

WTO reform and the crisis of multilateralism

A Developing Country Perspective



Faizel Ismail

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ABBREVIATIONS AND ACRONYMS

AB	Appellate Body
ACP	African, Caribbean, and Pacific Group of States
AfCFTA	African Continental Free Trade Area
AIIB	Asian Infrastructure Investment Bank
ASEAN	Association of Southeast Asian Nations
BRI	Belt and Road Initiative
BRICS	Brazil, Russia, India, China and South Africa
CAFTA	China-ASEAN Free Trade Agreement
CAP	Common Agriculture Policy (ECC)
CSI	Coalition of Service Industries
CTDSS	Committee on Trade and Development Special Session
CTG	Council for Trade in Goods
DDA	Doha Development Agenda
DG	Director General
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding
EAC	East African Community
EEC	European Economic Community
EU	European Union
FDI	Foreign Direct Investment
FOCAC	Forum on China-Africa Cooperation
FTAs	Free Trade Areas
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Council
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
GVCs	Global Value Chains
IMF	International Monetary Fund
IP	Intellectual Property
IPR	Intellectual Property Rights
ITC	International Trade Centre

ITO	International Trade Organization
LDCs	Least Developed Countries
MC	Ministerial Conference
MFN	Most Favoured Nation
MSMEs	Micro, Small and Medium Enterprises
NAFTA	North American Free Trade Agreement
NAMA	Non-Agricultural Market Access
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
RCEP	Regional Comprehensive Economic Partnership
S&DT	Special and Differential Treatment
SEPs	Standard Essential Patents
SDGs	Sustainable Development Goals
SOEs	State-Owned Enterprises
SPS	Sanitary and Phytosanitary Measures
SSM	Special Safeguard Mechanism
SVEs	Small and Vulnerable Economies
TBT	Technical Barriers to Trade
TFA	Trade Facilitation Agreement
TISA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TRQ	Tariff-rate quota
TTIP	Transatlantic Trade and Investment
WTO	World Trade Organization
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USTR	United States Trade Representative
WITA	Washington International Trade Association

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FOREWORD

At the December 2019 General Council meeting of the World Trade Organization, held in Geneva, the United States once again insisted on retaining its veto against the appointment of new Appellate Body members. The US has thus effectively paralysed the Appellate Body and deepened the crisis of the multilateral trading system.

The United States made a statement at the Buenos Aires Ministerial Conference, in December 2017, calling for comprehensive reform of the WTO. At the Organisation for Economic Co-operation and Development (OECD) Summit, held in May 2018, President Emmanuel Macron of France supported this call. During 2018, and the first half of 2019, a number of proposals on reform were submitted to the WTO. Following the European Union categories, these can be categorised as: a) special and differential treatment; b) rule-making (procedural and substantive); c) regular work and transparency; and d) dispute settlement.

These reforms are not entirely new. All have been made in different forms since the onset of the Doha Round of trade talks in 2001, and particularly since the collapse of the Doha Round in 2008. However, the second wave of reforms are more aggressive, strident and damaging to the interests of developing countries and the multilateral trading system. This book refers to the earlier reform proposals as the first wave of WTO reforms, and the more recent proposals (2018/2019) as the second wave of reforms.

The book provides an analysis of the US-led reform proposals on the WTO. First it argues that these proposals seek to deepen the asymmetry of the rules-based trading system. Second, the proposals seek to erode the gains that developing countries have made in the WTO through years of negotiation and

advocacy, especially for their different levels of development to be recognised, through the principle of Special and Differential Treatment (S&DT). Third, the analysis indicates that these far-reaching proposals are part of the “new approaches” or “pathways” delineated by the US and European Union to change the strategic course of the WTO in a way that favours their own interests. Developing countries have responded to the proposals by submitting detailed documentation, mostly refuting and disagreeing with the US-led proposals. Their views are discussed in this book. Developing countries have called for the WTO to be development-oriented and inclusive.

The book critiques the mercantilist and narrow approaches of most of the US-led reform proposals and seeks to build a discourse around an alternative set of concepts or principles to guide the multilateral trading system, drawing on the work of Nobel Prize laureate Amartya Sen. These principles include a) fair trade and equity; b) capacity building and solidarity; c) balanced rules and social justice; and d) inclusiveness and transparency.

In its latest *Trade and Development Report*, the United Nations Conference on Trade and Development takes a much broader view than the narrower remit of this book that only focuses on the multilateral trading system (UNCTAD, 2019). UNCTAD argues that the rules and practices of multilateral trade, investment and the monetary regime need urgent reform. UNCTAD is proposing a new set of principles, the Geneva Principles for a Global Green New Deal. These are a good starting point for the renewal of multilateralism, including a renewal of the rules-based multilateral trading system. It is indeed possible that the multilateral trade debate can be resolved only in a much broader setting, such as the “global green new deal” provides.

CONTENTS

<i>Abbreviations and Acronyms</i>	<i>vi</i>
<i>Acknowledgements</i>	<i>viii</i>
<i>Foreword</i>	<i>x</i>
Chapter One Two Waves and Seven Pathways of WTO Reform Proposals Led by the United States	1
Chapter Two A Short History of Developing Countries and Special and Differential Treatment in the General Agreement on Tariffs and Trade (GATT)	14
Chapter Three WTO Reform Proposals on Special and Differential Treatment and the Recategorisation of Developing Countries	24
Chapter Four WTO Reform Proposals on Substantive and Procedural Issues	37
Chapter Five WTO Reform Proposals on Regulatory Work and Transparency	55
Chapter Six Reform Proposals on the WTO Dispute Settlement System.....	62
Chapter Seven WTO Reform and the Chinese Economic Model: the Belt and Road Initiative and the US-China Trade War	74
Chapter Eight Towards an Alternative Trade Narrative and Vision for the Future of the WTO	105
<i>References</i>	<i>119</i>

Chapter One

TWO WAVES AND SEVEN PATHWAYS OF WTO REFORM PROPOSALS LED BY THE UNITED STATES

INTRODUCTION

On 9 December 2019 the United States once again rebuffed proposals made by the WTO membership to address its concerns and lift its veto on the appointment of new Appellate Body (AB) members – thus effectively paralysing the Appellate Body of the WTO and exacerbating the crisis of the multilateral trading system.

The European Union (EU) Ambassador, Joao Machado, replied to this US stance by stating that “the actions of one member will deprive other members of their right to a binding resolution of trade disputes and will no longer guarantee the right of appeal review...more fundamentally, the very idea of a rules based multilateral trading system is at stake” (EU, 2019). The predictions of WTO trade experts about the impending paralysis of the WTO Appellate Body, and the systemic debilitating impact across the multilateral trading system (discussed in chapter six), finally come to pass on 10 December as the terms of office of two of the three remaining Appellate Body members came to an end (Van den Bossche, 2019). The Appellate Body requires at least three members to constitute a quorum or Division to hear appeals. With only one member left, it ceased to be functional from 11 December 2019. The outgoing Appellate Body member of the WTO, Ujal Bhatia, who was a former Ambassador of India to the WTO, reflected on this situation by stating that the crisis of the Appellate Body is a crisis of trade multilateralism (Bhatia, 2019). This crisis created by the United States will impact negatively on the economic prospects of the majority of developing countries, mainly its smaller and more vulnerable economies.

From a developing country perspective, at least five reasons for the maintenance of an effective and functional WTO Appellate Body are highlighted by Danish and Kwa (2019a; 2019b). First, as Julio Lacarte-Muró, the first Chair of the AB, wrote of a functioning dispute settlement system: “This system works to the advantage of all members, but it especially gives security to the weaker members who often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests. In the WTO, right perseveres over might.” Second, according to James Bacchus, a former US Appellate Body member: “WTO member countries have an automatic right to appeal the legal rulings of ad hoc WTO panels under the treaty. If there are not three judges to hear an appeal, then the right to appeal will be denied and the WTO will be unable to adopt and enforce panel rulings.” Third, the AB is central to providing security and predictability for WTO rules, as without this divergent panel reports will create uncertainty. Fourth, the AB has modified almost 80 percent of the appeals from panels that have come before it, thus ensuring that incorrect decisions are moderated or corrected by the AB. Fifth, a paralysed dispute settlement system could result in increased unilateral action by member states.

There is universal consensus among trade experts that the WTO is in its worst crisis since the formation of the General Agreement on Tariffs and Trade (GATT) in 1947. This crisis can be traced to the debates during the Doha Round on governance and reform of the WTO, stimulated by the Sutherland and Warwick Commissions (in 2003 and 2007). The collapse of the Doha Round in 2008 ushered in a more vigorous debate led by United States Trade Representative (USTR) Susan Schwab’s robust critique of the WTO (see Schwab, 2011). The WTO has not been able to recover since this collapse. Indeed, the crisis of the WTO has worsened with each WTO ministerial meeting since the Doha Round collapse in 2008. WTO Ministerial Conferences (MCs) since 2009 until the last one in Buenos Aires in 2017 have not been able to agree to continue the Doha Round. While developing countries have continued to reassert the development objectives of the Doha Round, the developed countries, led by the US have pursued “new pathways” that sought to abandon the Doha Round and shift the trajectory of the WTO

in favour of the developed countries once again. This process can be said to be a first wave of reform proposals put forward by the developed countries, led by the US, and actively advanced in the WTO.

The coming into power of the new US Trump Administration in January 2017 has deepened the crisis in the WTO. President Donald Trump has adopted a protectionist stance since his election. As he promised in his election campaign, he withdrew the US from the Trans-Pacific Partnership (TPP) and the North American Free Trade Agreement (NAFTA), signaling his unhappiness with previous US trade agreements. The WTO has not escaped his attention. In October 2017 he stated: “The WTO was set up for the benefit of everybody but us. They have taken advantage of this country like you wouldn’t believe” (Brown and Irwin, 2008). In March 2018, he stated: “The WTO has been a disaster for this country. It has been great for China and terrible for the United States” (Brown and Irwin, 2018). This unhappiness with the working of the WTO extended to the WTO Dispute Settlement Body (DSB), prompting the US to veto the appointments of new Appellate Body members. Since 2018, the US has submitted several proposals to the WTO to demand reform of both substantive issues (such as the principle of special and differential treatment) and procedural issues (such as on the workings of the DSB). This process has led to a second wave of proposals by the developed countries for the reform of the WTO since the launch of the Doha Round.

This second wave of reform proposals (2018/2019) reinforce similar ideas and interests of the US and the EU that they advanced in the first wave. In the first wave of reform proposals (2008 to 2017), developing countries expressed their views on the earlier reform proposals in the formal processes of the WTO, including at the ministerial conferences since 2009 (see list in Table 1). However, the current reform proposals by the US and EU are more detailed, strident and far-reaching. While there is some continuity from the first wave, the second wave seeks to implement these reforms in an aggressive and divisive manner. There are also some substantive differences from the first wave.

These similarities and differences can be expressed as follows: First, while the US and EU had significant concerns with the use of S&DT flexibilities by developing countries in the first wave, the second wave of reforms seeks to aggressively withdraw the right of developing countries to use these flexibilities. Second, there is a shift from the emphasis on global value chains (GVCs) and services in the first wave towards the digital economy and e-commerce in the second wave. Third, the aggressive pursuit of plurilaterals that advance the interests of developed countries and divide the membership, have become a key feature of the second wave. Fourth, while an issue-by-issue approach was advanced in the first wave, with an emphasis on trade facilitation, this emphasis has now shifted to e-commerce. Fifth, while the US and other developed countries had been urging developing countries to notify changes to their trade policies in the first wave, the developed countries have proposed a radical change in the notification commitments of developing countries in the second wave of reforms. Sixth, while the US was critical of the decisions and working procedures of the Appellate Body during the first wave, it has decided to actively block the appointments of Appellate Body members and render the Appellate Body dysfunctional in the second wave. Seventh, while the US had been critical of China's trade policies in the first wave of reforms, these criticisms have escalated into a full-scale bilateral trade war that has permeated the US proposals on reform and China in the WTO in the second wave. The second wave of reform proposals are also submitted in a context of the deepening crisis of the WTO – both in its legislative pillar (rule-making or negotiating body) and its judicial pillar (dispute settlement body). Developing countries have taken the current proposals seriously and have responded in an equally detailed and comprehensive manner to the US and EU proposals.

The United States made a comprehensive statement at the Buenos Aires Ministerial Conference in 2017 calling for reform (USTR, 2017). During the last quarter of 2018, and first half of 2019, a number of proposals on WTO reform were submitted to the WTO. These proposals can be categorised (following the EU categories) as: a) special and differential treatment; b) rule-making (procedural and substantive); c) regular work and transparency; and d) dispute settlement.

Table 1: WTO Ministerial Conferences

Nur-Sultan (MC12)	8–11 June 2020 (postponed to 2021)
Buenos Aires (MC11)	10–13 December 2017
Nairobi (MC10)	15–18 December 2015
Bali (MC9)	3–6 December 2013
Geneva (MC8)	15–17 December 2011
Geneva (MC7)	30 November – 2 December 2009
Hong Kong (MC6)	13–18 December 2005
Cancún (MC5)	10–14 September 2003
Doha (MC4)	9–13 November 2001
Seattle (MC3)	30 November – 3 December 1999
Geneva (MC2)	18–20 May 1998
Singapore (MC1)	9–13 December 1996

The EU, US and Japan have tended to coordinate their views on the first three categories of issues. In this context, Cecilia Malmström, former European Commissioner for Trade, Hiroshige Seko, Minister of Economy, Trade and Industry of Japan, and Ambassador Robert E Lighthizer, United States Trade Representative, met in Washington, D.C. on 9 January 2019 and issued a statement reflecting their commitment to work together on the reform of the WTO.

The US proposals on dispute settlement are the most contentious. On this issue, the EU and the US are on different sides of the debate. The US is mostly alone in its aggressive and robust critique of the DSB. While there is no clear developing country/developed country divide in the WTO, given the fragmentation of the coalitions that have been created in the WTO since the launch of the Doha Round, many developing countries have been attempting to coordinate their positions on these issues. Minister Suresh Prabhu, the Commerce and Industry minister of India, hosted a two-day ministerial conference for several developing country ministers in New Delhi, on 13-14 May 2019 to respond to the crisis in the WTO and formulate a strategy for developing countries on the way forward. Ministers and senior officials from the following countries participated in the meeting: Argentina, Bangladesh, Barbados, Brazil, Chad, China, Egypt, Indonesia, Kazakhstan, Malaysia, Nigeria, Oman, Saudi Arabia, South Africa and Turkey. The ministers once again emphasised the need for the multilateral trading system to be based on the principles of development and inclusivity.

How should we understand this latest avalanche of proposals to reform the WTO by the developed countries? What is the developing country perspective?

The US and EU reform proposals are attempting to reverse some of the gains made by developing countries since the formation of the GATT in 1947. At the beginning of the creation of the GATT, the issues related to the categorisation of developing countries, the substantive issues to be negotiated, and debating its decision-making procedures. India and Brazil were the main protagonists representing developing countries in the earlier period and made numerous representations on these issues. The GATT ignored much of the developing country proposals for several decades and only recognised the category of “developing countries” in 1964 (in Part IV of the GATT). In addition, the main products of interest for developing countries, textiles and agriculture, did not appear on the agenda of the GATT negotiations despite their representations. Indeed, in these sectors, higher and higher levels of protection were to become the norm in the GATT from 1947 until the Uruguay Round.

For this reason, the developing countries were reluctant to move to a new round of negotiations. They argued that the GATT architecture was imbalanced and asymmetrical or biased against their interests. With each round of the GATT this asymmetry had worsened. This fear of a new round and lack of trust of the system was one of the causes for failure of the Seattle Ministerial Conference in 1998. It took much persuasion for the developing countries to agree to launch a new round in Doha, Qatar in November 2001. The 9/11 tragedy in the US and the need to strengthen multilateral cooperation led the US and EU to promise that the new round would address the “needs and interests of developing countries”. However, by the time of the first ministerial meeting after Doha, both the US and the EU were unable to deliver on their promise to make substantial cuts in agricultural tariffs and reduce trade distorting subsidies. The Doha Round was in crisis. Under the guidance and leadership of the ex-EU Trade Commissioner, Pascal Lamy, some significant progress was made at the next ministerial meeting in Hong Kong in 2005 and subsequently in the negotiations in Geneva, but this was

not enough. Pascal Lamy took a huge risk and called a group of ministers to Geneva in July 2008 in an attempt to break the impasse of the Doha Round. The 2008 ministerial meetings collapsed. Susan Schwab, the then USTR for the Bush Administration, walked out and declared the Doha Round a failure. She subsequently declared that the Doha Round was dead! The Doha Round has never recovered since.

This event was to usher in a new phase in the Doha negotiations. The new US Administration (of President Barack Obama) seamlessly took over the narrative of the Bush Administration on the Doha Round. The USTR argued that the round was obsolete. Both USTR Ron Brown, and subsequently Michael Froman, argued that the world had changed significantly since the launch of the Doha Round. They argued that the rise of China and other emerging economies had rendered the old flexibilities provided by the provisions of S&DT to be unworkable and no longer appropriate. They argued for these countries to be “graduated” out of the category of developing country. They went further to argue that the changes in the world economy ushered in by the increasing prevalence of GVCs made the focus on manufacturing and agriculture of the Doha Round obsolete and trade in services was now more important. They also argued that the highest priority to facilitate trade in the new global economy was customs reform. In addition, they criticised the WTO decision-making processes as being archaic and an obstacle to progress. The US called for “new pathways” to forge a way out of the impasse. The US and the EU pushed for both the substantive agenda of the WTO negotiations to be changed (from agriculture to services and trade facilitation) and the processes of the negotiations to move towards plurilaterals, especially in services trade. They both supported this narrative at the Geneva Ministerial Conferences in 2009 and 2011. However, not much progress was made at either conference, with the division between the developing and developed countries deepening.

The new 2018/2019 proposals on the reform of the WTO, led by the US and EU, must be understood in this context. The essence of the new proposals is to argue for the “graduation” of developing countries from this category and to forgo the use of special and differential treatment flexibilities, a right that was

fought for by developing countries for more than 50 years. For this reason, this book recalls the history of the negotiations on special and differential treatment (in chapter three). The crisis and collapse of the Doha Round stimulated the first wave of reform proposals in the WTO. Chapter four thus discusses the reform proposals that emerged in the heat of the debate on the collapse of the Doha Round.

The next three ministerial conferences of the WTO, at Bali (MC9), Nairobi (MC10) and Buenos Aires (MC11) arguably deepened the existing asymmetry of the GATT/WTO system, as in each ministerial the interests of developing countries were subordinated and the issues of interest of the developed countries were prioritised. This was already evident in Bali. Some progress was made on a few issues of interest to developing countries, such as export competition, in Nairobi. However, in Buenos Aires no real progress was made in the negotiations, with divisions between developed and developing countries and between developing and developing countries also widening. The objective and negotiating strategy of the US and other developed countries to abandon the Doha Round and the single undertaking, while moving forward on issues of interest to the developed countries (or issues that were “doable”), was well under way. In addition, the US and EU pushed ahead with plurilateral negotiations in the WTO, on issues such as services.

The second wave of reform proposals led by the US must be understood in this context. However, this book argues that the second round of WTO reform proposals are much more strident, aggressive and damaging to the interests of developing countries and the multilateral trading system. It is argued that these proposals seek to deepen the asymmetry of the rules-based trading system. These far-reaching proposals are part of the new approaches or “pathways” delineated by the US and EU to change the strategic course of the WTO in a way that favours their own interests. Seven such US led “pathways” are identified in this book.

SEVEN US-LED “PATHWAYS” TO REFORM THE WTO

The first pathway seeks to reinforce the principle of most favoured nation (MFN) and reciprocity that did not recognise the different levels of development of developing countries and their different needs and interests in the early period of the GATT. This pathway seeks to change the right of developing countries to use the principle and provisions of S&DT in the GATT/WTO by recategorising the so-called “emerging developing countries”. Over time, however, the countries falling into “emerging developing countries” has expanded. In its proposal in early 2019, the US proposed to exclude the following developing countries from any S&DT treatment:

- Developing Members who are also Members of the OECD, or are in accession to be OECD Members;
- Members of the G20;
- Any developing country classified as “high income” by the World Bank; or
- A country with 0.5 percent or more of global merchandise trade. (See the US submission WTO Document, 2019: WT/GC/W/764)

During the first wave, the second pathway sought to shift the focus of WTO negotiations towards issues of interest of the developed countries. This was based on the argument that, in an era in which GVCs have become the dominant form of global production and trade, the old issues of agriculture and goods trade are not a priority any more as services trade is now the main lubricant of the global economy, and customs regulations and restrictions at the border are a greater impediment to global trade. The GVCs trade narrative advanced the view that removing restrictions on trade in services together with trade facilitation should become the most important issue on the WTO agenda. However, in the second wave of WTO reforms the emphasis of the US and other developed countries has shifted to the digital economy and the US has led the way in aggressively pushing for new rules in e-commerce. In this book, the earlier or first wave trade strategy of the US and other developed countries will also be discussed with a view to record the historical evolution of the US strategy in the WTO. The limited scope of this book does not allow

for a fuller discussion of the multilateral trade strategy on digital trade and e-commerce for the US and other developed countries.

The third pathway is based on a critique of the consensus-based decision-making method that has long been adopted in the GATT/WTO in favour of an approach based on “variable geometry” and increasing resort to plurilateral approaches to negotiations in the WTO. Critics of the consensus approach to decision-making argue that it is a major cause of the WTO’s inability to make decisions, and that a more efficient method of decision-making would allow those who wished to move faster (coalition of the willing) to proceed with liberalisation in a plurilateral process that could be multilateralised over time. As argued in this book, the proposals to change the decision-making procedures of the GATT away from the consensus principle towards plurilaterals (and variable geometry) also moves the WTO back to the practices of marginalisation and exclusion of developing countries from the centre of decision-making in the WTO. While the plurilateral approach was actively pursued by the US and other developed countries in the first wave of WTO reforms, this strategy has become much more aggressive and divisive in the second wave of reforms.

The fourth pathway has called for the abandonment of the Doha Round and the single undertaking in favour of issue-by-issue negotiations. This approach has been used since the Bali Ministerial Conference. It reverts to the approaches that were used before the Uruguay Round when the single undertaking was used for the first time. It is argued in the next chapters that this approach reverts to the practice of prioritising the interests of developed countries in the GATT/WTO negotiations, observed since 1947. However, in the second wave of reforms the US and other developed countries have acted without due regard to the views and interests of the majority of WTO members. The US has been aggressive and open in its rejection of the Doha Round. With its allies, it is now pursuing plurilateral negotiations in the WTO on issues that are in its interests such as e-commerce, even though there has been no multilateral mandate for such negotiations.

The fifth pathway advocates a radical new method for the administration of “notifications” of trade measures by members in the WTO that increases the burdens on developing countries and changes the rights and obligations of members through a system of “counter-notifications”. While developing countries are willing to support increased efforts to notify trade measures, they have roundly rejected this radical departure from the existing rules. While the US and other developed countries have applied pressure on developing countries to notify their trade policies during the first wave of reforms, this agenda has become much more aggressive and insensitive to the interests and capacities of many developing countries. In addition to enhanced notification requirements, the second wave has included a range of punitive administrative measures, including charging a Member more than its normal assessed contribution to the WTO if such a Member has failed to comply with their notification requirements beyond a certain period of time.

The sixth pathway advanced by the US is the demand to change the approach and practices of the Appellate Body. The US has a long list of concerns about the approach and practices of the AB and the Dispute Settlement Understanding (DSU). The US has been leading the debate on these issues in the negotiating forum on Dispute Settlement. This negotiating group was established at the Doha Ministerial Conference to “continue the review on improvements and clarifications to the DSU”. However, the insistence by the US to continue opposing the nomination of new Appellate Body members until these issues are resolved to its satisfaction has created a crisis in the WTO. While the US, in the first wave of WTO reforms, raised its concerns with the functioning of the WTO Appellate Body, the US has insisted on its proposals being adopted during the second wave of reforms with the refusal to support the appointment of new Appellate Body members, rendering the body dysfunctional.

The seventh pathway identifies China and its “trade disruptive economic model” as the main target of the US-led reform proposals in the WTO. From the outset of the Doha Round, and especially after its collapse, China was

identified as the main target for reform of the WTO (Schwab, 2011). However, in the second wave of reform proposals, China is the number one target of the US-led reform proposals, with the US proposals on WTO reforms sought from China becoming a part of the broader bilateral “US-China trade war”. Many of the issues raised in these reform proposals are part of the competition between the first and second largest economies in the world. China has called for these issues to be resolved through dialogue and a win-win approach. Some of the tensions can be resolved only if there is an alternative vision for the multilateral trading system and a shift away from a mercantilist approach to trade that is informed by a GVCs narrative that advocates a world of free trade and “hyperglobalisation”.

This book argues that these trends can be referred to as the seven new “pathways” that the US has been leading in the WTO, since the collapse of the Doha Round, in its efforts to change the existing rules-based trading system in favour of the developed countries, once again. The US proposals sought during the first wave to change the focus of WTO members away from the areas of its own sensitivities, such as agriculture, towards issues of its own competitiveness and export interest, including trade in services and trade facilitation. This approach has become many times more aggressive in the second wave of WTO reform proposals as the US is now focusing on digital trade, which is much broader in scope than trade in services. It is also jettisoning the more limited General Agreement on Trade in Services (GATS) “positive list” liberalisation framework for a much more ambitious, all-encompassing liberalisation agenda through new digital rules. The proposals also seek to erode the gains that developing countries have made in the WTO through years of negotiation and advocacy, especially for their different levels of development to be recognised through the principle of special and differential treatment.

STRUCTURE OF THE BOOK

This book is structured as follows:

- Chapter two provides a historical overview of the discussion and negotiations on the principle and concept of S&DT and the issue of categorisation of developing countries in the GATT/WTO since 1947.
- Chapter three discusses the second wave of proposals on S&DT, with specific reference to the issue of categorisation of developing countries. This discussion is preceded by a summary of the debate and proposals made to reform S&DT in the first wave of WTO reform proposals.
- Chapter four discusses the second wave of reform proposals on substantive and procedural issues. This chapter discusses the second, third, and fourth “pathways” led by US in the period after the collapse of the Doha Round. A brief discussion on the first wave of reforms on each of these pathways is provided to create a historical context for the discussion of the second wave of US led reforms proposals. The discussion reflects the continuity in the thrust of the reforms advanced by the US and EU since the collapse of the Doha Round of WTO negotiations. However, it must be underlined that this second wave of WTO reforms is more aggressive and damaging to the interests of developing countries and the multilateral trading system.
- Chapter five discusses the reform proposals on the administration of “notifications” in which some radical proposals are made, creating new burdens on developing countries, and seeking to change the existing rights and obligations of developing countries.
- Chapter six discusses the slew of detailed technical proposals led by the US to reform the dispute settlement system and the functioning of the Appellate Body.
- Chapter seven discusses the US reform proposals of the “Chinese economic model”, the Belt and Road Initiative and the “US-China Trade War”.
- Chapter eight provides an analysis of the current conjuncture in the global economy on trade and globalisation and its implications for the multilateral trading system. Some broad principles are set out towards an alternative vision for the multilateral trading system and the WTO.

Chapter Two

A SHORT HISTORY OF DEVELOPING COUNTRIES AND SPECIAL AND DIFFERENTIAL TREATMENT IN THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

INTRODUCTION

At the time of the creation of the GATT, most developing countries were still under colonial rule. Developing countries as such were not recognised by the GATT, nor were their special development situations.¹ The main principles of the GATT – reciprocity and most favoured nation – contained in the preamble of GATT and Article 1, respectively, did not consider the development situation of developing countries. Over many years, developing countries kept fighting to create provisions in the GATT that addressed their particular development level and needs. Their special development situation was eventually recognised. However, developing countries were to later argue that the special and differential treatment measures that were gradually adopted by the GATT, such as Article XVIII, Part IV of the GATT and the Enabling Clause, were often not fully responsive to the demands of the developing countries and, in most cases, were dressed up in best endeavour language, without legal effect.² In addition, they argued that these S&DT measures were a palliative for the failure of the developed countries to open their markets to the main products of interest for the developing countries, textiles and agriculture. This chapter briefly sets out the history of special and differential treatment measures in the GATT and then outlines the measures taken by developed countries historically to protect their markets from the exports of interest to developing countries.

1 See Annex A, B, C, and D of the Havana Charter for the list of territories of the United Kingdom (UK); France; Belgium, Luxembourg and the Netherlands; and the US, respectively.

2 TN Srinivasan is quoted as stating that under Part IV the “less developed countries achieved little by way of precise commitments but a lot in terms of verbiage”. Quoted in Wilkinson and Scott (2008).

It will thus be argued that right until the onset of the Doha Round, the GATT remained imbalanced against the interests of developing countries and that the rules-based system that did emerge was asymmetrical in favour of the major developed countries.

THE SHORT HISTORY OF SPECIAL AND DIFFERENTIAL TREATMENT IN THE GATT

This section sets out the debate on the category of developing countries since the creation of the GATT until the WTO agreement on the Enabling Clause in 1979. It includes a discussion on the GATT principles and concepts of reciprocity and most-favoured-nation, Article XVIII, and Part IV, of the GATT.

Reciprocity and MFN

The principle of reciprocity was debated in the International Trade Organization (ITO) negotiations, between 1946 and 1948, with developing countries arguing that they were unable to negotiate with developed countries on a reciprocal basis due to their lack of bargaining power. Notwithstanding these objections, this principle was adopted as a core principle in the GATT (Wilkinson and Scott, 2008). In addition, a charter put forward by the Brazilian delegation critiqued the US proposal on the MFN principle, arguing that this was only appropriate for countries that were at a more advanced stage of development.

The efforts of developing countries to insert an amendment in the ITO charter that recognised the special situation of developing countries in the early stages of development was rejected by the US (Wilkinson and Scott, 2008). The principle of reciprocity, and MFN, were highly contested by developing countries during the negotiations in the ITO. These concepts were therefore continuously challenged by developing countries in the early period of the GATT's formation, during the early and later rounds of the GATT, and up to and including in the Doha Round.

The need to qualify the concepts of reciprocity and MFN to take into account the special needs of developing countries led to the adoption of a number of development provisions in the GATT. In addition, a number of provisions went beyond this to provide for positive measures to be adopted by the developed countries of the GATT to assist developing countries with their development needs, especially with capacity building and technical assistance. These measures were agreed to by developed countries, partly due to the increasing pressure that developing countries created in the GATT for them, and also because of the recognition by developed countries that the prevailing techniques of negotiation, the increasing protectionism in developed countries for products of interest to developing countries, and the outcomes of the early rounds were not resulting in market access gains for developing countries.

Article XVIII

At the review of the GATT in 1954/1955, developing countries again criticised the failure of the GATT to meet their needs, particularly with the exclusion of agriculture from the ambit of the GATT and the exemption of agricultural products from the ban on quantitative restrictions. Developing countries argued that they required to be afforded the use of trade restricting measures to protect their infant industries. Thus, Article XVIII of the GATT was revised to provide developing countries additional flexibility for their obligations. It enabled developing countries to raise their bound tariffs for the purposes of economic development, and with certain conditions to use any measure that was not consistent with other provisions of GATT for the purpose of promoting a particular industry.

Part IV of the GATT

In response to this criticism of the GATT and its failure to address the concerns of developing countries, at a special session of the GATT in Geneva, November 1964, the contracting parties drew up a protocol amending the GATT, and introduced a fourth protocol known as Part IV of the GATT. This

dealt with trade and development issues. Part IV of the GATT did commit developed countries to a) give high priority to the reduction and elimination of trade barriers to trade for goods of export interest to developing countries; b) refrain from introducing or increasing tariffs or non-tariff barriers on these products; c) remove the requirement for reciprocity; and d) create a Committee on Trade and Development to monitor progress being made in these areas.

Part IV of the GATT also created the basis for preferences for developing countries, both between developed and developing countries and between developing countries themselves. Developing countries took advantage of the latter provision and on 8 December 1971 a protocol relating to trade negotiations between developing countries was finalised along with some trade concessions between developing countries. Developed countries did use the former provision to introduce Generalized System of Preferences (GSP) schemes in favour of developing countries. Developing countries had created the pressure for a firmer legal basis for these legal arrangements than the GATT waiver that was used for this purpose.

Enabling clause

During the Tokyo Round, both these preferential arrangements were provided with a firmer legal basis through the adoption of the Enabling Clause in 1979. The agreement by the US to expand the preference system (the European countries had brought their colonial preferences into the GATT at its formation) led to the formal legal recognition of such derogations from the MFN principle of the GATT (Hudec, 1987). The Enabling Clause gave permanent legal authorisation for the GSP preferences, preferences between developing countries, special treatment for developing countries from GATT rules, and special treatment for the least developed countries. Developing countries had refused to sign any of the agreements or “codes” reached in the Tokyo Round until agreement was reached to include special and differential treatment provisions for developing countries. This was, therefore, agreed to by the US and the other developed countries in the GATT and took the

form of non-binding assurances of technical assistance to help developing countries comply with the new rules or exemptions from the new obligations. Part IV of the GATT (1965) and the subsequent Enabling Clause (1979) that created the basis for the special and differential treatment provisions of the Tokyo Round were a direct response to the failure of the developed countries to address the key interests of developing countries in their markets, due to the ever-increasing protection in their markets of products of interest to developing countries.

The next section discusses the underlying systemic issue of the protectionism of the developed countries, which exacerbated the challenges developing countries faced in the GATT. The asymmetry created by the GATT's initial refusal to recognise their particular development situation was worsened by the increased protectionism of the developed countries in the GATT, which prevented them from benefitting from the liberalisation of tariffs and non-tariff measures in the GATT.

PROTECTIONISM BY DEVELOPED COUNTRIES

By the mid-1960s, the evolution of the GATT led to two different experiences (Wilkinson, 2006). For the industrialised countries, "liberalization under the GATT had seen the volume and value of trade in manufactured, semi-manufactured and industrial goods increase significantly". In addition, "they had also managed to protect their agricultural, textile and clothing sectors through a blend of formal and informal restrictions". To give effect to this, there were a number of GATT waivers to protect developed country agricultural markets and the exclusion of textiles and clothing from liberalisation in developed countries. For developing countries, this meant that the products of interest to them were excluded from liberalisation (Wilkinson, 2006).

Cotton textiles and agriculture were the two significant sectors in which protectionism was to grow in the developed countries, particularly against the export products of interest to the developing countries. Rorden Wilkinson and James Scott argue that "the unwillingness of the United States and its

European Allies to open up agriculture to negotiation resulted in its *de facto* exclusion from the GATT's remit", and "measures were put in place to formally exclude textiles and clothing from the liberalization process" (Wilkinson and Scott, 2008; Wilkinson, 2014). They state that by the 1950s these practices became key features of the GATT.

In the mid-1950s, Karin Kock notes that protectionism was growing in the US and the administration was under great pressure to impose import restrictions on textile imports from different countries, although these imports represented a small percentage of total home consumption (Kock, 1969: 149). The growers of cotton and the textile manufacturers, Kock argues, formed an "unnatural alliance" to compel the administration to force exports of the cotton surplus at competitive prices, and to introduce quotas for imports of cotton textiles. The European Economic Community (EEC) had already imposed severe quantitative restrictions in the textile field. In 1961, short-term arrangements were agreed for trade in cotton textiles to secure "from exporting countries ... a measure of restraint in their export policy to avoid disruptive effects in import markets" (Kock, 1969: 151; Patterson, 1966: 310). By 1962, the Cotton Textile Arrangement was now partly integrated into GATT activities after an accord was reached with 19 countries (Patterson, 1966: 310). At the end of the Kennedy Round in June 1967, the US insisted on the extension of the Cotton Textile Arrangement in exchange for 15 percent to 20 percent in tariff reductions (Kock, 1969: 106).

Developed country protection in agriculture was equally harmful to developing countries. Import restrictions were applied in the US by the president through authority granted him in the US Agricultural Adjustment Act of 1933 and the Trade Agreements Extension Act of 1951. Quantitative import controls were thus applied by the US on products such as cotton, wheat and wheat flour, sugar, butter and cheese (Kock, 1969: 162). At the 1954-55 GATT Review session many countries wanted to address agriculture but the US needed import restrictions on dairy products, contrary to GATT rules, and requested a waiver, thus blocking any move to bring agriculture into the GATT negotiations (Curzon, 1965: 166). The Haberler Report presented to

the GATT parties in 1958 noted that, “agriculture protectionism exists at a high level in most of the highly industrialised countries” (Kock, 1969: 171).

The EEC Common Agricultural Policy (CAP) was put into operation in June 1962. The CAP gave domestic suppliers protection against external suppliers and provided assurance that every ton produced and not sold would be bought by an intervention agency. The CAP also provided export subsidies for surplus production (Kock, 1969: 202). During the Dillon Round agriculture was excluded (Patterson, 1966: 174). It was only in the Kennedy Round that “agriculture was to be included and it was agreed that negotiations shall provide for acceptable conditions of access to world markets for agriculture products” (Patterson, 1966: 178). However, immediately after the Kennedy Round, the US introduced new restrictions for dairy and other agricultural products. Again, members expressed regret that after 12 years the US still felt it fit to maintain and even to intensify the restrictions (Kock, 1969: 167).

The examples of cotton textiles and agriculture protectionism during the early years of the GATT indicate that protectionism by developed countries kept increasing in the sectors and products of interest to developing countries until the Uruguay Round. The failure of the GATT during the first eight rounds to address the issues of the appropriate balance between the principles of reciprocity and MFN, on the one hand, and the special development needs of developing countries, on the other, continued to haunt the members of the WTO in the Doha Round (Ismail, 2006).

THE DOHA ROUND – AN ATTEMPT TO RESTORE BALANCE IN THE WTO

Given this historical context, developing countries insisted that the Doha Round address the historical imbalances of the GATT/WTO. In 1994 the preamble of the Marrakesh Agreement establishing the WTO set out the objective of “sustainable development” and expressly referred to the need for “positive efforts to ensure that developing countries secure a share in the growth of international trade commensurate with the needs of their economic development”. This was delivered through some S&DT provisions that are considered largely hortatory (Qureshi, 2009).

Paragraph 2 of the Doha Declaration, launching the Doha Round in November 2001, states: “The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.” The Doha Declaration recalled the preamble of the Marrakesh Agreement and went on to state that, “In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play”.

These promises made in the Doha Round Declaration were, however, not fulfilled by the developed countries as the next Ministerial Conference in Cancún collapsed due to the inability of both the EU and the US to make the necessary reforms in their agriculture sectors. Some advances were made at the next Ministerial Conference held in Hong Kong in December 2005 with a small package of deliverables, including a commitment by the EU and other developed countries to eliminate export subsidies. However, the Doha Round was to remain stuck as the Director General, Pascal Lamy, pushed on with various initiatives in Geneva and in capitals around the world to break the impasse. Pascal Lamy took a huge risk and called a special ministerial meeting in Geneva in July 2008 in a final push to make a breakthrough in the Doha Round. This too proved futile and led to the collapse of the Doha Round. This is discussed further in the next chapter.

CONCLUSION

This chapter provides a background or historical context for the reform proposals that emerged after the collapse of the Doha Round. The next few chapters (three, four, five, six and seven) critically analyse the long list of reform proposals led by the US since the Trump Administration came into office. These proposals, it is argued, are part of the process to change the existing balance of rights and obligations in the WTO in favour of the developed countries, once again. Previous US Administrations (both the Bush Administration and the Obama Administration) had already begun this process after the collapse of the Doha Round in 2008. Susan Schwab, the Bush Administration USTR, had made a radical critique of the WTO and argued that “emerging countries” would need to be recategorised or play a greater role making more contributions than other developing countries. This narrative was maintained almost seamlessly by the Obama Administration that built on this narrative calling for “new pathways” that change the way the WTO functions and negotiates trade agreements. These pathways created the first wave of WTO reforms. The Trump Administration is building on this platform. For this reason, the next chapter first discusses the first wave of reform proposals that emerged after the collapse of the Doha Round before proceeding to discuss the US-led second wave of reform proposals in the WTO. It then focuses on the reform proposals on S&DT and the attempt to recategorise developing countries.

Table 2: History of trade rounds

Year	Place	Name	Issues	Number of countries
1947	Geneva		Tariffs	23
1949	Annecy		Tariffs	13
1951	Torquay		Tariffs	38
1956	Geneva		Tariffs	26
1960-1961	Geneva	Dillon Round	Tariffs	26
1964-1967	Geneva	Kennedy Round	Tariffs, non-tariff measures	62
1973-1979	Geneva	Tokyo Round	Tariffs, non-tariff measures, "framework" agreements	102
1986-1994	Geneva	Uruguay Round	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO	123

Chapter Three

WTO REFORM PROPOSALS ON SPECIAL AND DIFFERENTIAL TREATMENT AND THE RECATEGORISATION OF DEVELOPING COUNTRIES

INTRODUCTION

The current wave of US and EU proposals for reform of the WTO in the area of Special and Differential Treatment should be understood in the context of the attempts by the US and the EU to make similar reforms during the Doha Round, and especially after its collapse in 2008. The analysis in this book suggests that the current proposals of the US Trump Administration (and the EU) for reform of the WTO, while not inconsistent with the approach of the preceding US Obama and Bush Administrations (and the EU), go much further in making radical changes to reduce the special and differential treatment rights of developing countries. The US, however, played a leading role in creating the narrative for the collapse of the Doha Round. Part of this narrative included a demand for the recategorisation of developing countries and a change in the special and differential treatment flexibilities for developing countries. This constituted the first wave of US proposals for reform of the WTO. The genesis and development of this narrative is discussed in the following sections. It is argued that the first wave of reform proposals coincided with the collapse of the Doha Round in 2008 and the second wave of proposals emerges with the new Trump Administration.

THE FIRST WAVE OF US AND EU PROPOSALS FOR REFORM OF THE WTO: SPECIAL AND DIFFERENTIAL TREATMENT (AND THE ATTEMPT TO RECATEGORISE DEVELOPING COUNTRIES)

The new Obama Administration USTR, Ron Kirk, who came into office in early 2009, argued that the package on the table embodied in the 2008 WTO Chairs Texts did not offer any real gains for US stakeholders, and that the

US thus required the major developing countries to provide additional market access to that already provided in the Chairs Texts. The main rationale for this argument by the US was that the “emerging economies were growing faster than the US and increasing their share of global growth” (WTO Document, 2009: WT/MIN(09)/ST/3). Michael Punke, the new US Ambassador to the WTO, appointed by the Obama Administration, argued that “emerging countries had to make significantly more concessions on market access to conclude the Doha Round”. In his reaction to the Easter (21 April 2011) Reports of the WTO Chairs, the US Ambassador declared the Round was at an impasse. He argued that the reason for this was that the gaps between the main emerging developing countries and the US remained wide, spanning across the entire spectrum of the Doha Round issues. He explained that these were not technical gaps, but were essentially political (Punke, 2011a). In a statement delivered to the Cairns Group Ministerial Meeting in Saskatoon on 18 September 2011, Michael Punke argued that “no amount of tinkering with the process of the Doha Round negotiations will result in a breakthrough as the issues that divided the US and other emerging markets were related to the fundamental differences that exist on the nature of the responsibilities that emerging markets have with regard to the provision of additional market access” (Punke, 2011b).

Interestingly, the narrative of the US Democratic Party officials is not that different from that of some of the former Bush Administration trade officials. Susan Schwab, the chief US trade negotiator (USTR) during the Bush Administration, in her critique of the Doha Round, in an article in the journal *Foreign Affairs* states emphatically that, “the Doha Round has failed. It is time for the international community to acknowledge this sad fact and move on” (Schwab 2011). Susan Schwab puts this starkly: “More fundamental” she states in her article: “has been the Doha Round failure to address the central question facing international economic governance today: What are the relative roles and responsibilities of advanced (or developed), emerging, and developing countries?” She states that this is a fundamental flaw in the Doha mandate and thus she concludes that: “What this means, simply, is that it is time to give up on trying to save Doha” (Schwab, 2011).

This message became the main narrative for the Doha Round impasse by both current and former US Administration senior trade officials. All these USTR senior officials, past and present, and including President Obama, have been arguing that the current mandate has not foreseen the rise of the emerging economies, and they have demanded that these economies must pay a much higher price than the Doha mandate envisaged.

THE SECOND WAVE OF US AND EU PROPOSALS FOR REFORM OF THE WTO: SPECIAL AND DIFFERENTIAL TREATMENT AND THE RECATEGORISATION OF DEVELOPING COUNTRIES

The arguments presented by the US for the collapse of the Doha Round have re-emerged in the submissions and proposals by the US on Reform of the WTO in 2018/2019. What are the new proposals on special and differential treatment (and categorisation of developing countries) and what do they argue?

Five significant proposals on special and differential treatment have been published. Four of them were submitted to the WTO. These five include two proposals by the US (WTO Document, 2019: WT/GC/W/757/Rev.1 and WTO Document, 2019: WT/GC/W/764), one by the EU (EU Document, 2018: WK 8329/2018), and one by a group of developing countries, including China, India and South Africa (WTO Document, 2019: WT/GC/W/765/Rev.2) and another by the Africa Group,³ Bolivia, China, Cuba, India and Oman (WTO Document, 2019: WT/GC/202). The US first paper (WTO Document, 2019: WT/GC/W/757/Rev.1) is the most comprehensive and detailed critique of S&DT submitted to the WTO thus far. It is 45 pages long, including annexures with tables and graphs. At least three key arguments are made in the paper.

3 All African WTO members: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Congo (Democratic Republic), Côte d'Ivoire, Djibouti, Egypt, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

First, the main argument of the paper is that developing countries should no longer be allowed to self-declare themselves as “developing” as this definition is “outdated” due to “the great development strides” that have been made by developing countries, including the reduction of poverty, increased export shares, increased outward foreign direct investment (FDI), increased number of Fortune 500 companies, increased supercomputers, increased satellites in space, and increased defense spending.

Second, the US argues that the emerging developing countries have exploited their self-declared developing status to “deflect pressure to make meaningful contributions” and “have refused to offer commitments commensurate with their role in the global trading system”. The US paper argues that this disadvantaged the developed countries as “all the rules apply to a few (the developed countries) and just some of the rules apply to most, the self-declared developing countries”.

Third, the US thus concludes that, “an inability to differentiate among (developing) members puts the WTO on a path to failed negotiations. It is also a path to institutional irrelevance, whereby the WTO remains anchored to the past and unable to negotiate disciplines to address the challenges of today or tomorrow”.

The second US paper (WTO Document, 2019: WT/GC/W/764) builds on the first and makes bold proposals to “graduate” some developing countries out of special and differential treatment based on the following criteria: a) membership or accession to the OECD; b) membership of G20; c) classified as “high income” by the World Bank; and d) a country with 0.5 percent or more of global merchandise trade. The South Centre has applied these criteria to the developing countries in the WTO and compiled a list of 34 countries that will be excluded from the application of S&DT based on these criteria⁴

4 Antigua and Barbuda; Argentina; Barbados; Brazil; Chile; Colombia; Costa Rica; Israel; Mexico; Panama; Seychelles; South Africa; Trinidad and Tobago; Uruguay; Bahrain; Brunei Darussalam; China; Hong Kong, China; India; Indonesia; Korea; Kuwait; Macao, China; Malaysia; Oman; Philippines; Qatar; Saudi Arabia; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Thailand; Turkey; United Arab Emirates.

(Kwa and Lunenburg, 2019). In addition to these criteria, the US proposal further argues that, “Nothing in this Decision precludes reaching agreement that in sector-specific negotiations other members are also ineligible for special and differential treatment”. In effect, this proposal suggests that S&DT is not guaranteed for any member, including Least Developed Countries (LDCs) in any set of negotiations. For example, LDCs with more than 0.5 percent of world trade in a particular sector (such as Bangladesh in clothing and textiles or Benin in cotton) could find that they are told in future negotiations in these sectors that even they are not eligible for S&DT.

President Donald Trump has also issued a special memorandum on the developing country status of countries in the WTO (see Trump, 2019). This memorandum issued by President Trump singles out China for falsely claiming to be a developing country. The memo states that the US “has never accepted China’s claim to developing-country status”. The memo states that China and other such emerging countries “have sought weaker commitments in the WTO, including longer time-frames for the imposition of safeguards, generous transition periods, softer tariff cuts, procedural advantages of WTO disputes and the ability to avail themselves of certain export subsidies – all at the expense of other WTO members”. The memo instructs the USTR to “use all available means to secure changes at the WTO” to these rules and practices with a view to “no longer treat as a developing-country” any WTO member that in the USTR’s judgement is improperly declaring itself a developing country...” (Trump, 2019).

The European Union published a comprehensive set of proposals on its website after much debate within the EU (EU Document, 2018: WK 8329/2018). The EU paper covers a wide range of proposals on WTO modernisation that includes: a) issues related to EU proposals on rule-making (i) on the substantive issues, ii) on a new approach to flexibilities in the context of development objectives, and iii) on the process of the negotiations); b) regular work and transparency; and c) dispute settlement. The EU proposals on “a new approach to flexibilities in the context of development objectives” are summarised below.

The proposals begin with a very controversial statement that, “The WTO was founded with development at its center, underpinned by the fact that free rules-based trade contributes to growth and development”. The discussion in chapter three of this book refutes this assertion. The EU supports the view of the US by stating that “the current distinction between developed and developing countries, with no nuance no longer reflects the current reality of the rapid growth of some developing countries”. Like the US, the EU argues that this obsolete concept has been “an obstacle to the progress of negotiations”. The EU paper then proceeds to make some key proposals, including: a) “members should be actively encouraged to ‘graduate’ and opt-out of S&DT”; b) S&DT in future should be “needs driven and evidence-based approach”; and c) future S&DT should be “done only on the basis of a case-by-case analysis”.

DEVELOPING COUNTRIES’ RESPONSE

Developing countries responded to the US and EU proposals with a comprehensive submission to the WTO General Council (WTO Document, 2019: WT/GC/W/765/Rev.2) arguing that while the world has changed since the formation of the GATT and the WTO, “in overall terms the development divide remains firmly entrenched, the persistence of this divide is reflected in a wide range of development indicators, including levels of economic development, industrial structure and competitiveness, GDP [gross domestic product] per capita, poverty levels, levels of under-nourishment, production and employment in the agriculture sector, trade in services, receipts from IPR [intellectual property rights], company profits, and a range of capacity constraints, among other things”. These countries have argued that to demand absolute “reciprocity” is not fair. S&DT, it is argued, recognised these differences in developed and developing countries and was created to “allow developing countries the space to calibrate trade integration in ways that help them support sustainable growth, employment expansion and poverty reduction”. In any event, the submission states, the S&DT provisions are mostly “best endeavour” clauses, lack precision, effectiveness, operability and enforceability. Furthermore, they argue that the current

S&DT provisions are not “gifts” but were the outcome of negotiations and the status of developed and developing countries are reflected in the bargaining process and in the final rules themselves. In this context “self-declaration” of developing countries has proven to be the most appropriate approach that serves the interests of the WTO.

In their proposals to the WTO the developing countries argued that the “development divide” that existed in the 1960s and that led to the categorisation of “developed”, “developing” and “least developed” countries in the GATT still prevails today.

They illustrate this argument with the following data. In 2017, the GDP per capita (current US\$) of the United States, Canada, Australia, New Zealand and the European Union was US\$59 531, US\$45 032, US\$53 800, US\$42 941, and US\$33 715, respectively, while the GDP per capita of developing members, including China, India, South Africa and Brazil, were all below US\$10 000 (WTO Document, 2019: WT/GC/W/765/Rev.2 -3).

In addition, the submission argues that developing countries have a low share of services exports. According to the UN’s *World Economic Situation and Prospects 2018* report (UN, 2018), the population of developing economies, in 2016, constituted 85 percent of the global total, while their share in global services export was less than 30 percent, and their shares in the export of financial, telecommunication and other high value-added services were even lower (WTO Document, 2019: WT/GC/W/765/Rev.2 -3).

They also argue that, “since the creation of the WTO in 1995, in receipts of charges for the use of intellectual property rights, developed members have not only maintained a dominant position but also witnessed much higher growth in contrast to developing members”.

This is illustrated by the following facts. In the case of Standard Essential Patents (SEPs) from the International Organization for Standardization, International Electrotechnical Commission and International Telecommunication Union,

the US, EU and Japan continue to dominate with 3 790, 3 660 and 1 517 SEPs, respectively, accounting for 87.49 percent of the total. In 2017, the IPR receipt of charges of the EU, US and Japan was US\$144.1 billion, US\$127.9 billion and US\$41.7 billion, respectively. These figures were respectively 30 times, 27 times and nine times that of China (US\$4.8 billion); 206 times, 183 times and 60 times that of India (US\$700 million); 240 times, 213 times and 70 times that of Brazil (US\$600 million).

With reference to the arguments presented by the US and EU that some of the major developing countries are also major subsidisers of agriculture, the developing countries have presented the following sobering facts: “In 2016, the domestic support per farmer in the United States was \$60 586; the corresponding figures for some other WTO Members were the following: Japan (\$10,149), Canada (\$16,562), the European Union (\$6,762), China (\$863), Brazil (\$345) and India (\$227). Thus, the per farmer subsidy in the United States was 70 times that in China, 176 times that in Brazil and 267 times that in India” (WTO Document, 2019: WT/GC/W/765/Rev.2 -3).

The second submission by developing countries on S&DT complements and reinforces the arguments made in the above submission (WTO Document, 2019: WT/GC/202). The second submission made to the General Council on 9 October 2019 underlines that the Special and Differential Treatment provisions in the GATT/WTO are unconditional and treaty-embedded rights that have been provided to all developing countries, including in Part IV of the GATT. These rights have been fought for by developing countries over several decades, as the previous chapter has discussed, and are thus part of the negotiated outcome of the GATT/WTO negotiations. The proposal also points out that the WTO allows developing countries to make their own assessment about their development status and any unilateral action by developed countries to withdraw or deprive developing countries of these rights is inconsistent with members obligations. Moreover, the submission points out that such unilateral actions by developed countries undermines the foundations of the multilateral rules-based trading system (WTO Document, 2019: WT/GC/202).

In a critique of the US proposals, the South Centre sets out eight credible objections to the US arguments:

- a) S&DT is a right of developing countries (Part IV of the GATT, GATS and over 148 S&DT existing provisions in the GATT) and has become part of the architecture of the WTO and most developing countries acceded to the WTO due to this.
- b) The US proposal seeks to undermine in very serious ways, this right to flexibilities, even for LDCs, and shift the burden of proof to the developing country that seeks S&DT. S&DT will thus only be provided based on the judgement and goodwill of developed countries. This would be a fundamental change to the architecture of S&DT, which is a treaty-embedded right for all developing countries.
- c) The Doha Development Agenda has numerous provisions on S&DT including Article 44, which provides for the strengthening of the S&DT provisions, will be undermined by the US and EU proposals.
- d) The indicators that the US has chosen (G20 membership, level of income and trade share), it is argued, are arbitrary as the G20 is not a trade grouping. The level of income of a country could be influenced by the size of its population and trade share could be influenced by a country's dependence on imports or size of its population.
- e) The main purpose of the reform proposals of the US appears to be the division of developing countries so that it could advance its negotiating strategy to create new WTO rules on e-commerce, prevent the technological catching-up of developing countries by creating new rules on industrial subsidies, state-owned enterprises (SOEs) and technology transfer.
- f) A change in the right of developing countries to S&DT will have major implications for the entire multilateral system of governance including on climate change, in the United Nations Framework Convention on Climate Change, where the principle of "common but differentiated responsibilities" has been accepted.
- g) While LDCs are certainly entitled to special and differential treatment, other developing countries also face serious development challenges and require special treatment. (e.g. the majority of the world's poor live in countries that are classified as non-LDCs).

- h) Developed countries still enjoy “reverse S&DT” in the form of flexibilities for their sensitivities in many of the provisions of the GATT, in several sectors. These include large Aggregate Measurement of Support entitlements for product-specific support in agriculture, and unlimited subsidies in the Green Box (currently the US provides US\$119 billion and the EU provides €61 billion in the Green Box), a special safeguard, tariff escalation and tariff peaks, flexibilities for industrial subsidies in the Subsidies and Countervailing Agreement, and GATS flexibilities that are used to restrict movement of labour in Mode 4.

A CRITICAL ASSESSMENT OF THE FIRST “NEW PATHWAY”

The discussion above has indicated that, while the issue of S&DT was always controversial in the WTO, with developing countries calling for the existing provision to be made more “effective” “operational” and “legally binding” in the Doha Round, developed countries have tended to view the S&DT provisions as creating black holes for developing countries to escape implementing their WTO obligations. However, the collapse of the Doha Round in 2008 and the critique issued by Susan Schwab led to a new determination by the US and later the EU to change the rights and obligations of developing countries in the WTO. One of the main issues that created this situation was attributed to the rise of “emerging developing countries” such as China, India, Brazil, Argentina, and South Africa. The Obama Administration continued to make this point but maintained a posture of negotiation. During the complex WTO negotiations, since the launch of the Doha Round, the WTO was able to find creative ways of negotiating flexibilities for China, India and other small and vulnerable economies (SVEs), including for LDCs in the Trade Facilitation Agreement (TFA).

There was a display of creativity and accommodation between the larger and smaller developing countries early in the Doha Round. A group of developing countries (mainly the Africa Group and India) tabled 88 proposals, before the Doha Ministerial Conference in 2001, to review existing S&DT provisions of the GATT/WTO and seek to make them more “precise, mandatory and

operational” (Ismail, 2007). As the debate proceeded on the 88 agreement specific proposals in the Committee on Trade and Development Special Session (CTDSS) negotiating group, members identified several cross-cutting issues for discussion, including additional flexibility, graduation, differentiation, monitoring mechanism, capacity building, and policy space. Developed countries were reluctant to provide additional flexibility to *all* developing countries in the WTO based on the 88 proposals. The CTDSS was thus challenged to find a way of providing additional flexibility to those needing it *without* discrimination and *without* differentiation. The concept of “situational flexibility” then emerged in the informal discussions in the CTDSS, with a view to pragmatically provide additional flexibility to any developing country to support its development. This concept explicitly stated that no developing country should be excluded from requesting additional flexibility. However, the WTO would need to develop some criteria to ensure these additional flexibilities were granted on the bases of need – such as a challenging development situation requiring such flexibility (Ismail, 2007).

At the Bali Ministerial Conference in 2013, the sheer persistence and technical capacity of the Director General (DG) to craft creative solutions helped solve a number of seemingly intractable problems. The most creative solution he crafted was that on tariff-rate quota (TRQ) administration to get around the insistence of the US that China forgo S&DT and the marking out of a red line in this regard by China. The DG’s solution was to allow China and the US to maintain their positions with an opt-out provision for the US in the sixth year. This saved the day as all the other OECD members, especially the EU and Japan, agreed to stay in the deal and not join the US opt-out. The US opt-out clause had of course the ironic effect of providing the United States with reverse S&DT! Similarly, in the TFA, the negotiations between the LDCs, developing countries and the developed country members on the provision of technical assistance saw a creative solution emerge in which implementation of the TFA is linked to the provision of technical assistance for those members most in need. The larger developing countries, including China, India and Brazil, were willing to consider making more commitments in the agriculture and non-agricultural market access (NAMA) negotiations in the Doha Round

provided this was negotiated and developed countries made proportionate contributions. Thus the issue of the existing categories of developing countries has not been a major impediment to finding creative solutions in ongoing WTO negotiations.

However, the Trump Administration has taken on a more determined and radical approach to demand a change in the rights and obligations of developing countries on S&DT, including their voluntary signaling of opting out of all S&DT provisions in the future. This position adopted by the US takes the rules-based trading system full-circle back to the beginning of the GATT when the different and less developed situation of developing countries was not recognised by the developed countries in the GATT. The position of the US has been rejected by developing countries. In addition, developing countries have argued that the adoption of the principle of “common but differentiated responsibilities”, which is similar to the concept of S&DT, is recognised by the United Nations (UN) and especially in the climate change negotiations, thus indicating that this right to flexibilities is widely accepted in the wider global community. However, some developing countries have chosen to signal that they will forgo the resort to S&DT flexibilities in future WTO negotiations. The joint statement from Brazilian President Jair Bolsonaro and US President Donald Trump on 19 March 2019 expresses that Brazil will begin to forgo special and differential treatment in WTO negotiations. However, the statement emphasises that this decision does “not constitute any change or reduction in existing flexibility with respect to some provisions of current WTO agreements” (Itamaraty, 2019).

CONCLUSION

This chapter has provided a historical overview of the proposals by the US to recategorise developing countries since the collapse of the Doha Round in 2008. Since then there has been a persistent and consistent critique by developed countries, led by the US, of the need for “emerging developing countries” to forego their S&DT rights as provided in various provisions of the GATT. This set of proposals led by the US in this second wave is the first

of seven “new pathways” designed by the US to change the balance in the WTO. This demand will have the impact of rolling back the gains made by developing countries through their hard struggle to achieve recognition of their status as developing countries in the GATT. While some of the major developing countries have made development gains through their increasing share of world trade, increased growth and reductions of absolute poverty, the development divide between the developed countries and the developing countries remains wide. Developing countries have argued convincingly that a blanket removal of their rights will change the balance of rights and obligations in the GATT and increase the existing asymmetry of the WTO against developing countries. Developed countries attempts to change the rules of the game while they still retain several practices that impact negatively on the economic and social conditions of the poorest countries in the world such as the LDCs and the Cotton 4 is not credible.⁵

In chapter four, this book proceeds to discuss the large number of new substantive and procedural proposals submitted by the US and other developed countries to change the rules of the game of the WTO. These proposals are discussed as the second, third, and fourth US led “pathways” to change the balance of the WTO agreements decisively in favour of the developed countries, thus increasing the existing asymmetry and imbalance of the rules-based trading system.

5 The Cotton 4 include Benin, Burkino Faso, Chad, and Mali. These four cotton producers are negatively affected by US trade distorting subsidies of their cotton producers, leading to loss of production and livelihoods.

Chapter Four

WTO REFORM PROPOSALS ON SUBSTANTIVE AND PROCEDURAL ISSUES

INTRODUCTION

The collapse of the Doha Round in 2008 led the Bush Administration USTR, Susan Schwab, to declare the Doha Round “dead” (Schwab, 2011) and to call for the emerging developing countries, such as China, India, Brazil and South Africa to “take more responsibilities” and forgo their right to the use of special and differential treatment. The debate about the recategorisation of developing countries has since been a central demand of the US and was discussed in the previous chapter. The incoming Obama Administration was to take up the baton from the Bush Administration almost seamlessly in articulating the interests of the major US multinationals that the Doha Round was obsolete and there was a need for “new pathways” in the way forward for the WTO. This first major trend – or new pathway – was discussed in chapter 3.

At least six other key trends or new pathways have been advanced by the US. In the second pathway, the argument advanced was that in an era in which GVCs have become the dominant form of global production and trade, the old issues of agriculture and goods trade were no more priorities, as services trade was now the main lubricant of the global economy, and customs regulations and restrictions at the border were a greater impediment to global trade. The US argued that removing restrictions on services trade, together with trade facilitation, should become the most important issue on the agenda of the WTO. This new narrative on trade was to become increasingly appealing to the major policy think-tanks, such as the OECD, the World Bank and the WTO Secretariat. In the current second wave of reforms, the US has shifted this emphasis towards digital trade.

Third, the US also led the debate on the need for a move away from the consensus principle towards “variable geometry” and the increasing use of plurilateral approaches. This argument was first advanced in the Warwick Commission. The Sutherland Report (Sutherland et al, 2004) had earlier rejected this argument, endorsing the consensus principle that was the prevailing approach to decision-making in the WTO. More recently, the Bertelsmann Stiftung Report has brought back the old argument from the Warwick Commission and argued with new vigour for plurilateral approaches to break the impasse of multilateral negotiations (Hoekman, 2018). While the understanding by WTO members during the first wave of WTO reforms was that Members would need to agree by consensus on the changes to decision-making, the US and others are implementing significant changes to WTO rule-making processes in the second wave of reforms, without seeking any formal decision for these changes.

Fourth, the US made a strident argument for a return to the issue-by-issue approach to trade negotiations and an abandonment of the single undertaking (adopted in the Uruguay Round). In adopting this approach, the US used its power to determine which issues were “doable” and which issues were “not doable”. Needless to say, the issues of interest to the US became the dominant issues in the negotiations, and the issues of interest for the developing countries became marginalised. In the next three Ministerial Conferences, in Bali, Nairobi and Buenos Aires, the US and EU pursued this approach, exacerbating the asymmetry of the rules-based system, in favour of the US and the EU. In Bali, the US led the demand for trade facilitation to be concluded as a single issue of interest to all the members of the WTO and for the smaller countries to agree to this and save the WTO from failure. At the Buenos Aires Ministerial Conference, the focus of the US shifted to e-commerce.

Fifth, the US together with the EU and other developed countries have made controversial proposals to reform the administration of notifications, increasing the burdens on developing countries and seeking to change the existing balance in the rights and obligations of WTO members.

Sixth, the refusal of the Trump Administration to appoint new Appellate Body members has created a crisis in the AB. The current proposals, although much more stridently and robustly advanced by the Trump Administration, maintain a continuity of the long-standing critique and dissatisfaction expressed by the US on the workings of the DSB. The current US proposals take this reform agenda to new heights as the US has leveraged its power to block new appointments on the Appellate Body and effectively rendering the Appellate Body dysfunctional since December 2019.

Seventh, from the outset of the Doha Round and especially after its collapse, China was identified as the main target for the reform of the WTO (Schwab, 2011). In the second wave of reform proposals, China is the number one target of the US. In the current WTO crisis, the imminent collapse of the DSU and the “US-China trade war” are probably the most significant in their consequences for the instability of world trade. The second wave of WTO reform proposals has seen these bilateral issues permeate the proposals.

In the following section the second, third, and fourth pathways led by the US in the period after the collapse of the Doha Round, are discussed.

THE FIRST WAVE OF WTO REFORM PROPOSALS: SUBSTANTIVE AND PROCEDURAL ISSUES

From the collapse of the Doha Round to the Eighth Ministerial Conference (MC8 – December 2011)

At the informal Ministers of Trade meeting held at the OECD, Paris, in May 2011 it became clear that the Doha Round was at an impasse and, in the words of the US Ambassador, “not doable”. An alternative package had to be considered for the December 2011 (MC8) Ministerial Conference. The idea of a small package of deliverables thus emerged. A major debate ensued about the package for the December 2011 Ministerial Meeting (MC8), with some members preferring an LDC only package and others preferring an LDC plus package. The US insisted that it was only able to deliver to the LDCs if other members also delivered

on substantial areas of interest to the US, such as fish subsidies and export subsidies. The EU and Japan took a step back. By the end of July 2011 the idea of an “LDC package” began to erode and the US shifted the discourse to finding “new pathways” out of the current impasse in the Doha negotiations.

By the time of MC8, the US had developed its narrative on the reasons for the failure of the Doha Round and its alternative “new pathways” strategy to save the WTO. The new narrative was based on an analysis being developed by business interests and think-tanks in the US on the changes in the global economy, reflected in deepening GVCs, the waning support in the US for trade liberalisation, and the need to prioritise trade facilitation in the WTO (Aldonis, 2009). The origins of these new “pathways” are discussed further below.

At the G20 Summit held in Cannes, Australia, in November 2011, the US (Punke, 2011b), EU (EU, 2011) and Australia (Emmerson, 2011) made submissions on their proposals to break the impasse in the Doha Round and crisis in the WTO. These submissions have some similarities and notable differences.

What are the similarities in the views of all three submissions? First, they all declared the Doha Round to be undoable in the short term and called for “new approaches” or “new pathways” to the WTO negotiations. Second, they all argued for new “plurilateral” negotiations to be undertaken on a sectoral basis. Third, they expressed support for a mandate to negotiate “new issues”, including climate change, investment, competition and food security. Fourth, they called for the single undertaking to be abandoned with issues to be negotiated “piece by piece”.

What are the differences between these papers? First, while the EU submission calls for “plurilaterals” to be explored on the basis of the MFN principle (in which concessions are extended to all participants), the US and Australia argue that these “plurilaterals” should be based on a non-MFN basis (in which concessions are only extended to participants, such as in the WTO Government Procurement Agreement). The views of the US government on

the impasse in the Round and the way forward resonated with those of the US services industry. The views of the US industry are discussed below.

The US business lobbies were actively involved in trying to shape the future of the Doha Round. At a meeting convened by the Washington International Trade Association (WITA), some delegates called for a new “business model” to secure additional market access from the emerging developing countries (see WTO Reporter, 2011). These delegates proposed as alternatives, “plurilateral negotiations, single-sector talks, and non-MFN discussions”. Another delegate argued “we need to move away from the current texts”, and called for “increases in market access in the major emerging markets in agriculture, NAMA and services trade” (WTO Reporter 2011).⁶ The delegates also called for the single undertaking principle (“nothing is agreed until everything is agreed”), that the Doha Round negotiations is based on, to be “abandoned”. Frank Vargo, vice president for international economic affairs with the National Association of Manufacturers, and Bob Vastine, President of the Coalition of Service Industries (CSI), also argued that the MFN principle (in which concessions are extended to the entire membership of the WTO) should be replaced by a new concept: “we could have plurilateral sectorals that only benefit the countries that agree to participate” (WTO Reporter, 2011). On the future of the Round, one of the delegates (Frank Vargo) argued that it was a waste of time to declare that Doha is “dead”. Instead, he argued, the Doha Round should be conceived “as an ‘agenda’ for reaching agreements in different areas at different times”.

The WTO Eighth Ministerial Conference (MC8), held in December 2011, was inconclusive on the way forward in the Doha Round, as members had very different perspectives. In the period subsequent to MC8, some of these business lobbies were to meet again and discuss how to advance a “services plurilateral agreement” in the post-MC8 period. The reports of these meetings help to provide some insights into the motivations and intentions of the proponents for a “plurilateral” services agreement. The main proponents

6 Dave Salmonsens, Senior Director of Congressional Relations, with the American Farm Bureau.

of the agreement are the US CSI and the Australian Services Industry. Both the United Kingdom (UK) and the European Services Forums were also considering the issue, although they have declared a preference for plurilateral negotiations on services that are based on the MFN principle – in which concessions are extended to the entire membership of the WTO, such as in the WTO Information Technology Agreement.

However, the US CSI did not support an MFN type “plurilateral”, as it believed this would suffer from a “free rider” problem. Instead it supported a non-MFN plurilateral⁷ – in which the concessions are extended only to the participants of the agreements, such as the WTO Government Procurement Agreement (CSI, 2012; TheCityUK, 2012). In Geneva, the US Ambassador led the argument that a solution to the impasse was unlikely in the near future, as the impasse was rooted in the different perspectives on the new responsibilities of the emerging developing countries. He stated that the US would begin to work with those members that were willing (“coalition of the willing”) to discuss a possible plurilateral agreement in services. This agreement would be based on Article 5 of GAT. Article 5 provides for FTAs (Free Trade Areas) to be negotiated between a subset of the WTO membership in services, provided substantially all trade is covered (Washington Trade Daily, 2012).

Developing country groupings, including the Africa Group, the African, Caribbean, and Pacific Group of States (ACP), LDCs, SVEs, Argentina, Brazil, China, Ecuador, India, Paraguay, Uruguay and Venezuela, comprising over 100 developing countries, stated their views on the impasse in the Round and the way forward in a Ministerial Declaration, called Friends of Development (WTO Document, 2011: WT/MIN (11)/17). They committed to concluding the Doha Round on its development mandate, on the basis of the single undertaking in an inclusive and transparent manner. They rejected attempts to move forward by adopting plurilateral approaches that excluded and

7 Plurilateral Agreements between a small group of members can be negotiated in the WTO but need all the members to agree to this by providing a waiver from the MFN principle. The MFN principle is a core principle of the WTO and requires that no country should be discriminated against, and thus concessions agreed by some members have to be available to all members of the WTO unless the membership agree to waive their rights in this regard.

marginalised the majority of developing countries. They also rejected efforts to focus instead on “new issues”, such as investment, competition, or energy and climate change in the WTO while the Doha Round is abandoned or placed on the backburner. They argued that if any issues are to be harvested early, priority should be on issues of interest to the LDCs, such as cotton and duty-free, quota-free market access. The WTO membership thus remained divided at the December 2011 Eighth Ministerial Conference, with no solution as to how to break out of the deadlock and without a way forward.

The Ninth Ministerial Conference held in Bali in December 2013 (MC9)

At the traditional Davos informal Trade Ministers meeting held in January 2013, several OECD members, including Australia and the US, placed the issues of trade facilitation at the centre of any early harvest. The EU once again declared its reluctance to discuss export subsidies as part of an early harvest, and the US made it clear that the LDC duty-free, quota-free market access and cotton issues were “not doable”. Pascal Lamy also began to argue that the only viable way forward is to take small steps and to push ahead with the trade facilitation negotiations (Washington Trade Daily, 2012).

At the first meeting of Trade Ministers of the G20 that was held in Puerto Vallarta, Mexico on 18-20 April 2012, Angel Gurría, the DG of the OECD, and Pascal Lamy, the DG of the WTO, made a case for more open trade based on the analyses that the current trends in global trade were characterised by global value chains. They argued that more increased trade facilitation would contribute more than half of the gains from the Doha Round and there was thus a case for this specific issue in the Doha negotiations to be advanced as it was a “low hanging fruit”.

By the time of the General Council Meeting on 25 July 2012, the US had succeeded in shifting the debate from the focus on LDCs to trade facilitation, as the centrepiece of an “early harvest” or short-term deliverable, arguing that it is better to focus on things that can be done. Thus, the debate shifted to what else can be done to create “balance” with trade facilitation. At the

traditional Davos Trade Ministers meeting held on 26 January 2013, Canada, Australia and the US, among others, argued that there must be a deliverable in Bali to show that the WTO was still functioning. They both made a case of trade facilitation to be delivered. The Australian Minister claimed that trade facilitation could deliver 44 percent of the gains of the Doha Round and two-thirds of the benefits would go to developing countries. He stated that growth of GVCs required the trade of intermediate products and more efficient trade facilitation. Developed countries argued that the main benefits from a Trade Facilitation Agreement would go to developing countries. There were different perspectives on this issue by developed and developing countries and some academic observers (South Centre, 2013). The main concern of many developing countries was that the promise of financial assistance by the developed countries was not binding, whereas most of the new obligations in the main body of the TFA text were binding and would entail new implementation burdens on developing countries. The new DG, Roberto Azevedo, began his valiant attempt to advance the negotiations on the Bali Package in September 2013.

The Bali Ministerial was concluded on 7 December 2013. Aside from the Decision on Public Stockholding for Food Security Purposes (the interim Peace Clause), all the other issues of interest for developing countries were postponed to a post-Bali work programme. Developing country groups had raised concerns from the outset about the imbalanced nature of the package, with a view to improving the development content of the package and not to oppose the conclusion of a deal at Bali. In addition, all four of the LDC texts were of a best endeavour nature and the commitment to eliminate export subsidies, already agreed at the WTO Hong Kong Ministerial Conference in 2005 (by the end date of 2013) was only in the form of a political statement to honour this commitment sometime in the indeterminate future (WTO Document, 2013: RD/TNC).

The Tenth Ministerial Conference held in Nairobi 2015 (MC10)

The 10th Ministerial Conference of the WTO was held in Nairobi, Kenya, on African soil for the first time. As in the period before the 9th Ministerial Conference, WTO members were divided once again just months before the Nairobi Ministerial Conference and could not agree on both the agenda and the way forward post-Nairobi (Kanth, 2016).

The most significant decision taken in Nairobi was to eliminate export subsidies and discipline export credits in agriculture. A number of other issues of interest to developing countries were also discussed, but as the DG of the WTO himself stated: “more limited progress was achieved in other areas on the Special Safeguard Mechanism (SSM), public stockholding, minimizing the negative consequences of food aid, the LDC package and strengthening S&DT provisions” (Azevedo, 2016). On the crucial issue of the future of the Doha Round, the WTO members were divided and the final declaration from Nairobi stated: “We recognized that many members reaffirm the Doha Development Agenda”. However, the declaration went on to state that, “other members ... do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations” (WTO, 2015b).

Some commentators have argued that the Nairobi Ministerial Conference could be said to have been far worse than the Bali Ministerial Conference from the perspective of developing countries. The main reason for this argument is the apparent death knell served by this statement to the Doha Round. In addition, the Nairobi meeting had opened the window for bringing new issues into the WTO negotiations. This was seen as a victory for the developed countries as the USTR Ambassador Michael Froman commented in a press conference subsequent to the Nairobi meeting: “As WTO members start work next year, they will be freed to consider new approaches to pressing unresolved issues for the organization to consider” (Kanth, 2016). In the next Ministerial Conference of the WTO, the developed countries brought in issues mainly of interest to them and attempted to prioritise these in the WTO negotiations.

The Eleventh WTO Ministerial Conference held in Buenos Aires in December 2017 (MC11)

The Buenos Aires Ministerial Conference held in December 2017 even failed to reach agreement on a declaration. The US refused to support language recognising the “centrality of the multilateral trading system” and the need to support “development” (Hannah et al, 2018). India and other developing countries were of the strong view that a failure to acknowledge the existence of the Doha Round would signal the end of the single undertaking, with issues of interest to developing countries, such as agriculture, not addressed in future by the developed countries in the WTO. The Bali Ministerial Conference had agreed to negotiate a permanent solution on the issue of public food stocks for food security and no such agreement could be reached on this issue, or that of a special safeguard or domestic support, at Buenos Aires. The Buenos Aires meeting was a major turning point away from multilateral processes in the WTO towards plurilateral negotiating approaches according to some academic observers (Hannah et al, 2018).

The WTO membership was divided on several issues, this time also reflecting significant differences between developing countries as well. New issues that were not discussed in the WTO before were now on the agenda, such as investment facilitation, trade and micro, small and medium enterprises (MSMEs). On these issues, including e-commerce, a large number of members agreed to pursue plurilateral discussions.

On 11 December 2017, Ambassador Chiedu Osakwe of Nigeria held a press conference announcing that 42 members would begin “structured discussions with the aim of developing a multilateral framework on investment facilitation”, including on improving transparency, streamlining administrative procedures and facilitating FDI”. Fifty-seven members of the WTO issued a joint declaration on the creation of an informal working group for MSMEs. The declaration committed signatories “to discussing a range of issues of relevance to MSMEs, including access to information, promotion of a more predictable regulatory environment, reduction in trade costs, and increasing access to trade finance for MSMEs”. The Joint Declaration on Trade

and Women's Economic Empowerment gathered a great deal of momentum and was eventually signed by 119 WTO members and observers.

No positive movement was made on agriculture. On the issue of public food stocks which the Bali Ministerial had decided should be resolved by MC11 (at Buenos Aires), no progress was made. This led to developing countries, like India, opposing an outcome on other issues of interest to the developed countries. In its opening plenary speech to the Buenos Aires conference, India argued that, "This is a matter of survival for eight hundred million hungry and undernourished people in the world ... In this context, we cannot envisage any negotiated outcome at MC11, which does not include a permanent solution" (Hannah et al, 2018).

There was a big push by the US and other developed countries to get Members to agree to multilateral e-commerce negotiations. However, by the third day of the conference, this attempt had not materialised. A joint statement was issued at the end of the conference by 43 developed and developing countries, committing the group to "initiate exploratory work together toward future WTO negotiations on trade related aspects of electronic commerce". The negotiations would be open to all members to participate.

In the following section, the second wave of reform proposals on substantive and procedural issues is discussed.

THE SECOND WAVE OF US AND EU PROPOSALS ON SUBSTANTIVE AND PROCEDURAL ISSUES

What are the reform proposals of the US and EU on substantive and procedural issues? The Trump Administration has maintained the rhetoric of the previous US Administrations that "the US will not negotiate of the basis of the Doha Development Agenda (DDA) mandates or old DDA texts and considers the Doha Round as a thing of the past" (USTR 2018a). The USTR 2018 Trade Policy Agenda makes it clear that the US does not support a single undertaking or "package of results" approach but instead

prefers an issue-by-issue approach that prioritises issues of interest to the US. In Buenos Aires, the US focused on the issues of fisheries subsidies and e-commerce.

The EU paper (WK 8329/2018) expresses its concern at the failure of the rule-making function of the WTO and argues that, “there are multiple reasons for this situation including, in particular, divergent interests, the extreme difficulty in arriving at consensus decisions by all 164 Members and the current approach on development”. The EU paper thus argues that, in this context, any modernisation discussion has to cover both the substantive side and the process side of negotiations. The paper identifies the substantive issues as being “key to global trade as it evolves”. Key to global trade for the EU includes: a) the need to discipline SOEs; b) the list of prohibited subsidies in the Subsidies and Countervailing Measures agreement; and c) rules to address the barriers to services trade and investment, especially forced technology transfers, such as GATT, GATS, Trade-Related Investment Measures (TRIMS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS). The priority for the EU identified in its paper is the need to remove unjustified barriers to trade by electronic means (e-commerce).

The EU paper calls for a new negotiating process to unlock the negotiations. This process is referred to as “flexible multilateralism”. This requires “a model of negotiations in which individual issues can be built up by interested members under the auspices of the WTO towards eventual agreement by some or all members forming an integral part of the WTO framework”. These plurilateral agreements, the EU argues, should be made available for all members to join on an MFN basis. The EU also calls for the WTO Secretariat functions to be extended to support such processes and the implementation and monitoring of such plurilateral agreements.

In this regard the EU, together with a large number of developed and developing countries (about 55 countries) including China and Brazil, launched a process in the WTO to commence negotiations on trade related aspects of e-commerce (WT/L/1056 25 January 2019).

A CRITICAL ASSESSMENT OF THE NEW PATHWAYS

This chapter sets out the US-led proposals on four of the seven new pathways to reform the WTO proposed by the developed countries. These include the GVCs narrative on trade (second pathway); the attempt to discard the consensus approach to decision-making in the WTO in favour of a variable geometry approach and plurilaterals (third pathway); and the abandonment of the Doha Round and the single undertaking in favour of an issue by issue approach (fourth pathway). It should be emphasised that these WTO reforms were advanced in the first wave of reform proposals and are discussed to provide the reader with historical context to analyse the second wave of WTO reforms. In the second wave of WTO reforms there were some significant shifts in US and other developed countries' trade strategies. Each of these new pathways is critically assessed below.

The second pathway narrative on the emergence of global value chains as a new reality of international trade was drawn to the attention of the first Trade Ministers meeting held under the auspices of the G20, in Puerto Vallarta Mexico, by Angel Gurría, the OECD Secretary-General. He argued that emergence of GVCs as a new reality of international trade “where goods are no more manufactured in one country but are made in the world and the large share of intermediate goods exports provide a compelling reason for countries to have more open trade policies” (OECD, 2012). However, the OECD research does not point to the more perverse social impact of this form of globalisation, nor does it raise the increasing challenges this poses for developing countries that seek to break out of the trap of low-value production and advance their economic development strategies of diversification and industrial development.

The view of the global market as a self-regulating machine is divorced from the specific political, social and institutional structures and norms of societies. It is this same utopian logic of the self-regulating market that is now being advanced to make the case for what Dani Rodrik (Rodrik, 2011) describes as “hyperglobalisation”. However, as several writers have observed,

economic processes and the market are embedded in social processes and conform to the social norms of society and reflects their specific historical experiences (Polanyi, 1944; Cox, 2002). Moreover, many of the proponents of this GVC approach almost totally divorce their analysis of globalisation from the experiences of the majority of people in the world suffering the effects of a continuing economic and social crisis reflected in rising unemployment, inequality and poverty. It is partly due to this approach to globalisation that the marginalised and losers from globalisation have risen in both the US and the UK to elect populist leaders such as Donald Trump and Boris Johnson as leaders that are driving the protectionist narratives respectively, to “Make America Great” through the “America First” campaign and “Make Britain Great Again” through the Brexit campaign. The WTO members will need to be cautious about accepting a narrative on GVCs that advocates for “hyperglobalisation” as a solution to increase global growth and reduce poverty and unemployment world over.

In the third pathway, the Sutherland Commission report chaired by the previous Director General of the WTO, Peter Sutherland, made a judicious decision to avoid changing the consensus approach to decision-making in the WTO. However, the Warwick Commission that followed decided that the consensus approach was a major impediment to advance negotiations in the WTO. The Warwick Commission called for greater flexibility in the voting system (Warwick Commission, 2007). The Commission called for the concept of “variable geometry” to replace the more rigid “single undertaking” concept that was deployed in the Uruguay Round, and became the conventional approach in the Doha Round. The Warwick Commission points to the earlier practices in the Tokyo Round where various agreements were reached on the codes on standards, import licensing, anti-dumping, subsidies and countervailing measures and customs valuation. The Commission urges WTO members to seriously consider “critical mass as part of the decision-making procedures for delineating the WTO agenda”.

The Bertelsmann-Stiftung Report on the future of the WTO, which was published at the onset of the second wave of WTO reform proposals, came

to similar conclusions as the Warwick Report. The reports begins by arguing that “the fundamental consensus norm has been abused to resist multilateral discussion of new policy areas and concerns regarding functioning of the organization”. The report argues that “an important part of the agenda for global trade governance – does not necessarily require a single undertaking based approach with issue linkages and trade-offs”. It then proceeds to argue that “differentiation in the rights and obligations of developing countries is a sensitive political issue but essential”. It then takes a strong view in favour of “open plurilateralism” and urges the reader to accept the reality of the collapse of the Doha Round and move on to negotiate “a mix of old and new topics”. The new topics that the report suggests are the major priorities are “digital economy related issues such as e-commerce regulation” and “investment in services” (Hoekman, 2018).

In a critique of this plurilateral approach being mooted by some players, Wilkinson (2014) reminds us that the shift to plurilaterals when multilateralism is in crisis began with the GATT itself, which became the default “organisation” when the US Congress rejected the multilaterally negotiated ITO under US leadership. Earlier GATT plurilateral agreements, such as those agreed in the Tokyo Round were later multilateralised by the adoption of the principle of the “single undertaking” during the Uruguay Round. However, the most significant difference between the GATT and the WTO is the introduction of Article X in the Marrakesh Agreement that requires consensus for any amendment to the GATT/WTO Agreements or in the absence of this the application of a stringent amendment procedure. As Wilkinson (2014) observes, smaller countries have been excluded from plurilateral agreements since the early GATT days and the suggestions that they can be compensated for this in any future plurilateral by multilateral concessions on a non-reciprocal basis will not remove the risks of their interests being prejudiced or not considered in the plurilateral agreement. Besides, most poor and smaller countries in the WTO have continued to voice their preference for multilateral processes precisely because they are more inclusive and transparent. As Wilkinson observes, excluding these poorer and smaller countries suggests that they have made any agreement in the WTO

more difficult. This is clearly not the case. The reasons for the impasse in the Doha Round have more to do with the significant differences between the developed and developing country players on the development content of the negotiating issues, and any plurilateral that seeks to make progress on any substantive issues will require the participation of these players, particularly if they are to be later multilateralised in the WTO. Developed countries during the second wave of reforms are acting in a manner that disregards the provisions of Article X of the Marrakesh Agreement and as if the plurilateral initiatives, such as that on e-commerce, will become multilateralised without the full consent of developing countries.

In the fourth pathway, the US led the process to abandon the “single undertaking” in favour of an issue-by-issue approach. In the period after the collapse of the Doha Round in July 2008 and the 8th Ministerial Conference held in December 2011, US business groups, particularly in services trade were actively shaping the future of the WTO negotiations. At a meeting of WITA held before MC8 it called for the “single undertaking” approach to be abandoned and for the MFN principle to be replaced by a plurilateral approach “that only benefits countries that agree to participate”. The WTO negotiations should be conceived, in the view of these business lobbies, as an “agenda for reaching agreements in different areas at different times”. It was thus no accident that the USTR was to articulate this narrative at MC8 and thereafter on the road to the Bali Ministerial Conference in 2013 (MC9). These business lobbies were to argue that trade facilitation was the main issue that should be negotiated at Bali. The issues of interest to developing countries, including agriculture trade and development concerns, including that of the LDCs were declared to be not “doable” by the USTR and developing countries were urged to contribute to the success of the Bali meeting to save the WTO from being declared irrelevant due to its inability to negotiate agreements successfully. The Bali Ministerial Conference was therefore only able to agree on trade facilitation as a legally binding agreement with the other nine issues of interest to developing countries postponed to a post-Bali work programme.

At the Nairobi Ministerial Conference (MC10), a package of issues was agreed, with the issue of eliminating export subsidies and disciplining export credits in agriculture being the most important. However, on other issues such as “the SSM, public stockholding, minimising the negative consequences of food aid, the LDC package and strengthening S&D provisions” limited progress was made (Azevedo, 2016). On the crucial issue of the future of the Doha Round, WTO members were divided and not able to agree, and the developed members insisted on language in the declaration that reaffirmed their view that “new approaches are necessary to achieve meaningful outcomes in multilateral negotiations” (WTO, 2015b). Developing countries were yet again having to compromise and accept language that they did not agree to as they did not want the WTO Conference to fail on African soil.

The Buenos Aires Ministerial Conference (MC11), the first attended by the new US Trump Administration, was even worse for the WTO as the conference failed to even reach agreement on a declaration. Some academics were to observe that the US refused to support language recognising the “centrality of the multilateral trading system” and the need to support “development” (Hannah et al, 2018). The push for negotiations on a range of new issues including e-commerce, investment facilitation, trade and MSMEs created major divisions between developed and developing countries and between developing and developing country groups. No agreement was possible even on an issue such as fish subsidies that was of systemic interest to all members, in part due to the failure of the developed countries to honour their commitment made at the Bali Ministerial Conference to arrive at a permanent agreement on the issue of public stockholding by MC 11. Thus the second wave of WTO reforms were ushered in by a more aggressive and divisive approach to plurilateral approaches as developing countries were pressured to join a range of plurilaterals and were divided in their response.

CONCLUSION

These trends reflected in the processes and outcomes of the Ministerial Conferences from MC8 (Geneva 2011) to MC 11 (Buenos Aires 2017) constitute the “new pathways” and reform proposals being made by the US and the EU. These “pathways” were again proposed with increased vigour and robustness by the Trump Administration in the period from the December 2017 Ministerial Conference held in Buenos Aires until July 2019 in the lead up to the next Ministerial Conference originally scheduled for June 2020 to be held in Nur-Sultan, Kazakhstan. Due to the COVID-19 crisis this WTO conference has been postponed to 2021.

There are seven main pathways delineated by the US that emerge from this discussion. The EU is on the same page with the US on six of the seven pathways. The EU and the US are only divided significantly on the sixth pathway related to reform of the DSU. The next chapter looks at the proposals made by the US, EU and Japan, and other members on issues of administrative and regulatory reforms.

Chapter Five

WTO REFORM PROPOSALS ON REGULATORY WORK AND TRANSPARENCY

INTRODUCTION

This chapter discusses the proposals on regulatory work and transparency (categorised by the EU in its submissions). This relates to the work of the regular bodies or the implementing of the WTO agreements. WTO members are required to implement their obligations under various WTO agreements. The WTO administrative bodies monitor the implementation of these obligations. One of the contentious issues is the implementing of notification requirements under various WTO agreements. This issue has drawn a range of proposals by the US, EU and other developed countries. The proposals are not new, as some proposals to encourage notifications have been made by various countries in the WTO since the onset of the WTO. However, the new set of proposals in the second wave of reform proposals are radical and seek to change the existing balance of rights and obligations of members, and have thus provoked a response by developing countries. The proposals on the “regular work and transparency” of the WTO and reform of the system of notifications is discussed in the following section.

SUMMARY OF PROPOSALS ON REGULAR WORK AND TRANSPARENCY

The main issue in the proposals submitted under this category is on notifications to the WTO and the processes and procedures of the WTO working groups and committees. The US has been the main proponent of the transparency proposals on notifications, with the EU following in its comprehensive submission. The US, EU and Japan agree on the approach of the developed countries, and they have been supported by a few developing countries, such as Argentina and Costa Rica. These proposals are discussed

below. This section examines the views of the developing countries. A large group of developing countries have responded to these proposals.

The communication from Argentina, Costa Rica, EU, Japan and the US (WTO Document, 2018: JOB/GC/204 JOB/CTG/14) includes the proposals made by the EU in its comprehensive paper on WTO reform (see above). The submission recognises the importance of notifications as part of the regular work of the WTO and states that in view of “the low level of compliance with existing notification requirements” it is necessary to strengthen and enhance transparency and improve the operation and effectiveness of notification requirements. A revised version of the proposal was submitted to the WTO General Council by a few more members on 15 March 2020 (JOB/GC/204 Rev.3 JOB/CTG/14 Rev.3). The revised document made at least two significant changes. First, it removed the explicit reference to counter-notifications; and second, it excluded LDCs from these more burdensome notification obligations, provided they had requested technical assistance.

However, while the counter-notification provisions were excluded, the proposals did envisage that other members could bring to the notice of the WTO the non-compliance of members with their notification. In addition, while the LDCs are to be excluded from punitive measures, the proposal does impose an obligation on the LDC members of the WTO to submit written information to the WTO Secretariat and the relevant committee on the capacity they need to comply with the notification.

The communication to the General Council and Goods Council makes several proposals, including to instruct these bodies to “assess and report annually and to take appropriate steps to reinforce compliance”. The trade policy review body of the WTO is requested to create a special section on compliance of the member with notifications. A number of punitive measures are proposed for non-compliance of members including: a) representatives not to be nominated to chair WTO bodies; b) an increase of five percent on its budgetary contribution. After two years of non-compliance, a) the member should be declared an inactive member, b) speak last at such meetings; and

c) be identified as an inactive member by the General Council (JOB/GC/204 Rev.3 JOB/CTG/14 Rev.3).

Three more proposals have been submitted to the WTO on notifications and the processes and procedures of WTO working groups and committees; by the EU et al (WTO Document, 2020: WT/GC/W/777/ Rev.5); Hong Kong, China (WTO Document, 2019: RD/CTG/9) and Canada et al (WTO Document, 2020: G/C/W/780). The EU et al proposal was submitted to the General Council while the latter two were submitted to the Council for Trade in Goods. These three proposals have focussed on strengthening the powers of the regular committees of the WTO to monitor the notifications of members.

A CRITICAL ASSESSMENT OF THE FIFTH PATHWAY

In a comprehensive analysis of the Argentina et al proposals on notifications, a paper by South Centre has critiqued these proposals (Kwa and Lunenburg, 2019). The proposals, they state, aim to address the problem of notification compliance through strengthening notification requirements in the following ways: a) encourages counter-notifications; b) expands the Trade Policy Review Mechanism's oversight in the area of notifications; c) to change notification requirements from "should" to effectively a "shall"; and d) even if a member were up to date in notifications but had not notified in a particular year, punitive measures could be taken.

The most egregious part of the proposal on notifications was the attempt to extend the system of counter-notifications to all WTO agreements. Counter-notifications are provided for in some agreements only in the WTO and are not provided for in most agreements (Kwa and Lunenburg, 2019). For example, counter-notifications are not provided for in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Technical Barriers to Trade (TBT); the TRIMS agreement; the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement); and the TRIPS Agreement or the Trade Facilitation Agreement.

In the revised version of the Argentina et al paper (WTO Document, 2020: JOB/GC/204 Rev.3 JOB/CTG/14 Rev.3), the harsher provision of counter-notification was removed and a new provision excluding the LDCs from punitive measures was included. However, while the counter-notification provision was removed, the proposal does encourage WTO members to bring “to the attention of relevant committees any notifications that a member considers have not been made”. While the provision on LDCs does appear to exclude the poorest countries from the harsh punitive measures provided for in the proposal, it only does so on condition that the LDCs request the relevant assistance and provide this information to the relevant WTO committees.

The South Centre paper points out that while the LDCs are clearly the countries with the lowest level of compliance with notifications, all members including the developed countries fall short of their compliance obligations. For example, in the area of the agriculture domestic support, “the WTO Secretariat has noted that only 17 WTO Members are in 100% compliance, that is, 13% of the Membership, 31 Members or 23% have a compliance rate of 0%, i.e. they have not submitted any domestic support notification since they joined the WTO”. In the area of services notifications, the paper notes that GATS, Art III.3 is not being complied with by many developed countries, including the US. According to the WTO Secretariat, since 1995, the US has made only two notifications in this area, once in 2000 and another in 2010. In contrast, over the same period, other members have made many more notifications: Albania (122), Switzerland (65), China (58 – China has notified yearly since 2002 after becoming a member), South Africa (22).

In a response to these proposals, several developing countries have argued that any non-compliance by developing countries is not willful but is due to human resource and institutional capacity constraints (WTO General Council, 2019: WT/GC/W/ 778/Rev.1). They have thus rejected the proposals to make the notification requirements more stringent and have argued as follows:

Developing countries face challenges in complying with all their notification obligations due to human resource and institutional capacity constraints. Any non-compliance is not willful. Treaty obligations must be performed in good faith. Yet despite the best of intentions, the ability to fulfill all notification obligations inevitably depends on capacities that are commensurate with a Member's level of development and resources available. In light of these difficulties, we do not agree to additional transparency obligations. Any work in this area must be in the provision of capacity building to developing countries. Developed Members should also lead by example in submitting comprehensive, timely and accurate notifications.

In addition, the developing countries have made some counter-proposals to demand that developed countries live up to their obligations to notify and be transparent in the following areas: a) regular notification of entry-related measures affecting existing Mode 4 commitments of members; b) article 66.2 of the TRIPS Agreement requires developed countries to provide technology to LDCs; c) disclosure of origin of traditional knowledge and genetic resources in patent applications; and d) transparency in tariffs – non-ad valorem tariffs should be notified in ad valorem terms or converted to ad valorem tariffs.

All three proposals submitted on the strengthening of the powers of the regular committees are intended to apply increased pressure on members that are not in compliance with their trade obligations.

The EU et al proposal (WTO Document, 2020: WT/GC/W/777/Rev.5) is particularly problematic as it attempts to introduce stringent procedures for the WTO committees that lead to informal dispute resolution and draws on the expertise of the Secretariat to apply pressure on the member that is under scrutiny. This procedure will change the nature of the regular WTO committees, transforming their role from monitoring forums that encourage dialogue and sharing of information between members to one of policing of members' trade obligations and playing a dispute resolution role. The EU et al proposal attempts to draw the Secretariat into the role of increasing pressure

on those countries that are put under the spotlight. This will undermine the neutrality of the WTO Secretariat, which will become associated with the larger and more powerful WTO members. The Hong Kong, China proposal (WTO Document, 2019: RD/CTG/9 27), while focusing mainly on the work of the Council of Trade in Goods and its subsidiary bodies, also attempts to use the resources and expertise of the Secretariat to apply pressure on those members alleged to be not in compliance with their trade obligations.

The Canada et al proposal (WTO Document, 2020: G/C/W/780) also focuses on the work of the Council for Trade in Goods (CTG). However, the proposal is mainly concerned with the trade measures that members have been adopting on issues related to COVID-19. The Canadian et al proposal calls for “relevant subsidiary committees to include a dedicated section on COVID-19 measures in their respective reports to the CTG to support discussion in the CTG”. The objective of the proponents is not to limit the proposal to export restrictions or quantitative restrictions, but to expand the scope to “timely information and notification of any COVID-19 related measures and initiatives”. This proposal therefore envisages “relevant subsidiary committees to include a dedicated section on COVID-19 measures”. Thus, the main criticism of this proposal is that it adds another layer of notifications to the already burdensome and comprehensive notification requirements of WTO members. It is interesting to note that the Canada et al proposal goes beyond the directive of the G20 Trade Ministers that was held in Toronto, Canada on 14 May 2020 (G20, 2020). The Minister’s statement called on WTO members to “strengthen transparency and notify the WTO of any trade related measures taken in accordance with our WTO obligations”. This statement thus envisaged that the notifications on COVID-19 would be “in accordance with” existing WTO obligations and not “additional” to WTO obligations. It is thus unfortunate that the Canada et al proposal goes way beyond this ministerial directive and seeks to create additional and burdensome obligations on WTO members.

CONCLUSION

This chapter has summarised the proposals made by the US, the EU and other members on regular work and transparency in the WTO. There have been two sets of proposals submitted to the WTO. One set focusses on notifications and the other focusses on the processes and procedures of the regular committees of the WTO. It is argued that, while the encouragement and improvement of notifications is helpful and will strengthen the rules-based trading system, the attempt to change the balance of rights of members by creating additional burdensome obligations on WTO members, particularly developing countries, will increase the existing asymmetry of the rules-based trading system. In addition, the punitive measures imposed on countries that fail to comply with these additional obligations will increase the burden on developing countries, especially the LDCs. More work should rather go into assisting developing countries to improve their notifications and ensure that developed countries are more transparent in areas that have a disproportionate impact on poorer countries. In the next chapter, the US-led WTO reform proposals on the Dispute Settlement System is discussed as the sixth pathway.

Chapter Six

REFORM PROPOSALS ON THE WTO DISPUTE SETTLEMENT SYSTEM

INTRODUCTION

At the General Council meeting of the WTO, held in Geneva on 9-10 December 2019, the US Ambassador to the WTO rebuffed all the concessions and compromises made by the rest of the membership to resolve the impasse on the appointment of new Appellate Body members, contained in the draft decision proposed by the Facilitator, Ambassador David Walker – thus effectively crippling the functioning of the Appellate Body. Ambassador Shea went on to state that: “for more than 16 years and across multiple US Administrations, the United States has been raising serious concerns with the Appellate Body’s disregard for the rules set by WTO members” (Shea, 2019).

Since the onset of the Trump Administration, the US has become more robust in its reform proposals on the dispute settlement system. The US has, since August 2016, decided not to authorise any process for the selection of new AB members. At the time the Appellate Body had its full quorum of seven Appellate Body Members. At the end of 2018 the Appellate Body only had three members left (Hong Zhao, Ujal Bhatia and Shree Servansing) – just sufficient to create a quorum (Division) for an Appeal. By 10 December 2019 the WTO was left with only ONE remaining Appellate Body member (Hong Zhao) – thus rendering the Appellate Body dysfunctional.

It is widely recognised that the WTO dispute settlement system was “a jewel in the crown of the WTO” and is one of the most active international dispute settlement mechanisms in the world. According to the WTO, since 1995, as at September 2019, over 500 disputes had been brought to the WTO and over 350 rulings had been issued. The paralysis of the WTO Appellate Body was described by the Chair of the Appellate Body (at the time) in the

Foreward to the Appellate Body 2018 Report. He explained that “when a panel report is appealed, the current DSU rules provide that adoption of that report is suspended pending the appeal. If the Appellate Body cannot conduct proceedings because a Division cannot be composed, any losing party could prevent the adoption of the panel report by appealing it to a paralysed Appellate Body. The likely result is therefore not a reversion to the pre-GATT 1994 regime. Instead, an institutional paralysis stretching across panel and appellate proceedings will manifest ... Furthermore, the prospects of securing agreement to new multilateral trade rules diminish if negotiating members cannot rely on the principled and effective enforcement of those rules. The possible paralysis of the Appellate Body therefore concerns the operation of the multilateral system as a whole” (WTO, 2019).

Ambassador David Walker was appointed by the WTO membership at its December 2018 General Council meeting to assist the chair, as facilitator, in resolving the impasse on the selection of WTO members. The Walker process led to several draft reports, resulting in a Draft Decision in October 2019 and a new text released on 28 November 2019. The details of the Walker process are discussed by Danish and Aileen Kwa (2019b). Although the Walker process reached out to the US in making concessions without any reciprocal obligations on the part of the US, the US rebuffed these offers. This attitude was vigorously criticised by EU Ambassador Joao Aguiar Machado in his statement to the General Council on 9 December. He argued that, while the US was not ready to unblock the impasse on the appointment of Appellate Body members, the US has not formulated any single proposal or counterproposal of its own. The EU Ambassador warned that the consequences of the US action is that “the actions of one member will deprive other members of their right to a binding and 2-step dispute settlement system even though this right is specifically envisaged in the WTO contract” (EU, 2019). He went on to argue that the EU will not support or condone “a system slipping into power-based economic relationships”.

The serious consequences of maintaining the US veto on the Appellate Body was eloquently argued by outgoing member of the Appellate Body

Peter Van den Bossche, in his farewell speech on 28 May 2019. He predicted that the US was most likely to maintain its intransigent stance against the lifting of its veto on appointing Appellate Body members. Following the reasoning of his colleague Ambassador Ujal Bhatia, in his foreword to the 2018 Appellate Body Annual Report, he argued that from 11 December 2019, not only the Appellate Review but also the entire WTO dispute system would no longer be fully operational and could progressively shut down (Van den Bossche, 2019). Van den Bossche, a renowned trade law academic who had presided over 20 WTO appeals and been in consultations on 18 others, was critical of the US stance on the Appellate Body and reflected his frustration: “It is not clear to me, as I am sure it is not clear to most of you, whether any reform of the current system, short of its virtual elimination, will satisfy the United States” (Van den Bossche, 2019). He warned that the paralysis of the WTO Appellate Body would result in “a return to some kind of pre-WTO dispute settlement system that will no longer be fully operational and may progressively shut down”.

The US has been a critic of the Dispute Settlement System created by the Uruguay Round. Since the onset of implementing the new system, the US has raised a range of concerns about the functioning of the Appellate Body and the DSU agreed in the Uruguay Round. For this reason, the WTO established a negotiating group under the auspices of the Dispute Settlement Body of the WTO. At the Doha Ministerial Conference, ministers agreed to negotiate “to improve and clarify the dispute settlement system”. The negotiations are not formally part of the single undertaking and not linked to the Doha Round. Since then there have been many technical proposals to improve the functioning of the system. However, not much progress has been made on building consensus on these proposals. The United States has been regarded as an outlier in the many proposals for reform that have been made. This is because the US judicial system and political expectations of the WTO Appellate Body are argued to be different from the rest of the membership. The Walker process resulted in several draft progress reports, with a draft decision tabled at the General Council on 28 November (WTO Document, 2019:

WT/GC/W/791) that was rejected by the US Ambassador in his statement to the WTO General Council on 9 December 2019.

The United States had thought carefully about its response to the WTO membership efforts to reach out to it and find a solution to the impasse over its veto of Appellate Body members. Addressing the US Senate Finance Committee in March 2019, the USTR, Ambassador Lighthizer, argued that blocking the appointment of members to the WTO Appellate Body is the only way for the US to gain leverage in pushing for reforms of the WTO (Inside US Trade, 2019). Just before the 9 December 2019 WTO General Council meeting, the US House of Representatives passed a resolution in support of the USTR's positions in the WTO urging the USTR "continue to lead and work with other countries to pursue reforms at the WTO that – a) address concerns with the WTO's Appellate Body; b) improve the efficiency and transparency of dispute settlement proceedings; c) remedy the failure to satisfy notifications obligations of the various WTO agreements and develop accountability mechanisms to address this issue proactively; d) discipline the use of special and differential treatment for self-declared developing countries; and e) create new rules and structures that can serve the United States interests while promoting peace, prosperity, and open markets and societies" (US Congress, 2019).

In the following section, the US proposals submitted during the second wave of reform under the Trump Administration are briefly summarised and discussed. The US resort to the security provisions of the GATT and its attempt to exclude the DSB from adjudicating on its unilateral trade actions is briefly discussed. The response of the rest of the WTO membership is then discussed. In the current debate on the dispute settlement system, the US and the EU are adversaries. However, most WTO members are sympathetic to the concerns of the EU. Their views and proposals are thus discussed. Some reflections on the current debate on the dispute settlement are discussed with reference to the academic literature. Finally, a brief assessment of the US proposals is made in the concluding section.

THE SECOND WAVE OF US PROPOSALS ON THE REFORM OF THE DISPUTE SETTLEMENT SYSTEM

In the US President's 2018 Annual Report and 2019 Trade Policy Agenda (USTR, 2018a) the US argues that it has been raising concerns about the functioning of the WTO Dispute Settlement system for more than a decade. The US summarises its main concerns in five issues: a) disregard for the 90-day deadline for appeal; b) continued service by persons who are no longer AB members; c) issuing advisory opinions on issues not necessary to resolve a dispute; d) Appellate Body review of facts and review of a member's domestic law *de novo*; and e) the Appellate Body claims its reports are entitled to be treated as precedent. These five issues are briefly summarised in the following section.

a) Disregard for the 90-day deadline for appeal

The US argues that the Appellate Body has assumed the authority to take whatever time it considers appropriate for individual appeals and has been ignoring the mandatory 90-day deadline for deciding appeals set out in WTO rules.

b) Continued service by persons who are no longer AB members

The US argues that the Appellate Body purports to find in Rule 15 of its Working Procedures the authority to "deem" as an Appellate Body member one of its own members whose term has expired. However, the US states that under the WTO Agreement, it is the Dispute Settlement Body, not the Appellate Body, that has the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving as an AB member.

c) Issuing advisory opinions on issues not necessary to resolve a dispute

The report states that the United States has been increasingly concerned about the tendency of WTO reports to make findings that are unnecessary to resolve

a dispute or on issues not presented in the dispute. Instead the US argues that the purpose of the dispute settlement system is not to produce reports or to “make law,” but rather to help members resolve trade disputes among them.

d) Appellate Body review of facts and review of a member’s domestic law de novo

The US argues that Article 17.6 of the DSU limits an appeal to “issues of law covered in the panel report and legal interpretations developed by the panel”. However, in the US view “the Appellate Body has consistently reviewed panel fact-finding under different legal standards and has reached conclusions that are not based on panel factual findings or undisputed facts”. In addition, the US objects to the alleged practice of the Appellate Body to “review the meaning of a Member’s domestic measure as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for Appellate Body review”.

e) The Appellate Body claims its reports are entitled to be treated as precedent

The US also objects to the alleged assertion by the Appellate Body that its reports “effectively serve as precedent and that panels are to follow prior Appellate Body reports absent “cogent reasons.” The US argues that this is contrary to WTO rules.

US RESORT TO THE SECURITY PROVISIONS OF THE GATT TO JUSTIFY ITS UNILATERAL TRADE MEASURES

The reforms proposals of the US on the dispute settlement system began as a series of technical proposals when the negotiating group, under the DSB, was constituted. Since then, and particularly since the Trump Administration, these proposals have become more robust and political, as the US has resorted increasingly to unilateral trade measures such as Section 232 of the US Trade Expansion Act of 1962. Many countries in the WTO have been at the brunt of these measures including the EU, Canada, Mexico and Turkey, which are usually allies of the US in the WTO. The US has argued that it considers the Section 232 measures of the Trade Expansion Act of 1962 necessary for the

protection of its essential security interests, and therefore justified under Article XXI of the GATT. Similarly, the US has rebutted China's claim that the actions taken against China in the "US-China trade war" are not GATT illegal and can be justified under Article XXI on national security grounds.

In a submission to the WTO DSB, dated 29 October 2018, the US presented several of its concerns with China's trade policies. On the issue of Intellectual Property Rights, the US argued that certain policies of China related to "technology licensing" allows for a Chinese company to continue using the technology of US companies after the contract comes to an end, and also imposes unfavorable terms on US technology companies in support of its own companies. The US argues that these practices are inconsistent with China's commitments to Articles 3 and 28 of the TRIPS Agreement. The statement to the DSB at the same meeting on the request by China for the creation of a panel to address its concerns with US unilateral measures against steel and aluminium products exported by China to the US is much more robust and strident. The US statement asserts that, "We will not allow China's Party-State to fatally undermine the US steel and aluminum industries, on which the US military, and by extension global security, rely". It goes on to state that the US measures are "national security actions", and "that issues of national security are political in nature and are not matters appropriate for adjudication in the WTO dispute settlement system".

The 55-page statement delivered to the DSB responds to the separate proposals by the EU, Canada, Norway, Mexico and Turkey in a similar manner. The US argues that it considers the Section 232 measures of the Trade Expansion Act of 1962 necessary for the protection of its essential security interests, and they are therefore justified under Article XXI of the GATT 1994. In each case the US repeats its belief that, "Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement".

RESPONSE OF THE WTO MEMBERSHIP TO THE US REFORM PROPOSALS ON DISPUTE SETTLEMENT

In its comprehensive paper on WTO reform, the EU addressed the US's five key concerns cited above. It also stated that a more substantive concern raised by the US is with the "adding or diminishing of rights and obligations" by the Appellate Body in various disputes (especially in cases when the US lost cases to other members including the EU). The EU thus proposed to make proposals aimed at improving the efficiency of procedures and strengthening the independence of the Appellate Body. In addition, the EU stated that, in a second stage, substantive issues concerning the application of WTO rules would be addressed.

In a communication to the General Council, several major members of the WTO, including the EU, China, Canada, India, and Norway (see WTO Document, 2018: WT/GC/W/752/Rev.2) responded positively to the US concerns in an attempt to break the stalemate over the US non-appointment of AB members. This submission made a number of proposals including: a) on the issue of outgoing AB members, they proposed that the outgoing AB member shall complete the disposition of a pending appeal in which a hearing has already taken place during that member's term; b) on the 90-day rule, they proposed an enhanced consultation and transparency obligation for the Appellate Body, for the possibility of the parties to agree to the exceeding of the 90-day timeframe; c) on the issue of the meaning of Municipal Law, they proposed that, while the panel reports may include the legal characterisation of the measures at issue, they should not "include the meaning itself of the municipal measures"; and d) on the issue of precedents of WTO panel reports, they proposed "that annual meetings are held between the Appellate Body and WTO Members (in the DSB) where members could express their views and concerns with regard to some Appellate Body approaches, systemic issues or trends in the jurisprudence".

In a further communication to the General Council, the EU, China and India submitted four more proposals to reform the DSU and address some of these concerns of the US delegation (WTO Document, 2018: WT/GC/W/752/Rev.2). These members proposed as follows: a) on the independence of AB members they proposed “one single but longer (six-eight years) term for Appellate Body members”; b) on the need to strengthen the capacity and “geographical balance” of the AB, they proposed to increase “the number of Appellate Body members from seven to nine”; c) on the need to ensure an orderly transition between the outgoing and new Appellate Body members, “the outgoing Appellate Body members should continue discharging their duties until their places have been filled but not longer than for a period of two years following the expiry of the term of office”; and d) on the need for a more efficient selection process to replace outgoing AB members they proposed that this process should be “automatically launched no later than X [e.g. six] months before the expiry of their term of office”.

A CRITICAL ASSESSMENT OF THE SIXTH US LED PATHWAY

How should we understand this critique by the US Administration on the DSU and the DSB? In a comprehensive analysis of the US stance on the DSU and its refusal to appoint WTO AB members, Robert McDougall (2018) argues that “while concerns of one sort or another about dispute settlement in the WTO have animated successive US administrations almost since the founding of the organisation, the current US administration has elevated them to new heights”. He argues that the US is thus “using the process as leverage to bring about more systemic reform of the system, in particular of the functioning of the Appellate Body”. He argues that the current crisis in the WTO DSU is a reflection of the view in the US that the current “global trade rules are increasingly stacked against US interests” and motivated by the “growing strategic competition for economic dominance between the United States and China”. He believes that “the invocation of national security to justify a number of tariffs, suggest a new direction in US trade policy that does not consider the United States to be bound by the constraints of its international trade obligations”. He concludes that it is “reasonable to suspect the United

States of trying to ‘suspend’ the operation of the dispute settlement system to prevent any further consolidation of China’s perceived advantage under the current rules until there is a rebalancing of rights and obligations, whether this is negotiated bilaterally or multilaterally”.

This view finds some resonance with another group of researchers from the Peterson Institute. Jeffrey Schott and Euijin Jung (2019) argue that the US objective in this high-stakes poker game is to “circumvent obligations that make panel and Appellate Body rulings binding on WTO members”. They argue that US officials want to regain the right that existed prior to the WTO to block rulings on which they disagree and that disabling the WTO Appellate body will enable them to achieve this objective.

The United States was the original proponent of a strong dispute settlement mechanism in the WTO. However, it began to raise its concerns soon after the creation of the WTO. An important innovation of the WTO DSU system was to change the system of decision-making for the adoption of final reports subject to negative (or reverse) consensus decision-making, which removed the ability of individual members to block the progress of a dispute. McDougall states that as soon as the new more institutionalised and judicialised system began to emerge, the United States began a “slow escalation of efforts to restore a balance more acceptable to it”. The US complained about what it considered to be the “adjudicative overreach” of this more judicialised system. It thus began to refuse to support the reappointment of two US nationals on the Appellate Body, first in 2007 and again in 2011. This process culminated in its refusal in 2016 to support the reappointment of Seung Wha Chang, the Appellate Body member from Korea. This has resulted in the current crisis as only one member of the AB now remains after the WTO General Council Meeting held on 9-10 December 2019, creating a collapse of the DSU as at least three members are required to constitute a quorum for an appeal. McDougall argues that “restoration of the dispute settlement function may only be possible as part of a new bargain that updates the balance of rights and obligations, as was the case for the new features of the DSU that only came into force as part of the conclusion of the Uruguay Round”.

CONCLUSION

Two outstanding WTO experts and previous members of the WTO Appellate Body (Peter Van den Bossche and Ujal Bhatia) have argued that while the US has some valid concerns with the functioning of the Appellate Body, such as the long duration of its appeals, the US appears to be more concerned with using the Appellate Body issues as a lever to extract concessions in its wider quest for reform of the entire WTO system. The effect of this strategy is to render the Appellate Body dysfunctional until the US is able to rebalance the entire system to its advantage. Ambassador Bhatia argues that the crisis of the Appellate Body was a crisis of trade multilateralism (Bhatia, 2019). Professor Van den Bossche argues in this farewell speech that not only the WTO Appellate Review but the entire WTO dispute settlement system will no longer be fully operational. This is indeed a high-stakes poker game the US is engaged in, as Danish and Aileen Kwa (2019b) argue in their reflections on the December WTO General Council outcomes. How should we understand the US strategy to retain its veto on the appointment of WTO AB members?

It is more likely that the US is using the threat of rendering the Appellate Body in a state of paralysis as leverage in its negotiations for reform of the WTO as a whole. The “sense” of Congress Resolution and the statement of the USTR to the US Finance Committee suggest that the US wants to place all seven pathways to the reform the WTO on the table at the same time to negotiate a deal that rebalances the rules of the WTO in favour of the United States. Each of the seven pathways discussed thus far are inter-related and together constitute a comprehensive strategy to reform the WTO in favour of the US. These seven pathways to reform include: a) recategorisation of the “developing country” group in the WTO and the right of developing countries to the use of S&DT; b) adopting the trade narrative of GVCs; c) abandoning the consensus decision-making method of the WTO in favour of variable geometry and plurilateral negotiating approaches; d) abandoning the single-undertaking approach adopted in the Uruguay Round in favour of the issue-by-issue approach to focus on substantive issues of interest to the US and other developed countries; e) a focus on China and its “trade disruptive

economic model” as the main target of US reforms; f) strengthening the implementation obligations of developing countries mainly focused on notifications; and g) demanding changes on a slew of specific issues related to the functioning of the WTO Appellate Body and the interpretation of the WTO Dispute Settlement Understanding in favour of the WTO.

At a press conference at the end of the General Council meeting on 9 December 2019, the DG General of the WTO launched a process to consult on ways forward to rescue the Appellate Body, which he argued was severely compromised by the US decision to maintain its veto on the appointment of new members. He argued that he may need to find new concepts and larger frameworks to resolve the dispute between the US and the rest of the membership on the Appellate Body. He also held out the hope that the next WTO Ministerial Conference which was to be held in Nur-Sultan, Kazakhstan in June 2020 could be a turning point as the prospect of the issues related to the Appellate Body could be resolved in the context of US demands for a deal on fish subsidies and e-commerce. This conference has been postponed to 2021 due to the COVID-19 pandemic.

It is thus unclear how the current impasse in the negotiations on dispute settlement will be solved without a much broader and higher-level political intervention by the leadership of the major players to resolve the above dispute. The DG may need to consult more widely across the UN system, to include the systemic issues of Climate Change and the achievement of the 2030 Sustainable Development Goals (SDGs), and engage with the US and China on their competition to become the leaders of the new Fourth Industrial Revolution technologies, such as 5G telecoms technologies. Clearly, what is at stake is the imminent collapse of the “jewel in the crown” of the WTO and the multilateral trading system as a whole. An alternative vision for the WTO and the multilateral trading system and global governance is called for. This is discussed further in the concluding chapter. In the next chapter the US-led proposals on the reform of the “Chinese economic model” is discussed in the context of the “US-China trade war” and the Belt and Road Initiative.

Chapter Seven

WTO REFORM AND THE CHINESE ECONOMIC MODEL: THE BELT AND ROAD INITIATIVE AND THE US-CHINA TRADE WAR

INTRODUCTION

“A trade war of unprecedented scope and magnitude currently engulfs the world’s two largest economies – the US and China”. This is how a recent book describes the dispute between the United States and China (Crowley, 2019). The authors of the contributions to this edited book take a pessimistic view of the future of the multilateral trading system. This is partly due to their perspective that the main challenge is to “...integrate the fundamentally different economic systems of Western liberal capitalism and Chinese state capitalism...” (Crowley, 2019). These authors generally tend to believe that the way forward for the global trading system is to deepen integration by encouraging developing and emerging economies to adopt more liberal economic policies in the tradition of “Western liberal capitalism”.

The tension between two different economic systems or models arose in the 1970s and 1980s during the “trade wars” between the United States and Japan. The US had a well-established policy since the end of the Second World War to transform Japan into “a peaceful, democratic, liberal market society” (Ostry, 1997: 35). Both the US and the EU imposed unilateral protectionist measures against Japan during the 1970s and 1980s, using non-tariff measures such as voluntary export restraints that became known as the *new protectionism*. To a large extent, the US and EU succeeded in forcing Japan, by the end of the 20th Century, to converge to the Western economic model in a process of transformation called the *convergence club*. Sylvia Ostry, a former Canadian trade diplomat, argues that the United States was the “master builder who constructed the convergence club” in the post-Second World War period. Can the US succeed in using the WTO

as a convergence club to deepen China's integration into the US economic model in the 21st Century?

During the current trade war between the US and China, some mainstream academic scholars, such as Cowley et al, can see no other option but to converge with the hegemonic Western liberal capitalism model led by the United States (see Crowley, 2019). This perspective has been criticised by a group of very eminent scholars from the United States and China, who are extremely concerned about the escalation of trade conflict between the United States and China. These scholars have created a working group to deliberate on how to de-escalate the so-called "trade war" between the US and China (US-China Trade Policy Working Group, 2019). The working group argues that the perspective of many observers of the trade conflict is that there are only two options to resolve the crisis: a) deepening integration (hyperglobalisation); and b) decoupling (protectionism). The authors argue that both these options are not viable, nor desirable. They argue that an alternative approach is required that is based on peaceful coexistence and tolerance for different economic paths and systems. The alternative to these two polarised options (decoupling or deepening integration), they argue, should allow countries considerable latitude at home to design a wide variety of industrial policies, technological systems and social standards; to use well calibrated policies to protect their industrial, technological and social policy choices domestically without imposing unnecessary and asymmetric burdens on foreign actors; and to maintain a set of trade rules that prevent countries from deploying what economists call "beggar-thy-neighbour" policies. This chapter supports the call made by this group of eminent scholars. Instead of attempting to force the Chinese economy to converge with that of the United States, or to wait for another hegemon to replace the United States, academic writers should be imagining and advocating an alternative global economic order that is tolerant of different paths to development, mutually beneficial, equitable, and based on sustainable development.

At the time of Deng Xiaoping's opening up of China to the world, China's share of world trade was just over 1 percent. This share rose to about 4 percent at the

time of its accession to the WTO in 2001, and by 2009 China overtook Japan, Germany and the United States to become the largest exporter in the world (Ismail, 2016). The rise of China was one of the main reasons for the collapse of the WTO Ministerial Meetings in July 2008. Susan Schwab, the chief US trade negotiator (USTR) during the Bush Administration, in her critique of the Doha Round in an article in the journal *Foreign Affairs*, states emphatically that, the Doha Round has failed and puts the blame squarely on the rise of the “advanced emerging countries” led by China (Schwab, 2011). In 2008 President George Bush decided to join a small group of countries in the Asia-Pacific region in a free trade arrangement called the Trans-Pacific Partnership. President Obama, on assuming office in 2009, continued the talks and the TPP became the centerpiece of President Obama’s “strategic pivot to Asia.” President Obama was explicit on the main reasons for the TPP and stated that: “with the TPP, we can rewrite the rules of trade to benefit America’s middle class. Because if we don’t, competitors who don’t share our values, like China, will step in to fill that void”. In his statement on the signing of the agreement Obama stated: “TPP allows America – and not countries like China – to write the rules of the road in the 21st century, which is especially important in a region as dynamic as the Asia-Pacific” (Obama, 2016). Several writers thus argued that the US initiative to join the TPP was an attempt to contain the rise of China (Braz, 2012). In 2013, President Xi Jinping launched the Silk Road Economic Belt and a 21st Century Maritime Silk Road, which together became known as the Belt and Road Initiative (BRI). Many writers have argued that this initiative was an organic response to the US attempt to contain China’s rise multilaterally, regionally and bilaterally (Zhang et al, 2018).

China’s rise has spawned a persistent trend and trajectory for the centre of economic gravity to move from the North and West, to the East and the South. This research argues that three inter-related parallel and strategic engagements are playing out in the global economy as the first and the second largest economy in the world compete for hegemony at three levels: a) multilateral engagement in the WTO to force China to converge with the Western economic model; b) regional engagement in the Asia-Pacific region to isolate China and force it to converge with regional rules inspired by the

United States; and c) unilateral action to force China to change its “economic model”, especially its high-tech industrial policies, and liberalise its market.

On each level of engagement China has responded to the US initiatives with its own strategies by a) strengthening its commitment to working in the multilateral rules-based trading system and building alliances within the WTO to defend its interests; b) expanding its own free trade agreements within East Asia, with the Association of Southeast Asian Nations (ASEAN), and with its immediate neighbours, South Korea and Japan, in the Regional Comprehensive Economic Partnership (RCEP), and advancing a comprehensive trade and investment programme to deepen its integration in Asia and the world through the Belt and Road Initiative; and c) advancing its domestic economic development and building its global competitiveness through various programmes, including its Made in China 2025 high-tech industrial strategy, and defending its national interests vigorously in the US-China trade war. This research argues that these three levels of economic engagement between the United States and China are inter-related and must be analysed together as part of the US-China struggle for global hegemonic power.

This chapter sets out to explain the underlying forces that underpin the US-China trade war. It is argued that the crisis in the WTO; the tensions in the Asia-Pacific Region; and the bilateral US-China trade war are part of the crisis of global governance ushered in by the changing geography of global trade and economic power. The crisis that has been unfolding in the global system during the past two decades reflects the deepening contradictions between the North and South, led by the US and China. Some writers, such as Aaditya Mattoo and Robert Staiger (2019), provide a similar explanation for the US-China crisis but argue that the only resolution to the crisis will be the inevitable rise of another hegemonic force, such as China (see also Crowley, 2019). This research argues that the current crisis offers the world an opportunity to avoid the shift to another single hegemonic power to replace the US, and to rebuild and strengthen a global governance system that is underpinned by new norms of solidarity, mutual co-existence, balanced development and equity and that will be committed to serving the interests of all of humanity.

This chapter discusses the US-China trade war in three sections and argues that the trade and economic tensions between the two powers reflects itself at three levels: multilateral; regional and bilateral.

THE CHANGING GEOGRAPHY OF WORLD TRADE, GLOBAL GOVERNANCE, AND THE WTO

It took China about 15 years of negotiations with World Trade Organization members to finally accede to the WTO. Most expert observers agree that the terms of the Chinese accession were among the most stringent, with reviews to be conducted each year, in each WTO committee, non-market economy status to remain for 15 years, and a special safeguard to apply against China for 10 years (Wu, 2016). China's accession to the WTO at the launch of the Doha Development Round in November 2001 helped to catapult China into the pinnacle of global trade within a decade and transform the existing patterns of North-South trade that emerged after the Second World War. China's "rise", and that of other emerging developing countries that became known as the BRICS (Brazil, Russia, India, China, and South Africa), has changed the nature and direction of world trade through greater South-South trade and investment in the first decade of the new millennium (Ismail, 2016).

These changes in the world trading system in just over a decade have been dramatic. The following selected trade statistics illustrate these changes. China overtook Japan as the leading Asian exporter in 2004. China was to then overtake the US in 2007 and Germany in 2009 to become the world's largest exporter. According to the WTO, the share of developing country exports in world trade grew, from 26 percent in 1995 to 44 percent in 2014, while the share of developed economies' exports in world trade declined, from 70 percent to 52 percent, during the same period (WTO, 2015a).

The new millennium ushered in the most dramatic developments in world trade since the Second World War. These changes became one of the main reasons for the collapse of the WTO Doha Round ministerial meeting, held in Geneva in 2008. The Doha Round has not succeeded in emerging from this

crisis, notwithstanding efforts made to secure incremental outcomes at the 9th WTO Ministerial Conference, held in Bali, Indonesia (December 2013), the 10th WTO Ministerial Conference held in Nairobi, Kenya (December 2015), and the December 2017 Ministerial Conference held in Buenos Aires. The main argument of the major developed country members of the WTO, led by the US, is that the Doha Round is now obsolete given the new realities in the world economy, especially the rise of China and other emerging economies. In addition, it is argued by some writers that the dominant role of “global value chains” in world trade requires “new approaches” and “new pathways”, including plurilateral negotiations on a range of issues, including investment and services (Hoekman, 2014; World Bank, 2015).

The “new pathways” preferred by the US in the WTO are essentially an abandonment of the single-undertaking approach (that requires all issues to be agreed together) towards single-issue approaches (such as that on trade facilitation adopted in Bali). In addition, this approach signals a shift from multilateral approaches towards plurilateral approaches, such as the negotiations on services (TISA – the Trade in Services Agreement)⁸ and on Environmental Goods and Services in the WTO (Ismail, 2012). By the time of the Buenos Aires Ministerial Conference the main plurilaterals being pursued by a significant number of countries were on e-commerce, domestic regulation and investment facilitation. This “new narrative” has become the mainstream paradigm on trade influencing the “epistemic community” of researchers and policy thinkers in the WTO, OECD, and the World Bank, in much the same way as the “Washington Consensus” was to become in the late 1980s and 1990s.

The second wave of WTO reform proposals on plurilaterals has taken on a much more aggressive form with the US and other developed countries pursuing their narrow trade interests and aggressively advancing these by

8 TISA started in 2013. Twenty-three WTO members are taking part in the TISA talks: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the EU, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the United States.

pressuring developing countries to join in the process, dividing many of the developing country groupings in the WTO. There is no multilateral mandate for these plurilaterals, but the proponents wish to insert the outcomes into the multilateral framework of rules. The disregard for the WTO's consensus rule and its rules around amendments makes this second wave of reforms exponentially more serious than earlier plurilaterals.

The collapse of the Doha Round of trade negotiations in 2008 saw a simultaneous shift of the US towards mega-regional and mega-bilateral approaches to trade negotiations. The US prioritised the TPP and the Transatlantic Trade and Investment Partnership (TTIP) negotiations and shifted its negotiating resources towards a push for higher regulatory standards and disciplines on a range of trade-related issues that it believed were more important in driving the interests of its lead firms in global value chains. The US approach to the WTO negotiations is to use its mega-regionals and mega-bilaterals as part of its efforts to redesign the negotiating agenda on global rule-making to counter the growing competition it faces from China and other emerging developing countries (Braz, 2012). President Trump was to abandon both the TPP and the TTIP on his assumption of power in January 2017. However, his approach was to call for a comprehensive reform of the WTO that targets the role of China and other large emerging developing countries in the multilateral trading system and to insist on fundamental changes to the WTO Dispute Settlement system, especially its Appellate Body. The main target of the US in the WTO has been China and its “economic model”.

The US critique of the Chinese economic model in the WTO

The US has singled out China for its critique of what is wrong with the WTO and arguments about what must change in the WTO. In a comprehensive report titled *China's Trade Disruptive Economic Model*, submitted to the WTO General Council, the US has set out its complaints (WTO 2018: WT/GC/W/745). The US claims that when China acceded to the WTO in 2001, it agreed to adopt the WTO principles of “non-discrimination, market access,

reciprocity, fairness and transparency”. However, the paper argues that China has since strengthened its non-market, socialist and state-led economy in the following ways: a) Chinese state-owned enterprises play an “outsized role in China’s economy” and the government maintains strong control of these SOEs; b) the Chinese Communist Party continues to maintain control or otherwise influence the price of key factors of production including land labour energy and production; and c) government planning through industrial policies maintains control over strategic industries. The US argues that these policies lead to trade distorting measures being applied that impact negatively on the trade and economies of other WTO members in various ways, including: a) market access limitations; b) investment restrictions; c) massive market distorting subsidies that lead to excess capacity; d) preferential treatment to SOEs; e) unique national standards; f) technology transfer requirements; g) inadequate protection and enforcement of intellectual property (IP); h) cyber theft; and i) cross-border data restrictions and data localisation requirements.

The US complains that China has excess capacity in several sectors that distorts global trade. For example: a) in the steel sector, China’s annual production rose from 152 million MT in 2001 to 808 million MT in 2016, leading to China now having a 50 percent share of global production and becoming the largest exporter of steel of about 108 MT in 2016; and b) US imports of solar cells and modules from China increased by 500 percent between 2012 and 2016, resulting in a drop of prices by 60 percent and leading to the bankruptcy of US companies and 25 companies closing since 2012. The US paper recalls that the Chinese Protocol of Accession to the WTO questioned China’s claim to be a developing country, and in several WTO Agreements expressly denied China’s right to self-elect developing country status.

China has responded to the US views in its own comprehensive paper issued by the State Council Information Office of The Peoples Republic of China, dated June 2019. In this paper China sets out the many measures taken against it by the US and President Trump since March 2018. China argues that the US has unilaterally initiated a series of investigations under Sections 201, 232 and 301 and imposed tariff measures against China, which are contrary to the

rules of the WTO.⁹ China argues that in today's globalised world "the two economies are highly integrated together and constitute an entire industrial chain". The paper states that China and the US are each other's largest trading partners and significant source of investment. In 2018 bilateral trade in goods and services between the US and China exceeded US\$750 billion and two-way direct investment was greater than US\$160 billion. Between 2009 and 2018, the paper argues, China was one of the fastest-growing export markets for US goods with an annual average increase of 6.3 percent and an aggregate growth of 73.2 percent. In addition, China is the key export destination for US airplanes, soybeans, automobiles, integrated circuits and cotton.

In an attempt to rebut the argument that China is "stealing" US IP, the Chinese paper argues that China is an innovative nation and highly sophisticated civilisation contributing to human civilisation for over 5 000 years! China is making significant investments in research and development (R&D). In 2017 China's patent applications (1.382 million) ranked number one in the world (for the sixth consecutive year) and China's total R&D expenditure was second in the world (RMB1.76 trillion). The paper argues that since the US and China are the first and second largest economies in the world, and each other's largest trading partners, there is bound to be some trade friction. However, the paper emphasises that China remains committed to resolving disputes through consultations and dialogue. China draws a few lines in the sand. The paper argues that the "right to development cannot be sacrificed, still less can sovereignty be undermined". The paper calls for a win-win outcome to the negotiations and argues that, "negotiations will get nowhere if one side tries to coerce the other or if only one party will benefit from the outcomes".

The US has singled out China for its critique of what is wrong with the WTO. Six of the seven pathways, designed to change the way that the WTO functions, are targeted mainly, but not exclusively, at China. The Appellate Body reform proposals have a wider target, including the EU, as the US has been losing

9 Section 201 of the US Trade Act of 1974; Section 232 of the Trade Expansion Act of 1962; and Section 301 of the Trade Act of 1974.

AB cases, on issues such as “zeroing” to all the major trading countries. How should we understand this “trade war” between the US and China?

Professor Mark Wu, a Harvard-based trade expert and former USTR official, provides a unique insight into the Chinese political economy and State (Wu, 2016). He argues that traditional paths of convergence that the GATT/WTO has adopted for other economies, such as Japan, will not succeed with China. For this reason, he adopts a pessimistic perspective on the resolution of the crisis of multilateralism and the current US-China trade war. He argues that the Chinese State has six special characteristics that together constitute what he describes “China Inc”. They include the following: a) A powerful entity known as the State-Owned Assets Supervision and Administration Commission that allows the party-state to retain control over the “commanding heights” of the Chinese economy (including aerospace, aviation, chemicals, energy, metals, minerals, nuclear, petroleum, power, railway, steel, shipbuilding and telecommunications) while relying on signals from market mechanisms; b) various financial entities that permit the Party-state to control China’s largest banks and thereby direct its financial resources, while still injecting elements of market-based competition; c) entities within the Party, such as the Central Financial and Economic Affairs Commission, as well as within the state, such as the National Development and Reform Commission, that provide guidance and coordination across government agencies and firms; d) nimble, informal networks between entities in industry sectors that are smaller in scale than the conglomerate structures in Japan or South Korea, but nevertheless facilitate coordination; e) the Party’s Organization bureau, which sets individual performance metrics and directly controls personnel appointments within the government, largest state-controlled firms, banks, research institutions, and so on, thereby incentivising officials, board members, and senior managers to act in line with Party interests; and f) formal and informal linkages between the Party and private enterprises, including possibly minority equity holdings as well as the establishment of Party cells within companies (Wu, 2016).

According to Wu, previous USTR officials believed that China would converge just as Japan did in the 1980s and 1990s. He cites the case of former USTR

Charlene Barshefsky, who was responsible for negotiating the accession of China to the WTO, during the Bill Clinton Presidency. Testifying before the US Congress in the year 2000, Charlene Barshefsky expressed confidence that the accession agreement had effectively dealt with the unusual and special characteristics of the Chinese economy. She is quoted as saying, “no agreement on WTO accession has ever contained stronger measures to strengthen guarantees of fair trade and to address practices that distort trade and investment” (Wu, 2016). Wu also argues that the TPP that the US joined during the Presidency of George Bush, in 2008, and signed by President Obama in 2016, was mainly for the US to shape the future of world trade with China in mind. The US believed that once it had shaped the new rules of trade in the Asia-Pacific it would force China to join. In the next section this regional strategy of the US to contain China in the Asia-Pacific region and the reaction of China to this strategy is discussed. It will be argued that China’s regional and bilateral free trade strategy and its creation of the Belt and Road Initiative was a response to this US strategy.

REGIONAL FREE TRADE AREAS AND THE BELT AND ROAD INITIATIVE

The second grand strategy of the US is that of isolating China in the Asia-Pacific region by joining the TPP. With the collapse of the WTO Doha Ministerial meetings in 2008, the US moved to join the TPP to contain China’s rise in Asia. This shift was expressed as a *strategic pivot to Asia*, by President Bush (Morrison, 2019). President Obama continued to negotiate the TPP on his assumption of the US Presidency in 2009. To mitigate the costs of trade diversion, China responded with the formation of the RCEP. In addition, China has pushed ahead with bilateral free trade agreements of its own into strategic countries. This process of building free trade agreements stimulated a more ambitious and comprehensive complementary programme of investment in infrastructure, transport corridors and connectivity with China’s neighbours and is now known as the Belt and Road Initiative. It is argued in this book that there are two inter-related processes that have had a dialectical relationship: both China’s development-friendly free trade agreements with ASEAN and its

efforts to strengthen “developmental regionalism” through the BRI should be seen in the context of China’s efforts to respond to the US efforts to contain China in the Asia-Pacific Region through the TPP.

China-ASEAN Free Trade Area

A year before China joined the WTO, in 2000, former Chinese Premier Zhu Rongji initiated the idea of economic cooperation between China and ASEAN. In November 2002, ASEAN and China signed the Framework Agreement on Comprehensive Economic Cooperation. This process of economic cooperation finally led to the signing of a China-ASEAN Free Trade Agreement (CAFTA) on 1 January 2010. This was a historic agreement as it was China’s first free trade agreement and for ASEAN it was the first between the union and a third country (Yu, 2018). Lei Yu points out that at the time of signing this agreement three members of ASEAN (Vietnam, Laos and Cambodia) were not members of the WTO. However, China accorded MFN treatment to all the non-WTO members. China also granted the newer ASEAN members (Asean-4: Myanmar, Vietnam, Laos and Myanmar) five years longer to liberalise than the six old members (ASEAN-6: Indonesia, Malaysia, the Philippines, Singapore, Thailand and Brunei). China agreed that special and differential treatment would be given to Cambodia, Laos, Myanmar and Vietnam, allowing them to open fewer sectors and liberalise fewer transactions (Yu, 2018). ASEAN has become a significant trading partner for China. In 2011 ASEAN replaced Japan as China’s third largest trade partner.

At the 10 China-ASEAN Expo and the China-ASEAN Business and Investment Summit, held in September 2013, Chinese Premier Li Keqiang initiated an upgrade of CAFTA, and set an ambitious goal of expanding bilateral trade volume to US\$1 trillion by 2020 (Yu, 2018). This initiative of the Premier has induced a series of CAFTA-related economic cooperation initiatives, including the Bangladesh-India-Myanmar-China economic corridor, the Greater Mekong Sub-region Economic Zone, and the 21st-century Maritime Silk Road. China had adopted a deliberately flexible and developmental

approach to its economic relations with ASEAN. Former Premier Zhu Rongji urged Chinese CAFTA negotiators to abide by the principle of “giving more and taking less” and “giving first and taking later” (Yu, 2018).

Regional Comprehensive Economic Partnership

China and Japan have been competing for influence in the East Asian Region. China was keen to expand the CAFTA agreement by including Japan and South Korea in an ASEAN+3 initiative. However, Japan preferred an ASEAN+6 arrangement that also included Australia, New Zealand and India. Lei Yu argues that ASEAN assumed the driving seat when, at the 19th ASEAN Summit in Bali, in November 2011 it proposed its own model of the RCEP as a compromise between the Japan and China (Yu, 2018). The RCEP endorsed Japan’s insistence on the “10+6” formula while reaffirming the “10+3” formula as the main vehicle for building the East Asian Community.¹⁰ China has continued to build regional free trade arrangements within the Asia-Pacific region. New Zealand was the first developed country with which China had signed an FTA on 7 April 2008 after three years of negotiations. It took much longer to negotiate an FTA with Australia, but this was accomplished in November 2014. Both New Zealand and Australia are members of both the RCEP and the TPP.

The China-Korea Free Trade Agreement was finalised on 13 November 2014 and the China, Japan and South Korea FTA launched its fourth round of negotiations in March 2014. The sixteenth round of China, Japan and South Korea talks were held in Seoul from 27-29 November 2019 ((Ministry of Foreign Affairs of Japan, 2019).

The US joined the TPP in 2008 to try and curb the rise of China in the Asia-Pacific region. The TPP led by the United States included Brunei, Singapore, Malaysia and Vietnam, thus dividing ASEAN. CAFTA-negotiated issues mainly related to trade in goods. However, the TPP included a more

¹⁰ “10+3” refers to 10 ASEAN members plus China, South Korea and Japan. “10+6” means “10+3” countries plus Australia, New Zealand and India.

comprehensive set of issues in its negotiations, including the new generation issues, such as investment, competition and IP. China's participation in the RCEP, in which the United States does not participate, is a response to the US threat to contain China's rise in the Asian-Pacific region. Between 2000 and 2010 the US share of exports to 15 East Asian markets dropped by 42 percent (Yu, 2018). One of the main objectives of the United States in its strategic pivot to Asia has been to regain this market share (Yu, 2018). The question raised by some academic writers is whether this effort by the Chinese is simply a "charm offensive" or a genuine effort to support developmental regionalism (Yu, 2018)? This question is considered as we discuss the objectives and principles of the Belt and Road Initiative in the next section.

China's Belt and Road Initiative

President Xi Jinping, in his speech at Nazarbayev University in Kazakhstan, on 7 September 2013, proposed building a Silk Road Economic Belt and a 21st Century Maritime Silk Road as a "grand cause benefiting people in regional countries along the route" (Zhang et al, 2018). Formerly known as the One Belt One Road Initiative, the programme has been known as the Belt and Road Initiative since 2016. In October 2013, Beijing proposed building an Asian Infrastructure Investment Bank (AIIB) to provide specific funds, with itself the biggest shareholder in the bank with a stake of 50 percent. Beijing proposed to build highway, port, and dam projects in the East Asian Region in an attempt to increase "infrastructure connectivity" (Zhang et al, 2018). The following section looks at China's perspective of the objectives and vision of the BRI.

What is the BRI and how does it contribute to global governance in China's view?

The Chinese Office of the Leading Group for Promoting the Belt and Road Initiative produced a book titled *Belt and Road Initiative: Progress, Contributions and Prospects* (2019). The Office of the Leading Group identifies the principles of extensive consultation, joint contribution and shared benefits as priorities for the BRI. Mutual benefit and win-win outcomes (increased imports, outward FDI) are actively encouraged. International agreements and the building of international coalitions for Green Development within the Belt and Road are encouraged. The office identifies six pillars that define the Belt and Road Initiative: a) policy coordination (including, in the UN; regional organisations, such as the Forum on China-Africa Cooperation (FOCAC), and on sectoral issues, such as digitalisation, standardisation, tax, IP and maritime cooperation); b) infrastructure connectivity (such as the Greater Mekong Subregion Economic Cooperation); c) unimpeded trade (bilateral and regional cooperation agreements; FTAs such as China-ASEAN, China-Singapore, China- Pakistan); d) financial integration (innovative investment and financing models including with cooperation between the Peoples Bank of China, the World Bank, European Bank for Reconstruction and Development, and the BRICS Bank, bilateral currency swaps and Renminbi clearing arrangements); e) people-to-people ties (including in art, film, and cultural links, education, tourism and health, and the creation of 153 Confucius Institutes); and f) industrial cooperation (industrial cooperation signed with over 40 countries including Ethiopia and Egypt, and the establishment of industrial parks).

The Office of the Leading Group sets out seven concrete contributions to global governance that the Belt and Road Initiative sets out to advance (Office of the Leading Group, 2019).

First, China commits to building peace and security without interfering in the internal affairs of other countries. Second, the document states that: "Development holds the master key to solving all problems. In pursuing the belt and road initiative we should focus on the fundamental issue of

development, release the growth potential of participating countries, and achieve economic integration and coordinated development to the benefit of all participants”. Third, the BRI supports “free trade and an open world economy, inclusive and common development, that is rules based, open, transparent, inclusive and non-discriminatory”. Fourth, the group articulates a vision of “development that is green, low-carbon, circular and sustainable”. Fifth, the BRI sets out to strengthen cooperation in science, technology and innovation, by building a digital silk road for the 21st Century (big data, cloud computing, artificial intelligence). Sixth, China argues that it will encourage the interconnectedness of diverse culture and profound civilization. Seventh, China promises that the BRI will support a modern business environment that is corruption free and it will build cooperation in fighting corruption (Office of the Leading Group, 2019).

Contending perspectives on China’s Belt and Road Initiative

There is a growing academic literature by both Western writers and Chinese scholars on the Belt and Road Initiative. Some writers, such as Jonathon Hillman, have argued that the BRI is the most ambitious geo-economic vision in recent history. He states that the BRI covers more than 70 countries, and more than two-thirds of the world’s population with Chinese investments close to US\$4 trillion (Hillman, 2018). He points out that China intends to strengthen hard infrastructure with new roads and railways, soft infrastructure with trade and transportation agreements, and even cultural ties with university scholarships and other people-to-people exchanges. He argues that, “in all these ways, when much of the West is looking inward, China is connecting with the world” (Hillman, 2018).

The Belt and Road Forum was launched in 2017 and held for the second time in 2019 to build transparency and support for these principles and the BRI. The first BRI Forum was attended by about 30 world leaders and representatives from 110 countries (BRI Forum, 2017). While the BRI was officially launched in 2013, many of the projects in the BRI had started much earlier as there is no official definition of what qualifies as a BRI project. Chinese companies are

clearly the major beneficiaries of BRI projects. Some researchers argue that, according to Fortune 500, seven of the 10 largest construction companies in the world, by revenue, are now Chinese owned. Infrastructure investment is clearly also linked to market access as better infrastructure will facilitate trade between China and its trading partners.

The BRI has become part of China's expression of its foreign policy vision, principles and values for a new world order. President Xi Jinping expressed China's vision as follows at the 2017 BRI-Forum: "We reaffirm our shared commitment to build an open economy, ensure free and inclusive trade, oppose all forms of protectionism including in the framework of the Belt and Road Initiative. We endeavor to promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system with WTO at its core" (BRI Forum, 2017). "We uphold the spirit of peace, cooperation, openness, transparency, inclusiveness, equality, mutual learning, mutual benefit and mutual respect by strengthening cooperation on the basis of extensive consultation and the rule of law, joint efforts, shared benefits and equal opportunities for all" (BRI Forum 2017).

China has also become more willing to play a leadership role and has become more assertive on the world stage. At the 2017 Davos meeting, as President Donald Trump assumed his leadership of the United States, President Xi Jinping expressed China's perspective on the challenges confronting globalisation as follows: "It is true that economic globalisation has created new problems, but this is no justification to write economic globalisation off completely. Rather, we should adapt to and guide economic globalisation, cushion its negative impact, and deliver its benefits to all countries and all nations". Reassuring his audience of China's commitment to economic globalisation and common development, Xi closed by outlining his country's most prominent economic and trade initiatives – the RCEP (a free trade agreement centered around ASEAN + China, Japan, South Korea, Australia, New Zealand, and India); and most importantly, the BRI, which unquestionably is China's most comprehensive and most ambitious international economic initiative to date (Schortgen, 2018).

Some writers believe that the BRI can evolve into a channel to promote alternative political economy, development and governance paradigms for developing economies, and effectively usher in a post-Washington Consensus era (Schortgen, 2018; Wang, 2019). Another study states that China's growing involvement on the world stage has been accompanied by its leadership creating three new global-development finance institutions: the US\$100 billion AIIB, the \$100 billion New Development Bank (formerly known as the BRICS Bank), and the US\$40 billion Silk Road Fund (McKinsey, 2017). The BRI is seen by some writers as the organic response of China to US attempts to contain and frustrate its rise, particularly in areas of direct competition such as the new Fourth Industrial Revolution technologies. The BRI has the seeds of the emergence of a new type of globalisation, and new forms of global governance, based on cooperation, mutual benefit and development (Gao, 2018, in Zhang et al, 2018). Gao argues that the BRI is advancing a "new wave of Globalization 5.0, led by China and supported by a well-established ecosystem cultivated by China over the years, including the Asian Infrastructure Investment Bank, the Silk Road Fund, the Regional Comprehensive Economic Partnership, the South-South Dialogue, the New Development Bank, and the Confucius Institutes" (Gao, 2018 in Zhang, et al 2018).

China's BRI has become a comprehensive response to US attempts to contain its rise in the Asia-Pacific region and the world. China's BRI has been criticised by academic writers and observers and viewed with suspicion. The BRI has been seen as a threat to the US hegemony by some US writers such as Nadège Rolland, senior fellow with the National Bureau of Asian Research, who argues that: "Taken together, BRI's different components serve Beijing's vision for regional integration under its helm. It is a top-level design for which the central government has mobilised the country's political, diplomatic, intellectual, economic and financial resources. It is mainly conceived as a response to the most pressing internal and external economic and strategic challenges faced by China, and as an instrument at the service of the PRC's [People's Republic of China] vision for itself as the uncontested leading power in the region in the coming decades. As such, it is a grand strategy" (see Morrison, 2019).

China's role in Africa has come under much scrutiny by both African policymakers and academics world over. For this reason the next section discusses China's evolving role in Africa and the role of the BRI.

China-Africa and the Belt and Road Initiative

China's trade and economic relationship with Africa has evolved considerably since the founding of the People's Republic of China in 1949. In 1964 China provided 53 percent of the loans received by Africa and in the 1970s it financed the Tazara Railway line from Zambia's copper belt to the port of Dar es Salaam in Tanzania (Brautigam, 2009). However, since the formation of FOCAC, in 2000, this relationship has expanded rapidly. By 2009 China overtook the US to become Africa's largest trading partner (Schneidman, 2015). In 2010 China became Africa's largest export destination. In sharp contrast both the EU, which remains the main destination for Africa's exports, and the US have declined as an export destination for Africa. In 2005, 52 percent of Africa's exports went to Europe. This percentage was reduced to 36 percent in 2014, while over 27 percent of Africa's exports went to Asia in 2014 (mainly China). Similarly, only about 7 percent of Africa's total exports went to North America in 2014. Pigman (2016) reports that total goods trade between the US and Africa reached a peak of US\$100 billion in 2008 and was valued at US\$50 billion in 2014. In sharp contrast, two-way trade between China and Africa was valued at US\$210 billion in 2013 but had fallen to US\$152 billion in 2014 (with Asia) (Schneidman, 2015; WTO, 2015a).

FOCAC has met every three years at ministerial and presidential levels and made a large number of commitments to enhance its support to Africa in a number of areas, including: opening its market up to 95 percent for LDCs; providing concessional loans and grants; support for infrastructure; and generous debt relief (UNCTAD, 2010). At the 6th FOCAC, held in Johannesburg on 4-5 December 2015, China's President Xi Jinping announced a big package that covers the areas of industrialisation, agricultural modernisation, infrastructure, financial services, green development, trade and investment facilitation, poverty reduction and public welfare, public

health, people-to-people exchanges, and peace and security. The package included US\$60 billion of funding support (Xinhua News, 2015). The Beijing Summit of FOCAC in 2018 saw 53 of the 55 African countries represented, reflecting the convening power and influence of China in Africa (Oyewole, 2019).

China's rise has created both opportunities and challenges for African countries. Huge opportunities for Africa include exporting its commodities at higher prices into the Chinese market, propelling its growth rates. However, China's rise has also created the challenge for Africa to manage the impact of the increasing competitiveness of China's labour-intensive manufactured products on its own nascent labour-intensive manufacturing sectors, such as clothing and textiles, leather and footwear, electronics, and furniture (Ismail, 2011). In the first decade of China's entry into the WTO, African countries were increasingly under siege as China's exports of manufactures caused many factory closures and deindustrialisation of several African countries. Interestingly, as China's own wage levels have begun to rise, it has begun to sub-contract out the labour-intensive parts of production to lower-wage regions, mainly in South and Southeast Asia. More recently, African countries, such as Ethiopia, have begun to tap into this opportunity and succeeded in attracting Chinese investors to build industrial capacity and manufacture in the low-value sectors of clothing and textiles, electronics and footwear (World Bank, 2013). In addition, unlike the private sector investors in the US and the EU, the Chinese SOEs have taken a longer view of their investments in Africa and have begun to invest in infrastructure, such as energy, road and rail transport, port development and logistics. The African Development Bank argues that Africa will need to leverage its abundant natural resources, and the growing size of its middle class that has made it an attractive consumer market, to negotiate a more mutually beneficial relationship with China.

There is a growing academic literature and articles in the popular press that are critical of China's role in Africa. According to a recent survey of this literature, the key concerns and complaints against the Chinese aid and investment approach include: a) encouraging poor governance and aiding corruption;

b) lax borrowing rules that increases the debt profile of African countries and dependence; c) dumping of Chinese goods in African markets; d) employing Chinese workers instead of African local labour; and e) damaging the environment of African countries (Oyewole, 2019).

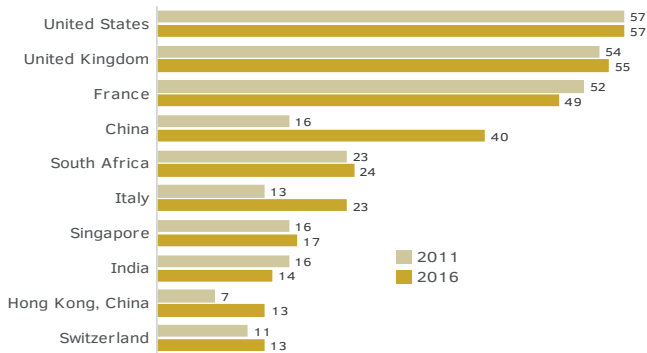


Figure 1: Top investor economies in Africa, 2011 and 2016 (billions of dollars)

Source: UNCTAD, *World Investment Report 2018*.

Note: Numbers are based on the FDI stock data of partner countries

However, there are also many myths about the role of China in Africa. For example, while Chinese investment in Africa has been increasing exponentially, the share of Chinese investment in Africa's total inward investment is relatively small relative compared to the US, UK and France. FDI inflows from China rose from US\$21 million in 2005 to US\$1.44 billion in 2015, which may reflect China's involvement in large infrastructure projects (road and building construction) and in the financial and telecommunications sectors. However, China's share of FDI in 2013 and 2014 was only 4.4 percent of the total (Dollar, 2016). China's share of infrastructure investment was about one sixth of the total of US\$30 billion that China received in the period before 2016 (Dollar, 2016). Another study finds that China only accounted for around 5 percent of global FDI into Africa in 2015 (Brautigam et al, 2017). The latter study argues that China still has a very small presence in these countries' manufacturing sectors and

that Chinese investment in Africa is not large enough to be either a calamity or panacea, but the evidence from Ethiopia indicates that countries can harness its potential to achieve meaningful growth in jobs and productivity (Brautigam et al, 2017). The study by Brautigam et al finds that while Chinese investment in Africa (2013, 2014 and 2015) was still in mining, its investment in manufacturing was rising. The study also found that in Ethiopia, Chinese firms in its manufacturing sector employed a little over 5 000 workers, the vast majority being Ethiopian, and Chinese firms source roughly 70 percent of their inputs locally.

A recent study of the China-Africa economic relationship undertaken by the global accounting and consulting company McKinsey & Company confirms the study by Brautigam et al that China is a relatively small investor, compared to the US, UK and France, but the growth of its investments, the extent of its infrastructure financing, and the volume of its trade is far greater than these major powers. McKinsey evaluated Africa's economic partnerships with the rest of the world across five dimensions: trade, investment stock, investment growth, infrastructure financing, and aid. McKinsey finds that China is in the top four partners for Africa in all these dimensions with no other country matching this depth and breadth of engagement (McKinsey, 2017). The study finds that there are more than 10 000 Chinese-owned firms operating in Africa with 90 percent of these firms being privately owned. McKinsey argues that Africa-China trade increased from US\$13 billion in 2001 to US\$188 billion in 2015 – an average annual growth rate of 21 percent, while FDI has grown even faster, from US\$1 billion in 2004 to \$35 billion in 2015, according to official figures. This represents a breakneck average annual growth rate of 40 percent (McKinsey, 2017). McKinsey's research found that about 12 percent of Africa's industrial production and nearly 50 percent of Africa's foreign construction market, are led by Chinese firms. Contrary to the prevailing myths, the study found that Chinese investment was responsible for significant job creation and skills development, transfer of new technology and knowledge, and financing and development of infrastructure, resulting in the employment of several million African jobs.

	Goods trade, 2015 \$ billion	FDI stock, 2014E \$ billion	FDI growth, 2010-2014 %	Aid, 2015 \$ billion	Infrastructure funding, 2015 \$ billion
①	China 188	US 79	China 25	US 10	China 21
②	India 59	UK 71	South Africa 13	UAE 7	France 3
③	France 57	France 70	UK 11	China 6	Japan 2
④	US 53	China 32	US 10	UK 6	Germany 1
⑤	Germany 46	SA 30	France 6	Germany 4	India 1
China ranks	#1	#4	#1	#3	#1

Figure 2: China is now Africa's biggest economic partner

Source: McKinsey, 2017

In just more than a decade, China has become Africa's most important economic partner (McKinsey, 2017). There is no other country with such depth and breadth of engagement in Africa across the dimensions of trade, investment, infrastructure financing, and aid. Chinese “dragons”— firms of every size and sector — are bringing capital investment, management know-how, and entrepreneurial energy to every corner of the continent — and in so doing they are helping to accelerate the progress of Africa's “lions,” as its economies are often referred to (McKinsey, 2017). The McKinsey study finds that Chinese firms invested in the largest steel plant in West Africa, the largest ceramic tile factory in East Africa, and the largest bank in all of Africa. The Chinese telecommunications giants Huawei and ZTE built most of Africa's telecoms infrastructure. Chinese contractors built the US\$1.2 billion Tanzania Gas Field Development Project in 2015; the US\$3.4 billion, 750-kilometer Ethiopia-Djibouti Railway in 2016; and the US\$3.8 billion, 750-kilometer Standard Gauge Railway in Kenya in 2017.

How should African countries engage with China's BRI? First, African countries need to use their agency and collective negotiating power through the African Union, the African Development Bank and the Economic Commission for

Africa and Regional Economic Communities to negotiate mutually beneficial trade and investment deals with China that advance the African Continental Free Trade Area (AfCFTA) and “developmental regionalism” in Africa (Ismail, 2020a). Second, African countries should leverage the resources and financing facilities, such as the AIIB, created by the Belt and Road Initiative, to support their infrastructure investment needs. Third, China’s cooperation programmes on Industrial Parks and Free Trade Zones offer African countries opportunities to mobilise investment to industrialise and build their regional value chains. Fourth, the lessons from China and ASEAN, such as the experience of the Greater Mekong Subregion, can offer African countries valuable insights into how to build their own regional integration in the AfCFTA in a way that is inclusive, mutually beneficial, and builds cross-border infrastructure and industrialisation across the African Continent. Fifth, African countries should be insisting that China’s BRI supports the effective implementation of the AfCFTA that is consistent with their own vision for a “developmental regionalism” approach to regional integration (Ismail, 2018).

This section has argued that China’s multipronged strategy in the Asia-Pacific region to strengthen its economic cooperation, deepen free trade arrangements that are asymmetrical in favour of the smaller ASEAN countries, and expand its investments in regional infrastructure and industrialisation in the ASEAN region, was then extended to the broader Asian region. This process gained momentum as the US joined the TPP and began to divide the region through including some of the ASEAN members, creating new rules and standards and isolating China. This strategic engagement and competition between the US and China was extended to the rest of the Asia-Pacific region through the ASEAN+3 and ASEAN+6 negotiations that led to the RCEP. The BRI has become a comprehensive response to this process and also begun to create principles and objectives for regional and global governance. These values and principles have become the hallmark of the approach that China has taken in the US-China bilateral trade war that is discussed in the following section.

THE US-CHINA BILATERAL TRADE WAR

The discussion in the previous section indicates several instances at the multilateral and regional levels of engagement when the United States has been frustrated at the failure of its efforts to create a process of “convergence” since the accession of China to the WTO in 2001. In its 2017 report on China’s compliance with the WTO, the USTR was to state: “it is now clear that the WTO rules are not sufficient to constrain China’s market-distorting behavior” (USTR, 2018b). The report documents that various high-level bilateral forums that were created to resolve trade and investment issues, including the US-China Joint Commission on Commerce and Trade in 2003, followed by the US-China Strategic Economic Dialogue in 2006 and the US-China Strategic and Economic Dialogue in 2009 in 2017. However, the USTR reflects its frustration at the lack of progress as follows: “Despite this constant high-level engagement over the years, these dialogues failed to generate anything more than incremental market access improvements or the repeal or modification of problematic Chinese measures that should never have been issued in the first place.” In August 2017, the USTR initiated an investigation under Section 301 of the Trade Act of 1974, to evaluate China’s “policies related to technology transfer, intellectual property and innovation”. At the second high-level meeting between President Trump and President Xi, held in Beijing in November 2017, the US “made clear that it is seeking fundamental changes to China’s trade regime, including the overarching industrial policies that have continued to dominate China’s state-led economy” (USTR, 2018b). The USTR report went on to critique the “indigenous innovation” and “secure and controllable” objectives of the Made in China 2025 Industrial Policies of China.¹¹ The US argues that China will continue to use a plethora of trade and industrial policy tools, such as intellectual property, investment, subsidies that will force US firms to transfer their technologies to US firms, distort trade and create excess capacity of products such as aluminium and steel that will flood global markets (USTR, 2018b).

11 In May 2015, China’s State Council released Made in China 2025, a 10-year plan spearheaded by the Ministry of Industry and Information Technology and targeting 10 strategic industries, including advanced information technology, automated machine tools and robotics, aviation and spaceflight equipment, maritime engineering equipment and high-tech vessels, advanced rail transit equipment, new energy vehicles, power equipment, farm machinery, new materials, biopharmaceuticals and advanced medical device products (Morrison, 2019).

On 23 March 2018, the US imposed a 25 percent tariff on all steel imports and a 10 percent increase on all aluminium imports. The new US Administration has been preparing for this type of trade protection for some time. On 18 August 2017, the USTR initiated an investigation in terms of Section 232 of the Trade Expansion Act of 1962 that produced two reports by January 2018. On 22 March 2018, President Trump signed a memorandum directing the following actions: a) to file a WTO case against China for its discriminatory licensing practices; b) to restrict investment in key technology areas; and c) to impose tariffs on Chinese products (such as aerospace, information technology and machinery). In retaliation for the steel and aluminium tariffs, China responded with tariffs of 15 to 25 percent on 128 products on 2 April 2018.

The US-China trade war was dramatised in the press during 2018, beginning with the imposition of the first China-specific tariffs on 6 July 2018 by the United States (Dezan Shira and Associates, 2019). However, many academic writers argue that the trade friction between the US and China had been ongoing for some time. In an analysis of US-China trade protection, Evenette and Fritz (2018) argue that before the 2018 tariff hikes between the US and China, “over 70 percent of Chinese exports to the US already faced one or more US trade distortions”. The authors make the point that the US protection against Chinese exports had begun long before the Trump Administration and were already extensive. The reverse is also true, the authors argue. They state that coincidentally only 30 percent of US exports to China did not face a policy-induced trade distortion before the tariff hikes of 2018. This longstanding tension in the trade relationship was expressed robustly by the United States Commerce Secretary Wilbur Ross at Davos in January 2018 when he stated that, “Trade wars are fought every single day, the difference is US troops are now coming to the ramparts” (Zillman, 2018). The discussion on the increased tension in the WTO between the US and China during the WTO Doha Round trade negotiations and the strategic pivot to Asia that the US had made during the period of the Obama Presidency, in an attempt to contain the rise of China in the Asia-Pacific region, is an important context for the growing bilateral trade tension observed during the Trump Presidency.

The US frustration at its failure to integrate China into its *convergence club* has also been reflected in the observations of several trade experts (see Crowley, 2019). Chad Brown (2019) provides several reasons for the US decision to adopt unilateral measures against China in the Trump era. First, he argues that the WTO dispute settlement system was not able to act against a suite of Chinese economic policies that went against the spirit rather than the letter of WTO law. Second, he argues that a combination of Chinese policies, such as high tariffs in addition to intellectual property rights theft and inducement of American investors to transfer technology, were not WTO-inconsistent in isolation. Third, he states that the US was frustrated at losing dozens of WTO cases on anti-dumping due to a method of calculation referred to as “zeroing” that rendered the US impotent to deal against unfair trade. This argument was made in a different manner by Mark Wu (2016) who argues that the economic model of China was so complex and different to the Western capitalist model that the rules of the WTO were not able to adequately discipline China’s subsidies and trade distorting policies.

However, the US imposed tariffs on aluminium and steel were not against China alone but against a large number of countries, including, the EU, China, Japan, Mexico, Canada, India, Norway, Russia, Switzerland and Turkey (Lee, 2019). In addition, according to Yong-Shik Lee (2019) the US tariffs on aluminium and steel are the largest trade measures in history, affecting US\$29 billion dollars of steel trade and US\$17 billion dollars of aluminium trade. Several countries retaliated and adopted tariff measures against the US (EU, China, Mexico, Canada, Russia, India and Turkey) while others decided to restrain their exports by creating quotas for their exports in negotiations with the US (South Korea, Brazil and Argentina). Yong-Shik Lee, a WTO law expert on trade, argues that both these measures are not consistent with WTO law. The US argued that its measures are justified as a national security exception under GATT Article XXI. Lee (2019) points out that Article XXI has been rarely invoked by WTO members and that the agreement envisaged that the provision will only be used by members in situations, “necessary for the protection of its essential security interests”. Lee argues that it was unlikely that the US actions were “necessary for the protection of its essential security interests” (Lee, 2019).

The US-China trade war began on 6 July 2018 (Day 1) and ended with the announcement of a “phase one deal” on 13 December 2019 (Day 526) (Dezan Shira and Associates, 2019). The US led the tariff war with several rounds of tariff increases, rising with each round and reaching a total of US\$550 billion in China specific tariffs, and the Chinese responded to the US tariff increases after each round with a proportionate increase of their own cumulating at a total of US\$185 billion of US-specific tariff increases (Dezan Shira and Associates, 2019). Interestingly, the trade war was managed by increasingly aggressive rhetoric to escalate the tariff increases and erratic negotiations between the two governments at senior official, ministerial and presidential levels. While President Xi visited Trump’s Mar-a-Lago Estate in Florida, on 6-7 April 2017, where they set up a 100-day Action Plan to resolve their trade differences, the negotiations did not succeed in managing what turned out to be a full-scale trade war that was to last until the end of 2019. The negotiations took place in over 15 rounds with several breakdowns between the parties and resuscitation of the talks by the leaders. China also lodged at least three disputes against the US tariff increases in the WTO. The negotiations were partly about tariff increases due to “structural imbalances in trade” but mainly about issues such “forced technology transfers, intellectual property protection, and non-tariff barriers”. The US passed legislation on export control on emerging technologies such as artificial intelligence, robotics and quantum computing as these were argued to be dual use and could be used for military purposes. The US banned US companies from doing business with Chinese telecommunications company ZTE in April 2018 and in June 2018 announced that a deal was agreed with ZTE to resume business. In May 2019 the US placed Huawei, the Chinese technology company, on its “entity list”, which effectively bans US companies from selling to the Chinese telecommunications company without US government approval. China responded with an “unreliable entities” list of its own in May 2019. In June 2019 the US relaxed the ban on Huawei.

The Phase One Deal, signed by President Trump on 15 January 2020, has been criticised by several observers. Under the “deal” China has agreed to purchase US\$200 billion worth of goods and services in 2020 and 2021 on

top of the total amount purchased in 2017 and includes select agriculture, energy, manufacturing and services US exports to China. China has also agreed to improve its intellectual property protection, to refrain from forcing US companies to transfer technology to Chinese companies, and to open its market to more US investment (Prasad, 2020). Paul Kruman argues that the US achieved very little from the US-China trade war. He argues that President Trump lost the war to China because he underestimated the power of a large economy like China and its capacity to hold its own in the negotiations. In addition, he argues that the trade war was costing US consumers and companies, as Chinese prices did not fall, and Chinese retaliation hurt US farmers that were dependent on the Chinese market. The United States lost many close allies (such as the EU, Canada and Mexico) during the trade war and lost the moral high ground and its leadership role on multilateralism and free trade. In addition, the US objective during the war to push-back against Chinese industrial policy, such as its Made in China 2025 trade and investment strategy, failed as the Phase One Deal did not discipline Chinese subsidies or technology policy (Krugman, 2019; Prasad, 2020). However, other commentators have argued that the US-China trade deal was extremely one-sided as it lays almost all the implementation burdens on China. The 86-page document has 105 mentions of “China shall...” while there are only five mentions of “US shall...” (Lunenburg, 2020). Ironically, the agreement is a return to the “managed trade” of the 1980s when the US and the EU imposed “voluntary export restraints” on Japan. Furthermore Lunenburg (2020) argues that the use of political power to extract unilateral trade concessions goes against the grain of multilateralism and exposes the WTO as being powerless to intervene in this dispute.

At least three useful insights can be drawn from the US-China trade war. First, the Chinese response to the US tariff increases and trade measures were deliberate, timeous and proportionate. Second, notwithstanding the apparent disengagement between the two powers that was reflected in the media, the two powers were deeply engaged from senior official level to the highest levels of their leadership throughout the two-year “trade war”. Third, despite the apparent victory declared by President Trump, the US was worse off at the

end of the two-year war with no visible achievements in the Phase One Deal signed on 15 January 2020 (Krugman, 2019) – even though the Phase One Deal was totally one-sided, reflecting the use of political power to extract unilateral concessions, in the face of a powerless WTO, underlying the crisis of multilateralism (Lunenborg, 2020).

CONCLUSION

By any measure the current episodes of trade warfare between the United States and China, the collapse of the multilateral trading system amplified by the paralyses of the Appellate Body of the WTO, and the attempts by the US and China to conduct strategic trade negotiations in the Asia-Pacific region reflect a deepening crisis of governance in the global trading system and globalisation.

This chapter has argued that the mainstream academic literature on the current trade war reflects an obsolete belief in the convergence theory developed by the United States to integrate Japan into the Western liberal capitalist model in the 1970s and 1980s. This approach to the current crisis of global economic governance, it is argued, is not appropriate in the current conjuncture. Furthermore, this chapter also argues that the view that the world has to choose between only two options: the hegemony of the US Western liberal capitalist model and the hegemony of the Chinese economic model is erroneous (Obama, 2016; Matoo and Staiger, 2019). This study supports the view taken by the eminent group of academics in the US-China Trade Policy Working Group (2019) that the world should be seeking alternative approaches to the polarised options of hyperglobalisation (convergence) or protectionism (decoupling). The current crises provide the world with the opportunity to consider and debate alternatives to the US or China polarised debate.

The Belt and Road Initiative is a comprehensive response by the Chinese Government to the attempts to contain China's rise in its own region (Southeast Asia) and a positive response to the crisis of global governance

bilaterally, regionally and multilaterally. This research has thus argued that the BRI should be analysed as a comprehensive response by China to defend itself against US attempts to contain it in the Asia-Pacific region, to US attempts to make it converge to a Western liberal economic model that is defined by the US, and attempts by the US to discipline its use of industrial policy to advance its objective to compete in the high-technology and new innovations of the Fourth Industrial Revolution.

While most elements of the BRI have been applied mainly in Southeast Asia, the BRI has a strong footprint in Africa. It has been argued that China's rise has created both opportunities and challenges for African countries. A growing academic literature and various articles in the popular press criticise China's role in Africa, but there are also many myths about the role of China in Africa. This chapter has reviewed the literature and argues that the lessons from the experiences of China-ASEAN offer African countries valuable insights to build their own regional integration in the African Continental Free Trade Agreement in a way that is inclusive, mutually beneficial, and strengthens investment in cross-border infrastructure and industrialisation across the African Continent. African countries should use their agency and insist that China's BRI supports African countries to implement the AfCFTA with a "developmental regionalism" approach, similar to the efforts it has undertaken in the Greater Mekong Subregion.

This chapter has argued that the current crisis of global governance and globalisation offers the world an opportunity to avoid the shift to another single hegemonic power to replace the US, and to rebuild and strengthen a global governance system underpinned by new norms of solidarity, mutual co-existence, balanced and sustainable development and equity that is committed to serving the interests of all of humanity. In the next chapter the values and principles of an alternative regional and multilateral governance institutions are explored and advanced.

Chapter Eight

TOWARDS AN ALTERNATIVE TRADE NARRATIVE AND VISION FOR THE FUTURE OF THE WTO

INTRODUCTION

On his reappointment for a second term, the Director General of the WTO, Pascal Lamy, recognised that there was a need to “make the WTO more development-friendly, more user-friendly, so that its benefits are felt by all, large and small, rich and poor, strong and weak” (WTO Document, 2009: JOB(09)/39). He went on to make some proposals for incremental reform in four areas: negotiations, implementation, coherence and outreach. He concluded by stating that “no major surgery” was needed in the WTO and that “no major overhaul of the system is in my view required, but rather a long to-do list to strengthen the global trading system”.

In sharp contrast to this view of the reforms required, a recent critique of the GATT/WTO by Rorden Wilkinson makes a cogent argument for a more fundamental reform of the WTO (Wilkinson, 2014). Wilkinson argues that the architects of the GATT created the system in their own interests and that the initial rounds of GATT addressed the interests of the major developed countries – the US and the EU. With each new round the basic asymmetry that was created in the GATT system was perpetuated in favour of the developed countries. In addition, newcomers to the system thus had to also accede to the GATT (and later the WTO) in a disadvantageous manner (Wilkinson, 2014).

The imbalances of the current trading system have been a subject of critique by many academic writers and WTO members (Finger, 2007). Indeed, Wilkinson’s assertions are part of a growing literature that has called for the inequities of the GATT/WTO to be addressed (Stiglitz and Charlton, 2005). The role of developing countries in the current Doha Round has been unprecedented, with the building of powerful developing country groupings

or alliances such as the G20, the NAMA 11,¹² the G33 and the ACP, LDC and Africa Group among others. Non-government Organisations (NGOs) and other civil society groups have also played an important part in the unfolding critique of the past practices and inequities of the WTO rules (Jawara and Kwa, 2003). These criticisms have highlighted the legitimacy crisis of the WTO (Elsig, 2007).

At a meeting of a group of developing countries hosted by Minister Suresh Prabhu, the Commerce Minister of India, developing countries once again declared their commitment to multilateralism that is inclusive and developmental (Ministry of Commerce of India, 2019). Their views were expressed as follows:

The Multilateral Trading System is the collective responsibility of all countries who have a stake in it... The principles of non-discrimination, predictability, transparency, the tradition of decision-making by consensus and, most importantly, the commitment to development, underlying the multilateral trading system, are too valuable to lose.

The WTO Ministerial Conference scheduled to be held in Kazakhstan in 2020 has been postponed to 2021 due the challenges posed by the COVID-19 pandemic. This delay provides a good opportunity for Ministers of Trade, trade officials in capitals, civil society stakeholders and academic experts to debate and advance these proposals. This chapter of the book discusses the need for an alternative approach to reform of the WTO that seeks to rebuild the WTO and the multilateral trading system on some universal principles. Some recommendations are made to this end.

12 The NAMA 11 Group of developing countries was formed in the period shortly before the Hong Kong Ministerial Conference in December 2006. The NAMA 11 includes Argentina, Brazil, Egypt, India, Indonesia, South Africa, Philippines, Namibia, Tunisia and Venezuela.

TOWARDS AN ALTERNATIVE VISION OF MULTILATERALISM

The crisis in the WTO negotiations is due to the paradox that while the majority of people – in developed and developing countries – are skeptical of the benefits of hyperglobalisation – the major developed country players in the WTO have been pushing for aggressive trade liberalisation, particularly on issues of interest to their business lobbies. During the first wave of WTO reforms, those that were seeking to revive support for trade liberalisation based their arguments on the GVCs approach, which was attempting to reincarnate the mantra of trade liberalisation and hyperglobalisation as a solution to all our social and economic ills. While some of the major transnational corporations in the US were demanding aggressive liberalisation (such as the US Coalition of Services Industries), the dominant perspective across the political spectrum in the US believe that the gains from the Doha Round are too little and the adjustments and obligations required of the US will be too high. There appears to be an unusual bipartisan consensus in the US today that the Doha Round is dead – and that it does not serve US interests to pursue it in its current form and mandate.

However, the inequities of the current trading regime remain a stark reminder of the ills of the past. LDCs, such as Bangladesh, remain discriminated against and locked out of the major developed country markets. Developed country subsidies and high tariffs in agriculture still distort world trade – the case of the African Cotton Four countries has become a litmus test for the legitimacy of the trading system. New rules negotiated in the Uruguay Round have reduced policy space for developing countries wishing to pursue their industrial development. The rules of the WTO are perceived by developing countries to be biased in favour of the rich countries. The Doha Round sought to address these issues in the Doha Development Agenda.

Meanwhile, new systemic challenges confront the world trading system. The distortionary impact of unregulated finance on the trading system through, for example, exchange rate movements that dwarf changes in tariff regimes,

are yet to be seriously addressed at the multilateral level. The need to develop alternative energy sources and the increasing use of measures such as border taxes to reduce carbon use will create a demand for new trade rules. High food prices have raised the spectre of food shortages and a demand for new rules on export taxes and export bans of food. The case on Rare Earths against China by the US, EU and Japan has raised the question of new rules on natural resources. The proliferation of transcontinental and non-contiguous FTAs, such as the TTIP and the TPP, are creating an increasingly fragmented global trading system, although these have been temporarily suspended due to President Trump's decision to withdraw US participation. In addition, increasing proliferation of non-tariff barriers (including sanitary and phytosanitary measures and technical barriers to trade standards and regulations) as new protectionist devices demand the need for clearer and more transparent disciplines and to fast-track dispute settlement mechanisms.

During the first three months of 2020 the COVID-19 health pandemic has had a devastating impact on the global economy with the International Monetary Fund (IMF) declaring it to be the "worst economic impact since the great depression" with more than 170 countries facing negative growth (Gopinath, 2020). The impact of the virus has also had a crippling impact on international trade, with disruptions of global value chains exacerbated by protectionist policy responses by WTO members. According to the International Trade Centre (ITC) map of temporary trade measures, more than 90 countries imposed temporary restrictions/bans on pharmaceuticals, medical products, personal protective equipment (PPE) (masks and gloves), hand sanitisers and food products (ITC, 2020; accessed 20 May 2020) and; about 103 countries imposed temporary liberalising measures (with 10 imposing restrictions) on the above products (ITC, 2020).

Two main forms of trade measures have been taken by WTO Members: a) reduction of tariffs on medical related products to deal with the pandemic, and reduction of tariffs for food; and b) export restrictions (or measures such as requirements for licensing) mainly on medical-related products to ensure that the domestic needs are given priority, and fewer export restrictions on

food items (UNECA, 2020). Developed countries (such as Switzerland and New Zealand) have made submissions to further liberalise trade in health and agriculture products) (Kwa et al, 2020). Developing countries in the WTO were asked to: a) further liberalise health products and agriculture; b) ban export restrictions in agriculture; and c) negotiate new digital trade rules, liberalise online trade and free data flows. Kwa et al (2020) argue that liberalising may be a necessary policy response in the short term. However, developing countries should not give up agriculture protection and export restrictions, which may be necessary to manage domestic prices. The authors argue that new trade rules on e-commerce and digital trade would be premature and could prevent countries from putting in place data sovereignty and data localisation requirements (Kwa et al, 2020).

Global supply chains were already being disrupted by protectionism of the major developed countries before the COVID-19 pandemic. This trend of reshoring of production back to the major developed countries is being accelerated by active policy steps being taken by OECD leaders in the US and the EU. The Economist magazine predicts that COVID-19 will fundamentally reshape trade – accelerating the trend towards shortening supply chains. Just-in-time manufacturing, it is argued, using global suppliers will give way to a greater focus on using regional supply chains (The Economist, 2020).

African countries too are taking steps in response to this protectionism of the North and their vulnerability to Northern markets to focus on domestic and regional production. For example, the East African Community (EAC) Heads of State Meeting held on 12 May 2020 noted that the region's key economic sectors are experiencing a slowdown as a result of the COVID-19 pandemic. They directed member states to prioritise regional value chains to support local production of essential medical products and supplies including masks, sanitisers, soaps, overalls, face shields, processed food, and ventilators as part of efforts to combat COVID-19 (EAC, 2020).

All these issues demand the need for increased global cooperation (Ismail, 2020b).

Alternative conceptions of trade, development and multilateralism

A new approach to these challenges will need to be constructed as the limits of globalisation become more apparent (Rodrik, 2011). In his book, *The Globalization Paradox*, Dani Rodrik has argued that the world cannot simultaneously pursue democracy, national determination and economic globalisation. He suggests that a thin layer of international rules that leaves substantial room for maneuver by national governments – and that is consistent with the values and aspirations of different nations – will be more resilient.

In this context the challenge today is to construct an alternative analysis of the crisis of “actually existing” globalisation rather than the theoretical versions of the prevailing fashion. An alternative narrative is required as the more appropriate policy response to this crisis at national levels, both in developed and in developing countries. The GVCs approach attempts to bring back a narrative of trade and the virtues of trade liberalisation that was constructed to advance the interests of the US and EU. The GATT (and the World Bank/International Monetary Fund) was the institutional embodiment of this narrative (Wilkinson, 2014). The challenge will be to construct an alternative narrative of trade and the multilateral trading system – one that speaks to challenges faced by millions of people in the world today – unemployment, poverty and inequality. The alternative approach to trade liberalisation has to reconcile the need to avoid falling back into protectionist policies that lead to increased trade conflict while creating new economic opportunities for developing countries and fairer global trade rules.

Where should such an alternative analysis begin? We need to recognise that markets are not self-regulating, or a disembedded sector from society. Each national economy is different. Each is embedded in a social context. Liberalising trade therefore does not have the effect of creating new opportunities for all automatically by creating new efficiencies or by reallocating resources from one sector to another. Trade liberalisation must be seen as a tool for development.

There has been a different vision and conception of the multilateral trading system than that which eventually emerged in the GATT. Developing countries such as Brazil and India made significant contributions to the debate on the architecture of the ITO in the UN conferences called to discuss this. The Havana Charter that was the outcome of these debates and negotiations incorporated a number of principles and values that are still relevant today for the trading system. These include the need to address the social impact of trade on employment and development and to recognise the differences in the levels of development of countries and their different needs and capacities (see Drache, 2000, on the aims and objectives of the ITO). At the time of its formation, the GATT was not representative of the world's nations, as the majority of developing countries were still colonies in 1947. Russia did not join the ITO negotiations or the GATT (then as the Soviet Union), China was to withdraw from the GATT in 1950, and South Africa had been an apartheid state since 1948.

The 1990s witnessed the end of the cold war with the falling of the Berlin wall in 1989, and the end of apartheid in 1994, followed by the accessions of China to the WTO in 2001 and Russia in 2012, and the accessions of a large number of developing countries bringing the total number of WTO members to 164 in 2019. In addition, unprecedented attention was given to the WTO by civil society leading to protests around the WTO Ministerial Conference in 1999, known as the Battle of Seattle. Developing countries also began to participate more actively in the WTO and succeeded in negotiating a development mandate that was to launch the Doha Round in December 2001.

The Doha Development Agenda took on board the concerns of developing countries with the asymmetry and imbalances of the WTO rules inherited from the Uruguay Round. These concerns were addressed in various provisions of the mandate, including the implementation issues on special and differential treatment and an explicit commitment in paragraph 2 of the mandate to “make the needs and interests of developing countries at the heart of the work programme”. By Cancún (MC5), many of the NGOs that were denouncing the inequities of the WTO in Seattle were making concrete

proposals to advance the interests of developing countries, and principles of equity and inclusiveness, in the WTO negotiations. In addition, developing countries organised themselves in various groups and alliances – such as the Africa Group, ACP, LDCs, the G20, G33, and NAMA 11. This spurred an active debate in academia (Stiglitz and Charlton, 2012; Wilkinson, 2014) on the nature of the multilateral trading system and need for reforms to address the inequities these different groups were pointing to. In addition, the UN bodies offered some new concepts that challenged the existing ethos of the WTO (for example, the International Labour Organization’s Social Dimensions of Globalization, the Human Rights Commission’s Right to Development and the SDGs). Thus, the principles, values and norms of the existing architecture of the WTO are being challenged, and there is a growing expectation that the principles, values and norms expressed in this discourse must find their way into the new architecture of the WTO. The multilateral trading system – its architecture and underlying principles – is being reshaped to make it more relevant to the needs of the 21 Century. This discourse and debate has created new insights into what is required to re-energise and redefine the concept of multilateralism in the context of the WTO.

DEBATING THE PRINCIPLES OF TRADE MULTILATERALISM

This book argues that the overall objectives of “development” and the needs and interests of developing countries should be the main focus of the multilateral trading system. This analysis draws on the work of Amartya Sen (Sen, 1999) who defines development as the process of expanding human freedoms. Drawing on this insight four principles are proposed as a guide to the multilateral trading system.

First Principle: Fair Trade – Equity

To provide developing countries with economic opportunities to export in global markets, we have to create a level playing field. In agriculture, we have to remove the distortions caused by subsidies in developed countries that prevent and undermine developing countries from pursuing their comparative advantage. Joseph Stiglitz argued for the introduction of the concept of the Right to Trade (Stiglitz and Charlton, 2012). Whatever we do with the Doha Development Agenda, we cannot ignore the reality of the current inequity that still prevails in the trading system: the plight of the four West African LDC cotton producers facing high trade distorting subsidies is a stark reminder of the inequity of the trading system.

Second Principle: Capacity Building – Solidarity

Poor countries can do little to take advantage of market access opportunities, when this is made available to them, if they do not have the capacity to produce, and export. Thus Sen (1999) has argued that poverty should be understood not so much as low incomes but as a deprivation of basic capabilities. The Hong Kong Ministerial Declaration (WTO, 2005) recognised the importance of “Aid for Trade” and called on the Director General of the WTO to: a) create a Task Force that “shall provide recommendations on how to operationalise Aid for Trade; and b) to consult with members as well as the IMF and World Bank and other relevant international organisations “with a view to reporting to the General Council on appropriate mechanisms to secure additional financial resources for Aid for Trade”. This Task Force submitted its recommendations to the General Council at the end of July 2006. However, a great deal remains to be done to implement the recommendations of the Task Force; to provide additional aid for trade; to ensure the existing aid is effective; and that there is ownership by the partner countries. Joseph Stiglitz has also argued that such an Aid for Trade facility that monitors and evaluates the effectiveness of Aid for Trade should be located in UNCTAD. This proposal needs to be discussed further.

Third Principle: Balanced Rules – Social Justice

Third, the rules of the trading system also need to be balanced. While strengthening the rules-based system for all to benefit, this should provide sufficient flexibilities to prevent developing countries from bearing the cost of these rules. While Sen (1999) argues for government regulation to enable markets to work more effectively, he states that a system of ethics, based on social justice is required to build vision and trust for the successful use of the market mechanism. It is even more important to recognise differences that exist in the social, economic and political relations and institutions of countries. Rule-making should not seek to average out and impose external standards but recognise differences, apply the rules with flexibility, and retain policy space for development (Rodrik, 2011).

Fourth Principle: Inclusiveness, Transparency and Full Participation

Fourth, the participation of developing countries in the negotiating process is crucial to ensure that they are engaged in negotiating the new rules in a fair and democratic manner. Sen (1999) argues that depriving countries the opportunity to participate in crucial decisions on public affairs is to deny people the right to develop. In the early years of the GATT, the participation of developing countries was merely procedural while the substantive decisions were taken by the major developed countries. This changed in the Doha Round as developing countries had become more organised, had built negotiating coalitions, and were demanding to be heard and their interests addressed in the negotiations. However, some major players not accustomed to genuine participation by all are attempting to return to the old practices of negotiating only among some and hoping to then impose this on the rest – this is the so-called “plurilateral” approach used in the Tokyo Round. Other observers frustrated at the need to address the complexity of negotiations in a multilateral setting based on consensus have argued for a short-circuiting of democracy through the variable geometry approach in which a small group of major players first shape the deal. In Sen’s view participation is essential for development.

The above principles would need to be debated and discussed by developed and developing countries, NGOs, business and trade union stakeholders, and the academic and intellectual community. In its latest *Trade and Development Report*, UNCTAD takes a much broader view than the narrower remit of this paper that has focused only on the multilateral trading system (UNCTAD, 2019). UNCTAD argues that the rules and practices of multilateral trade, investment and the monetary regime need urgent reform. The report argues that these rules are currently skewed in favour of global financial and corporate interests, and powerful countries, leaving national governments, local communities, households, and future generations to bear the costs of economic insecurity, rising inequality, financial stability and climate change. UNCTAD proposes a new set of principles that is referred to as the Geneva Principles for a Global Green New Deal. The UNCTAD Geneva principles for a new global green deal are set out in the section below.

PRINCIPLES FOR A NEW GLOBAL GREEN DEAL

1. Global rules should be calibrated toward the overarching goals of social and economic stability, shared prosperity, and environmental sustainability, and be protected against capture by the most powerful players.
2. States share common but differentiated responsibilities in a multilateral system built to advance global public goods and protect the global commons.
3. The right of states to policy space to pursue national development strategies should be enshrined in global rules.
4. Global regulations should be designed both to strengthen a dynamic international division of labour and to prevent destructive unilateral economic actions that prevent other nations from realising common goals.
5. Global public institutions must be accountable to their full membership, open to a diversity of viewpoints, cognisant of new voices, and have balanced dispute resolution systems.

CONCLUSION

United States policymakers and academic observers have long held a polarised view of the world. President Obama remarked in his signing of the TPP: “When more than 95 percent of our potential customers live outside our borders, we can’t let countries like China write the rules of the global economy. We should write those rules, opening new markets to American products while setting high standards for protecting workers and preserving our environment”. President Trump has maintained this stance with greater vigour and has led the US-China trade war with great costs to the world economy and the United States. The US insistence that the rules of global trade should work to the advantage of the United States has led to the collapse of the Doha Round of the WTO and the paralysis of the WTO Appellate Body, threatening the very existence of the multilateral rules-based system that has served the world since the Second World War by creating stability in world trade. Academic observers such as Crowley (2019) still maintain a perspective that the main challenge is to “...integrate the fundamentally different economic systems of Western liberal capitalism and Chinese state capitalism...”. This type of thinking is similar to the attitude adopted by the United States to the integration of Japan into the Western liberal capitalist system in the 1970s that Sylvia Ostry (1997) refers to as the *convergence club*. Matoo and Staiger (2019) also provide two polar alternatives for the world, to either converge to the US hegemonic model or the Chinese hegemonic model. This perspective is both unrealistic in a multipolar world and undesirable from a global governance perspective.

This research suggests that a different type of thinking is required in the current global conjuncture to resolve the crisis of multilateralism. China’s response to the US attempts to contain its rise and force it to converge to the Western liberal capitalist model has produced interesting ideas and insights towards building an alternative form or forms of multilateralism that are based on values and create the building blocks of a new global governance for the 21st Century.

The Belt and Road Initiative of China has begun to provide the world with interesting new insights on the possibilities for a different type of economic engagement. The Chinese Office of the Leading Group states that, “the Belt and Road will become a road of peace, prosperity, opening up, green development, innovation, connected civilization and clean government. It will make economic globalization more open, inclusive, balanced and beneficial to all”. The document emphasises the need to focus on “development” as the “master key to solving all problems” and support a vision of “development that is green, low-carbon, circular and sustainable”. Furthermore, the BRI supports “free trade and an open world economy, inclusive and common development, that is rules based, open, transparent, inclusive and non-discriminatory” (Office of the Leading Group, 2019).

These ideas on the values and principles that should underpin a new globalisation and global governance in the 21st Century are similar to the views of a group of eminent scholars from the United States and China concerned with de-escalating the trade war (US-China Trade Policy Working Group, 2019). They have argued against a polarised view of the world that sees the only options as that of hyperglobalisation or protectionism. Instead they have called for an alternative approach to globalisation that is based on peaceful coexistence and tolerance for different economic paths and systems.

UNCTAD has reminded us that the current climate crisis and the need to deliver on the Sustainable Development Goals requires “a well-funded, democratic and inclusive public realm at the global as well as the national level” (Kozul-Wright, 2019). Richard Kozul-Wright argues that what is needed is a Global Green New Deal that combines environmental recovery, financial stability and economic justice through massive public investments in decarbonising our energy, transport and food systems while guaranteeing jobs for displaced workers, and supporting low carbon growth paths in developing countries.

As the world celebrates the seventy-fifth anniversary of Bretton Woods, Kozul-Wright recalls the wisdom of Henry Morgenthau, the Treasury Secretary of

the United States at the time, of the creation of the Bretton Woods institutions. Morgenthau understood that what was at stake was “world security and the development of the world’s resources for the benefit of all its people” and he insisted that countries would be given the requisite degree of economic independence – policy space – to ensure that governments could make good on their promise of full employment and would cooperate more closely to eliminate the aggression and bullying that accompanied “power economics”. As we begin the work of building the global governance institutions of the 21st Century, the words of Morgenthau can help to reignite a debate about how to build a secure world and the development of the world’s resources for the benefit of all its peoples.

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The WTO has not been able to recover since the collapse of the Doha Round in July 2008. Several ministerial conferences including the Buenos Aires meeting in December 2017 failed to reach agreement. The US Trump Administration launched a campaign to reform the WTO in 2018 and 2019. This book argues that the Trump Administration reform proposals have been much more aggressive and far-reaching than the Obama Administration before it, threatening to erode hard-won special and differential treatment rights of developing countries. By blocking the appointment of new Appellate Body members, the US has effectively paralysed the Appellate Body and deepened the crisis of the multilateral trading system. Developing countries have responded to the proposals and called for the WTO to be development-oriented and inclusive. This book provides a critical analysis of the US-led reform proposals and seeks to build a discourse around an alternative set of concepts or principles to guide the multilateral trading system based on fairness, solidarity, social justice, inclusiveness and sustainability.



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