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# Reform of global trade governance: the role of the European Union

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## ABSTRACT

The World Trade Organization (WTO) faces an existential crisis. Nominations to the Appellate Body (AB) are deadlocked; tariffs are being raised and retaliated against; and substantive negotiations are stalled. A number of Members, including European Union (EU or the Union) and its Member States, are convinced that the WTO is in need of profound reform, *inter alia*, with a view to integrating developing countries further, addressing unfair subsidies and state-owned enterprises (SoEs), and optimizing the dispute settlement mechanism (DSM). The EU has recently presented several reform proposals. It has also tightened its domestic tools for enforcing trade obligations and is cooperating with like-minded partners outside the institutional framework of the WTO. The present article looks into the WTO's challenges from a European perspective, with a critical analysis of the EU's proposals for reform, while also highlighting its approach on tackling issues that affect the international economic order outside the WTO.

## KEYWORDS

Global trade governance; World Trade Organization; appellate body; plurilateral agreements; European Union

## I. Introduction

Although it celebrated its 25<sup>th</sup> anniversary only in 2020, the WTO is in an existential crisis today. With 164 Members, its membership has grown considerably since 1995, but has also become very diverse, adding to the complexity of the organization's decision-making processes. The WTO's lawmaking process is cumbersome and largely fails to generate new trade rules apt for the 21<sup>st</sup> century patterns of globalization.<sup>1</sup> Its crown jewel, the DSM, is facing unprecedented challenges with the defunctness of the AB since December 2019.<sup>2</sup> Last but not least, trade wars are back. A number of Members, including the Union and its Member States, are convinced that the WTO and global trade governance are in need of profound reform.

This special issue deals with the theoretical and empirical research on the EU's role in global governance, as well as its interactions with international institutions.<sup>3</sup> In this regard, this article analyzes the EU's role in an organization that is fundamental to the international order – the WTO, as well as its influence on the multilateral trading system and the making of international trade rules. What are the current opportunities and

constraints faced by the EU to reform the multilateral trading system? – the article aims to address this question. We look into the challenges from the perspective of the EU, the extent and specificity of the EU's involvement in the multilateral trade governance process, and the EU's potential to diffuse norms, standards, and ideas with respect to multidimensional aspects of international trade. Our analysis also includes a critical analysis of the Union's proposals for the reform of the global trade regime.

While much of the scholarship deals with specific analyses of the EU's recent proposals,<sup>4</sup> we aim to provide a bird's eye view of the EU's role in modernizing the WTO and reflect on the future of global trade governance in general. Wouters and Raina discuss the EU's leadership with respect to multilateralism vis-à-vis regionalism; and Antimiani and Salvatici discuss the same from the perspective of policy making. Borovikov and Tuominen's contribution discusses the practicalities of the implementation of the decisions of WTO rulings by the Court of Justice of the EU and its implementation with the EU's framework. Weiß and Furculita underscore the legality of the trade enforcement regulation 654/2014 in detail from the lens of WTO law, free trade agreements (FTAs), and general international law. Although, Leblond and Viju-Miljusevic discuss the challenges to the EU's trade policies, their contribution gravitates mainly around the internal conflicts within the EU's founding documents and its legal framework.

While the scholarship on EU's role in international trade can be traced on multiple trajectories, all of which are important and relevant, this article aims to supplement the literature by providing a holistic analysis of the practical aspects of current challenges and opportunities faced by the EU and its potential to reform the WTO as robust and an efficient organization.

The reform process at the WTO is chosen as a case study because trade rules are still governed heavily at the multilateral level, i.e. at the WTO, and much of the international trade law framework in most jurisdictions is based on WTO law. However, current trends highlight that the enforcement of international trade rules is taking place increasingly outside the WTO framework and through domestic jurisdictions, especially in the EU. In this regard, we also analyze the EU's non-multilateral approaches pertinent to the subject-matter of this article.

The article unfolds as follows. In [Section II](#), we analyze the EU's role and its positioning in the reform of international trade governance. In doing so, we underscore the current developments and the stance that the EU has adopted in the recent past. [Section III](#) delves into the efforts by the EU to reform the WTO, and the challenges it faces in the (re-) making of international trade law. In doing so, we highlight how the EU is not only aiming to work on a multilateral level but has also attempted to strengthen its domestic tools as a safety net against innovative methods used by certain WTO Members to circumvent the gaps in international trade regulations. [Section IV](#) concludes and provides some reflections on the future.

## **II. The EU's path to reform international trade**

The EU is a global trade power.<sup>5</sup> There is no other area of international relations where the Union is so widely recognized as a world class player.<sup>6</sup> This has much to do with the very strong legal powers which have been conferred upon the Union by its Member States in the area of trade: the 'common commercial policy', as it is officially called, constitutes one

of the exclusive competences of the Union.<sup>7</sup> For nearly 60 years, the European Commission has built a unique reservoir of expertise and negotiation capacities within its Directorate-General Trade. It is the Commission which speaks for the EU at the WTO in Geneva, and it is the Commission which negotiates all trade and investment agreements for the Union.<sup>8</sup>

While the EU has always professed its commitment to multilateralism, which is enshrined in the TEU<sup>9</sup> and has been reconfirmed repeatedly, including in recent policy documents,<sup>10</sup> the area of trade offers an interesting illustration of the Union's pragmatism in this respect. In the early years of the millennium the EU had put the WTO first. After a series of failed ministerial conferences, though, the European Commission reconsidered its strategy in 2006<sup>11</sup> and started to prioritize the negotiation of deep and comprehensive preferential trade agreements with the EU's strategic partners. Especially during the years of the Trump Administration in the United States (US), the Union prioritized and accelerated a (re-) negotiation of bilateral trade and partnership agreements with such partners, resulting in important new agreements with, *inter alia*, Canada, Korea, Japan, Mexico, Singapore and Viet Nam, and ongoing negotiations with Australia and New Zealand. Nevertheless, the European Commission has always insisted that the EU remains 'committed to open trade anchored in the rules-based multilateral trading system' and that '[t]he EU's multilateral obligations in the [WTO] are the basis of our trade relations around the world'. In a 2017 Communication, the Commission boasted that the EU 'is leading the way on reshaping the WTO negotiating agenda, seeking to modernize world trade rules and to restore the primacy of the WTO in rule-making, especially at a time of increasing protectionism'.<sup>12</sup> In this regard, the outcome of the meeting of the European Council – i.e. the Union's periodical gathering of the heads of state and government of the Member States – of 28 June 2018, is important to iterate. In its conclusions, adopted in a context of growing trade tensions, the European Council noted the importance of a rules-based international trade order and highlighted its commitments towards modernizing the same.<sup>13</sup>

In response to this invitation, on 18 September 2018, the European Commission published a comprehensive concept paper on WTO modernization as a basis for its discussions with the European Parliament, the Council and the other Members of the WTO.<sup>14</sup> Still more recently, the von der Leyen Commission has sought to 'strategize' its trade policy. In the 2021 Trade Policy Review, the Commission pointed to a new, less 'naïve' approach.<sup>15</sup> It focuses on 'open strategic autonomy', which combines 'assertively defending the EU's interests, protecting the EU's economy from unfair trade practices' with sustainability, fairness and rules-based cooperation. Its aims are to project the EU as a global norm-maker, by leading the way, for example, on regulatory cooperation, promotion of sustainable value chains, and the reform of the WTO. On the latter, the Commission reiterated that 'support for effective rules-based multilateralism is a key geopolitical EU interest'.<sup>16</sup>

Interestingly, on the same date the Commission published an annex to the aforementioned communication, entitled *Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System* (2021 Document).<sup>17</sup> In the 2021 Document, the Commission considered that 'the EU has a fundamental strategic interest in ensuring the effectiveness of the WTO. Not only is trade vital for our economy; promoting rules-based international cooperation is the very essence of the European project. The EU must therefore play a leading role in creating momentum for meaningful WTO reform'.<sup>18</sup> To reform the WTO,

the Commission proposes mainly (i) restoring a fully functioning WTO DSM with a reformed AB; and (ii) restoring the effectiveness and credibility of the WTO as a forum for the negotiation of trade rules and further liberalization. [Section III](#) delves into these action points in detail.

### III. The EU and the modernization of international trade law

The EU has played a significant role in the reform of the making of international trade law, particularly in the context of WTO rules, in the recent past. This section aims to highlight the EU's efforts in proposing reforms and underscores the key challenges that it may face in the future to successfully implement its goals for global trade governance reform, while also highlighting the EU's efforts to reinvigorate international trade rules outside the WTO framework.

#### A. WTO dispute settlement reform

It may be recalled that the blocking of the (re-) appointment of members of the AB by the US started during the Obama administration but was expanded by the Trump administration to *all* nominations.<sup>19</sup> As a result, on 10 December 2019 the terms of two of the three remaining members expired, depriving the AB of a quorum to hear appeals and making it *de facto* defunct. The US' grievances are many, including, delays in the adjudication process (reports should be circulated within 90 days of an appeal), and the AB's (perceived) judicial overreach.<sup>20</sup>

The problem with the presently surviving single tier DSM, is that it creates uncertainty regarding the outcome of trade disputes.<sup>21</sup> If panel reports are appealed, the appeals go 'into the void'.<sup>22</sup> In essence, there is no outcome for the dispute until either the parties agree on a solution themselves, or until the AB becomes operational again.<sup>23</sup> This uncertainty creates two possibilities: either WTO Members will not use the DSM at all with the fear of it being appealed into the void and the dispute is inevitably frozen, or they take a risk to bring a dispute in the hope that the AB would be restored. Both are highly risky as WTO litigation generates considerable financial burdens for Members.

Being aware of the urgency of the matter, the EU had, together with a number of other WTO Members, submitted proposals to the WTO's General Council in December 2018 to amend the Dispute Settlement Understanding (DSU).<sup>24</sup> However, the US denounced the same.<sup>25</sup> In December 2020, 121 WTO Members proposed to reinvigorate the appointment process.<sup>26</sup> They noted the urgency in re-establishing an appellate mechanism in order to effectively carry out its functions. The proposal was aimed at appointing new AB members. Unfortunately, the proposal was never adopted. During a meeting held in July 2021, WTO Members urged for the restoration of the AB. Mexico highlighted that the extensive number of WTO Members submitting a proposal for AB reforms reflected a common concern regarding the AB, and that it was seriously affecting the whole DSM, working against the best interest of all WTO Members.<sup>27</sup> Among the many WTO Members that stood by Mexico's statements was the EU. It stated that a fully functioning WTO DSM was fundamental for a rules-based trading system, and that the restoration should be addressed as a priority. It also noted that all WTO Members must share the responsibility

to restore the DSM and fill vacancies for the AB as laid down under the DSU procedural requirements.<sup>28</sup> The Commission also noted that the task should ‘not be linked to the other aspects of WTO reform’.<sup>29</sup>

In this crisis situation, the EU has initiated and has sought positive responses from other Members to set up an interim mechanism through the use of arbitration procedures under the DSU. The idea of using the arbitration procedures provided under Article 25 of the DSU as a work-around to a non-functional AB, initially prompted by Andersen et. al.,<sup>30</sup> caught some speed, with the EU agreeing to this procedure with Canada<sup>31</sup> and Norway.<sup>32</sup> The agreement, now called the Multiparty Interim Appeal Arbitration Agreement (MPIA), has been notified to the WTO in April 2020.<sup>33</sup>

The MPIA, as the name suggests, is an interim arrangement in the absence of the AB to carry on with appellate review of WTO disputes between MPIA signatories. It is a ‘stoppage measure’.<sup>34</sup> It seeks to preserve the multilateralized dispute settlement rules, even without the support of key influential trade players like the US. The vision is not to create a separate appeal mechanism. But, while systemic concerns regarding the WTO DSM are addressed, in particular, the appellate review, the MPIA would serve as a means to uphold security and predictability in the system by providing a temporary platform to resolve disputes. The review is limited to the issues of law that are covered in the panel reports. The mandate of the arbitrators is to uphold, modify or reverse the legal findings and conclusions of the panel.<sup>35</sup> In this respect, their mandate mirrors the one that the members of the AB possessed, and also uses the same terminology provided under Article 17.13 of the DSU.

While keeping to the spirit of the AB in terms of adjudicatory procedures, the MPIA also includes reforms that address some of the concerns which led to the AB’s demise in the first place. One such concern is that of judicial activism. To resolve this, the MPIA limits the authority of the arbitrators to address issues that are necessary for that particular dispute. Arbitrators are also limited to address only those issues that have been raised by the parties.<sup>36</sup> Another issue that was raised against the AB was that it routinely violated the timeframe within which it had to release its report.<sup>37</sup> Article 17.5 of the DSU restricts the time-period of the AB’s rulings to 90 days. The MPIA now places the power of extending the time period to the parties to make that decision.<sup>38</sup> It further enables parties to streamline the process by, *inter alia*, page and time limits.<sup>39</sup> Although these reforms do not tackle all the systemic concerns surrounding the WTO DSM, the MPIA is a significant step towards addressing problems that have plagued the AB for a long time.

This temporary solution, based on Article 25 DSU, has been explicitly rejected by the US, which considered the EU for a long time part of the problem.<sup>40</sup> Interestingly, in the 2021 Document, the Commission for the first time acknowledged that ‘[t]he United States has raised a number of valid concerns about certain adjudicative approaches of the AB as well as about specific rulings in certain cases’ and that ‘a meaningful reform is needed’.<sup>41</sup> The Commission responds to the American criticism by stating, *inter alia*, that the WTO adjudicators are not bound by precedents ‘*but should take into account previous rulings to the extent they find them relevant in the dispute they have before them*’.

On the face of it, this seems to go a long way in addressing US complaints: strict limitation of the role of the AB to legal issues raised on appeal; mandatory timelines; no system of precedents. However, while at their June 2021 summit the EU and the US made a commitment to work together cooperatively to achieve meaningful WTO reform,

including advancing ‘the proper functioning of the WTO’s [...] dispute settlement system’,<sup>42</sup> the US reaction to the reform proposals for the AB at the meeting of the DSB of 22 February 2021 came as a cold shower: it stated that it was ‘not in a position to support the proposed decision’ and that the US ‘continues to have systemic concerns with the Appellate Body’, adding that it ‘has raised and explained its systemic concerns for more than 16 years and across multiple US Administrations’.<sup>43</sup>

While the EU and other WTO Members who support the MPIA<sup>44</sup> proclaim that it is a stopgap measure, there has been scholarly research to highlight its advantages and disadvantages.<sup>45</sup> The advantages, *inter alia*, include legal certainty, and predictability of the WTO DSM.<sup>46</sup> However, there also several disadvantages.<sup>47</sup> First, only few WTO Members have signed up to the MPIA. This means that the MPIA can prohibit the appeal into the void only in a very limited number of disputes. It cannot widely and systemically prevent the freezing of the WTO DSM. Second, the MPIA lacks legal bindingness and enforceability. There is a possibility for MPIA signatories to deny the resolution of disputes. Third, the MPIA does not address concerns where the arbitrators do not comply with the restriction of limiting their analysis to the issues of law and legal interpretations of the panel reports.<sup>48</sup>

Irrespective of the advantages and disadvantages, it is important to stress once again that the MPIA cannot be a permanent solution. It can only operate as a temporary measure. The end goal would still be to accelerate the discussions on resolving the broader issues surrounding the DSM, and incorporate the concerns of WTO Members into a meaningful solution.

While there has been little momentum in the restoring the rules-based order at the WTO, we may see a slow and gradual progress in the future. With the change in administration in the US (from Trump to Biden), the outlook on WTO reforms has slightly changed. In an October 2021 speech, Ambassador Tai, the new US Trade Representative, noted that dispute settlement reforms are not to be confused with the restoration of the AB or going back to the way it used to be. She stated that it was about ‘revitalizing the agency of Members to secure acceptable resolutions. A functioning dispute settlement mechanism, however structured, would provide confidence that the system is fair. Members would be more motivated to negotiate new rules’.<sup>49</sup> These remarks highlight that WTO Members indeed intend to negotiate on dispute settlement reforms. However, it seems like the restoration of the AB might not be on the negotiating agenda. This is what a former AB Member had also predicted: that the future appellate mechanism will look drastically different from how the AB was set up.<sup>50</sup>

Unlike the US, the EU is adamant on upholding the rules-based multilateral trading system. It intends to do so with a robust DSM. In this regard, it has assumed leadership, for example, by commandeering the establishment of the MPIA. It has received strong support from many major players in the WTO DSM, including both developed and some advanced developing Members. However, the US’ hegemonic influence in the making of multilateral trade reforms have stalled the progress. The EU is in a unique position to bring together like-minded WTO Members in reforming the DSM towards a secure and a predictable system, while also incorporating some of the concerns of the US due to a strong transatlantic partnership. As the WTO is a ‘member-driven’ organization, negotiations to fix crucial some aspects of the DSM,



as well as preserve the rule of law, can aid in truly reforming the DSM, with Members across board to join in the reform process. However, the reforms might take time, considering there are pressing issues such as waivers for COVID-19 vaccines, fisheries subsidies that are being considered for the 12<sup>th</sup> Ministerial Conference in June 2022, with ever more complications of the Russian invasion of Ukraine to gain ‘consensus’ on all the negotiating agendas.

## B. Restoring the WTO as an effective negotiating forum

According to the Commission, ‘[a]t the heart of the crisis in the WTO lies the failure of its negotiating function’.<sup>51</sup> On substance, the priority should, in the Commission’s view, be to modernize the rules of the WTO on digital trade, e-commerce, investment facilitation, services domestic regulation and the role of the state in the economy, including on subsidies.

Regarding the method for negotiations, the Commission considers that ‘a single undertaking approach has failed to deliver ...’. It notes that ‘[r]eaching consensus among 164 members against the backdrop of today’s diffuse global balance of power is a huge challenge’.<sup>52</sup> This is a fact. Different WTO Members have different perspectives on the issues that plague the system, and different solutions to resolve them. Such approaches inevitably lead to a failed path of multilateral solutions, i.e. the failure to converge negotiating agendas to best reach a multilateral solution. In this regard, the Commission has analyzed different alternatives to reach a solution. One of the main methods the Commission notes is to negotiate on a plurilateral level. The Commission states that ‘progress can best be achieved through different processes, in particular open, plurilateral agreements.’ WTO Members should also reflect on how to better integrate plurilateral agreements within the WTO framework.<sup>53</sup>

It is interesting to see how the Commission sees such ‘open, plurilateral negotiations’. The difficulty should not be underestimated, as the WTO membership has until now never been able to reach consensus on adding plurilateral initiatives to the list of WTO plurilateral agreements in Annex 4.<sup>54</sup> The Commission observes rightly that the current technique used to integrate plurilateral agreements in the WTO architecture has been for every participant to incorporate the additional commitments unilaterally into their schedule of commitments,<sup>55</sup> but that such technique has a number of drawbacks. The EU, according to the Commission, is in favor of an inclusive approach to plurilateral agreements. However, it noted that caution must be exercised and certain principles such as ‘openness to participation and future accession by any WTO member, facilitation of the participation of developing countries, transparency of the negotiating process, as well as means of protecting the existing rights of non-participants while avoiding free-riding’ must be respected.<sup>56</sup>

However, negotiating plurilateral agreements has a slippery-slope effect. The negotiations can go well beyond the mandate of Article II:3 of the WTO Agreement,<sup>57</sup> and into informal dialogues, such as ‘open’ negotiations through Joint Statement Initiatives (JSI). JSIs are an innovative approach proposed by a number of like-minded WTO Members at the 11<sup>th</sup> Ministerial Conference of the WTO in Buenos Aires in December 2017. They are a plurilateral negotiating tool, typically initiated by a group of WTO Members, who start negotiations on certain issues without adhering to the rule of consensus decision-making.



JSIs have witnessed a backlash in the recent past, especially from developing Members like India and South Africa. They contend that JSI have no legal status under the WTO agreements, as such initiatives fall outside the negotiating mandate prescribed by the rules.<sup>58</sup>

In essence, India and South Africa contend that the JSIs purport to create a new set of WTO rules which are neither multilateral nor plurilateral. They note that through the JSIs, WTO Members are circumventing the fundamental principles and procedures of the WTO Agreement of consensus. They highlight that some Members believe that if benefits are provided on a most-favored nation (MFN) basis, there is no need to achieve consensus for the JSI outcomes, and that some Members can reach an outcome without requiring the approval of other WTO Members. They note that this goes against the provisions of the WTO Agreement.<sup>59</sup>

The contestation of open negotiations through the JSI might create further issues, as there is a possibility to block further negotiations. As highlighted in the introduction, there are several areas that need current and immediate attention. Without meaningful solutions and multilateral negotiations, several issues could be stalled. One of the only possible options would then be to negotiate outside the WTO. Negotiating outside the WTO would mean that the institution could be driven to irrelevance. Either way, there would be frictions between WTO Members on resolving several key issues.

Every crisis presents opportunities for innovative methods of resolving them. In such a situation, the EU can step up as a leader in bringing WTO Members together (at least, many of them) to find meaningful solutions, if it is prepared to take their interests and views into account. However, getting consensus from 164 WTO Members has proven to be extremely difficult, even with some like-minded Members clubbing their agendas together. Only the lowest common denominator issues are being discussed and addressed at the multilateral level due to the stalemate in the negotiating process. This proves a surmounting challenge to the EU and its efforts have not been realized to the desired level. Even if the EU aims to assume the leadership role, without strong and genuine cooperation from other Members, it is extremely difficult to aim at a meaningful solution. In this regard, the possibility to achieve successful outcomes have become limited.

### **C. The EU's efforts outside the WTO framework**

Reforming the rules and regulations of international trade at the multilateral level has proven to be challenging. In this regard, the EU, although has geared up its negotiating strategy to propose changes to international trade rules at the multilateral level because multilateralism is in its DNA,<sup>60</sup> has also adopted certain non-multilateral strategies such as high-paced negotiations through FTAs and unilateralist measures.

We do not posit this to be a hypocrisy in terms of protecting the rules-based multilateral economic order, but that the EU is simply formulating tools to mitigate the damages of measures adopted by other WTO Members that could potentially harm the EU and its economy. In this regard, we delineate and analyze the measures and approaches adopted by the EU.

## 1. International cooperation outside the WTO

Due to the difficulties faced by Members to successfully achieve a negotiating outcome, the EU has cooperated with like-minded trade partners in order to regulate certain measures that elude the surveillance of WTO law. For example, the EU has collaborated with the US and Japan in a trilateral, outside the WTO, to work towards regulating SoEs and new-age subsidies. The EU and the US have launched the Trade and Technology Council in order to 'coordinate approaches to key global trade, economic, and technology issues and to deepen transatlantic trade and economic relations based on shared democratic values'.<sup>61</sup>

Moreover, the EU has enhanced its practice of negotiating FTAs. In the recent past, it has concluded many FTAs, with countries like Canada, Singapore, Viet Nam, and many other agreements, such as with Mexico, is currently being negotiated for implementation. Moreover, it has also made use of the DSM in FTAs, and we may be, more generally (not just from the EU's perspective), the rise of FTA litigation. In this regard, the EU has attempted to circumvent the negotiating deadlock at the WTO to ensure that the international trade regime that it desires to be subjected to, is still based on the rule of law.<sup>62</sup>

While the WTO's intrinsic voting mechanism proves to be difficult in achieving multi-lateral consensus on issues, FTAs can aid in bridging this gap. The EU can maintain the rule of law through hard law such as international treaties (FTAs included), and also push for resolving some imminent issues relating to environment, labor, and gender. If the negotiating country for an FTA does not share certain norms, ideas and standards as that of the EU, it can still be a fruitful negotiation if there is genuine cooperation on shared interests. Moreover, an FTA also needs to be compliant with WTO law, i.e. through Article XXIV of the General Agreement on Tariffs and Trade (GATT). In this regard, FTAs do not contradict WTO law, but compliments the legal strictures of the multilateral trading system. The EU should not shy away from cooperating outside the WTO through FTAs, as such an opportunity provides bases for deep and comprehensive economic ties with other countries who share common goals.

## 2. Unilateralist dimensions

In the recent past, the EU has attempted to strengthen its domestic capacity in terms of trade enforcement through policies like 'open strategic autonomy', rather than rely solely on international treaties such as FTAs and the WTO agreements. The reasons for doing so are several, as highlighted throughout this article. Moreover, other developed Members like the US already have domestic trade enforcement tools to tackle certain new-age problems like SoEs and other unfair trade practices. For example, the US, in order to 'protect' itself from exports of China did not have to formulate new rules. It merely relied on the existing tools such as Section 232 investigations on imports that threaten the US' national security interests and Section 301 tariffs and Special 301 restrictions. In contrast, the EU does not have these tools in place and is now formulating the same to tackle certain problems.

As early as in 2017, the EU modernized its calculation of its dumping margins, to include constructive normal value for domestic sales in cases of significant market distortions and State interventions, for example for export from China. While this was

a minor step in tackling market distortions, much has changed in the aftermath of the trade war initiated by the Trump administration in the US (2017–2021). The EU has now formulated many other tools such as anti-coercion instrument, proposal to regulate foreign subsidies, MPIA sanctions, regulation on import of deforestation-free products, reformed export control regulations, and economic sanctions. Moreover, the EU has also appointed a Chief Trade Enforcement Officer to ensure the effective implementation of trade agreements with other countries.

The anti-coercion instrument has been devised to protect the EU from external pressures applied by other countries through trade and investment barriers that affect the sovereign choices of the Union.<sup>63</sup> The regulation of foreign subsidies is proposed to mitigate the encroachment of EU producers and industries by foreign governments.<sup>64</sup> The EU purports to impose MPIA sanctions in instances where WTO Members block the adoption of WTO rulings, and if the Member doing so has not acceded to the MPIA. The reason for adopting such a measure is because if the WTO rulings are not adopted, and is blocked by the Members, then the measures in the dispute can continue to be imposed that could hurt the EU producers and industries. In order to mitigate this damage, the EU has empowered itself to adopt such sanctions. While these are new and innovative tools to tackle the measures that circumvent WTO rules, their compatibility with WTO law is yet to be determined and scholars have provided their critical analyses to the same.<sup>65</sup>

Outside the WTO framework, the EU has also proposed new regulations for export controls and economic sanctions.<sup>66</sup> In terms of export control, the EU has aimed to tighten the trade of dual-use items, civilian goods that also have a use in military and security domain, while also enhancing the human rights angle to the same. In terms of sanctions, the EU has considered numerous sanctions in order to curtail other countries' use of military powers and influences. For example, the recent horrific invasion of Ukraine by Russia, has triggered the EU to consider numerous trade restrictions,<sup>67</sup> that is probably justifiable under WTO law.

In this regard, the EU has strengthened its domestic tools to tackle certain issues in order to ensure that it is protected from the shocks of tensions in international relations. While the compatibility of these tools with WTO law and international law is questionable,<sup>68</sup> the EU has demonstrated that it will not shy away from strengthening itself when the rules-based international trade order is withering away.

It must be noted that the EU's priority seems to be in the right direction, i.e. attempt to restore the multilateral order, and use domestic tools in case if the multilateral rules and regulations prove to be ineffective. However, the issue with usage of domestic enforcement mechanism is that there is no stop to this. If the EU imposes measures through one of the tools highlighted above, the affected countries may adopt countermeasures. As such, this may lead to a race to the bottom, with numerous trade restrictions in place, that will most likely affect the EU industries as well as producers abroad negatively, and disrupt the resilience of the global supply chains. Therefore, we note that such domestic instruments must be used with caution and only in instances where multilateral rules prove to be ineffective in tackling the issues.

The trajectory of the EU to negotiate outside the WTO framework might seem like a dangerous precedent to an internationalist who is adamant on protecting the multilateral approach to negotiating international trade. While the abovementioned

trends could be viewed as a trade off to multilateralism, it may not be a tradeoff if the measures are implemented with a strong reasoning to ensure that there is no rollback to the era of protectionism.

As noted above, it has been extremely challenging for WTO Members for meaningful solutions, and there has been a stalemate in the negotiating forum. However, this does not absolve Members of their responsibilities to tackle certain imminent issues. In April 2022, Hillman remarked that we currently view trade as a nucleus to many issues, such as development, environment, labor, and gender. However, it is important to change the fundamentals of this understanding and put these issues at the core of the reforms.<sup>69</sup> In this regard, the EU's leadership outside the WTO framework, be it through new generation FTAs that include gender chapters, such as in CETA, or through environmental protection measures such as the Carbon Border Adjustment Mechanism and the regulation on import of deforestation-free products, may be viewed as a positive development that aims to reform international trade from an economic perspective, but also include several issues at its core of reforming the global trading regime.

#### IV. Concluding remarks

As one of the world's leading trade powers, the EU plays an active role within global trade governance, in particular within the context of the WTO. Being in an existential crisis since a number of years, the latter is in need of reform in order to preserve its role in the multilateral rules-based international order. In February 2021, the European Commission presented a comprehensive set of proposals for reform of the WTO. This contribution has critically reviewed these proposals. Depending on the subject matter, the EU will have to 'sell' its proposals to different and difficult stakeholders: the US in the case of the WTO DSM; India, South Africa and a great number of developing countries in the case of plurilateral negotiation processes; China when it comes to SoEs; a large number of developing country Members with regard to increased transparency and more strongly enforced notification requirements; and, similarly, a great number of WTO Members regarding the proposals to make sustainable development a central theme for giving the WTO a new sense of purpose. Long gone are the days of the GATT and early WTO when the old 'Quad'<sup>70</sup> was able to push proposals for the whole membership. With its 164 Members, including increasingly assertive emerging economies like China, India and South Africa, today's WTO is a very heterogeneous organization where finding common solutions is becoming ever more challenging. Rallying support from the whole WTO membership is definitely an objective the EU should continue to pursue by bringing Members with shared interests on certain important negotiating agendas.

Along with international cooperation, the EU also finds itself in a position of reinvigorating its domestic mechanisms. As shocks of the current trade wars are felt all around the world, it is necessary to have a robust domestic enforcement mechanism as a safety net. However, caution must be exercised in formulating such measures in order to avoid economic nationalism and aggressive protectionism that could negate the benefits of international trade.

## Notes

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6. See *inter alia* Jan Wouters, 'At Home and Abroad: The European Union in a Changing Global Order', 115 *Proceedings of the Annual ASIL Meeting* 325–335 (2021).
7. Consolidated Version of the Treaty on the Functioning of the European Union, Art. 3(1), OJ C 202 (7 June 2016) [hereinafter 'TFEU'].
8. We are aware of the nuances of the mixity of economic agreements, and the contestation of competences between the EU and its Member States for investment agreements. However, this is not the focus of our research.
9. See, next to the citation from Art 21(2)(h) TEU above, Art 21(1), 2<sup>nd</sup> sub-para, last sentence, TEU, pursuant to which the EU 'shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.'
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17. Annex, Communication COM(2021) 66 final.
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55. This was done for the Understanding in Financial Services and for the Reference Paper on Telecommunications.
56. *Ibid.*, 12.
57. Article II:3 of the Marrakesh Agreement states that '*The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.*'.
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