

ORIGINAL ARTICLE

Next-Generation Agreements and the WTO

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Abstract

This paper reviews the trade agreement landscape and argues that the conventional understanding of trade agreements as encapsulated in the WTO Agreements is now outdated. This misperception about trade agreements is not just an institutional insufficiency. Concentration on those agreements has led many practitioners and commentators to underestimate the variable texture of the global trade agreement fabric. But these shortcomings have not inhibited states from concluding innovative alternatives to regulate and manage the cross-border movement of goods and services. As this paper shows, trade-related agreements that do not fit the perceived traditional mold have proliferated. Given these advances, more policy and scholarly attention is required. Accordingly, this paper serves as a roadmap for the accommodation of trade agreements within the WTO and as an agenda for additional research.

Keywords: Trade agreements; Trade-plus; Transparency

1. Introduction

In the introduction to this special issue, the editors observe that trade-related agreements concluded outside of the WTO have received a mixed reception. For the last 25 years, states have both embraced and eschewed these agreements. Volumes of scholarly work have sought to assess them.¹ There are those observers who consider such agreements to be alternatives to the WTO Agreements – easier to conclude than those done under the WTO umbrella but achieving complementary aims. Some see trade agreements outside of the WTO as an opportunity to experiment with new trade-related norms and to take advantage of the trade regime to achieve additional public policy goals. Other commentators view such agreements as a threat to the WTO's economic sustainability, its political legitimacy, or the legal stability of the norms memorialized in the WTO Agreements.²

This paper reviews the trade agreement landscape and argues that the conventional understanding of trade agreements as encapsulated in the WTO Agreements is now outdated. That understanding is overly limited to large-scale agreements that seek to reduce tariffs to zero. This misperception about trade agreements is not just an institutional insufficiency. Concentration on those agreements has led many practitioners and commentators to underestimate the variable texture of the global trade agreement fabric. However, these shortcomings have not inhibited states from concluding innovative alternatives to regulate and manage the cross-border movement of goods and services.

¹See, e.g., A. Mattoo et al. (eds.) (2020) *Handbook of Deep Trade Agreements*. World Bank Group; R. Acharya (ed.) (2016) *Regional Trade Agreements and the Multilateral Trading System*. Cambridge University Press.

²Each of these positions was articulated and then made prominent already in 1993 by J. Bhagwati, 'Regionalism and Multilateralism', in J. de Melo and A. Panagariya (eds.), *New Dimensions in Regional Integration*. Cambridge University Press.

As this paper shows, trade-related agreements that do not fit the perceived traditional mold have proliferated. Nearly all WTO members readily conclude them. Given these advances, more policy and scholarly attention is required. Accordingly, this essay serves as a roadmap for the accommodation of trade agreements within the WTO and as an agenda for additional research. Section 2 takes stock of the topography and shows how trade-related agreements now take many forms. The terrain is much changed since 1994. Acknowledging this change creates space to seriously consider the contributions of these agreements and to reconcile them with the work of the WTO in more transparent and meaningful ways. Section 3 analyzes the institutional constraints and opportunities for doing so. Finally, section 4 promotes renewed engagement among practitioners and scholars with these themes in light of the changing role of the WTO, the values that these agreements promote, and the constituencies they implicate.

2. Peaks and Valleys in the Trade Agreement Topography

When the WTO was born, there were fewer than 100 free trade areas, preferential trade agreements, or customs unions.³ Today, trade-related agreements have grown in number, breadth, and scope. The WTO Regional Trade Agreements Committee acknowledges 351 agreements that have been reported to it.⁴ These 351 agreements are the ‘peaks’ in the trade agreement topography. They dominate the landscape and often track the specifications of the WTO Agreements. But there are also agreements in the ‘valleys’ that rarely get reported or discussed. This section takes up each with an eye to their evolution and contributions.

The most traditional trade instrument outside the WTO continues to be what many call the ‘free trade agreement’ (FTA). Defined by its commitment to reduce tariffs and non-tariff regulatory barriers between the parties to zero on substantially all the trade between them, the FTA is now a staple among trade institutions.⁵ Where FTAs have regional scope, they are sometimes called regional trade agreements (RTAs). Such agreements that now include many parties are often referred to as ‘mega-regionals’, as well.⁶ These have received considerable political attention among major economic players in the last decade. The term ‘preferential trade agreements’ (PTAs) is sometimes used to refer also to these same agreements or still others that likewise give preferences to states parties.⁷ These three acronyms – FTA, RTA, PTA – are imperfectly applied. For simplicity, I will refer to all of these agreements as FTAs. What links them all is attention to reducing tariffs and often non-tariff barriers among or between the parties and their conclusion and application outside of the WTO.

Putting aside the discrepancies in their titles, FTAs have continued to grow in popularity as evidenced by their exponential increase since 1994. The United States is party to 14 free trade agreements currently in force, all but two of which have entered into force since 2000.⁸ The European Union (EU) reports 44 FTAs to the WTO with several more soon to be completed.⁹

³See WTO Secretariat (1995) ‘Regionalism and the World Trading System’, Appendix Table 1. See ‘Overview of Developments in International Trade and the Trading System’, WTO News, 1 December 1995, www.wto.org/english/news_e/pres95_e/ov11.htm#Back%20to%20Top.

⁴Regional Trade Agreements, *supra* note 1. These break down into 320 agreements notified under GATT Article XXIV, 188 notified under GATS Art. V, and 61 notified under the Enabling Clause. *Ibid.*

⁵General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. A-11, 55 U.N.T.S. 194, Art. XXIV.

⁶I do not discuss here plurilateral agreements concluded under the auspices of the WTO. Those agreements have recently grown in importance for rule development within the WTO, however, and also merit additional attention. For an important overview of plurilaterals, see N. Lamp (2016) ‘The Club Approach to Multilateral Trade Lawmaking’, *Vanderbilt Journal of Transnational Law* 49(1), 7–55.

⁷While this term is used by many, it can also be confused with preference programs which I do not discuss here.

⁸Free Trade Agreements, Office of the United States Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited 1 November 2021).

⁹See WTO, ‘Regional Trade Agreement Database, Results for European Union’, <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=918&lang=1&redirect=1> (last visited 1 November 2021).

Trading under the Africa Continental Free Trade Agreement commenced on 1 January 2021, bringing together many of the countries on the continent while also working closely with the several African regional economic partnerships.¹⁰ In the Asia-Pacific region, since the conclusion of the Association of Southeast Asian Nations Free Trade Area of 1992, intra-regional and inter-regional agreements have grown in number including the recent Regional and Comprehensive Economic Partnership, which entered into force on 1 January 2022, and the Comprehensive and Progressive Transpacific Partnership Agreement (CPTPP).¹¹ China and India are party to or are negotiating 62 FTAs between them.¹²

FTAs have grown also in scope, expanding to many chapters covering not just tariff barriers and customs facilitation and not just non-tariff barriers covered by the WTO Agreements but also social policies that may have an effect on trade such as labor and environment. Recent academic volumes have tried to cover their many facets, including their attention to so-called ‘trade-plus’ areas.¹³ These deals have been subject to praise for these expansions by civil society actors seeking inclusion of enforceable binding trade-plus obligations and to critique by some states and private actors pushing back on these inclusions as overreach.

Taken together, this rapid expansion in number, geographic reach, content, and depth has led commentators to refer to the present generation of FTAs as a ‘spaghetti bowl’ – a mass of agreements concluded without consideration for their varying policy promotions or their potential distortions in conditions of competition for traders.¹⁴ Under this view, the ‘spaghetti bowl’ garbles the coherence of the trade law system and directs attention away from multilateral efforts toward greater trade liberalization. Some evidence indicates convergence within the spaghetti bowl rather than divergences in legal norms, however. Textual analyses suggest that the apparent race to conclude FTAs has led to a normative cascade in certain areas with similar language appearing in FTAs from different parts of the world. For example, some European and Asian FTAs have adopted language and chapter ideas from US FTAs.¹⁵ In recent years, some commentators saw these trends as indicating a constitutionalization of trade norms through which multilateral advances are made even in the absence of a multilateral instrument.¹⁶

Thus, while the views on the influence of FTAs for the broader trade law system remain variegated, the statistics leave no doubt that the FTA boom is the most important trade law development since the creation of the WTO. FTAs have eclipsed the WTO in some elements of importance, not all economic. And yet, some WTO members appear to be putting the brakes on FTAs. The United States, for example, has negotiated only one such agreement since 2011.¹⁷ The US Biden Administration has made clear that it is not intending to conclude any FTAs in the near term.¹⁸ Doubts linger about the future of the South American trade bloc, Mercosur, in light of years of backsliding toward protectionism.¹⁹ Nonetheless, in many other parts of the world, the

¹⁰See African Union, CFTA, <https://au.int/en/cfta> (last visited 1 November 2021).

¹¹Free Trade Agreements, Asian Regional Integration Center, <https://aric.adb.org/fta> (last visited 1 November 2021).

¹²Ibid.

¹³See, e.g., those sources cited in notes 1 and 2.

¹⁴See J. Bhagwati (1995), ‘US Trade Policy: The Infatuation with Free Trade Agreements’, in J. Bhagwati and A.O. Krueger (eds.), *The Dangerous Drift to Preferential Trade Agreements*. Washington, DC: AEI Press.

¹⁵To name one: the same labor obligations in the Trans-Pacific Partnership Agreement form part of the Canada–EU Comprehensive Economic Trade Agreement. What is more surprising, however, is the appearance of US-initiated language in agreements between states neither of which shares an FTA with the United States. For instance, the same labor chapter language from TPP appears also in the EU–Vietnam Free Trade and Investment Protection Agreement.

¹⁶See, e.g., K. Claussen (2019) ‘Revisiting the Multilateral Trading System: Anatomy of the WTO Impasse’, ASIL Proceedings 112, 315 (hereinafter Claussen, *Impasse*).

¹⁷United States–Mexico–Canada Agreement, agreed 1 October 2018, entered into force 1 July 2020.

¹⁸See J. Biden (2019) ‘Responses to United Steelworkers’, Federal Candidate Questionnaire, USW Voices (17 May 2020), www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf.

¹⁹‘Can Mercosur Reverse Decades of Backsliding?’, *The Economist*, 27 March 2021.

path toward greater economic integration through FTAs appears to continue, prompting both excitement and caution from trade law practitioners.²⁰

While FTAs will remain the broad and dominant peaks in the trade law landscape, in the valleys are other agreements that are becoming increasingly important trade tools. These non-standardized trade-related agreements often surround and support the peaks, and sometimes shroud them, but they also stand alone, undernoticed. I refer here to agreements that affect and adjust trade flows but that do not cover large parts of bilateral or regional trade. Rather, they may be thought of as regulatory trade agreements. These agreements may adjust tariff rates, but more often they address non-tariff barriers. They lack a common vocabulary though they are often shorter, more targeted, and typically bilateral. Consider, for example, a 2013 agreement between Mexico and the United States regarding their bilateral treatment of exports of tomatoes.²¹ Or consider mutual recognition agreements such as the 2002 Agreement between the Swiss Confederation and the European Community on mutual recognition in relation to conformity assessment, an instrument designed to remove technical barriers to the trade of industrial goods between Switzerland and the EU.²²

Although these agreements receive less attention, they are critical to regulating the ins and outs of transnational commerce. Part of their underestimation is the result of their national administration involving little international cooperation apart from working with nuanced regulatory changes in the territory of the other party. Another aspect is their rather quiet negotiation and conclusion. In some government systems, and in contrast with FTAs, these sorts of agreements do not require extensive political approval nor do they affect multiple broad constituencies. A third factor in their under-appreciation is confusion about their categorization or contribution to the trade law system. Policymakers have referred to these often short trade agreements as ‘mini’ or ‘skinny’ trade deals to distinguish them from FTAs.²³ But that does not mean they are insignificant. The United States alone is party to more than 1200 such agreements that control the cross-border movement of hundreds of goods and services into and out of the United States.²⁴ Few of these are reported to or discussed within the WTO.²⁵ The institutional infrastructure of China’s Belt and Road Initiative also is comprised of agreements related to trade, but they too do not fit the ‘traditional’ mold.²⁶ Certain arrangements on the African continent are neither FTAs nor customs unions nor mini-deals in the US sense.²⁷

²⁰Compare K.A. Shaw (2021) ‘China is Racing Ahead to Lock-in Asian Trade: Time to Worry’, *Barron’s*, 3 December 2021, www.barrons.com/articles/china-rcep-trade-deal-51638479544?tesla=y (arguing that the United States ought to (re-)join Comprehensive and Progressive Trans-Pacific Partnership Agreement) with D. Henig (2021) ‘Perspectives: The World Trading System Is No Longer Subject to Universally Agreed Rules’, *Borderlex*, 1 December 2021, <https://borderlex.net/2021/12/01/perspectives-the-world-trading-system-is-no-longer-subject-to-universally-agreed-rules/> (arguing that more agreements create suboptimal economic outcomes).

²¹Memorandum of Understanding for the Exchange of Information on Exports of Fresh Tomatoes between the Secretariat of Economy of the United Mexican States and the Department of Commerce of the United States of America’, 19 and 23 August 2013.

²²This agreement is available at www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Technische_Handelshemmnisse/Mutual_Recognition_Agreement_MRA0/MRA_Schweiz_EU.html (last visited 1 November 2021).

²³See, e.g., Testimony of US Trade Representative Robert Lighthizer, House Ways & Means Comm., 17 June 2020, www.c-span.org/video/?473040-1/house-ways-means-committee-hearing-trade-policy.

²⁴See K. Claussen (2022) ‘Trade’s Mini-Deals’, *Virginia Journal of International Law* 62, 315.

²⁵The recent US–Japan trade agreement is among the exceptions. Members held a robust discussion about the deal’s WTO compliance at the WTO RTA Committee.

²⁶See generally T.C.I. Klett and O.R.S. Oswald (2018) ‘Free Trade Agreements as BRI’s Stepping-Stone to Multilateralism: Is the Sino–Swiss FTA the Gold Standard?’, in W.Z.I. Alon and C. Lattemann (eds.), *China’s Belt and Road Initiative*. London: Palgrave Macmillan.

²⁷See J.T. Gathii (2011) *African Regional Trade Agreements as Legal Regimes*. Cambridge University Press, 67–68 (describing how African trade agreements also facilitate water governance, among other policies). The AfCFTA does not include the expansive set of commitments that characterize the deep and comprehensive commitments now common in the mega-

While we do not have global statistics on just how many such arrangements states have agreed, preliminary investigations suggest that there are many thousands with more to come. These trade agreements are the sites of cutting-edge advances in cross-border foreign commerce in the 2020s. These are the next generation agreements. Discussions surrounding ‘digital trade deals’ are on the rise as are ‘sustainable development and trade’ agreements – both of which fall into this category: they do not satisfy the GATT definition of FTAs but they still regulate trade flows. At present, we lack good estimates of their economic, political, social, or legal impacts. More research is needed on the work of these agreements. Having those studies will help inform how they can be reconciled with or understood within the WTO system, a topic to which the next section turns.

3. Managing the Shifting Terrain

The broader we open the aperture to consider these ‘next generation’ trade agreements,²⁸ the more we might question whether the WTO and our multilateral institutional framework can effectively co-exist with these now ubiquitous tools: is the panoply of trade agreements contributing to, furthering, resulting from, or disrupting WTO aims? Many commentators and policy-makers asked this same question of FTAs as they began to proliferate, evaluating whether FTAs were ‘stumbling blocks’ or ‘building blocks’ for the multilateral system. At a certain point, those questions lost relevance as the trade community began to understand that FTAs had numerous functions that could serve multiple aims.

Now, looking at the rise of next generation trade agreements, I suggest that the better inquiry is to ask how they interact with other trade instruments rather than to assess that interaction through a normative, liberalization-driven lens. Like FTAs, these other trade agreements are not going away. As noted in section 2, they have diverse aims and targets, and they are universally deployed. Thus, rather than evaluate these agreements in the shadow of the WTO, we might instead turn to their engagement with the WTO. In this functional analysis, we might ask: are they enabled by the WTO? Are they enabling the WTO to do its work?

At a time when queries about the future relevance of the WTO remain at the forefront of public view, the WTO’s engagement with these instruments is likely to come under scrutiny. This section analyzes the constraints and flexibilities of the WTO system when it comes to next generation trade agreements and the broad collection of FTAs. It zooms in on two areas where WTO members might consider the functions they are serving, and ultimately, how to manage and work with them.

3.1 *The WTO’s Promotional Legal Structure and Operation*

Two features of the legal and institutional structure of the WTO have important impacts for next generation agreements and our review of them. First is the fact that the limited rules in the WTO Agreements about other trade agreements are rarely enforced or reviewed, and today are merely cosmetic. Second, and seemingly in tension with the first, is that the WTO Agreements create space for these regulatory-styled agreements. Because of these two features, explained in greater detail below, the WTO Agreements in both word and in operation are not just permitting these agreements but also empowering them. The WTO’s institutional structure both under-accounts for these agreements and promotes them, creating a ripple effect in their use.

As to the weaknesses of the rules, the WTO Agreements’ treatment of trade agreements negotiated outside its auspices is substantially limited. Article XXIV of the General Agreement on Tariffs and Trade (GATT) lays this foundation and, as others have noted, its text is both far

regionals. Gathii argues that this omission indicates the absence of popular support in some African countries for such extensive commitments in intra-African trade.

²⁸I note that despite this title, many agreements of the type I discuss are not recently concluded. Trade-related agreements such as those described here have been in place for decades but only recently have come to the fore.

from clear and subject to consternation among scholars and states.²⁹ Article XXIV provides exceptionally for the establishment of free trade areas and customs unions that would otherwise contradict the GATT's principles of most favored nation treatment and national treatment.³⁰ WTO Members may enter into such agreements under certain conditions outlined in Article XXIV as well as those set out in similar provisions in the General Agreement on Trade in Services (GATS) and, in the case of developing countries, in the 'Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries' better known as the Enabling Clause.

Writing in this *Review* in 2006, Kerry Chase traced the history of Article XXIV and its negotiation in the 1940s.³¹ Chase described how the United States advocated an exception to the multilateral principles because it had secretly negotiated a free trade deal with Canada that it needed to accommodate.³² In the following decades, despite the failures to amend the language, contracting parties worked with it – or perhaps, more aptly, worked around it. On the eve of the conclusion of the WTO negotiations, John Jackson argued that 'in applying Article XXIV over some decades, it has become increasingly clear that the language of Article XXIV is not adequate for the developing international economic practices today'.³³ Jackson noted that while there was a widely recognized need for revision, there was not political support for such a move.³⁴

It is perhaps unsurprising, then, that only one dispute has prompted an in-depth review of the interpretation of that language.³⁵ In the early years of the WTO, some commentators questioned whether members would bring additional challenges to FTAs under the WTO Agreements.³⁶ Yet no additional disputes about Article XXIV's extension to the agreements of the early 2000s materialized. One trade official has referred to Article XXIV as 'one of the most abused' of the GATT articles.³⁷ Further, despite widespread evolution in FTAs and more recently in other trade-related agreements, there have been no major debates about the WTO exceptions that relate to them. From the lack of controversy, we might conclude that the rules have been fully normalized and that members are all in compliance, but a simple look at the agreements as described in section 2 suggests otherwise. Members may fear mutual criticism if they were to raise concern with another member's agreement.³⁸ It appears that, as a consequence, these rules have become irrelevant to state practice, just as Jackson acknowledged already in 1993.

Second, certain of the WTO Agreements such as the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade create space for next generation agreements. By setting out a foundation for bilateral collaboration on these regulatory non-tariff barrier areas, these agreements open the door for additional normative development among members where circumstances permit or require. They may even catalyze small

²⁹Kerry Chase catalogs these views, K. Chase (2006) 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV', *World Trade Review* 5(1), 1–30.

³⁰General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. A-11, 55 U.N.T.S. 194, Art. XXIV.

³¹Chase, *supra* note 29, at 2–3.

³²*Ibid.*

³³J.H. Jackson (1993) 'Regional Trade Blocs and the WTO', *World Economy* 16, 121–131.

³⁴*Ibid.*, at n.9, citing the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, Dunkel Draft, at pp. U1–4. C.P. Bown, A. Sykes, and R. Staiger (2017, 'Multilateral or Bilateral Trade Deals? Lessons from History', in C.P. Bown (ed.), *Economics and Policy in the Age of Trump*. London: CEPR Press) note that after concluding a series of trade agreements in the 1930s and 1940s, the United States did not negotiate others until the mid-1980s.

³⁵Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (adopted 19 November 1999).

³⁶See, e.g., G. Shaffer (2006) 'The Challenges of WTO Law: Strategies for Developing Country Adaptation', *World Trade Review* 5(2), 177–198.

³⁷World Trade Organization (1995) *Regionalism and the World Trading System*. Geneva: World Trade Organization, 63.

³⁸See Claussen, *Impasse*, *supra* note 16.

agreements with their ground rules. Thus, it is not just that external trade agreements serve as building blocks for further multilateral agreement but also that the WTO Agreements can develop sufficient frameworks for external agreements.

3.2 *The Shaky Transparency Regime*

Apart from the deficiencies in the legal and management tools of the WTO to engage more fully with the evolving trade agreement landscape, the WTO could do more to enhance and engage with trade-related agreements concluded outside its auspices through its transparency regime. Indeed, an underperforming transparency regime is part of the reason we have underestimated these many types of trade agreements. We have a skewed view of the trade agreement network because members are not reporting these trade-related agreements, and even when they do, there is limited engagement or action.

The WTO's Transparency Mechanism allows for the early announcement of FTAs to the membership. This Mechanism, created in 2006 on a provisional basis, encourages members to submit information about a proposed or agreed FTA. The WTO Secretariat then presents the agreement to the members with some descriptive analysis. The Committee on Regional Trade Agreements will consider FTAs falling under the GATT or GATS. The Committee on Trade and Development will consider RTAs falling under the Enabling Clause. At the time of its initiation, the Transparency Mechanism was to be reviewed by members, and, if necessary, modified or replaced by a permanent system adopted as part of the overall results of the Doha Round.³⁹ It remains today as envisioned in 2006.

This Transparency Mechanism is not, however, designed for anything apart from FTAs. It reports a long list of trade agreements that fall under the FTA umbrella as I have defined it here but it does not take account of agreements that fall outside of that universe. There are also doubts regarding some members' commitment to the Mechanism. The transparency norms for FTAs as with many trade measures are relatively weak, and even when members notify agreements they are subject to little or no scrutiny. In sum, publicly available information about next generation agreements has been lacking both within the WTO, where there is neither a means nor a culture of notifying them, and also domestically in some places.⁴⁰

4. Revisiting the Mixed Landscape and Rebuilding

Having analyzed the next generation agreements against the WTO provisions designed to address agreements negotiated outside its purview, this section suggests alterations that could serve the interests of the states and the institutions undertaking this important work. As the assessment in the prior section showed, the present disciplines for trade agreements are inadequate to take account properly of next generation agreements. Instead, members would be well served to reinvest in the agreement framework with mechanisms that facilitate trade-related agreements even outside the multilateral system, build capacity among developing members to conclude such agreements, and share information for monitoring and for responsive, productive engagements about their evolution.

4.1 *Facilitation*

Given the plurality of forms of agreements related to trade, how ought the WTO take stock of them? The organization – through its members and Secretariat – needs to develop a better way to measure, monitor, and maintain them. The WTO's RTA Database works adequately

³⁹Transparency Mechanism for RTAs', World Trade Organization, www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm

⁴⁰See K. Claussen (2022) 'Missing Deals: Transparency in Foreign Commercial Lawmaking', *Columbia Law Review* 122 (forthcoming) (discussing the transparency problems with trade agreements in the United States).

for collecting the large FTAs that are reported.⁴¹ Yet this system is not enough. The WTO could at least measure and make available other trade-related agreements. It could become a clearinghouse also for these agreements and the Secretariat could carry out the same useful analyses that it conducts for FTAs.

Two primary difficulties in such a management system are quickly apparent: one is members' willingness to participate in such an arrangement and the second is defining the criteria for these types of next generation agreements to make their collection practicable. The organizational steps within the Secretariat are easy enough to undertake but participation by members will take additional work. That work could begin with a meaningful engagement within the RTA Committee on the other types of agreements beyond FTAs that are important enough to be tracked and shared. As I have discussed elsewhere, the diversity in form of mini-deals makes standardizing them challenging, but that does not mean it would be impossible to make decisions for their management either at the national level or at the multilateral level.⁴² Members ought to get past the 'blindness' approach (of not looking closely at each other's agreement models) within the WTO and the binary perspectives of seeing trade agreements as obstacles or opportunities to look at questions and issues of design.

A study of next generation agreements could lead to positive outcomes like capacity building, lowering transaction costs among partners, and smoothing understandings of trade policies. Part of that exercise ought to be a discussion about what features are widely supported, what features are detrimental, and what features merit greater promotion. These issues, which are closely connected to the transparency dimension laid out in section 2, are largely focused on the means through which the WTO can work with next generation agreements and go to the heart of the WTO's potential to be a next generation organization.

4.2 Voice

The longer the trade community focuses on the larger institutions, such as the partially overlapping and non-hierarchical arrangements in the 'spaghetti bowl' and the risk of normative fragmentation, the more likely it is to miss the opportunity for conversation around not just new forms of agreements but also those agreements' priorities and voices. We are already navigating how these institutions can co-exist in symbiotic ways; we ought not study them in a vacuum but rather consider the benefits of institutional interactions.⁴³ This moment is not about competing for territorial or normative space; it is about reconciling and mutually reinforcing allied commitments.⁴⁴ The former issues of regime complexity remain important, but the recent action is occurring at *micro-* not *macro-*levels.⁴⁵

At the micro-level, next generation agreements implicate diverse constituencies – some who have already been engaged in large FTAs like organized labor representatives and steel industries – but also smaller sectors and more marginalized groups. The partners to these agreements are also changing. Until recently, many of these agreements were primarily concluded between North and South states but now there are many more agreements that may be considered North–North

⁴¹'Regional Trade Agreements', World Trade Organization, www.wto.org/english/tratop_e/region_e/region_e.htm (last visited 21 October 2021).

⁴²Claussen, *supra* note 40.

⁴³Debra Steger made a similar point in what was then 'next generation' agreements in 2012. See D.P. Steger (2012) 'Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements', *Legal Issues of Economic Integration* 39, 109.

⁴⁴Harlan Cohen discusses these dynamics as cyclical. See H.G. Cohen (2018) 'Multilateralism's Life-Cycle', *American Journal of International Law* 112, 47.

⁴⁵Alter and Raustiala helpfully lay the groundwork for issues of regime complexity in recent years. See K.J. Alter and K. Raustiala (2018) 'The Rise of International Regime Complexity', *Annual Review of Law and Social Science* 14, 329.

and South–South. Their targets and their primary inputs have evolved but more important is their public interaction.

The WTO would benefit from taking steps already now to accommodate these trends and these voices, first by developing a ‘transparency-plus’ regime that would not just collect and analyze all forms of trade agreements but would communicate more to these constituencies about agreement features. The transparency system ought not just be a library of statistics for trade scholars to parse, but also a means of engaging with the voices affected by them about what trade agreements can and do achieve.

Second, the WTO could itself work with the micro-level groups alongside states to dissect these agreements. The Secretariat does not have an exclusive hold on the costs and benefits of these agreements. With the freedom created by members’ reluctance to dissect each other’s evolving agreements, the WTO might be in a position to outsource some of that analysis to these constituencies by creating a means for receiving comments on the agreements. The Secretariat could then organize those comments for members as a feedback loop for more responsive trade policies. To be sure, a global public notice-and-comment system could easily become an unwieldy and overwhelming undertaking if not designed well with careful choices but it would be a step toward greater engagement with the voices that are at the forefront of next generation agreements.

5. Conclusion

The trade agreement landscape has never been static. A look back at the last two centuries demonstrates that the ground has always been shifting.⁴⁶ This moment is no different. In just a decade, we have moved from an almost exclusive focus on major FTAs to a more flexible and innovative idea of trade agreements. Recognizing this changing landscape requires us to ask what is important for the global economic regime and the present moment. It means looking beyond the organization that is the focus of this special issue. It also means looking beyond what we tend to consider to be conventional ideas of trade economics, law, and politics.

The trade agreement network and the WTO are not mutually exclusive regimes. As the WTO itself evolves so will these other systems and other instruments. In some instances, they may compliment and in some instances they may complicate the work of the WTO but there is no longer a need to be overly concerned with their compatibility. Rather, our intellectual energy ought to be concentrated on how to manage them together and draw benefits from their interaction.

The WTO reform efforts already are heavily weighted with lofty goals and complicated political compromises. Managing, sharing, and working with the next generation trade agreements should be among the less controversial and most fruitful for the membership.

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⁴⁶See generally M. Ovádek and I. Willems (2019) ‘International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice’, *European Journal of International Law* 30, 361–389.