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# Enforcement of Multilateral Trade Regulation by Non-State Actors – Desirable and Feasible?

Iveta Alexovičová 

Faculty of Law, Maastricht University, Maastricht, Netherlands  
Email: [i.alexovicova@maastrichtuniversity.nl](mailto:i.alexovicova@maastrichtuniversity.nl)

## Abstract

Since its inception, the inter-state dispute settlement system of the World Trade Organisation has generally been praised for effectively protecting the rule of law in international trade relations. While the relatively recent dismantling of this system does not necessarily mean the end of the WTO nor of the binding nature of its rules, the current crisis may be a good opportunity to reconsider the role of the rule of law in international trade relations and the ways in which it could further be accommodated. One suggestion, occasionally raised in the past, would be strengthening the enforcement of WTO rules by opening it to private action, either before national courts or through international adjudication. After all, the latter has been widely available to foreign investors covered by thousands of international investment agreements in force for decades. This contribution recalls the reasons behind the current lack of private enforcement of WTO law and argues that developments in international trade relations and experiences with investor-state dispute settlement are likely to work against rather than in favor of its introduction in the foreseeable future. Increased transparency and institutionalisation of non-state actors' role in trade enforcement is therefore recommended instead.

**Keywords:** direct action; enforcement; non-state actors; transparency; WTO law

## 1. Introduction

For almost a quarter of a century, multilateral trade regulation – as reflected in the law of the World Trade Organisation (WTO) – was generally considered “actually” enforceable, distinguishing itself from most other fields of international law. This enforceability was ensured, in particular, through a mandatory and binding inter-state dispute settlement system (DSS) in place since the entry into force of the WTO Agreement in 1995. As a core WTO function, the DSS was praised for effectively protecting the rule of law in international trade.<sup>1</sup>

<sup>1</sup> E-U Petersmann, “Rule-of-Law in International Trade and Investments? Between Multilevel Arbitration, Adjudication and Judicial Overreach” in F Marrella and N Soldati (eds), *Arbitrato, contratti e commercio internazionale. Studi in onore di Giorgio Bernini-Arbitration, contracts and international trade. Essays in honour of Giorgio Bernini* (Giuffrè, 2021) pp 197–221 <[https://cadmus.eui.eu/bitstream/handle/1814/74032/2021Marrella\\_024211818\\_14petersmann.pdf](https://cadmus.eui.eu/bitstream/handle/1814/74032/2021Marrella_024211818_14petersmann.pdf)> accessed 15 September 2023. On the concept of the rule of law, see contribution by H Culot, “The Concept of the Rule of Law and Global Governance: Theoretical Perspectives” in this special issue. Note that the WTO Agreement itself (incl. its annexes) does not refer to the rule of law concept. The concept has also not played an explicit role in the DSS, although occasionally Members mentioned it as a commonly accepted principle underpinning the multilateral trade regulatory framework represented by the WTO system, eg Panel Report, *Saudi Arabia-Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R/Add.1, 16 June 2020, Annex C-7, Integrated Executive Summary of the Arguments of Japan, paras. 8 and 16.

The system was exceptionally productive<sup>2</sup> and, given its relatively efficient, predictable and reliable nature, generally regarded as the “crown jewel” of the multilateral trading system embodied by the WTO.<sup>3</sup>

In 2019, this “glorious experiment with the rule of law in international relations”<sup>4</sup> came to an end when the organisation failed to appoint new members of the Appellate Body, bringing the number of incumbent members below the required quorum of three.<sup>5</sup> While first-instance adjudication by panels continues to take place, a losing Member may appeal, thereby making the panel report unadoptable and thus unenforceable. A way around is possible, in place and occasionally used<sup>6</sup> but it does not encompass the entire WTO Membership and is not (meant to be) a definitive answer to the crisis. Efforts to resolve the matter have thus far failed and while the WTO Membership pledged to work towards a solution by 2024,<sup>7</sup> there is no doubt much will be needed to fix the system.<sup>8</sup>

The current DSS crisis is not necessarily the end of the WTO nor of the binding nature of its rules, at least for Members that continue to value them. Arguably, Members’ compliance is secured by other features of the system, not just by the availability of a formal DSS. At the same time, enforcement in cases of non-compliance remains important because room for non-compliance does exist in the WTO, whether the DSS gets fixed or not. Several features, outside and in the DSS, allow Members to avoid meeting their WTO obligations, even after a breach of their obligation is formally established, leaving room for diplomacy and economic and/or political power to prevail.

To some extent, this is unsurprising given the nature of trade relations between states. Trade has always been one of the main instruments of states’ foreign policymaking, more

<sup>2</sup> P Van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization, Text, Cases and Materials* (3rd edn, Cambridge University Press, Cambridge, 2022) 174.

<sup>3</sup> S Lester et al., *World Trade Law, Text, Materials and Commentary* (3rd edn, Hart Publishing, Oxford, London, New York, New Delhi, Sydney, 2021) 149.

<sup>4</sup> WTO, *Farewell Speech of Appellate Body Member Peter Van den Bossche* (28 May 2019) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/farwellspeech\\_peter\\_van\\_den\\_bossche\\_e.htm#:~:text=On%2028%20May%202019%2C%20departing%20Appellate%20Body%20member,heart%20but%20not%20because%20this%20is%20my%20farewell](https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm#:~:text=On%2028%20May%202019%2C%20departing%20Appellate%20Body%20member,heart%20but%20not%20because%20this%20is%20my%20farewell)> accessed 15 September 2023.

<sup>5</sup> The failure was caused by the persistent refusal of the United States’ to join consensus needed for such appointment, arguing *inter alia* that the Appellate Body regularly engaged in judicial activism, thereby adding obligations and diminishing rights of WTO Members, in breach of the mandate given to it by WTO Members. See Office of the United States Representative, *Report on the Appellate Body of the World Trade Organization* (February 2020) <[https://ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf)> accessed 15 September 2023. See also e.g. E-U Petersmann, “The ‘Crown Jewel’ of the WTO Has Been Stolen by US Trade Diplomats – And They Have No Intention of Giving It Back” in D Prévost et al. (eds), *Restoring Trust in Trade, Liber Amicorum in Honour of Peter Van den Bossche* (Hart Publishing, Oxford, London, New York, New Delhi, Sydney, 2018).

<sup>6</sup> It has the form of arbitration pursued under art 25 DSU and agreed either ad hoc or in the form of the Multi-Party Interim Appeal Arbitration Agreement (MPIA). On the latter, see series of blogs by J Pauwelyn, “The MPIA: What’s New?” (Parts I–III) (*International Economic Law and Policy Blog* (IELP Blog)) <<https://ielp.worldtradelaw.net/>> accessed 15 September 2023. The first arbitration award under MPIA was issued in December 2022 in Colombia – *Anti-Dumping Duties on Frozen Fries From Belgium, Germany and The Netherlands*, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS591/ARB25, 21 December 2022. The first ad hoc arbitration was concluded in July 2022 in Turkey — *Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS583/ARB25, 25 July 2022.

<sup>7</sup> WTO, MC12 Outcome Document, WT/MIN(22)/24, WT/L/1135, para. 4 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/24.pdf&Open=True>> accessed 15 September 2023.

<sup>8</sup> An important reason for the current skepticism is the linking of the dispute settlement reform to the overall reform of the organisation by the United States. See e.g. S Lester, “The Latest From Katherine Tai on WTO Dispute Settlement Reform” (*IELP Blog*, 26 March 2023) <<https://ielp.worldtradelaw.net/2023/03/the-latest-from-katherine-tai-on-wto-dispute-settlement.html>> accessed 15 September 2023.

so since military force became outlawed.<sup>9</sup> Diplomacy, negotiations but also unilateral instruments and pressure have been important tools in trade policymaking and dispute resolution. The situation has partly changed with the establishment of the WTO, which came with a large body of multilaterally agreed rules covering or affecting many policy areas, and indeed a binding DSS resolving disputes by application of law. These features have undoubtedly strengthened the rule of law in international trade relations, the central theme of this special issue, despite no explicit mention of the concept in the WTO agreements, and even if never fully prevailing over the politics. In fact, WTO Members may have never felt the importance of the rule of law for the system as strongly as during – and due to – the current crisis. The crisis may therefore be an opportunity to reconsider the role of the rule of law in international trade relations and the ways in which it could further be accommodated, although certainly subject to a meaningful update of substantive rules.

One suggestion capable of strengthening the rule of law at the WTO, occasionally raised in the past, is opening of the enforcement of WTO rules to private action, either before national courts or through international adjudication. The latter has been widely available to foreign investors covered by thousands of international investment agreements (IIAs) in force for decades. Not to traders, though, while international trade and investments are significantly interlinked and international agreements regulating them are both part of the same (broader) field of international economic law. They all pursue the same objective of creating a stable and predictable legal environment conducive to increasing cross-border trade and investment flows without unnecessary obstacles. Some WTO agreements even contain rules of direct concern to foreign investments.<sup>10</sup> Yet, only investment agreements enable private enforcement of state obligations through litigation before an international tribunal. Despite much criticism of the investor-state dispute settlement (ISDS) system in recent years, most states continue to stand behind the idea while not extending it to their trade obligations, even if placing both trade and investment obligations increasingly frequently in the very same agreement. Assuming that – sooner or later – the WTO Membership will find a solution to the current crisis, this contribution recalls the reasons behind the lack of direct private enforcement of trade obligations and argues that recent developments in international trade relations and experiences with ISDS are likely to work against rather than in favour of its introduction in the foreseeable future. Instead of direct private action, the contribution suggests less intrusive avenues that could strengthen the position of non-state actors in the enforcement of WTO law surviving the current crisis. To facilitate this, the contribution first briefly outlines the existing compliance and enforcement framework of the WTO and the role of non-state actors in it.

## II. The WTO compliance and enforcement framework

Various theories have been developed by legal and political science scholars attempting to explain why states comply with international law<sup>11</sup> and how best to enforce different types

<sup>9</sup> WJ Davey and PC Mavroidis, “Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?” (1998) 32 *Journal of World Trade* 147, p 154.

<sup>10</sup> For example, rules on trade-related investment measures (in the WTO’s TRIMS Agreement), on trade-related intellectual property rights (in the WTO’s TRIPS Agreement) and on establishment abroad and cross-border supply of services by presence of natural persons (in the GATS). For more details, see S Puig, “International Regime Complexity and Economic Law Enforcement” (2014) 17 *Journal of International Economic Law* 491, p 496.

<sup>11</sup> A useful overview of such theories can be found in, eg a persuasive study by AT Guzman, “A Compliance-Based Theory of International Law” (2002) 90 *California Law Review* 1823, pp 1830–40.

of state obligations.<sup>12</sup> Considerations conducive to compliance include reputation, self-interest, cost-benefit considerations, consent-based nature of international law, availability of dispute settlement and/or sanctions. They all are arguable also for the WTO system. Indeed, WTO Members are motivated to comply with their obligations because they wish to be regarded as credible partners worth committing to, and because they want and expect others to do the same to benefit from the system. Compliance contributes to the predictability and legal certainty of the WTO legal framework, which is vital for well-functioning markets. As such, it is an objective expressly pursued by the WTO DSS.<sup>13</sup>

Several institutional features built into the WTO system further support Members' willingness to comply. Among them is the Member-driven and consensus-based nature of the WTO, reflected *inter alia* in agenda-setting by the Membership itself and consensus decision-making.<sup>14</sup> When an issue appears on the WTO agenda, it shows Members' appreciation of its importance and their collective interest in addressing the issue. Similarly, when no Member objects to the decision to the extent that it is prompted to block consensus, the likelihood of compliance is higher relative to the situation in which some Members are outvoted. It has been argued that the compliance facilitating nature of consensus is one of the reasons why the WTO maintains consensus-based decision-making despite the profound difficulties to adopt decisions given the almost universal membership of the WTO and the great diversity of their trade and economic interests.<sup>15</sup>

The institutional structure of the WTO helps too. Various bodies, all composed of representatives of all Members, provide for ample opportunities to discuss issues of interest, including by raising – and addressing – specific trade concerns vis-à-vis another Member.<sup>16</sup> In addition, each Member's individual trade policies and practices are regularly monitored by the entire Membership through a formal trade policy review process.<sup>17</sup> While the review is expressly not intended to serve as a basis for enforcement of specific obligations,<sup>18</sup> by exposing inconsistencies with WTO law the review may in fact “shame” Members into compliance.<sup>19</sup> Lastly, when a dispute between specific Members proceeds to the formal DSS, the DSB keeps the implementation of the findings under surveillance for as long as needed, with the non-complying Member required to report on their progress at each DSB meeting.<sup>20</sup>

The extent to which WTO Members actually comply with their WTO obligations is difficult to measure as it is mostly non-compliance – both a priori non-compliance with rules and a posteriori non-compliance with dispute settlement rulings establishing a priori non-compliance<sup>21</sup> – that attract attention. Even there, while the latter can be more easily

<sup>12</sup> In the field of international trade law, an example of a booming body of academic literature concerns enforcement of trade and sustainable development obligations undertaken in many recent free trade agreements, eg GM Durán, “Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues” (2020) 57 Common Market Law Review 1031.

<sup>13</sup> Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3 (WTO Agreement), Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art 3.2.

<sup>14</sup> Van den Bossche and Zdouc, *supra* note 2, pp 151 and 160.

<sup>15</sup> P Van den Bossche and I Alexovičová, “Effective Global Economic Governance by the World Trade Organization” (2005) 8 Journal of International Economic Law 667, pp 671–72.

<sup>16</sup> See e.g. I Manak, “Enforcing International Trade Law in the World Trade Organization's Committees: Courting Third Party Opinion” (PhD dissertation, Georgetown University 2019).

<sup>17</sup> WTO Agreement, Annex 3 Trade Policy Review Mechanism, Art IV:4 and para. A(i).

<sup>18</sup> *Ibid.*, para A(i).

<sup>19</sup> Van den Bossche and Zdouc, *supra* note 2, p 109.

<sup>20</sup> DSU, Art 21.6.

<sup>21</sup> Terms “a priori non-compliance” and “a posteriori non-compliance” were used by Mexico in its submission to the DSB concerning DSU review, explain below on p 5 and n 27. See WTO, Diagnosis of the Problems Affecting

tracked due to the DSB surveillance over implementation of rulings in each dispute, and the record is not bad,<sup>22</sup> the former is more difficult, if not impossible, to determine. That said, there are several structural impediments in the WTO system that do not support compliance.

The already mentioned consensus-based nature of WTO decision-making is both an enablement and an impediment of compliance. This is so because consensus makes adoption of new rules very difficult in an organisation with such large and diverse Membership. This leads to the existing rules becoming outdated and detached from changing economic, political and social realities. A notorious example is the failure of the Doha Development Round to reach any meaningful outcome. A few scarce examples of negotiation successes, including from the 2022 Ministerial Conference,<sup>23</sup> do not undermine the argument that various important questions blocking the system remain unresolved.<sup>24</sup> The loss of confidence in existing rules breeds resentment against them, depressing compliance. A prominent example is the current US approach to China stemming from the US' view that WTO rules are not fit for purpose to address challenges arising from China's economic model of state capitalism,<sup>25</sup> eventually resulting in the blockage of the entire DSS.

At the WTO, there also is no "guardian of the treaty," leaving Members with the exclusive choice to act against alleged non-compliance – or not to act. This too is a drawback of the WTO's Member-driven nature, mentioned above as a compliance facilitator. If no Member considers it worthwhile to confront a non-complying Member, for whatever reason, the latter may maintain a priori non-compliance, theoretically forever. Even when a challenge is brought and non-compliance affirmed, eventual enforcement of possible a posteriori non-compliance through retaliation harms both sides – it not only restricts market access for the non-complying Member, it also increases prices for targeted products in the retaliating Member's market. Hence, retaliation is rarely used even when authorised by the WTO DSB<sup>26</sup> and, therefore, an insufficient deterrent of non-compliance, especially in very sensitive cases. Lastly, there is always a possibility that the Members involved in a dispute strike a deal with a different solution, short of a priori or a posteriori compliance, surrendering rules to politics. While this may work well between equals, rules are needed to protect those on the weaker side of the bargain, thereby bringing more equity into international trade relations.<sup>27</sup>

Hence, if the rule of law and the effective enforcement of existing rules are valued, there are valid reasons for arguing that the current WTO state-to-state enforcement system is not ideally designed to ensure it. In fact, WTO Members themselves have been discussing ways of improving "effective compliance" with WTO rules for a long time, starting right after the Dispute Settlement Understanding (DSU) entered into force in 1995. As mandated at the time of its adoption, the DSU was to be reviewed after initial experiences with it to decide whether to "continue, modify or terminate" it.<sup>28</sup> After 25 years and several missed deadlines for the completion of the review, the DSU has remained unchanged, with efforts currently

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the Dispute Settlement Mechanism Some Ideas by Mexico, TN/DS/W/90 (2007) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W90.pdf&Open=True>> (accessed 15 September 2023), pp 9–10.

<sup>22</sup> Van den Bossche and Zdouc, *supra* note 2, p 215.

<sup>23</sup> MC12 Outcome Document, *supra* note 7. Most notably, a new Agreement on Fisheries Subsidies was adopted.

<sup>24</sup> They include the designation of the "developing country Member" status and the challenges posed by non-market economies (especially China) to the system.

<sup>25</sup> United States Trade Representative, *2022 Report to Congress on China's WTO Compliance* (February 2022) <<https://ustr.gov/sites/default/files/2023-02/2022%20USTR%20Report%20to%20Congress%20on%20China's%20WTO%20Compliance%20-%20Final.pdf>> (accessed 15 September 2023).

<sup>26</sup> Van den Bossche and Zdouc, *supra* note pp 2, 216.

<sup>27</sup> *Ibid.*, p 38.

<sup>28</sup> Overview of the mandate and work conducted thus far is provided in the relevant section of the WTO website available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_negs\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm)> (accessed 15 September 2023). Proposals relating to enforcement, available on the WTO website, were made e.g. by Mexico back in 2007 (TN/DS/W/90 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W90.pdf&Open=True>>) and



halted until the resolution of the Appellate Body crisis.<sup>29</sup> If ever resumed, they are likely to continue focusing on the improvement of the inter-state dispute settlement system.

### III. Involvement of non-state actors in the enforcement of WTO law

At the WTO, non-state actors are involved in the enforcement of Members' obligations in three important *indirect* ways. Firstly, non-state actors typically bring the attention of the government to alleged violations of WTO rules by another Member; in some countries following formal procedures.<sup>30</sup> Indeed, there are few, if any, WTO disputes without a trader behind them. Secondly, and to the extent desired by the government, non-state actors may be involved during the legal proceedings. This may include as much as providing full legal assistance and/or participation in the Member's delegation appearing before the panel or the Appellate Body, or as little as merely providing factual evidence and/or assisting in the preparation of legal submissions. Lastly, non-state actors may file *amicus curiae* briefs sharing their views on the dispute with the adjudicators,<sup>31</sup> although they are rarely accepted in practice<sup>32</sup> and a dispute must be initiated by a government for a brief to be filed.

Private involvement in enforcement of WTO law is thus significant but ultimately always depends on the discretion of Members (and in case of *amicus curiae* also the WTO adjudicators). When deciding whether to bring a dispute against another Member or not, governments consider interests not limited to legal considerations or even the economic (or political) importance of the trader or sector affected; they also include overall relations with that Member.<sup>33</sup> From the perspective of effective enforcement of WTO rules, this is clearly not ideal. Direct litigation by economic operators affected by non-compliance could fill the gap. This could be achieved in two ways – by granting WTO law direct effect before Members' domestic courts (in the EU case including its courts) and/or by providing private actors with access to international adjudication.

#### III.1. Past decisions on direct private action

Much has been written about direct action by private actors in the past, especially in the context of direct effect of WTO law. This is because the WTO agreements contain no provision about this, leaving the choice to each Member.<sup>34</sup> This is not unusual in international law.<sup>35</sup> The only well-known exception is European Union (EU) law where,

the African group in 2008 (TN/DS/W/92 <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W92.pdf&Open=True>>) (both accessed 15 September 2023).

<sup>29</sup> WTO, Report by the Chairman, Ambassador Kokou Yackoley Johnson, to the Trade Negotiations Committee, TN/DS/32 (21-8666) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/DS/32.pdf&Open=True>> accessed 15 September 2023.

<sup>30</sup> Van den Bossche and Zdouc, *supra* note 2, pp 194–95.

<sup>31</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras. 105–108; and Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601, para. 43.

<sup>32</sup> WTO, Dispute Settlement System Training Module, 9.3 Amicus Curiae submissions <[https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c9s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm)> (accessed 15 September 2023).

<sup>33</sup> Davey and Mavroidis, *supra* note 9, p 148.

<sup>34</sup> This was explicitly confirmed by the panel in *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, Panel report of 22 December 1999, paras 7.72 and 7.78. It has been reported that a proposal for direct effect tabled by Switzerland was rejected during the Uruguay Round negotiations which resulted in the establishment of the WTO. – eg H Ruiz Fabri, “Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?” (2014) 25 *European Journal of International Law* 151, p 154.

<sup>35</sup> See A Nollkaemper, “The Duality of Direct Effect of International Law” (2014) 25 *European Journal of International Law* 105.

against positions held by the Member States (MSs) at the time, the EU Court of Justice (ECJ) decided for all MSs that EU law had direct effect in their legal orders. Although (what is now) the EU Treaty also did not provide for direct effect, the ECJ considered that the treaty objectives and the institutional setup of the EU indicated that a “new legal order of international law” was created, concerned not only with states but also their nationals, upon which EU law, independently from MSs’ laws, imposed obligations and conferred rights.<sup>36</sup> When sufficiently specific, clear and unconditional, those rights must be protected by national courts to ensure effective supervision of the MSs’ observance of their Treaty obligations.<sup>37</sup>

From the perspective of general international law, EU law is an outlier and considerations applied by the ECJ to introduce direct effect (and later supremacy)<sup>38</sup> of EU law do not typically apply in other fields. This was also the main argument for the ECJ to deny direct effect to the General Agreement on Tariffs and Trade (GATT) 1947<sup>39</sup> and later the WTO Agreement too.<sup>40</sup> Adopting a teleological interpretative approach once again and considering the “spirit, the general scheme and the terms” of the GATT,<sup>41</sup> the ECJ opined that strong diplomatic features and flexibility of the GATT and its DSS offered much leeway to the parties to substitute compliance with alternative solutions, negotiated or unilateral, thereby preventing direct effect.<sup>42</sup> Since consultations and negotiations for both a priori and a posteriori non-compliance were retained in the WTO system, the ECJ adopted the same position in respect of the WTO Agreement.<sup>43</sup> The fact that the EU’s most important trading partners also did not accord direct effect to WTO law was an additional reason for the ECJ to do the same, thereby protecting “the scope of maneuver” for the EU and its institutions.<sup>44</sup>

Indeed, most WTO Members including all major powers like the US, China and India deny direct effect to WTO law too.<sup>45</sup> In case of the US, approval of the WTO Agreement by Congress was made conditional upon explicit exclusion of its direct effect.<sup>46</sup> In many other

<sup>36</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Reference for a preliminary ruling: Tariefcommissie – Netherlands [1963], ECLI:EU:C:1963:1, p 12.

<sup>37</sup> *Ibid*, p 13. For an in-depth explanation of direct effect of EU law, its conditions and application to different types of EU acts, see e.g. P Craig and G de Búrca, *EU Law, Text, Cases, and Materials* (7th edn, Oxford University Press, Oxford, 2020), ch. 8.

<sup>38</sup> Case 6-64 *Flaminio Costa v E.N.E.L.*, Reference for a preliminary ruling: Giudice Conciliatore di Milano – Italy [1964] ECLI:EU:C:1964:66. See also *ibid*, ch. 10.

<sup>39</sup> Joined cases 21 to 24-72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit (International Fruit Company)*, Reference for a preliminary ruling: College van Beroep voor het Bedrijfsleven – Netherlands [1972] ECLI:EU:C:1972:115.

<sup>40</sup> Case C-149/96 *Portuguese Republic v Council of the European Union (Portugal v Council)* [1999] ECR I-08395, ECLI:EU:C:1999:574. Note that also the Council, upon the Commission’s proposal, expressly noted in the decision approving the conclusion of the WTO Agreement that WTO law was “not susceptible to being directly invoked in [Union] or Member State courts.” Council Decision 94/800/EC Concerning the Conclusion on Behalf of the European Community, As Regards Matters Within Its Competence, of the Agreements Reached in the Uruguay Round Multilateral Negotiations (1986–1994), OJ 1994 L 336/1, Preamble.

<sup>41</sup> *International Fruit Company*, p 1227, point 20.

<sup>42</sup> *International Fruit Company*, pp 1227–228, points 21–27.

<sup>43</sup> *Portugal v Council*, paras. 36–42.

<sup>44</sup> *Ibid*, paras. 43–46.

<sup>45</sup> Van den Bossche and Zdouc, *supra* note 2, p 78.

<sup>46</sup> RA Brand, “Direct Effect of International Economic Law in the United States and the European Union” (1997) 17 *Northwestern Journal of International Law & Business* 556, pp 570–71. As explained on the preceding pages, the rejection of direct effect for the WTO Agreement was fully in line with the US prior approach to the issue of direct effect of international trade agreements.

countries, courts took the decision, despite the arguably more political than legal nature of the question.<sup>47</sup>

Especially the ECJ's repeatedly confirmed<sup>48</sup> denial of direct effect to WTO law has attracted much scholarly attention. The CJEU has been criticised for its inconsistent approach towards trade agreements, also in the application of the same criteria,<sup>49</sup> for a failure to recognise the rule-based nature of the WTO and its DSS<sup>50</sup> and/or for its failure to protect the rights of private parties, in particular when suffering from retaliation.<sup>51</sup> That said, many have argued that the ECJ's denial of direct effect was correct and that other avenues should be sought to ensure protection of private rights.<sup>52</sup> The section below outlines arguments used to argue against – and for – direct private action against WTO non-compliance.

### III.2. Arguments against – and in favour of – direct private action

Numerous reasons have been put forward *against* direct effect of WTO law, most of them repeated also in respect of the idea of direct access of non-state actors to the WTO DSS. From a political economy perspective, it has been noted that the objective of the multilateral trading system represented by the WTO is to generate benefits to Members at the (aggregate) country level rather than to individual traders, some of whom are necessarily harmed by the distributive effects of international trade and it is up to each Member's political decision whether and how to offset those effects.<sup>53</sup> Unlike the EU where direct effect (and supremacy) of EU law has been instrumental in furthering MSs' integration, the WTO does not aspire to such a goal.<sup>54</sup> Instead, it provides for an exchange of reciprocal and mutually advantageous arrangements between Members, with built-in flexibilities allowing deviation when needed.<sup>55</sup> Allowing private litigation would thus not be in line with the WTO's purpose to produce certain market conditions rather than confer specific rights on individual traders.<sup>56</sup>

From a political perspective, it has been emphasised that WTO law is a product of negotiations during which power politics rather than democratic balancing of various interests plays an important role. The balancing occurs at the national level and should be left to domestic political processes in accordance with Members' own values. Preserving Members' normative freedom facilitates their readiness to accept far-reaching WTO rules

<sup>47</sup> Nollkamper, *supra* note 35; Fabri, *supra* note 34, p 151.

<sup>48</sup> Note that a limited (indirect) possibility of invoking WTO law before the ECJ was open in cases where the relevant EU legislation refers to or clearly intends to implement WTO provisions. – Case 191/82 *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission of the European Communities* [1983] ECR 02913, ECLI:EU:C:1983:259; and Case C-69/89 *Nakajima All Precision Co. Ltd v Council of the European Communities* [1991] ECR I-02069, ECLI:EU:C:1991:186.

<sup>49</sup> Eg Brand, *supra* note 46.

<sup>50</sup> Eg M Bronckers, "From 'Direct Effect' To 'Muted Dialogue', Recent Developments in the European Courts' Case Law on the WTO and Beyond" (2008) 11 *Journal of International Economic Law* 885, pp 893 and 898.

<sup>51</sup> Eg E-U Petersmann, "Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT" in M Hilf and E-U Petersmann (eds), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Kluwer Law and Taxation Publishers, Deventer, Boston, 1988); Bronckers, *supra* note 50, p 893; I Živičnjak, "Effect of WTO Law in the EU and the Individual's Right to Damages Caused by a Breach of WTO Law" (2012) 8 *Croatian Yearbook of European Law and Policy* 531.

<sup>52</sup> Eg JO Berkey, "The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting" (1998) 9 *European Journal of International Law* 626; Bronckers, *supra* note 50, p 893; I Živičnjak, *supra* note 51, p 557; Ruiz Fabri, *supra* note 34, p 173.

<sup>53</sup> Berkey, *supra* note 52, pp 654–656.

<sup>54</sup> Ruiz Fabri, *supra* note 34, p 167.

<sup>55</sup> *Ibid*; Berkey, *supra* note 52, p 653.

<sup>56</sup> Berkey, *supra* note 52, p 656.



that affect many non-trade concerns.<sup>57</sup> Direct action for private actors would also affect Members' internal institutional balance, shifting power from the political (executive and legislative) branches to courts<sup>58</sup> and allow specific and well-organised private interests to prevail over other (possibly different and/or less organised) private interests and broader state interests.<sup>59</sup> It would also disregard externalities created by WTO disputes in terms of their impact on the further development of WTO law and the long-term interests of the WTO system as a whole, including its flexibilities. It has been argued that this is especially important at the WTO given the difficulties with negotiation of new rules.<sup>60</sup>

From a legal perspective, it has been noted that WTO law is different from EU law which is in place to harmonise rules among EU Member States in pursuance of a single unified market. In contrast, WTO law leaves Members with greater discretion to affect competitive conditions in their territories, providing *inter alia* flexibility in commitments, more extensive exceptions and no competition rules.<sup>61</sup> WTO law is also unlike human rights law where direct effect has been granted most often outside the EU context. Human rights law restricts margin of appreciation for states to protect individuals whereas WTO law leaves Members with discretion to negotiate to pursue their interests in exchange for benefits received from other Members.<sup>62</sup> Hence, unlike reciprocal WTO law, human rights are absolute rights. Lastly, WTO law is different from the investment regime created for the protection of private property rights rather than certain market conditions.

In respect of the DSS itself, it has been noted that the already mentioned flexibilities would be nullified by private action.<sup>63</sup> Moreover, if WTO law were given direct effect, the complexity of WTO rules would potentially result in divergent interpretation by domestic courts of provisions not previously interpreted by WTO adjudicators and difficulties in assessing correctness of implementation of dispute settlement rulings.<sup>64</sup> The latter would not be an issue only if private litigation was available at the WTO itself.

Arguments *in favour* of direct private action relate to the systemic interest in protecting a functioning multilateral trading system based on predictability and legal security.<sup>65</sup> They underscore the need to recognise and ensure that, arguably unlike the GATT 1947, the WTO is rules-based<sup>66</sup> and private action would "solidify" the rule of law in the system.<sup>67</sup> It has also been noted that direct action would increase the effectiveness of WTO law<sup>68</sup> and the protection against inherently protectionist domestic tendencies.<sup>69</sup> It would reduce the power of lobbying and politics, and protect those without sufficient voice due to their size

<sup>57</sup> JP Trachtman and PM Moremen, "Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?" (2003) 44 Harvard International Law Journal 221, pp 223 and 249.

<sup>58</sup> Ruiz Fabri, *supra* note 34, p 172.

<sup>59</sup> Trachtman and Moremen, *supra* note 57, pp 234 and 247. See also Davey and Mavroidis, *supra* note 9, pp 158–59.

<sup>60</sup> Trachtman and Moremen, *supra* note 57, p 223.

<sup>61</sup> Berkey, *supra* note 52, p 652.

<sup>62</sup> Ruiz Fabri, *supra* note 34, p 173.

<sup>63</sup> See also Berkey, *supra* note 52, p 642.

<sup>64</sup> Berkey, *supra* note 52, p 650; GT Schuyler, "Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System" (1997) 65 *Fordham Law Review* 2275, p 2303.

<sup>65</sup> Ruiz Fabri, *supra* note 34, p 168.

<sup>66</sup> *Ibid*; GA Zonnekeyn, "The Status of WTO Law in the EC Legal Order – The Final Curtain?" (2000) 34 *Journal of World Trade* 111, p 120. The latter criticised the CJEU for "the implicit recognition that international trade relations within the WTO are essentially governed by politics, rather than by the rule of law."

<sup>67</sup> Davey and Mavroidis, *supra* note 9, p 153; GI Zekos, "The Case for giving to Private Parties Access to the WTO Dispute Settlement System" (2007) 8 *Journal of World Trade and Investment* 441, p 449.

<sup>68</sup> Ruiz Fabri, *supra* note 34, p 166.

<sup>69</sup> T Ige and O Ilesanmi, "Giving Direct Effect to World Trade Organisation (WTO) Law: A Case For And Against" (2020) 6 *International Journal of Legal Developments and Allied Issues* 143, p 152; Zekos, *supra* note 67, p 449.

or level of organisation.<sup>70</sup> It would also mitigate the difficulties of some (developing) countries in accommodating private parties at the national level.<sup>71</sup> And it would provide redress for those bearing the unfair burden of compensation or retaliation applied in cases of a posteriori non-compliance.<sup>72</sup> Direct private action would generally depoliticise dispute resolution given that private actors are not as susceptible to political pressure<sup>73</sup> and do not suffer from the so-called “glass-house” problem, ie not throwing stones when feeling vulnerable themselves.<sup>74</sup> It would prevent harm to international relations between Members<sup>75</sup> and enhance further negotiations on new rules by creating trust in their meaningfulness due to the availability of effective enforcement.<sup>76</sup>

### III.3. Desirable and feasible at present?

Most arguments against and for direct private action with respect to WTO law remain convincing. There is indeed little doubt that direct private action would depoliticise the WTO DSS, increase effectiveness of WTO law and its enforcement and further strengthen the rule of law in international trade relations. This has been the central idea also behind direct private action, in the form of ISDS, in the international investment regime.<sup>77</sup> Rather than dealing with claims themselves, and disturbing their inter-state relationships, states were said to be better off by allowing investors to resolve their issues themselves before an independent international adjudicator free of potential bias towards the state involved.

ISDS has enabled foreign investors to challenge harmful state behavior if contrary to a relatively limited number of, but often broadly worded, obligations contained in IIAs, such as fair and equitable treatment or full protection and security. Although some of these specific obligations are exclusive to IIAs, others including non-discrimination and performance requirements resemble similar WTO obligations, and so do available exceptions. More importantly, ISDS claims increasingly relate to state regulatory measures, strongly reminding of (and sometimes replicating) challenges before the WTO DSS.<sup>78</sup>

A degree of convergence of the fields of international trade and investment law has not gone unnoticed<sup>79</sup> and could speak in favour of introducing direct private action in trade agreements too, despite (significant) differences in their evolution and

<sup>70</sup> Ige and Ilesanmi, supra note 69, p 151. See also Ruiz Fabri, supra note 34, p 165, who explained pro-bias of domestic politics for domestic production as opposed to consumers or importers.

<sup>71</sup> A Catbagan, “Rights of Action for Private Non-State Actors in the WTO Disputes Settlement System” (2009) 37 Denver Journal of International Law and Policy 279.

<sup>72</sup> Živičnjak, supra note 51; A Alemanno, “Private Parties and WTO Dispute Settlement” in J Chaisse and T Balmelli (eds), *Essays on the Future of the World Trade Organization, Volume II, The WTO Judicial System: Contributions and Challenges* (Editions interuniversitaires suisses – Edis, Geneva, 2008).

<sup>73</sup> Schuyler, supra note 64, p 2277.

<sup>74</sup> Davey and Mavroidis, supra note 9, pp 148 and 151.

<sup>75</sup> Schuyler, supra note 64, pp 2277 and 2294–95.

<sup>76</sup> *Ibid*, p 2295.

<sup>77</sup> IFI Shihata, “Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA” (1986) 1 ICSID Review – Foreign Investment Law Journal 1.

<sup>78</sup> The most notorious example may be challenges against Australia’s tobacco plain packaging legislation, brought both to ISDS (by Phillip Morris in *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12) and to the WTO (by five Members in *Australia — Tobacco Plain Packaging*, WT/DS434, 435, 441, 458 and 467). For other examples, see eg NA DiMascio and J Pauwelyn, “Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?” (2008) 102 American Journal of International Law 48, pp 49–50.

<sup>79</sup> J Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus* (2015) <<https://ssrn.com/abstract=2549050>> (accessed 15 September 2023), pp 7–9. See also J Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, Cambridge, 2016). A recent development suggesting the convergence trend is the conclusion of the negotiations on the text of the WTO Agreement on Investment Facilitation for Development in 2023.

features.<sup>80</sup> After all, as noted already, both trade and investment agreements aim at the creation of a predictable, stable and safe legal environment conducive to encouraging and enabling cross-border economic exchange that will benefiting the parties' economies at large. This aim is explicitly enshrined in the WTO DSS and treaty preambles confirm that this applies to IIAs too.<sup>81</sup> It has even been read into substantive standards of investment protection, most notably the fair and equitable treatment (FET) obligation.<sup>82</sup> Yet, only investors have the possibility to effectively enforce commitments undertaken by states to pursue this objective, including by claiming compensation for damages caused by states' regulatory choices. Of course, ISDS tribunals would typically award monetary compensation rather than (consider) encroaching upon the regulatory autonomy of the host state by ordering withdrawal or alteration of the host state's measure.<sup>83</sup> This is a different remedy than that currently available under the WTO system, but this could change, at least for specific situations. For example, as noted earlier, compensation of damage sustained through retaliation for a posteriori non-compliance with WTO rulings has been suggested as an alternative to full direct private action under WTO law.<sup>84</sup> While not going as far, the ECJ itself did in fact apply another alternative solution by allowing private litigants to challenge the legality of EU legislation that refers to, or clearly intends to implement, WTO provisions.<sup>85</sup>

Moreover, some arguments against direct private action with respect to WTO law could be questioned. Take reciprocity – how different is reciprocity in the WTO from reciprocity underlying IIAs? It is true that important WTO obligations are a result of negotiations based on reciprocal exchange of concessions and commitments in specific economic sectors, which is a particular feature of international trade agreements. However, there are many other WTO obligations, like the prohibition of export subsidies or unnecessary obstacles to trade created by technical regulations or sanitary and phytosanitary measures, or the obligation to protect intellectual property rights, that are not a result of such exchange. This latter group may have become more substantial under the WTO agreements relative to the GATT 1947. The nature of these obligations seems not substantially different from other international obligations, including those in IIAs. Moreover, arguably, reciprocity may be more important in bilateral treaties (like most IIAs) than in multilateral quasi-universal treaties (like the WTO's) which create benefits for a large number of countries.<sup>86</sup>

Could the flexibility provided in the WTO system through various exceptions be a justifiable reason for denying private litigation? After all, Members would be able to invoke these exceptions vis-à-vis private litigants, just as they do in ISDS – and just as they do vis-à-vis other Members under the current WTO DSS. The WTO rules' complexity could indeed cause issues with their correct and consistent interpretation and application by

<sup>80</sup> For a brief historical overview and explanation of main differences between the regimes, see eg S Cho and J Kurtz, "Convergence and Divergence in International Economic Law and Politics" (2018) 29 *European Journal of International Law* 169.

<sup>81</sup> Eg Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, signed 19 February 2008, Preamble <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download>> (accessed 15 September 2023), or Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the one part, and the European Union and its Member States, of the other part, 30 October 2016, OJ L 11, 14.1.2017, 23, 3rd, 5th and 8th paras.

<sup>82</sup> Eg *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, paras. 284.

<sup>83</sup> Eg *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 559–63.

<sup>84</sup> Supra note 72.

<sup>85</sup> See supra note 48 and Bronckers, supra note 50.

<sup>86</sup> See Ruiz Fabri, supra note 34, pp 169–70.

domestic courts but would not be an argument against, rather in favor of, the opening of the WTO DSS itself to direct litigation. The latter would also prevent asymmetry in Members' obligations caused by direct effect being granted by only some Members, an argument used also by the ECJ to deny WTO law direct effect in the past.

It is more difficult to refute the political economy argument that the multilateral trading system is envisaged to create benefits to countries at their aggregate level rather than at the level of individual sectors or traders, some of which will necessarily find themselves on a losing side of global competition, at least in the short term. At the same time, trade negotiations seem to be the right place and time for Members to make their macroeconomic cost and benefit analyses and corresponding choices, subsequently reflected in their specific obligations. Thereafter, ideally, available exceptions should enable similar choices in case of justifiable reasons arising later. Naturally, the latter presupposes that WTO rules on exceptions are adequate and capable of adjusting to changing realities of international trade and politics. Members would also not necessarily need to lose the right to modify their commitments and concessions. In any case, direct litigation would not prevent Members from making macro-economic choices, it only enforce them with private litigants unable to enforce more than what Members have decided committing to. Moreover, Members' right to decide about the distribution of macroeconomic benefits from trade internally by adopting appropriate domestic policies at any time would remain unaffected.

Arguably, the likelihood that the removal of the current DSS flexibilities would reduce Members' readiness to accept far-reaching obligations is the strongest argument against direct private action in the WTO system. This purely political argument goes squarely against the idea of the rule of law in international trade relations but reflects the political reality that WTO Members do appreciate rules creating a certain level of security and predictability for economic operators but only to a certain extent. The possibility of deviation beyond what is permitted under the framework of available exceptions seems too important and unlikely to go away, now perhaps less than ever.

By now it is clear that a meaningful update to important aspects of the WTO rulebook is far from reach. The changed economic and geo-political reality since the 1990s, when the Uruguay Round negotiations were concluded with the WTO Agreement, and the inability of Members to find an agreement on how to reflect the new reality in applicable rules, has led to increased rather than decreased politicisation of international trade relations.<sup>87</sup> When powerful Members consider WTO rules no longer to fit for purpose, they will not enhance their enforcement, to the contrary, as the current crisis of the WTO DSS proves. Even if the crisis is eventually resolved, without significant substantive law changes Members will want to retain a larger rather than accept a reduced "scope of maneuver." The chances of this happening – and even resulting in rules with sufficient level of obligation and precision enabling direct private action – are slim. More than that, a successful rulebook update could be equally insufficient. It is not merely an altered reality economically but also geo-politically that has prompted "weaponization" rather than depoliticisation of trade whereby trade is used to pursue important foreign policy next to purely economic goals, both increasingly interconnected.<sup>88</sup> Politics is likely to be more rather than less important, ruling out the feasibility of allowing direct private challenges at the WTO for some time to come.

Politics has largely returned to international investment policymaking too and experiences with ISDS may well be an additional argument against the feasibility of providing direct private action in the WTO system. The extent and degree of successful

<sup>87</sup> See A Roberts *et al.*, "Toward a Goeconomic Order in International Trade and Investment" (2019) 22 *Journal of International Economic Law* 655.

<sup>88</sup> *Ibid.*

ISDS litigation against state regulatory acts have resulted in a significant backlash against – and subsequent reform of – the ISDS and the entire system of foreign investment protection by IIAs.<sup>89</sup> Leaving the ISDS itself aside, the main reform objective is to find an appropriate balance between investment protection and state regulatory autonomy to pursue other (economic and non-economic) societal interests. The reform is multifaceted and its detailed account is beyond the scope of this limited contribution. It suffices to stress that much effort is directed towards de facto elimination of future regulatory challenges by foreign investors, including by often excluding or restricting FET, the most important instrument used in this respect.<sup>90</sup> At the WTO, challenges typically relate to regulatory acts. Allowing private actors to make them in a field as comprehensive as WTO law would go against the ongoing trend in international investment law.

In addition, such a move would be against the trend observed in preferential trade agreements. For some time now, many preferential trade agreements, in particular those involving developed countries like the US, EU and Canada, contain specific chapters (or side agreements) on “trade and sustainable development” (TSD) imposing obligations concerning the protection of the environment and labor standards. Typically, such TSD chapters explicitly assign a role to non-state actors in the enforcement of states’ obligations.<sup>91</sup> They do so by obliging the treaty parties to provide for a contact point for private submissions alleging non-compliance<sup>92</sup> and a national mechanism for consultation with the public and stakeholders.<sup>93</sup> They also establish transnational bodies composed of civil society representatives and designated with information sharing, consultative and advisory functions on matters covered by TSD chapters.<sup>94</sup> While not as frequently, some TSD chapters provide for a possibility of direct private complaints to a treaty body composed by parties’ (senior) representatives (eg an environmental committee).<sup>95</sup>

The active involvement of non-state actors in the enforcement of states’ obligations in preferential trade agreements is noteworthy. At the same time, this trend supports rather than contradicts the view that increased private litigation for the enforcement of trade obligations is unlikely to be introduced any time soon, inside or outside the WTO. This is because also in preferential trade agreements the involvement of non-state actors is always strictly limited to the enforcement of environmental and labour obligations and never trade obligations. For the latter, many agreements expressly prohibit the parties to allow enforcement by private actors at the national level, thus excluding direct

<sup>89</sup> See M Waibel *et al* (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International, Alphen aan den Rijn, 2010).

<sup>90</sup> United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements Reform Accelerator*, UNCTAD/DIAE/PCB/INF/2020/8 (2020) <[https://unctad.org/system/files/official-document/diaepcbinf2020d8\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf)> (accessed 15 September 2023), pp 20–22.

<sup>91</sup> Eg S Dewan and L Ronconi, *U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America*, IDB Working Paper No. IDB-WP-543 (2014) <<https://doi.org/10.2139/ssrn.2559639>> (accessed 25 February 2024); L Van den Putte, “Involving Civil Society in the Implementation of Social Provisions in Trade Agreements: Comparing the US and EU Approach in the Case of South Korea” (2015) 6 *Global Labour Journal* 221; D Prévost and I Alexovičová, “Mind the Compliance Gap: Managing Trustworthy Partnerships for Sustainable Development in the European Union’s Free Trade Agreements” (2019) 6 *International Journal of Public Law and Policy* 236, pp 247–48.

<sup>92</sup> Eg Agreement between the United States of America, the United Mexican States, and Canada (USMCA), signed 10 December 2019 <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>> (accessed 25 February 2024), Arts. 23.11 and 24.5(2).

<sup>93</sup> Eg USMCA, Arts. 23.16 and 24.5(3).

<sup>94</sup> Eg CETA, Art 22.5.

<sup>95</sup> Eg USMCA, Art 24.27. In these instances, private complaints would concern allegations of a party’s failure to effectively enforce its environmental laws.



effect.<sup>96</sup> Moreover, even for the environmental and labour obligations, while non-state actors may submit direct complaints, they still have no direct access to the (specific) DSS available under these TSD chapters. Here too, it is a decision of the government(s), acting individually or through a joint treaty body, to eventually pursue a case against another treaty party – or not to pursue it.

That said, developments in preferential trade agreements could be a source of inspiration for improving the position of non-state actors in the enforcement of international *trade* rules. Without removing the final discretion of the governments with regard to the initiation of a formal inter-state dispute, greater transparency and institutionalisation of the process at the national level could give non-state actors a stronger sense of having a voice, even if not a vote.

#### IV. Transparency and institutionalisation as an alternative

Transparency is not an extraneous concept at the WTO, there are many provisions in the agreements incorporating various types of transparency obligations and procedures.<sup>97</sup> Most of these obligations are not directed towards non-state actors, however, but towards other WTO Members. This is especially the case with the various notification obligations and the most far-reaching transparency obligation implied in the formal trade policy review. Although the WTO makes most of its documents public, and increasingly so,<sup>98</sup> they are not written with citizens in mind.<sup>99</sup> This undermines their accessibility and usefulness for non-state actors.

When it comes to private actors, it should be noted that WTO agreements do oblige Members to provide certain private participatory rights for traders and other interested parties, usually in the form of specific procedural due process rights in national proceedings.<sup>100</sup> However, these rights do not extend to legislative processes<sup>101</sup> and even less so to the decision-making on potential enforcement actions. As mentioned above, such approach has recently been pursued under preferential trade agreements for the enforcement of TSD obligations. This contribution suggests that a similar attitude should be considered in relation to the enforcement of obligations under the WTO agreements.

At present, while some do, certainly not all Members have a formal framework in place for non-state actors to initiate investigations into trade barriers encountered in other countries.<sup>102</sup> A well-known example with existing procedures is the EU, which has relatively recently taken a new step and established a so-called Chief Trade Enforcement Officer (CTEO) responsible for enforcement of both trade and TSD obligations under

<sup>96</sup> Eg Agreement between the United States of America and Australia, signed 18 May 2004 <[https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file148\\_5168.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf)> (accessed 25 February 2024), Art 21.15.

<sup>97</sup> R Wolfe, *Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life*, World Trade Organization, Staff Working Paper ERSD-2013-03 (2013) <<https://doi.org/10.2139/ssrn.2229741>> (accessed 25 February 2024).

<sup>98</sup> On its website, the WTO offers a relatively long list of valuable online databases, many of them available to public: <[https://www.wto.org/english/res\\_e/wtoapps\\_e.htm](https://www.wto.org/english/res_e/wtoapps_e.htm)> (accessed on 25 February 2024).

<sup>99</sup> Wolfe, *supra* note 97, p 15.

<sup>100</sup> Eg Steve Charnovitz, “Transparency and Participation in the World Trade Organization” (2004) 56 Rutgers Law Review 927, p 937.

<sup>101</sup> *Ibid.*, n 69.

<sup>102</sup> A comprehensive overview of such frameworks, or a lack thereof, will be provided in national implementation chapters in KN Schefer and T Cottier (eds), *Elgar Encyclopedia of International Economic Law, Expanded Edition* (Edward Elgar Publishing, forthcoming in 2024), <<https://doi.org/10.4337/9781800882324.fm2>> (accessed 25 February 2024). An example of a country without a formal framework is Canada. – *Ibid.*

multilateral and preferential trade agreements.<sup>103</sup> The CTEO manages inter alia the EU's "single entry point" where non-state actors can submit their complaints, subsequently receiving information about the complaints' progress and assessment.<sup>104</sup> The establishment of such a formal contact point with accompanying procedures could be made mandatory for all WTO Members, institutionalising access of non-state actors to their governments and increasing transparency in, and accountability for, the handling of private complaints.

An obligation to have a formal contact point for non-state actors would not be unprecedented in the WTO system. The Agreement on Trade Facilitation (TFA) provides for such an obligation, enabling enquiries by "governments, traders, and other interested parties" relating to the importation, exportation and transit of goods.<sup>105</sup> Moreover, it has been reported that many national implementation committees established under the TFA include members from both public and private sectors, even if not required by the TFA, although strongly recommended by the UN Economic and Social Council.<sup>106</sup> The analogy with the TFA could be questioned because trade enforcement has a different, politically more sensitive, nature than trade facilitation. The latter is non-controversial, generally leading to a win-win situation for all involved parties, whereas trade enforcement can potentially result in a win-lose scenario if a formal dispute is pursued. This may be true. However, many reasons behind institutionalisation of non-state actors' involvement in government-led activities are arguable in both areas too, ranging from information and knowledge sharing to the legitimacy and acceptance of decisions.<sup>107</sup> When it comes to the practical feasibility of the proposal, the TFA could also provide inspiration in respect of its special and differential treatment provisions, subjecting the obligation to establish a contact point for private trade enforcement complaints to technical assistance for (L)DC Members in accordance with their self-determined needs.<sup>108</sup>

The suggested introduction of an obligation to provide a formal national contact point and procedure for non-state-actors' involvement in trade enforcement does not go as far as some preferential trade agreements do in relation to the parties' TSD obligations. Respecting the Member-driven nature of the WTO, it is not suggested that a new WTO body is created to involve private sector representatives. Moreover, the ultimate decision on whether to pursue enforcement against another Member would remain in the hands of governments. However, an institutionalised and transparent procedure for non-state actors would address many concerns raised against direct private litigation before a national or international adjudicator, discussed in this contribution. In addition, institutionalisation and increased transparency at the national level would enable governments to benefit from input by non-state actors that are more likely to mobilise themselves and report non-compliance.<sup>109</sup> This may be especially valuable for Members with limited monitoring capacity that are, as a result, less likely to bring a WTO dispute,

<sup>103</sup> See the European Commission official website <[https://policy.trade.ec.europa.eu/enforcement-and-protection/chief-trade-enforcement-officer\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/chief-trade-enforcement-officer_en)> (accessed 25 February 2024).

<sup>104</sup> European Commission, *Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements* (2023) <[https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational\\_guidelines.pdf](https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf)> (accessed 25 February 2024).

<sup>105</sup> WTO Agreement, Annex 1A, Agreement on Trade Facilitation (TFA), Art 1. 3.

<sup>106</sup> TFA, Art 23.2; United Nation, Economic and Social Council, *Recommendation No. 48: Private Sector Participation in National Trade Facilitation Bodies*, ECE/TRADE/C/CEFACT/2023/7, 29 August 2023 <<https://www.tfafacility.org/sites/default/files/2023-11/ECE-TRADE-C-CEFACT-2023-07E.pdf>> (accessed 25 February 2024).

<sup>107</sup> *Ibid*; T Betz, "Domestic Institutions, Trade Disputes, and the Monitoring and Enforcement of International Law" (2018) 44 International Interactions 631. The same has been argued in the context of trade monitoring: A Ghosh, "Developing Countries in the WTO Trade Policy Review Mechanism" (2010) 9 World Trade Review 419.

<sup>108</sup> Eg A Eliason, "The Trade Facilitation Agreement: A New Hope for the World Trade Organization" (2015) 14 World Trade Review 643, section 5.

<sup>109</sup> Betz, *supra* note 108, p 655; Wolfe, *supra* note 97, p 5.

thereby also missing out on the opportunities to “shape” the interpretation and application of law to their advantage in the long term.<sup>110</sup> Lastly, enhanced transparency would ensure that governments’ decisions are less captured by interest groups, promoting the accountability and legitimacy of the system as well as its effectiveness.<sup>111</sup>

## V. Concluding remarks

The recent collapse of the WTO DSS and a partial return to unilateral trade policymaking by power casts serious doubts on the role of the rule of law in international trade relations, at present and in the future. While the body of WTO law remains in place, the unavailability of effective enforcement turns binding rules *de facto* into soft-law, forcing the system to rely on Members’ willingness to comply. This willingness fades away if the law no longer reflects the needs of those subject to it. In such a situation, the rule of power politics takes over from the rule of law. Fixing WTO rulemaking and its DSS is thus of utmost importance for bringing the rule of law back to the multilateral trading system. More so considering that other than inter-state dispute resolution at the WTO level seems unfeasible – and perhaps also undesirable – at least for the time being. Leaving aside practical considerations of potential private action to enforce WTO law, such as the capacity of the adjudicatory system that would be chosen for this purpose to handle a large number of potential disputes,<sup>112</sup> this contribution has argued that increased politicisation of international economic relations between states, and the experiences in international investment and preferential trade agreements make introduction of private enforcement for trade obligations unlikely. Instead, increased transparency and institutionalisation at the national level should be used to further strengthen the role of non-state actors, and the rule of law, in this field.

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<sup>110</sup> *Ibid.*, p 656.

<sup>111</sup> Wolfe, *supra* note 97, p 3; CP Bown and B Hoekman, *Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough*, World Bank Policy Research Working Paper No. 4450 (2007) <<https://ssrn.com/abstract=1077482>> (accessed 25 February 2024).

<sup>112</sup> For inspiration for possible solutions to such practical problems, see H Nordström and G Shaffer, “Access to Justice in the World Trade Organization: A Case for A Small Claims Procedure?” (2008) 7 *World Trade Review* 587.