is also influenced

⁶ See, generally, William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 JOHN MARSHALL J. INFO. L. 1069, 1082 (1999).

⁷ General Agreement on Tariffs and Trade 1994 (GATT 1994), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (1994), at Art. X [hereinafter GATT Art. X] (Article X was originally Article 15 of the draft Charter of the International Trade Organization (ITO)).

by the U.S. Administrative Procedures Act (APA) that had recently passed in the United States.⁸ Article X is entitled *Publication and Administration of Trade Regulations*, the purpose of which was to level the playing field when the U.S. has rules regarding access to information and publication while other countries relied on opaque and informal administrative structures that usually were detrimental to importers. Article X requires that all “law, regulations, judicial decisions and administrative rulings of general application” be “published promptly in such manner as to enable governments and traders to become acquainted with them.”⁹ Article X:2 requires that measures be enforced only after they have been officially published.¹⁰ Article X:3 requires that such measures be administered in a “uniform, impartial and reasonable” manner and that Member states should “maintain or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to custom matters” and requires that such review be conducted by agencies that are “independent” from the administering agency.¹¹ Clearly, the language of Article X is very broad and can be seen as intruding into the domestic governance structure of a country. Notwithstanding its broad language and inclusion first into the draft ITO and then into the GATT in 1947, it was not viewed as an important provision. At that time, nations had not yet created the modern expansive regulatory state that we know today. Therefore, Article X was viewed as a procedural provision and not one that contains any substantive requirements. Consistent with this view, from 1947 until 1984 there is no reference to Article X in GATT disputes. Starting in 1984, the United States began to invoke Article X against Japan and what it saw as a particularly opaque practice of “administrative guidance”—using Article X as a way to target the informal channels of communication between the Japanese government and Japanese businesses.¹² However, Article X was always raised in conjunction with more substantive provisions and was seen as “ancillary” to the substantive claim of violation, e.g., Article XI (Prohibiting Quotas and Nontariff Barriers).¹³ As a result, those few adopted GATT cases

⁸ *Id.*; Administrative Procedure Act, 5 U.S.C. § 555 (2006).

⁹ GATT, *supra* note 7 at Art. X:1.

¹⁰ *Id.* at Art. X:2.

¹¹ *Id.* at Art. X:3.

¹² See e.g. Japan – Trade in Semi-Conductors, Report of the Panel adopted on 4 May 1988 (L/6309 – BISD 35S/116).

¹³ For full discussion of the early GATT 1947 Article X cases see, Padideh Ala’i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, in *REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY*, 165–169 [hereinafter *From Periphery to Center*]. See also,

refused to discuss the scope of Article X once a violation of the substantive provisions was confirmed. Article X was viewed as ancillary and unnecessary to discuss. In fact, from 1947 until 1995, there was only one adopted GATT panel decision that found a violation of Article X.¹⁴

The Uruguay Round of agreements that culminated in the creation of the WTO expanded the scope and importance of Article X.¹⁵ The Marrakesh Agreement did not amend Article X but emphasized its relevance and importance when it was explicitly referenced in many other WTO Annex 1A agreements. Its language was also replicated and included with the expansion of the WTO mandate into trade in services and intellectual property rights.¹⁶ In sum, the creation of the WTO brought the issue of transparency from the periphery into the center of the mandate of the WTO.

2.2 Transparency Requirements of Other WTO Agreements

With the creation of the WTO, Article X of GATT 1947 became Article X of GATT 1994.¹⁷ In addition, for the accession of new countries to the WTO, specifically China and Vietnam, the protocols of accession focused on transparency obligations and included additional transparency obligations as a prerequisite for accession of those and other countries.¹⁸

Article X was incorporated and cross-referenced in: the Agreement for Implementation of Article VII of the GATT 1994 (the Customs Valuation Agreement); Agreement for Rules of Origin; and Agreement on Safeguards.¹⁹ Insofar as other Annex 1A Agreements are concerned, there are many notification and other transparency-related obligations included that do not

Padideh Ala'i, *Transparency and the WTO Mandate*, 26 AM. U. INT'L L. REV. 1009 (2011).

¹⁴ See Report of the Panel, European Economic Community—Restrictions on Imports of Dessert Apples (Complaint by Chile), Para. 12.29–30, L/6491 (June 22, 1989).

¹⁵ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994).

¹⁶ *Id.*

¹⁷ GATT, *supra* note 7.

¹⁸ See generally Protocol of Accession of the People's Republic of China, WTO Doc. WT/L/432 (Nov. 23, 2001); Protocol on the Accession of Viet Nam, WTO Doc. WT/L/662 (Nov. 15, 2006).

¹⁹ See Agreement for Implementation of Article VII of the GATT 1994 (the Customs Valuation Agreement), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994); Agreement for Rules of Origin, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 217 (1994); Agreement on Safeguards, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 209 (1994).

explicitly mention Article X. Transparency and due process provisions are central in the Sanitary and Phyto-sanitary Agreement (SPS Agreement); the Technical Barriers to Trade Agreement (TBT Agreement); the Agreement on Implementation of Article VI (Dumping code); and the Agreement on Subsidies and Countervailing Measures (SCM).²⁰ The proliferation and expansion of Article X throughout the Annex 1A agreements are a reflection of the rise of the regulatory state from 1947–1995 and the move away from trade liberalization and removal of nontariff barriers to the least trade-restrictive application of trade restrictions.

Transparency is even more central in trade in services given that some services are heavily regulated. Under the General Agreement on Trade in Services (GATS), transparency (unlike national treatment and market access) is fundamental and applicable to the entire services sector.²¹ Article III of GATS largely follows Article X of GATT and makes it applicable to trade in services. In addition to all obligations contained in Article X, Article III of the GATS requires that WTO Members annually inform the WTO Council for Trade in Services of any changes made to the laws that affect trade in services and the commitments that each Member has made under their GATS schedule. Article III also requires that Member states “establish one or more enquiry points to provide specific information to other Members.”

Similarly, Article 63 of the Trade-Related Intellectual Property Agreement (TRIPS) also features transparency commitments inspired by Article X of GATT adjusted for relevance in the area of intellectual property.²² Article 63, like the other provisions, requires publication of all intellectual property laws and regulations “in such manner as to enable governments and right-holders to become acquainted with them.” In addition, there is a notification requirement that all Members notify their relevant intellectual property laws and regulations to the Council for TRIPS “in order to assist the Council in its review of the operations of [the] Agreement.”²³ Article 63 also allows Members to object

²⁰ Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 401 (1994) [hereinafter SPS Agreement]; Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 (1994) [hereinafter TBT Agreement]; Agreement on the Implementation of Article VI of GATT 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 (1994); Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 (1994).

²¹ See GATS, *supra* note 5.

²² See TRIPS, *supra* note 5 at Art. 63.

²³ TRIPS, *supra* note 5, at Art. 63.2.

to another Member's specific judicial and administrative rulings in the area of intellectual property and to request detailed justification for the ruling.

In addition to these general transparency provisions that are applicable to everyone, some WTO Members have additional transparency commitments in their protocol of accession.²⁴ The point of this chapter is not to inquire about the effectiveness of these transparency provisions in transforming any Member states into more open and democratic societies. The purpose is to show that regardless of the WTO's limitations, promoting transparency is at the core of the mandate of the WTO. Transparency is, therefore, a basic requirement of any effective regulatory framework.

2.3 Domestic Transparency Requirement under the Trade Policy Review Mechanism

The Trade Policy Review Mechanism (TPRM) of the WTO issues periodic reports on each of the WTO Member states, which describe policies and identify procedures in need of greater transparency.²⁵ The TPRM encourages *domestic transparency* that goes even beyond the substantive procedures of the WTO Agreements mentioned above.²⁶ Under TPRM, Members "recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both the Member's economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems."²⁷ Under the TPRM, however, Members have acknowledged the limits of WTO power in implementing domestic transparency, as it states that "implementation of domestic transparency must be on a voluntary basis and take into account each Member's legal and political systems."²⁸

²⁴ See e.g. Man-Keung Tang & Shang-Jin Wei, *The value of making commitments externally: Evidence from WTO accessions*, 78 J. OF INT'L ECON. 216, 229 (2009) (stating that many developing countries had to undertake "wide-ranging policy changes that go beyond narrowly defined trade areas," including in transparency, to obtain WTO membership).

²⁵ See Trade Policy Review Mechanism, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 480 (1994); See *Overseeing national trade policies: the TPRM*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tp_r_e/tp_int_e.htm (last accessed Nov. 28, 2022).

²⁶ See *id.*

²⁷ *Id.*

²⁸ *Id.*

2.4 Transparency and Dispute Settlement

As mentioned earlier, the GATT panels have only discussed Article X in a handful of cases and those claims were always dismissed as being ancillary. Since 1995, however, WTO dispute settlement panels and the Appellate Body directly addressed Article X, underscoring its importance. The Appellate Body specifically stated that Article X “may be seen to embody a principle of fundamental importance—that of full disclosure of governmental acts affecting Members, private persons and enterprises...the relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions.”²⁹ The Appellate Body further stated that Article X requires governments to not only be transparent with international and cross-border traders, but with their own domestic traders as well. In other words, the WTO transparency obligations are intended to increase government accountability and transparency not only vis-à-vis importers and other WTO Members, but also for a Member’s own citizens and enterprises. The focus on transparency is clear in cases involving environmental conservation.³⁰ Unlike the GATT years, a trade-restrictive measure with an environmental or conservation goal can be justified as an exception to the trade rules so long as it is administered in a manner that respects the principles of transparency, due process and non-discrimination. The Appellate Body jurisprudence makes clear that “rigorous compliance with the fundamental requirements of due process” is required under WTO rules for administration of all measures (including WTO consistent measures) and even more emphasis is given to them in instances where the measure itself is inconsistent with the WTO rules and being justified as an exception.³¹ Examples of the latter include health and safety measures and environmental and conservation measures.

3. THE WTO AS A FORUM FOR REGULATORY COOPERATION

We have reviewed the breadth of the transparency obligations enshrined in the WTO Agreements. These transparency requirements that are monitored through the WTO structure are unique among international organizations and can be strengthened so as to enable the WTO to become a forum for regulatory

²⁹ See Appellate Body Report, United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear, 21, WTO Doc. WT/DS24/AB/R (adopted Feb. 25, 1997).

³⁰ See e.g. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

³¹ See *id.* at ¶ 182.

cooperation, reciprocity and ultimately harmonization. The WTO can also become of increasing importance to private actors who need information about border measures and internal measures that would affect the sale and distribution of their products or services as well as protection of their intellectual property. So far, some of the WTO committees have been far more successful than others in acting as a forum for discussion of regulations and as a repository of notifications of changes in laws, rules or regulations. Two committees have been particularly active: the TBT Committee and the SPS Committee. It is worthwhile to have the success of these committees amplified, expanded and replicated as much as possible in other areas.

3.1 SPS Committee

The Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement) sets out the basic rules on food safety, and animal and plant health standards that Members should follow.³² The SPS Agreement allows Members to set standards on food safety, animal and plant life and health, so long as the standards used are based on science, supported by scientific evidence, are applied only to the extent necessary for their legitimate goal of protecting human, animal or plant life or health, and do not discriminate between countries in an “arbitrary” and “unjustifiable” manner.³³ The emphasis on “application” of the measures is inevitably focused on transparency and due process considerations. The SPS Committee also privileges international standards developed by certain international standard-setting organizations as meeting the scientific justification required under SPS.³⁴ Article 12 of the SPS Agreement establishes the SPS Committee as a forum to discuss issues relating to the implementation of SPS measures. Under Article 7 of the SPS Agreement, entitled “Transparency,” Members must notify about changes in their SPS measures and should provide information about such measures. Notification and discussion regarding SPS regulations happen at the SPS Committee level. Most of the activities and discussions of the SPS Committee

³² SPS Agreement, *supra* note 20 at p. 69 (At the 12th Ministerial Conference in June 2022, Ministers adopted the “SPS Declaration: Responding to Modern SPS Challenges” and recognized new opportunities and challenges brought by the changes in the global agricultural landscape since the adoption of the SPS Agreement in 1995).

³³ See SPS Agreement, *supra* note 20, at pmbl., Art. 2.

³⁴ SPS Agreement, *supra* note 20, at Annex A:3 (the three standard-setting organizations specifically mentioned by the SPS Agreement as appropriate for Member involvement and use for domestic measures are: the Codex Alimentarius Commission; the International Office of Epizootics; and the international and regional organizations operating within the framework of the International Plant Protection Convention).

are available on the WTO website.³⁵ In 2021 alone, the SPS Committee discussed 109 SPS notifications and other communications that related only to COVID-19.³⁶ Members and observers also provided updates on COVID-19 and SPS issues.³⁷ In addition, in five months, Members raised over 20 new Special Trade Concerns (STCs) relating to issues such as: regulation on plastic materials coming into contact with food; pesticide policies and maximum residue levels; and import restrictions on meat, dairy and poultry products.³⁸ The SPS Committee also discussed on its agenda legislation on endocrine disruptors; restrictions on animal products mainly due to the avian influenza, the African Swine Fever and other STCs; phytosanitary restrictions on fresh fruits; and restrictions on bovine meat products and fish products.³⁹ Indeed, these are forums for discussions on important issues that do take place and many issues are resolved in the Committee and do not proceed to dispute settlement (even when we had a functioning Appellate Body).⁴⁰ Most importantly, this committee is a forum for discussions. The WTO SPS Committee works closely with the three sister organizations—the Codex Alimentarius Commission, the International Plant Protection Convention (IPPC), and the International Office of Epizootics (OIE)—and receives updates from those standard-setting bodies.⁴¹ The WTO SPS Committee is also a forum to address: (1) international standards; (2) regional standards; and (3) national standards.⁴² The SPS Committee continuously dedicates activity to hear from experts outside of the regular committee meetings and also creates virtual thematic

³⁵ See generally *The SPS Committee*, WORLD TRADE ORG. https://www.wto.org/english/tratop_e/sps_e/work_and_doc_e.htm (last accessed Nov. 27, 2022) (describing the SPS Committee's work and directing to further information regarding Committee news, meetings, decisions, and other resources).

³⁶ WTO End-Year Trade Monitoring Report, WORLD TRADE ORG., (Nov. 22, 2021), https://www.wto.org/english/news_e/news21_e/factsheetm_e.pdf, at 4.

³⁷ See *id.*

³⁸ See generally Trade Concerns Database, WORLD TRADE ORG., <https://tradeconcerns.wto.org/en>

³⁹ Specific Trade Concerns – European Legislation on Endocrine Disruptors (No. 382), WTO Doc. G/SPS/GEN/1846, WORLD TRADE ORG., (Oct. 21, 2020); Annual Report on the Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Doc. G/SPS/GEN/1908, WORLD TRADE ORG., (May 26, 2021); Summary of the Meeting of 3–5 November 2021, WTO Doc. G/SPS/R/104, World Trade Org., (Dec. 17, 2021) at 3.1.7, 3.2.22, 3.2.25.

⁴⁰ See generally Henrik Horn, Petros Mavroidis, Erik Wijkström, *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees*, COLUMBIA U. L. SCHOOL, CENTER FOR L. & ECON. STUD. Working Paper No. 494 (2013).

⁴¹ See SPS Agreement, *supra* note 20, at Art. 3.4, 12.3, Annex A:3.

⁴² See *id.* at Art. 12.

sessions for Members. One such thematic meeting held in 2021 was on African Swine Fever.⁴³ These discussions are of use to industry and private traders who are affected by SPS measures. The SPS Committee itself is a transparency mechanism that is extremely useful in the area of regulatory cooperation, and it lends itself to negotiations of CMAs when a group of countries seeks to promote a certain standard and approach to an SPS measure, such as in the area of plastic pollution.⁴⁴ The SPS Committee has been one of the most successful committees in the WTO in terms of the number of notifications it receives from Members.

3.2 TBT Committee

The TBT Agreement allows technical regulations and standards so long as they are nondiscriminatory in substance and application and do not create unnecessary obstacles to trade.⁴⁵ The necessity test is satisfied if the objective of the measure is deemed as “legitimate” and the application of it is not more restrictive than necessary.⁴⁶ In that regard, the higher the “nontrade” value, and the extent to which it is consistent with international standards, the easier to justify the trade restriction it imposes. A technical regulation is defined as “a document that lays down product characteristics or their related processes and production methods... with which compliance is mandatory.”⁴⁷ A standard is a “[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is *not* mandatory.”⁴⁸

The TBT Committee is authorized under Article 13 of the TBT Agreement to consult on any matter that relates to the operation of the TBT Agreement.⁴⁹ The work of the TBT Committee has been to review specific TBT measures (laws, regulations and procedures) that are raised by Members as STCs.⁵⁰

⁴³ SPS Committee Thematic Session on African Swine Fever, WORLD TRADE ORG. (Mar. 23, 2021), https://www.wto.org/english/tratop_e/sps_e/sps_thematic_session_230321_e.htm (last accessed Jan. 6, 2023).

⁴⁴ Summary of the Meeting of 14–16 July 2021, WTO Doc. G/SPS/R/102, WORLD TRADE ORG., (Sept. 17, 2021) at 4.1.4; *see also*, Temitope Adeyemi, *A ‘Critical Mass’ Approach to Negotiations in the WTO: A Case Study Analysis*, U. WESTERN ONTARIO 8139 (2021).

⁴⁵ *See generally* TBT Agreement *supra* note 20.

⁴⁶ *See id.* at Art. 2.

⁴⁷ *Id.* at Annex 1.1.

⁴⁸ *Id.* at Annex 1.2 (emphasis added).

⁴⁹ *Id.* at Art. 13.

⁵⁰ *See* Technical Barriers to Trade, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (last visited Nov, 27, 2022).

These objections are usually made in response to the notification requirements of the TBT Agreement. To date, over 700 Special Trade Measures have been raised within the TBT Committee database. In addition, the TBT Committee is a forum where Members exchange experiences that tend to focus on: (1) good regulatory practices, (2) regulatory cooperation among Members, (3) standards, (4) transparency, and (5) conformity assessment procedures.⁵¹ An example of the work done by the TBT Committee is the list of national enquiry points, with 96% of the membership providing contact information for their TBT enquiry points that are set to assist traders.⁵² Since 1995, the TBT Committee received notifications of a proposed technical regulation or conformity assessment from 142 Members, with a total of 43,956 notifications.⁵³ The TBT notifications are usually followed by a period for comments by other Members. In addition, the WTO Secretariat provides the TBT with technical assistance.⁵⁴ I am not naïve to think that notifications alone or discussions at the WTO are in themselves leading to regulatory cooperation, but the importance of this forum should not be lost. It should be enhanced so that better use can be made of it by different stakeholders, including private traders. Within the context of the TBT Committee, WTO Members have agreed to discuss regulatory cooperation in the following areas: (1) climate change; (2) plastic regulation; (3) digital products; (4) cybersecurity; and (5) micro, small and medium enterprises.⁵⁵ These are, once again, areas that are ripe for future CMAs/OPAs, explained in further detail below.

⁵¹ See BERNARD HOEKMAN, REVITALIZING MULTILATERAL GOVERNANCE AT THE WORLD TRADE ORGANIZATION: REPORT OF THE HIGH-LEVEL BOARD OF EXPERTS ON THE FUTURE OF GLOBAL TRADE GOVERNANCE (2018), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2081&context=auilr>

⁵² *The WTO Agreement Series: Technical Barriers to Trade*, World Trade Org. (2021), 27 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2081&context=auilr> (last accessed Nov. 27, 2022) (“To date, 149 (of 159) members (and two observers) have notified their enquiry points to the WTO.”)

⁵³ Twenty-Seventh Annual Review of the Implementation and Operation of the TBT Agreement, G/TBT/47, at 4 (Mar. 2, 2022) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/47.pdf&Open=True>.

⁵⁴ *The WTO Agreement Series: Technical Barriers to Trade*, WORLD TRADE ORG. (2021), 24 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2081&context=auilr> (last accessed Nov. 27, 2022).

⁵⁵ Ninth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4, G/TBT/46, at 6 (2021), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/46.pdf&Open=True>.

4. TRANSPARENCY HAS BEEN CENTRAL TO ANY SUCCESS OF THE WTO

The first successful multilateral agreement concluded at the WTO in recent years is the Trade Facilitation Agreement (TFA).⁵⁶ The TFA's focus is on transparency, and it has also embraced a highly unusual development approach to the implementation of the agreement that provides capacity-building and technical assistance to help with compliance in its provisions.⁵⁷ The recent pandemic has also underscored the WTO's strength as a convener and repository of all pandemic-related laws and restrictions. This is a role that can be enhanced so as to prepare the institution for future emergencies.

4.1 The Trade Facilitation Agreement

One of the few successes, and perhaps the most important success, of the WTO in the negotiations arena since 1995 is the Trade Facilitation Agreement (TFA), which is fundamentally a transparency agreement.⁵⁸ In a way, one may say that the TFA itself is an expansion of Article X. The core of this agreement is about expediting the movement, release and clearance of goods, including goods in transit. The TFA has three main goals: to expedite release of goods that cross international borders; to improve cooperation among customs authorities; and to provide technical assistance and capacity-building on customs and trade facilitation matters to developing and least developed countries.⁵⁹ The OECD has stated that the TFA can reduce trade costs globally between 10 and 18%.⁶⁰

Specifically, the TFA requires Members to publish and make easily accessible a wide variety of information relating to the customs regimes of individual Members so as to enable governments, traders and other interested parties to become acquainted with the legal measures impacting trade.⁶¹ These provisions include required forms and documents for importation and exportation, laws, regulations and penalties, and to make such information available on the

⁵⁶ Agreement on Trade Facilitation, November 27, 2014, WT/L/940 [hereinafter TFA].

⁵⁷ See generally *Trade Facilitation*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (last accessed Nov. 27, 2022).

⁵⁸ See e.g., TFA, *supra* note 56 at Art. 5: Other Measures to Enhance Impartiality, Non-Discrimination, and Transparency.

⁵⁹ *Trade Facilitation*, WORLD TRADE ORG. https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (last accessed Nov. 27, 2022).

⁶⁰ *Why trade facilitation matters in today's global economy*, OECD, <https://www.oecd.org/trade/topics/trade-facilitation/> (last accessed Nov. 27, 2022).

⁶¹ See TFA, *supra* note 56, at Art. 1:1.

internet and update it to the extent possible.⁶² Provisions also exist that require Members to maintain enquiry points to answer reasonable enquiries from governments, traders and other interested parties in matters listed in the agreement.⁶³ The TFA also includes provisions for customs cooperation.⁶⁴ Another unique and new aspect of the TFA—in addition to its focus on transparency—is how it allows Members to take advantage of special and differential flexibilities, with provisions of the agreement being placed into different categories requiring different time periods for implementation.⁶⁵

The TFA is also uniquely novel in that it seems to embrace the development mandate of the WTO by addressing capacity-building, with Members committing to assist and support capacity-building to both developing and least developed countries with the objective of full implementation of the TFA commitments. In 2014, the WTO launched the Trade Facilitation Agreement Facility (TFAF) to provide implementation assistance. TFAF assistance includes helping Members prepare their notifications, technical assistance, and capacity-building and support for LDC Members for accessing assistance from other organizations.⁶⁶ A total of 149 WTO Members have already ratified the TFA.

4.2 The WTO's Transparency Role in a Pandemic

The COVID-19 pandemic showed us that some problems are global and cannot be solved by any single nation alone given the interconnected world economy that no longer allows for large periods of isolation of any nation state without devastating economic and political consequences. The COVID-19 pandemic caused severe shortages of medical personal protective equipment (PPE), among other critical products, at a time when there was severe disruption of global value chains and in the face of domestic restrictions. The WTO was in a good position to monitor the restrictions on movement of medical supplies and be able to move toward removing them. From mid-October 2019 when the pandemic started in China until mid-May 2020 when it shut down the world economy, 363 new trade and trade-related measures were notified

⁶² *See id.*

⁶³ *See TFA, supra* note 56, at Art. 1:3 Enquiry Points.

⁶⁴ *See TFA, supra* note 56, at Art. 12: Customs Cooperation.

⁶⁵ *See generally TFA, supra* note 56, at Section II: Special and Differential Treatment Provisions for Developing Country Members and Least-Developed Country Members.

⁶⁶ *The Facility*, WORLD TRADE ORG., <https://www.tfafacility.org/facility> (last accessed Jan. 29, 2023) (In addition to TFAF there is the World Bank's Trade Facilitation Support Program (TFSP) and the Global Alliance for Trade Facilitation).

under the WTO Agreements, with 165 of them being trade-restrictive; 256 out of the 363 new measures were COVID-19-related measures notified at the WTO. In April 2020, the WTO General Council issued a warning that its Members should exercise “maximal restraint in the use of export restrictions and other measures that could disrupt supply chains” and called on Members to “improve transparency on new COVID-19 caused trade-related measures.”⁶⁷ Sixty-five WTO Members agreed at the WTO meeting to share information on COVID-19 trade-related measures. By October 2020, WTO Members had repealed 39% of the restrictive measures on trade in goods adopted immediately after the start of the pandemic, while the remaining 124 COVID-related measures in the heavily impacted services sector were trade-facilitating.⁶⁸ The constant monitoring, notification and collection of regulatory information by the WTO led to the establishment of the COVID-19 Trade Facilitation Repository—a joint platform created by the partnership of the WTO, WHO, United Nations Conference on Trade and Development (UNCTAD), the Commonwealth, the International Trade Center (ITC), the World Customs Organization (WCO), and the Global Alliance for Trade Facilitation (Global Alliance).⁶⁹ The Repository consolidates information on trade-facilitation measures adopted by key stakeholders and provides access to this information within a single database. By March 2020, the Members were using Article 31 of TRIPS to permit compulsory licensing for COVID-19 vaccines and medicines. By the end of July 2020, the WTO trade monitoring activities recorded 47 COVID-related measures regarding trade-related IP rights taken by 24 Members. In sum, the WTO provided systems for its Members that facilitated trade and provided transparency in the chaos that the pandemic presented in 2020. With news that more such pandemics are in our future, it is important to expand and strengthen the WTO’s notification system specifically as it relates to global trade flow of essential medical goods, equipment and supplies.

⁶⁷ *WTO report finds growing number of export restrictions in response to COVID-19 crisis*, WORLD TRADE ORG., https://www.wto.org/english/news_e/news20_e/rese_23apr20_e.htm (last accessed Jan. 29, 2022).

⁶⁸ WORLD TRADE ORGANIZATION, OVERVIEW OF DEVELOPMENTS IN THE INTERNATIONAL TRADE ENVIRONMENT: ANNUAL REPORT BY THE DIRECTOR-GENERAL, WTO Doc. 20-8541, at 3 (2022).

⁶⁹ See generally COVID-19 Trade Facilitation Repository, WORLD TRADE ORG., <https://www.tfafacility.org/media-resources/covid-19-trade-facilitation-repository> (last accessed Jan. 8, 2022) (Global Alliance is a public-private partnership for trade-led growth, supporting governments in developing countries and LDCs in implementing the WTO’s TFA).

5. PLURILATERALS AND THE WTO

5.1 Plurilaterals Concluded

Traditional plurilaterals, also known as Article II:3 plurilateral agreements, are contained in Annex 4 of the WTO Charter. These plurilateral agreements require consensus to be incorporated into the WTO. Two such agreements are: the *Agreement on Civil Aircraft* and the *Government Procurement Agreement* (GPA).⁷⁰ These agreements, within some limits, can be applied in a discriminatory manner where only signatories directly benefit from them. Because consensus is required to add a new plurilateral agreement under Annex 4, it has been difficult to proceed with any.

Open plurilateral agreements (OPAs), in contrast, are critical mass agreements (CMAs) that have been concluded when a group of WTO Members is interested in pursuing cooperation. The agreement is “open” in that it is applied in a nondiscriminatory manner. That means that those who have not signed it can also benefit from it without any obligation. These agreements only work if there are not serious concerns about free-riding. Agreements that promote certain minimum standards of transparency or promote regulatory cooperation may be appropriate for OPAs or CMAs. It has been argued that the health of the multilateral system can only be regained through coalitions of “like-minded” Members to conclude open plurilateral agreements “within the WTO.”⁷¹ OPAs traditionally have been concluded when the majority of Members in the world produce the majority of certain products or services agree to it.

5.1.1 The Information Technology Agreement

The Information Technology Agreement (ITA) is an OPA that was concluded in 1996 at the first Ministerial Conference in Singapore.⁷² From its original 29 participants, the agreement now includes 82 signatories and thus covers 97% of world trade in information technology products.⁷³ The agreement is specif-

⁷⁰ Agreement on Trade in Civil Aircraft, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, 3248 U.N.T.S. 1 (2015); Government Procurement Agreement, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, 3008 U.N.T.S. 49 (2012).

⁷¹ Alan Wolff, *The Future of Multilateralism and the Role of Plurilaterals* remarks at Nanyang Technological University, Singapore, Nov. 16, 2021, <https://www.piie.com/sites/default/files/documents/wolff-2021-11-16.pdf>.

⁷² General Agreement on Tariffs and Trade: Information Technology Agreement, Mar. 25, 1994, WTO Doc. WT/MIN(96)/16, https://www.wto.org/english/docs_e/legal_e/itadec_e.pdf.

⁷³ Information Technology Agreement—an explanation, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm (last accessed Oct. 26, 2022).

ically aimed at tariff reduction: it requires participant Members to bind their customs duties at zero for IT products covered, which in 1996 included goods relating to products such as computers and semiconductors. Technological change and advancement motivated participants to expand the product coverage of the ITA. After several years of negotiation over 17 rounds, in 2015, participants agreed to expand the scope of the ITA to cover an additional 201 products.

5.1.2 Agreement on Regulatory Principles of Basic Telecommunications (GATS Telecom Reference Paper)

WTO Agreements regarding the evolving telecommunications sector also reflect successes of OPAs. During the Uruguay Round, the 1994 General Agreement on Trade in Services (GATS) was negotiated, along with its Annex on Telecommunications, which established guidelines on regulating the use of public telecommunications transport networks and services.⁷⁴ In 1997, WTO Members finalized negotiations on basic telecommunications, which culminated in the publication of the GATS Telecom Reference Paper.⁷⁵ This Reference Paper is only legally binding on WTO Members who choose to adopt it in their schedules.⁷⁶ Currently, 75% of all WTO Members have made commitments for market access and national treatment in trade in telecommunications services, and 64% have adopted the principles of the Reference Paper.⁷⁷ These commitments greatly reduce trade barriers for telecommunications providers by allowing transmission of services across borders, foreign direct investment, and establishment of new telecommunications companies.

5.1.3 The Pharmaceutical Agreement

The Pharmaceutical Agreement (Pharma Agreement) was entered into in 1994 (during the Uruguay Round) and is another example of an open plurilateral agreement (OPA).⁷⁸ It is an OPA in that only the signatories are obligated

⁷⁴ GATS, *supra* note 5, at Annex on Telecommunications.

⁷⁵ José-Antonio Monteiro, Hold the line: The evolution of telecommunications provisions in regional trade agreement, WTO Staff Working Paper, No. ERSD-2021-7, WORLD TRADE ORG. (Feb 24, 2021) <https://www.econstor.eu/bitstream/10419/231364/1/1749361566.pdf>.

⁷⁶ Telecommunications Services: Reference Paper, Apr. 24, 1996, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm

⁷⁷ Telecommunications commitments and exemptions, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm (last accessed Jan. 16, 2023).

⁷⁸ General Agreement on Tariffs and Trade: Trade in Pharmaceutical Products, Mar. 25, 1994, WTO Doc. L/7430, <https://docs.wto.org/gattdocs/q/GG/L7599/7430.PDF> [hereinafter WTO Pharma-Agreement].

under it, but the signatories committed to implementing the outcome on an MFN basis. Since 1994, membership of the WTO has expanded, including China and Russia, but they are not currently signatories to the Pharma Agreement (with the exception of Macao).⁷⁹ The Pharma Agreement eliminated tariffs with 22 Members on around 7,000 pharmaceutical products, their derivatives and chemical intermediaries. As of 2016, 34 Members control 65% of the global pharmaceutical trade and are covered under this agreement. The Pharmaceutical Agreement should have its scope extended to also include medical supplies, medical equipment and technology, and personal protective equipment.

The foregoing shows that OPAs or CMAs work if there is a small group of like-minded countries who produce the majority of the products in an area, are not worried about the free-rider problem, and are willing to apply an agreement on an MFN basis to all the WTO Members. As the Telecom Reference Paper shows, agreements on best regulatory practices are also ripe for OPA use. Other areas have been subject to ongoing negotiations that can be used as OPAs or CMAs, particularly if the focus remains on regulatory cooperation and harmonization and transparency, such as: electronic commerce; agreement on micro, small and medium enterprises; environmental goods agreement; plastic pollution; fossil fuel subsidy; or investment facilitation for development, among others. Most of these agreements have been subject to joint-statement initiatives (JSIs) made by Members since 2017. This is not an exhaustive list and is supplemented by those discussed below.

5.2 Potential for Future Open Plurilateral Agreements (PA)

5.2.1 An agreement on electronic commerce and digital trade

Although at this point it is not clear that this will be an OPA and applied on an MFN basis, the negotiations have included 86 Members with over 90% of global trade that have agreed to a need for an open, transparent, predictable environment in facilitating electronic commerce.⁸⁰ The six main themes include: enabling e-commerce; openness and e-commerce; trust and digital trade; cross-cutting issues; telecommunications; and market access. The key sticking point for negotiators in this area is the issue of data flow limitations; some claim that doing so will enhance intellectual property rights and reduce financial crimes, while others worry that it will push companies to establish

⁷⁹ *The WTO's Pharma Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/pharma_ag_e/pharma_agreement_e.htm.

⁸⁰ Joint Initiative on E-Commerce, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm (last accessed Jan. 29, 2023).

a commercial presence solely to comply with regulations present in certain parts of their supply chains.⁸¹

5.2.2 Micro, small and medium enterprises (MSME) agreement

In December 2017, 87 WTO Members issued a joint initiative statement (JSI) that established an informal working group for micro, small and medium enterprises (MSME).⁸² The group arose from the concern that MSMEs are left out of international trade because they lack information on requirements and opportunities and they generally do not have sufficient capital to sustain operations abroad.⁸³ Although the group is voluntary and nonbinding, in December 2020 it adopted a package of six recommendations to address the foregoing issues for MSMEs in international trade. These recommendations are: including MSME-related information in WTO trade policy reviews; ensuring access to relevant information; facilitating trade for MSMEs; promoting participation from MSMEs in developing regulations; supporting the implementation of the 2019 Decision on the WTO Integrated Database; and ensuring MSMEs have access to finance across borders.⁸⁴

5.2.3 Environmental goods agreement

Negotiations are also ongoing for an environmental goods agreement (EGA) that seeks to eliminate tariffs on products that can help toward generating clean energy, managing waste, and combating pollution in all forms. WTO Members began plurilateral negotiations for an EGA in July 2014, and the number of participants has steadily grown since then, currently reaching 46 WTO Members.⁸⁵ However, the EGA remains unfinished as of late 2023.

⁸¹ Joint Statement Initiative on Electronic Commerce, WTO Doc. WT/L/1056, WTOPLURILATERALS, https://wtoplurilaterals.info/plural_initiative/e-commerce/ (last accessed Jan. 17, 2023).

⁸² World Trade Organization, Ministerial Statement of 13 December 2017, WTO Doc. WT/MIN(17)/58/Rev.1.

⁸³ See Loly A. Gaitán G., *Trade Agreements and the World Trade Organization: Lessons for the Micro, Small, and Medium-Sized Enterprises Joint Statement Initiative*, INT'L INST. FOR SUSTAINABLE DEVELOPMENT (Aug. 2020), <https://www.iisd.org/system/files/2020-09/trade-agreements-wto-en.pdf>.

⁸⁴ See Micro Small and Medium Enterprises (MSMEs), WTO PLURILATERALS, https://wtoplurilaterals.info/plural_initiative/micro-small-and-medium-enterprises-msmes/ (last accessed Jan. 13, 2023).

⁸⁵ See Environmental Goods Agreement (EGA), WORLD TRADE ORG., https://www.wto.org/english/tratop_e/envir_e/ega_e.htm (last accessed Jan. 15, 2023); Environmental Goods Agreement, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/other-initiatives/environmental-goods-agreement> (last accessed Jan. 15, 2023).

5.2.4 Potential agreement on plastic pollution

Another example of a potential future OPA is one on plastic pollution. Unlike the plurilateral agreements discussed thus far, the primary impetus for an agreement to eliminate plastics pollution has come from UN bodies rather than the WTO. However, the WTO continues to maintain informal dialogue on reducing plastic pollution and support production of environmentally sustainable plastics.⁸⁶ In 2019, over 180 nations agreed to the “Plastics Amendments” to the Basel Convention on the Transboundary Movement of Hazardous Wastes.⁸⁷ These amendments aim to enhance regulation of plastic waste movement across borders by clarifying which types of plastic waste are presumed to be hazardous and are therefore required to undergo the prior informed consent (PIC) procedure.⁸⁸ This procedure ensures that exported waste is managed in an environmentally friendly manner by requiring the exporting country to notify the importing country and the importing country to consent to importation and issue a “movement document” and a confirmation of the disposal of the waste.⁸⁹ The WTO can be an appropriate forum to agree on certain rules on the problem of plastic pollution.

5.2.5 Fossil Fuel Subsidy Reform Initiative

Twelve WTO Members delivered a statement for the reform of fossil fuel subsidies at the 2017 Ministerial Conference, and currently 48 Members co-sponsor the Fossil Fuel Subsidy Reform Initiative.⁹⁰ The ministerial statement primarily establishes the Members’ aims, without concrete mechanisms on how to reach those goals.⁹¹ The statement illustrates that all of the sponsoring Members agree to reduce fossil fuels because they encourage wasteful

⁸⁶ Informal dialogue on plastics pollution and environmentally sustainable plastics trade news archives, WORLD TRADE ORG., https://www.wto.org/english/news_e/archive_e/ppesp_arc_e.htm (last accessed Jan. 13, 2022).

⁸⁷ BC-14/12: Amendments to Annexes II, VIII and IX to the Basel Convention.

⁸⁸ Basel Convention Plastic Waste Amendments, BASEL CONVENTION, <http://www.basel.int/Implementation/Plasticwaste/Amendments/Overview/tabid/8426/Default.aspx> (last accessed Jan. 13, 2023).

⁸⁹ See Plastic Waste and the Basel Convention, GRID-ARENDA & BASEL CONVENTION SECRETARIAT (July 27, 2021), <https://storymaps.arcgis.com/stories/63f88d8da65841f3a13ba4018d26361d>; See also Tallash Kantai, *The Road to a Treaty on (Marine) Plastic Pollution*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Sept. 26, 2022), <https://www.iisd.org/articles/policy-analysis/treaty-marine-plastic-pollution>.

⁹⁰ Fossil Fuel Subsidy Reform (FFSR): Background Information for Press, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/mc12_e/ffsr_press_background.pdf (last accessed Jan. 13, 2023).

⁹¹ See World Trade Organization, Ministerial Declaration of 14 December 2021, WTO Doc. WT/MIN(21)/9/Rev.1.

consumption, and to create a clear timeline for the phase-out of fossil fuel subsidies. The ministerial statement also addresses the sponsoring Members' desire to adopt solutions that take into account the realities of developing countries' economies and are transparent for all WTO Members.⁹²

5.2.6 Investment facilitation for development

Investment facilitation for development has been a topic of discussion at the WTO for several years. In 2017, 70 WTO Members issued a Joint Statement on Investment Facilitation for Development,⁹³ and 98 Members issued a second Joint Statement on Investment Facilitation for Development in 2019.⁹⁴ In September 2020, the WTO formally launched negotiations toward an Agreement on Investment Facilitation for Development. These negotiations remain ongoing, and address issues like transparency and reliability of investment measures, making administrative procedures related to investment more efficient, promoting sanguine business conduct at all levels, and ensuring the provision of assistance for developing and least-developed countries.⁹⁵

5.3 Opposition to and Criticism of OPAs

The road to OPAs is not without opposition at the WTO, as should be expected. In 2021, India and South Africa circulated a communication to all WTO Members at the meeting of the General Council entitled: "The Legal Status of 'Joint Statement Initiatives' and their Negotiated Outcomes."⁹⁶ India and South Africa argue that OPAs are WTO-inconsistent because they are not being negotiated as Annex 4 plurilateral agreements that require WTO

⁹² *See id*; *see also* Fossil Fuel Subsidy Reform (FFSR), WTO PLURILATERALS, https://wtoplurilaterals.info/plural_initiative/fossil-fuel-subsidy-reform-ffsr/ (last accessed Jan. 13, 2023).

⁹³ World Trade Organization, Ministerial Statement of 13 December 2017, WTO Doc. WT/MIN(17)/59.

⁹⁴ World Trade Organization, Ministerial Statement of 22 November 2019, WTO Doc. WT/L/1072/Rev.1.

⁹⁵ *See* Investment facilitation for development, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm (last accessed Jan. 13, 2023); *See also* Investment Facilitation for Development, WTO PLURILATERALS, https://wtoplurilaterals.info/plural_initiative/investment-facilitation-for-development/ (last accessed Jan. 13, 2023); Martin Dietrick Brauch, Investment Facilitation for Sustainable Development: Getting it right for developing countries, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Aug. 26, 2019), <https://www.iisd.org/articles/policy-analysis/investment-facilitation-sustainable-development-getting-it-right>

⁹⁶ The Legal Status of 'Joint Statement Initiatives' and their Negotiated Outcomes, WTO Doc. WT/GC/W/819, Feb. 19, 2021.

Member consensus. They argue that OPAs are contrary to the consensus-based decision-making of the Marrakesh Agreement enshrined in Articles III:2, IX, and X of said Agreement. They contend that such agreements violate procedures for amendment to the WTO Agreements as they are not merely amendments to schedules. In sum, India and South Africa argue that the OPA or JSI process is undermining multilateralism and consensus-based decision-making, and both are fundamental underlying principles of the WTO.⁹⁷ I argue, however, that the OPA and JSI are consistent with both the multilateral and consensus-based requirements of the WTO because subcategories of WTO Members have been and will continue to enter into agreements with each other, and divorcing that from the multilateral institution will only further weaken the WTO. Not allowing OPAs to be included within the WTO will only weaken the international rule of law and harm many smaller and weaker economies. OPAs acknowledge the values of multilateralism (as opposed to other non-WTO free trade agreements) when they apply OPAs on an MFN basis without requiring non-signatories to take on any of the obligations. I do recognize the history of imperialism and colonialism that has for centuries allowed a small group of countries to force their rules on the rest of the world, and perhaps this is partly responsible for the reaction by India and South Africa (to this and many other multilateral initiatives in Geneva). However, today, the choice is either reverting to the power-oriented world where only powerful and hegemonic powers dictate the rules, dividing us into spheres of influence, or, in absence of consensus and strong leadership, allowing a core group of WTO Members to enter into agreements that promote overall global transparency, regulatory cooperation and reciprocity. It is for that reason that I advocate the use of OPAs, as it is the best protection we have in maintaining a rule-based system in absence of consensus or strong and unchallenged leadership by WTO Members.

6. CONCLUSION

The WTO must focus and enhance its role in promoting transparency for its Members and its important role as a forum for regulatory cooperation. WTO Members should be allowed to enter into OPAs under the auspices of the WTO, particularly if they focus on good regulatory practices and transparency. The important work of WTO technical committees, specifically its TBT and SPS Committees, must be promoted and discussed widely so that global stakeholders as well as the general public adequately appreciate them. Technical work is boring and tedious and does not grab the attention of news media,

⁹⁷ *See id.*

yet it is vitally important to maintaining and promoting international rule of law. There are no other international organizations that are as effective in this area as the WTO. The WTO strengthens and complements the work of other international organizations, including standard-setting organizations.⁹⁸ The WTO must rely on its technical expertise and its technocratic staff to survive the rising political tensions among its Members that will inevitably make any multilateral negotiation unlikely, in the short term, to succeed. Although India and South Africa (and maybe others) oppose the use of OPAs, so long as such agreements limit their scope to promoting fundamental values of transparency and good regulatory practices, the world will benefit from them.

⁹⁸ See e.g., SPS Agreement, *supra* note 20, at Annex A:3 (the three standard-setting organizations specifically mentioned by the SPS Agreement are: the Codex Alimentarius Commission; the International Office of Epizootics; and the International Plant Protection Convention).