

Years Twenties, years of Article XX? The risen cause of Sustainability in the WTO - Part II

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[Click here for Part I](#)

Blowin' in the wind. (Or the failed promises of the WTO's Sustainable Development Agenda)

The trumpets of Sustainable Development blew heartily at the creation of the WTO, which succeeded the GATT in 1994, just two years after the Rio Summit. For starters, The Marrakech Agreement establishing the WTO[1] explicitly listed Sustainable Development amongst the statutory goals of the organisation (while, ironically, the notion of "Free-Trade" never appeared anywhere in the GATT and WTO rulebooks). Second, the results of the Uruguay Round included the creation of a Committee on Trade and Environment[2] entrusted with the mandate to explore the linkages and synergies between the two sets of policies. Third, the first WTO Ministerial Conference, held in Singapore in 1996[3], officially recognised the Environment as one of the key non-trade issues that needed to be addressed in the WTO agenda (alongside the nexus between trade and labour standards at the time). Fourth, the 2001 Doha Development Agenda[4] provided for an ambitious negotiating program on trade and the environment (including relations between WTO rules and Multilateral Environmental Agreements, together with a substantial work program covering issues such as eco-labelling, harmful fisheries' subsidies and the linkages between intellectual property rights and the UN Convention on Biodiversity). Fifth, rulings by the WTO's Appellate Body made clear that WTO rules could not be interpreted in "clinical isolation"[5] from other public international law. The Appellate Body explicitly recognized the legitimacy of sanitary and environmental concerns over trade objectives.

Sadly, the castle was made of sand and soon collapsed. Environmental issues became early collateral victims of the ever-deeper confrontations that have divided the WTO membership and derailed the DDA negotiations. After the failure of the Cancun Ministerial Conference in 2005[6], much of environment-related issues were *de facto* kicked off the WTO radar screens. Neither the environmental negotiations foreseen under the DDA (except, much later for fisheries), nor its planned work program ever really started. Without updating of its mandate, the CTE remained mired in discussions among experts that, while often interesting and useful, failed to generate tangible policy footprints. Green constituencies from civil society as well as officials from Environment Ministries, who had been previously so keen to help shape the DDA's environmental agenda, ultimately resigned themselves to pursue such matters in other settings, including for some Members within preferential trade agreements. Ironically, such trends coincided with the far greater attention paid by

multinational enterprises to the environmental footprints arising from their cross-border trade and investment activities.

A first attempt to revive the WTO's Sustainable Development Agenda came from attempts to craft a plurilateral (i.e. less than full membership) agreement for the liberalisation of trade in environmental goods (EGA), a negotiation formerly mandated at the multilateral level in the Doha Declaration. Multilaterally, this negotiation had failed in 2011 as it had met the strong opposition of a number of developing countries. Therefore, a group of interested delegations, who for most of them, had always been active in the DDA negotiations, decided to work plurilaterally to achieve their goal. While promising, the plurilateral negotiation finally stalled in 2016.

A second push unexpectedly came from the 2015 UN Summit that adopted the Sustainable Development Goals (SDGs)[7], a global framework agenda for governments and international organisations, which succeeded the Millennium Development Goals that had been agreed at the turn of the century). Among the seventeen SDGs, many of which impact trade policies directly or indirectly, one of them - SDG 14.6 directly instructed the WTO to contribute to the preservation of the world's oceans by reforming subsidy practices that contributed to illegal fishing, overfishing and overcapacities. Historically, negotiations on fishery subsidies had been generated from the CTE early discussions and already formed part of the DDA in 2001 under the rules chapter (subsidies). But their elevation to one of the SDGs endorsed by world leaders affirmed the importance and urgency of a successful outcome. Most importantly, it assigned a high (and highly visible) political mandate to the WTO and, for the first time, one that chiefly and explicitly involved not the pursuit of a trade objective but of a sustainable development one: that of keeping the fish alive in the oceans! To this day, these negotiations remain the sole multilateral negotiation still proceeding at the WTO. They are however proving difficult to conclude. WTO Members failed to meet the deadline set to conclude the talks at the Ministerial Conference held in Buenos Aires in 2017. A new deadline set for the end of 2020 met the same fate. Will it be ever be finalized and, if so, when? The answer, my friend, is blowing in the wind.

The times they are-a-changing. (Or: the Sustainable Development agenda goes plurilateral)

While the DDA produced limited results when set against its initial ambitions, the WTO started slipping into irrelevance vis-à-vis the two major structural transformations that are now reshaping the world economy: the digital and the green transformations. In responding to mounting signs of institutional and policy marginalisation, part of the WTO membership decided to initiate or renew discussions on these themes under plurilateral. The Buenos Aires conference in 2017 marked the launching point of what has become an ambitious negotiation on electronic commerce. What about the Environment? It was only very recently, towards the end of 2020, that two new plurilateral initiatives were launched somewhat discreetly within the CTE, with the aim of starting new discussions on trade and environment.

The most encompassing of the latter two initiatives is called FAST - an acronym standing for "Friends of Advancing Sustainable Trade"- and is being promoted by a group of like-minded countries[8] committed to launching so-called "structured" -plurilateral- discussions on trade and the environment. While the substantive perimeter of such talks remains to be confirmed, environmental goods tariff liberalisation, fossil fuel subsidies reform, climate change (including border tax adjustment mechanisms), circular economy, as well as trade of plastic wastes, have been identified as possible agenda items. A first stocktaking of the "structured discussions" held under the FAST group is being planned for the next WTO Ministerial Conference in 2021. In addition to its support to the FAST initiative, the European Union also signalled its intention to propose the launch of negotiations

aiming at liberalising trade in goods and services that may contribute to the fight against climate change[9] (an idea first introduced by Chinese Taipei in 2018).

Another important plurilateral initiative has been led jointly by China and Fiji, with the support of group of other Members.[10] The initiative aims at exploring the role that the WTO may play to contribute to the global fight against pollution from plastic waste in global trade.

Because the above plurilateral initiatives are still at a very early stage, it remains difficult to predict the concrete deliverables they might produce. Yet, in and of itself, the simultaneous launch of such discussions is not only highly symbolic but worthy of recognition and support. At long last, and as for other pressing priorities in trade governance (i.e. digital trade, gender, investment, MSMEs) in need of closer analytical and/or negotiating scrutiny), the WTO Members may cooperate in addressing pressing environmental challenges through plurilateral discussions. A particularly welcome feature of both the FAST and Plastics initiatives is that they include large Member constituencies straddling the old North-South divide. Further solace can be taken from the fact that proponents include both traditional partisans of open trade alongside advocates of enhanced market regulation. Such coalitions offer hopes that a new Sustainable Agenda may soon generate significant traction within the WTO.

Moving forward will not be easy and, as usual, the devilish details will lie in implementation. Progress will require a complete change of mind-set and work methods on the part of trade negotiators. Successful outcomes at the trade and environment interface will require a move away from the zero-sum mercantilist “give-and-take” approach traditionally used in multilateral trade negotiations (the WTO model) to an inclusive interstate engagement in cooperative efforts toward delivering global public goods (the Paris Agreement model). Such a paradigm shift may be facilitated by real change in the discussions methods: opening avenues for dialogue with civil societies and businesses representatives would be important in that regard. The “WTO Trade and Environment Week”[11] that has been held in 2019-2020, back-to-back with the meetings of the CTE offers a promising start for enhancing such informal exchanges. The workshops on Trade and Climate change organised over the last 3 years by France, Canada and the International Chamber of Commerce (ICC World) at the WTO also exemplify the usefulness of strengthening dialogue between trade negotiators and stakeholders invested in the cause of Sustainable Trade.

Finally, the ascendance of a set of new leaders capable of taking a fresh look at the trade policy agenda will help. This needs to start at the WTO itself, where fresh eyes and reinvigorated leadership from a newly selected Director General. More than ever, the prompt confirmation of the nomination of Dr. Ngozi Okonjo-Iweala, who clearly won the WTO selection process, is needed. Considerable hope also lies with the policy priorities on trade and the environment to be laid out by the incoming US Administration.” The indispensable rise of the Sustainability agenda at the WTO may well be associated with another Bob Dylan title: **“Changing of the guard”!**

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[1] WTO | legal texts – Marrakesh agreement

[2] WTO | Environment | CTE Work

[3] WTO | Singapore Ministerial 1996

[4] WTO | The Doha Round

[5] WTO | Appellate Body Repertory of Reports and Awards 1995-2013 - Interpretation

[6] WTO | Ministerial conferences - Cancún 5th Ministerial

[7] United Nations Sustainable Development - 17 Goals to Transform Our World

[8] Australia, Canada, Chile, Chad, Chinese Taipei, Costa-Rica, the European Union, Gambia, Iceland, Japan, Kazakhstan, Liechtenstein, North Macedonia, Maldives, Mexico, Moldova, Montenegro, Norway, New-Zealand, the United Kingdom, Senegal, Singapore, South Korea, and Switzerland.

[9] Introductory Remarks by Valdis Dombrovskis (europa.eu)

[10] Australia, Barbados, Canada, China, Fiji, Jamaica, Morocco, Switzerland

[11] WTO | WTO trade and environment week 2020