7-2021

Pathways to Just, Equitable and Sustainable Trade and Investment Regimes

Tomaso Ferrando
University of Antwerp, Belgium

Nicolas Perrone
University of Andres Bello, Chile

Olabisi D. Akinkugbe
Dalhousie University Schulich School of Law

Kangping Du
SISU, China

Recommended Citation

Tomaso Ferrando et al, "Pathways to Just, Equitable and Sustainable Trade and Investment Regimes" (Fairtrade Germany and Fairtrade Australia, 2021).

Pathways to Just, Equitable and Sustainable Trade and Investment Regimes

Authors:

Dr. Tomaso Ferrando (University of Antwerp, Belgium)

Dr. Nicolas Perrone (University Andres Bello, Chile)

Dr. Olabisi Akinkugbe (Dalhouise University, Canada)

Dr. Kangping Du (SISU, China)

This study was commissioned by the Fairtrade Germany and Fairtrade Austria. The contents of this document are the sole responsibility of the authors and can under no circumstances be regarded as reflecting the position of these organisations. To get in touch with the authors, please write to Tomaso Ferrando at Tomaso.ferrando@uantwerpen.be. To get in touch with the commissioning organizations, please write to Peter Möhringer at P.Moehringer@fairtrade-deutschland.de

Outline

Summary of content and recommendations

In this report we discuss what a **Fair, Just and Equitable approach to the global, liberalized and hyper-competitive system of global trade and investments should be**. The global market for goods and capital affect the life of producers and workers, stimulates the run towards cheaper products and puts farmers and workers against each other. The current vision of trade and investments is based on the **silencing of gendered and reproductive labour** and is responsible for the increase in inequality and relative poverty. Furthermore, it **stimulates the extraction of commodities** and contributes to the degradation of the planet, it has a **significant impact on greenhouse gas emissions** (GHG) due to transportation representing above 7% of the world total GHG, and it is closely linked with the **appropriation of nature through patenting and the shift towards capital-intensive forms of production**. These are the injustices that the Fair Trade movement wants to overcome are not simple externalities of the global system of trade and investments. These are not 'market failures' or exceptions, but structural situations upheld by international laws and policy. As a matter of fact, these social and planetary impacts are produced and intensified by the rules of a game that is oblivious of historical patterns of unevenness and domination and that believes in the capacity of the 'invisible hand' and techno-fix solutions to address all problems.

In light of this, our report claims that the **Fair Trade Movement shall not play 'outside the market' nor accept that the existing narrative and mechanisms will provide a solution that addresses the root causes of the problem**. If the Fair Trade Movement was to play outside the market, it would create islands of fairness in a sea of degradation and violence, which sooner or later would also swallow those few bubbles (unless they can be reproduced thanks to the support of an elite interested in fair and sustainable products). This is because the **global market is characterized by an inherent expansionist tendency** and needs to stretch its frontiers, compete for resources and ensure a larger shares of consumers. If the approach was that of tweaking with current mechanisms and narratives, it would accept the historical violence and inequality of colonialism and uneven development that are at the basis of the global system of trade, it would dismiss the role that global trade has in piercing the planetary boundaries, and it would accept that contemporary social problems shall be addressed by making the pie larger rather than adequately redistributing what is already available. Given that the aim is that of implementing justice, equity and sustainability, we thus **suggest ten principles/recommendations to be utilized by the Fair Trade movement** when thinking about its approach to trade, its campaigns and where does it stand vis-à-vis concrete issues.

1) Acknowledge that trade and investments are much more than techno-legal spaces: they are political constructions with a	**Trade and investment regimes are not neutral** but political. Therefore the attitude towards trade and investments must be political. Public and private actions in these areas not only affect the Fair Trade movement, but larger shares of the population and the planet on which we all live. A vision for trade and investments shall not be focused exclusively on the benefits or challenges for the Fair Trade movement: islands of fair trade in an ocean of unjust

transformative impact on people and planet.	trade and investments are deemed to have a short life. Moreover, even if they were successful, they would be operating in the context of a global system of trade and investments that deplete the planet and treats people as disposable.
2) Adopt a systemic and intersectional approach to justice, trade and investment	A just, sustainable and equitable approach to trade and investment must be **intersectional, systemic and complex**: coordination, cooperation and solidarity – in particular with actors beyond the Fair Trade movement - shall be central to the future approach of Fair Trade towards trade and investments. Two decades after the Seattle protests against the WTO, the wheel shall not be re-invented: it shall be enriched with the most recent experiences and the imminent nature of planetary and social boundaries.
3) Adopt a bottom-up and producers-based vision of just, sustainable and equitable trade and investment.	Recognize that **there is no one notion of trade and investment justice** and that the Fair Trade movement shall engage in an internal conversation on what a just, equitable and sustainable trade and investment regime is. The voices, experience, knowledge and aspiration of the producers (including those outside of the Fair Trade movement) shall have a central role in this conversation.
4) There's no one size-fits all approach to trade and investments	There is not only one way of doing trade and investments. International trade and Foreign Direct Investments are just one of the multiple possibilities of engaging with trade, markets and financing. It is essential to start from the role that trade plays in the achievement of the socio-environmental goals of Fair Trade: **is international trade a tool or an end in itself**? We believe that Fair Trade shall see trade as a tool and therefore subordinate its form, practices and promotion to the achievement of its goals. Striving for competitiveness, giving priority of consumers' interests, aiming to more trade rather than better trade, and continuously searching for cheaper products

	(especially without addressing issues of accessibility and equity) are attitudes that consider trade as a goal and not a tool: is the Fair Trade movement reproducing a neoliberal approach to free trade and investments that see them as unchallengeable sources of prosperity?
5) Words and concepts embedded in law and regulations matter.	Level playing field, competitiveness, comparative advantage, trickle down, are **rhetorical devices that are often taken for granted**. Just, equitable and sustainable trade and investment regimes require to understand, analyse and challenge the notions and premises of the global trade and investment regime.
6) History of the trade and investments' regime matters.	There cannot be a just and equitable future if we do not take into consideration the past and how we got where we are. Centuries of uneven development are central to the current conditions of power imbalance and dependency. Fair Trade's vision of trade and investment must be strongly rooted in historical awareness and in the proposition of a role for trade and investments that is reparatory and restorative.
7) Question the inherent impact of international trade on the planetary boundaries, not only that of trade linked to deforestation and biodiversity loss.	Trade liberalization is often proposed as a solution to climate change. More circulation of green goods, less carbon intensive goods and a faster exchange of green technologies are seen as opportunities to internalize negative externalities and reducing the total amount of GHG. However, this approach is blind to the incompatibility between an increase in international trade, the expansion of consumption patterns, the need for more commodities, the surge in GHG linked with shipping and both the planetary and social boundaries.
	A climate justice approach to trade and investments requires to consider the impact that large-scale investments and the trade in goods and services have on climate change. As revelead by a 2015 study of the Organization for Economic Cooperation and

8) Replace the 'trade and climate' approach with a climate justice approach to trade. It is not about 'a green EU-Mercosur agreement' for more green international trade. It's about a system of trade that regenerates social and planetary boundaries.	Development (OECD) and the International Transport Forum (ITF), trade-related freight transport generates already 7% of total GHG and could get to 15% by 2050 if global market was to expand by 3,5% a year. Moreover, a climate justice approach is based on the recognition that green solutions to GHG emissions (technical solutions and trade solutions) are likely to reinforce current imbalance of power because they will be unevenly distributed. Thirdly, climate justice means thinking of a trade and investment regime the allocates responsibilities for the ecological debt that polluters have vis-à-vis the rest of the world and holding them politically and financially responsible.
9) Recognise that the use of unilateral and bilateral trade measures to protect people and the planet can easily become a form of neo-colonialism	Attention shall be paid so that campaigns for the protection of the environment and the respect of human rights launched in the Global North do not become new forms of economic and political control of lives in the Global South. When countries in the Global North impose border adjustment mechanisms, carbon taxes, incentives to green trade, Processes and Products Mechanisms and other forms of trade measures they generate distributive/regressive impacts in the Global South that are incoherent with human rights and the principles and purposes of sustainable and inclusive development. The alternative is not represented by the liberalization of green trade or more business-as-usual, but by a systemic and bottom-up understanding of the transformative impact of the trade and investment regime. Without addressing power imbalances, historical unevenness and the distributive impact of international trade and investments, a global green economy will increase GHG from transportation, boost dependence on minerals and intensify social inequality.

10) Do not limit actions to trade. Work across areas and beyond fragmentation.	The vision for trade and investments shall **not be limited to trade and investments**. Other areas of public policy, such as taxation, financial markets, competition law, recognition of the socio-economic role of informal markets, shall be equally considered.

The adoption of an **intersectional and systemic approach to justice, equity and sustainability** has concrete implications on the approach that the Fair Trade movement should adopt with regards to a set of trade and investments issues that are prominent in the contemporary international and regional debate. In the last part of this report we engage with five of these topics and present the main elements of a renew policy approach that follows the indications contained in our analysis.

1. *Green trade, climate change and biodiversity loss*

A systemic approach to trade, climate change and biodiversity loss could be structured around three points: **a) what is green and who decides it? b) green trade and investments for whom? c) are more green trade and investments compatible with the planetary boundaries?** When answering these questions, advocacy, organizing and policy efforts shall go in the direction of making sure that the 'green shift' of trade and investments is not just about individual technologies or forms of production, but a systemic move towards de-growth and the abandonment of the obsession for the Gross Domestic Product. **No 'green' transition should take place if it is not socially just and capable of addressing intra and infra-states inequalities**. No green transition and no advocacy effort shall be blind to the acknowledgment that the Global North is responsible for most of the climate emergency and that trade and investments' policies shall be structured around the need for reparation of the ecological debt, an essential step towards a 'playing field' that is truly levelled.

For the Fair Trade movement, a systemic approach to trade, investments and the just and green transition requires, first of all, **advocating for less international trade, not only for high-carbon goods but for any kind of good and service**. Just trade is not a matter of greener international trade. It is about reshaping the patterns of trade and the distribution of value so that smallholders have reliable alternatives to the dependence on international trade, local markets are strengthened and most of the value added stays in the region where it is produced. But this is not all. A green and just transition requires a multiplicity of policies and actions that have trade and investments in the background: holding countries in the Global North accountable to their commitment of investing 100 billion dollars per year in climate actions in the Global South; making sure that these investments are defined by the needs of the most vulnerable and in need and not by the interests of the elite and investors;[1] obtaining **open access to green and democratic technologies for the Global South**; pushing for **knowledge transfer and public ownership of new technologies**; ensuring that **national**

[1] Climate finance justice: International perspectives on climate policy, social justice, and capital. Climatic Change 161, 243–249 (2020). https://doi.org/10.1007/s10584-020-02790-7.

transition plans adopted in the North also take into consideration the socio-environmental impact in the South; making sure that the **plans adopted in the South are not challenged before the WTO for being trade distortive**; requiring the **renegotiation of the content of the Energy Charter** in order to reduce the power of private actors in holding government hostages of polluting technologies.

2. *Trade liberalization as an opportunity for fair trade*

A systemic approach to trade and investment liberalization should be based on the **complementary purpose of guaranteeing the respect both planetary and social boundaries, i.e. based on the notion of climate and social justice, and the protection, respect and fulfilment of human rights**. The Fair Trade movement shall support trade and investment measures that contribute to increasing equity, sustainability and justice for all, not only for the actors who are already part of its network or those who may join it in the future. The Fair Trade movement shall not aspire to islands of justice, equity and sustainability in a sea of degradation and impoverishment.

A systemic approach to trade liberalization would not be satisfied with the ex-ante and ex-post human rights and environmental impact of multilateral and unilateral measures. As a matter of fact, these countermeasures start from the premise that more trade and more liberalization are inherently positive for people and planet, they just need to be tweaked in order to internalize possible externalities. On the contrary, **a systemic approach is based on enriching the vision and aspirations with broad considerations on the historical, distributional and procedural characteristics of more international trade and investments**. In particular, it recognizes that global trade is often a continuation of the colonial past (e.g. plantations, foreign-owned investments in the Global South and concentration of production processes in the Global North), that more trade means more extraction of resources, more dependence, more GHG, more competition, and worse conditions for the most vulnerable and exposed.

Secondly, a systemic approach to trade liberalization **would pose structural questions about the distributional effects of the reduction of trade and investment barriers**. If the goal is an equitable and just trade and investment regime, it cannot be achieved by embracing a notion of global trade that is embedded in more competition among farmers, workers and SMEs – including those who are part of the Fair Trade network. For example, the EU-Mercosur agreement would reduce tariffs for import of Brazilian coffee so that Brazilian producers have a tariff advantage vis-à-vis Colombian or Vietnamese farmers. Not to talk about the role that international trade and the creation of global markets have on strengthening the competition between large-scale players and small-players. All this is against the aim and purposes of the Fair Trade Charter.

Thirdly, a systemic approach to trade liberalization requires to re-think the existing principles behind trade and investment and the idea that the state is only an enabler of private actions rather than a central player in shaping and defining the contours of global value chains.

There are many possible patterns. Why, Jan Orbie asks, "instead of voluntary fairtrade labels, priority is not be given to arrangements that **regulate commodity markets** and guarantee sufficiently high and stable prices?"[2] At the same time, representatives of La Via Campesina interviewed for this report call for the establishment of a **true partnership in (national and international) trade** where risk is equitably distributed along the chain and where access to market and the price paid do not depend on global demand for a good nor on the international commodity prices. True partnership is where investments, collaboration, technical assistance, guaranteed purchases and guaranteed living incomes/wages are implemented by the stronger party to take away risks (financial, social, climatic) from the shoulder of the vulnerable party. Even if that means looking for alternative local markets and lower satisfaction of the needs of consumers in the Global North. Just trade is not about exchange at better terms but about partnership but must be seen as a set of actions defined by the satisfaction of the needs and rights of the producers.

A systemic change would not only be that of a living income and price differential, but that of a new Fair Trade-producers relationship that moves away from price and is embedded in business solidarity, collaboration and a different contractual dynamic with producers. If the future of farmers still depends on the existence of a buyer and a market, it is on them that falls risk of changes in purchasing practices, increase competition with other producers (like in the case of Brazilian coffee becoming cheaper to import to Europe after the EU-Mercosur agreement), the buyer deciding not to purchase from them, volumes going down (as for some commodities during the Covid-19 pandemic), etc. Fairtrade shall thus decide to operate like a sort of **International Community Supported Agriculture Scheme**, where every year the members (the Fair Trade movement and its clients, including retailers and public authorities using their procurement power) guarantee an income to the farmers that is based on their needs, rights and cost of production, reducing the risk for a failed harvest and accounting for the fact that certain farmers may have too little land to live decently only out of the premium price that they receive from the market.

When social boundaries are considered, it appears clear that fair, just and equitable trade is not about more liberalization, more circulation of international capital, more productivity and more competitiveness, but it is about better trade, rewarding trade, trade that guarantees living income and prosperous life conditions, and a trade that is defined by the needs of producers and workers, not the other way round. If we move away from more international trade, **relocalisation and socialisation of production** of goods become two crucial objectives. They mean to abandon the narrative of global trade as prosperity and international movement of goods and services and try, as much as possible and where environmentally logical, to act locally and support countries in the Global South to develop their own food and industrial production.

Regionalization is not only about smaller markets that operate according to the same premises, but **thinking about markets in a different way, mainly as relational and ecological**

[2] Jan Orbie, Fair trade and covid-19: Resisting resilience?, available at: https://blogs.die-gdi.de/2020/07/01/fair-trade-and-covid-19-resisting-resilience/ [last accessed 18 December 2020].

interactions that help remainining within the planetary boundaries without overshooting the limits of our planet. Consumerism, economic growth, productivity, more trade as economic prosperity, etc. are, therefore, assumptions that must be questioned. Relocalisation and regionalization also mean 'diversification' and working on adding value at the origin for local markets. From a Fair Trade perspective, it would not only be a matter of pushing the policy conditions for local production and distribution, but also to expand the basket of core products and strategically engage in the direct support to small, democratically organized producers, unorganized producers and the informal sector as the most vulnerable in the market.

3. Trade and gender

The link between trade and gender represents one of the priorities of the Fair Trade movement and is addressed in the 2021-2025 Global Fairtrade Strategy.[3] A systemic approach to trade and gender would be based on two main assumptions: **a) international trade and investments as sources of gender-based inequality; b) gender as one of several variables that determine power relations and social inequalities.** In our analysis we use feminist approaches to international trade and investments to provide some elements of reflection to suggest that the Fair Trade movement shall adopt a position on trade and gender that moves beyond its current 'productivist' approach and therefore publicly advocate and structure its internal organization accordingly. In particular, it shall look beyond international trade as an opportunity for economic revenues and that adopts an intersectional approach to discrimination and inequality.

First of all, the movement shall **acknowledge that liberalization policies have a strong gendered impact**. For example, they reduce the collection of states' resources, which often leads to cutting projects and social services provisions that generally favour women and increase gender equality, as they are not considered to be a core matter. As a matter of fact, the use of export tariffs can be a particularly important "source of revenue for governments to fund public services; subsidies can help support infant industries which may provide alternative employment for women; local content requirements can ensure that locally-based businesses (which are more likely to be run by women) can benefit from inward investment."[4] If trade must be just and equitable, Fairtrade and the Fair Trade movement shall not embrace liberalization and more trade given that this is going to affect the capacity of countries to respect their international and national obligations vis-à-vis women's rights.

Secondly, poorly designed and gender-blind trade and investment rules do not contribute to women's economic security. On the contrary, they worsen their situation, mainly because it is their unpaid care labour that internalize the cost of competitivity as a reduction of the costs of production. Moreover, although women are not a homogenous group and are impacted by trade policy in different ways depending on a range of socio-economic factors, there is strong evidence that free trade policies can have significant negative impacts for women irrespective of their context. Moreover, liberalizing market may

[3] Fairtrade International, Global Fairtrade Strategy. Changing Trade, Changing Lives 2016-2020, January 2016, available at https://www.fairtrade.net/about/strategy.
[4] Ibid.

also increase the import of cheaper goods, reduce the space for the local informal economy and, eventually, have a negative impact on women.

We recognize that the Fair Trade concept and Fairtrade labelling are there to redress the unjust payments, the harassments and the discrimination, and to contribute to the improvement of the working conditions. However, this does not automatically mean an improvement in the conditions at home nor the redistribution of care labour. In addition, the liberalization of trade and investments that favour Fair Trade products will favour the circulation of exploitative goods too.

A truly transformative approach to trade and gender requires to **abandon the idea that it is enough to give a larger segment of the global market's pie to women**. A systemic and intersectional approach should question the idea of a larger pie and consider the broad implications of more liberalization, more competitiveness and more export driven economies. In the agricultural sector, this would increase dependency on cash-crops, trigger a race to the bottom for prices (even in the context of a living income) and subordinating the empowerment of women to their capacity/possibility of being actors in the productive economy.

A systemic approach to trade and gender shall follow the 2016 Fairtrade International Gender Strategy and be self-reflexive and aware of the potential risks hidden behind a universal approach to women as generators of economic value and participants in the global market for goods and services.[5] The push for a systemic approach to trade and gender should assume a strong policy connotation and be oriented towards the content and the procedure of multilateral and bilateral trade and investment agreements. At least, the Fair Trade movement **should advocate for ex-ante and ex-post intersectional assessments of these policies, i.e. forecasts and evaluations of the way in which changes in the rules are impacting the most marginalized** (independently on the fact that they are part of the Fair Trade movement). But this is not all: Fairtrade and the Fair Trade movement should **challenge the compatibility between liberalization and the mission to address gender inequality**. As a matter of fact, competitiveness between countries and between producers is often obtained by shifting social costs on the most vulnerable, which is the opposite of what equitable trade should do.

4. *E-commerce as the Future of International Trade*

At the moment, e-commerce is one of the most discussed topics at the level of international trade. Given the expansion on the conversations around e-commerce and the way in which e-commerce is presented as a possibility for smaller players, it is thus crucial to look at the distributive implications of e-commerce and the way in which global market would be transformed by a shift away from brick and mortars in favour of online purchasing. As in the

[5] Fairtrade International, Gender Strategy 2016-2020: transforming equal opportunity, access and benefits for all, Fairtrade International, available at https://www.fairtrade.net/library/gender-strategy-2016-2020.

previous cases, we adopt a systemic and intersectional approach to the e-commerce 'revolution' to flag concerns and suggest concrete policy and advocacy patterns.

The development of e-commerce and digitalization cannot be disassociated from the ownership of the technology, its accessibility, the distribution of value and the working conditions of all those people that make the technology and e-commerce possible. Pushing for the e-commerce revolution means supporting an economy based on a hyper-concentrated market that concentrates added value (for research and development, services provisions, etc.) in very few hands and in very few countries of the world, whereas natural resources (minerals in particular) are mainly sourced in the Global South.

Secondly, the concentration of e-commerce and data platforms produces a range of new consumers harms that have been summarized by Nathan Newman in a paper on 'How Big Data Enables Economic Harm to Consumers, Especially to Low-Income and Other Vulnerable Sectors of the Population': a) Individual surveillance of users by employers, financial institutions, the government and other players that these platforms allow; b) big data platforms extract data from users with little financial compensation; c) third, information asymmetry between big data companies and consumers is easily converted into economic inequality when one side of every transaction has so much more knowledge about the other during bargaining.

Thirdly, e**-commerce tends to favour larger players and low hanging fruits, the opposite of what a distributive justice and equity approach to trade would require**. Not to talk about the shift from labour intensive retailing to capital intensive e-commerce and digital marketplaces, which is often associated with a loss of employment among the categories that are already most marginalized and negatively affected by the economic scenario.

Fourthly, the **global digitalization and the expansion of e-commerce on a planetary level are inevitably related to an increase in extractive practices and GHG emissions.** Computers, submarine cables, servers, antennas, and the rest of the 'digital' infrastructure are material goods that are made of minerals, metals and other materials that have to be extracted, traded, mobilized and assembled. Moreover, the construction and the functioning of the Information and Communication Industry (ITC), i.e. making and running computing devices (desktops, notebooks, LCD displays, CRT displays, smartphones and tablets), data centers (servers, communication, storage, cooling and power) and communications networks (office networks, telecom operator, cooling and power) requires an extremely high amount of energy that has been constantly increasing in the last two decades (including in the EU)[6] and could reach the 14% of global GHG emissions in 2040.

[6] At the European level, the European Framework Initiative for Energy & Environmental Efficiency in the ICT Sector recently reported that the "ICTs account for **8-10% of the European electricity consumption** and up to 4% of its carbon emissions [although] nearly 70% the decision makers in the UK, France and Germany do not have a system in place to measure environmental impact." See Energy & Environmental Efficiency in the ICT Sector, available at: https://ictfootprint.eu/en/about/ict-carbon-footprint/ict-carbon-footprint.

In light of these four points, the identification of e-commerce as a solution to the development deadlock and for the future of trade must also be analysed through the lenses of the digital divide, the distribution of value, the consequences of opening up to global digital competition, and the environmental impact of digitalization. A systemic approach to e-commerce requires to follow the invitation of the European Data Protection Supervisor and to think about the humans and nature behind digitalization, on top of the distributive and socio-economic consequences that the digital global marketplace may produce.

Therefore, our suggestion is to **advocate against a scenario of increased digitalization where producers of goods and services from all over the world compete through oligopolistic digital platforms, international shipments contributes to even more GHG than today and where data is mined and sold by tech giants**. Technology shall not be embraced uncritically but, in the spirit of the 'Slow Race' promoted by Melissa Leach and Ian Scoones, shall be understood as a cultural and social construction.[7] Rather than aiming at a universal technological fix, like e-commerce or worldwide digitalization of the marketplace to reward the most competitive actors and provide consumers with more goods, we shall ask who are going to be the winners and who are going to be the losers. And that also includes the planet and its ecological boundaries.

5. *Investment law and investment arbitration*

A discussion around building a just, equitable and sustainable system of trade and investments must inevitably consider the role that Bilateral Investment Treaties, the Energy Charter and Investment Arbitration play in protecting the economic rights of foreign investors vis-à-vis the social, economic and cultural rights of citizens (and sometime also their civil rights). The area of investment would require, per se, a separate work of historical reconstruction, contemporary assessment, definition of key questions and possible scenarios. Rather than an in-depth analysis of the investment regime, section 7.5 of the report critically discusses some key aspects and invites the Fair Trade movement to adopt a holistic and systemic approach to international investment law to inspire future strategy/advocacy position on the issue.[8]

- ***IIL is not only about investment arbitration:*** The main critique has been that private arbitration is a bias mechanism of dispute resolution where commercial lawyers who are closely dependent on the international economic system are given the power to adjudicate whether or not the use of public authority (laws, regulations, administrative concessions, expropriation, default on bonds, etc) are aligned with the obligations that recipient states have undertook with the country of origin of foreign investors. However, international investment law is about the imposition on national governments of legal obligations that strengthen foreign investors' economic rights vis-à-vis the political space of governments.
- ***Investment arbitration cannot only be challenged when European countries may lose:*** European civil society organization and activists were ready to challenge the

[7] Leach, M. and Scoones, I. (2006) *The Slow Race. Making technology work for the poor*, London: Demos.

[8] Cecilia Olivet and Pie Eberhardt, Profiting from Injustice, Transnational Institute, available at: https://www.tni.org/en/briefing/profiting-injustice [last accessed 21 December 2020].

conclusion of the US-EU Transatlantic Trade and Investment Partnership (TTIP) and the inclusion of an arbitral clause that would have allowed private companies to sue nation states for breaches of the agreement. The mobilization was successful and TTIP negotiations were put on hold. However, **Investor-States Dispute Settlement (ISDS) clauses have been introduced in Bilateral Investment Treaties since the 1960s and alternative mechanisms of dispute resolution are present in the latest agreements concluded by the EU** (such as the one with Singapore). Yet, the same level of resistance has not been raised in these cases, as the use of investment arbitration in conflicts between EU companies and non-Western governments did not represent an issue.

- ***Shall arbitrators deal with human rights and environmental law***? The true matter is whether or not arbitral courts or special courts should exist and have special jurisdiction in cases brought by foreign investors against states. If we think that foreign investors need/have the right to special forums, thus we shall at least have human rights considerations in the adjudication. However, this poses the problem of how human rights will be interpreted, defined and balanced by non-human rights lawyers (i.e. arbitrators who often have a commercial background) and a commercial setting. If we believe that foreign investors shall have the same procedural rights as any other investor, thus the question of human rights is irrelevant.
- ***IIL is not only about protecting investments but also opening up markets****:* Most of the attention in IIL has been given to the use of national/regional law to protect strategic assets. However, it is important to realize that the combination between trade liberalization (less barriers to export from a country) and the investment regime (better regulatory treatment and more protection when you invest in that country) clearly has an impact on the opening up of economies that is a precondition to the protection of the investments. When we engage with IIL, we shall not only think about the resolution of disputes between private and public parties, but consider the way in which the entrance of foreign capitals into a country can significantly transform their socio-environmental dynamics
- ***IIL is transformative of the economy, society and the environment:*** the Fair Trade movement's understanding of IIL must be informed by the recognition of the transformative impact that foreign investments can have on the economy, society and the environment: foreign investments can intensify productivity, but they can also redirect local production, increase the use of natural resources, and represent an unbeatable competitor for national incumbents.
- ***Lack of Transparency****:* Trade and investment agreements alike have been severely criticized because of the lack of transparency and public participation that characterizes the negotiation phase. This is a very important battle for democracy. However, the issue of transparency must be preceded by two considerations: a) are we equally calling for transparency when a country in the Global North (or the EU) is concluding trade and investment treaties with a country in the Global South? b) Are we capable of creating solidarity relationships with the producers, consumers, unions, etc. that will be disadvantaged by the conclusion of an investment agreement that favours the privatization of their economy by capital originating from the Global North?
- ***No space for communities and third parties****:* finally, IIL must be challenged because the current system of dispute resolution does not allow the participation of affected parties. They are not invited or not allowed to intervene. These communities have a lot at stake but have remained almost invisible to the international investment regime.

However, apart the possibility to submit *amicus curiae* briefs, they have neither rights nor remedies in this regime."[9]

6. Blind Spots Beyond International Trade and Investment

We believe that there are **other areas of public policy beyond trade and investments that Fairtrade and the Fair Trade movement should be looking at and shall be developing a policy and advocacy position on.** They are more or less directly connected with international trade and investment, and in some cases already touched upon by advocacy actions promoted by members of the FT movement.[10] Even if not closely related to international trade and investments, these areas are certainly capable of affecting the living conditions of people at the beginning of the Fair Trade chains and the intensity of the extraction of natural resources. This is because they are based on the recognition that markets are not mere 'private spaces' determined by the invisible hand of demand, supply and rational behaviours. On the contrary, markets are filled with regulation, built around the public authority and the legal recognition of property and contract, defined by the redistributive or regressive intervention of states in the form of taxation and provision of public services, nudged by the use of public prerogatives to purchase goods and services, and shaped by the enforcement of obligations and accountability. In the next sections, we present some areas of interest and briefly sketch their relevance also for organizations that are mainly focused on international trade. In this report we discuss:

Property, contracts and distribution of productive assets*:* As organizations whose actions are deeply embedded in the trade and investment regime, we believe that it would be important for Fairtrade and for the Fair Trade movement to reflect on the kinds of property and contract that are at the basis of their experience and how their actions (both in terms of private choices and advocacy) are aimed at supporting forms of property and contract that are aligned with the idea of just, equitable and sustainable trade. Is the movement contributing to broad access to land and factors of production? Is it using its logistic, economic and legitimacy strength to support small-scale realities that are struggling for emancipation, or are they reproducing historical inequalities in the distribution of resources? Are contracts empowering and creating long-term trust that go beyond sale, or are they replicating classic business transactions?

Taxation as central to redistribution and redirection of production/consumption patterns: Governments (and the EU) can use taxation of goods to define the 'permeability' of borders by goods and services. This shall be complemented by another tactical use of the fiscal

[9] Nicolas Perrone, The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime, *AJIL Unbound* , Volume 113 , 2019 , pp. 16 – 21, DOI: https://doi.org/10.1017/aju.2018.92; Nicolas Perrone, *Investment Treaties and the Legal Imagination. How Foreign Investors Play By Their Own Rules*, Oxford: Oxford University Press, 2020.

[10] See, for example, the work realized on public policies to promote a proliferation of the economy by mission-driven enterprises (https://wfto.com/article/press-release-new-research-fair-trade-enterprises-provides-fresh-insights-business-models), competition policy and commodity-specific protocols and measures (such as the idea of the observatory of prices for the coffee chain that has been promoted in the last years by Fair Trade Advocacy Office).

prerogatives within the state, i.e. the use of taxation to create incentives or disincentive to certain forms of production and consumption that happen locally. One measure that has been raised already within the Fair Trade movement is that the network could advocate for public authorities at the national and European levels to introduce differentiated VAT rates to encourage the transition of consumption and production patterns toward more sustainable ones. By making sustainable, fair and equitable products more accessible, governments would be creating a monetary incentive to increase the consumption of certain goods and – indirectly – redefine the value chains behind those goods and those that will be more expensive.

Public procurement as an obligation to shape a just, equitable and sustainable economies*:* Public authorities are not only regulators. They are large-scale buyers of goods and services. In the EU, in 2017, the public purchase of goods and services was estimated to be worth some €2 trillion or 13,3% of GDP.[11] Some actors in the Fair Trade movement are already active in dialoguing with public authorities (from cities to the regional level) to favour the use of these funds in favour of enterprises that adopt high standards in both the environmental and social sphere. Our recommendation is for this dialogue to be intensified and to push further in the strategic use of public procurement as a leverage for trade that is equitable, just and sustainable. An expansion of the share of public purchases that directly support this kind of trade would require several steps: better understanding of the existing regulations and their limits; advocacy for regulatory transformation; mapping of best practices; training of the public actors who are involved in the definition of the procurement procedures; organizations of small-scale producers so that they can participate in large-scale bids; assessment of the distributive implications and the social consequences of the redefinition of the flow of public funds.

Provision of public services and universal basic income*:* Governments' economic responses to Covid-19 has proved that state intervention is essential to guarantee the survival of our society. However, the pandemic has also proved that this kind of action is possible in the Global North but very unlikely in the Global South. If we truly want to build an equitable trade system, we need to work to create socio-economic conditions that give farmers, producers and workers the choice whether to participate in trade or not, whether to engage in certain activities or not, whether to sell or not, and to make sure that they can thrive out of their activities. The provision of living income/wage through the purchase of the harvest is one option. However, this makes the achievement of that economic condition dependent on the quality of the harvest, the quantity of the goods produced, etc. A very different way of looking at the relationship between people and their needs is to say that they shall be covered by the state through the provision of public services and goods. Thus, workers, farmers and producers would not be dependent on their work in order to receive what is (at least) essential for living. This may sound radical, but it is the way in which the welfare state has been operating for decades around the world, with countries in Europe that continue to use taxation to pay for healthcare and education (but not food).

[11] DG GROW, Public Procurement Indicators 2017, European Commission.

Informality: Informality is, therefore, a key component of the economies where Fairtrade and the Fair Trade movement operate, often representing the invisible backbone of those formal activities that are part of the visible value chain. For sure, informality often means precarious works, lack of social security, lack of stable contracts (or of contracts), unequal bargaining power, economic and social violence. In response, formalization is often presented as the solution. However, informality is often the sole way in which people can make a living and support themselves and their family. We believe, therefore, that the movement and Fairtrade International shall develop a clear and sophisticated position on informality, based on the understanding of the role that these activities play along with care labour and reproductive labour, as we mentioned above, and on the fact that formalization inevitably has redistributive implications. We think that it is important for the Fair Trade movement to have a more nuanced understanding of the formal/informal (often artificial) divide and the living/working conditions all along the food chain.

Financialization of global commodity markets: On a daily basis, the price of several food stuffs (coffee, cocoa, etc.), minerals and other commodities is dependent on financial interventions and speculations rather than addressing problems of equity and justice. If "Fair Trade is based on modes of production and trading that put people and planet before financial profit," it is thus important that Fair Trade and Fairtrade International acquire a stronger understanding of the role of financial capital in the determination of commodity prices and dialogue with organizations and individuals who have been strongly advocating against the financialization of food and other resources. International prices for commodities shall not be taken as neutral and a given. On the contrary, Fairtrade and the Fair Trade movement may want to be at the forefront of the critique of how these prices come to be and how the unequal distribution of financial tools is negatively affecting the most vulnerable in the value chains.

Strong accountability mechanisms and enforcement of duties/obligations of private actors operating along the value chains: Fairtrade and the Fair Trade movement shall pay particular attention to the ongoing legislative and political debates on transnational corporate accountability. Corporate impunity for human rights (and environmental) violations is certainly one of the aspects that make international trade and investments most incompatible with the principles of justice, equity and sustainability. Along with working to establish fair chains, it is thus important that Fairtrade and the Fair Trade movement strengthen their position on this issue and create spaces of dialogue and reflection to understand the implications of the multiple forms of addressing the problem. Although we appreciate the attention that Fairtrade International is giving to human rights and their respect in the context of the chains that they certify, we believe that an approach to trade based on justice and equity requires a strong position with regards to accountability and the fight against impunity. More precisely, we believe that a systemic fight against power imbalances, inequalities and the systemic obstacles to the achievement of human rights requires the intervention of public authorities and the enforcement of legal obligations.

Intro: tools and directions for just, sustainable and equitable trade and investments

The global nature of the Covid-19 pandemic has done what the ongoing climate and other social crises have not been capable of achieving: it has brought to the attention of the broad public and policy makers the extreme fragilities of people's lives and the risks behind an interconnected economy that depends on just-in-time and the continuous circulation of goods and services. For those who have paid particular attention to the way in which the biological and economic crises spread, the virus has also unveiled the socio-economic inequalities associated with the uneven distribution of wealth across and within countries, the disparity in access to resources and the gaps is health, food and logistic infrastructures.[12]

When furlough schemes and social security measures become the tools to spare from poverty and destitution, it becomes essential to consider that 2 billion people, most of them in the Global South (although it is a growing tendency in the North) lack social protections, workers' rights and decent working conditions. When access to clean water is crucial to reduce the risk of infection, we cannot forget that 1 billion people make up the ranks of urban poor surrounding big cities that have no adequate access to clean water (80% of which are located in Asia and Sub-Saharan Africa). When the virus spreads faster among weak and vulnerable populations, we must consider that "pockets of food insecurity may appear in countries and population groups that were not traditionally affected" and that an amount of people between 83 and 132 million will be added to the total number of undernourished in the world in 2020.[13]

In few weeks, the lockdowns have triggered a semi-paralysis of international trade and pushed billions of people both in the North and in the South (although with different levels of intensity) into a state of socio-economic suffering. All across the world, this condition of crisis and emergency has led to reflections on the desirability of the economic system built through decades of liberalization and global integration. **Calls for alternatives have been raised, although they have quickly dissipated due to the intensity of the daily struggle**. Moreover, the origin of the virus at the encounter between humans and nature and the impossibility for most countries to cope with this crisis brough to the forefront the intrinsic interconnection between society and nature and raises questions on the capacity of governments to actually deal with the socio-economic effects of the intensification of the climate emergency. A writing projected on a wall in Santiago de Chile summarizes it, as it stated that "We shall not go back to normality, because normality was the problem."

When we think about the relationship between the Covid-19 pandemic and the multiple crises that are happening at the same time, a multiplicity of interpretations are possible. On the one end of the spectrum, this scenario can be read as an exceptional context. It can be claimed that the pandemic and the lockdowns have introduced an external element to a functioning system and that the goal is to re-establish resilience and an oily mechanism. On the opposite end, the link between the virus and the ongoing crises can be read through

[12] Mariano Aguirre, The impact of COVID-19 is all down to inequality, OpenDemocracy, 7 April 2020, available at: https://www.opendemocracy.net/en/impact-covid-19-all-down-inequality/ [last accessed 15 October 2020].
[13] Food and Agriculture Organization, The State of Food Security and Nutrition in the World, Food and Agriculture Organization, Rome, 2020, available at: http://www.fao.org/3/ca9692en/online/ca9692en.html#chapter-1_1 [last accessed 12 October 2020].

the lenses of the **distributive impact of the global economy and decades of delocalization, low wages, strive for efficiency and dependence: for this interpretation, international trade and investments are not the victims of the biological crises but have created the conditions for fragility, injustice and unevenness.**

The report has been commissioned by Fairtrade Germany and Fairtrade Austria with the purpose to gather food for thought for a policy position of Fairtrade[14] on trade policy by looking critically into presumptions, theories and ideologies and glean some ideas off the mainstream. It is conducted by **combining legal expertise in the area of international economic law with the expertise, knowledges, visions, opinions and aspirations of multiple actors who are active in the Fair Trade movement[15] or have been reflecting on how to transform international trade and investment in light of the multiple social and environmental crises**. The views expressed in this report do not represent the current thinking or attitudes of Fairtrade and are in the sole responsibility of its authors.

The authors are four legal academics from four different continents with more or less direct connection with the field of law called **'Third World Approaches to International Law', a field of law that recognizes the role of international law in upholding the colonial project and the implications that it has had in silencing voices from the Global South and alternative perspectives.** The authors are conscious that they do not represent gender diversity and apologize for this inappropriate circumstance. They are extremely glad for the support and exchange that they have received by colleagues to provide a less-biased and a gender-aware account of the dynamics and outcomes of the system of laws, policies and power that underpins the trade and investment regime.

This research was undertaken with the awareness of the **multiplicity of perspectives on trade and socio-environmental justice that characterize the Fair Trade movement** and with the aim to provide some historical, intellectual and technical tools that can be used as the bases for an open, informed and much needed conversation among the organizations and individuals who are part of the movement. Its starting point is the recognition that the current scenario is one of struggle, emergency and regression. At the same time, there is the **perception that the ongoing multiple crises represent the last window of opportunity** to engage with the systemic problems that brought the planet and society where they are (poverty, inequality, climate collapse, etc.). If the Fair Trade movement wants to respond to the global requests to take the climate and social catastrophe seriously, there is no time to lose. The trade and investment regimes as the output of past and present actions (including legislative decisions, policies, private regulations and individual actions) are at a crossroad. But they also represent a crucial point of intervention if we want to invert the current socio-environmental patterns. Thus, it is important to understand their origin, implications and potential.

---

[14] The Fairtrade system includes three regional producer networks, over 25 national Fairtrade organizations and marketing organizations, Fairtrade International and FLOCERT (the main independent certifier for Fairtrade) https://www.fairtrade.net/about/fairtrade-system

[15] "The movement brings together many actors such as Fair Trade organisations, labelling initiatives, marketing organisations, national Fair Trade networks, Fair Trade support organisations, Fair Trade Towns, academic and education institutions, specialised Fair Trade importers, civil society organisations in both the North and Global South, places of worship, researchers and volunteers." https://fairtrade-advocacy.org/the-fair-trade-movement-2/ Fairtrade is part of the Fair Trade movement

Methodologically, the report has been constructed through a **combination of desk-based research, an online survey on trade justice that received more than thirty responses, fifteen one-on-one interviews with activists, small-scale producers (Fairtrade and conventional), representatives of trade unions, think tanks, academics and policy makers from five continents, and four regional brainstorm sessions (China, Latin America, Europe and Sub Saharan Africa).** In the survey and the interviews, the authors asked the participants about their vision of 'trade justice', their concerns with the present system of trade and investment, their suggestions for an improvement of the social and environmental conditions of people and planet, and what they think the medium and long-term priorities shall be for Fairtrade International and for the Fair Trade movement as an even broader set of actors.

By reaching out to people and organizations, the authors have had the chance to listen to the diversity of opinions and aspirations with regards to the future of trade and investments. More importantly, they had the opportunity to learn from actors on the ground and to use the 'ivory tower' vision of academia to better understand the daily experiences and needs of the people who produce, exchange, distribute and consume goods. Farmers, workers, Small and Medium Enterprises (SMEs), indigenous communities, cooperatives, activists and many other actors around the world have a lot to say about trade, investments and globalization. But their voices are often silenced or not heard. Therefore, the authors did their best to reach and listen to the voices of those who are absent to the political and regulatory discussions around trade and investments and put them at the centre of our reflection. For sure, more could have been done. There is hope in the fact that the Fair Trade movement and its actors are in a privileged position to build this space of dialogue and make sure that the future that it is promoting is actually aligned with the visions, desires and needs of the people and communities that Fair Trade aims at supporting.

Through readings, interviews and interactions, the authors learned about the commonality of goals that characterizes the Fair Trade movement and the diversity of tools, approaches and behaviours. In the context of diversity, it was clear that **Covid-19 revitalized the movement's desire to act against the inability of the present structures of international trade and investments to guarantee the rights of the most vulnerable and most marginalized, those who the Fair Trade movement has the mandate to support**. On the contrary, it also emerged that the link between international trade and the climate crisis, a man-made catastrophe that has already devastated the lives of billions of people around the world and has brought millions of youngsters in the streets, has yet to be fully unpacked and internalized in the strategies, actions and practices of the movement. Finally, the report brought to light that **there is a gap between the voices, desires and aspirations of the actors on the ground and the perspective, strategies and priorities of the members who are operating at different levels of the global network.** As indicated in the 2021-2025 Global Fairtrade Strategy,[16] this distance shall be bridged and the people's visions of international trade and investments shall be solidly put at the centre of a just, equitable and sustainable trade and investment system that benefits everyone independently on whether they are already part of the Fair Trade movement. What 'just, equitable and sustainable trade and investments' mean is what this report is about. Not to provide a definition, but to help the readers build clarity and identify the next steps of action.

[16] Fairtrade International, 2021-2025 Global Strategy, supra n 3, p. 4.

The report is divided into eight sections. The aim is to take the reader from the urgency of the pandemic into the systemic elements that build the trade and investment regimes and then back to the main debates and discussions that concern the present and future of international trade and investments. The goal is to provide the individuals and organizations who are members of the Fair Trade movement – and in particular the actors of Fairtrade International – with a **systemic, integrated and holistic understanding of the complexity of international trade and investments as much more than the product of private market actors.** In the pages that follow, the trade and investments regimes are presented as a combination of historical and present dynamics, of ideologies and practices, of public and private interactions. The report does not take international trade and investments as a uniform space nor as a given. At the same time, we do not take justice, equity and sustainability as monolithic: each term can be interpreted differently and lead to different implementations. Therefore, the pages that follow to cast some light on the historical trajectories that created the present state of trade and investment, the multiple understanding of justice, trade, investments that were discussed and implemented throughout the decades, on how this diversity of forms and conceptions dialogues with the purpose of the Fair Trade movements, i.e. building a system of trade that is just, equitable and sustainable.

The report maps and analyses institutions, actors, ideologies and vocabularies that are central to the contemporary debates and those that have been forgotten (for example, International Commodity Agreements and states' active role in consolidating the position of national champions). This will help the readers mastering a stronger set of tools to engage with contemporary challenges and conversations around the present and future of trade and investments. Covid-19 and the national lockdowns that have temporarily suspended informal economic activities, paralysed the global system of logistic and challenged the economic solidity of small businesses have produced dire consequences on the lives of individuals and intensified existing socio-environmental inequalities and injustices. Climate change, a much larger crisis, is lurking behind the ongoing crisis and is going to have much more severe consequences on people and the planet. For decades, the Fair Trade movement have been building islands of fairness in the search for sustainability and socio-economic justice where Fairtrade "producers enjoy security and sustainable livelihoods, fulfil their potential and decide on their futures."[17]

International trade and investments have a transformative consequence on people and the planet, that the impact of trade liberalization on states' revenues, people's human rights, inequality, uneven development, etc. This is the reason why Fairtrade International and the Fair Trade movement want to raise their voice and consolidate their advocacy role. **Time has come for the Fair Trade movement to enrich their vision of "a world in which all producers enjoy security and sustainable livelihoods, fulfil their potential and decide on their futures" with a strong and holistic vision on the future of trade and investments.** To get there, the report recommends adopting a systemic, integrated and critical engagement with trade and investment that builds new opportunities for producers while recognizing the prominence of planetary and social boundaries. Instead of tinkering with the global system of trade and investment, the **Fair Trade movement should go back to its origins and the motivations that informed its mission**: understand that the global system of trade and investment is characterized by systemic injustices that affect people and the planet and that

[17] Id, p. 6.

cannot be merely addressed with the creation of islands of fairness or with an improvement of the current system.

1. Covid-19, trade and investments: between uncertainty and possibility

In June 2020, only few months after the first Covid-19 case was detected in China, the pandemic had already plunged the world in the worst recession since World War II.[18] International trade and investments, the backbone of the global economy, were at the same time the victims and the responsible of this. After the lockdown measures were adopted in the Hubei province, firms across the world suffered a significant blow to their business model and to their capacity to procure components for their products and/or the final goods to be placed on the market. What else could have happened in a global economy where 10 out of 14 million containers that arrive in Europe each year come from China?

Once we realize that the city of Wuhan – also known as 'motor city' – was not only where the virus propagated but is also the global hub for a multitude of global commodity chains in the automotive, electronics, biopharmaceuticals and steel sectors, it shall not come as surprise that the automotive sectors of South Korea and Japan were among the most affected. In few weeks, Asian multinational corporations like Hyundai, Kia, Nissan, Honda and Mazda had to shut down their facilities, slow down the chains or halt the output of particular models.[19] Several time zones to the West, there were reports of Jaguar Land Rover flying parts out of China in suitcases to keep UK production going,[20] while more than 1.1 million jobs in the European automotive sector were affected.[21] For workers employed in those processing plants, a clogged value chain meant the loss of jobs and/or furlough schemes.

However, it was the subsequent domino effect of multiple national lockdowns that the made the precarious, uneven and interconnected character of the global economy most evident. On the one hand, the suspension of production has led to furlough, dismissals and unemployment both in the countries where the measures were implemented and in the countries upstream in the chain (e.g. providers of raw materials or components) and related services (e.g. IT services realized in India and bought by EU and USA based companies).[22] On the other hand, the slowdown in consumption and the paralysis in the freight and passenger flights[23] had significant consequences on those chains that operate on a just-in-time manner

[18] World Bank. 2020. *Global Economic Prospects, June 2020*. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-1553-9. License: Creative Commons Attribution CC BY 3.0 IGO.
[19] The Economist, Coronavirus: the impact on global supply chains, The Economist, 19 March 2020, available at: http://www.eiu.com/industry/article/479237431/coronavirus-the-impact-on-global-supply-chains/2020-03-19 [last accessed 12 October 2020].
[20] Chris Isidore and Julia Chatterley, Jaguar Land Rover is flying parts out of China to keep its European factories open, CNN Business, 19 February 2020, available at: https://edition.cnn.com/2020/02/19/business/jaguar-land-rover-chinese-parts-coronavirus/index.html [last accessed 12 October 2020].
[21] European Automobile Manufacture Association, COVID-19: Jobs of over 1.1 million EU automobile workers affected so far, data shows, 31 March 2020, available at: https://www.acea.be/press-releases/article/covid-19-jobs-of-over-1.1-million-eu-automobile-workers-affected-so-far-dat [last accessed 14 October 2020].
[22] Pascale Davies and Alice Tidey, Coronavirus job cuts: Which companies in Europe are slashing their workforces because of COVID-19?, Euronews, 3 September 2020, available at: https://www.euronews.com/2020/07/24/coronavirus-job-cuts-which-companies-in-europe-are-slashing-their-workforces-because-of-co [last accessed 12 October 2020].
[23] Cancellation of passenger flights linked to travel bans has limited the availability of air cargo, while urgent shipping of essential goods has increased demand. The result has been an extension of delivery time and an increase in the price of *air cargo*. For example, it costed 30% more to fly goods between China and North America and almost 60% more to fly goods between Europe and North America. See Enda Curran, Urgent Demand for Medical Equipment is Making Air Cargo Fees "Absolutely Crazy", 31 March 2020, *Bloomberg*, available at:

(e.g. garment) and provide fresh food to consumers (e.g. banana, avocado, flowers, etc.).[24] To cope with lower demand and reduced access to market, cheaper labour and cheaper environmental practices were sought, as evidenced by the spike in child labour in the cocoa sector in Ivory Coast.[25]

To aggravate the macro-economic point of view, the contraction of trade and lower likelihood of private profits determined a 30-40 per cent reduction in global Foreign Direct Investments (FDIs) in the years to come.[26] Given the central role that private investments play over publicly funded projects and operation, it is thus to be expected that a 'second shock' from the divestment from developing countries will occur and that it will have far more long-lasting effects on global production than the temporary supply chain disruptions caused by COVID-19. The virus and the paralysis that it generated revealed the limits and risks of national economies based on the continuous and uninterrupted flow of private capital.

In addition to FDIs, the change in the economic scenario also impacted private remittances. According to the World Bank: "global remittances are projected to decline sharply by about 20 percent in 2020 due to the economic crisis induced by the COVID-19 pandemic and shutdown. The projected fall, which would be the sharpest decline in recent history, is largely due to a fall in the wages and employment of migrant workers, who tend to be more vulnerable to loss of employment and wages during an economic crisis in a host country."[27] Whereas for decades economic migration represented – when allowed - an opportunity to make up for the wage disparity and uneven conditions between countries and regions, Covid-19 challenges also this option and brough back to the surface another invisible layer of dependence.

The halt of the global economy has had visible and material economic consequences all across the planet. The March 2020 *OECD Interim Economic Outlook* projected a downside scenario where global growth would have halved to 1.5%. That was optimistic. The most recent estimates of the June OECD Economic Outlook suggest an unprecedented collapse in the first half of 2020 of almost 13% of the global GDP. The sudden stop, the lockdown and the unexpected public expenditure will lead to the first increase of global absolute poverty since 1998, with the share of the world's population living on less than $1.90 per day projected to increase from 8.23% in 2019 to 8.82% in 2020 (under the baseline scenario) or 9.18% (under the downside scenario). Between 71 and 100 million new poor will be added to those who

---

https://www.bloomberg.com/news/articles/2020-03-30/-absolutely-crazy-air-cargo-fees-highlight-supply-chain-squeeze [last accessed 14 October 2020].

[24] Interview with Khalil Apuzen-Ito and Koronado Apuzen, FARMCOOP, Philippines, realized on 7 October 2020.

[25] International Cocoa Initiative, Hazardous child labour in Côte d'Ivoire's cocoa communities during COVID-19, 1 July 2020, available at: https://cocoainitiative.org/news-media-post/hazardous-child-labour-in-cote-divoires-cocoa-communities-during-covid-19/ [last accessed 14 October 2020].

[26] United Nations Committee on Trade and Development (UNCTAD), Coronavirus could cut global investment by 40%, new estimates show, 26 March 2020, available at: https://unctad.org/news/coronavirus-could-cut-global-investment-40-new-estimates-show [last accessed 14 October 2020].

[27] World Bank, World Bank Predicts Sharpest Decline of Remittances in Recent History, World Bank, 22 April 2020, available at: https://www.worldbank.org/en/news/press-release/2020/04/22/world-bank-predicts-sharpest-decline-of-remittances-in-recent-history [last accessed 12 October 2020].

were already living under the official World Bank threshold, bringing numbers to more than 660 million people worldwide.[28]

The surge in poverty, as in hunger, malnourishment and the effects of climate change, have not been equally distributed across the world. On the contrary, the expected pattern is that of an intensification of international and intra-national inequality, with "almost half of the projected new poor will be in South Asia, and more than a third in Sub-Saharan Africa."[29] That the world post-covid19 will be even more unequal is taken as a fact, with Nobel Laureate Joseph Stiglitz recognizing that "as bad as inequality had been before the pandemic, and as forcefully as the pandemic has exposed the inequalities in our society, the post-pandemic world could experience even greater inequalities."[30]

At times of uncertainty and emergency, it is important to go at the origin of the word 'crisis', which derives from ancient Greek and it was used not to define panic and immobility, but the moment where a reasoned and reflected choice must be taken after a period of illness. The **Covid-19 crisis can be seen as a crossroad in the history of modernity, neoliberalism and capitalist way of organizing the world economy**. It can become an opportunity to understand the root causes of the pathology and treat them, with historical and contemporary understanding of the complexity of the world in which we live and the ramification of the socio-environmental problems. However, it can also be a moment to shock and awe,[31] and intensify the existing visions and policies with the benefit of emotional, economic and political chaos.

If we add that the world is already facing the consequence of climate change, that already five years have passed since the adoption of the Agenda 2030 and the Sustainable Development Goals, that the Doha round was a total failure, that African countries are negotiating the Phase II of the African Continental Free Trade Area Agreement (AfCFTA), that the European Union has launched its European Green Deal, that all but few countries around the world are facing a recession and that the World Trade Organization elected its first female and non-Western born General Director, we understand the importance of the present moment. As Linda Vera from the Coordinadora Latinoamericana y del Caribe de Pequeños Productores y Trabajadores de Comercio Justo (CLAC),[32] mentioned in our conversation, **when these multiple threats are challenging the survival of people and the planet, we cannot only focus on the good things that we are doing through trade but also engaging with the bad aspects of international trade and the political spectrum that prevent us from building a just, equitable and sustainable world.**

[28] The World Bank, Projected poverty impacts of COVID-19 (coronavirus), The World Bank: Washington, 8 June 2020, available at: https://www.worldbank.org/en/topic/poverty/brief/projected-poverty-impacts-of-COVID-19 [last accessed 14 October 2020].
[29] Ibid.
[30] Joseph Stiglitz, Conquering the great divide, International Monetary Fund, Finance and Development, Fall 2020, available at: https://www.imf.org/external/pubs/ft/fandd/2020/09/COVID19-and-global-inequality-joseph-stiglitz.htm [last accessed 14 October 2020].
[31] Naomi Klein, *The Shock Doctrine*, Toronto: Random House of Canada, 2009.
[32] Coordinadora Latinoamericana y del Caribe de Pequeños (as) Productores(as) y Trabajadores(as) de Comercio Justo (CLAC) is one of the three Fairtrade producers networks. For more info, see here: http://clac-comerciojusto.org/.

1.1 International trade and State interventionism: opening new spaces of reflection or exceptional measure?

The pandemic has demonstrated that the state-market division is much more blurred that we were told. While global value chains were brought to a standstill and foreign direct investments paused, governments and regional organizations intervened to guarantee the availability of essential goods and services, medicines and Personal Protection Equipment (PPEs). They limited trade by means of tariffs and import-export management, promoted furlough schemes, distributed resources to enterprises and households, and also organized emergency food aid schemes and nationalization of economic activities to prevent foreclosure. In a nutshell, public authorities have intervened in the global market and have used their policy and purchasing powers to redress some of the flaws and negative consequences determined by the private logic of distributive efficiency, competitiveness and search for cheap inputs.

The current interventionist approach, although not new, opens interesting spaces of reflection that will be addressed in this report. Now more than ever, it is clear that international trade is not a matter of private merchants and individual agreements: it is the product of a multi-layered system of laws, regulations, agreements and enforcement that makes market actors operate more or less freely. Thus, **is Covid-19 signifying the end of the state as a facilitator of private profits and the begin of an era where public prerogatives are utilized to make sure that needs are satisfied?** For some organizations, it should not be the case. On the contrary, more trade should be the answer to the paralysis and standstills. On March 20, for example, the director general of the WTO requested "*G20 members could ask the WTO, the WHO, the WCO, and other IOs to establish coordinated norms and best practices to facilitate trade in COVID-19 related health products and services"* rather than stockpiling and hording.

In the specific case of food, on 31 March 2020 the heads of the FAO, WHO and WTO issued a Joint Statement reminding that: "When acting to protect the health and well-being of their citizens, countries should ensure that any trade-related measures do not disrupt the food supply chain […] It is at times like this that more, not less, international cooperation becomes vital. In the midst of the COVID-19 lockdowns, every effort must be made to ensure that trade flows as freely as possible, specially to avoid food shortage."[33] A strong position in favour of the liberalized trade in food was also adopted by the World Bank, which reiterated its support of global trade as a protection of local markets at the time of shock, called for an immediate abandonment of protectionist measures and stockpiling, and accused domestic forces and national dynamics of being the responsible behind an increase in food insecurity."[34]

Whether or not we believe that an interventionist state is the solution to the socio-economic-environmental crises that are currently affecting people and the planet, it is important that we **consider these unilateral and multilateral state actions in favour of national economies and individuals (including corporations) in the broader context of an uneven world.** While high-income countries have set up large rescue packages, low-income countries are often unable to do so. According to the IMF policy response tracker, "Germany

[33] WHO, WTO and FAO, Mitigating impacts of COVID-19 on food trade and markets, 31 March 2020, Rome and Geneva, available here: http://www.fao.org/news/story/pt/item/1268719/icode/
[34] Ibid.

and Italy, for example, have so far used amounts that are more than 25% of GDP on economic stabilization while Malawi, Kenya, and DRC used less than 1%."[35] While advanced economies have reacted with strong fiscal and monetary policy measures, low-income countries are often only able to use fiscal measures to a slight extent because they have limited financial options and face dangerous debt levels. This is why they still rely more strongly on family bonds, clan structures, or religious communities as a mechanism to help and support.

The same disparity in satisfying basic needs and upholding socio-economic rights can be seen within the realm of trade and investments, where not all countries have the same economic and political space to use trade measures to guarantee livelihood and rights of their citizens, nor the financial and legal capacity to prevent further exploitation of nature and people or restructure their national economies through local production and consumption. Of course, as we will discuss below, the rules of international trade provide the possibility of unilateral trade measures motivated by national security (Article XI of the General Agreement on Trade and Tariffs - GATT), or environmental considerations or the aim to protect animal, human and plant life (Article XX of the GATT).

1.2 Looking beyond Covid-19: the multiple pathways to trade and investment justice, equity and sustainability

In light of what has been happening since January 2020, and given the desire to respond to the young generations request for a climate sensitive recovery, multilateral trade policies and investment strategies are suddenly back on the table. Although not particularly popular with media and the broad audience, they are clearly among the priorities of G20 governments and an increase number of corporations, think tanks, multi-lateral organizations, NGOs and academics. Few years after the death of the WTO was announced by academics, politicians and think tanks,[36] and at a time when the attention was on the study of global value chains as self-governed fluid connections between consumers, geographies and factors of production, Covid-19 is now used as a justification to ask governments and international organizations to do something different from what has been done for decades. However, **what does 'different' mean, what is it for and who is it for?** Is it just a matter of implementing technical and regulatory changes that strengthen the system without addressing its systemic socio-environmental failures? Is it about transparency, due diligence, human rights clauses and an increased circulation of green goods and services? Or is it about a systemic reconsideration of the premises and implications of international trade, people and planet?

For the WTO, the World Bank and the OECD, there is no doubt. As mentioned by the OECD in June 2020: "In the midst of significant uncertainty, there are four things we can do: 1) boost confidence in trade and global markets by improving transparency about trade-related policy actions and intentions; 2) keep supply chains flowing, especially for essentials

[35] Markus Overdiek, Global North and Global South: Four suggestions to overcome disparate economic responses to COVID-19, GED. New Perspectives on Global Economic Dynamics, 13 August 2020, available at: https://ged-project.de/globalization/global-north-and-global-south-four-suggestions-to-overcome-disparite-economic-responses-to-covid-19/ [last accessed 23 October 2020].

[36] Jeffrey Dunoff, The Death of the Trade Regime, EJIL, Vol. 10, No 4, 1999, pp. 733-762; Keith Johnson, How Trump May Finally Kill the WTO, Foreign Policy, December 9, 2019, available at: https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/; David Fickling, The WTO is dead, long live the WTO, The Seattle Times, 14 May 2020, available at: https://www.seattletimes.com/opinion/the-wto-is-dead-long-live-the-wto/.

such as health supplies and food; 3) avoid making things worse, through unnecessary export restrictions and other trade barriers; and 4) even in the midst of the crisis, think beyond the immediate."[37] Beside the most radical approach in favour of free trade, another approach is taking place, that is becoming particularly popular in Western countries and in China. In May 2020, in the midst of the pandemic, the former EU Commissioner for DG Trade, Phil Hogan, released an interview that let no space to imagination: at a time when the globalisation of production and trade is being blamed from all sides, Hogan stated, the European Commission will do anything to save it. For him: "We need more free trade agreements."[38]

However, Hogan was not blindly embracing the free trade doctrine. In several interviews that he gave before resigning, he reinforced the need for a more stable and resilient international trade, with re-shoring and regionalization of strategic production (like Personal Protective Equipment, minerals for the green transition and food) and bilateral investment treaties guaranteeing access to what is not produced in the EU.[39] As we discuss below, **European trade authorities call this approach to trade and investments "Open and Strategic Autonomy," a way of building a two-tiers global market where not everything is circulating freely and at the same speed.** Such concept appears not dissimilar to the Chinese idea of a "Dual circulation" strategy,[40] a redefinition of national and international markets aimed at cutting its dependence on overseas markets and technology in its long-term development, nor to Trump's America approach to free trade agreements, with a lot of regulatory and financial emphasis being put on the creation of jobs at home (in the USA), "bringing enterprises back" and strengthening the national economy vis-à-vis the loss of value and employments that has characterized the last fifty years of neoliberal choices.

Rather than a novelty, **a two-tiers approach to international trade is rooted in the construction of the international trade and investment regime**. The history of international trade and investment is characterized by uneven subsidies and dumping (like the EU Common Agricultural Policy and the imposition of austerity in the countries of the Global South), the uneven opening of borders, the regressive application of quotas and non-tariff measures, and the inconsistence in the protection of national investors operating abroad versus the protection of foreign investors acting at home. The adaptation of the free trade model to the needs of growth and recovery hides, as we will see, the reproduction of historical and contemporary inequalities and unsustainable practices. Calls for liberalization and trade may thus not show the whole picture.

---

[37] OECD, COVID-19 and international trade: Issues and actions, OECD Policy Response to Coronavirus, 12 June 2020, available at: https://www.oecd.org/coronavirus/policy-responses/covid-19-and-international-trade-issues-and-actions-494da2fa/ [last accessed 09 July 2020].

[38] Sentence reported in Amélie Canonne, Maxime Combes and Aurélie Trouvé, From globalization to ecological and solidarity reshoring, in *Dessine-moi un pangolin*, Regards/Diable Vauvert, 2020

[39] The Eu support to bilateral trade agreements was clear before, during and after the first lockdown. Over the last 24 months, agreements were concluded with Singapore, Japan and Vietnam. At the beginning of May, a new agreement with Mexico was finalized. Similarly, In order to increase meat imports from New Zealand and Australia, the EU commission has been going on with the negotiations with these countries in April and May 2020. At the moment, the Commission is in negotiation with the Mercosur countries (Argentina, Brazil, Paraguay and Uruguay) for a EU-Mercosur trade agreement. Possible future agreements are envisaged with China (investment), Chile and Indonesia, and in specific sectors within or outside the WTO, such as fisheries, e-commerce or services.

[40] Kevin Yao, What we know about China's 'dual circulation' economic strategy, Reuters, September 15, 2020, https://www.reuters.com/article/china-economy-transformation-explainer-idUSKBN2600B5 [last accessed 19 October 2020].

In December 2020, when the Executive Vice-President and Commissioner for Trade Valdis Dombrovskis stated that "At a time when the European economy is in crisis, international trade is more essential than ever. Our trade agreements make it easier for EU companies to grow by trading outside the internal market. Tariff cuts boost trade, and we see this borne out in our growing trade with Canada and Japan", he was certainly underlying the intention of the European Union to use liberalization to support EU businesses in accessing foreign economies with goods, services and investments. What he was not disclosing is the whole picture of regional subsidies (like the Common Agricultural Policy), the increase in standards aimed at reducing import of foreign goods, the re-shoring of productive activities considered to be essential, and – more importantly – the distributive impact that strategic autonomy may have on third countries that historically depend on export to the European Union or do not have the chance to compete with European goods.

The intensification of free trade and strategic autonomy are not the sole two options ahead of us. For organizations like CLAC and La Via Campesina, the think-tank SEATINI, and the progressive academic and thinkers that we had the chance to interview, the answer is not more of the same nor a two tiers-system that reinforces the dependence on international trade, does not help reinforcing local economies and keeping added value regionally, and opens national markets to cheap products realized elsewhere. These voices would agree with the words of the Nobel Laureate and former World Bank chief economist Joseph Stiglitz, according to whom: "During the reign of neoliberalism, no attention was paid to how policies (such as capital and financial market liberalization) contributed to greater volatility and inequality, nor to how other policy changes—such as the shift from defined-benefit to defined-contribution retirement (or pension) plans, or from public to private pensions—led to greater individual insecurity, as well as to greater macroeconomic volatility, by weakening the economy's automatic stabilizers."[41]

From this perspective, the WTO and international trade and investment law are perceived as forms of "imposition and discipline on governments to open their markets, allowing dominant producers and investors to extract wealth, thereby reproducing historically asymmetrical economic relationships of unequal exchange."[42] They are, to use the words of Nelly Grotefendt from the Forum Umwelt & Entwicklung: "hurdles that have to be decomposed to achieve just, fair, sustainable and ecological transition."[43] In this scenario, the way forward is not represented by strengthening the existing rules and creating more resilience in the global value chains, but by a comprehensive rewriting of the rules of the economy. In Stieglitz' opinion "The rules governing globalization must do more than just serve corporate interests; workers and the environment have to be protected. Labor legislation needs to do a better job of protecting workers and providing greater scope for collective action." [44]

Given the interconnected nature of the global economy, if we want to build and implement a vision for the future, we need to have a clear vision of the trade and investment regime. The way in which goods and services are produced, by who and for whom, how they

[41] Stiglitz, supra n 30.

[42] Answer to our survey, question 1 - Inequality has increased substantially since the 1990s, when the WTO was created. Do you think the WTO and international trade law are implicated? Could they do something to reduce inequality?

[43] Interview realized on 27 October 2020

[44] Stiglitz, supra n 30.

are transported and processed, consumed and thrown away, is closely linked with the fight against climate change and the fight for social justice. In this sense, the pandemic and its impact cannot be read as a self-standing event. On the contrary, they must be understood and read in the context of the historical, geographical and socio-economic complexity of the contemporary regime of exchange in goods and services. At the same time, it is evident that neither the pandemic nor the economic downturn will be tamed until there is a robust level of cooperation and a collective effort that goes beyond mere self-interest. As one of the responses to our survey mentioned: "there should be better coordinated policies that recognise the social and environmental externalities of the current trade and pricing system"[45] and addresses the disparity in social, environmental and economic conditions that are leaving "long-lasting scars"[46] and challenging the achievement of the goals and futures that citizens and – some – governments around the world want to see.

However, **do we know where we want to go?** Do we have an idea of the economy that we want to build and the role that trade and investments shall play in getting there and in strengthening it? Are we calling for better free trade and investments or a different kind of trade and investments? Are we supporting regionalization by any means, or we want to make sure that re-shoring is aligned with social and ecological regeneration? **Do we want more international trade, less international trade, greener trade, trade that is based on needs rather than GDP? Do we want sustainable growth?** Do we want de-growth? Do we want to take the global exchange of goods and services for granted, or do we want to imagine new ways of allocating production, value, labour and the benefits of the economy? Do we want to take climate change seriously and put it at the centre of our reflection, or we want to balance the interests of climate change with the interests of economic growth and prosperity? In a nutshell, **what is the trade and investment regime that we want to achieve and support, i.e. what does it mean for us to look at trade and investment through the lenses of justice, equity and sustainability?**

These are just some of the questions that we have to ask, the answer of which depends on the idea and theory of justice that we adopt and implement. In the next Section, we provide a brief introduction to the main notions that characterize the contemporary conversations around trade and investments. A clear understanding of words and concepts that are commonly used and – often – taken for granted without questioning, would facilitate the engagement with the rest of the document. Afterwards, we dive into a selection of different understandings of justice and discuss them in connection with the trade and investment regime. Before moving forward and thinking about the future of trade, we thus invite the reader to think about notions that we often use to engage with trade and investments and how they link with their preferred vision of justice.

[45] Answer to our survey, question 1 - Inequality has increased substantially since the 1990s, when the WTO was created. Do you think the WTO and international trade law are implicated? Could they do something to reduce inequality?
[46] Ibid.

2. The Vocabulary of International Trade and Investments

International trade and investments are currently about moving goods across borders, providing services and creating the conditions for the free circulation of capital around the planet. However, they are also about ideas, principles, theories and objectives that lie underneath the construction of this globalized and interconnected world. In order to properly deal with the present and future of trade and investments, and to properly reflect on what it means to implement a system that is just, equitable and fair, **it is essential to familiarize with the concepts that are mostly used to justify the status quo and promote further liberalization**. The terms that we have selected are those that are most likely to be contained in policy briefs, free trade agreements, reports and public speeches of policy makers. They are not mere description of the global economy, but normative aspirations towards a world that ought to be. Because they tend to be taken for granted, we are therefore going to unpack them and offer some critical considerations that may help better construct our own theory of a just, equitable and sustainable global economy. We have selected: **a) trade as prosperity; b) comparative advantage and specialization; c) guaranteeing a level playing field; d) competitiveness as innovation.**

2.1 Free Trade and free investments as economic growth and prosperity

When reading official statements on free trade and open trade policies, it is common to come across statements like the following, contained in a 2018 European Commission's document on trade and sustainable development: "Open trade policies drive prosperity by deepening economic ties between consumers, workers and citizens across the globe."[47] For the World Bank: "Countries that are open to international trade tend to grow faster, innovate, improve productivity and provide higher income and more opportunities to their people. Open trade also benefits lower-income households by offering consumers more affordable goods and services. Integrating with the world economy through trade and global value chains helps drive economic growth and reduce poverty—locally and globally."[48] For the International Monetary Fund, trade liberalization is an inevitable step towards economic success and better living standards: "No country in recent decades has achieved economic success, in terms of substantial increases in living standards for its people, without being open to the rest of the world. In contrast, trade opening (along with opening to foreign direct investment) has been an important element in the economic success of East Asia, where the average import tariff has fallen from 30 percent to 10 percent over the past 20 years."[49]

[47] European Commission, Non paper of the Commission services. Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, Brussels: European Commission, 2018.
[48] World Bank Group, Stronger Open Trade Policies Enable Economic Growth for All, Washington: World Bank Group, 3 April 2018, available at: https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all [last accessed 22 October 2020].
[49] The IMF Staff, Global Trade Liberalization and the Developing Countries, Washington: International Monetary Fund, November 2001, available at: https://www.imf.org/external/np/exr/ib/2001/110801.htm#i [last accessed 22 October 2020].

This approach derives from the **general consideration that lower tariffs equal more competitiveness, that then lead to more trade with international partners, more economic activities, more jobs and more income to distribute**: greater economic productivity due to easier access to foreign markets and a better environment for foreign capital, it is claimed, increase the amount of resources that a society disposes of to provide public goods and satisfy individual needs. At the same time, **importing cheaper goods means that consumers have access to more affordable products and therefore can satisfy more of their needs with less money.** In a nutshell, the process that is represented is a combination between 'trickle-down economics' and consumers' wellbeing based on more consumption as the outcome of an unregulated trade. On the one hand, the idea is that the increase in Gross Domestic Product (GDP) of a country – however it is generated – will have a positive impact all across the economy and benefit also those that are located at the bottom of the 'pyramid'. On the other hand, the premise is that cheaper goods and services (because countries levy lower tariffs, do not impose duties and have a more predictable legal system that protects private investments) will increase people's consumption and standards of living.

We discussed about this point with The Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI), a Non-Governmental Organization (NGO) working on trade, fiscal and development related issues for the realisation of sustainable development and improved livelihoods in Uganda, East Africa and the African Region.[50] For them, **the rhetorical association with trade, economic growth and development produce a state of confusion that prevents a deeper analysis of the local and micro-dynamics behind trade liberalization.** According to Africa Kiiza, a representative of SEATINI, it is evident that after decades when free trade and free investments have been presented as tools for growth and prosperity, the promotion of development and the maximization of trade have come to be increasingly viewed as synonymous, to the point where the latter easily substitutes for the former. For him: "The net result has been a confounding of ends and means. Trade, under FTAs has become the lens through which development is perceived, rather than the other way around. Many of these trade rules have thus largely focused on deepening Liberalisation (through higher reciprocity tariff deductions, etc.), rather than promoting development as their main goal."[51]

However, there are two considerations that need to be raised with regards to the idea of 'free trade' as a source of economic prosperity. First of all, **that 'free' trade, when understood as entirely unregulated trade, is a myth.** Just like any market interaction, trade requires a whole host of legal background arrangements in order to function. Property rights need to be enforced, contract law needs to be in place, and so on. However, once the rhetoric of the unregulated market is normalized, it becomes extremely hard to propose and advance claims that states shall be more engaged with the definition of industrial policies, the provision of incentives to the most disadvantaged sectors, the strategic use of public procurement, etc. Despite the fact that the largest economies in the world, the USA, the EU and China, are all

[50] Interview with Africa Kiiza, Immaculate Ndagire and Faith Lumonya, SEATINI, 24 August 2020.
[51] Ibid.

engaged in this kind of practices (with the difference that the USA and the EU are openly promoting liberalization and free trade as the sole patterns to wellbeing and prosperity).

The idea that the market exists outside of the reach of the state and that market dynamics lead to economic growth and development is also challenged by historical accounts. For centuries, commodity exporters in Europe (like the United Kingdom before the Corn Laws were revoked in 1846), the United States and China manipulated import tariffs and quotas in order to build infant industries that would provide the foundation for an economically diverse and more stable economy, less subject to the wide (but downward from a trend perspective) swings in commodity prices.[52] For Ha Joon-Chan, when developed countries ask developing countries to liberalize trade and investments or support the conclusion of regional trade agreements (like the African Continental Free Trade Agreement) before national industries are sufficiently structured, resilient, self-reliable and capable of resisting the increased pressure from global competition, would be like ‘kicking away the ladder' with which developed countries have climbed to the top.[53] **By asking or nudging developing countries in following a different patterns from the one that developed countries undertook, larger economies would thereby prevent developing counties from adopting policies and institutions that they themselves have used and reinforce historical and present inequalities.**

If trade, economic growth and development have been taken for granted, it becomes essential to engage with the actual impact of liberalization and the opening of countries to foreign capital. In particular, **we need to reflect on the way in which global competitiveness and the strive for cheaper inputs (e.g. land, labour, softer environmental regulation, etc.) can benefit the most marginalized and excluded**. As a matter of fact, mainstream theories of trade as prosperity do not make a distinction between the economic benefits of trade in terms of growth on the one hand and the distribution of these benefits has always been central to trade theory. As we discuss in section 2.4 below, we need to ask who is winning and who is losing from international trade and investment liberalization.

Moreover, and this is done in section 2.4 below, we also **need to embed more trade, longer trade, economic growth and more foreign direct investments in the context of climate change and planetary boundaries:** are the increase in productivity, more consumption, longer value chains and the support to continuous economic growth compatible with the commitments that countries have undertaken in the 2015 Paris Agreement and to the construction of an economy that is rewarding people without overshooting the planet?[54]

---

[52] These United Kingdom and the United States were often the pioneers and frequently the most ardent users of *interventionist* trade and industrial policy measures in their early stages of development.

[53] Ha Joon-Chan, Kicking Away the Ladder: The “Real” History of Free Trade, Foreign Policy in Focus, 2002; Ha Joon-Chan, Kicking Away the Ladder: Development Strategy in Historical Perspective, 1st Edition, New York: Anthem Press, 2003.

[54] See Kate Raworth, *Doughnut Economics*, London: Random House, 2017.

2.2 Comparative advantage and specialization

When we think of international trade and investments, we often focus on the material actions of producing, transporting, processing and consuming. Less often, we think about the set of international and national laws that define these activities. Even less often, we spend time engaging with the economic justification behind trade and investments liberalization, i.e. with the economic theories and principles that underpin the creation of the global market as a proxy for economic growth and prosperity.

Across the centuries, various theories of free trade have been promoted and used as intellectual justification of policies and actions. Not surprisingly, the main term of reference are white men who lived in the United Kingdom or in the United States. Some of them, like Adam Smith and David Ricardo, were directly involved in international trade, banking and the expansion of commercial roots benefitting British citizens and the wallets of British shareholders. First**, the promotion of international trade was justified with the ideas of the Scottish economist and philosopher Smith, who argued that free trade is always desirable as it extends the market**.[55] However, between two nations, trade would be mutually beneficial only if each had an absolute cost advantage in a different product. Because England had higher wages and prices than many other nations around the world, it shall come as no surprise that **Smith was thus an ardent proponent of state action to enhance England's terms of trade such as the Navigation Acts requiring the use of British ships for moving goods through its Empire**.

Second came the ideas of Ricardo, a British thinker, banker and merchant, who adjusted Smith's theory of absolute advantage and promoted the idea that trade was always going to be beneficial as long as a country had a comparative advantage vis-à-vis another. Taken for granted the differences in production technologies that exist between countries (including the fact that a country only produce raw material, like grapes, and another is specialized in value added products, like wine), and with no workers' mobility, Ricardo recognized that it is advantageous for two nations to trade as long as each specializes in a commodity that they are *relatively more efficient* at producing, by comparison to the other. This meant that countries did not have to be the best at producing a good or service (in terms of unit of labour needed for a unit of the good or service), so that all countries could find their way into the global market. For the theory of comparative advantage, every nation has something that it can produce relatively efficiently as a result of its particular endowments, with potential gains from trade thus available to all.

Ricardo's theory of comparative advantage is still the most influential argument in mainstream economics. So much that in 1969, at the height of decolonization and the construction of the new global economy, American economist Paul Samuelson, arguably the most influential economist of the 20th century, could state that: "comparative advantage is the best example of an economic principle that is undeniably true but not obvious to

[55] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations,* Library of Economics and Liberty 2000 [first edition 1776].

intelligent people."[56] More recently, the theory has been developed further by the Heckscher-Ohlin model, which introduced a variable linked to capital endowments, i.e. on the availability of cheap factors of production (land, minerals, labour, etc.). According to this model, countries will export goods that rely heavily on their abundant factors of production and will import goods that rely heavily on their scarce factors of production. Like Ricardo's theory of comparative advantage, the Heckscher-Ohlin approach is rooted into the idea that trade is *always* beneficial because specialization in what countries are most apt for will raise the overall production of goods and services and it will do so in each country involved in the market.

Comparative advantage and specialization are central to most of the current conversations around trade and the decisions that are made by individual states in order to seize some benefits of the global market. They are used to justify bilateral deals, regional agreements and to promote market integration as in the case of the African Continental Free Trade Agreement. For this reason, they must be understood in their conceptual limitations and long-term implications. Conceptually, the theory has intrinsic problems with its premises:

- it claims that **existing difference in production** (between raw materials and added value products, for example) **is a given** and not a historical condition that must be redressed;
- it **does not consider the possibility of uneven development** as a consequence of continuous specialization into different phases of the value chain (grapes or wine);
- it considers that **full employment is guaranteed** by the free mobility of workers (and that workers who do not want to migrate do not have to);
- it is concerned with the **aggregate value of production** rather than on the distribution of value and production in each context (both between states and within national economies);
- it is based on the **idea that countries cooperate for each other's benefit and good**, rather than competing against each other in order to provide more market space to their companies and seizing a higher share of the pie;
- **it assumes that the international economy is in equilibrium,** with trade balances, markets clear, and all production factors fully employed, no waste, no excesses and no winners or losers.
- **It conceives the world as if geography was practically non-existent:** typically, there are two countries of equal size and influence, with no internal spatial differentiation, and transportation costs associated with trade are ignored, in particular those concerning climate change and pollution.
- it is based on the premise that nature is a factor of production and not an ecology to be regenerated and preserved.

Ricardo's **stylized empirical example, trade between England and Portugal in grapes and wine, says it all: it falsified the historical record of a trading relationship that consistently enriched England and impoverished Portugal** and that the United Kingdom kept using its regulatory and political power to maintain its position of commercial superiority and

[56] Paul A. Samuelson, *The Way of an Economist*, in Paul A. Samuelson (ed) *International Economic Relations: Proceedings of the Third Congress of the International Economic Association*, (London: Macmillan), 1969, pp. 1–11.

retain as much value added as possible. In addition, the whole theory appears to be based on a very narrow and non-cosmopolitan understanding of the world. Moreover, the theory of comparative advantage that underpins global trade as specialization and exchange is, to use the words of Galtung, a lazy way of looking at the world: "I have something in excess, send it down to the storehouse, ship it out, get in return something somebody else has in excess provided we both agree on the price. And that is it. A very simplistic theory indeed… to the point of irresponsibility not asking what additional impacts the agreement reached might have on both parties, and the rest of the world for that matter. We should be able to do better than that."[57]

Because of the global reach of trade and the direct link between trade and climate change, we can conclude that international trade has a transformative impact on society and the planet, including on those people who do not produce and do not trade, on those consumers who do not receive the goods that are exchanged internationally, and those geographies that are not directly affected by the extraction of natural resources or the direct pollution of a factory. If that is the case, shouldn't a theory of trade consider that?

On the contrary, these shortcomings and the utilitarianism behind Ricardo's theory are often dismissed in the name of the global wellbeing produced by more production and more exchanges. Each stage of theorization is presented as a revolutionary advance on the previous one and continues along the same pathway. Yet, these propositions rely on a series of heroic assumptions that inter alia disentangle trade from everything else. Once such assumptions are accepted and validated, it can be deduced that trade specialization and trade without any material or immaterial obstacle enhance international output so that each country can be better off (obtaining more commodities for the same effort) with trade than in autarchy. If that is the case, global wellbeing requires the establishment of a level playing field that incentivizes competitiveness between specialized countries and drives technological innovation and the most efficient allocation of the factors of production.

2.3 Fair Trade as Building a Level Playing Field

The link between comparative advantage, specialization and the idea of 'fair and free' trade as a level playing field with no obstacles to trade is central to contemporary debates around trade. This has two main implications that will be discussed throughout this document: on the one hand, it is normalizing a notion of 'fair' trade as 'free' trade that departs significantly from the notion of 'fair' trade that is promoted by the Fair Trade movement and is based on the idea that fairness is not about procedures but about goals, i.e. sustainability, equity and justice; on the other hand, **the idea that trade is 'fair' only when no restriction to individual entrepreneurship exists, can easily be twisted in order to reproduce present and historical injustices rather than addressing them.** The strategic use of 'level playing field' by large economies is clearly visible in a recent European Union's statement on the need for trade defences against distortive practices.

[57] Johan Galtung, Towards a New Economics: on the theory and practice of self-reliance, UNT, 1985, p. 11.

According to the EU, "The EU's commitment to the liberalisation of international trade depends on a level playing field between domestic and foreign producers based on genuine competitive advantages." As a consequence, the European Commission has established a Trade Defence Directorate whose mission is to:

> "***defend the European production against international trade distortions****, such as subsidization or dumping [by applying] trade defence instruments (anti-dumping, anti-subsidy, safeguard) in compliance with EU law and WTO rules. […] EU Trade Defence thus underpins the gradual and progressive liberalisation of international trade benefits by ensuring a level playing field between domestic and foreign producers based on genuine competitive advantages*."[58]

In this reconstruction of the international trade regime, which is also supported by international organizations like the Organization for Economic Cooperation and Development (OECD), the International Chamber of Commerce, and, of course, the World Trade Organization, **public interventions in the market are considered manipulation and deviation from what otherwise is seen as 'genuine' competition**, i.e. a competition that occurs within the intellectual paradigm defined by Smith, Ricardo and the economists that strengthened the narrative of 'free' trade as a market without a state and inherently positive. This reconstruction of international trade as a competing ground has several element in common with the idea that society is based on natural selection and the survival of the fittest: what is fair is the existence of a global market where everyone abides by the same rules and where those who deserve it win. Those who are not fit for purpose, will lose their share and find an alternative way of participating in the economy. For the OECD, a fair market is a competitive one that is not "distorted by market barriers and government actions that favour companies and products that are not necessarily the best."[59]

The 'level playing field' approach is often presented hand-in-hand with the concept of 'rule-based trade', i.e. with the idea that dumping, state subsidies, regulatory advantages to national economic actors, etc., are deviation from the rule and from the concept of legality, that should be reinstated by matters of policy changes, international enforcement or, in some cases, countermeasures and economic threats. By associating the idea of 'level playing field' with that of 'legality' and 'respect for the rules', **policy makers and international organizations give the impression that state support is incompatible with the international system of trade and inevitably wrong**. When the same approach is taken by the European Union, as in the case mentioned of the EU Trade Defence mentioned before, the message that is put forward is that Europe is a disciplined and respectful abider of the rules and other economic actors (most of the time it is China) going against the rule of the game, cheating.

Although we recognize the importance of abiding by the rules, **we question the compatibility between the notion of trade justice and the idea of the 'level playing field' as**

[58] Trade Defence Directorate (no date), *Trade Defence. Ensuring a Level Playing Field*, Brussels: Directorate General for Trade, European Commission.
[59] OECD, Levelling the Playing Field, Paris: OECD, available at: https://www.oecd.org/trade/topics/levelling-the-playing-field/

a space for untamed competition between countries and private corporations that benefit from or suffer due to centuries of colonization, operate in the context of historical and present uneven commercial relationships and have been unequally contributing to climate change both in absolute and pro capita basis. Moreover, we encourage to question the promotion of the 'level playing field' in the context of the significant distortions that are produced by the regulatory and financial actions of the European Union (let's think about the Common Agricultural Policy or the public subsidies to fossil fuels, that ignite most of the economy),[60] the United States and other countries of the OECD. What legitimacy do OECD countries have in disciplining or challenging unilateral measures adopted by third countries in support of their economies, when OECD countries have been doing it for centuries (by not accounting for slavery, colonialism, GHG emissions, etc.) and still continue today (e.g. with the CAP, the US Agricultural Bill, etc.). Although the idea of the 'level playing field' may be compatible with a libertarian understanding of justice as freedom, this is certainly not the case with distributive notions of justice nor with the principles of reparatory and climate justice.

As we mentioned above and discuss in the final part of this report, since the 2001 Doha Declaration the WTO members agreed on the introduction of the notion of 'special and differential treatment' (S&D) as the promotion of a multiple tiers system within the WTO that would consider existing difference between developing and developed countries in terms of economic growth, stages of industrialization and risks associated with the complete abolishment of tariff and non-tariff barriers to trade. The special provisions include:

- longer time periods for implementing Agreements and commitments;
- measures to increase trading opportunities for developing countries;
- provisions requiring all WTO members to safeguard the trade interests of developing countries;
- support to help developing countries build the capacity to carry out WTO work, handle disputes, and implement technical standards and;
- a set of ad hoc provisions related to least-developed country (LDC) Members.

An S&D provision has also been included in the 2020 Regional Comprehensive Economic Partnership (RCEP) Agreement concluded by ASEAN with Australia, China, Japan, Korea and New Zealand.[61] Although a step in the right direction, S&D is far from creating an actual level playing field that addresses historical and present differences in the global economy. We spoke about it with Vicente Paulo Yu from the Third World Network, who identified the main criticalities of S&D. First of all, the approach is that of achieving a fair market as a market that guarantees adequate opportunities to everyone, without considering equity as the

[60] According to a 2017 IPOL Report: "Estimates of combined fossil fuel subsidies in the EU range from €39 billion to over €200 billion per annum. These significant figures indicate a lack of coherence between the EU's energy and climate mitigation - correct price signals are important for Europe's climate policy goals, hence phasing out fossil fuel subsidies is important in order to help align energy prices with environmental goals." DG for Internal Policies, Policy Department A: Economic and Scientific Policy, *Fossil Fuel Subsidies*, European Commission, 2017.

[61] The clause should benefit Cambodia, Lao PDR, Myanmar and Viet Nam in particular. However, the clause is still associated with an increase in trade, economic growth and productivity, i.e. does not consider the possibility that less- industrialized countries shall be supported in the construction of local markets for the satisfaction of needs, nor it considers the environmental implications of more trade.

distributive impact of trade realized between uneven players characterized by uneven past and presents. Secondly, the scope of the S&D has been increasingly narrowed, with the European Union claiming that not all developing countries should benefit from it but only Least Developed Countries and Small Islands Developing States (SIDS). By reducing the space of application, Vicente Paulo Yu informed us, the European Union would be claiming that the poor in these countries deserve more protection than the majority of the global poor, given that 2/3 of the poor people in the world live in middle income developing countries like India, Brazil and Indonesia). Third, S&D is based on inter-state dynamics and – to a certain extent – inequality, but does not take into consideration the consequences that trade has on intra-national equity/equality. Like any other mainstream approach to international trade, S&D is still constructed on the idea that what happens within their countries is a matter of their concern, a question of national sovereignty and policies, and is not linked to international trade.

Beside the technical details explained by Vicente Paulo Yu, some structural concerns can be raised with regards to S&D. For example, **S&D is a way of deflecting claims for historical reparation or differentiated responsibilities for climate change**. Moreover, S&D is based on the idea that developing countries are in the process of becoming developed, and that they will soon achieve economic maturity and do not need the more favourable conditions any longer: in this sense, national GDP and some 'unclear parameters'[62] are the sole elements that are taken into consideration when it comes to a country's 'graduation', without considering the extent to which growth and wealth are distributed. Finally, S&D is **rooted in the premises of liberalization and 'free' trade, although it recognizes that not all countries shall liberalize at the same time and that some countries need ad hoc support.** Therefore, S&D is not about the distributive outcome of trade, nor about the redressal for past injustices. Similar to the 'starting gate' theory discussed below, S&D is about setting a different level starting point in the quest for competitiveness and comparative advantage, with the hope that the 'free' market will then do its magic.

2.4 Protectionism is a taboo: but protective measures could make a difference

The final aspect to be considered when discussing about the future of trade has to do with the negative connotation that is generally associated with protectionism as the strategic use of trade measures (or other regulatory measures like production standards or health and safety measures) to reduce or zero the import of goods and services into the country. This became evident with the ongoing 'trade war' between the United States and China, where the 'battlefield' is populated by the 'good guys' of trade liberalization and the 'bad guys' who use trade in a selfish and utilitarian way aimed at their own good. The Covid-19 pandemic and the use of 'national security exceptions' to reduce the trade in food and personal protective equipment (PPEs) intensified the polarization between the two 'fields' and provide further

[62] These are the terms used by Daniel Uribe from the South Centre, whom we interviewed on 31 August, 2020.

'ammunitions' to the supporters of unconstrained free trade as the best way of allocating goods and services.

The generalized negativity that characterizes discussions around protectionism and protective measures has a significant impact on the definition of governments' political imagination and advocacy strategies. **Protecting the economy, protecting markets, protecting workers and farmers, for example, are perceived as violations of the dominant mantra of free trade and breaches of the rules of the game**. As such, advocacy and policy proposals must be shaped in the form of 'strategic liberalization', 'selective integration' or 'regional cooperation' rather than in the form of import substitution, autarchy, closure of borders and other forms of control of the national frontiers. However, **this was not always the case and, as we mentioned already in a couple of occasions**,[63] protective measures such as the Corn Laws in the United Kingdom or US first revenue law of 1789, that was used by the George Washington administration to impose an average taxation level of 8.5 percent on all imported goods and that was used as a way of protecting the consolidation of national industries that were still at an infant stage.

For sure, we are not claiming that isolationism and autarchy shall be promoted as the most desirable approaches to the world economy. Especially if they are pursued by the most advanced economies with the intention of leveraging their economic weight and bargaining power vis-à-vis other countries and third country businesses. Moreover, for a small economy, autarchy doesn't work. This has to do with the size of the market, the size of population, the reduction of costs that derive from reaching economies of scale and – importantly – from the availability or capacity of obtaining raw materials and/or intermediate goods to be then transformed into final products. These elements dictate that small economies, that are mostly in Africa, Latin America and the small islands, simply cannot rely on pure autarchy and import substitution policies. For **these economies, integration is a key mechanism, but this shall be obtained through forms of strategic integration and selective liberalization**, that is by building the conditions to strengthen national industries and collaborate horizontally with other countries on the basis of reciprocal needs rather than competing on the basis of costs of production, productivity and competitiveness. Staying away from full liberalization and full autarchy, countries should thus think about **prioritizing regional trade and investment dynamics, rather than global ones,** as an opportunity to create strong enough industries, economies and consolidate principles of sustainability, cooperation and satisfaction of human and planetary needs.

Although this seems utopian, there are multilateral trade experiences where countries decided not to adopt a protectionist attitude but at the same time to engage in the interchange of goods and services according to their needs and capabilities, rather than by fully liberalizing. This is the case of the **Alianza Bolivariana para los Pueblos de Nuestra America (ALBA)** established in 2004 and based on the principles of solidarity and, for what possible, in the interchange of goods and services that are the most beneficial for the social and economic necessities of the countries involved.[64] Differently from bilateral and

[63] See Ha-Joon Chan, Kicking Away the Ladder, supra n 53
[64] Acuerdo Entre Venezuela y Cuba Para la Aplicacion de Alba, La Habana, Cuba, 14 December 2004.

multilateral agreements that only operate on tariff and non-tariff obstacles to trade, ALBA is based on **policy dialogue and convergence between countries**, with jointly made decisions that would complement national production in the name of rationality, existing comparative advantages existing across the countries, effective use of resources, minimum price for crucial resources (like oil), increase in employment, joint access to markets, exchange of technological knowhow, and other forms of solidarity in trade and investments. Of course, the example of ALBA shall be analysed more in details and unpacked in its implementation and dependence on the production of fossil fuel by Venezuela, but it represents an example that trade integration, cooperation and reciprocal support between countries are possible even in the XXI century.

A smaller, but recent and equally interesting form of cooperation between countries is represented by the agreement on the **Living Income Differential for cocoa producers concluded between Ivory Coast and Ghana**. In that case, the state-led imposition of a mandatory extra-price for the ton of cocoa vis-à-vis the international market is used by the countries, where 65% of the world cocoa is produced, not to produce autarchy or shut down of trade, but to form a protective cooperation that shall increase the overall amount of value that remains in the countries and – at least in theory – with the producers.[65] The agreement, the short and medium-term effects of which will have to be assessed, analysed and unpacked in the coming years, brought back into the picture the role of states' authorities in defining the terms of trade and in forcing a different distribution of value and resources than the one that full liberalization, global competitiveness and the international price of commodities would determine.

Of course, the agreement does not mean that the two countries will abandon their role as exporters of raw material, nor that climate and social justice will be achieved. For example, without adequate control, higher prices for farmers may go in directions that are not desirable nor what the Fair Trade movement advocates for. Moreover, higher prices linked to the adoption of sustainable practices could improve on-farm practices but they could also lead to a shift from diversified production into more production of cash crops and – in the worst case scenario – to more deforestation than what the two countries have recently experienced, mainly driven by farmers' expectation of higher return. Moreover, there is no element to support that the introduction of the LID linked to the production and export of cocoa will be able to support the most marginalized smallholders rather than the low hanging fruits.

This is not to critique the LID. On the contrary, is to **welcome the policy as a public intervention in the redefinition of market dynamics for the best interest of farmers**. However, more income for farmers may not be the solution to systemic problems. **Without diversification and with higher prices, in fact, deforestation and more monoculture seem to be likelihood scenarios**. What is clear, however, is that Ghana and Ivory Coast's interventions openly challenge the mantra 'free' trade mantra that in the last forty years have undermined

[65] Baudelaire Mieu (2020) Ghana and Côte d'Ivoire taste success in raising price of cocoa, The Africa Report, 8 September, available at: https://www.theafricareport.com/40945/ghana-and-cote-divoire-taste-success-in-raising-price-of-cocoa/ [last accessed 3 November 2020]. This decision followed a few months after Fairtrade's decision to increase its minimum price per t/cocoa by 20% (from 2000 – to 2400US$).

the political possibility for cooperation and solidarity through trade. More cases like ALBA and the Ivory Coast-Ghana agreement shall be studied and reflected upon. To this extent, history provides us with some interesting examples of strategic integration and protective measures that put people and needs, and not global competitiveness, at the centre.

3. Trade and investment justice: which approach do we choose?

Looking at the existing literature on global justice, trade and investments, it appears unclear how to locate trade on the spectrum between something ideal and something non-ideal for justice: **is there space for international trade and investments in the pursue of global justice? shall trade and investment be governed by substantive principles about the distribution of gains? Or by procedural principles that prescribe how traders ought to interact? Or should trade and investments justice be about the relation with a range of topics in the domain of global justice (human rights, justification of states, climate change)?** Establishing one idea of trade and investment justice as superior to the others is key to making progress on these issues.[66] By presenting some of the main options and reflecting on them, we aim to indicate some possible directions and trigger this necessary debate within the Fair Trade movement.

To identify the pathways to trade and investment justice, it is not enough to set goals and aspirations. We need to start our journey by reflecting on the notion of justice (or the multiple notions of justice) and the way in which we can use justice to think about the current and future of the trade and investment regime. This approach follows Amartya Sen's invitation not to be architects of 'castles of justice' in the sky but to start right at the foundations. We wanted to **share, explore, and debate our perspectives on how to repair the edifices in which we currently live**. "Justice arises not from a blueprint, but from a process of open public reasoning in which as many potential policies, strategies or institutions are considered as possible."[67] In light of this, we engaged with a multiplicity of actors and **asked 'what is trade and investment justice', 'what are the present injustices' and how would a 'just trade and investment regime would require for Fairtrade and the Fair Trade movement'?** As expected, we received very different answers and reflections and we grouped them into four categories that reflect a number of theories of justice that have been discussed along the centuries: **a) justice as individual freedom; b) procedural justice; c) distributive justice; d) reparatory and climate justice**.[68] Inevitably, the way in which we assess the trade and investment regime depends on the theory of justice that we embrace and adopt.

Generally speaking, we could say that **justice is about the distribution of wealth and resources including the use of natural resources, jobs, waste, pollution, etc**. As John Stuart Mills taught, such distribution is not a matter of coincidence or luck, but "a matter of human institution only. The things once there, mankind, individually or collectively, can do with them as they like. They can place them at the disposal of whomsoever they please, on whatever

[66] Mathias Risse and Gabriel Wollner, 'Three Images of Trade: On the Place of Trade in a Theory of Global Justice', 1(2) *Moral Philosophy and Politics*, 2013, 201–225.
[67] Amartya Sen, *The Idea of Justice*, Cambridge: Harvard University Press, 2009.
[68] We also received comments that align with a feminist conception of justice, where the subordination of women and non-cisgender, along with the obliteration of reproductive labor (of women, care takers and nature) is central to the reproduction of an unjust society. We recognize the lack of sufficient knowledge and expertise on this point and raise the need for a critical feminist engagement with the approach to women and gender that is adopted in the International Fair Trade Charter and the actions of the Fair Trade movement. Could you say to say a bit more on that, because of the role of gender in the new Fairtrade Strategy

terms. The distribution of wealth, therefore, depends on the laws and customs of society."[69] As mentioned below, **international trade rules are based on the agreement between states that, with limited exceptions, market dynamics are the most appropriate way to distribute resources**, for example because they increase production where the cost of labour or the cost of complying with environmental practices are lower. However, other forms of allocating scarce resources can be thought of, each one with different impacts on people and the planet. For this reason, we wanted to begin our reflection from the official position of the Fair Trade movement when it comes to trade and justice, and then reflect about the other possible interpretations of the notion of trade and investments justice that could be used when dealing with concrete issues arising from the trade and investment world and in defining a long-term strategy about them.

To better define the Fair Trade movement's position vis-à-vis trade, investment and justice we conducted ad hoc interviews with members of the movement, including representatives of European organizations and farmers in West Africa, Latin America and the Philippines. We heard from them and posed similar questions to those that we asked to other stakeholders. In addition, we analysed at the **2018 International Charter Fair Trade movement and the 2009 Charter of Fair Trade Principles** as generally accepted terms of reference for the principles, missions and objectives of the different actors that compose an extremely varied network. In particular, we looked at all the available translations of the Charter and we noticed two things that inform our conversation below.

Firstly, we realized that **the goal to engage with trade and transform it in order to achieve justice is clearly stated on the front page** of the English, French (*transformer le commerce afin d'établir justice)*, Spanish (*transformar el comercio con el fin de alcanzar la justiciar*), Portuguese (*transformar o comércio a fim de alcançar justiça*), Dutch (*om handel te veranderen met het oog op rechtvaardigheid*) and Polish (*dąży do osiągnięcia sprawiedliwości*).[70] The considerations that we make in the section below are thus mainly based on the English version of the Charter and all the other versions of the Charter that use a word with a meaning close to that of justice.

Secondly, we noticed that all the International Charters recognize that **the transformation of trade shall not only lead to achieve justice (or Fairness), but shall also lead**

[69] John Stuart Mills, The Principles of Political Economy, Book II: distribution, in Nicholas Capaldi and Gordon Lloyd (eds), *The Two Narratives of Political Economy*, Hoboken, New Jersey: Scrivener Publishing, 2011

[70] The German version of the Charter uses the English word Fairness rather than Gerechtigkeit or any other synonym, a linguistic choice that would suggest the need for some internal reflection and consideration on the difference between justice and fairness and the tautological search for fairness in trade by a movement that has Fair Trade in its name. According to a representative of Fairtrade Germany, the "Main reason for using the word "fairness" and not "justice" are rooted 1) in historic communication of TransFair and GEPA the Fair Trade Company, the main players doing the translation" that decided to use "fair" as the main terminology. 2) fair as an anglicism is since decades part of German vocabulary, also because of TransFair campaigning since 1992. In that context, "fair" is perceived as "just."

to equity and sustainability for people and planet.[71] As we discuss below (and in the final considerations), we believe that the slogan 'justice, equity and sustainability for people and planet' clearly identifies a vision based on the respect for the planetary boundaries and the upholding of social needs and rights (like Kate Raworth's doughnut economics),[72] but challenges the unequitable and unjust distribution of opportunities, resources, values and risks. In the sections that follow we thus provide more elements on what the vision of trade justice, equity and sustainability contained in the 2018 International Fair Trade Charter would imply with regards to international trade and investments, and then unpack the four different theories of justice (freedom, procedural, distributive, restorative and climatic) to provide more elements and opportunities of reflection about our personal and organizational approach to trade, investments, justice, equity and sustainability. The 2009 Fair Trade Principles and the 2021-2025 Global Fairtrade Strategy are also useful allies in defining the scope of Fairtrade's and the Fair Trade movement's approach.

3.1 The Fair Trade movement's mission to transform trade for justice, equity and sustainability

There is no doubt that the Fair Trade movement has always had the notion of justice at its core. Social justice had a role in motivating two US-based organizations, Ten Thousand Villages organization (formerly Self Help Crafts) and SERVV, when they began buying needlework from Puerto Rico in 1946 or trading "with poor communities in the South in the late 1940s." On the other side of the Atlantic, Oxfam UK started to sell crafts made by Chinese refugees in Oxfam shops in the 1950s and in the Dutch organisations began to sell cane sugar with the message "by buying cane sugar you give people in poor countries a place in the sun of prosperity" in the 1960s. Throughout the years, fairness and justice for the small and marginalized producers, and the idea to bring them into the system of commercial trade, have mobilized thousands of people across the globe and led to the establishment of the complex network of Fair Trade actors that is the Fair Trade movement.[73]

The link between the movement and the achievement of a just world is still pivotal, and assumed a more holistic conception than in the initial days of the Fair Trade. The 2018 International Fair Trade Charter, for example, aims at orienting the Global Fair Trade movement towards a transformation of trade "in order to achieve centre the justice, equity and sustainability for people and planet." [74] To reinforce the statement, the document recognizes that "The Fair Trade movement is made up of individuals, organizations and

---

[71] The Spanish version of the charter talks about '*igualdad'* (equality) rather than *'equidad'* (equity), while the German version talks about '*Gleichberechtigung und Nachhaltigkeit*' (equality of rights).
[72] Kate Raworth, *Doughnut Economics*, supra n 54.
[73] World Fair Trade Organization, History of Fair Trade. 60 Years of Fair Trade: a Brief History of the Fair Trade movement, available at: https://wfto.com/about-us/history-wfto/history-fair-trade [last accessed 19 November 2020]
[74] Fair Trade movement, The 2018 Fair Trade Charter.

networks that share a common vision of a world in which justice, equity and sustainable development are at the heart of trade structures and practices so that everyone, through their work, can maintain a decent and dignified livelihood and develop their full human potential."[75] For the Fair Trade movement, "Justice, equity and sustainable development should be at the heart of trade structures."[76]

In the Charter's approach to trade and justice, the former is not only a tool to achieve the latter. On the contrary, **trade can impede justice**. Thus, the negative socio-environmental externalities and detrimental impacts of the dominant trade regime are not only acknowledged, but challenged by means of concrete practices like minimum price and FT premium, but also with the aspiration to establish and support democratic and participatory processes of international and national rules making to truly benefit people in need and the planet. "By demonstrating that greater justice in world trade is possible," the International Charter states, "Fair Trade also seeks to involve citizens in rewriting the rules of trade with the needs of small producers, workers and consumers at their heart."[77]

The attention to a greater and transformative notion of trade justice is also evident from Principle 9 of the Fair Trade Principles, 'Promoting Fair Trade', which clearly states that one of the main objectives of the movement is to "**Raise awareness for the need of greater justice in world trade by trading fairly with poor communities**." In this sense, the focus shall not only be on the exchange of goods and services, making sure that it takes place in a way that respects people (by guaranteeing socially acceptable wages – Principle 4 – or by ensuring no child labour – principle 5 – and good working conditions – principle 7) and maximises the use of sustainable energy and raw materials while minimising waste and pollution (Principle 10).

The dissatisfaction with trade injustices and the way in which they were reproducing social and environmental violence at a global scale has played a central role in the Fair Trade movement since its inception. Trading fairly was not just about the construction of an alternative trade system, but also a way of denouncing the impacts and implications of the mainstream forms of global trade that had been built across decades of liberalization and global competition between very unequal economies. For Laura Raynolds, the Fair Trade movement was created to challenge the traditional neoliberal view of commercial conventions through a "reconsideration of the meaning of "fairness" in commodity prices, market exchanges, and North-South relations." [78] Trade, to use the words of the International Fair Trade Charter, shall not be "a force just for economic growth" but shall be transformed into a force "for social justice and sustainability"[79]

[75] ibid
[76] Ibid.
[77] Ibid.
[78] Laura Raynolds, Consumer/Producer Links in Fair Trade Coffee Networks, Sociologia Ruralis, 42 (4), 2002, p. 410.
[79] The International Fair Trade Charter, see supra n 74.

It could thus be said that the mission and vision of the Fair Trade movement are rooted in a redistributive and concerned conception of neoliberal trade as the reproduction of historical inequalities. In this context, producers' needs and their self-development (towards prosperity and autonomy) appear to be at the centre, with partnership, direct contact, awareness-raising and equal exchange being the tools. International trade and mainstream markets' dynamics are thus perceived as part of the problem, with the movement calling for a regulatory and redistributive intervention of the public authority.

Moreover, the combination between justice, equity and sustainability for people and planet builds an idea of the future that implies a challenge to the unequal relationships of power and distribution of value that are generated by the international trade regime while at the same time putting the planetary boundaries and the limits of growth at the centre. The focus on the unevenness produced by the ongoing form of globalization is evident from the Charter, where it is stated that:

> *"The models of trade promoted by global institutions and large corporations have not delivered on their promise to eliminate poverty and have caused unprecedented levels of inequality.* ***Markets are typically dominated by a handful of international firms who have the power to set the terms of trade for their suppliers, forcing prices down, often to levels below the full costs of production.*** *This leaves small producers and workers struggling to earn a living wage and vulnerable to exploitation."*[80]

When we look at the reality on the ground, however, we realize that there are discrepancies in the direction taken by different streams of the Fair Trade movement vis-à-vis the neoliberal system of trade and social justice. From the interviews that we realized and the analysis of the documents available, it appears clear that different visions of international trade are currently brought forward and different theories of change that tend to play within, without or against the global system of international trade. For some, "standards are complex regulations and guidance to be able to comply with/implement higher-level rules (UN/ILO conventions/human rights requirements, technical requirements to ensure "fairness" along supply chains, etc.) and to make compliance with them controllable/verifiable."[81] Thus, the point is not trade nor standards, but the volume of Fairtrade, as mentioned by a 2012 CEval study according to which there is "No impact with sales under Fairtrade conditions below 30% of total sales".[82] Because the absence of mandatory EU and international regulations on what is fair, "30% of sales can only be achieved – if at all – via complex standards,"[83] standards and labelling are instruments to operate within the existing patterns of trade and improve local

[80] Ibid, p. 4.
[81] Exchange with Fairtrade Germany.
[82] Center for Evaluation, *Assessing the Impact of Fairtrade on Poverty Reduction through Rural Development, Final Report*, Fairtrade Impact Study Commissioned by TransFair Germany and Max Havelaar Foundation Switzerland, 2021, available See https://www.fairtrade-deutschland.de/fileadmin/DE/mediathek/pdf/fairtrade_impact_study_evaluation_report_en.pdf
[83] Ibid.

social conditions and environmental practices. Thus, Fairtrade label is an indicator in a context characterized by governmental/regulation failure to enforce fairness and sustainability.[84]

For other actors of the Fair Trade movement, the picture is different: the visions that are more embedded in the global market for goods, the original concept of self-development has been replaced with a guarantee against market exploitation (from satisfying needs and achieving prosperity to guaranteeing living conditions). For them, standards are used to define the contour of the mission.[85] The demand of the consumer has become more and more important, almost to the point of being the main need to satisfy.[86] More importantly, some of the voices within the movement lament that the direct critique against the neoliberal market and the inherent inequality that it generates – as unequivocally stated in the 2018 Charter - has been substituted in some cases by the use of market, ethical standards setting and the certification bodies to improve the quality of the market, i.e. to achieve justice, equity and sustainability through the mainstream market rather than, leveraging transparency, fairness of procedures and uniformity.

For the members who support this critical approach, such as Rudi Dalvai, the Fair Trade movement has undergone a "metamorphosis": it is not only the approach to international trade and investments that has changed, but also the notion of trade justice, equity and sustainability that is applied.[87] According to Dalvai: "The new form of fair trade is often oriented to develop and promote a particular certification label and to satisfy the "ethical demand" of the consumer, thus offering the kind of guarantee against the exploitation requested by the consumer. It's a new concept that is introduced to the market, but it is certainly different from the concept expressed by Fair Trade pioneers which is centered on the process of development and partnership with small and marginalized producers, not simply that they are free from exploitation."[88] While certain members may be adopting an approach to international trade that is playing by its rules and finding spaces of justice within it to transform it from within, other members have expressed their dissatisfaction with the way in which global value chains are structured.

According to these more critical voices, like those of, Anne Maire Yao and Franck Koman, representative from the West African Fairtrade-certified cocoa producers[89] and the Fairtrade-certified banana production in the Philippines, it is clear that **international markets are defining their lives and not the other way round**. Global competitiveness forces them into a condition of uncertainty, insecurity, and dependency on a market where the allocation of power is clearly imbalanced and that they have no power to define and shape. The power

[84] Ibid.
[85] Joe Osman, *Traidcraft. Inspiring a Fair Trade Revolution*, Oxford: Lion Hudson IP Limited.
[86] Rudi Dalvai, The Metamorphosis of Fair Trade, Fair World Project, 2012
[87] Ibid.
[88] Ibid.
[89] We interviewed Anne Maire Yao (responsible for the cacao programme of Fairtrade Africa), Issaka Seydou Frank, Franck Koman (Coordinator of RICE, the Réseau Ivoirien du Commerce Equitable – Ivory Coast Fair Trade network).

imbalance and the absence of feasible alternatives, like a regional market for their products, the guarantee of a market that rewards all the efforts that they make to obtain the certification, the possibility to diversify into food production and become self-sufficient, or the existence of the infrastructures needed to add value to the products rather than exporting the raw material, are conditions that reproduce their vulnerability and need a reconsideration of the engagement with global value chains that go beyond minimum prices, premiums and technical support.

This diversity of opinions and strategies that characterizes the Fair Trade movement with regards to the opportunities and limits of the global free market is even wider if we consider voices from outside the Fair Trade movement like those of La Via Campesina, SEATINI, and the representatives of small and medium enterprises in Argentina and Chile. Such **diversity is reflected in the theory of change that we implement and the way in which we engage – or not – with the legal, political and ideological pillars that underpin the dynamics of international trade and investments and with the impact that they have on the ground**. One of the main purpose of this document is, therefore, to provide some theoretical and practical element to assess where the different members stand vi-a-vis the message contained in the 2018 Fair Trade Charter and the aim of challenging the social injustice that has been generated by the increase in trade and investment liberalization.

The second purpose is to **trigger a systemic reflection on environmental sustainability** as one of the goals that the Fair Trade Charter aims at obtaining. As a matter of fact, the Charter's call to transform trade for justice and equity also has an environmental and climatic connotation. This is evident from the reference to 'sustainability' in the subtitle, but also from the specific section on 'Nurturing Biodiversity and the Environment'. According to the Charter:

> "The protection of the environment and the long-term viability of natural resources and biodiversity are fundamental pillars of Fair Trade. Good environmental practice including protection of soil and water resources and reduction of energy consumption, greenhouse gas emissions and waste is the responsibility of all actors in the chain of production, distribution and consumption. The entire value chain should be managed to ensure that the real costs of good environmental practice are reflected in prices and terms of trade. Small-scale farmers and artisans are among the most vulnerable to the effects of climate change and it is important they are supported in developing and investing in adaptation and mitigation strategies."

Despite the reference, the **environmental component of the Charter appears less developed and structured than the social one**, mainly because the environmental component "only lately got more attention of Fair Trade actors. For too long the Fair Trade movement defined itself as a social movement only."[90] However, four elements stand out about the movement's position and approach vis-à-vis the environmental impacts of global value chains:

[90] Exchange with Fairtrade Germany.

a) **the adoption of an approach is based on the idea of protecting nature and biodiversity**, on 'nurturing' small farms so that they can grow,[91] rather than supporting and fostering practices that regenerate them (such as agroecology) ; b) the **recognition that all actors of the value chain have a role to play in the reduction of greenhouse gas emissions**, without specifically addressing the way in which different actors contribute differently – both within each chain both around the world, with consumers in North America, Australia and some European countries being responsible of a much higher per capita ecological footprint than consumers in other parts of the world;[92] c) that, differently from the uneven contribution to climate change, **the Charter recognizes the uneven impact of the intensification of climatic events and that farmers are among the most exposed and at risk**; d) that the **Charter does not take a clear position on the link between trade and climate change**, therefore not engaging with the compatibility or incompatibility of current levels of international trade – or of an intensification of international trade in goods and services (including from the Fair Trade movement) and the Intergovernmental Panel on Climate Change's (IPCC) recommendations of keeping the increase in temperature below 1.5 degrees Celsius above pre-industrial level.[93]

The limited attention that the Charter pays to the link between trade and climate change was explained by a member of Fairtrade Germany with the fact that the charter was published in 2018, one year before the "breakthrough of climate change as defining megatrend for almost everything in 2019."[94] Thus, **the approach of the Charter is considered to be insufficient and individual members of the Fair Trade movement are engaging in debates about fair transport** (social: working conditions; environmental: carbon emissions). For example, Fairtrade Germany has thus developed a background paper on transport of Fairtrade goods, including its climate change impact. **The recent wave of climate awareness is remarkable and shall be fully supported.** However, we could not notice the climate inertia behind a movement that has been working for more than fifty years with some of the people who are most affected by climate change and in a countries where the climate emergency has been already causing significant harm.

In the rest of this document, we present different theories of justice applied to trade and investments. We aim at unpacking the legal, ideological and historical complexity of the contemporary system of trade with the aim to open spaces of reflection on the diversity of visions that exist within the movement of what justice, equity and sustainability for people and planet mean . If justice, equity and sustainability are at the core of the transformative vision of Fair Trade and if the neoliberal trade and investment regime is incapable of guaranteeing them – as the Charter clearly states –a clear idea of what we consider socio-environmental justice becomes essential to think about the steps that we want to take to

---

[91] Ibid.

[92] Source: Global Footprint Network, available at: http://data.footprintnetwork.org/#/? [last accessed 23 October 2020].

[93] IPCC, Special Report. Global Warming at 1.5°, available at: https://www.ipcc.ch/sr15/ [last accessed 23 October 2020].

[94] Exchange with Fairtrade Germany.

adapt, change or subvert the contemporary system of trade. Does the Fair Trade movement believe in freedom of enterprise and the efficient allocation of resources? Does it think that justice is about clear, universal and fair rules of trade that internalize social and environmental costs? Do the members of the movement believe that trade rules should be subordinated to the solution of the inequality trap and global unevenness rather than just moving goods and services? If the movement agrees with the climate emergency is compromising the survival of all living beings on the planet and that any future action should be informed by the political and ethical principles of climate justice as historically and socially defined, how is it going to transform its premises, operations and objectives?

3.2 Justice as individual freedom to exchange

Libertarians look at the relationship between trade, investment and justice from the point of view that justice is synonymous with freedom and liberty. Thus, they conclude that **justice is obtained when a system based on free exchange, free circulation of capital and free investments is in place**. In this sense, the market will be just not as a means to some pattern, but insofar as the exchanges permitted in the market satisfy the conditions of just acquisition and exchange. For libertarians, just outcomes are those arrived at by the separate just actions of individuals that enter into trade as 'consenting adults', without any relevance for the distributive outcome of such transaction. Therefore, **freeing of trade and capital flows leads to the multiplication of market transactions that can lead to the efficient allocation of the world's scarce resources, generating greater output, more wellbeing and higher levels of consumption that would not be possible under protectionism**. In this sense, trade and markets are seeing as 'private' spaces made of a multitude of individual transactions that generates economic growth. The state is non-existent or, if so, is seen as an encumberment that manipulates what would otherwise be an efficient process. History is also invisible, as contemporary patterns of production, trade routes and purchasing power (i.e. income and wealth to be spent) were not defined by what happened before.

In the contemporary literature on liberalized trade, **the idea of just trade as free trade emerges with reference to the heavily protected markets for agricultural products in the United States and the European Union**, with dumping measures (such as the Common Agricultural Policy), manipulating demand and offer and – therefore – not allowing for free enterprise and free exchanges. Similar to the 'procedural justice' approach described below, the 'libertarian' approach to trade and investment justice is often used to promote a vision of market as a private space that is inevitably distorted by the intervention and presence of public actors.

Rather than calling for better or different regulations, the libertarian approach to international market is embedded in the notions that **unregulated and non-distorted market transaction lead to the most efficient allocation of resources and that economic incentives**, rather than regulations and sanctions, can steer market actors to redefine production, distribution and consumption. In this optic, rather than being pushed by the top-down intervention of the authority, a change in the global and local dynamics of trade would be best achieved by a transformation in consumers' sensitivity and demand, which would have a trickle-down effect all along the production network, reward sustainable and fair producers, and drive out of market those who are not responding to the requests and needs of the buyer. Within this context, all transactions are structured around the premises of demand and offer, efficient allocation, competitiveness and the entrepreneurial freedom to entering – or not – into a transaction. Like a tennis competition where the player at the top of the league and the bottom play with the same balls, the same size of the court, the same rules and have access to the same complaint mechanism: the winner is the most competitive and efficient player, and who loses will have to improve, change sport or move elsewhere.

3.3 Justice as fair, uniform and transparent procedure

A second approach to justice is that of **'procedural justice', which is based on the idea that it is essential to guarantee the fairness of the processes in order to resolve disputes and allocate resources**. Although the notion of procedural justice is mainly used in the legal framework, it can also be applied to nonlegal contexts in which some process is employed to resolve conflict or divide benefits or burdens. This is visible, for example, in the areas of Human Rights and Environmental Due Diligence that are discussed in the final part of this report. Broadly speaking, procedural justice concerns the fairness and the transparency of the processes by which decisions are made. The underlying notion is that the application of fair, uniform and transparent rules leads to equitable outcomes.

In the context of trade and investment regime, the notion of procedural justice can be encountered in the **idea of 'rules-based trade'** that is currently championed by several countries, including the European Union, and organizations like the International Chamber of Commerce (ICC). Such position is often associated with the support of multilateral trade and the centrality of the World Trade Organization as a space for negotiation, governance and dispute resolution. Talking about 'rules-based trade' means, to use the words of ICC Secretary General John W.H. Denton, to **start from the assumption that i**nternational trade has fuelled decades of economic growth and development while recognizing that the "current rulebook is ill-designed to cope with the disruptions of our digitalised and complex world, or to share the benefits of globalisation in an more equitable way."[95]

Four areas of intervention are generally associated with this approach: "Strengthening the WTO governance and accountability; Reviewing and updating the existing WTO rulebook;

[95] International Chamber of Commerce, Reforming the Multilateral Rules-Based Trading System, ICC, 19 September 2020, available at: https://www.wita.org/atp-research/reforming-multilateral-trading-system/ [last accessed 19 October 2020].

Accelerating new rule making; Establishing robust and trusted dispute settlement mechanisms; Promoting regime coherence."[96] The common thread is represented by the understanding that the multiplication of bilateral relations has created uneven trading conditions and that the socio-environmental challenges of the future cannot be left in the hands of private actors and the principles of efficient allocation of resources. Differently from the most libertarian approach discussed above, procedural justice requires therefore a top-down intervention of the public authority that internalizes (some or all) the negative externalities that are otherwise generated by the market and creates a "level playing field" where all parties can compete and cooperate so that their 'steered' economic actions can lead to the achievement of a greater good.

Along with the idea of rules-based and homogenous interactions, **the notion of "Level playing field for all countries" assumes a central role in the construction of this approach to trade**. Here, building a 'level playing field' means using public interventions and regulations to build a marketplace with no distortions (like protectionism) or subsidies, where "a clear line between 'public bodies' and 'private bodies' exist and where a set of suitable sanctions is in place against those who fail to comply with their international trade duties. Differently from the 'distributive' or 'restorative and climate justice' approaches discussed below (2.5), procedural justice is not interested in the outcome of the transaction that takes place within the market, but in the construction of a market place where structural diversities are addressed before the transaction takes place. In this sense, it does not matter who wins and who loses, but that rules are put in place that considers the difference between the players and avoid unfair practices like social and environmental dumping.

If we use again the metaphor of the tennis match, **this time the player at the top of the league and the bottom play with the same balls, the same size of the court, the same rules and have access to the same complaint mechanism, but measures are introduced that may improve the condition of the weaker player and/or make sure that no player is using doping**. Among these measures, we can think of the 'Special and differential treatment' for developing countries that is guaranteed by the WTO treaties and treaties like the Agreement on Agriculture when it comes to receiving more time to liberalize markets, a lower percentage of tariffs' reduction or exceptions to specific sectors (See section 4.4 below). We can also think of borders adjustments and carbon taxes (see Section 4.5 below) that are unilaterally introduced to increase the cost of importing goods that are obtained in countries with lower environmental, social or food safety standards (often developing countries, i.e. the beneficiary of special and differential treatments). Another kind of measures that aims at creating a level playing field is the introduction of unilateral trade measures such as the mandatory labelling for imported timber required by the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation: in this case, the use of public authority makes it more expensive to produce

[96] Ibid.

sustainably (due to the cost of the certification) but at the same time guarantees that non-labelled products will not enter the EU market and unfairly compete.

3.4 Trade and investment justice as distributive justice

Both theories that we analysed so far (libertarian and procedural) are relatively silent on the question of how the gains from trade ought to be distributed both within and between countries. Because both rely on the efficient allocation of the market or focus exclusively on the construction of a fair and universal level playing field where actors can freely engage, they do not directly deal with the way in which the encounter between commercial actors produces and distributes benefits and penalties. For all theories, some form of distribution will take place: jobs will be gained and lost, economic value will be generated by combining labour, land and capital (factors of production) and exchanged,[97] biodiversity will be regenerated or destroyed, but this is not up to the pubic authority to define as long as markets are properly functioning.

If we are truly interested in the 'winners' and 'losers' of the trade and investment regime, and if we agree that the global market has intensified the inequality and the power imbalance (as mentioned in the 2018 Fair Trade Charter), we may thus want to explore the concept of "distributive justice" as interested more in the outcome rather than the procedure. Distributive principles vary in numerous dimensions: what is considered relevant to distributive justice (income, wealth, opportunities, jobs, welfare, utility, etc.); the nature of the recipients of the distribution (individual persons, groups of persons, reference classes, etc.); what basis the distribution should be made (equality, maximization, according to individual characteristics, according to free transactions, etc.). Although we cannot deal with all these aspects, we present here below three notions that may be useful to further reflect on the desirability of distributive justice and how public authority could be used to subordinate international trade and investments to this goal.

[97] There is no one theory of value and value generation. For the sake of the present document, it is important to think that economic value (as expressed in monetary terms) is a conventional representation of the combination between different factors of production (labour, land and capital). A crucial component of the capitalist system is that the amount of money that is paid for the use of the factors of production is lower than the amount of money that is obtained from the market when the same good or service are sold (exchange value). In this way, capital can expand. Thus, labour will never be rewarded for what it actually provides as much as other factors of production will be paid less than the contribution that they bring to the productive process. One way of achieving this goal is by not paying for negative externalities (such as environmental contamination) or not paying for the reproductive labour and care labour that are essential to the survival of workers. By not paying for elements that contribute to the productive process, capital can benefit from the gap and appropriate the value differential. The call for a 'true cost' assessment of goods and services aims at closing this gap. However, the fact that a true cost is calculated does not mean that capital will exploit a differential between what is paid and what is obtained from the market. A non-capitalist way of looking at value does not consider the monetary exchange but the utility that is generated by goods and services. This is called 'use value' and is independent on the price tag.

The most widely discussed theory of distributive justice since the XX century has been that proposed by John Rawls in *A Theory of Justice*,[98] and *Political Liberalism*.[99] For Rawls, there are two principles of justice that apply within the territorial context of the state:

> 1. Each person has an **equal claim to a fully adequate scheme of equal basic rights and liberties**, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
>
> 2. Social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and (b), they are to be to the greatest benefit of the least advantaged members of society.

According to Rawls, who coined the idea of the 'veil of ignorance', social injustice can be addressed only if the rules are defined by people who have enough information to know the consequences of their possible decisions but would not know, or would not take into account, in which segment of the society they operate. By not knowing one's ultimate position in society (i.e. if their economic, social, cultural, racial, gender, etc. positionality), the theory goes, policy makers would create a just system because they would not want to make decisions which benefit a certain group at the expense of another, because the decision-maker could theoretically end up in either group. Although **Rawl's was clear in stressing that his theory would only apply within the national context and did not speak about international or historical injustices that would require an international distributive justice approach**, there is an increasing number of academic articles trying to apply the notion of distributive justice to the context of international trade and investments.[100] A global approach to distributive justice is also called 'cosmopolitanism' and looks at the world population as one community.

One way of adopting the veil of ignorance approach to trade negotiators, negotiators would have to put aside any relevant knowledge about their countries and the utilitarian approach that is often associated with it: **whether they are big or small, rich or poor, in possession of plentiful natural resources or barren, they would conclude agreements that are not based on the possibility of obtaining something more for themselves but on providing a fully adequate scheme of equal basic rights and liberties to all**. Since one may occupy any position in the society once the veil is lifted, the veil of ignorance would force the parties to consider society from the perspective of all members, including the worst-off and best-off members, not only through the lenses of their national champions, the strongest exporters and those who will be benefitting from the liberalization of trade. Any trade agreement grounded in asymmetrical power relationships between, say, small-scale farmers

[98] John Rawls, *A Theory of Justice*, Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1971 [First edition, 1921].
[99] John Rawls, Political Liberalism, New York: Columbia University Press, 1993.
[100] James Christensen, Trade Justice, Oxford: Oxford University Press, 2017; Frank J. Garcia, *Global Justice and International Economic Law: Three Takes*, Cambridge: Cambridge University Press, 2015; Aaron James, *Fairness in Practice: A Social Contract for a Global Economy*, New York: Oxford University Press, 2012; David Miller, 'Fair Trade: What Does it Mean and Why Does it Matter?', 14(3) *Journal of Moral Philosophy* (2017), at 249–269; Andrew Walton, 'The Common Arguments for Fair Trade', 61(3) *Political Studies*, 2013, at 691–706.

and large-scale industrial conventional agriculture, would be quickly exposed as unjust, and thus it could not survive.

However, the veil of ignorance and the negotiation of the rules of the game is only one way of thinking about trade and distributive justice. For Kapstein, for example, the application of the principles of distributive justice to the construction of a durable international economic order would require that developed countries would have to do more to open their markets to products originating in developing countries, while making greater aid transfers to the South aimed at building the conditions for local industrialization and economic empowerment.[101] For Suttle, the application of distributive justice to trade would **justify the use by poor countries of coercive trade measures, such as borders adjustments and tariffs when they promote equality (or at least reduce inequality)**.[102] External Trade Measures (ETM) like the unilateral restrictions to trade we discuss in section 3 below, in such cases, can thus be defended on the grounds that they improve the condition of their disadvantaged users relative to their better-off trading partners, and should not be seen as interference towards the individual realization through trade nor a destabilization of the level playing field.

Whereas the first approach relies on more trade to achieve the goal, the latter considers the possibility of less trade as a proxy towards distributive justice and, more precisely, towards 'strict egalitarianism' as the condition where "every person should have the same level of material goods (including burdens) and services. Because people are morally equal, equality in material goods and services is the best way to give effect to this moral ideal. When following this pattern of distributive justice, a society has good reason to adopt trade policies that will address the reasons for its own deficiencies of social justice, including refraining from adopting trade policies that exacerbate its failures of social justice. We could thus imagine that 'strict egalitarianism' would justify the exercise by each individual state of their sovereign power to regulate borders and guarantee equity and equal rights among all their members (an object that is shared by the International Fair Trade Charter). However, we should question whether this restrictive approach to trade, as much as a utilitarian approach that pursues liberalization for the sake of national interest, does not exacerbate inter-states inequalities. i.e. whether the use of unilateral trade measures to address national inequality – like the 'Buy American Measure - produces or strengthens existing intra-state inequality elsewhere.

Another way of conceiving distributive justice is that of the 'starting gate' principles, according to which all people should have the same wealth at some initial point, after which people are free to use their wealth in whatever way they choose, with the consequence that future outcomes are bound to be unequal. Being focused on the original allocation of resources and not on the subsequent procedure nor on the final outcome, the 'starting gate' approach to distributive justice differs from all the theories that we have presented so far, and

---

[101] Ethan B. Kapstein, Distributive Justice and International Trade, *Ethics & International Affairs*, Volume13, Issue1, 1999, Pages 175-204. The strategic distribution of resources and aid has been at the core of the rebirth of Europe after the II World War, with the Marshall Plan aimed at consolidating the regional economy and avoiding further violence.

[102] Osin Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation*, Cambridge: Cambridge University Press, 2017.

is characterized by a flawed understanding that social, geographical, historical, cultural, etc. conditions do not matter.

Even we all tend to claim that we deserve what we have because we worked hard for it, people are born into more or less nurturing families and social circumstances.[103] People are born into families and neighbourhoods which are more or less encouraging of education and the development of economically advantageous talents. There are a whole range of social influences which have fundamental and unequal effects on children's economic prospects and for which they are in no way responsible—the influences children are exposed to are a matter of their luck in what has been called the 'social lottery'. **When we apply this notion to trade, we would assume that it is enough to provide the same opportunities, to produce, trade and gain from international market, without considering the effective participation to trade, the actual benefits and the production of winners and losers**. As such, and because of the lack of procedural considerations, the 'starting gate' perspective risks to legitimize the reproduction of systemic injustices caused by uneven development rather than promoting a just, equitable and sustainable society.

Whether we follow the veil of ignorance, strict egalitarianism or the 'starting gate' approach to justice, international trade and investments, we will always consider trade not as an end in itself but – when needed - as a proxy to satisfy Manfred Max-Neef's essential human needs[104] (and respect Kate Raworth's social boundary) and help regenerating the planet (strengthening the planetary boundaries). As mentioned in the 2017 Global Justice discussion paper on *Ten alternatives to a corporate trade agenda*: ***"Decent jobs, restoring the environment and tackling climate change, ending poverty, creating a more equal society, respect for rights and freedom from fear, good health, and education that helps everyone reach their potential – all of these things and more matter far more in life than trade***."[105] To this list, we would add considerations about the possibility of imagining a world where prosperous living is obtained even without selling our time in the form of labour and the importance of recognizing and adequately addressing the role of care labour, reproductive labour and informal labour have in upholding the contemporary socio-economic order and the role that they will have in a more just society.[106]

This specific approach to distributive justice as the instrumental use of trade to achieve socio-environmental goals also resonates with some of the conversations we had with members of the Fair Trade movement and with the answers provided to our survey. For one of the participants answered that: "Just trade would bring benefits in terms of wealth distribution, improving quality of life and democratizing the economy." While another participants suggested that "Just trade is that which puts people at the center of its rules and interventions - designed by trade policies that serve the people – and would start from a different premise: not that of comparative advantage that requires the 'free' movement of the factors of production to maximise global wealth, but that of serving the needs of human

[103] Kwame Anthony Appiah, The Myth of Meritocracy, The New York Times, 19 October 2018, available at: https://www.theguardian.com/news/2018/oct/19/the-myth-of-meritocracy-who-really-gets-what-they-deserve [last accessed 22 December 2020].
[104] Max-Neef, Manfred, Antonio Elizalde and Martin Hopenhayn, *Human Scale Development*, The Apex Press, 1991.
[105] Global Justice Now, Ten alternatives to a corporate trade agenda, Global Justice Now, June 2017.
[106] See, e.g. Silvia Federici, *Wages against Housework*, New York: Power of Women Collective and Falling Wall Press, 1975.

and non-human beings inhabiting this planet, supporting life enhancing rather that life-destroying connections between people and resources."

In addition, when we think about free trade agreements through the lenses of cosmopolitanism, we are asked to **consider the way in which existing and new trade rules impact the distribution of resources not only within each country, but also in between countries.** If we move from the bilateral to the multilateral level, a cosmopolitan approach would require to think about the distributive impact of the trade regime not only in terms of economic growth per country, but also in terms of inequality, living conditions, human rights, etc., in each country. **This double level of assessment is particularly important when we consider that outcome of the current neoliberal system, where the inequality between countries is shrinking but the inequality within countries and the depletion of natural resources are increasing**. Thus, even if the total amount of value of goods and services that is produced and traded internationally is distributed more evenly across geographies, a cosmopolitan approach asks us to focus on whether the benefits are allocated within societies in a way that reduces existing inequalities and favours the worse-off.

Because the focus is on intra-state and inter-state outputs, therefore, a cosmopolitan approach tells us that we cannot only look at the distributive impact of international trade and investments rules but **we need to reinforce it with a strong attention to what happens within each country and how the interaction between state and market contributes to achieving social justice and equity**. In brief, a distributive justice approach that aims at bending trade and investment rules to the needs of the most marginalized, subordinated and exploited, requires to be politically active not only to change the rules at the international level, but also at the national level. Along with trade, we shall thus look at fiscal measures, social provisions, national regulations of labour and environmental issues, etc. All in the context of international trade and investment laws that shall favour the use of national laws and regulations to fill the inequality gap and not prevent countries from exercising their regulatory autonomy.

International distributive justice, or cosmopolitanism, can help us disentangling challenging situations like the proposal of a free trade agreement between countries with unequal economic and political conditions. Yet, there is no one theory of distributive justice and there would be no one approach only. Although each agreement, negotiation, policy and vision must be analysed in the context where it is unfolding and deeply anchored to the socio, economic, cultural and historical reality of the parties involved, we can make a gross generalization of what the different options would be.

If we were to follow the veil of ignorance, we would consider **unacceptable any trade agreement that reinforces the subordination and marginalization of some actors within countries and between countries**: if small-scale farmers in a developing country are worse off and large-scale agroindustry is better off, we will have to reject it. However, we shall be accepting the trade agreement if both small-scale farmers and large-scale agroindustry are better off, even if this maintains the existing inequality, for Rawls' theory accepts inequality if it goes in favour of those who are worse off.

If we adopt a 'starting gate' approach, we shall focus on the phase before the negotiation and claim that all parties shall be put in the condition of having equal opportunities to benefit of the trade agreement, which would require therefore investments and support to level the playing field not only of regulation but also of infrastructures, access to market, salaries, etc. Before opening up the market, we should therefore create the conditions for a truly equal level playing field, and then – if needed – liberalize the market and let it do its magic.

Finally, if we adopt a 'strict egalitarian' approach, we would reject any trade deal that does not go in the direction of reducing the social gap between the 'haves' and the 'haves not' in society, first of all by providing marginalized and subordinated people with all their social needs, rights and conditions for prosperity and secondly making sure that the social and economic distance with the rest of society is not increased.

3.5 Trade and investment through the lenses of reparatory and climate justice

With the theory of 'starting gate' we have referred to the importance of guaranteeing equal opportunities to all the parties that are involved in the competitive race for markets and economic growth. In this section, **we want to introduce two complementary theory of justice that starts from a similar understanding of the contemporary world, i.e. that there are historically constructed injustices that have to be redressed before we can fully engage in the construction of the future, but also focus on the justice of the outcome**. For lack of better words, we have decided to call them 'reparatory justice' and 'climate justice', although we realize that neither term has been consistently used to talk about international trade and investments. Although different, the two terms are characterized by a historical approach to justice (the past matters for the present, and the present is linked to the future) and by the object of building a society that is not only equitable, but is also respecting both planetary and social boundaries.[107]

3.5.a Reparatory Justice

The notion of reparatory justice has been borrowed from struggles based on the premise that **future social worlds shall produce and be produced by reparations claims for historical injustices with a focus on slavery, colonialism, segregation, gender and racial discrimination**. This approach looks at present inequalities (social, cultural, economic) and claims that current benefits must be understood as the outcome of a historical process and therefore cannot be de-contextualized. Britain's benefits from industrialization, that are clearly visible today and that were crucial to Ricardo's theory of comparative advantage, cannot be seen separately from the role of imperialism, colonialism and the exploitation of resources and labour in the Global South. If global market was like a Monopoly, we must consider that some countries in the North (and private actors) have been playing alone (or exploiting others) for centuries, while countries in the South were invited to join only at a later stage, once everyone else had already built their most luxurious hotels.

Colonial injustices are part of these historical injustices. They cover a large historical time span, ranging roughly from the early sixteenth century to the latter half of the twentieth century, and were perpetrated in many ways, including in ways that directly affect today global economy. For example, colonial history includes land-taking, political domination,

[107] See Kate Raworth, *Doughnut Economics*, supra n 54.

cultural imposition, large-scale killings, support to genocides, and various forms of economic exploitation of natural resources and people. During the colonial times, the colonized were deprived of rights or entitlements, enslaved and killed, structurally targeted by unjust exclusions from the benefits of development and growth, victims of rule-based systemic or structural wrongs and functional to the continuous accumulation of resources by the local elite and the colonial power. And the list of historical injustices that could continue.[108] In macro-economic terms, reparatory justice states that the global distribution of wealth that originated in those centuries underpins much of the contemporary intra-state and inter-state inequality. In legal terms, reparatory justice claims that that enrichment was unjust and, therefore, shall be the object of reparation, restoration and rehabilitation.[109]

When we utilize the principles of reparatory justice to think about international trade and investment, we have to **recognize the inherent injustice behind the principle of comparative advantage and the need to historically inform the idea of 'level playing field' by transforming it into a process to address the economic, political, gender, race and financial imbalance that has been created throughout centuries of historical injustices, colonization and uneven balance of trade** (the Global South exporting raw material and the Global North exporting value added products). At the same time, we have to think that it is not enough to aim to guarantee an equal starting point (like the theory of the 'starting gate' suggests) but that it is essential to construct an international system of trade and investments (associated with national legal system) that avoid the reproduction of inequalities and unevenness along the way. The level playing field is, therefore, not only that of common but differential treatment for developing and developed countries based on the redressal of historical processes and dynamics, but also a playing field based on the search for strict equality.

A reparatory justice approach to international trade has clear implications for Fair Trade. It suggests, in fact, that when players in the Global North want to set up a Fair Trade value chain to address poverty and marginalization in India, Bangladesh, or any other former colony, they cannot just focus on South-North trade as a source of future opportunities for the 'wretched of the Earth'.[110] On the contrary, a Fair Trade approach should be based on the **understanding that the Global North had a central role in creating the conditions of exclusion and subordination and on the adoption of a holistic approach that understands poverty as a historically defined and dynamic process rather than a status.** In this sense, a broader approach to North-South interactions should be pursued that recognizes that the wealthy North benefitted from the impoverishment of the South and therefore the former shall not only pay for goods and services that are produced today and in the future, but shall engage in the construction of a future where the historical inequality is translated into differentiated responsibilities and expressed in the establishment of concrete regulatory and

---

[108] J. von Platz and D. A. Reidy (2006) The Structural Diversity of Historical Injustices, 37 *Journal of Social Philosophy* 360.

[109] Of course, this does not mean to let corrupted authorities and rent seeking governments off the hook. Similarly, it would be a mistake to accept forms of reparation where former colonizing powers and slave abusers use reparation as indulgence to "get even" but they are paid to corrupt governments that do not reach the people. The engagement with international reparation shall also be linked with the empowerment of groups and people in the recipient of this form of support to make sure that we do not reinforce the narrative that "the fault is entirely that of the corrupted South because we made due with our history". Aware of these considerations, it is still essential to conceive today's struggles and violations in the context of historically unequal processes of extraction and accumulation and to imagine concrete ways for reparation and restoration.

[110] Franz Fanon, *The Wretched of the Earth*, Grove Press, 2005 [first edition 1961].

political frameworks that redress historical inequality rather than assuming its non-existence. Can it be done by the Fair Trade movement alone? Of course not. But a reparatory approach would require Fair Trade to be aware and create awareness about historical processes and the need for political and legislative reforms that do not take the past for granted but aim at amending its consequences.[111]

In this sense, bilateral and multilateral trade agreements shall be preceded and accompanied by political engagement in areas like reparation for slavery, colonization and historical violations of human rights, but also tend as much as possible to redress the ongoing and contemporary consequences of historical injustice. **Debt forgiveness, tax justice, land redistribution, increase in unconditional official development aid, promotion of national and regional industrialization, etc. would be areas of intervention that can be leveraged to reduce conditions of inter-state historical dependence and subordination along with conditions of intra-state marginalization and discrimination.[112]** Any form of liberalization and international exchange that is not embedded in the larger project of redressing these historical patterns and restore their current implications, would thus fall short vis-à-vis the goal of restorative justice. Even if they lead to an improvement of the living conditions of small-scale producers, workers, etc.

This approach to trade justice resonated in some of the answers that we received to our survey, with a respondent stating that trade justice is achieved when we have in place a system of "trade that is deliberately aiming at bridging the development levels between the Global North and the Global South." In this sense, **trade shall not integrate producers in the South into a global economy that benefits the North more and increases the gap between former colonies and the colonizing countries, but should be organized in a way that redistributes wealth, value and opportunities and allows a progressive but continuous reduction of the historical gap between countries and people**. Along similar lines, another respondent highlighted the political nature of this endeavour. For them: "Just trade can be a paradigm rather than a set or norms and regulations. It can include rules and regulations that offset the structural and dynamic inequalities, but as paradigm it also requires that active policies are implemented too." If the aim is that "Historically disadvantaged economies (especially due to colonial oppression) on a macro scale SMEs on the micro scale must be in a position to reap benefits form free trade,"[113] trade and investments must be openly embraced as a political tool and subordinated to the construction of a future that redresses the present and historical inequalities at the local and international level.

Finally, a reparatory approach to trade justice and globalization would require to **assess and question the history behind the actors and players of international trade.** If the trade regime has been built through centuries, the same is for several actors that operate at all levels of this network: producers, traders, processors and retailers. If we are interested in addressing historical injustices and create a just regime that truly rewards and supports those that have been marginalized and excluded from socio-economic benefits, we cannot turn a

---

[111] Although here the call is for differentiated responsibilities and the creation of trade and investment systems that address the historical inequality, it is important to highlight that some movements, including indigenous communities and Afro-American organizations, there would not be any just future without a financial compensation for the violence of the past.
[112] L. Moffett and K. Schwartz (2018) Reparations for the transatlantic slave trade and historical enslavement: Linking past atrocities with contemporary victim populations', 36 *Netherlands Quarterly of Human Rights* 247.
[113] Response to the survey.

blind eye to the background of the actors we engage with and conclude deals with. To use the title of Howard Zinn's autobiography: "We cannot be neutral on a moving train."[114] Questions must be asked. **Shall the Fair Trade movement accept and support players that benefitted from the colonial era, for example by accessing large tracts of land during the occupation of Sub Saharan African countries or that have reproduced the plantation scheme which was typical of the colonial era? Is it possible for an enterprise to be part of the value chain of Fair Trade products if its history is closely tied with that of slavery, colonialism, land grabbing, expulsions and the benefit of European imperialism?** Reparatory justice asks us to consider the legacy of the past into the present, and we believe that this should be translated into new requirements to be part of the Fair Trade network that go beyond current practices and performances.

3.5.b Climate Justice

The idea of climate justice has been constructed as a holistic and systemic approach to climate change adaptation and mitigation and during the negotiations of the 2015 Paris Agreement was strongly promoted by indigenous communities, social movement and civil society organizations predominantly in the Global South. For climate justice activisms, climate change cannot be seen as a mere natural event but must be seen a social event. For three reasons.

- First, **climate change and the intensification of climatic events cannot be and shall not be seen as the responsibility of the whole humanity**, but rather the consequences of economic and social patterns that are overshooting the planetary boundaries. This requires a 'common but differentiated responsibilities' approach to emission curbing and restoration.
- Secondly, the **effects of climate change are most felt by people who live in poverty, exclusion, marginalization and without adequate means to guarantee their own survival and livelihood at time of food shortage, draughts, etc**. This requires prioritizing the livelihood of the most affected and adopting a socially oriented approach to the green transition.
- Third, any **response to climate change adaptation and mitigation is just only if it aims to the construction of a world that is going to be socially just to future generations**. Green investments, green policies, development programmes, divestments, etc. shall be coordinated so that present and future generations can equally benefit of a regenerating planet.

The uneven impact of climate change and the need for a differential treatment is also recognised by the 2018 International Fair Trade Charter, where it is stated that "Small-scale farmers and artisans are among the most vulnerable to the effects of climate change and it is important they are supported in developing and investing in adaptation and mitigation strategies."[115] When applied to international trade and investments, this approach would require the rules of the game to be drafted in a way that clearly favour those who are most affected by climate change, for example by supporting their livelihood, favouring technology transfer, guaranteeing political space and financial resources to implement national policies around climate change (something that international investment law and the extra protection

[114] Howard Zinn, *You can't be neutral on a moving train*, Seattle: Penguin, 1994.
[115] International Fair Trade Charter, see supra n 74, p. 21

of acquired and expected rights of the investors are not often compatible with – see Section 5.5 below).

This approach to climate justice was also spelled out in joint statement released in the name of the Fair Trade movement in occasion of COP24. The document started from the assumption that “Inequalities and climate change are intrinsically linked; so too are their solutions”[116] and urged the Parties of the UNFCCC to “recognize fair trading policies and practices as an important component of climate mitigation and adaptation strategies.”[117] For the signatories, climate justice is an urgent global challenge and a just international trade system becomes the tool to support small-scale farmers who are most vulnerable to climate change and that, at the same time, play a crucial role in feeding the planet and adopting climate compatible agricultural techniques. For them: “Trade justice is therefore an important way to achieve climate justice, by prioritizing the needs of smallholder producers and taking into account their increased vulnerabilities.”[118]

A similar approach to trade justice as essential to climate justice has been adopted by the Fairtrade Foundation. In a campaign on ‘Trade Justice and Climate Justice’, FTF highlights the role that the Fairtrade premium has in promoting better living conditions, more sustainable practices and higher levels of resilience for small-scale farmers. Thanks to the fact that small-scale producers can trade internationally at better conditions than conventional markets would guarantee, they can therefore face climate change and contribute to its mitigation. In a 2020 blog entitled ‘There is no Climate Justice without Trade Justice’ and aimed specifically at the cocoa sector, Katy O’Brien from Fairtrade Foundation stressed that:

> “It is vital, therefore, that farmers receive the support they need to cope with the effects of climate change. We’d like the chocolate industry take an approach to living income that would see not just the payment of sustainable prices, but also support for farmers to produce more on less land and to grow other crops that are resistant to the effects of climate change. Supporting living incomes is necessary both to help cocoa farmers cope with the worst effects of climate breakdown, and to prevent deforestation linked to cocoa production from making it even worse. There is no climate justice without trade justice. Cocoa farmers are on the front line of the climate emergency. By buying Fairtrade you are supporting biodiversity, environmentally friendly farming and helping farmers adapt to and mitigate against the effects of climate change.”[119]

More recently, the new team of Traidcraft plc made a clear statement about the importance of putting climate change and farming practices at the centre of their approach to trade. Similarly to the previous examples, it seems that the problem is the way in which things are produced and that a fair trade approach can stimulate sustainable activities and reward

[116] Trade Justice: A key component of building smallholder farmers’ climate resilience Policy Statement of the Global Fair Trade movement to COP 24

[117] Fair Trade Advocacy Office, No Climate Justice without Trade Justice, available from https://fairtrade-advocacy.org/other-information/no-climate-justice-without-trade-justice/

[118] Ibid.

[119] Katy O’Brien, There is no Climate Justice without Trade Justice, Fairtrade Foundation, 24 February 2020, available at: https://www.fairtrade.org.uk/media-centre/blog/there-is-no-climate-justice-without-trade-justice/ [last accessed 19 November 2020].

producers who align with the needs of the planet. In a conversation with Joe Osman, the Tradcraft plc staff states that:

"Traidcraft 2 need a cultural revolution [that] we had lost our appetite and our edge to be radical [and] our mission is urgent. We need to wake up and panic because we want to be part of a movement that stops the house from burning to the ground. This involves supporting farmers who produce organically, invest in biodiversity, reforest their communities, educate their children, and build solid communities. More than ever, our way of doing trade is the antidote to conventional, slash/burn, extract, pollute, and move on farming practices. And if we have to adopt more radical methods of communicating this, then so be it. You have been warned!"[120]

However, a climate justice approach as advocated by La Via Campesina or more radical social movement would require more than trading in raw commodities, paying a premium to farmers and shifting to agroecological (or sustainably intensive) practices. For them, climate justice cannot only be a matter for those who can join a global value chain. Especially given the fact that only a fraction of global production is actually traded internationally. Moreover, a climate justice approach would demand a **historical and systemic understanding of climate change as a socio-economic problem that is caused by the intensification of extractivism and the globalization of exchanges needs to adopt an approach that goes beyond the focus on what happens at the beginning of the value chain and the way in which value is distributed. Few other points shall be mentioned.**

Firstly, a climate justice approach would challenge the idea that a global market-place for goods and services is compatible with the planetary boundaries. Therefore, **it would not find the way forward in more international trade** (and more GHG, as we discuss in section 2.4 below), but rather advocate for the construction of local and non-international forms of trade and exchange, including via diversification, industrialization and protection of local self-reliance. Secondly, a climate justice approach would not accept that the efforts are only directed towards supporting small-scale farmers who are over-exposed to climate disaster nor towards promoting sustainable (or agroecological) ways of producing. **A climate justice approach would challenge the possibility of relying/partnering with large-scale corporate players or with productive structures – like the plantation – that are incompatible with a notion of social justice and that are historically linked with the largest social and environmental externalities**.

Moreover, a climate justice approach would push for a **recognition of the different responsibilities that countries and people in the North have for the current ecological and climatic conditions in the Global South** (i.e. ecological debt) and would advocate and campaign for the financial and material compensation for this historical responsibility. A climate justice approach would not focus on absolute numbers and propose one-size-fits all solutions. On the contrary, it would require a reflection based on the fact that "The richest one percent of the world's population are responsible for more than twice as much carbon pollution as the 3.1 billion people who made up the poorest half of humanity during a critical 25-year period of unprecedented emissions growth"[121] and that on a per capita basis, the

[120] Joe Osman, *Traidcraft*, supra n 85, from personal correspondence with the author, p. 234.
[121] Tim Gore, Confronting Carbon Inequality, United Kingdom: Oxfam, 2020, available at: https://www.oxfam.org/en/research/confronting-carbon-inequality [last accessed 25 November 2020].

highest amount of imported raw material – whether directly in the form of commodity or embedded in the final goods that are traded – is the highest in Europe and North America (See figure 1 below).[122]

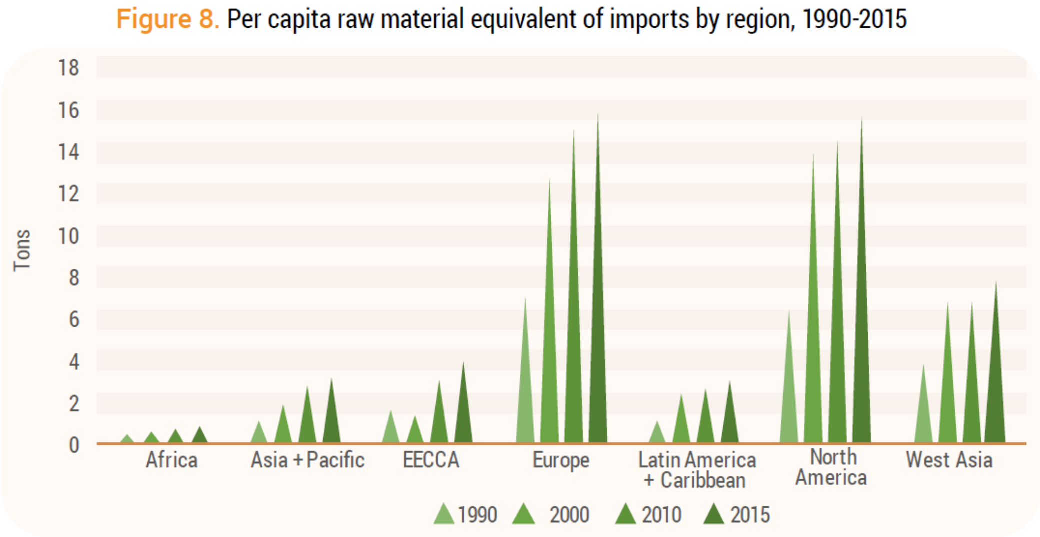

Figure 1: source UNEP, International Resource Panel Global Material Flow Database, 2020

In the context of the international climate justice movement, **the social construction of climate change is reflected in the concept of "Common but differentiated responsibilities and respective capabilities" (CBDRRC) as a guiding principle** in the international climate change regime created by the United Nations Framework Convention on Climate Change in 1992 and inherited by the Paris Agreement in 2015. CBDRRC reflects historical responsibilities for climate change and requires that the future legal and policy framework should be designed in a way that accounts for the past as much as for the respective capabilities of nations. When applied to the area of international trade and investment, the adoption of the CBDRRC principle has implications that go beyond a higher distribution of future gains to the most marginalized or compensations for the intensification of climate change. It requires to build a system of trade that takes into account the historical contribution to climate change and is not contributing to the reproduction of climate injustice in the future. It is, therefore, a system where multilateral measures (like the intensification of trade in green goods and the increase in FDIs in green projects) and unilateral measures (like carbon taxes, environmental tariffs, privileged access to green goods and services, and carbon border adjustments) cannot be imposed without considering the historical responsibility of the countries involved and without taking into account the social implications that they may have.

We provide more details about the relationship between trade and climate change in the rest of this document and discuss the different ways of engaging with trade and climate that differ on the basis of whether we adopt a market-based, climate change adaptation and mitigation or climate justice approach. Anyone interested in following the principles and objectives of climate justice should thus combine a strong attention to the planetary boundaries with a marked focus on people's conditions. But that is not all. Attention should be dedicated to advocating for policies, regulatory interventions and the establishment of a

[122] UNEP, International Resource Panel Global Material Flow Database, 2020, available at: https://www.resourcepanel.org/global-material-flows-database [last accessed 24 November 2020].

trade and investment regime that are aligned with the 1.5° objective of the IPCC. Finally, energy should be spent asking that historical and present polluters pay, that past responsibilities are accounted for as a premise to any form of exchange, and that the new 'green' economy departs from the socio-environmental dynamics of capitalism as usual and is constructed around the principles of justice, equity and sustainability for both present and future generations.

4. The Contemporary Free Trade and Investment Regimes: how did we get here and where are we going?

So far, we have provided – hopefully –a clearer sense of the multiple concepts that underpin the trade and investment regimes and have discussed how the adoption of different theories of justice would underpin different structures for the trade and investment regime (an end in itself, a means for redistribution of wealth and value, the reproduction of historical and climatic inequalities, etc.). Now it is time to enter into the details of the contemporary trade and investment regime and its intellectual, historical and legal construction. In this Section, we start with a brief historical reconstruction of its progressive construction with the aim of proving that there is not one way of thinking about international trade and investments, that what we see today is not inevitable and that there is no universal experience of trade and investments. Finally, we present the patchwork of multilateral and bilateral agreements that operate as the backbone of international trade and investments.

4.1 The Overlooked History of International Trade and Investment

From time immemorial, different regions have been exchanging goods with each other, enriching themselves in the process. The predominant basis for trade has been interregional divergences in supplies of primary factors, technological and climatic conditions and patterns of demand. **Along with horizontal trade relations, empires, colonies and military occupations also played a central role in the establishment of the global market place that we see today.** Tracing the historical roots of contemporary trade and of the rules of international economic law that governs it provides us with the opportunity to better understand the continuity with the past. At the same time, a focus on what trade and investment rules used to be provide us with the tools to realize that the present is not inevitable and that for centuries the premises and objectives of the neoliberal market were opposed and rejected, including by the same countries that are now wholeheartedly supporting them.

Mainstream accounts of international trade and investment law tend to depart from the end of the II World War and the conclusion of the General Agreement on Trade and Tariffs (GATT) in 1947, thus and looking at the construction of the global economy through the lenses of international organizations like the World Bank, the International Monetary Fund and the United Nations (UNCTAD and UNDP above all). So doing, accounts dismiss the historical roots of contemporary international economic law and overlook its links with slavery and colonialism as underpinning elements of the global economy. On the contrary, scholarship that traces continuities of domination and racism from the colonial period to period of liberal internationalism in the post-second world era is denigrated and relegated to the periphery.

Because we believe that history can provide us with important insight on the present (both in terms of existing inequalities and in terms of alternative visions of international trade), we use this part of our document to gather some elements of reflection and trigger considerations that could be relevant when considering what position to adopt on the conclusion of a bilateral trade agreement or when thinking about possible ways of rethinking international trade and investment. Without entering too much into the details, we have decided to analyse four main moments in history and highlight their relevance for the present times: **a) trade and investments in the colonial era; b) the post-II World War and the**

negotiations of the International Trade Organization; c) the proliferation of International Commodity Agreements as trade mechanisms to stabilize global markets and challenge uneven development; d) the decolonization phase and the rise of the New International Economic Order.

4.2. Trade and investments in the colonial era

The relevance of colonialism in the construction of the contemporary trade and investment regime is evidenced by a date, 1947: it was the year when the General Agreement on Trade and Tariffs (GATT) was signed by twenty-three countries. Back then, most of Sub Saharan Africa was still a colony, and the same was the case for large tracts of the Commonwealth. The GATT, the building block of the contemporary regime, was signed by Southern Rhodesia, Ceylon and the recently independent India. However, **the impact that colonialism has had on trade and investments goes beyond agreements: it has to do with access to and remuneration of capital, enclosure of land and the establishment of plantations (a good amount of which is still fully integrated in the global trade regime) and the consolidation of specific trade routes that link exporting zones in the Global South with consumption or transformation zones in the North**. When we talk about 'level playing field', 'fairness as freedom' and 'trade distortions' we shall always think historically and consider the present through centuries of unequal distribution of resources, opportunities and wealth. In this section, we look backward to think forward.

European Colonialism has left a large imprint in international trade relations. Formal colonialism ended in Latin American in the early 1800s, and 70 years ago in Africa and some parts of Asia. Yet, colonialism is still an everyday phenomenon. One of the legacies of European Colonialism is an international division of labour whereby the Global North focuses on the most value-adding activities, being manufacturing or Researched and Developed, and the Global South dedicates to the least economically significant tasks. The political economy of trade relations, of course, is much more complicated than the location of economic activities. Transnational elites in the Global North and the Global South benefit from this division of labour.[123] At the same time, unquestionably, labour conditions in the South are worse than in the North.

It is often said that the Global North does better economically because of the quality of its institutions; still, historical evidence suggests that **industrialization in Europe was possible because of colonial trade relations, not by private property or the national state**. The latter helped but were not the decisive factors.[124] The institutions of colonial trade are relevant not only as they illustrate a process of commodification, extraction and deindustrialization in the Global South, but also since there is some continuity between those and current institutions. Trade laws today look very different from the 18th or 19th century; they are not unilateral impositions but rather relations between formally sovereign countries. After some examination, however, the continuity is striking.[125]

---

[123] Cutler, Claire A., *Private power and global authority: transnational merchant law in the global political economy* (CUP 2003); Bhupinder Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 European Journal of International Law 1-37, 6;

[124] Kenneth Pomeranz, *The great divergence: China, Europe, and the making of the modern world economy* (Princeton University Press 2000) 14-5.

[125] See, e.g., Anghie, Anthony, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005).

In Latin America, the Spanish and Portuguese established an extractive model based on the exploitation of natural resources to be exported to Europe. When returning to the Americas, those ships were loaded with European goods. **The colonizers controlled the entire business: extraction, transport and sale of manufactures and labour (i.e. slaves)**. European capital coming to Latin America was devoted to extractivism directly and indirectly, not only to build mines and plantations but also to build the infrastructure to speed up and make the extractive process more efficient. The colonial merchant was not to be imaginative but to operate within these pre-established patterns. Such trade and investment models were supported by force, that is war capitalism, as well as by colonial monopolies and rules preventing import-substitution.[126]

Independence in Latin America did not change colonial core-periphery dynamics. The new states were controlled by a ruling elite closely aligned with the interests of long-distance trade. Governments implemented private property and free trade institutions, such as low tariffs, facilitating the continuity of colonial economic relations. The free navigation of rivers similarly reinforced the advantage that Europeans have over transportation, making it impossible for the emergence of a Latin American merchant fleet.[127] Foreign capital further consolidated this economic model. Latin American countries promoted foreign investment and favoured granting these investors national treatment—that is the Calvo doctrine—and generous incentives, but European countries insisted that international law also provides a minimum level of protection that no nation can violate regardless of national treatment. This standard could be enforced not only through international courts but also by gunboat diplomacy.[128]

Colonization operated differently in Africa and Asia. Europeans had trade relations with these parts of the world for centuries, and only took formal control of large parts of these regions in the 19th century. Trade was crucial in all this; in particular, European's need to extract more natural resources and open markets for its products.[129]

In the case of Africa, the primary role of this continent in international trade was through slave trade. Africa was a provider of forced labour, a business that connected Africans and Europeans, and for which Europeans paid in Chinese and Indian cloth at first. European goods were of much inferior quality. Slaves were taken to the Americas to work in the plantations and mines held by the Spanish, Portuguese, French, British and later the US. Europeans were at the centre of this model: they were the only traders or merchants, bringing goods from one place to the other, and paying slaves with those goods. Those slaves worked to produce natural resources, minerals, and food, that were fundamental to European industrialization.[130] Once industrialization was successful, crucially, Europeans replaced Chinese and Indian cloth with their own manufactures.

The need for more resources and new markets pushed Europeans to formally colonize Africa in the 19th century. The trade model they established was similar to that seen earlier in the Americas. **Foreign investment was used to extract resources and to build the**

[126] Sven Beckert, *Empire of cotton: A global history* (Vintage 2015).
[127] Tulio Halperín Donghi, *The contemporary history of Latin America* (Macmillan 1993) 4, 117-33.
[128] Sornarajah, Muthucumaraswamy, *The International Law on Foreign Investment* (CUP 2017).
[129] Pomeranz (2000); Beckert (2015).
[130] The production of sugar, e.g., was closely associated with industrial labour and international trade. See Michael Fakhri, *Sugar and the making of international trade law* (CUP 2014) 7-8.

infrastructure to facilitate extraction and export. This capital was strongly protected by colonial institutions first and by international law and political influence after independence. British and French colonialism in Africa was different, but the outcome was similar. Colonizers controlled the production of natural resources; colonies could not trade freely with the rest of the world. Again, this was a privilege of the metropolises.

For China, India and Japan, the situation was different. These economically developed parts of the world rivalled Europeans in many industries in the late 18th century, including cloth.[131] However, these nations were behind in sea transport and war technology, particularly sea war. For many decades, Europeans were buyers of Chinese and Indian products, which they had to pay in gold or silver as they produced nothing of local interest. Luckily for Europe, China was in massive demand of silver and Latin America was a large producer of silver, which Europeans extracted without leaving any value in regions such as Potosí, Bolivia—today one of the poorest parts of the continent. Europeans also exported opium to China to pay for their imports.

Eventually, the Chinese needed less silver and banned opium for public health reasons, creating problems for European merchants. These actions led to a war with Britain and other European countries, which ended with China being forced to open their markets, accept the imports of opium, and recognize the jurisdiction of European nations over otherwise domestic questions of trade and foreign investment. India suffered a similar fate, although it was formally colonized by the British. In a few years, the two most important producers of cloth were transformed into cotton exporters. This was the joint achievement of the European industrial revolution and war capitalism.[132]

When these countries became formally independent, the situation did not change markedly. In the 19th century, Latin American countries had low tariffs, as opposed to the United States or Germany, and European nations responded strongly against local industrialization efforts.[133] The War in Paraguay remains one of the bloodiest events in history, a war waged by Argentine, Brazil and Uruguay but sponsored by Britain. The end of colonization in Africa was followed by industrialization attempts through import-substitution, but institutions such as marketing boards, which were created by the colonizers, remained geared against peasants: They were paid little and worked in bad conditions.[134] The War in Paraguay and the role of marketing boards in West Africa are two very different examples of the role that some national elites have played and continue playing in the continuation of extractivism core-periphery economic relations.[135]

---

[131] Pomeranz (2000).

[132] Sam Beckert, *Empire of Cotton: A Global History*, Random House USA, 2005.

[133] Antonio Tena-Junguito, Markus Lampe, and Felipe Tâmega Fernandes, 'How much trade liberalization was there in the world before and after Cobden-Chevalier?' (2012) 72 The Journal of Economic History 708-740, 714, 735-6; Mario Pastore, 'State-Led Industrialisation: The Evidence on Paraguay, 1852-1870' (1994) 26 Journal of Latin American Studies 295-324.

[134] Lynn Krieger Mytelka, 'The unfulfilled promise of African industrialization' (1989) 32 African Studies Review 77-137, 81, 98-99.

[135] In the case of Latin America, see Fernando Henrique Cardoso and Enzo Faletto, *Dependency and development in Latin America* (University of California Press 1979).

4.3 The post-II World War, the Havana Charter and International Commodity Agreements

The first decades of the XX century represent a continuation of the colonial and mercantilist approach to trade. On the one hand, a large tract of the world was still under colonial control and represented a privileged source of raw materials. On the other hand, leading powers opted for collaboration and cooperation in the area of trade as the most efficient way of guaranteeing access to goods, avoiding the race to the bottom of competitiveness, and restoring economies after the Great Depression. This was particularly the case of primary commodity markets, which were subjected to governmental intervention from the 1933, where the first International Wheat Agreement (IWA) was concluded as a response to low wheat prices during the Great Depression.

The end of the Second World War coincided with international discussions on the construction of a trade regime what would avoid the risk of excess production and low prices, a condition that was considered to be incompatible with international stability and link to the surge in unrests and conflicts. In July 1944, when the United States convened the forty-four allied countries to the United Nations Monetary and Financial Conference in Bretton Woods, the goal was to agree on an international order based on three pillars: stability of finance, a joint effort in the post-war reconstruction and stability of trade. To fulfil these purposes, the Conference parties discussed the establishment of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (later part of the World Bank Group) and the International Trade Organization.

At the time where Keynesian ideas of the economy where not considered radical, public intervention in the reconstruction, a stable financial market and coordinated trade where the priorities to be collectively achieved to avoid a new dark age. Although the World Bank and the IMF were established and have been at the centre of the global economic and financial system since then, the International Trade Organisation (ITO) never came into existence and is not equally known. **The ITO was seen as the third pillar of Bretton Woods, was aimed to be the product of international consensus around trade and was rooted in the understanding of trade as a tool to achieve public goods rather than an end in itself**. Thus, when we think about the last eighty years of international trade, we cannot overlook the function that the ITO should have played and the different vision of trade that it would have brought forward.

On February 18, 1946, the Economic and Social Council of the United Nations issued a resolution calling an International Conference on Trade and Employment for the purpose of promoting the expansion of the production, exchange and consumption of goods.[136] The Conference, which met at Havana on November 21, 1947, and ended on March 24, 1948, drew up the Havana Charter for an International Trade Organization to be submitted to the Governments represented for its ratification. Fifty-six countries met in Havana, most of which considered themselves 'underdeveloped'. The socio-economic difference between the

[136] Resolutions adopted by the Economic and Social Council during its 1st session, 23 January-18 February 1946. - 1946. - p. 183-184.

countries and the role of trade were two crucial elements in the preparatory works towards the Convention and the Charter itself.

In the resolution calling for the Convention, the UN committee recognized the need that the "**co-operative economic measures already taken be supplemented by further international measures dealing directly with trade barriers and discrimination which stands in the way of an expansion of multilateral trade**."[137] Although the goals appear similar to those of contemporary trade, the solution was not identified in liberalization and free trade, but rather in the coordinated regulation of supply and demand, typically through export controls.

This is evident from the suggested agenda of the Conference, that according to the UN Committee should have included:

a) "International agreement relating to the **achievement and maintenance of high and stable levels of employment** and economic activity;
b) International agreement relating to regulations, restrictions and discrimination affecting international trade.
c) International agreement relating to **restrictive business practices**.
d) International agreement relating to **inter-governmental commodity arrangements**.
e) Establishment of an international trade organization, as a specialized agency of the United Nations, having responsibilities in the fields of (b), (c) and (d) above."[138]

"Full employment" represented one of the most important issues that emerged from the resolution, a way of expressing concerns about the stability of international demand as a promoter of employment and the fear that – in a liberalized world economy – a reduction in consumption in key markets (like the United States) would rapidly cause disruption elsewhere. A liberalized trade regime where producers of primary commodities would be dependent on the demand and consumption in other parts of the world did not seem the best way to avoid the fragilities and tensions that could lead to more global unrest. The Havana Charter was thus structured in a way that countries could prioritize employment over free trade. Article 21.4.b, for example, stated that no country could be required to alter policies directed towards the maintenance of full employment or the promotion economic development, even if these created balance-of-payments difficulties and would require the suspension of import of certain goods not considered to be essential.[139]

Along with employment, the UN Committee wanted the Havana Conference to reflect and propose solutions to the risks posed by uneven development and the hyper-fluctuation of commodity prices. Despite the absence of any reflection on the economies of colonies and the socio-economic impact of colonialism, the resolution at least requested "the Preparatory Committee[140] […] to take into account the special conditions which prevail in countries whose

[137] Id, 184.
[138] Ibid.
[139] United Nations Conference on Trade and Employment, held at Havana, Cuba, from November 21, 1947, to March 24, 1948, Final Act and Related Documents, art. 21.4.b, Restrictions to safeguard the Balance of Payments.
[140] The following Governments were represented in the Preparatory Committee: Australia, Belgium, Luxembourg, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Netherlands, New Zealand, Norway, South Africa, USSR, the United States of America and the United Kingdom.

manufacturing industry is still in its initial stage of development, and the questions that arise in connection with commodities which are subject to special problems of adjustments in international trade."[141]

During the Convention, Australia, India, China, Lebanon, Brazil and China urged that 'underdeveloped' states should be allowed to use import quotas to help promote industrialization and strengthen their infant industry before opening up to global trade. In particular, India as the (newly independent) representative of the 'underdeveloped' countries pressed the Preparatory Committee to recognize the freedom to use protective devices such as quantitative restrictions, differential internal taxation, mixing regulations, and preferences between neighbouring states for the purpose of economic development. Most of the eighteen Latin American countries that attended the Convention, in particular Argentina, were equally intentioned to obtain a strong recognition of the uneven economic conditions and a space of political freedom to protect their industries vis-à-vis more advanced economies. The delegate of El Salvador, Ricardo Jiménez Castillo summarized the creation of two blocks around the idea of what is a 'level playing field' in international trade: 'The industrialized countries' concept of equilibrium", wrote Castillo, "was very formal, while the underdeveloped countries felt that there should be a basic criterion - unequal treatment for un- equally developed countries."[142]

Several months into the negotiations, a final agreement was achieved and introduced in Chapter IV of the Charter, according to which:

> "The Members recognize that special governmental assistance may be required to promote the establishment, development or reconstruction of particular industries or branches of agriculture, and that in appropriate circumstances the grant of such assistance in the form of protective measures is justified. At the same time they recognize that an unwise use of such measures would impose undue burdens on their own economies and unwarranted restrictions on international trade, and might increase unnecessarily the difficulties of adjustment for the economics of other countries."[143]

Along similar lines, the Havana Charter also included one article on foreign investments, where Members undertook the obligation not to discriminate against foreign investors but also maintained the right "to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies."[144] More importantly, it contained **specific indications about the possibility of concluding international commodity agreements between countries to achieve price stability and ensure that market fluctuations would not negatively impact their economies, employment, living conditions of their citizens and the environment**.

Chapter VI of the Havana Charter is where the idea of international trade as a set of coordinated and agreed commodity agreements is unfolded. Although it sounds like a very

[141] Ibid.
[142] As quoted in Richard Toye (2003) Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948, *The International History Review* 25(2), 282-305, 291.
[143] United Nations Conference on Trade and Employment, supra n 139, Article 13.1, *Governmental assistance to Economic Development and Reconstruction.*
[144] Id, art. 13, *International Investment for Economic Development and Reconstruction*.

different world from today, in the aftermath of the II World War fifty-six countries had convened that the future of trade should have not been based on efficient allocation and competitive advantage, but by convergence, coordination and mutual support in the form of international agreements that would direct and constrain production and distribution of value across countries. Article 57, in particular, lays down the *Objectives of Inter-governmental Commodity Agreements,* and states that*:*

The **Members recognized that inter-governmental commodity agreements are appropriate for the achievement of the following objectives**:

(a) to **prevent or alleviate the serious economic difficulties** which may arise when adjustments between production and consumption cannot be effected by normal market forces alone as rapidly as the circumstances require;

(b) to provide, during the period which may be necessary, a framework for the consideration and development of measures which have as their purpose economic adjustments designed to promote the expansion of consumption or a shift of resources and man-power out of over-expanded industries into new and productive occupations, including as far as possible in appropriate cases, the development of secondary industries based upon domestic production of primary commodities;

(c) to **prevent or moderate pronounced fluctuations in the price of a primary commodity** with a view to achieving a reasonable degree of stability on a basis of such prices as are fair to consumers and provide a reasonable return to producers, having regard to the desirability of securing long-term equilibrium between the forces of supply and demand;

(d) **to maintain and develop the natural resources of the world and protect them from unnecessary exhaustion**;

(a) to provide for the expansion of the production of a primary commodity where this can be accomplished with **advantage to consumers and producers, including in appropriate cases the distribution of basic foods at special prices**;[145]

(b) to assure the **equitable distribution of a primary commodity in short supply.**

In March 1948, 53 countries signed the Final Act authenticating the text of the Havana Charter. However, there was no commitment from governments to ratification and, in the end, the ITO was not ratified by the United States and never came into force. In the absence of an agreement supported by the United Nations and aimed at strengthening cooperation while favouring the creation of a world market, two dynamics unfolded: on the one hand, in 1947 twenty-three countries that were part of the Preparatory Committee of the ITO had decided to sing an international agreement to provide each other with trade concessions and a set of rules designed to prevent these concessions from being frustrated by restrictive trade measures.[146] This was the General Agreement on Trade and Tariffs (GATT), an international trade agreement that was supposed to be temporary and followed by the Havana Charter, but became the backbone of the global trade regime; on the other hand, countries in the Global North and Global South entered into international commodity agreements that implemented some of the principles of the Havana Charter to specific sectors of the global market. Given

[145] This point reminds us of the strategic use of public procurement to support local production, increase economic return, uphold sustainable production and provide subsidized meals to the most vulnerable.

[146] Founding members of GATT were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States. The first Session of the Contracting Parties was held from February to March in Havana, Cuba.

the fact that the GATT as one of the pillars of the World Trade Organization is discussed in the next section (see 2.31 and 2.3.2), in this section we will offer some further reflection on the history of the International Commodity Agreements and their objectives.

4.4 The proliferation of International Commodity Agreements

We know that "International trade agreements have greatly encouraged the dismantling of price regulation methods. This has led to extremely volatile prices for agricultural raw materials and consequently to even more economic insecurity for small-scale producers."[147] However, **the recent history of international trade is populated by "international commodity agreement" (henceforth ICA)** as treaties between governments of producing and consuming countries that aims at regulating the terms of international trade in a specified commodity. Although the first ICA was concluded in 1933 (on wheat) it was the absence of the institutional structures which the Havana Charter aimed to create that nudged interested governments into negotiating self-standing trade agreements on specific commodities. Since 1933, there have been six ICAs which have had "economic" clauses that allowed or required public interventions in the stabilization of prices through regulation of supply and demand: the International Cocoa Agreements (ICCAs), the International Coffee Agreements (ICOAs), the International Natural Rubber Agreements (INRAs), the International Sugar Agreements (ISAs), the International Tin Agreements (ITAs) and the International Wheat Agreements (IWAs).

The motivation of the early post-War commodity agreements was the avoidance of excess supply and the associated low prices that would have had a negative effect on the productive texture of producing countries. These agreements operated largely through supply management, principally export controls, although the IWA was built around multilateral contracting. Through the control of trade, commodity agreements in tropical commodities were also seen as opportunities to guarantee higher prices to the exporting countries and as mechanisms to guarantee regional cooperation rather than race to the bottom competition. Article 1 of the **1972 International Cocoa Agreement**, for example, clearly stated that the objective of the Agreements were:

a) to alleviate serious economic difficulties which would persist if adjustment between the production and consumption of cocoa cannot be effected by normal market forces alone as rapidly as circumstances require;
b) to prevent excessive fluctuations in the price of cocoa which affect adversely the long-term interest of both producers and consumers;
c) to make arrangements which will help stabilise and increase the export earnings from cocoa of producing countries, thereby helping to provide such countries with resources for accelerated economic growth and social development, while at the same time taking into account the interests of consumers in importing count;
d) to assure adequate supplies at reasonable prices, equitable to producers and consumers; and
e) to facilitate expansion of consumption and, if necessary, and insofar as possible, an adjustment of production, so as to secure an equilibrium in the long term between supply and demand.[148]

---

[147] Coordination Sud, *Benefits of Fair Trade: a fairer share for farmers and more sustainable agricultural value chains*, The Notes of South, #23, May 2020.
[148] International Cocoa Agreement, United Nations, *Treaty Series* , vol. 882, 1972, p. 67.

Similarly, the International Grains Arrangement (IGA) of 1967 was an agreement whereby importing countries agreed to buy a certain percentage of their total imports from participating exporting countries, within a set price range. Exporting countries agreed to make available to the importing countries, within a certain price range, a sufficient quantity to satisfy their needs. When prices rose above the maximum price range, the producing countries had to sell stipulated quantities to consuming countries and the maximum price. When prices fell below the minimum price range, consuming countries were obliged to purchase stipulated quantities from producing countries at the minimum price within the range.

Although **each ICA provided different instruments to be deployed** (e.g. export quotas, buffer stocks and multilateral contracts), they were all based on the idea of **cooperation between participants to avoid the negative consequences of price fluctuations**. Consumer countries would be protected from high prices. For example, multilateral contracts would act as forward contracts and would pre-determine the price of a commodity sold between two countries for several years. Therefore, producer countries could be required to sell commodities at the high of a certain price range to consumer countries, although the actual open market price is well above the high of the agreed on price range. Another example is an ICA employing the buffer stock device. In this instance, a significant increase in the price of the commodity may be reversed to the benefit of the consumer countries when the manager of a buffer fund, that has stock piled commodities coming from the exporting country, sells the commodity in the open market and reduces the high prices. Finally, there is the IGA example of employing export quota device: when prices in the open market rise above the price range agreed to in the IGA, producer countries are required to sell their commodities to consumer countries at lower prices than the open market.

ICAs, including in the agricultural sector, were also accepted by the USA Office of Foreign Agricultural Relationships, which considered ICAs an essential instrument against the slow response that the agricultural sector has vis-à-vis fluctuations of prices. The Great Depression had demonstrated that farmers who have invested heavily in production cannot easily scale back and convert the land to other uses, therefore they needed to be protected against the instability of a price increasingly determined by global demand and supply (financial investors had not started pouring money into food commodities, yet). On the contrary, the State Department accepted their use only as "temporary expedients," considering that governmental intervention would *render the marketplace concept of comparative advantage meaningless*.

Exporting countries and authors were looking at multilateral contracts, buffer funds and quotas as fair ways of building trade post-II World War. For many, ICAs would guarantee affordable goods to producers and fair and minimum prices to exporting countries while limiting the race to the bottom between competing economies. ICAs as a source of higher income for farmers were also discussed as a potential ally of production in the Global North, and in particular in the United States. There, the Office of Foreign Agricultural Relationships (OFAR) claimed that there was "a basic need for government aid to agriculture resulting from differences between agriculture and other aspects of the national and world economy" and from the nature of agricultural production: farmers could not adjust to changing market conditions as readily as manufacturers. When demand increased, as in World War I and again in World War II, farmers expanded production rapidly, but they could not easily cut production when demand slackened as it did during the interwar years. "Agricultural production cycles and limited options (such as acreage, capital, climate and soil constraints) prevented farmers from rapidly shifting their production plans if the prices for a particular commodity began to fall. At times, as during the Depression, any shift at all proved to be futile when prices for almost all commodities entered a general decline. Farmers had few choices but to keep on producing in the short run (even trying to increase production in order to improve their marginal returns)."[149]

The role of ICAs in pushing for a more equitable distribution of resources to producing countries while expanding international trade was clear in the work of the United Nations Conference on Trade and Development (UNCTAD), which was in charge of ICAs since 1964 and sought, from 1976, to stimulate the negotiation of new agreements as part of the Integrated Programme for Commodities (IPC) in connection with the so-called New International Economic Order (NIEO).

UNCTAD's work stressed the need for price stabilisation and that the objectives of ICAs should include increased export earnings for developing countries, re-allocation of resources, and increased consumption. In its first Final Act, the UNCTAD concluded that ICAs stimulate

> "*a dynamic and steady growth and ensuring reasonable predictability on the real export earnings of the developing countries so as to provide them with expanding resources for their economic and social development, while taking into account the interests of consumers in importing countries, through remunerative, equitable and stable prices for primary commodities, having due regard to their import purchasing power, assured satisfactory access and increased imports and consumption, as well as coordination of production and marketing policies*."[150]

However, in 1964 it was already clear that the **export of raw commodities could not and shall not be an end in itself and that ICAs should be considered a proxy towards a different structure of the international market**. For UNCTAD, interventions were needed to redefine the dynamics of international trade and support developing countries (most of which had obtained independence by 1964) in the **diversification of production, industrialization and the end of the dependency from uneven balance of trade**. In 1964 it was clear that history mattered and that the uneven economic conditions of countries would only be reproduced if they were left following the principles of comparative advantage and engage in international trade without an international legal framework that allowed them to upgrade and diversify. Articles 39-43 of the 1964 UNCTAD Final Act stress that:

> "39. The **developing countries should not rely merely on the expansion of traditional exports of primary products and raw materials**. Promotion of industries with an export potential in developing countries is essential. Diversification and expansion of exports of manufactured and semi-manufactured goods are among the important means to assist the developing countries to achieve, in time, a balance in their external accounts.

---

[149] Berton E. Henningson, *The Historical Case for International Commodity Agreements*, League of Rural Voters, 2014.

[150] Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March-16 June 1964, Vol. I, Final act, Art. 37.

40. The establishment and expansion, in developing countries, of industries with an export potential call for a whole series of interrelated measures and action on the part of the developing countries within the framework of over-all planning, as well as by developed countries and appropriate international organizations.

41. **The role of the public sector in the economic development of developing countries is recognized, as well as the role of private capital, domestic and foreign**.

42. Developing countries face obstacles and difficulties in marketing their manufactures and semi-manufactures in the developed countries. In order to facilitate the industrial exports of developing countries, their products should have freer access, particularly to the markets of the developed countries, but also to the markets of other developing countries.

43. Easier access to markets should be provided, not only for existing and traditional exports of manufactures and semi-manufactures, but also for a wider range of products in order to improve the opportunities for the establishment, in the developing countries, of a wider range of industries more technically evolved and producing industrial goods of higher degrees of complexity."[151]

These few Articles demonstrate the acknowledgment of **need to rethink the links between trade, de-colonization, sovereignty over natural resources, rebalancing uneven development and addressing the needs of people (less of the planet) by going beyond mainstream economic theory**. Such approach to international trade and investment would become even clearer in the following years when the idea of a New International Economic Order was promoted by the newly independent developing countries and put at the centre of the activities of the United Nations General Assembly. We are now in the early 70s, right before the Washington Consensus and the end of the Cold War radically changed the realm of what is feasible and possible.

4.5 Decolonization and the rise of the New International Economic Order.

The 1960s was the decade of independence for several Sub Saharan countries. A direct consequence was the increase in the number of developing countries joining the United Nations and a change in the quantitative balance between the Global North and the Global South. Stirred by aspirations of development, improvement of living conditions and decolonization of the global economy, developing countries got together to shape international law so that it might provide for economic justice. **Through the 1960s and 1970s, developing countries from all over the world raised their voices in the international forums and adapted their national policies in order to build a New International Economic Order (NIEO)** based on structural reform of the world economy as defined by the existing body of international law as subordinated to the needs and visions of industrialized countries as net beneficiaries of the global economic system. In 1974, the General Assembly of the United Nations adopted resolutions 3201 (S-VI) and 3202 (S-VI) on the Declaration and Programme of Action on the Establishment of a New International Economic Order, which lay down – along with the Charter on Economic Rights and Duties of States – the foundations of the new international economic order as a new vision for international law and the global economy

[151] Ibid, art. 39-43.

based on the restitution for the economic and social costs of colonialism, racial discrimination, and foreign domination.

International trade was a central component of NIEO. For its proponents, NIEO should be based on a more equitable system of trading relations between the developed and the developing world, meaning a different distribution of value based on the need to rebalance historical and present unevenness. For example, the Charter on Economic Rights and Duties of States would have imposed the duty on all States, if adopted, to adjust the prices of export to the prices of import, to guarantee against dumping and the maintenance of economic disparity. Another building block of NIEO was represented by the Integrated Programme for Commodities (IPC), a proposal that was endorsed by the United Nations General Assembly in 1974 and was at the centre of political debates for some years. The IPC should have helped building a new economic order based on different premises than free trade and race to the bottom competitiveness. This appeared clear in UNCTAD Resolution 93(IV), which recognized the "**need to conduct international trade on the basis of mutual advantage and equitable benefits, taking into account the interests of all States, particularly those of the developing countries**" and that there was the "need for improved forms of international co-operation in the field of commodities which should promote economic and social development, particularly of the developing countries."[152]

Within this political horizon, the UNCTAD resolution identified a set of political objectives to be reached through regulatory reform: **the achievement of stable conditions in commodity trade that are remunerative and just to producers and equitable to consumers**, the improvement of the terms of trade of developing countries, the elimination of the economic imbalance between developed and developing countries, the expansion and diversification of the trade of developing countries by expanding the processing of primary products and promoting industrialization, the improvement of productivity and competitiveness by means of research and development, and the increase in earnings from export. **It recognized that commodity prices should be stabilized around levels which would be "remunerative and just to producers and equitable to consumers."[153]**

Price stability was not seen as a way to continue the export of raw materials at remunerative and just prices, but a tool to redistribute resources differently along the value chain, satisfy the needs of producers and consumers rather than intermediaries, and increase the amount of resources that stayed in the country of origin, so to reduce economic dependence, increase investments in industry and adding value activities, diversify and achieve high levels of autonomy. **UNCTAD produced a non-exclusive list of "core" commodities in which it hoped to see ICAs, most of which of relevance for the Fair Trade movement: banana, bauxite, cocoa, coffee, copper, cotton and cotton yarns, hard fibres and products, iron ore, jute and products, manganese, meat, phosphates, rubber, sugar, tea, tropical oil, and oilseeds**.[154] However, developed country governments argued for a commodity-by-commodity approach to negotiations and the IPC never came into being as a collective agreement on a multiplicity of commodities.

---

[152]UNCTAD, Integrated Programme for Commodities, resolution 93(IV) of the United Nations Conference on Trade and Development), UNCTAD: Geneva, 1978. See also Rothstein, Robert L. (1979) Global Bargaining: UNCTAD and the Quest for a New International Economic Order Princeton: Princeton University Press.
[153]UNCTAD, id.
[154] Id, Art II. Commodity coverage.

Along with the control over commodity markets and a different distribution of value along trade chains, the NIEO programme included several points that resonate with contemporary requests of addressing failures of the global trade and investment regime:
The main tenets of NIEO were:

- Developing countries must be **entitled to regulate and control the activities of multinational corporations operating within their territory**.
- They must be **free to nationalize or expropriate foreign property** on conditions favourable to them.
- They must be **free to set up associations of primary commodities** producers similar to the Organization of Petroleum Exporting Countries (OPEC); all other States must recognize this right and refrain from taking economic, military, or political measures calculated to restrict it.
- Creating a **more cooperative negotiating climate between developed and developing countries**, and streamlining the global bargaining process by reducing the total number of participants involved.[155]

The link between International Commodity Agreements and the Fair Trade movement appears clear. And at least of two kinds. On the one hand, the mission of Traidcraft, one of the precursors of the Fair Trade movement, was aligned with the need to increase remuneration for local producers but, at the same time, aim at supporting industrialization, upgrading and the rupture of the commodity based economies. As Joe Osman reports in his recent book on Traidcraft, the concept of "adding value to a commodity by having it processed in or close to its origin always applied to our food product development thinking and was formalized as part of Traidcraft's purchasing policy in the early 2000s."[156] According to the policy, Traidcraft" "will aim to maximize the value added in country of production by processing or packaging at or near to the source. Wherever possible this will be organized and controlled by the supplier… the maximization of sales, and benefits to suppliers resulting from that, should not be compromised by reducing the viability of a product through lower quality of higher costs."[157]

On the other hand, Osman also suggests that the "origins of Fairtrade labelling can also be traced back to the collapse of the International Coffee Agreement which had been designed to regulate production and stabilize world market prices."[158] The collapse of the Coffee Agreement was not the only relevant event that changed the pattern of global trade and investments. Starting in the 80s, the Washington Consensus of liberalization, free trade, austerity and debt brought NIEO to an end, and with it also the idea that was promoted at the Bretton Woods conference of a coordinated and collaborative global economy with a strong social component. The International Trade Organization never came into being. The World Bank and the International Monetary Fund began pushing for structural adjustment programs that promoted privatization, the end of commodity boards, export-led policies and the intensification of the uneven development based on the export of raw materials.

[155] See
[156] Joe Osman, *Traidcraft*, Supra n 85, p. 148.
[157] Ibid.
[158] Id., p. 106.

However, the NIEO, the IPC, the different ICAs and what happened in the UN General Assembly in the aftermath of the decolonization wave demonstrates that **alternatives to the current system of trade are not only possible, but they have been enshrined in declarations and resolutions, discussed and experimented, supported politically and fought for**. More importantly, the decades that preceded the end of the Cold War and the 'victory' of the Western conception of the world have left a legacy of ideas, projects, aspirations and a clear identification of the close link between the past, the present and the future. New international commodity agreements could be concluded, although they have to conform to certain principles: such agreements could only be adopted to deal with severe market disruption; their aim would be limited to price stabilization and not price increases; and importing and exporting countries would have equal voting power.[159] If we look at the import/export trends since 1990s, what is clear is that trade dynamics have reinforced the division of labour between high income countries and the rest of the world: the former are importing raw material and exporting finished goods, while the others are net exporters of raw material. On a per capita level, Figure 2 below indicates that 'in 2017, each person in the high income group was dependent on the mobilization of an average of 9.8 tons of material resources elsewhere in the world,"[160] therefore shifting social and environmental problems related to extraction and processing activities from high-income importing countries to low-income exporting countries.

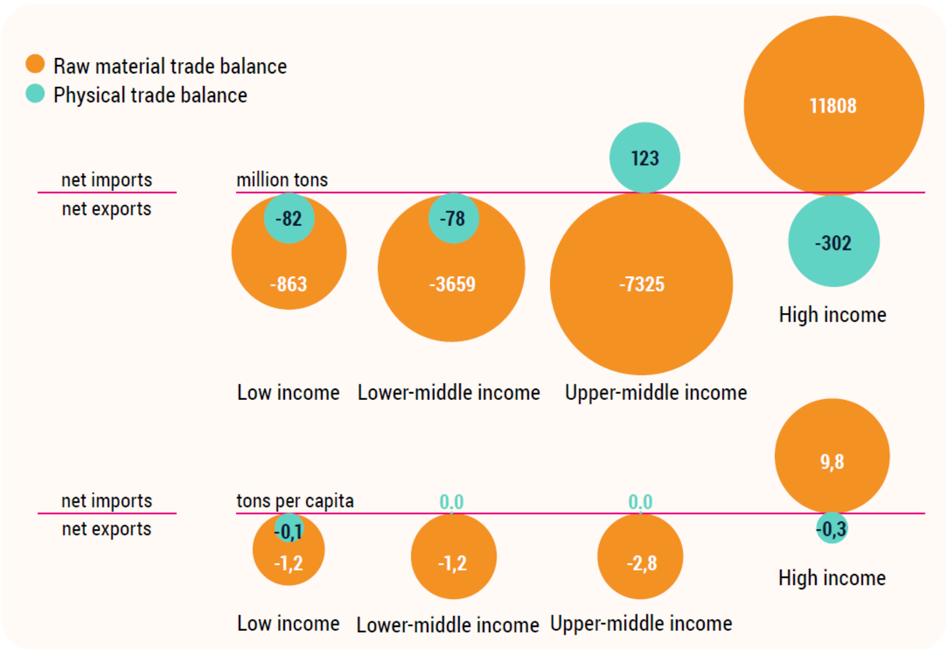

Figure 2: Source UNEP and IRP, *Sustainable Trade in Resources. Global Material Flows, Circular Economy and Trade*, Geneva: Nairobi, Kenya: UNEP, 2020

[159] Article XX (h) of GATT exempts international commodity agreements from the rules of GATT and provides the flexibility needed for future international commodity agreements.
[160] UNEP and IRP, *Sustainable Trade in Resources. Global Material Flows, Circular Economy and Trade*, Geneva: Nairobi, Kenya: UNEP, 2020, p. 35.

In the contemporary context of dependency and uneven development, the programme of the New International Economic Order and the ICAs should not be taken as a blueprint. As a matter of fact, resources were seldom distributed in a way that supported the smallest and most-marginalized farmers, but rather increased the revenues of large players and public administrations acting as intermediaries. In addition, limited attention was paid to climate change and the environment, whereas extractivism and shipping goods around were identified as goals to achieve, though under national ownership of developing countries. Today, the stabilization of commodity prices through a **new Integrated Programme for Commodities would not be enough to fulfil the double goal of respecting the planetary boundaries while upholding human rights and guaranteeing high living standards for all workers**.[161] Along with a legislative fix of minimum prices, there would be the need for a broader regulatory, political and ideological transformation of the international trade regime and within each country: this should concern the **redistribution of value, the diversification of production, the strengthening of local economies and the establishment of a trade and investment system capable of respecting the ecological balance**. Looking backward should not be a reason for melancholia or regret. On the contrary, it should be a reminder that we do not have to reinvent the wheel and that we must learn from the achievement and mistakes of the past.

Let's use as example the cocoa living differential agreement concluded by Ivory Coast and Ghana in 2019. The deal, a piece of international law, binds them to require extra $600 per ton of cocoa when placing the raw beans on the international markets. This is, to a certain extent, a reduced form of International Commodity Agreement, but it **still depends on the international price as defined by the stock markets and does not involve any purchasing country**. Thus, if we look at the history of the ICAs and we compare it with the way in which the European Union is approaching Ghana and Ivory Coast, i.e. promising technical support and providing the space for stakeholder engagement, we realize that there is the legal space to **promote and propose something different (like a new ICA on cocoa) and to do it even better than in the past (by using Official Development Aid and development money to promote the establishment of local industries, the addition of value in the country of origin, regional markets, differentiation of production, an agroecological and food-sovereignty based approach to the agricultural sector in the two countries, etc.).** Arguments may be promoted of why this is not going to happen or should not happen (for example, the loss of employment in the North, the higher prices for European consumers or the fact that extra revenues were not actually distributed to farmers). However, it is important to know that trade has been different (or alternative) than the one we see today and that only few decades ago – and still today – countries, individuals and organizations believed that systemic transformations were – and still are - possible.

[161] Kate Raworth, *Doughnut Economics*, supra n 54.

5. The main legal structures behind the current global economy and the trade wars

5.1 The WTO as a jewel in the crown of free trade and globalization.

The free trade and investment regimes are not spontaneous products of the market, but legal constructions that have been refined, adapted and enforced through centuries. From the local to the international, legal structures have been issued and enforced that represent the backbone of globalization. When we think about global value chains that cut across tens of jurisdictions, capital flows into and form countries, or the circulation of goods and services, we have thus to think about the combination of international and national laws that make such complex system of exchange possible. And that define the bargaining power that each actor (states, corporations, small-scale producers, workers, etc.) can exercise, the ways in which value is produced and how value is distributed. This short premise, although simplistic, reveals the importance of thinking about international trade law and international investment law when we reflect on the socio-environmental challenges of today and imagine the visions of tomorrow.

As we have seen, international trade and investment law were central to the process of globalization that has been taking place for centuries. And to the responses that were leveraged against it, especially towards the end of the XX century. In 1999, when the anti-globalization riots took place in Seattle, the protests were aimed at the World Trade Organization (WTO) as the organizations that was identified as the space where trade negotiations, trade rules and trade sanctions were developed in order to intensify trade integration, the free circulation of goods, services and capital, and create a universal marketplace for raw materials, labour, ideas, etc. In the slogans and messages of the people who gathered in Seattle (and elsewhere before and after that crucial date), the WTO and its rules were the 'can opener' that were putting countries against each other, reducing the political and regulatory autonomy of governments with regards to crucial areas of their economy and society, and favouring the funnelling of resources from the South to the North. But, what is the WTO and is it only the WTO that matters when we think about international trade and investments? Moreover, does the relationship between trade, investments and globalization date back only thirty years? Let's take one question at the time.

The World Trade Organization is an international organization created in 1994 by means of an international agreement between states signed in Marrakech at the end of eight years of negotiation (the so called Uruguay Round of multilateral trade negotiations, lasted between 1986 and 1995). The treaty establishing the WTO entered into effect on January 1, 1995, and the WTO with it. At the time of writing, the WTO has 164 members, accounting for 98% of world trade and 22 countries that are negotiating their membership. The WTO is not a treaty nor a set of rules. Rather it is the hub of multilateral free trade as it provides a space for negotiation, oversight and implementation of rules that represent the minimum standard of free trade for all its members.

The WTO has a Secretariat, that sits in Geneva, with no decision-making role. The Secretariat has duties concerning technical support to the members, technical assistance for developing economies, legal assistance in the dispute settlement process and elaboration of data and analysis on the state of global trade that are used to explain the WTO and promote the way forward. Decisions and changes in the existing rules of multilateral trade are made by members, normally at the Ministerial Conference that takes place every second year and is preceded and/or followed by rounds of negotiations (like the Uruguay Round or the Doha Round). Because the general rule of international law is that no country can be bound by an agreement that it has not signed or ratified, and because the WTO was established by means of an international agreement, any change in the composition, structure and functioning must be unanimously agreed and ratified.

In order to be part of the WTO, each country has to sign and ratify the multilateral agreements that underpin international trade and therefore agree to liberalize trade at least as much as required by them. The three main international agreements that operate under the umbrella of the WTO are: the General Agreement on Trade and Tariffs (GATT, entered into force in 1947), the General Agreement on Trade in Services (GATS, came into effect in 1995), the Trade in Intellectual Property Rights (TRIPs, came into effect in 1995). The areas covered by the three pillars of the WTO already expose that international trade is more than just facilitating the circulation of goods. Whereas the GATT (that was signed in 1947 by 23 countries as a temporary agreement and now central to the WTO system, as we discussed above) mainly deals with the free circulation of goods, the reduction/elimination of tariff and non-tariff barriers to trade, the limits on quotas, and the provision of unilateral and multilateral exceptions to liberalization, the GATS and the TRIPS stretch liberalization to the area of services and intellectual property.[162] In particular, whereas the GATT and the GATS aim at limiting states' interventions and any form of direct and indirect restrictions to trade, the TRIPS pushes countries into reforming their intellectual property regimes and adopting higher levels of protection. In this sense, the construction of the multilateral trade regime happens by means of less and more public presence in the market.

The legal notions at the centre of the international trade regime are the principles of non-discrimination, national treatment and most favoured nation. Although different, these notions share the common goal of erasing distinctions in the way national products and services are treated vis-à-vis foreign product, so that every economic actor has the same opportunity to compete for the market and within the market. As such, these legal principles embed obligations of non-intervention and duties to get rid of obstacles to trade. In particular, non-discrimination means that likely products and services must be treated in the same way, with no distinction in terms of tariffs, fiscal regime, requirements, etc. National treatment requires states to treat foreign products, capital and services in the same way – or better – than nationals. Finally, Most Favoured Nation (MFN) means that if a state guarantees better terms of trade to a third country, the same must be applied to all other countries that have

[162] At a time when e-commerce, digital services and digital platforms, social media and gig-economy, smart-agriculture, genetically modified seeds, public procurement for services, working from home, etc. are significantly expanding, GATS and TRIPS should receive more attention from civil society and non-governmental organizations interested in social, environmental and economic impacts of trade.

concluded a MFN agreement. Although these notions may appear too abstract and too removed from the real life of the economy, they play a crucial role in defining the regulatory and political space of governments around the world.

5.2 The WTO is more than GATT, GATS and TRIPS

The WTO is the international organization in charge of the oversight, re-negotiation and implementation of the three agreements that we have mentioned. However, this is not all. Throughout the years, the **WTO has also been the place where other treaties have been negotiated and signed, which intensify the process of liberalization and bring it to specific sectors.** Some of them bind all member states, while others, like the Agreement on Government Procurement (GPA) and the Agreement on Trade in Civil Aircrafts have only been signed and ratified by a bunch of countries and only apply to the interactions between them. Through the conclusion of these international agreements, countries accept to redefine their attitudes vis-à-vis trade but also to modify their internal policies so to make them compatible with the idea of the global market as a level playing field where all competitors have the same opportunity to participate and win.

We can think, for example, about the **Agreement on Agriculture (AoA),** which entered into force on January 1, 1995 and was inspired by the construction of a global market for agricultural products and required all WTO members to undertake to implement national agricultural policy reform agenda to increase market access for foreign products, reduce domestic support to agricultural production and cut export subsidies. The long-term objective for the multilateral trading system "is to establish a fair and market-oriented agricultural trading system" with the assumption that this shall be achieved through "substantial progressive reductions in agriculture support and protection".[163] Most of the trade in food, agricultural products and their derivates, with the exception of fish and fish products, is therefore defined by the AoA.[164] However, we cannot only think about the AoA when we consider the way in which international law determines the shape, operations and distributive impact of the food system (Box 1).

Other relevant treaties that were concluded in the multilateral context of the WTO are the **Agreement on the Application of Phytosanitary Measures (SPS) and the Agreement on technical barriers to trade (TBT),** which have a direct impact on the regulatory space that countries have with regards to health, safety and the creation of exception to the norm of free trade and liberalization. In the case of the SPS, the goal of the treaty is to balance the free trade in goods with the rights of states to adopt sanitary or phytosanitary measure that may

[163] WTO Agreement on Agriculture, preamble. See also, Michael Fakhri, Interim report of the Special rapporteur on the right to food. The right to food in the context of international trade law and policy, A/75/2019

[164] The definition of the Agreement covers not only basic agricultural products such as wheat, milk and live animals, but the products derived from them such as bread, butter and meat, as well as all processed agricultural products such as chocolate and sausages. The coverage also includes wines, spirits and tobacco products, fibres such as cotton, wool and silk, and raw animal skins destined for leather production. Fish and fish products are not included, nor are forestry products.

protect people, animals or the planet. Not surprisingly, the treaty is drafted in a way that free trade is the norm and limits are the exception. According to Article 1.2, each Member State shall ensure that any sanitary and phytosanitary measure with regards to imported products is applied "only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence."[165] The import of chlorine chicken or genetically modified food, for example, is mainly regulated by the content of the SPS and the idea that limits to trade are acceptable only when 'necessary, based on scientific principles and maintained with scientific evidence'.

Box 1. International trade and investment rules and the food system

When it comes to the relationship between food systems and international trade, we can easily realize how local, national and regional food systems – whether food is produced for export or not – are defined by the content of these international agreements and the way in which they are implemented. The AoA, for example, challenges the possibility of public support to agriculture, independently on whether products are exported or not, with the aim to increase competitiveness and reduce distortions of the international market in food products (but has not been used to challenge the European Common Agricultural Policy nor the Farm Bill in the USA). In his first report, the current United Nations Special Rapporteur on the Right to Food, Michael Fakhri, is clear: "The Agreement on Agriculture, which came into force as part of WTO in 1995, has been a barrier to fully realizing the right to food."

In the broader context of liberalization, reduction of duties and public support to agriculture, the AoA recognizes the possibility of a 'Special and Differential Treatment' for developing countries. However, allowances are often weak (such as longer implementation periods and lower reduction rates on agreed commitments) or not much use to the poorest and most vulnerable (such as unlimited spending allowances on agriculture for countries that face unsustainable debt levels and chronic budget shortfalls). Moreover, developing countries that have joined WTO since its creation have been given only limited access to special and differential treatment.

Similarly to the AoA, the SPS and TBT affect states' power to impose limits to import of food stuff, therefore exposing farmers and producers to international competition even when standards, cost of production and externalities are different. Stockpiling policies, higher prices for purchase of locally produced food, public procurement in support of farmers, limits to import based on socio-economic reasons, etc., have thus very limited space in the system of international trade.

In addition to these pieces of international regulation, we need to consider the transformative impact that international investment. As we discuss below in Section 5.5, international investment law is structured to increase the presence of foreign capital, open up to the exploitation of natural resources and facilitate the implementation of export oriented activities. Trade and investments in the food system are interconnected. Foreign direct investments, as Covid-19 has clearly revealed, are attracted by the possibility of exporting and trading goods produced in the countries of destination: this means that the international trade and investment regimes create incentives to the establishment of export-oriented food production and achieve food security not by means of local production but import and trading.

[165] WTO, Agreement on the Application of Phytosanitary Measures, Art. 2.1, Basic Rights and Obligations.

Similarly, the Technical Barriers to Trade (TBT) Agreement "aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade."[166] For Article 2.2, each Member State "shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."[167] Being free trade the objective, limits to trade are the exception and must be accepted only when they are deemed necessary, aimed at achieving a legitimate objective and supported with scientific and technical information. Such legitimate objectives "are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment."[168]

We can finish this short overview of (some of) the different prongs that compose the international trade regime with the Trade Related Investment Measures (TRIMS) Agreement, according to which "WTO members may not apply any measure that discriminates against foreign products or that leads to quantitative restrictions," because both these public interventions would be in violation of WTO principles of National Treatment and non-discrimination. In this sense, the TRIMS is meant to preserve and expand the markets of existing global players (incumbents) by outlawing local content policies that, for example, enabled countries like Korea and Malaysia to develop their motor vehicle industries. Exceptions are possible also in the case of the TRIMS, for example by adopting a safeguard measure when "a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products,"[169] but the legal construction is often narrow and the proof of the serious injury hard to make.

A general set of exceptions is also contained in both the GATT (Art. XX) and the GATS (Art. XIV). The articles state that, when necessary to protect specific interests (such as protecting public morals or maintaining public order; protecting human, animal or plant life or health; securing compliance with laws or regulation which are not inconsistent with the provision of the Agreements), Member States have the possibility to apply unilateral restrictions to trade that are sufficiently connected with the protection of that interest and do not constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade in services. However, the 'necessity' requirement, the need for a direct relation between the unilateral measure and the objective to achieve, the legal and economic complexity of proving the legitimacy of the measures and the political and financial cost of a WTO dispute often paralyse countries, the policies of which are thus victim of a chilling effect due to the fear of breaching international trade obligations.

[166] WTO, Technical Barrier to Trade Agreement, Art. 2.2, Preparation, Adoption and Application of Technical Regulations by Central Government Bodies.
[167] Ibid.
[168] Ibid
[169] Agreement on Safeguards, Article 2.1.

The use of unilateral exceptions to trade is receiving a significant amount of attention from policy makers and organizations in the Global North interested in accounting for environmental externalities and, in particular, for the greenhouse gas emissions that are connected with production of goods and services in countries with lower environmental and climate standards than those of the importing country. In the last years, especially after the European Commission issued the EU Green Deal and the Farm to Fork Strategy, the debate has intensified on the possibility of unilaterally introducing borders' adjustment and carbon taxes to "balance carbon leakage and environmental dumping that are linked with the production of the goods and services" outside of the EU. As part of the EU Green Deal, the Commission has already announced that a Carbon Border Adjustment Mechanism (CBAM) for selected sectors will be introduced by 2021. The aim is to reduce the amount of 'virtual CO2' that European Union is importing, i.e. the amount of CO2 needed to import all goods and services, which currently amounts to more than 20 % of the EU's own territorial CO2 emissions.[170] Given the attention that unilateral measures are obtaining in the pursue of a fairer and more sustainable global economy, their premises and implications are discussed with more details in Section 7.2.1 and 7.2.2 below.

5.3 The WTO dispute resolution mechanism as part of the trade regime

The fact that the WTO regime recognises spaces for unilateral intervention – although narrowly defined - help us understanding, to some extent, the ongoing trade wars between the United States, China and Europe. It also helps clarifying the role of the WTO as dispute resolution body for trade-related controversies between Member States and guarantor of free trade. As a matter of fact, the tariffs and quotas that the Trump administration imposed since 2018 on 300 billion of what ?of Chinese imports (and on some European products) were, in strict legal terms, limitations to the free movement of goods justified by the USA with their intention of redressing unfair (i.e. dumping) practices adopted by the Chinese government – on the one hand - and protecting their national security – on the other hand. The compatibility of these national measures with the rules of international trade was raised by China vis-à-vis the WTO and on September 2020 the WTO Dispute Resolution Panel issued its judgment.

In its opinion, the Dispute Resolution Panel declared that USA tariffs on Chinese goods are *prima facie* inconsistent with the GATT and that "the United States has not met its burden of demonstrating that the measures are provisionally justified under Article XX(a) of the GATT 1994"[171] (necessary to protect public morality). For many authors, the intervention of the WTO must be praised, as it reinforces the importance of the multilateral system of trade and the universality of the rules of the game.[172] For the general audience, Trump nationalism and protectionism have no space in the contemporary system of trade and the intervention of the

[170] Gabriel Felbermayr and Sonja Peterson, Economic assessment of Carbon Leakage and Carbon Border Adjustment, European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union PE 603.501, April 2020.
[171] WT/DS543/R, Conclusions and Recommendations.
[172] BBC News, US China tariffs 'inconsistent' with trade rules says WTO, 15 September 2020, available at: https://www.bbc.com/news/business-54168419 [last accessed 20 October 2020].

WTO must be preached. Although we may agree on the space that a President like Trump and his xenophobic nationalism may have in the world of today, three considerations must be made:

a) that the judgment reinforces the idea that free trade and untamed mobility of goods represents the norm, and that there is a very limited space for exceptions;

b) that the dispute resolution mechanism of the WTO is constructed in a way that reinforces, rather than eliding, economic imbalances between the parties involved;

c) the USA-China case is not the sole trade war that is currently happening, but is the sole one that receives media attention and that made it to the WTO.

The first point is relevant because it reminds us that a rule-based trade system implies the construction of a liberalized and free trade system where states are required not to intervene in the economy (although, as we saw, the market needs public authority to function). The last two points deserve some attention, as they remind us of the importance of thinking about the international trade regime as a space that defines and constraints 164 countries and 98% of the world economy, but where some countries count more than others. Because the dispute resolution mechanism is the legacy of a past where trade dynamics were negotiated and agreed upon, the WTO has very limited enforcement power. On the contrary, the dispute resolution bodies often consider the possibility that the state will not comply with its conclusions and recommendations, i.e. will not withdraw the illegal measures. According to the GATT, in the absence of voluntary compliance, the panel can seek a mutually acceptable solution, compensation to the complaining WTO member, or use the "last resort" of temporarily suspending the application of concessions or other obligations vis-a-vis the noncomplying member.[173] This last point means that the state that has successfully brought the case to the WTO may be allowed to adopt countermeasures against the losing party, as an incentive for the latter to implement the recommendations. Because of this, what truly makes the difference in trade disputes is the economic threat that a country can exercise over the other, that is the possibility of using countermeasures to balance the negative trade impact of the illegal measures.

Even in the context of a system meant to liberalize trade, countries that are in a condition of economic dependence or that represent an irrelevant market for large players such as the United States, China and Europe, are thus deprived of effective instruments to effectively challenge protectionist measures that go to their detriment. If we also consider that bringing a case to the WTO for an infraction or upholding the content of the treaties may have a political effect on the future of trade and non-trade negotiations, we can thus understand the lack of cases brought by small and medium economies against high income countries and the possibility that certain countries have in using trade measures to sanction competitors. While it is generally known that Trump has raised tariffs on Chinese steel and

[173] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

aluminium, it is much less known that in 2019 the US President suspended duty-free access to Rwandan textile imports into the USA because of the African nation's refusal to lower trade barriers for American-made clothing and shoes, or that African neighbour countries are involved in multiple trade wars aimed at strengthening their national positions in light of the incoming conclusion of the African Continental Free Trade Agreement (AfCFTA) and the attempt to obtain a comparative advantage vis-à-vis regional competitors.[174]

5.4 The spaghetti bowl of Free Trade Agreements, Preferential Trade Agreements and Regional Trade Agreements

If this is the world of multilateral trade agreements, the situation gets even more complex and confused when we consider that there are more than 420 regional trade agreements already in force around the world. Free Trade Agreements (FTAs), Preferential Trade Agreements (PTAs), regional trade agreements (like the North-Atlantic Free Trade Agreements (NAFTA), the European Union, the Association of South Asian Nations Free Trade Area (AFTA), the Southern Common Market (Mercosur), the Common Market of Eastern and Southern Africa (COMESA), or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership – CPTPP) are concluded between two or more countries to intensify their trade relationships by going even further than the content of the WTO rules (GATT, GATS, TRIPS, etc.). The African Continental Free Trade Agreement (AfCFTA), a regional agreement that will create a common market for most of Sub Saharan Africa and that will soon enter into force, is just the last of a series of regional attempts to use trade liberalization to steer economic, social and environmental dynamics.

BOX 2 The African Continental Free Trade Area Agreement

The African Continental Free Trade Area Agreement (AfCFTA) is the latest effort by African States to restructure the international economic order from below. The AfCFTA aims to create a large single African market for goods, services and movement of persons. The AfCFTA Phase I negotiations comprise of three key agreements: Protocol on Trade in Goods; Protocol on Trade in Services; and the Protocol on Dispute Settlement. While the Protocol on Trade in Goods include provisions relating to the elimination of duties and quantitative restrictions on imports, rules of origin, trade facilitation and transit, trade remedies, protections for infant industries and general exceptions among others; the Protocol on Trade in Services provides for transparency in service regulations, progressive liberalization of services sectors and mutual recognition of standards, licencing and certification of services suppliers among African states. The formal commitments enshrined in the AfCFTA will build on the modest gains recorded in the context of informal intra-African trade. To the extent that an integrated African economy would strengthen competitiveness of the local industries, enhance the realization of economies of scale for domestic producers, boost industrialization, enhance better allocation of resources and attract foreign direct investments, the AfCFTA has the potential to restructure both international and intra-African economic relations. However, viewed against the background of struggles by African

[174] Interview with SEATINI, 24 August 2020.

states to maximize existing economic integration aspirations of the regional economic communities, the AfCFTA is an ambitious agreement.

The existence of multiple layers of trade agreements is disciplined by the WTO rules. According to GATT Article XIV, article V of the GATS and the Enabling Clause, countries can conclude regional and bilateral agreements to establish free trade areas, custom unions, interim agreements that precede FTAs (like the interim agreement between the EU and Ivory Coast in the context of the EU-ECOWAS agreement), Preferential Trade Agreements and Economic Integration Agreements. The main aim of this 'spaghetti bowl' of trade agreements, as it has been defined, is to establish ad hoc trade relationships that liberalize even further compared to the WTO standards, i.e. reduce even more the tariff and non-tariff obstacles between their economies. In a sense, the intensification of bilateral and regional trade agreements is the response to the 1999 Seattle protests, the opposition against the Multilateral Agreement on Investments (MAI), and the need for consensus to change the content of international agreements like the GATS, GATT and TRIPS.

From a geopolitical point of view, the use of FTAs and the disengagement with the multilateral forum of the WTO has also the consequence of intensifying specific trade partnerships and creating preferential trade dynamics that can be of particular interest because of the resources that are exchanged (e.g. Brazilian livestock from Mercosur and EU automotive to Mercosur, EU livestock to South Korea and Japan, fish and minerals from ECOWAS, processed EU tomatoes to ECOWAS, etc.) and the possibility of consolidating existing value chains or establishing new ones. Along with being separate treaties vis-à-vis the WTO, most of these agreements contain their internal mechanism to solve trade disputes, some of which have a much stronger grip that the WTO dispute settlement mechanism. To give two examples, the Court of Justice of the European Union, for example, has a sanctioning power vis-à-vis Member States that breach the rules of the EU internal market, while Chapter 11 of NAFTA contains an investor-state dispute clause that allows private investors from each country (USA, Canada and Mexico) to directly sue a country for a breach of the rules of free(r) trade contained in the treaty. If states' regulatory space was already affected by the adhesion to the WTO, the conclusion of FTAs makes the straightjacket even tighter. If the GATT and GATS already liberalize economies, each FTA, PTA or regional agreement goes one step further.

Even in Europe, Free Trade Agreements and Regional Trade Agreements have been the object of criticisms and resistance. The most recent cases are those of the Transatlantic Trade and Investment Partnership (TTIP) negotiated between the USA Government and the European Commission and blocked before it a final text was agreed, and the EU-Canada Free Trade Agreement (CETA), signed in 2016 but not ratified by the regional Government of Wallonia because of the negative impact that further liberalization would have had on the regional economy, so that it only provisionally entered into force.[175] In both cases, some European policy makers, NGOs, civil society organizations and sub-national governments (like

[175] Euroactiv, Belgian region of Wallonia blocks EU-Canada trade deal, Euractiv, 14 October 2020, available at: https://www.euractiv.com/section/trade-society/news/belgian-region-of-wallonia-blocks-eu-canada-trade-deal/ [last accessed 21 October 2020].

Wallonia) were ready to challenge free trade agreements that would have negatively affected the regional economy or subordinated governments to the commercial rights of corporations.

What happened with CETA demonstrates, to use the words of Ohio Omiunu, that sub-national governments (including cities, regions, etc.) represent potential spaces of resistance, scrutiny and mobilization and they should be involved in any trade and investment negotiations. Something that is partially happening in Europe with the Committee of the Regions, but hardly happening in the Global South, where the difference of experiences and the different vision that originate from the ground are missing. On the other hand, it is noteworthy that the larger public opposition that was leveraged against CETA and TTIP was not replicated in the case of the EU-Singapore 'new generation' and comprehensive trade agreement (which goes far beyond lowering tariff and non-tariff barriers),[176] nor the agreements with Japan and South Korea.[177] Even in the case of the EU-Mercosur agreement(See Section 5.4.1 below), the Economic Partnership Agreements, the African Continental Free Trade Agreement (See box 2 above), resistance and opposition are not assuming the same connotations and organic structure that we saw when the health and economic safety of European citizens was at stake.

It is thus important to highlight the strategic role of FTAs in intensifying the liberal agenda and the market opportunities for most competitive economies, so to understand the micro and macro implications that they can have. The role of FTAs in pursuing further liberalization was best summarized in a 2003 op-ed by then US Trade Representative Robert Zoellick. In the piece, Zoellick stated that:

> "[W]hat should the U.S. do if other nations choose protectionism over free trade? Under the WTO's procedures, one nation can block progress. It would be a grave mistake to permit any one country to veto America's drive for global free trade. Our strategy is based on a concept that any economics professor should appreciate: competition. If some countries hide behind the false security of protectionism, the U.S. will work with those that believe true economic strength is achieved through openness. The strategy is simple: The U.S. is spurring a competition in liberalization. […] That is why the U.S. has pressed forward with a portfolio of free trade agreements while doing all we can to make the WTO negotiations succeed. Our FTAs are encouraging reformers — many in fragile democracies — in Latin America, Africa, the Middle East, and the Asia-Pacific region. These partners have become some of the

[176] The EU–Singapore FTA deals with more than trade and FDI liberalisation. It provides for the virtual complete elimination of tariffs, addresses existing non-tariff barriers (for instance it includes commitments on the removal of double testing requirements for motor vehicles and electronics), and requires a modification of Singapore public procurement rules in order to provide better market access to European service suppliers in Singapore in sectors such as telecommunications and transport. Over the first five years, it is estimated that EU GDP would grow by 0.06 % and Singapore GDP by 0.35 %. Source: European Parliament, Briefing: Trade negotiations between the EU and ASEAN member states, 11 November 2020, available at: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)659337 [last accessed 12 November 2020].

[177] In addition, negotiations are under way with Indonesia, while talks are currently on hold with Malaysia, the Philippines and Thailand. The aim of the EU is to "strengthen its economic cooperation with ASEAN, in order to maintain its competitive position in this dynamically developing region." Source: European Parliament, Briefing: Trade negotiations between the EU and ASEAN member states, ibid.

> WTO's foremost champions for open markets. […] We will do our best at Cancun to keep the Doha negotiations on track. But if others falter, the Bush administration will keep negotiating for free trade — to create jobs, keep America competitive, and create opportunities for modernizing reformers around the world."[178]

Because of the way in which they go beyond WTO provisions, FTAs, PTAs and regional agreements have been often called WTO-plus or WTO-extra, depending on whether they intensify the liberalizing framework already contained in the WTO or they touch upon other areas and sectors that are not directly dealt with in the WTO. Whether WTO-plus means less barriers to trade (e.g. tariffs, non-tariffs barriers, mutual recognition of standards, etc.), the conclusion of WTO-extra clauses can go in different directions: on the one hand, the agreements can be used to push for regulatory changes in areas such as competition law, privatization of health care, provision of social security and pensions, etc.; on the other hand, free trade agreements can also contain clauses requiring that traded goods are produced with higher labour, human rights or environmental standards than those required by some of the countries involved in the deal. Trade and Sustainable Development Chapters (TSD) fall into the category of Trade-extra and contain development related objectives to be combined with or obtained through the market liberalization required by the WTO-plus part of the treaties. Because the use of trade agreements to require higher socio-environmental standards is receiving a lot of attention, we engage with its content, limits and opportunities in the section of this report dedicated to 'Trade and…' as one of the possible pathways for the future of trade and investments.

The existence of multiple layers of market liberalization made of hundreds of individual agreements concluded between countries provides us with two important elements of reflection. Firstly, that the rules that shape international trade are increasingly defined outside of the multilateral context of the WTO. This reduces the space for solidarity and collaboration and directly challenge the convergence and consultations that are taking place in the context of the United Nations (for example, within the Group of the 77, that gathers 134 developing countries). If uneven development is part of the problem, the direct negotiation between uneven parties can hardly go in the direction of re-balancing existing inequalities. Secondly, the bilateralization and regionalization of trade to reach objectives that cannot be obtained at the multilateral level teach us that bilateral and regional agreements, like the EU-Mercosur, shall be embedded in the broader context of free trade, universalization of regulatory standards (like in the case of WTO+ agreements) and transformation of national legal framework and economies, before being addressed in the details of their sustainability or labour chapters.

5.4.a The EU-Mercosur trade agreement: different levels of criticism

After twenty years of negotiation, the EU and the Mercosur states - Argentina, Brazil Paraguay and Uruguay - reached a political agreement for a comprehensive trade and investment agreement between the two regional markets (a WTO-plus and WTO-extra, to use the

[178] Robert Zoellick, Our Credo: Free Trade and Competition, *Wall Street Journal*, 10 July 2003, available at: https://www.wsj.com/articles/SB105779339812506300 [last accessed 20 October 2020].

definition we provide below) on June 28th, 2020. The deal is presented by the EU as a win-win for both economic blocks, with more trade liberalization and more foreign direct investments, access to public procurement, common rules in areas that are indirectly affecting trade (food safety, intellectual property rights, geographical indication, competition law, etc.) and the introduction of environmental and social chapters to combine freer trade with development goals. In addition, because the EU will be the first major trading partner to conclude a trade agreement with the Mercosur bloc, the deal is seen as a way to provide EU companies with a 'first-mover' advantage vis-à-vis businesses from other countries. "EU-based enterprises will have privileged access to raw material, while European companies already established in the Mercosur countries will be able to import parts and intermediate goods more easily."

The agreement has been criticized and the negotiations suspended because of the possible impact of freer trade on consumers' health and the environment, in particular due to the import of fruit and vegetables treated with banned pesticides and an intensification of deforestation to face the increase in the international demand for (cheaper) livestock and ethanol. In this sense, the link between free trade, health and deforestation is clear: lower barriers to trade and mutual recognition of food safety and environmental standards will lead to lower prices of fruit, vegetables, livestock, ethanol for EU consumers, a condition that will then lead to higher international demand and consumption.

Reactions against the deal have been mainly of two kinds. Some NGOs and policy makers in France, the Netherlands, Wallonia and Austria have called for stronger environmental and food safety standards in the treaty, claiming that the problem is not free trade but the incentive to forms of production linked with environmental and health risk. For them: "there cannot be a deal so long as the Amazon is burning."[179] On the other hand, calls have been made to scrap the whole process and think beyond the environmental and health implications and think about the distributive and long-term implications of an intensification of trade between the two blocks. Using arguments of social and climate justice, calls have been made to abandon the historical pattern of global comparative advantage, competitiveness and export-led development for the Mercosur (livestock, ethanol, fruits and vegetables in exchange for cars and parts, machinery, chemical and Pharmaceuticals). In 2019, Mercosur's biggest exports to the EU were agricultural products, such as foodstuffs, beverages and tobacco (21.2%), vegetable products including soya and coffee (17.4%) and meats and other animal products (6.5%). On the contrary, the EU's exports to Mercosur include machinery (28.6%), transport equipment (12.7% of total exports), chemicals and pharmaceutical products (24.2%).

Whether we are going in one direction or another, it is important to embed any Free Trade Agreement in the historical context, the ongoing trade relationships between the parties who are negotiating it and the way in which freer trade, more investments and less regulatory obstacles will produce winners and losers. By opening up new market opportunities between the two countries, the EU-Mercosur will not only increase the amount of overall trade between the regions, and the consequent emission of GHG. It will impact public budgets by cutting duties and borders' tariffs (4 billion Euro a year go to Mercosur countries), increase competition between countries and producers in Mercosur and non-Mercosur countries (for example, coffee producers in Brazil who receive privileged access to the EU market versus

[179] The Amazon is burning. Stop the disastrous Mercosur trade deal, available from: https://actions.sumofus.org/a/save-the-amazon-stop-the-disastrous-mercosur-trade-deal

coffee growers elsewhere in the continent) and reinforce an economic relationship based on the export of raw materials from the Global South, the transformation in the EU, and the sale back to Mercosur customers or businesses. Is this the kind of world economy that we aim for?

5.5 Foreign Direct Investments, bilateral investment treaties and investors-state disputes resolution (ISDS)

We mentioned at the beginning of this report that when we talk about the ongoing process of globalization we need to consider international trade and international investments as the two sides of the same coin. When talking about Covid-19 and the impact on the global economy, we also highlighted how the closure of borders and national lockdowns have had a negative effect on foreign direct investments, significantly reducing the amount of international capital invested into third countries and significantly affecting the macro and micro dynamics of economies often built on these flows. If our goal is to build a just, equitable and sustainable economy, we thus have to familiarize not only with the regime behind international free trade but also with the promotion and protection of Foreign Direct Investments as tools for growth and development.

Like international trade, foreign investments have been central to the construction of the global economy as we know it. Already in the 17th century, Europeans developed legal tools to protect property and investments of their citizens abroad. These legal tools were central to the European commercial and imperial expansion and included friendship, commerce, and navigation treaties, unequal treaties and concessions along with the de jure subjugation of non-Western peoples and lands to European interests.[180] One example, cited by Kate Miles in her book on the *Origins of International Investment Law*,[181] is the Dutch East India Company, a corporation established in the Netherlands that received legal, logistic, diplomatic and military support from its home country when reaching out to distant geographies to build infrastructures, increase local productivity and trade back to Europe. For centuries, diplomacy and gunboats (often referred to as 'gunboat diplomacy') were deployed by home countries to help their national establishing investments abroad (including in colonies) and to protect their property from nationalization and expropriations.

Since 1959, the narrative and political approach around foreign direct investments changed. The substance, however, remained almost the same. This was the year of US President Truman's speech that inaugurated the beginning of the era of 'development' and it was only few years before most of the remaining colonies became independent and started looking for their own economic trajectory. In 1959, the West Germany and Pakistani government signed the first Bilateral Investment Treaty for the protection of national investors operating in their countries.

[180] Michael Fakhri, Book Review: The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital, by Kate Miles, Journal of International Economic Law, 2015, 18, 697–708.
[181] Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital*, Cambridge: Cambridge University Press, 2015.

In the aftermath of decolonization, two opposite dynamics were thus taking place: on the one hand, Western countries and international organizations like the United Nations Committee on Trade and Development began pushing for ad hoc protection of investors that would guarantee international standards for expropriation, nationalization and treatment along with a separate mechanism for the resolution of the disputes between investors and states. On the other hand, states in the Global South promoted agricultural reforms and the nationalization of land and activities that belonged to former colonizers and foreigners: they wanted compensation rules governing nationalization to be derived from domestic law rather than international law and wanted to pay (or not) what they thought to be the right amount for those assets, not what the home country of the investor or the international community of former colonial power thought was appropriate. Data tell us which of the two direction the world took: since 1959, more than 2500 treaties were signed between countries, the vast majority of which was concluded only after 1989 and the beginning of the most recent phase of globalization.

For decades, foreign direct investments have often been associated with economic growth and, as a spill over effect, jobs, development, opportunities for knowledge transfer and alleviation of poverty. To this extent, the Asian Tigers are often identified as the best example of the positive impact of foreign direct investments: foreign capital established in the region, set up businesses and industrial hubs, and established new global value chains or strengthened those that were already in place. For the OECD: "Foreign direct investment (FDI) is an integral part of an open and effective international economic system and a major catalyst to development, [they help] create a more competitive business environment and enhance enterprise development."[182] However, recent empirical evidence on the impact of FDIs on economic growth is rather mixed, with a sample of 111 countries made by Baiashvili and Gattini reporting a mix of positive, neutral, or even negative relationship of FDI with growth.[183]

Whether or not FDIs lead to economic growth, this is a concern only if we believe that economic growth is automatically associated with an improvement in socio-environmental conditions and in a reduction of the inequality gap. An assumption that is challenged by the fact that the world is more unequal and environmentally unstable today than it was when the global free trade regime was institutionalized. However, there is another concern that is independent from it, which is the potential that FDIs and international investment law have to transform and adapt the local economy and the environment to the needs of international trade and the investors. When a country liberalizes its investment strategy and creates a competitive environment, as suggested by the OECD and other international organizations, is it just about joining the global market? Or there is something more that we should be thinking of?

To answer this question, there are two levels of consideration. First of all, we have to consider that foreign direct investment tend to favour (if not exclusively favour) large-scale

[182] OECD, Foreign Direct Investment for Development. Maximising Benefits, Minimising Costs, OECD: Paris, 2002.
[183] Tamar Baiashvili and Luca Gattini, Impact of FDI on economic growth: the role of country income levels and institutional strength, European Investment Bank: Luxembourg, 2020

projects and large-scale interventions that are capable of significantly remunerating capital. When governments create a competitive environment to attract this kind of investments, what they are doing is to favouring the establishment of economies of scale and large-players that tend to be capital intensive, export oriented, in percentage exploit larger shares of natural resources, employ less workers than Small and Medium Enterprises and produce goods and services at a price that can drive smaller players out of market. This is the case with agricultural investments, mining operations and the establishment of factories that become hubs of global value chains (e.g. garment, technology assemblage, food processing, etc). Secondly, we have to briefly consider the way in which bilateral investment agreements and investments' clauses contained in free trade agreement create a legal imbalance between the property rights of the foreign investor and the power of governments to regulate on social and environmental matters.

Like free trade agreements, the aim of bilateral investment treaties (BITs) is to facilitate international mobility of goods and services, in this case of foreign capital invested in third countries. Although it is dubious whether the existence of a BIT is enough to increase the amount of foreign direct investments between countries,[184] what is not contested is that BITs provide foreign investors with an extra level of legal protection vis-à-vis host states, national investors and local communities.[185] First of all, the notion of 'investor' has been increasingly interpreted in a broad sense, so to include shareholders, bond holders and financial investors, covering therefore much more than brick and mortar enterprises. The legal privilege that foreign investors benefit from assumes the form of a duty for the state to provide ad hoc compensation in case of (direct and indirect) expropriation, to fairly and equitably treat the foreign investor (i.e. do not compromise the business by means of discriminatory and unjustified regulation) and to submit to investors-state arbitration in case the investor considers that the rights contained in the BIT have been violated (note that in most cases, BITs do not provide states with the possibility of suing investors before an arbitral court, and that in the past administrative and criminal cases against the investors have been triggered as violations of the right to a fair and equitable treatment).

If we are interested in justice, equity and sustainability, our attitude towards the liberalization of investments must thus be based on the combination of the macro and micro implications of FDIs, not only on the existence of Investor-States Disputes Settlement mechanisms.[186] Although privatization of justice and the subordination of states to the decisions of an arbitral panel raise significant issues in terms of democracy and transparency, the issues with FDIs go beyond the moment of adjudication. They include the impact of BITs on the regulatory space for host governments (e.g. the constraints on expropriation of foreign

[184] Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... and They Could Bite*, Policy Research Working Paper, No. 3121, Washington: World Bank, 2003, available at: https://openknowledge.worldbank.org/handle/10986/18118 [last accessed 22 October 2020].

[185] Nicolas M. Perrone, The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime, *AJIL Unbound*, 113, 2019, 16-21; Nicolás M. Perrone, The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?, 7 *Transnational Legal Theory* 383, 2016.

[186] Cecilia Olivet and Pia Eberhardt, *Profiting from Injustice: challenging the investment arbitration industry*, Amsterdam: Transnational Institute, 2013; Cecilia Olivet and Pia Eberhardt, Profiting from Crisis, Amsterdam: Transnational Institute, 2014.

land for an agricultural reform, on nationalization of strategic industries owned by foreigners, or on the possibility of using their authority to fill the economic gap between large-scale economic players owned by foreigners and smaller national economic actors): as a matter of fact, there is clear evidence that BITs have a chilling effect on states with limited economic and political capacity, affecting their possibility of implementing financial, social and environmental policies for the good of their citizens and territory.[187]

Furthermore, the promotion of FDIs must be read through the environmental impact of global value chains, a matter that not only concerns the risks linked with large-scale extraction of raw materials, agricultural projects or on-site contamination, but also the increase in GHG due to the production of more stuff and the movement of more goods and services around the world. Moreover, we should ask if foreign capital and investments shall be receiving a stronger legal protection than national actors, or the difference in legal structures and political system should be discounted as part of the entrepreneurial risk faced by investors. Finally, our attitude towards liberalization of investments must be informed by the impact that FDIs may have on short-term and long term inequality: large-scale agricultural projects that hire numerous workers or mining operations may create jobs, but are they truly providing an opportunity to redefine the allocation of value and productive activities between the Global South and the Global North? Rather than focusing on technicalities and micro-components of the trade and investment regime, we shall look at the broader picture and the long-term implications of freer trade and unrestrained circulation of capital.

[187] Joathan Bonnitcha, Assessing the Impacts of Investment Treaties: Overview of the Evidence, Winnipeg, Canada: The International Institute for Sustainable Development, 2017; Kavalijt Singh and Burghard Ilge (eds), Rethinking Bilateral Investment Treaties. Critical Issues and Policy Choices, Amsterdam and New Delhi: Both Ends, Madhyam and SOMO, 2016.

6. A systemic and holistic approach to the socio-environmental impacts of trade and investment liberalization

The 2018 International Fair Trade Charter is adamant in putting the disjuncture between economic growth and inequality at the centre of the reason for Fair Trade's action. It is thus useful to quote its main statement on this point and reflect about the fact that the situation in the last two years has worsened:

> "The expansion of global trade in recent decades has been a major contributor to economic growth in most countries but the gains from increased global trade have not been shared evenly. Trade liberalisation has not delivered its promise of poverty reduction. For several decades, world trade has grown on average nearly twice as fast as world production and countries that were able to fully participate in this wave of globalisation have seen a reduction in the numbers of people living in extreme poverty. Yet inequality has grown dramatically and to unprecedented extremes; it has been estimated that the wealth of the richest 1% equals that of everyone else and just 8 people (in 2017) own as much as the poorer half of the world's population. The other side of this coin is that wages for ordinary working people have not kept pace with the cost of living; many barely receive a subsistence income. 800 million people still suffer from extreme poverty and face a daily struggle to secure access to land, water, education, and healthcare. Even for those who have been able to move out of extreme poverty, their position is fragile, and economic shocks, food insecurity and climate change threaten to rob them of their hard-won gains. The global economic crisis of 2007/8 has amplified these trends. Current levels of inequality – within and between countries - are a major threat to human rights and a cause of instability, conflict and forced migrations."[188]

If we analyse the last thirty years from the point of view of social equality, there is little doubt that the concerns raised in Seattle in 1999 were justified. Although studies report that inter-state inequality has lowered due to the intensification of exchanges and capital flows, market liberalization and the opening of national economies has led to an increase in intra-state inequality. More importantly, the reduction of the gap between developing and developed countries in terms of GDP does not mean that people are actually living better.

But who are the winners and losers of trade and investment liberalization? When we think about the role that trade policies and 'bringing jobs back to the USA' had in the victory of Trump in the United States and if we combine them with the stagnant real income growth and rising inequality in developed countries (also due to years of austerity imposed after the financial crisis), we may tend to conclude that international trade has the developing countries on "the winning side". Of course, we shall not dismiss the fact that low costs of transportation combined with a more integrated digital network and the lower cost of production in countries of the Global South have contributed to substantial job loss in U.S. manufacturing in the 1990s

[188] International Fair Trade Charter, supra n 74, p. 14.

and 2000s or the EU, jobs that were once considered the entry ticket to the U.S. middle class. However, trade has not been a zero-sum game: not all people in the developing countries are not the winners and not all people in the developed countries are losers.

On the contrary, international trade integration, free markets and global competition for cheap prices generated winners and losers within on both sets of countries alike, at least in the short term. According to Branko Milanovic,[189] the period that followed the fall of the Berlin wall and that is often associated with the end of the clash of ideologies and the victory of the Western socio-economic paradigm has clearly led to winners and losers. The winners are the rich everywhere and the middle classes in the emerging countries, while the losers are the economically marginalized in the developed countries, the post-Soviet states and much of the poorest in the world, particularly in sub-Saharan Africa. Although it is certainly not the case that all of these effects are the result of international trade and investments, the intensification of free trade flows has been a core, and highly visible, element of globalization.

Along with considerations on intra-state inequalities, it is important to also refer to the argument that there is an inherent tendency for international inequality to increase. Free trade globalization and the creation of a global market have widened the gap between the Global North and the Global South but also created in both the Global North and the Global South intra-country polarization between domestic regions that prosper from trade and those that are driven to greater poverty by trade. This is often referred to as the doctrine of 'uneven development' and usually associated with radicals such as Baran, Frank and Wallerstein. However, similar arguments have also been made by such less radical authors as Myrdal, Lewis and Krugman.

At the core of this theory, as Krugman already reported in 1980, there are not only decades of statistics and data, but a consideration: when trade is liberalized across regions, a small 'head start' for one region in terms of industrial, technological and financial capacity will cumulate over time, with exports of manufactures from the leading region crowding out the industrial sector in lagging regions. If countries (and individual producers) have an uneven capacity of operating at a higher level of the value chain (e.g. in research and development, transformation, distribution, retailing) the liberalization of trade between countries will intensify this unevenness rather than filling the gap. Trading raw materials with industrialized countries will intensify the gap and prevent industrialization in less-developed countries.[190] If trade is a way of filling the gap between developed and developing countries, and if developing countries export commodities and import manufactured goods, they would have to export more and more in order to import less and less, echoing the nineteenth-century Russian lament that "we export even though we die."

A clear understanding of the link between international trade, regional uneven development and the intensification of intra-state inequality is crucial to the way we approach

[189] Branko Milanovic, A time to celebrate… or to worry?, Social Europe,1 February 2021, available at: https://socialeurope.eu/a-time-to-celebrate-or-worry

[190] Krugman, P. (1980) Trade, accumulation and uneven development, *Journal of Development Economics* 8, 149-161.

trade, justice, equity and sustainability. As Krugman wrote in 1980: "As long as both countries produce agricultural goods, wage rates will be equalized by trade; while because of the external economies in manufacturing production, whichever country has the larger capital stock will have a higher profit rate and will therefore grow faster. The result is an ever-increasing divergence between the regions, which ends only when a boundary of some kind has been reached."[191] It should thus not come a surprise that the universalization of free trade and the creation of a global market based on competitiveness had differential impacts on the developing world too, "with East Asian countries benefiting from it because of their prior protectionist policies and managed trade during the period of globalization, and Latin America, Africa, and the Middle East drawing little benefit or indeed suffering from it."[192]

From the perspective of justice, equity and sustainability, if we think about the way in which regions, countries and individuals have been integrated in the global system of trade, the fact that liberalized trade reproduces unevenness rather than reducing it and distributing prosperity, should trigger the alarm bell. But what should sound even more alarming is the solution that economists tend to offer when shown the evidence that liberalization is unequally distributing resources, depressing wages, and creating unemployment. When this is the case, mainstream economists claim, people should "relocate from adversely affected regions toward better-performing areas over time, causing earnings differences to dissipate[and that the] unequal effects of trade persist partly because of a lack of outmigration from adversely affected regions after large trade shocks."[193] If economic migration is the economists' solution to the inevitable inequality produced by liberalization and uneven development, we may wonder how much we should follow the underlying economic theory that suggests liberalization, trade integration and openness to global capital as proxies for economic growth and development.

Along with the past, a holistic approach to trade justice requires to look at the environmental implications of trade and the interaction between trade, planet and social justice. First of all, trade liberalization and the incentive towards the global circulation of goods and services must be read through the lenses of their environmental impact and their contribution to climate change. One of the main points raised by the protesters in Seattle was that the intensification of the free trade agenda would have increased the pressure over natural resources, reduced the regulatory space of countries and favoured the extraction and export rather than the preservation and the creation of local economies. Three decades later, evidence of the environmental impact of a laissez faire trade policy have piled up, with an increase in deforestation, mining operations, water diversion, soil erosion, loss of biodiversity, etc. directly linked with the establishment and consolidation of international value chains.. The deforestation of the Amazon forest to graze livestock for export, the increase in the use of pesticides and fertilizers to guarantee production and volumes, the expansion of Robusta coffee monoculture in Vietnam to jump on the bandwagon of the international coffee market,

[191] Ibid.

[192] Walden Bello, Why free trade is bad for you (or most of you at any rate), Common Dreams, 12 March 2019, available at: https://www.bilaterals.org/?why-free-trade-is-bad-for-you-or [last accessed 21 October 2020].

[193] Nina Pavcnick, The winners and losers from international trade, IIIS, 23 January 2019, available at: https://www.iiss.org/blogs/survival-blog/2019/01/winners-losers-trade [last accessed 23 October 2020]

and the contamination of rivers, lakes and oceans with waste from industrial production are only some of the known examples.

Moreover, an increase in trade has been associated with an increase in the extraction of raw materials and the production of waste, often at a faster pace than the increase in trade. From 1970 to 2017, the annual global extraction of materials tripled. Following the current trend, global materials use could more than double by 2060.[194] More importantly, the growth of international trade has been outpaced by the increase in the so-called 'upstream resource requirements of traded commodities', i.e. the amount for materials, energy, water and land that is used in the extraction and production of traded goods but are not embedded in the final good. Between 1990 and 2017, the raw material equivalents of trade grew 4.5 per cent annually, whereas direct physical trade grew 3.5 per cent annually – implying an "outsourcing" of material use through trade.[195] In 2017, these indirect, "embodied" or "virtual" materials in trade "amounted to 35 billion tons, exceeding the direct volume of goods traded across nations (11 billion tons) by a factor of three. At a global scale, this means that a fully one-third of the total of 92 billion tons of materials extracted in the global economy are destined to produce goods for trade." In a nutshell, "when considering the whole life cycle of traded products, trade is responsible for much larger amounts of material extraction than direct trade flow indicates."[196]

The negative correlation between international trade and biodiversity is now openly recognized also by the European institutions, with the June 2020 Trade and Biodiversity analysis realized for the European Parliament stating that "import flows have direct negative externalities on EU biodiversity through pollution, imported pathogens and invasive species. Trade also impacts global biodiversity (positively or negatively)."[197] For example, imports of 'virtual' land, water and natural resources through agricultural and bioenergy products can have a significant impact on biodiversity overseas (palm oil, soybean, wood based products, etc.). In addition, trade could intensify overexploitation of natural resources and habitat degradation. The channels are both direct (e.g. externalities of transport, dissemination of invasive species or pests) and often indirect, through displacement in land use, or changes in relative prices. At the same time, trade is seen as a potential threat to biodiversity (through importing pathogen species) and an opportunity (by setting standards and clear metrics that prevent the negative effects on biodiversity)."

Moreover, by encouraging more production and consumption, global free trade is a key driver of increased carbon emissions and overwhelms whatever gains are made by greater energy efficiency. As a matter of fact, trade and investment liberalisation provide legal and

---

[194] Oberle, B., Bringezu, S., Hatfield-Dodds, S., Hellweg, S., Schandl, H., Clement, J. et al., Global Resources Outlook 2019: Natural Resources for the Future We Want. A Report of the International Resource Panel, 2019, Nairobi, Kenya: United Nations Environment Programme; OECD, *Global Material Resource Outlook to 2060: Economic Drivers and Environmental Consequences*. Paris: OECD, available at: https://read.oecdilibrary.org/environment/global-material-resources-outlook-to-2060_9789264307452-en#page1 [last accessed 24 November 2020].

[195] UNEP, International Resource Panel Global Material Flow Database, supra n 122.

[196] UNEP and IRP, *Sustainable Trade in Resources.* Supra n 160, p. 30.

[197] Cecilia Bellora, Jean-Christophe Bureau, Basak Bayramoglu, Estelle Gozlan, Sébastien Jean

economic incentives to establish or strengthen new and/or longer global value chains, the consequence of which is a larger carbon footprints. When the EU and Mercosur intensify trade, therefore, we need to consider the increase in GHG associated with more deforestation, more production of livestock or more sugar transformed into ethanol. According to a 2019 study by Pendrill et al. on the link between trade and deforestation between 2010 and 2014: "Depending on the trade model used, 29–39% of deforestation-related emissions were driven by international trade. This is substantially higher than the share of fossil carbon emissions embodied in trade, indicating that efforts to reduce greenhouse gas emissions from land-use change need to consider the role of international demand in driving deforestation. Similarly, deforestation emissions [linked to international trade in commodities] constitute a substantial share (˜15%) of the total carbon footprint of food consumption in EU countries."[198] Figure 3 below graphically represents the trade in embedded CO_2 that takes place between different regions of the world.

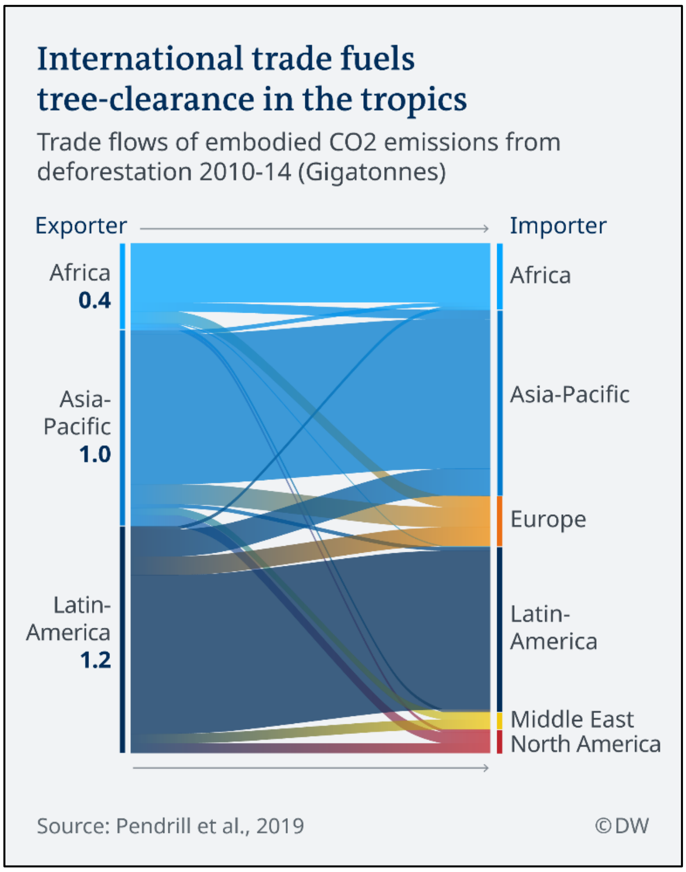

Figure 3: Florence Pendrill, U. Martin Persson, Javier Godar, et al. (2019) Agricultural and forestry trade drives large share of tropical deforestation emissions, *Global Environmental Change* 56

This is not all: we need to look at the planetary impact of moving more goods around the world, a crucial element of international trade that has already a significant impact on climate change but is often overlooked. According to a 2015 study of the Organization for Economic

[198] Florence Pendrill, U. Martin Persson, Javier Godar, et al. (2019) Agricultural and forestry trade drives large share of tropical deforestation emissions, *Global Environmental Change* 56, 1-10, 1.

Cooperation and Development (OECD) and the International Transport Forum (ITF) on all transport of goods (maritime freights, road transport and air freights), the role of international trade-related freight transport in contributing to climate change should be central to any considerations about the future of trade. In the study, the OECD and ITF report that "international trade-related freight transport [accounted in 2015] for around 30% of all transport-related CO2 emissions from fuel combustion, and more than 7% of global emissions."[199] What is more worrisome is that we are on a pattern of growth and globalization linked with more transport-related emissions.

According to the same study, a baseline scenario of economic growth of 3.5% per year would lead to longer supply chains – mainly due to the growth in trade corridors connecting emerging economies and non-OECD countries-, an increase in volume of traded goods, an annual increase in world trade by 3.5% and an overall increase of trade-related freight transport emissions by a factor of 3.9%, the equivalent of a +400% increase in GHG emissions from trade-related freights only. Even assuming technological development and efficiency improvement over the next three-and-a-half decades, the OECD and ITF conclude, "CO2 emissions from international trade-related freight transport will grow by 290% in the baseline scenario, i.e. to nearly three times today's level."[200] But it can get worse. The "implementation of a multilateral trade liberalisation regime would push CO2 emissions from trade-related freight transport to 15% above the business-as-usual baseline scenario by 2050."[201] In particular, "full liberalization of tariffs and GDP growth concentrated in China and India [will] lead to transport emissions growing much faster than the value of trade, due to trade shifting toward distant trading partners."[202] Therefore, there is no doubt that we should put the link between trade in goods play and the climate emergency at the centre of our vision. As we discuss in Section 7.2.1 below, there are different ways of linking climate change and trade, and not all of them deal with the social and environmental unsustainability of international trade and investments.

Covid-19 has exposed, once more, the precariousness, uncertainty, inequality and dependence that characterise a global economy based on the idea of unconstrained free trade, global competitiveness, just-on-time production and hyper-consumerism. If we add that the last decades have unequivocally revealed that the same economic system and the small percentage of the planet that benefit from it are also the main responsible for the ongoing climate catastrophe, we realize that the construction of a just, equitable and sustainable trade and investment system for people and planet, as envisioned in the International Fair Trade Charter, may require more than few adaptation and technical interventions. We are facing with the power of ideas that are reproduced without being questioned (as we saw in Section 3), the violent legacy of the past that is overlooked and

---

[199] OECD/ITF, The Carbon Footprint of Global Trade, OECD/ITF, 2015, available at: https://www.itf-oecd.org/carbon-footprint-global-trade [last accessed 21 October 2020].
[200] Ibid, p. 8.
[201] Ibid, p. 9.
[202] Anca Cristea, David Hummels, Laura Puzzello and Misak Avetisyan, 2-13, Trade and the greenhouse gas emissions from international freight transport, *Journal of Environmental Economics and Management* 65, 153–173.

silenced (see Section 4) and the rush to liberalization, competitiveness and protection of private capital that is embedded in the global spaghetti bowl of free trade agreements and bilateral investment treaties.

The difficulty of the task ahead is recognized by the International Fair Trade Charter when it states that: "The failures of the conventional trading system are deep-rooted and complex" and that "Fair Trade takes a holistic approach to tackling these by combining many individual approaches."[203] In the last section of this report we thus combine the voices of the people we interviewed, the answers to the survey and our own collective knowledge to imagine what this holistic approach towards justice, equity and sustainability for people and planet may look like. We identified three possible patterns (change through the market; achieve procedural justice; fight for reparation and climate justice) and we made an exercise of thinking which steps each pattern would require and what the implications of each of them would be for the members of the Fair Trade movement and the planet in 2030 and 2050. Although this effort is intrinsically speculative, we believe that the identification of the different trajectories may trigger important and much needed conversations within members organizations and across the movement.

[203] International Fair Trade Charter, supra n 74, p. 6.

7. Multiple ways forwards for a just, equitable and sustainable trade and investment regime: 2030 and 2050 scenarios

We began this document by highlighting that the global economy is at a crossroad. This has to do with the Covid-19 pandemic, which has significantly affected business as usual and exposed the fragility and dependency that lie behind just-on-time, Global Value Chains and the reproduction of North-South uneven development. This also has to do with the climate emergency, which already affects billions of people around that world and has made it to the table of some of the largest economies in the world: the European Union with its EU Green Deal, China with its commitment to carbon neutrality by 2060 and – maybe – the United States with the post-Trump administration. The year 2020 has also been characterized by an intensification of trade wars between China and the United States, by the acceleration of the negotiations for the EU-Mercosur agreement, Brexit and the conclusion of the Regional Comprehensive Economic Partnership (RCEP) between Australia, Japan, New Zealand, South Korea and the ten members of the Association of Southeast Asian Nations (ASEAN), including China, Indonesia, Malaysia, the Philippines and Thailand. In a joint statement, the leaders of these fourteen countries declared that "the trade deal would form a crucial part of their plans to recover from the pandemic, which has forced countries around the world to lock down their economies." But what trade are they talking about? And what kind of recovery shall trade support?

So far, it has been the intention of the authors to provide the readers with tools, references and elements of reflection in order to address these two questions. As a matter of fact, there is not a unique answer and the approach that is adopted (by individuals, organizations, policy makers, international financial organizations, etc.) will define the direction that the world – both in terms of planet and living beings - will take. The hope is that by this point each reader has taken some time to think about future actions, the way in which they will steer their organizations, and which position they will take when it comes to some of the dilemma around trade, investments and the future of people and the planet. Will Fairtrade include the impact that trade and investments have on climate on its lobby and advocacy agenda, with particular attention to the Fair Trade impact on climate? Will Fairtrade strengthen its gender agenda and adopt a qualitative approach that goes beyond employment and income? Will it engage with the promotion of foreign direct investments beyond the limited issue of investment arbitration? Will the movement integrate its policy and advocacy with areas that are not strictly aligned with trade regulation?

The authors look forward to this conversations to take place within the Fair Trade movement and across movements. In order to simplify the identification of the next steps, but without any claim of completeness, the final section of this report presents some of the main debates in the area of trade and investment and suggest three possible attitudes vis-à-vis each of them. This is certainly simplistic, superficial and not capable of expressing the complexity and richness of possible positions, but it was a fun experiment.

We have identified six topics: **7.2.1) Green trade, climate change and biodiversity loss; 7.2.2) Trade liberalization as an opportunity for fair trade; 7.2.3) Trade and gender; 7.2.4) E-Commerce as the future of the global market for goods and services; 7.2.5) Investment law and investment arbitration; 7.2.6) Blind spots and missing pieces: taxation, informality, financialization of global commodity chains, etc.**

For each issue, the report introduces and briefly discusses three different ways of dealing with it. For lack of better terminology, it was decided to call these options the 'business as usual' position, the 'trade and…' position and the 'systemic' position. Each of them is based on a combination of different theories of justice, approaches to the language of trade and visions of the role that international trade should be play in defining the world (people and planet) of the future. All of them – maybe optimistically – assume that a transformation is needed and that it will happen.

- 'Business as usual' embraces the ideas of comparative advantage, sustainable competitiveness and specialization as the drivers of change. From this point of view, the increase in cost of production of unsustainable practices, the efficiency gains obtained through technological innovation (such as blockchains and/or hydrogen) and the shift in consumers' demand will reshape the trade regime and make it more compatible with the needs of people and the planet.

- 'Trade and…' starts from a different assumption, i.e. that the system of international trade and investment is incapable of fixing its own problems and that interventions are needed in order to steer capitalism and private initiative. In this (broad) category we included proposals for environmental, social and healthy labelling, the adoption of environmentally and socially sustainability protocols in bilateral and multilateral trade agreements, the focus on development chapters to leverage trade for economic improvement, the adoption of codes of conduct, the unilateral use of trade to limit the import of goods and services that are obtained in violation of international standards or contribute to human rights or environmental violations.

- The 'systemic' approach to the future of trade and investment regime would combine the principles of NIEO with the notion of climate justice and recognizes that the adoption of a historically informed and systemic approach to the theoretical, geographical, economic and intellectual premises of international trade and investments is inevitable. From this point of view, it is not about 'making international trade and investment better,' because international trade is incompatible with the planetary boundaries and because long chains are closely linked with the reproduction of uneven development, inequality and dependency. Moreover, as we heard from Jesus Andrade from CONONORCA Chapas and La Via Campesina,[204] it cannot be a future where the international commodity price represents a term of reference. Nor a future where – to use the words of the FARMCOOP - producers and workers are dependent on international trade, rather than trade being dependent on the satisfaction of the needs of people and the planet.[205] For a 'radical' approach, the future of international trade is inevitably a future of less trade, shorter and local trade, self-reliance, diversification, less dependency and a political understanding of trade as public policy. If people and countries are dependent on international trade, it is not about giving them more international trade. It is about breaking the chains of this dependency and – at the same time – avoid the climate collapse.

[204] Interview with Jesus Andrade, CONONORCA Chapas, member of La Via Campesina, 15 October 2020.
[205] Interview with Khalil Apuzen-Ito and Koronado Apuzen, FARMCOOP, Philippines, realized on 7 October 2020.

After these analyses, we dedicate a final reflection on the role that **voluntary standards and labelling can play in each of the scenarios and contributing to the different visions of a just, sustainable and equitable trade**.

7.1 Green trade, climate change and biodiversity loss

The link between trade, climate change and biodiversity loss is increasingly discussed. This relationship assumes multiple forms, from the link between an increase in trade and the intensification of extractivism (see above Section 3.4) to the emission of GHG linked to global shipping. When it comes to biodiversity loss, there is growing acceptance that international trade contributes to imports of 'virtual' land, water and natural resources through agricultural and bioenergy products can have a significant impact on biodiversity in the countries of origin (palm oil, soybean, wood based products, etc.). Overall, trade is associated with a both a direct impact on climate and biodiversity (e.g. through externalities of transport, dissemination of invasive species or pests) and an indirect one, through change in the land use or changes in relative prices of land and therefore an intensification of exploitation of soil and natural resources.

In light of the intensification of climate emergency, the international obligations that countries undertook in the Paris Agreement, the calls coming from farmers and people on the ground to tackle climate change before it is too late, the surge of collective acts of resistance against the perpetrators of the climate catastrophe (Fridays for Future, Extinction Rebellion, climate litigation, etc.), **it appears inevitable that climate change and the loss of biodiversity have to be put at the centre of the future actions of the Fair Trade movement**.

As we mentioned above, the Fair Trade Charter identifies sustainability as one of the three pillars (along with justice and equity) that shall operate together and must be achieved through a reform of trade (and investments). The Charter also discusses the way in which climate change mostly affects the most marginalized, i.e. those that the movement aims at supporting by establishing fair trade relationships. In addition, the 2021-2025 Global Strategy clearly recognizes the need for Fairtrade International to develop a:

> "consistent agronomic approach and deep understanding of how to build greater resilience to the effects of climate change. This includes the ability to adapt to micro-climates, as well as the cultures and interests of the people living in different regions producing different products. Meanwhile, actors across the supply chain are increasingly demanding climate-conscious production, including consumers and businesses with increasing environmental commitments and reporting requirements. Seeking ways for Fairtrade to demonstrate the business case for the holistic approach, including the environment, will be critical for Fairtrade to maintain its relevance and ensure farmers and workers are thinking about the sustainability of their livelihoods. Fairtrade will enter into strategic partnerships to create a clear model for sustainable

> agriculture differentiated by region and product, harvesting the knowledge and best practice across contexts."[206]

The increasing attention that climate change is receiving in the official documents realized by the members of the movement reflects the responses to our survey and the interactions that we had with our interviewees: **climate change and its impact on the planet and the lives of people was constantly depicted as the central challenge to be politically addressed and solved**. This was clear in our conversation with CLAC, who identified climate change as a priority in its agenda and aims at intensifying the dialogue between urban and non-urban movements. Similarly, the impact of climate change was presented as one of the main concerns by small-scale cocoa farmers in West Africa and representative of a banana cooperative in the Philippines: they all participate in the Fairtrade labelling scheme, but they live in fear of losing their harvests, their land and – as too often happens – their lives.

In the context of international trade, climate change and biodiversity loss, **it is important to understand how the requests and worries of farmers– and the whole Fair Trade movement – can be translated into concrete actions and advocacy stands to be followed in the coming years**. In the next sub-sections, we summarize three possible approaches to this dense relationship: a) the 'business as usual' attitude that is inspired by the notion of sustainable growth and relies on market dynamics, incentives and sanctions to change the current state of the global economy and support the transition towards a green economy; b) the 'trade and…' attitude that recognizes the need for regulatory intervention in steering the global trade regime towards greener and more sustainable practices. This mainly takes the form of a new 'green level playing field' where the cost of unsustainable environmental practices is internalized. This can be done through the conclusion of climate chapters in bilateral trade agreements or by utilizing unilateral interventions (carbon taxes, border carbon adjustments, quotas, global standards, etc.) to reduce the trade in polluting goods and services; c) a 'systemic' approach based on the notion of climate justice discussed above, which questions the compatibility of international trade with the planetary boundaries, highlights the link for common but differentiated responsibilities and the size of historical climate debt, raises concerns on the regressive impact that some unilateral policies may have, and promotes concepts of green and just degrowth rather than sustainable growth.

7.1.1 Business as usual: 'Market will react. Market always reacts'.

Mainstream economics applied to climate change and biodiversity loss claims that **price signals provide information that communicates to us that it is time to stop certain activities (e.g. it has become too expensive based on resource exhaustion and environmental or social damage) and that the rational choice is to direct funds and attention to the green economy**. Because the market is the representation of demand and offer, when the demand for polluting goods decreases or when the offer of certain goods is affected by climate change (like in the case of tropical 'commodities'), the price will be capable of representing the ongoing transformation that is happening on the ground and – through futures and foreign direct investments – provide signals about the availability of certain goods in the time to come.

[206] Fairtrade International, 2021-2025 Global Strategy, p 17.

Higher demand means also more production, more jobs and more economic opportunities. On the contrary, lower demand is synonym with foreclosure.

At stake, **there is the global market for low carbon environmental goods and services that in 2012 was estimated to be worth €4.2 trillion**. In this framework, a central role is played by consumers' choices and the way in which they buy (states can also be consumers when they act as public purchasers). The more consumers opt for sustainable products, the more they will induce a transformation in the chain that provides them. **The more low carbon goods and services are purchased, the more these chains are rewarded, production scaled up, prices lowered and the market shifted towards a higher level of compliance with the planetary boundaries**. For the supporters of this position, often heard in international policy arena, it is true trade – and in particular more trade – that we can solve the climate emergency and restore biodiversity. International trade and investments are seen as:

- A tool towards green specialization and efficient green production;
- A mechanism to favour technological transfer between countries towards countries with less green capacity: investors will benefit from capital mobility and fill existing gaps in green production;
- A tool that allows consumers to control and monitor global value chains and distribute rewards/sanctions according to their compatibility with Environmental (and sometime social) consequences of their actions;
- An opportunity for capital to flow there were it is more efficient and therefore trigger a race to the top competition between countries and businesses in the rush towards green and sustainable practices.

In **a perfectly liberalized trade and investment regime, price defines the movement of goods and capital**. Investors, policy makers, consumers and producers will thus react to these price signals and will be induced into investing in alternative ways of doing things and/or in resolving the problems created by climate change (if it is cheaper or economically more desirable than finding alternative ways of doing things). In the name of comparative advantage, competitiveness and efficient allocation of resources, incumbent market actors will be forced to adapt to the price signals or they will be pushed out of the market. On the other hand, newcomers (e.g. companies that are putting climate change adaptation and mitigation at the centre of their business models, sustainable producers, enterprises promoting an idea of circular economy, etc.) will be capable of expand and thrive and occupy significant shares of the new market as defined by the change in preferences and conditions.

Such position is based on **the understanding of the market as a complex of rational choices and – as such – as an institution that must be trusted and relied upon**. As Gills and Morgan discuss in a recent contribution: "Mainstream economic theory has no fundamental roots in earth system dynamics, material process or biophysical boundary states, but even though mainstream economic theory lacks these, there is a presupposition that our economic signalling system will divert us away from any seriously problematic biophysical limits. It is, for example, typically assumed we will avoid 'tipping points' even though measurement of these is not intrinsic to mainstream economics (hence no necessary limits need be imposed now to the economy)."[207] At the same time, this assumption towards 'greening' considers that

[207] Barry Gills & Jamie Morgan (2020): Economics and climate emergency, *Globalizations*, p. 5-6, DOI: 10.1080/14747731.2020.1841527.

informed consumers will inevitably (or most likely) change their consumption patterns towards more sustainable, less exploitative, climate friendly, etc. products.

This last point requires to be critically scrutinized and its own assumptions challenged: **are all consumers rational actors that will inevitably do what is best for the planet and society around them?**[208] Are all consumers financially able to afford more expensive goods or willing to pay more for goods that produce less externalities? Moreover, which consumers are we talking about? In the Global North? Or also in the Global South? And what is the relationship between them? Are we creating competition for the same products, are we diverting part of production to wealthier markets because they can pay more (this is what an efficient allocation of goods would imply). Finally, shall we consider the population as only made of consumers who buy internationally traded products, or shall we think in terms of citizens, people who cannot afford or do not buy internationally traded products?

If this is the approach to be followed, **the attitude towards 2030 and 2050 shall be that of achieving an expanded share of Fair Trade products that are placed on the global market thanks to their capacity of responding to the market signals that are produced by producers, consumers and intermediate actors**. The focus shall therefore be in creating awareness among producers, industry and consumers: producers will be informed about the risks of climate change, the need to adopt climate friendly practices if they want to be able to continue participating into the market and will receive support in order to achieve this goal, along with access to a market that increasingly rewards their efforts; industry will be equally informed about the material risk that climate change (and biodiversity loss) represents with regards to their own activities, as it may significantly affect the availability of 'raw materials in the short, medium and long-term period; finally, an increasing number of consumers will be informed about the implications of their choices, the transformative power of purchasing as tool to reward climate and environmental friendly chains, and they will be provided with enough and clear information.

In this context, **the direct role of the state is minimal as the assumption is that any intervention of the public authority is a manipulation of the market and – therefore – shall be avoided**. However, such distinction between the market and the state assumes that current market dynamics – including with regards to international trade – are not already altered by the use of public prerogatives. **Subsidies to fossil fuel and environmental unfriendly forms of production, restrictions to trade in low carbon goods and services that are not produced nationally, the lack of clear standards for what is 'green', 'sustainable', 'low carbon', etc., are all forms of distortion of the market that has an inevitable consequence on the functioning of the pricing signal**. For this reason, an increasing number of actors is calling states to intervene in this sector and use their powers (unilaterally or in a joint way) to redress market failures and create a new 'green level playing field'.

---

[208] The 2021-2025 Global Strategy seems to take consumers as a uniform category operating in wealthy environment that can afford higher prices, and consumer choices as rational and foreseeable. It states that "Consumption patterns are shifting as consumers become more interested and involved in the origins of the products they purchase and seek assurances on whether or not human rights are being respected in food value chains (North and South). Consumer confidence has been hit by the COVID-19 pandemic and shopping behaviors have changed. Fairtrade will continue to be both a trusted source of information and a validation of purchasing decisions, while also anticipating and responding to new patterns of demand." A more nuanced understanding of consumers (including on producers as consumers) and on accessibility would be needed. See Fairtrade International 2021-2025 Global Strategy, supra n **Error! Bookmark not defined.**.

7.1.2 Trade and…: State should steer the transition towards a 'green global market'

The 'Trade and…' approach to international trade is well summed up by this statement contained in a 2020 report by the United Nations Environment Programme: "While the contribution of international trade in fuelling economic expansion has long been recognised, its impact on the environment is more ambiguous. Trade can prove damaging to the environment by boosting overall resource production and use, shifting production to countries with less-stringent environmental legislation, and increasing energy use and pollution linked to transportation. Yet, when accompanied by appropriate measures, trade can enable and accelerate the transition to a greener, more circular economy – for instance, by facilitating access to green technologies and to other environmental goods and services."[209]

From this point of view, **international trade should not be let alone to market actors (assuming that there is a market that is not influenced by public regulation and the exercise of public authority**). On the contrary, a public steer to private dynamics could help addressing market failures, reallocate incentives and sanctions, and steer international trade in the direction of climate change adaptation and mitigation and the fight against biodiversity loss. This is, at least on paper, the position that the European Union is officially adopting and seems to be pushing forward when it comes to its interactions with trade partners: **trade policy as an "enabler towards a climate neutral, resource efficient and circular global economy and support the achievement of the Green Deal and Sustainable Development Goals**."[210]

In the 'Trade and…' approach to climate change that is currently adopted by the European Union and other countries of the Global North, a central role is played by **trade agreements** negotiated between two or more trading partners to liberalise trade in goods and services probably represent the space where the most comprehensive initiatives regarding trade, climate change and biodiversity loss can be undertaken. Through a trade agreement it is possible to offer **preferential access to specific goods conditional on compliance with certain agreements in favour of biodiversity**, for example, or to **maintain tariff protection on products considered sensitive in terms of biodiversity**. At the same time, a trade agreement could be used by the countries to agree on the increase in tariffs, imposition of quotas, and other measures that can also be adopted unilaterally (see below).

Trade agreements are increasingly used to introduce Trade and Sustainable Development (TSD) chapters, the intention of which is to deal with the improvement of environmental and climate change performances at the national level. For example, the EU is promoting the introduction of a trade and sustainable development chapter (TSD) in the agreement with the Mercosur that uses the trade agreement to deal with aspects of environmental degradation and climate change. According to the EU position, "The EU-Mercosur agreement is based on the premise that trade should not happen at the expense of the environment or labour conditions; on the contrary, it should promote sustainable development. In the TSD chapter, the two sides agree to pursue their trade relationship in a way that contributes to sustainable

[209] UNEP and IRP, supra n 160.
[210] INTA Committee, What role can trade policy play to advance the objectives of the Green Deal?, 7 December 2020.

development and builds on their multilateral commitments in the fields of labour and environment."[211]

In 2019, then Commission President Juncker lauded EU-Mercosur (EUMAA) saying that "[t]rade policy has become a tool for climate policy" and that the TSD Chapter of EUMAA contains a commitment to "effective implementation of the Paris Agreement" which "locks countries into commitments taken on stopping deforestation in the Amazon, for example."[212] In January 2020, then Commissioner Hogan stated that "We are equally willing to use existing agreements to contribute to the fight against climate change: we both want to use the agreement with Mercosur as a lever to anchor countries like Brazil in the Paris agreement and to get Brazil to fulfil its commitments in the Paris agreement."[213] In the case of the EU, however, **these chapters are currently not binding nor enforceable, and have, in their present state, almost no impact**. Such claims are amplified in a Commission policy brief which cites a pledge by Brazil to reduce its net greenhouse gas emissions by 37% and action to stop illegal deforestation; these are commitments in the Paris Agreement, it is argued, that would be effectively implemented by the TSD Chapter.[214] However, **critical voices have been raised against the current structure of the Chapter and in favour of a more stringent commitment and an approach that recognizes the need for ad hoc mechanisms to enforce the clause while maintaining the overall trade agreement** (See box 3).

Box 3 The TSD in the EU-Mercosur Trade Agreement (EUMAA)

The TSD Chapter of the EU-Mercosur agreement is presented by EU policy makers as a term of reference for future engagement in the area of trade, environment and climate change, it is worth pointing at **some of its weaknesses as brilliantly presented by a 2020 analysis realised by ClientEarth**.[215]

- The EUMAA TSD Chapter only includes environmental and labor issues, **omitting important issues such as human rights and indigenous rights** that are closely connected with the protection of the planet and the reduction of GHG emissions;
- Pursuant to the obligation in the TSD Chapter on each party to 'effectively implement' the UNFCCC and the Paris Agreement. Therefore, a **withdrawal from the Paris Agreement by any of the parties would constitute a violation of the TSD Chapter.**

[211] European Commission, EU-Mercosur Trade Agreement, Trade and Sustainable Development

[212] "Trade policy has become a tool for climate policy. In the agreement, each of the parties … commits itself to the effective implementation of the Paris agreement. This locks countries into commitments taken on stopping deforestation in the Amazon for example." European Commission, *Remarks by President Juncker* (29 June 2019) available at https://ec.europa.eu/commission/presscorner/detail/en/speech_19_3468

[213] European Commission, Keynote address by Commissioner Phil Hogan at the Centre for European Reform, 4 Feburary 2020, available at https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/keynote-address-commissioner-phil-hogan-centre-european-reform_en.

[214] European Commission, *EU-Mercosur Trade Agreement, Briefing on Trade and Sustainable Development* (no date) available at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157957.pdf .

[215] ClientEarth, We take action against the EU for failing to consider environmental and social impacts of South American trade deal, ClientEarth, 16 June 2020, available at: https://www.clientearth.org/latest/latest-updates/news/we-take-action-against-the-eu-for-failing-to-consider-environmental-and-social-impacts-of-south-american-trade-deal/ [last accessed 10 December 2020].

- However, **the Paris Agreement does not strictly oblige parties to achieve a certain level of CO2 reduction or to cease deforestation**.
- In the Paris Agreement, the parties **do not have 'obligations of result'** to actually achieve the CO2 reduction or other targets communicated in their Nationally Determined Contribution;
- **When it comes to deforestation, the Paris agreement does not have prescriptive force but only contains recommendations;**
- Differently from other non-EU FTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the EUMAA TSD Chapter is not covered by the general dispute settlement mechanism of the EU-Mercosur Trade Agreement, but instead there is a chapter-specific dispute settlement mechanism. According to the latter, disputes are examined by a Panels of Experts who, unlike under the general dispute settlement mechanism, cannot impose sanctions for non-compliance;
- Once EUMAA is in force, even if a party to EUMAA were to withdraw from the Paris Agreement, **the terms of EUMAA mandate the other party to keep providing preferential access to its market, with no possibility of full or even partial suspension of the market access commitments it made under EUMAA**. The sole option would be for one party to withdraws from the agreement;
- Most **binding provisions**, such as on the reduction of illegal trade in wildlife, **are phrased in a very vague way**;
- Civil society is involved through the establishment of two Domestic Advisory Groups, but these bodies are unable to initiate a claim under the TSD Chapter. They also lack the institutional authority to request the Commission to properly investigate alleged breaches of social, environmental and human rights obligations.
- Concerns are raised about the EUMAA impact on social and environmental rights, given that the European Commission concluded the trade negotiations with Mercosur without having completed its own Sustainability Impact Assessment (SIA) process and the EU and Mercosur countries reached a political agreement on the trade part of EUMAA, while only the first phase of the SIA process (out of three) was completed

Another regional trade agreements shall be taken as example of the link between trade and the promotion of the 'green economy'. Before the Covid-19 pandemic, **New Zealand, Fiji, Costa Rica, Iceland and Norway started the negotiation for a new trade agreement considering a range of trade related issues that have the potential to contribute meaningfully to addressing climate change and other serious environmental issues**. Three key areas will be covered, some of which have also been considered by other countries. They are the perfect representation of the combination between public powers and market dynamics to establish a new 'green level playing field' that rewards the most environmentally efficient and sustainable forms of production and gets rid of existing distortions of the market that uphold climate change. In the proposal for the agreement, the countries aim towards:

- **Liberalization of green goods and services:** The elimination of tariffs on environmental goods and new commitments on environmental services: the idea is that environmental goods and service products will become cheaper to buy in each of the countries involved – accelerating access and uptake, and so helping to improve the environment. Obstacles to trade prevent, it is claimed, an efficient allocation of production and consumption, therefore denying the possibility of specialization and benefitting of comparative advantage. In line with Ricardo's theory of comparative advantage, in the absence of tariffs slowing down the circulation of low carbon goods, countries that are in a better position to produce green goods and services will receive an economic boost and their enterprises will have an incentive to scale up and produce for the rest of the market goods. More goods at lower prices will thus be available. Liberalization of environmental goods and services is presented by the WTO as the most desirable approach to trade and climate change. For the WTO: "Facilitating access to products and services in this area can help improve energy efficiency, reduce greenhouse gas emissions and have a positive impact on air quality, water, soil and natural resources conservation. A successful outcome of the negotiations on environmental goods and services could deliver a triple-win for WTO members: a win for the environment, a win for trade and a win for development."[216]

- **Eliminate subsidies to fossil fuel:** with the agreement, countries will commit to eliminate fossil fuel subsidies so to help remove the perverse effects of these environmentally harmful and socially regressive subsidies. According to the parties involved, the elimination of fossil fuel-based trade distortions has the potential to deliver many trade, economic, social and environmental benefits because it will reward the most sustainable and climate friendly forms of production. This second measure addresses a specific form of trade distortion, i.e. the direct support to forms of production that are highly incompatible with the need to mitigate climate change by reducing the emissions in GHG. Once subsidies are eliminated, it is claimed, more sustainable forms of production that use alternative sources of energy will become more competitive and will thus expand their market share. As we are talking about an international trade agreement, we should not only think about the effect that abolishing subsidies would have on the internal market but also to the creation of new international trade routes for low carbon goods and services. This position is also shared by UNEP, according to which: "trade agreements could play a role in limiting the use of subsidies for the production and consumption of fossil fuels, which globally amount to over $500 billion a year. Subsidies make greenhouse gas-emitting fuels cheaper, thus creating an incentive to produce more." Similarly, it is worth noticing that during the 2017 WTO Ministerial Conference (MC11), a sub-set of WTO Members adopted the Fossil Fuel Subsidies Reform Ministerial Statement, which called for further WTO action to discipline fossil fuel subsidies. [217] **A central point of this Declaration is that the phasing out of subsidies shall not have detrimental impacts on the rights of developing countries and that a multilateral solution through the WTO would be preferred to bilateral interventions.[218]**

[216] WTO, Activities of the WTO and the challenge of climate change, available online at https://www.wto.org/english/tratop_e/envir_e/climate_challenge_e.htm [last accessed 1 December 2020].

[217] Chile; Costa Rica; Iceland; Liechtenstein; Mexico; the Republic of Moldova; New Zealand; Norway; Samoa; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Uruguay

[218] In the Declaration we can read that: "We seek the rationalisation and phase out of inefficient fossil fuel subsidies that encourage wasteful consumption, and encourage the international community to join us in those efforts; We recognise that reform needs to take fully into account the specific needs and conditions of developing countries and minimize the possible adverse impacts on their development in a manner that protects the poor and the affected communities; We seek to advance discussion in the World Trade Organization aimed at achieving ambitious and effective disciplines on inefficient fossil fuel subsidies that encourage wasteful consumption, including through enhanced World Trade Organization transparency and reporting that will enable the evaluation of the trade and resource effects of fossil fuel subsidies programmes."

- **<u>Voluntary eco-labelling:</u>** this point shows that the 'trade and…' approach is based on the interconnection between public and private actions in the establishment of the new 'green level playing field'. The parties to the agreement will help support the development of high-integrity eco-labels that are transparent in their criteria and meaningful to consumers. By defining clear standards and guidelines, countries will increase the level of certainty for all actors of the market (producers, industry and consumers) about what is green and what is not green and – therefore – reduce the obstacles to trade that derive from the adoption of different standards, approaches and forms of recognition of the characteristics of goods and services. Similarly, a **uniform set of standards would facilitate the work of investors, who will be capable of comparing a diversity of goods and services by adopting a common framework, therefore having a easier life in supporting the transition towards a green economy**. another area of interest is the promotion and enforcement of global sustainability standards by means of bilateral and multilateral trade agreements. Differently from the carbon tax or the CBAM, which are unilateral and impose an environmental price on the import of certain goods and services, these standards are or may be introduced in trade agreements and are bans/limits to trade that affect the circulation of goods that are not obtain with the respect of the socio-environmental standards applicable in the country with the highest standards. The EU Farm to Fork Strategy, to give an example, suggest that the European Commission will enter into negotiations at the bilateral and multilateral level to impose its high sustainability standards and make sure that production in partner countries is compliant. At the WTO level, the sanitary and phytosanitary agreement (SPS) is particularly relevant when it comes to the possibility of unilaterally implementing standards in the food, agricultural and biodiversity sectors.

The negotiations between New Zealand, Fiji, Costa Rica, Iceland and Norway are useful to highlight some of the possible ways in which countries can leverage trade mechanisms to deal with climate change, environmental degradation and the loss of biodiversity. **Along with the liberalization of green goods, the elimination of national subsidies and the establishment of a common labelling system, there are also 'negative' measures that countries can take to limit trade in non-environmental goods and, therefore, incentivize other forms of production and consumption**. The three categories of 'unilateral and negative trade measures' are: tariffs, tariffs-rate quotas and non-tariffs measures.

- **Tariffs:** One possibility is for countries to increase the import tariffs of high carbon goods or goods associated with deforestation, loss of biodiversity, etc. However, because of the structure of international trade and the preference to liberalization, the space for this intervention is very limited. This depends on the fact that two kinds of tariffs exist: the default one, so called most-favoured nation (MFN-) and the preferential tariff that is applied to the signatories of trade agreements or in the case of unilateral measures such as the Generalised System of Preferences (GSP) or the Everything But Arms (EBA). In addition, WTO countries have committed not to exceed a certain level of MFN tariffs. In the case of the European Union, the level of the MFN tariff is almost equal to this binding level. **It is therefore not possible for the European Union to permanently raise its MFN duties beyond their current level**, **except by opening negotiations with all its trading partners**. Similarly, an increase in preferential tariffs would require a redefinition of the trade agreement. This therefore **limits the possibilities of raising tariffs on products whose production abroad or consumption in Europe would have negative impacts on climate change, biodiversity, deforestation, etc.** This is of particular concern because **the EU MFN tariff rate for crude oil, iron ore, copper, nickel and zinc, to name a few, is null. Their imports are duty-free**. In order to increase the duties on these products, new trade agreements should be signed. Years of liberalization cannot be easily disentangled.

- **Tariff rate quota (TRQ):** one option is to introduce import quotas for specific goods and play with the tariffs. According to the total quota of goods imported, they will be subject to different tariffs. Within a limit (i.e. as long as the threshold quantity is not reached), the tariff is zero or preferential; outside the quota, the tariff is higher, and usually prohibitive. However, similar to the tariffs, the use of tariff rate quotas is limited in the WTO framework, which does not make it the best instrument to mobilise for the protection of climate change and biodiversity.

- **Non-tariff measure (NTM):** any measure other than a tariff that protects domestic producers. In the current context of low tariffs, NTMs represent the main protection for the European market. As we mentioned above, the use of unilateral measures to restrict trade in goods is considered by Art. XX of the GATT, although under specific requirements in terms of procedure (non-discrimination and non-disguised protectionism) and circumstances (protection of protecting human, animal or plant life or health; securing compliance with laws or regulation which are not inconsistent with the provision of the Agreements). When it comes to climate change, biodiversity and deforestation, non-tariff measures can assume multiple forms. To give an example, in the area of biodiversity loss, the EU currently uses NTMs like:

    - systematic inspection of shipments, to protect its biodiversity from invasive species;
    - import and export bans for certain animal and plant species classified as invasive;
    - a ban on the commercialisation of the most endangered species (aligned with (the Convention on International Trade in Endangered *Species* of Wild Fauna and Flora);
    - licensing systems.

Other **unilateral trade measures are the Generalised Systems of Preference (GSP)** through which developed countries can unilaterally offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries. In the GSP+ scheme adopted by the EU, the commitment to ratify and implement some human rights and governance standards has been added, which may open the possibility for climate conditionalities.[219]

Other **Non-Tariff Measures** that have been receiving a lot of attention in the 'trade and…' debate are the introduction of borders' adjustment and carbon taxes as unilateral trade

---

[219] The compatibility between GSP+ and WTO law is still debated. See Lorand Bartels, The WTO Legality of the EU's GSP+ Arrangement, 10 August 2007, available at SSRN: https://ssrn.com/abstract=986525.

measures aimed at balancing carbon leakage and environmental dumping that are linked with the production of the goods and services in a third country. As part of the EU Green Deal, the Commission has announced that a **Carbon Border Adjustment Mechanism (CBAM)** for selected sectors to be introduced by 2021: it has launched a public consultation and commissioned some studies to define the benchmark for pricing (the hardest part of CBAM, as they have to identify which emissions are internalized and the cost of the ton of GHG).

The idea behind the CBAM and any carbon tax is for the importing country to raise a levy on goods from countries with 'weaker' climate policies. At the EU level, the CBAM it is likely to be applied to the following sectors: cement, steel, and aluminium. Accordingly, companies operating in this sector that are based in a non-EU country and wish to sell into the 27-nation bloc will need to either meet the EU's environmental standards or be ready to pay the proposed tariff. In order to be compatible with article XX of the GATT, the CBAM will have to be: justified by one of the exceptions contained in the article and respect the chapeau, i.e. it cannot discriminate against any individual trading partner or be a protectionist measure in disguise. The introduction of this unilateral measure is perceived by most EU policy makers, corporate players and civil society organizations as a much needed tool:[220] from their perspective, the CBAM will be levelling the playing field between European and non-European players, reducing the impact of unfair competitive practices that involve the dumping of environmental externalities and incentivizing export countries to adopt at least European standards in terms of the environmental and climate impact of their national production.

Finally, in addition to liberalization and limits, countries could decide to **provide direct or indirect subsidies to national production of green goods and services**. However, WTO represents a possible obstacle to these measures when they are considered to be trade-distorting. Under current WTO rules, economy-wide subsidies for clean energy would be permissible because they are not specific to an industry (non-discriminatory). However, any form of export subsidies is – in principle - prohibited.[221] Similarly, domestic subsidies for specific industries for the development and production of green products are not prohibited but actionable by other WTO countries if the latter believe that their domestic production or exports are adversely affected.[222] As we discussed above (Section 5.3 on trade adjudication), WTO members can take two types of actions: if they are affected in third markets, they can contest the subsidies through the WTO dispute settlement mechanism, asking for them to be curtailed or removed; if they are affected in their own markets, they can ask for the measure to be curtailed or removed and impose countervailing duties on products benefitting from such subsidies.

---

[220] Some critiques have been raised by market actors who claim that the CBAM risks to adopt a one-size-fits all approach and may not adequately consider the carbon intensity of individual value chains and products. For these voices, that are supported by international lobbies, the CBAM should be converted into an individual adjustment mechanism (IAM) that allows each importer to declare the actual impact of the good and pay the correspondent levy, rather than being subjected to a sector-based levy. See Ben des Vos, The Carbon Border Adjustment Mechanism: ensuring fairness, EURACTIV, 29 October 2020, available at: https://www.euractiv.com/section/energy-environment/opinion/the-carbon-border-adjustment-mechanism-ensuring-fairness/ [last accessed 1 December 2020].
[221] See Part II of the WTO Agreement on Subsides and Countervailing Measures.
[222] See Part III of the WTO's SCM Agreement.

One of the **objectives of the 'trade and…' approach to the green transition is that trade policies can be used to build a 'global circular economy'**. This is evident in the approach adopted by the European institutions and – with some circumspection – by the United Nations Environment Programme (UNEP): for them, a revision of multilateral and unilateral trade can lead to a reduction in extractive practices and the increase in recycling and re-using of what is already in the market. The idea of circular economy is not new and is one of the pillars of the EU Green Deal, having been systematized in a 2020 new Action Plan that announced "initiatives along the entire life cycle of products, targeting for example their design, promoting circular economy processes, fostering sustainable consumption, and aiming to ensure that the resources used are kept in the EU economy for as long as possible."[223]

A 2020 report by UNEP and Trade Hub provides a broad understanding of the link between trade and a global circular economy, including in terms of the change in import/export dynamics between developed and developed countries. The underlying idea is clear: **"multilateral trade rules and regional trade agreements can be used proactively to advance the circular economy and minimize the environmental impacts associated with resource extraction**." A trade policy supportive of a global circular economy would thus slower trade growth in primary raw materials, change patterns of trade in waste and scrap for recycling, increase trade in secondary raw materials, second-hand goods and goods for re-manufacture, facilitate the emergence of trade in new services (such as waste management), recycling, refurbishment and remanufacturing. However, a move away from raw materials would have a negative impact on developing countries and people that are dependent on such export.[224] However, an increase in demand for waste and scrap provides developing countries with a comparative advantage in the sorting, recycling and remanufacturing of materials with additional economic opportunities.[225] Since scrap importing countries are often also manufacturing hubs, developing a competitive scrap industry would not only have environmental benefits but could also make economic sense."[226]

Rather than a world economy where raw materials and added value goods represent the two main categories, trade policies and national policies should create a global space for trade and investments in waste, recycled material and added value products.[227] In this optic, it is stated that, along with national policies, "international trade agreements could play a role in:

- (i) defining key product categories for new tradeable products associated to the circular economy;
- (ii) developing and harmonizing quality standards for circular economy products;
- (iii) opening markets for trade in goods and services relevant to the circular economy; and
- (iv) providing technical assistance for developing countries.

[223] EU Commission, DG ENVI, The EU Circular Economy Action Plan, available at: https://ec.europa.eu/environment/circular-economy/ [last accessed 5 December 2020].

[224] 24 for countries in the world depend on export of raw material to the EU for a percentage between 1 and 8 percent of their GDP. Countries that are most exposed are the Democratic Republic of the Congo, Guinea, Guyana, Liberia, Madagascar, Mauritania, Mozambique, Namibia, Niger, the Republic of the Congo, Sierra Leone, South Africa, and Suriname.

[225] A 2020 report Commissioned by the Permanent Representation of the Netherlands to the WTO concludes that 'these shifts also present new opportunities for job creation and development, especially in emerging services industries like recycling, repurposing and re-use of materials." Colette van der Ven, The Circular Economy, Trade, and Development: Addressing spillovers and leveraging opportunities, TULIP, 8 July 2020.

[226] UNEP and Trade Hub, supra n 160, p. 50.

[227] Id.

In addition, the WTO could play a role in advancing an inclusive transition to a circular economy by:

(i) including the circular economy as a priority area in the multilateral agenda;
(ii) strengthening the role of the Committee on Trade and Environment;
(iii) facilitating specific initiatives related to the circular economy; and
(iv) strengthening the link between Aid for Trade and circular economy objectives."[228]

If the approach is that of 'trade and..' and the goal is greener trade (whether of green goods and services or a global circular economy), what actions would be needed and how would international trade look in 2030 and 2060? The starting point is that **more international trade is seen as an opportunity for a greener global economy, that trade measures can and shall have an impact in defining the way in which national production takes place, and that the role of governments is that of using trade policies to establish a new 'green level playing field' as the fair and environmentally sustainable market for the future**. The technical tools will be the liberalization of green goods and services, unilateral measures limiting the import of high carbon goods and services, and the conclusion of trade agreements that contain a combination of liberalizing and restrictive measures along with TSD chapters with adequate 'teeth'. Moreover, the Fair Trade movement may think about joining forces with the advocates for the exclusion of green subsidies from the WTO, even when distortive of trade, so that countries could actively contribute to a quicker transition.[229] However, it is worth noticing that each of these tools can be shaped differently and lead to a multiplicity of environmental and social outcomes depending on which country is adopting them, how they are drafted and implemented.

As we discussed above, a carbon border adjustment mechanism that introduces a uniform levy for all products belonging to the same category may negatively impact players that adopt higher production standards and therefore represent a disincentive to the progressive improvement of environmental performances. Similarly, a TSD Chapter that is not adequately enforceable or without an adequate participation of civil society organization may favour the intensification of trade routes without actually improving the production practices on the ground. More importantly, **these kinds of measures may have significant social implications in terms of who will be the players with the capacity to access the new 'global green market'**. Will the environmental and climate standards be set so that Fair Trade members will be able to participate in these new trade arena? What is green and who decides it? Will quota be imposed in a way that guarantees space to smaller players or favour large-scale players who have an easier access to trade? Will a further round of liberalization (this time of green goods) have a progressive or regressive impact on Small and Medium enterprises around the world, given that SMEs are mostly active on local markets? The establishment of a new 'green playing field' does not mean, in our opinion, that all Fair Trade members would automatically benefit, as they have not benefitted from the construction of the conventional global market.

---

[228] Van der Ven, id, p. 5.
[229] Steve Charnovitz, Green Subsidies and the WTO. Policy Research Working Paper, No. 7060, Washington, DC.: World Bank Group, 2014, available at: https://openknowledge.worldbank.org/handle/10986/20500 [last accessed 1 December 2020].

If the intensification of the international trade in green goods and services is considered by the Fair Trade movement as the way forward, the movement shall at least advocate to obtain that any initiative concerning trade, environment and climate change shall be subordinated to a Human Rights impact assessment (see below) and a socio-economic impact assessment of its material impact on existing commercial activities. States should at least realize open and transparent consultations before undertaking the measures, clearly assess both the environmental and social implications of the measures, make sure that the measure is not detrimental to small and medium-scale producers within and without the country, and introduce clear monitoring/accountability/grievance schemes that would allow Fair Trade members (both in countries of origin and in importing countries) to assess and guarantee the respect of the measures contained in the trade agreement or unilaterally imposed.

Depending on whether or not the social implications of these ‘green trade measures’ are considered, the world could look very differently in 2030 and 2060. If effective, **the measures should intensify the trade in low carbon goods and services, allowing countries with high levels of research and development – and access to cheap labour and cheap materials needed to produce these goods** (whether scraps, raw material or alternative sources of energy in the context of the elimination of the subsidies to fossil fuels) – to specialize and become leaders in these new sectors. The worst case scenario is that of a new economic order where SMEs and small-scale producers from all over the world do not have the financial or technological know-how to adapt to the required standards, they lack the funds to invest in new sources of energy or processes, or they are victims of the competition from larger players that – within the same country and the same sector – are able of offering green goods at lower prices. In this sense, the new ‘international green level playing field’ would not look differently from today’s global economy: it would just be greener. Mining, agriculture and garment seems to us three areas where the unquestioned shift towards a green economy could favour large-players rather than SMEs and small-holders.

Finally, two points must be raised: a) green investments may have negative consequences in terms of human rights; b) the focus on trade as a tool for environmental and climatic transition may pose the risk of a two-tier economy. For what concerns a), it is important to think that the intensification of trade in green goods and services will inevitably lead to more investments in factories and value chains that produce and distribute those services. This, as in the case of wind farms in the Colombian Guajira,[230] the large-scale dams in Sub Saharan Africa,[231] or mining for lithium in the Bolivian Salazar,[232] can have negative impacts on the rights of indigenous and local communities, i.e. the same people that the Fair Trade movement would like to support. Therefore, a campaign on the green transition in the area of trade and investments cannot be dissociated from a campaign against green grabbing, green expulsions and violations of human rights connected with the intensification of the

[230] Vincent Kiezebrink, Joseph Wilde-Ramsing and Gisela ten Kate, Human rights in wind turbine supply chains, ActionAid and SOMO, 2018, available at: https://www.somo.nl/human-rights-wind-turbine-supply-chains/ [last accessed 2 December 2020].
[231] Fredrick Mugira, Beyond Fueling Land Grabs: Dams and Reservoirs Worsen Water Shortages, Pulitzer Center, 2019, available at: https://pulitzercenter.org/reporting/beyond-fueling-land-grabs-dams-and-reservoirs-worsen-water-shortages [last accessed 2 December 2020].
[232] Alice Baxter, Bolivian Indigenous People Lose Out On Lithium, Human Rights Pulse, 29 August 2020, available at: https://www.humanrightspulse.com/mastercontentblog/bolivian-indigenous-people-lose-out-on-lithium [last accessed 2 December 2020].

global market for green products. For what concerns the risk of a two-tier economy, it is important to advocate in a way that avoids a future where green goods produced according to the standards imposed by main importing countries will be exported while local markets will continue consuming goods and services produced without the same requirements. Therefore, it is important that environmental and climate constraints, whether in the form of TSD chapters or unilateral measures, are embedded in the broader context of global competitiveness, a hyper-liberalized market and the existing inequalities between market's actors. Even more importantly, as we discuss in the 'systemic' approach, it would be to consider these measures in the historical context of uneven development and the risk for new forms of green-imperialism.

7.1.3. A systemic approach: are global green trade and investments compatible with planetary boundaries?

A systemic approach to trade, climate change and biodiversity loss could be structured around three points: a) what is green and who decides it? b) green trade and investments for whom? c) are more green trade and investments compatible with the planetary boundaries?

a) ***What is green and who decides it?***

A systemic approach to trade, climate change and biodiversity loss would certainly be based on the assumption that the future of trade should be that of less (or zero) trade in goods whose production or consumption has negative impact on the environment, the climate or biodiversity. However, this approach would also **recognize that the definition of what is good and what is bad for the planet is a controversial and delicate decision.** As a matter of fact, the identification of green and non-green items can have a strong socio-economic impact. For this reason, the adoption of a systemic approach to the liberalization of green goods and services would ask for a definition of green that takes into consideration the full life cycle assessment of the products (for example, the minerals contained in wind turbines or electric batteries) and that is also combined with an analysis of the human rights that may be affected by the production and consumption of those goods and services. **When we think of green, are we aware that – as the World Bank wrote in 2020 - "the production of minerals, such as graphite, lithium and cobalt, could increase by nearly 500% by 2050, to meet the growing demand for clean energy technologies" and that "over 3 billion tons of minerals and metals will be needed to deploy wind, solar and geothermal power, as well as energy storage, required for achieving a below 2°C future."?[233]**

'Green' **should be at least aligned with the idea of planetary and social boundaries promoted by Kate Raworth's *Doughnut Economics***.[234] But should be closely linked to the notions of climate and ecological justice. Advocacy, organizing and policy efforts shall go in the direction of making sure that the green move is not only about individual technologies or forms of production, but a systemic move towards de-growth and the abandonment of the obsession for the Gross Domestic Product. 'Green' shall be non-

[233]World Bank, Mineral Production to Soar as Demand for Clean Energy Increases, Washington DC: World Bank, 11 May 2020, available at: https://www.worldbank.org/en/news/press-release/2020/05/11/mineral-production-to-soar-as-demand-for-clean-energy-increases [last accessed 3 December 2020

[234] Ibid.

extractivist, mitigate climate change below the requirements of the 1.5 degrees indicated by the IPCC, and actively foster the regeneration of biodiversity. But green shall also be associated with an economy that recognizes the limits of a finite planet and that is sceptical of the possibility of decoupling, i.e. the increase in economic growth with a reduction in the environmental impact of the global economy. **If global trade in 'green' goods and services is the future, the first step is to advocate for 'green' that departs from the patterns of unlimited growth and, at the same time, is rooted in the respect of human rights at all phases of the chain**. A systemic approach would not accept a 'new green trade and investment regime' that is based on the same intellectual premises of the current regime.

b) Green trade and investments for whom?

The second point to keep in mind when we adopt a systemic approach to justice and the future of trade and investments, is that we need to enrich our reasoning with considerations about the distributive impact of trade and investments. **If countries collectively or unilaterally decide to create a new 'green level playing field' for trade and investments, who is going to win and who is going to lose?** More importantly, we need to embed the measures in the holistic context of contemporary inequality and the historical perspective of uneven development and the different levels of industrialization and technological innovation that countries (companies and individuals) have achieved.

When the European Commission, after decades of pushing for liberalization and favouring the production of goods in countries with weak environmental regulations, is calling for higher standards and the internalization of environmental dumping via carbon adjustment mechanisms or carbon taxes, who is going to win and who is going to lose? When countries sign a regional trade agreement that liberalizes trade in 'green' goods, phases out fossil fuel subsidies and identified tariff quotas for specific goods (like livestock or soybeans, as in the case of the EU-Mercosur), they are certainly thinking about the environment and the impact of production on climate change (although, as we saw, the EU-Mercosur agreement is pretty weak on enforcement). However, are they thinking about the distributive implications of asking for higher standards, more investments, research and innovation, adoption of higher standards of methods and processes of production, etc.?

If we adopt a **systemic and historically constructed approach to 'greening' international trade, we cannot avoid thinking about the similarities between these kinds of measures and the protectionist measures that European countries and the United States adopted in the past in order to facilitate the development of their national industries**. At the same time, we cannot overlook the fact that measures like borders adjustments and carbon taxes will inevitably have a heavier effect on countries with lower levels of industrialization, less resources to support a green transition and those actors (SMEs in particular) who have historically suffered the competition of larger corporations, often supported with foreign capital.

Moreover, the 'green shift' of trade and investments seems incompatible with the recognition of the climate and ecological debt that the Global North has with the

Global South and the principle of 'common but differentiated responsibility' promoted by the climate justice movement. No 'green' transition should take place that is not just. No green transition shall take place without acknowledging that the Global North is responsible for most of the climate emergency and reparation is needed in order to establish a true 'level playing field'. Is the establishment of a new global 'green' market going to be a way to give a competitive advantage to the Global North? When New Zealand, Fiji, Costa Rica, Iceland and Norway conclude a regional agreement to liberalize 'green' goods and reduce 'fossil fuel subsidies', we shall not see these countries as equal. For example, Norway is leading the pack in the generation of hydrogen energy and is an oil producing country. Others, on the contrary, would be markets of destination, with the risk of reinforcing the North-South divide and create new forms of 'uneven green development'.

In light of the risk that green trade is a more unjust trade, a systemic approach would require that the socio-economic implications of 'green' measures are taken into account and, if they cannot be avoided, they are internalized by means of providing adequate financial support and alternative opportunities. As the 2021-2025 Global Strategy recognizes, the revision of the environmental components of Fairtrade Standards in order to align them to the highest environmentally sustainable practices must represent little to no added burden to the producer, or the scheme would not be just and socially sustainable.[235] At the end of the day, this is what the European Union is doing with its citizens in the context of the just transition: it is providing financial support, new jobs opportunities, development, reskilling and environmental rehabilitation in all these contexts where fossil fuel and carbon heavy industries will have to be phased out. If countries are worried about the future of their workers once the productive patterns are aligned with the Paris Agreement, shouldn't they also consider the future of all those producers who depend on the European market and are at risk of more poverty and more marginalization?

There also other reasons why the dependency that international trade creates for millions of people and tens of countries must be taken seriously. First of all, the existing dependency on trade is often used to state that international trade is beneficial to people and countries. However, it is often used to mention that these countries and these people are dependent on trade, in the sense that a reduction in the demand for those goods, or the entry into the market of a cheaper competitor, risk to have severe consequences on the economic stability of the country. Covid-19 has clearly demonstrated this point. **The intensification of climate change can only enlarge the cracks that Covid-19 has opened.** For free-trade promoters, the paralysis of global trade require more resilient and more coordinated value chains. For a systemic understanding of trade, environment and climate change, on the contrary, the paralyses of trade would be addressed by creating a resilient future for small-scale producers, workers, farmers, etc. i.e. a future with less dependency on international trade and less competition from international trade. This is due to the impact of climate change, that is significantly affecting production and requires diversification, but also because of the intensification of the interruption to the logistic chain.

[235] Fairtrade International, 2021-2025 Global Strategy, p 18.

If climate change is taken seriously, the approach to international trade shall be based on supporting the diversification of production (including outside of the agricultural system) and the diversification of markets towards local and regional spaces. As the Special Rapporteur on the Right to Food, Michael Fakhri, discusses in his first thematic report, the goal shall not that of supporting sustainable practices in the context of international dependency, but to support sustainable practices in the context of high levels of autonomy, solidarity and dignity.[236] Rather than advocating for a liberalization of 'green' goods and new standards, therefore creating a new international competitive framework where producers are all acting against each other and where they are victims of an increasing dependency on international trade, **a systemic approach would thus require to focus on local resilience, strengthen them and draft trade laws (and national laws and development cooperation laws) that strengthen the independence and autonomy of people.**

Another reason why dependency and resilience have to be taken seriously when thinking about the future of trade, environment and climate change is that **countries of destination may adopt unilateral measures with a significant effect on producing countries**. For example, when article 36 of the New European Union organic regulations, due to come into force in 2021, limits the size of organizations and the amount of land that each member can farm, they may be justified by an analysis of the European agricultural system and its dynamics, but at the same time they are forcing small-scale farmers to restructure their cooperatives, and create high costs when they are already struggling to make ends meet. A voice from the Dominican Republic finds that the proposed changes are disastrous: "This EU regulation is against rural development and against international cooperation. It limits opportunities for disadvantaged groups and for small producers like our members to grow. It also has the potential to damage, or even destroy existing businesses like ours, as we will not be able to stem the additional costs and red tape." For sure, this situation could be avoided by making sure that European policies (or other national policies) are coherent with the principles of development and cooperation: but isn't the risk of national policies in the Global North with a strong impact on the Global South another reason to start de-linking from international dependency?

c) More green trade and investments in the framework of the social and planetary boundaries

We have already mentioned a series of reflections that should accompany us when we systemically approach unilateral or multilateral decisions to 'greening' trade. However, the crucial point is another one. It is the underlying incompatibility between the global trade in goods and services and the social and planetary boundaries. This takes two forms: on the one hand, when we accept the establishment of a new 'green global market' by the adoption of trade restrictions of liberalizations, we are also accepting the continuation of the non-green global market and the underlying premises of international trade: more trade means economic prosperity which means better lives. **Despite carbon taxes, borders adjustments, certifications, the end of fossil fuel subsidies and other measures, the trade in non-green goods will continue: they will only make them more expensive and will lead – in the best case scenario –to their phasing out in decades.** The planet has no time to wait. At the same time, the 'global

[236] See Michael Fakhri, supra n 163.

green market' will be based on the same premises of the old market: global competition among people, corporations and countries that produces winners and losers. People cannot afford more of this.

But a systemic approach would tell us more. **We would have to think whether or not our support to the 'green global market' is legitimating the ideas that inspired the construction of the world economy and we are discounting the environmental impact, in terms of GHG, pollution, contamination, etc. linked with the trade logistic**. We discussed it above (see Section 3.4): a 2015 OECD and ITF report revealed that "international trade-related freight transport [accounted in 2015] for around 30% of all transport-related CO2 emissions from fuel combustion, and more than 7% of global emissions."[237] According to the same study, a baseline scenario of economic growth of 3.5% per year would lead to longer supply chains – mainly due to the growth in trade corridors connecting emerging economies and non-OECD countries, an increase in volume of traded goods, an annual increase in world trade by 3.5% and an overall increase of trade-related freight transport emissions by a factor of 3.9%, the equivalent of a +400% increase in GHG emissions from trade-related freights only. Even assuming technological development and efficiency improvement over the next three-and-a-half decades, the OECD and ITF conclude, "CO2 emissions from international trade-related freight transport will grow by 290% in the baseline scenario, i.e. to nearly three times today's level."[238]

From the point of view of trade and environment, **goods that travel around the world are not only the raw materials that are extracted or the fossil fuel used by ships, flights and trucks**. They are the infrastructures, the energy, the expansion of ports, the containers, the technological infrastructure. They are the excesses of production that are discarded and the waste that is dumped at the end of products' lives. Even if the whole global production was shifted to more sustainable practices and even if the transport of goods was capable of reducing its emissions, the planet would continue moving in the opposite direction of what is contained in the official documents of the IPCC and in the slogans of the people who have been taking the streets to protect the planet. Opening new South-South trade routes or creating an African common market to intensify the amount of exchanges, is hardly what the planet needs. Thus, **a systemic approach would tell us that it is not really a matter of internationally trading green goods or high carbon goods: it is about international trade per se**. If this is the case, advocacy and decision making processes shall move away from 'making international trade and investments greener' towards 'building a different trade and investment regime'.

For the Fair Trade movement, this means working for a differentiated system of production that is not aimed towards international trade and that finds other ways of supporting farmers' rights. This means working towards less trade not only for high-carbon goods, but for any kind of good. For example, Coscione suggests the possibility of de-linking value chains from large-scale plantations, advocating for land reforms and supporting the distribution of land to smallholder who can farm agroecologically and

---

[237] OECD and ITF, supra n 199.
[238] ibid

support their food sovereignty.[239] This would mean **moving away from the core product that are mostly traded in the context of the fair trade market, and supporting producers diversifying their production and their markets**. This also means recognizing that trade (international or local) shall not be the sole way of supporting smallholders, workers and the most vulnerable. Official Development Aid, fiscal policies, free transfer of knowledge and democratic technologies, investments in local markets and territorial economies and the forgiveness of international debt are just some of the interventions that shall happen and that can contribute to the significant improvement of living conditions among the most marginalized.

At the level of advocacy, it means that the **Fair Trade movement should not only focus on trade and investments. When it comes to international trade advocacy, the Fair Trade movement should not be advocating for stringent TSD chapters in free trade agreements, but rather for trade agreements and unilateral measures that reduce international trade and support programmes for the green and just transition of workers and producers who are dependent on international trade and environmental degradation, like the European Commission is doing with the just transition**. As pointed out by Jan Orbie, "the European Commission points out that it uses its trade leverage to pursue sustainable development objectives through a separate chapter in its trade agreements. In reality, exactly the opposite is true: these chapters have served as leverage to convince public opinion and parliaments to ratify the trade agreements [and open up economies."[240] This also means working for an investment regime that does not create an incentive towards large-scale corporations whose main focus is that of mass-production and distant trading.

This means promoting the circular economy, but not in the way the United Nations Environment Programme is advocating: **international trade should not be used to transform the whole planet in a gigantic circular economy and developing countries in the places where materials are recycled.**[241] On the contrary, trade rules should be implemented so that each country has the possibility of investing in green subsidies and green technologies that facilitate the establishment of a national/regional circular economy. For this, these kinds of subsidies should be excluded by the application of the WTO. Moreover, trade in waste, like the millions of tons of plastic or scrap materials that flow from the Global North to the Global South, should be strongly sanctioned and disincentivized.

In conclusion if the Fair Trade movement's intention is to adopt a systemic approach to trade, investment, environmental degradation, climate change and biodiversity loss, we have to take in mind three main points:

a) **the creation of a 'green level playing field' based on the same premises of the current trade and investment regime (productivity, competitiveness, export-led production, etc.) would create new forms of inequality and would likely intensify historical inequalities due to colonialism and uneven development**;

[239] Marco Coscione, *Comercio Justo en Clave Decolonial*, Medellin: Kavilando, 2018.
[240] Jan Orbie, interview with the authors.
[241] Ayuk, E.T., Pedro, A.M., Ekins, P., Gatune, J., Milligan, B., Oberle, B. et al, Mineral Resource Governance in the 21st Century: Gearing Extractive Industries Towards Sustainable Development. A Report of the International Resource Panel, 2020, Nairobi, Kenya: United Nations Environment Programme, p. 14.

b) the ‘green level playing field’ would **intensify trade in goods and services, therefore increasing the amount of GHG produced** by shipping, logistic, etc. and the amount of materials that are extracted (in particular minerals behind ‘renewable energy’ and the ‘digital revolution’). Liberalization as an increase in mobility is inevitably incompatible with the planetary boundaries;
c) **Climate justice requires that no ‘green’ transition shall be de-linked from its socio-economic implications** and addressing injustice and inequality (intra-country and inter-countries).

Therefore, rather than ‘green trade and investments’, the sole future that appears compatible with a systemic and climate justice based approach to trade and investments is that of regionalization and diversification, trade agreements that discourage trade and a shift away from trade and economic growth as the drivers of change.

7.2 Trade liberalization as an opportunity for fair trade

A second area of interest concerns the push towards **liberalization of international trade independently on the adoption of environmental or social standards**. Although the future of EU-Global South trade relationships is expected to have a strong green and/or sustainability element in it,[242] this is not necessarily the case for other trade relationships, like the agreements concluded by the United States, or regional agreements like the **African Continental Free Trade Agreement (AfCFTA) or the Regional Comprehensive Economic Partnership (RCEP)**,[243] which, despite being signed in 2020 and including Australia, the Republic of Korea and New Zealand, does not mention climate change, child labour or forced labour.

If this is the case, it is therefore important to reflect on the positions that the Fair Trade movement could adopt **when further trade and investment liberalization are promoted as opportunities for more exchanges and economic growth**. Whether green or not, the tendency is to create spaces for more flows of goods, services and capital: especially South-South. This situation presents the Fair Trade movement with a dilemma: shall we support the liberalization as it makes it cheaper to trade in Fair Trade products and that increases the amount of foreign investments in the country? What and who shall we think of? The producers in the Global South who are part of the Fair Trade movement and would have more access to the international market? The producers in the Global South who are not part of the Fair Trade movement and are not trading internationally? Non-producers in the Global South? The producers in the Global North? Shall we promote South-South trade as an alternative to the North-South uneven relationships, or not? Finally, can we really de-link the environmental and climate aspect from any discussion around more trade and more investments?

---

[242] During the Fairtrade breakfast on December 8, 2020, the EU Trade Commissioner Dembrovskis highlighted that the role of the European Union is to lead by example and use trade to improve the practices and conducts taking place in countries that trade with the EU. Therefore, more engagement with (green and sustainable) trade is envisaged and not a withdrawal from trade.

[243] ASEAN, Summary of the Regional Comprehensive Economic Partnership, 16 November 2020, available at: https://asean.org/summary-regional-comprehensive-economic-partnership-agreement/ [last accessed 9 December 2020].

7.2.1 Business as usual: more trade for more economic prosperity

We have spent a significant part of this document presenting the argument that are generally used to promote free trade and the liberalization of exchanges in goods and services: specialization, comparative advantage, efficient use of resources, employment, and the generation of economic growth that contributes to increase the overall wellbeing of people. In a joint statement, USA and Kenya discussed the ongoing negotiations for a free trade agreement stating that "Increasing and sustaining export performance to the United States requires a trade arrangement that is predictable and guarantees preferential market access for Kenyan products. Kenya is also keen to attract Foreign Direct Investment from the United States that will improve vertical and horizontal linkages in the Kenyan economy. The increased inflow of investment from the United States has the potential to create job opportunities and catalyze other value chains that will benefit Micro and Small Enterprises in Kenya."[244]

In the case of the RCEP, parties state that: "The objective of the RCEP Agreement is to establish a modern, comprehensive, high-quality, and mutually beneficial economic partnership that will facilitate the expansion of regional trade and investment and contribute to global economic growth and development. Accordingly, it will bring about market and employment opportunities to businesses and people in the region. The RCEP Agreement will work alongside and support an open, inclusive, and rules-based multilateral trading system."[245] With regards to the African Continental Free Trade Agreement (AfCFTA) (see box 4), the approach of the African Union is that "the AfCFTA will boost intra-African trade, it will promote industrialisation and competitiveness and contribute to job creation, and it will unleash regional value chains that will facilitate Africa's meaningful integration into the global economy. The AfCFTA will also improve the prospects of Africa as an attractive investment destination. It will help advance the empowerment of Africa's women, by improving women's access to trade opportunities which will in turn facilitate economic freedom for women, and expand the productive capacity of countries."[246]

BOX 4 The AfCFTA to create a common market for Sub-Saharan Africa

The AfCFTA has a *general* and *specific* set of objectives that are mutually reinforcing. The *general objectives* of the AfCFTA, inter alia, are the creation of a single market for goods, services, and movement of persons and investments among African countries; creation of a liberalised market for goods and services based on successive rounds of negotiations; lay the foundation for the establishment of a Continental Customs Union and enhance the competitiveness of the economies of African States both with the continent and the global market.[247]

[244] Joint Statement Between the United States and Kenya on the Launch of Negotiations Towards a Free Trade Agreement, 7 August 2020, available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/july/joint-statement-between-united-states-and-kenya-launch-negotiations-towards-free-trade-agreement [last accessed 09 December 2020].

[245] ASEAN, supra n 243.

[246] African Union, Thirteenth extraordinary session on the AfCFTA: The Assembly of the Union adopts decision on the start of trading, December 5, 2020, available at: https://au.int/en/pressreleases/20201205/thirteenth-extraordinary-session-afcfta-assembly-union-adopts-decision-start [last accessed 9 December 2020].

[247] See Art. 3 – *General Objectives*. See, Jonathan B. Rudahindwa, "IEL and the AfCFTA: Beyond Trade Liberalisation, Economic Transformation and Development", AfronomicsLaw Blog, February 11, 2019, http://www.afronomicslaw.org/2019/02/11/iel-and-the-afcfta-beyond-trade-liberalisation-economic-

The agreement aspires towards a better coordination of African trade regimes and the elimination of challenges associated with multiple and overlapping trade agreements across the continent. Although the AfCFTA is progressive in enshrining provisions that aims to address the perennial problem of multiple and overlapping trade agreements, the practicality or modus operandi for achieving the objective remains obscured in light of the historical trajectories and heterogeneity of the different regions in Africa. The objectives of the agreement also include socio-economic development, gender equality, structural transformation of the state parties,[248] as well as healthcare.[249]

To realize the *general* objectives, the AfCFTA provides for the following *specific* measures: the State Parties are to progressively "eliminate tariffs and non-tariff barriers to trade in goods" and "liberalise trade in services"; cooperate "on investment, intellectual property rights and competition policy on all trade-related areas", and "on customs matters and the implementation of trade facilitation measures"; establish "a mechanism for the settlement of disputes concerning their rights and obligations; and "maintain an institutional framework for the implementation and administration of the AfCFTA."[250]

Article 5 of AfCFTA incorporates principles such as variable geometry; consensus decision-making; adoption of regional economic community free trade areas and as building blocs; as well as best practices in the RECs, State Parties, and International Conventions binding the African Union among other traditional provisions in trade agreements. The institutional framework for governance and implementation of the AfCFTA consists of the Assembly, as the highest organ, and in descending order, the Council of Ministers, the Committee of Senior Trade Officials and the Secretariat.[251]

According to all these accounts, **bilateral or multilateral trade represents an opportunity to open business avenues, integrate new players into the global economy and consolidate existing trade and investment dynamics through a predictable and clear regulatory**

---

transformation-and-development/; David Luke and Jamie MacLeod, *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective*, (2019: Routledge).

[248] See, Oyeniyi Abe, "Gender Mainstreaming and Empowerment under Agreement for the Establishment of the African Continental Free Trade Area", January 30, 2019, AfronomicsLaw Blog, http://www.afronomicslaw.org/2019/01/30/gender-mainstreaming-and-empowerment-under-agreement-for-the-establishment-of-the-african-continental-free-trade-area-afcfta/. Similarly, Vera Songwe, Executive Secretary of the United Nations Economic Commission for Africa noted that "One of the big indirect effects of the African Continental Free Trade Agreement (AfCFTA) will be that women become a lot more economically empowered…" See, Saïd Business School News, "AfCFTA will boost economic empowerment of women in Africa", 22 March 2019; online: https://www.sbs.ox.ac.uk/news/afcfta-will-boost-economic-empowerment-women-africa

[249] Walter Ochieng, "Will Free Trade Make Africans Sick?", Project Syndicate, April 15, 2019; https://www.project-syndicate.org/commentary/africa-free-trade-agreement-health-risks-by-walter-ochieng-2019-04. With respect to healthcare, Walter Ochieng argues has been neglected with "alarming oversight" in the discourse so far. Further, he notes that "the pact raises concerns about the weakening of government-funded public-health systems, increasingly unequal access to care, a medical brain-drain, higher drug prices, increased consumption of unhealthy products, and the spread of diseases. African governments should act immediately to assess these threats and counter the AfCFTA's potential negative health implications."

[250] See Article 4 (a)-(g), *Specific Objectives*.

[251] Article 9. See, Gerhard Erasmus, "The AfCFTA Institutions: Could the Secretariat hold the key to Implementation?", Tralac Working Paper Series, February 6, 2019. Online: https://www.tralac.org/publications/article/13887-the-afcfta-institutions-could-the-secretariat-hold-the-key-to-implementation.html

framework. Whether North-South or South-South,[252] less barriers to trade and investments are seen as a beneficial and capable of unleashing the potential of entrepreneurs and workers, in particular women (see below section 7.3 for a more detailed account of the link between trade and gender). From a pure economic perspective, the business as usual approach of liberalization would mean focusing on the opportunity that trade liberalization represents in terms of employment in export-led sectors and increase in the access to market for small-scale producers. In the case of the RCEP, for example, the focus would be on the impact that the multilateral trade agreement would have in increasing the export of Vietnamese coffee to the Australian or Korean markets, or the impact that it would have in lowering the cost of exporting garment products realised in Cambodia towards one of the countries in the region.

An approach that favours further liberalization and integration of trade may or may not be independent on the considerations on trade and climate that have been presented above: standards, requirements, etc. may be introduced in the multilateral agreements or unilaterally. Similarly, it may or may not consider the social impact of liberalization, i.e. assume that economic growth will be beneficial without questioning who will be the real recipient of these increase in traded volumes. However, **the 'business as usual' focus of the Fair Trade movement could not be independent on the justice, sustainability and equity aspect, as they are entrenched into the Fair Trade Charter and core to its mission**. Thus, for Fair Trade it would not only be a matter of assessing if the liberalization of certain areas of trade and the attraction of certain investments would have a positive economic impact on Fair Trade producers in the countries involved.

The 2021-2025 Global Strategy seems to embrace an approach to more fair trade as the goal of Fairtrade International, an attitude that could align with the idea of more liberalized trade as an opportunity for prosperity. Strategic Pillar 2, "Growth and Innovation" states that:

- "A strategy for growth through which Fairtrade will deliver greater volumes of existing Fairtrade-certified products sold on Fairtrade terms, and introduce new products and services to drive the overall strength and sustainability of the Fairtrade movement.
- Less niche, more mainstream – Drive additional volumes and market share in existing markets by working with our most committed partners to increase their Fairtrade commitments, expanding and deepening the range of customers for Fairtrade products. To effectively cater for customer needs at scale, Fairtrade will segment the market to provide a more bespoke offer to commercial partners and producers alike. We will be more effective in the way we manage our wide product portfolio, introducing segmented levels of service based on their relevance to Fairtrade as a whole.
- New sources of growth – New growth opportunities both in existing and untapped markets with an expanded offer covering traditional certification, as well as new bespoke services for different actors along the supply chain."[253]

If the Fair Trade movement was to adopt a 'business as usual' approach to liberalization and embrace more trade as an opportunity, it would in any case require to assess the impact

[252] South-South trade dynamics can assume multiple forms. They can be based on small-scale, solidarity-based, reciprocal and self-reliant forms of production, distribution and consumption, or simply reproduce the dominant model of competitiveness, specialization, etc. Talking about South-South trade, therefore, does not mean automatically to talk about fair, just, equitable and sustainable trade.

[253] Fairtrade International, 2021-2025 Global Strategy, p 7.

that multilateral and unilateral measures would have in terms of their social and environmental impact. Yet, a narrow focus on production and producers would not require the Fair Trade movement to go beyond the analysis in relevant sectors and in the countries that are involved in the process of liberalization. Thus, a Fair Trade approach to the RCEP could not only consider the increase in export of Fair Trade coffee from Vietnam or an increase in Fair Trade garment from Cambodia, but should also ask the following questions (among others):

- Who are the producers who can actually benefit from more exported volumes? Is the measure favouring small-scale players? What about landless people and those who will become landless because of the way in which trade opportunities are unequally distributed?
- Is the increase in export such that non-Fair Trade players are going to reap most of the benefits and negatively impact the market position of Fair Trade?
- Is the liberalization such that foreign products, Fair Trade or not, may have a negative impact on Fair Trade producers and businesses' access to the local market?
- How is the increase in productivity associated with cheaper exports going to impact the environment and, in particular, the sustainable use of resources?
- Is liberalization intensifying specialization and compromising the process of diversification and construction of resilient chains?
- What is the environmental impact (both in terms of GHG, opportunity cost of other uses of the land, land use conversion, loss of biodiversity, etc.) of new trade routes and of an intensification of trade?

In this framework, a Fair Trade approach to liberalization would always require – even in the absence of environmental and sustainability chapters in the trade and investment agreements and unilateral measures – two elements:

- An ex ante and ex post environmental and social assessment of the trade and investment measure with specific attention to the elements discussed above (distributional implication, short-medium-long term impact on Fair Trade small scale producers and workers);
- Assessment of the environmental impact that the increase in exchange of goods, capital and services will have and its compatibility with the 1.5° threshold indicated by the IPCC.

Although each case is different, it can be concluded that a 'business as usual' approach to free trade as an opportunity for more Fair Trade cannot be accepted without strong caveats and caution. At least, it would require the Fair Trade movement to support trade and investments' liberalization only if it is likely to have a positive material impact on Fair Trade producers in the countries involved and it is not incompatible with the Paris Agreement. Whether it is the case of RCEP, AfCFTA or the USA-Kenya agreement is not possible to say. For sure, the RCEP and the AfCFTA are going to increase the competition between Fair Trade producers in different member states. Moreover, in the case of the AfCFTA it will also increase truck-based trade within the region, which is one of the largest sources of GHG emissions. On the other hand, the USA-Kenya agreement may have the consequence of opening the Kenyan market to US agricultural products, therefore representing a possible threat to Kenyan Fair Trade producers who also sell on the local market.

In any case, **this approach would be characterized by a narrow focus that exclusively takes into consideration producers and the environmental impact in the countries involved in the liberalizing process**. More specifically, it would only reason on the impact that trade and investments liberalization would have on present and future Fair Trade producers and the use of natural resources in the country of origin of the products. If the reader's intention is to go beyond these limitations, a broader engagement with trade liberalization must be adopted that we resume in concept of 'trade and…' discussed in the next section.

7.2.2 Trade and…: human rights and environmental Impact Assessment beyond the Fair Trade market

The principles and goals of the Fair Trade Charter are incompatible with an unregulated liberalization of trade and investments. At least, it requires an **assessment of the impact that more exchanges and more capital mobility would have on the economic conditions of Fair Trade Producers, the environment and biodiversity in the countries affected by the liberalization**. However, the Fair Trade Charter is clear in recognizing that untamed free trade has negative consequence on people and planet and that this injustice must be redressed. Quite often, **the same rules that may increase the market space for Fair Trade producers threaten the human rights of non-Fair Trade agricultural producers, workers, indigenous people, and especially women**. For example, cutting agricultural tariffs in west African countries can be an opportunity for the export of Fair Trade cocoa beans, but it is also a chance to boost EU exports of milk power, chicken parts and pork, displace local producers who do not participate in international trade in raw materials, undermine their right to food and make these countries more vulnerable to external price shocks.

Similarly, expanding import quota in the EU or cutting export tariffs in Mercosur countries can increase the market for Fair Trade gold extracted in Peru, but at the same time it would reduce the cost of exporting soy and meat production to the detriment of rain forests and the rights of indigenous peoples. Because the WTO, Free Trade Agreements and Multilateral Agreements often go beyond the trade elements (the so called WTO+, as we mentioned above), **accepting free trade agreements that can boost access to market for Fair Trade producers may have the consequence of legitimizing the consolidation of an intellectual property regime that can limit local farmers access to seeds and undermine their right to food** or have impacts in areas that are completely unrelated to the Fair Trade market, such as poor people's access to generic medicine. At the same time, increased investor protection that can be associated with an increase in foreign investments and the establishment of production facilities in the Global South can also create additional obstacles for the necessary land reform and the fulfilment of the rights to food and housing of many more people than those who will be benefitting from the new jobs.

Given that the Fair Trade movement wants to put justice, equity and sustainable development at the heart of trade (and investments) structures[254] and given that trade and investment liberalization determines socio, environmental and regulatory transformations that go beyond the sole Fair Trade producers, **it is evident that the Fair Trade movement shall analyse trade and investment policies in their integrity and not only with regards to the positive or negative impact that they can have vis-à-vis the Fair Trade market and the Fair**

[254] Fair Trade Charter, supra n 74, p. 9.

Trade producers. When the Charter states that "The Fair Trade movement shares a vision of a world in which justice, equity and sustainable development are at the heart of trade structures and practices so that everyone, through their work, can maintain a decent and dignified livelihood and develop their full human potential"[255] it is clearly mandating all Fair Trade members to challenge the injustice, inequality and environmental degradation that may arise from trade and investment agreements, even if this is not directly linked to the lives of Fair Trade producers.

Therefore, the **question to be posed is not whether liberalization will be good or bad for Fair Trade producers and products, but whether the trade agreement will increase the levels of justice, equity and sustainability**. In the specific context of food chains, the members of the Fair Trade movement may want to join the G-33 and its call for identifying special products and trade mechanisms to allow developing countries to designate a certain number of products as "special" and exempt them from tariff reduction requirements and other disciplines. From a technical point of view, they could call for a redefinition of the countervailing measures agreement or the exceptions contained in Article XX of the GATT or in the Technical Barriers to Trade Agreement. From a more political and broader perspective, they could decide to join the efforts of those actors (some of which are part of the movement already) who are asking for more transparent and binding ex ante and ex post assessments of the impact that liberalization will have on human and labour rights, socio-economic conditions, the environment and biodiversity protection. Different ways of doing these assessments exist and a full overview cannot be provided in this context. In the next paragraphs we'll thus make reference to the main approaches to Impact Assessment and will reflect on the opportunities and limits behind this way of engaging with trade and investments policies.

The idea that unilateral trade measures and trade agreements should be subject to human rights and sustainability impact assessments has been gathering momentum in recent years. This idea springs from concern – particularly on the part of trade unions and civil society organizations – that states are not presently doing enough to anticipate and address the human rights and environment related risks associated with, or consequent upon, their trading arrangements with other countries. As a matter of fact, given the universal and superior character of international law, the conclusion of trade and investment agreements or the adoption of unilateral trade and investment policies shall be compatible with the international obligations that States have assumed with their own citizens and the whole members of the human community.[256] For example, the Committee on Economic, Social and Cultural Rights in its concluding observations on Switzerland recommended that "the State party undertake an impact assessment to determine the possible consequences of its foreign trade policies and agreements on the enjoyment by the population of the State party's partner

[255] Ibid.

[256] Committee on Economic, Social and Cultural Rights, general comments No. 12 (1999) on the right to adequate food, paras. 19 and 36 ("States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention"); No. 14 (2000) on the right to the highest attainable standard of health, para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health"); No. 15 (2002) on the right to water, paras. 31 and 35-36 ("States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.").

countries, of their economic, social and cultural rights."[257] When a country concludes an agreement that generates negative consequences on the human rights of people living in another country (including their right to a healthy environment), we could thus conclude that it is in breach of its international obligations.

Since the late 1990s, various UN treaty bodies and UN agencies (in particular the Office of the United Nations High Commissioner for Human Rights – OHCHR) have called for human rights impact assessments to be carried out prior to the conclusion of trade agreements.[258] In 2011, the then UN Special Rapporteur on the right to food, Olivier De Schutter, published a set of guiding principles on human rights impact assessments of trade and investment agreements in a report to the UN Human Rights Council. More recently, the International Labour Organization (ILO) has published guidance focusing on the relationship between trade and labour.[259] However, **most of the impact assessment so far have been realized outside of the official trading process, mainly by third parties interested in informing the negotiations or pushing for a change in the existing policy**. For example, the most recent multilateral agreements concluded by the European Union (including the TTIP with the United States and the EU-Mercosur) have been publicly challenged because of the impact that they would have had on citizens, animals, the environment, the rights of workers, etc. In the case of the AfCFTA, an ex-ante analysis realized in 2017 by the United Nations Economic Commission for Africa (UNECA) and Friedrich Ebert Stiftung (FES) led to making several recommendations for consideration by trade negotiators (including a list of goods to be excluded from liberalization because of their potential negative impact on the right to food, and the insertion of a safeguard clause for food security measures). Authors also offered a series of recommendations to governments for measures aimed at improving policy coherence and resilience.[260]

The goal should be that of **having public, democratic and intersectional assessments embedded in the procedure of scoping, negotiating, signing and implementing**. Both before the policy/agreement is undertaken and after this is put in place. However, the opportunity of an institutionalized assessment is also its main limit: depending on the methodology,

[257] E/C.12/CHE/CO/2-3, para. 24.

[258] Since 2003, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has on several occasions recommended the use of
human rights impact assessment techniques 'to gauge the extent to which trade liberalization can promote and protect human rights'. See OHCHR
(2003), *Report of the High Commissioner for Human Rights on Human Rights, Trade and Investment*, UN Doc. E/CN.4/Sub.2/2003/9, Geneva:
OHCHR, at para 63, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf? OpenElement (accessed 9 Jan. 2019).
See also Economic and Social Council (2017), *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic,*
Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, Geneva: Economic and Social Council, at para 13, p. 32,
http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImn sJZZVQcIMOuuG4TpS9jwIh
CJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y (accessed 9 Jan. 2019).

10 Olivier De Schutter, ibid.

[260] United Nations Economic Commission for Africa (UNECA) and Friedrich Ebert Stiftung (FES) (2017), *The Continental Free Trade Area (CFTA)*
in Africa – A Human Rights Perspective, July 2017, p. 41, https://www.uneca.org/publications/continental-free-trade-area-cfta-africa-%E2%80%93-human-rights-perspective [last accessed 24 November 2020].

expertise, procedure and the binding nature of the assessment, it will have the possibility to actually steer and direct the policy process (including preventing the conclusion of the agreement) or legitimize a process that was never supposed to be radically altered but only slightly adapted to the concerns raised by third parties. **The importance of the methodology, scope, procedure, etc. is evident** from the "Critical review of the Trade Sustainability Impact Assessment for the Free Trade Agreement between the EU and the Republic of India from a gender perspective" realized by Wide and the Heinrich Böll Stiftung in 2009. Since the beginning, the methodological choice appears to pre-determine the outcome of the impact assessment. We read, in fact, that "the mechanistic use of economic modelling and textbook assumptions of perfect markets has huge limitations in giving a real understanding of the complex impact of trade liberalisation on women's livelihoods, empowerment and gender equality."[261]

The central purpose of an *ex ante* human rights and environmental impact assessment is to reduce the risks of future inconsistencies between the transformation imposed with the trade policy and the objectives contained in international law, the sustainable development goals, the Paris Agreement, etc. As mentioned above, the process can be a mere 'ticking the box exercise' or can assume a relevant function when its outcome is binging on the whole process. At the moment, ex ante impact assessment as not very common and their role is more of support to decision-makers and negotiators rather than control and direction of their operation. Impact assessments, as in case of the EU-Mercosur deal, are thus seen as a tool for anticipating future adverse scenarios and ensuring that they are addressed, either in the negotiated text itself or through appropriate measures. In this sense, the agreement will be concluded but clauses – like the TSD chapter in the EU-Mercosur – will be added. As we mentioned above, the adoption of these clauses can have a mere symbolic role (as in the case of the EU-Mercosur TSD Chapter that has no binding nature and whose violation is not adjudicated in the same way as any other breach of the agreement) or stronger capacity to constraints trade.

The value of a human rights impact assessment is that it can be used to **cast some light on important issues that operate outside of the mere commercial sphere and would otherwise be obscured** (such as freedom of expression and privacy), and in their ability to '[shift] the focus from the overall welfare of a country (i.e. growth in the GDP) onto the impact that the trade policy would have on people and the planet, and in particular on the most vulnerable and disadvantaged, whose rights are often the most likely to be violated. Differently from a trade conditionality, the *ex-ante* impact assessment is not about the state of the rights in the countries concluding the deal, nor the imposition of constraints aimed at making sure that the other parties in the agreement (or the beneficiaries of the unilateral trade policy) sign to international treaties or respect specific commitments. On the contrary, it is an attempt to forecast what impact the agreement will have due to the present socio-economic conditions of the parties, the liberalization scheme and the way in which production, trade, consumption and waste disposal will be transformed. In the words of Olivier De Schutter: "Human rights impact assessments can be an important tool for States in negotiating trade and investment agreements, particularly to ensure that they will not make

[261] Barbara Specht, A critical review of the Trade Sustainability Impact Assessment for the Free Trade Agreement between the EU and the Republic of India from a gender perspective, WIDE and Heinrich Boll Stiftung, 2009.

demands or concessions that will make it more difficult for them, or for the other party or parties, to comply with their human rights obligations."[262]

The fact that impact assessments are at least transformed into mandatory elements of the negotiating procedure is crucial. Similarly, it would be essential to advocate for impact assessments that have a weight on the continuation of the negotiations. According to Olivier De Schutter, whenever the results of the human rights impact assessment reveals the existence of incompatibilities between the trade and investment policy and existing international obligations of the countries involved, this shall be translated into a range of responses, including but not limited to the following:

(a) Termination of the agreement;
(b) Amendment of the agreement;
(c) Insertion of safeguards in the agreement;
(d) Provision of compensation by third-State parties;
(e) Adoption of mitigation measures.

Independently on the way in which impact assessments are made relevant, De Schutter reminds us that **"the precautionary principle should be applied**: if a human rights impact assessment identifies that there are reasons to believe that the agreement may cause harm, even where those potentially harmful effects are not demonstrated or cannot be quantified the burden of proof that it is not harmful falls on the Governments negotiating the agreement."[263]

Because not all the impacts of the entry into force of a trade or investment agreement/measure can be anticipated, the ex-ante human rights impact assessments should be complemented by human rights impact assessments performed once the impacts are measurable and throughout the life of the measure. Thus, **the human rights impact assessment should not be conceived as a one off, but as a "an iterative process, taking place on a regular basis, for instance, every three or five years**. Safeguard clauses should be inserted into the trade or investment agreement to ensure that, should such ex post assessments lead to the conclusion that the State is unable to comply with its human rights obligations within the constraints of the agreement, it should be released from such constraints to the extent of the incompatibility."[264] However, the existence of the process would not be enough. What should be advocated for is the existence of a right of denunciation or withdrawal that, in the absence of the State's intention to redefine the content of the agreement or modify its policy, would give interested third parties the possibility to force the compliance with human rights obligations.

Impact assessments, **both ex-ante and ex-post, present multiple challenges that have to do with the procedure, methodology, complexity of the local economies, selection of the experts, etc**. More importantly, they are based on the capacity of foreseeing the future and

---

[262] Olivier De Schutter, *Report of the Special Rapporteur on the right to food, Olivier De Schutter: Guiding principles on human rights impact assessments of trade and investment agreements*, UN Doc. A/HRC/19/59/Add.5, Geneva: Human Rights Committee, 2011, p. 3. https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf [last accessed 11 December 2020].
[263] De Schutter, id.
[264] De Schutter, id, p. 9.

imagining the way in which the transformation of trade and investments dynamics will impact people and the planet. As such, it must rely on economic modelling as a tool for forecasting future events and then drawing conclusions about likely social or environmental effects. Which industries will benefit? Where? Which human rights will be violated? To what extent? How will competitiveness impact individuals and the environment? How will the market react, the cost of oil influence, and the logistic chokeholds respond? Multiple scenarios are possible, and every voice will have its assessment. In the case of the EU-Mercosur, for example, environmentalist organizations are denouncing the risk of an intensification of deforestation linked to cheaper costs for livestock and soya, while the European Commission is claiming that the introduction of quotas and legal requirement on no-deforestation will be such to reduce the negative impact on the Amazon and the Cerrado rather than amplifying it. Who will be heard? Which impact assessment will win? At the end of the day is a matter of strength of the voice and political power.

Rather than relying on the outcomes of an experts' assessment, it would thus be important to focus on the establishment of meaningful and effective consultation and embed the impact assessment process into a larger attempt to subordinate trade agreements and unilateral trade policies to the existing framework of international human rights and environmental law. In terms of advocacy, this means not only to call for more transparency, participation and democratic procedures before the conclusion of the policy, but also to uphold policy coherence and the primacy of international law along the life of the policy and make sure that instruments exist to challenge trade and investment agreements that are incompatible with international States' obligations. For sure, the right of every citizen to take part in the conduct of public affairs, recognized under the International Covenant on Civil and Political Rights (art. 25 (a)), implies that no trade or investment agreement should be concluded in the absence of a public debate. However, it is important to remember that the normalization of impact assessments and monitoring of the trade and investments policies may also be used to legitimize the negotiation process and facilitate further liberalization. As a matter of fact, "Human rights impact assessments seek to clarify the nature of such choices [between conflicting interests, rights and economic growth, etc.], and to ensure that they are made on the basis of the best information available. The question of which trade-offs are acceptable is to be decided at the level of each country, through open and democratic processes, which the human rights impact assessment seeks to inform. However, the process of setting priorities and of managing trade-offs, as well as the substance of the outcome, must comply with certain conditions."[265]

So far, the European Commission has been the only state-based institution to take up this challenge in earnest, largely as a response to political pressure. The European Commission now routinely requests the preparation of **Trade Sustainability Impact Assessments (**SIAs), which are intended to include an assessment of the human rights impacts of proposed trade agreements (alongside other social, economic, environmental and sustainability issues). However, SIAs have been criticized for failing to provide clear and compelling analyses of the relationships between trade agreements and enjoyment of different human rights, let alone a clear roadmap for policymakers and trade negotiators as to what should be done. SIAs are based on the recruitment of independent expert, the opinions of which "provide the Commission with an in-depth analysis of the potential economic, social, human rights, and

[265] De Schutter, id.

environmental impacts of ongoing trade negotiations."[266] Each SIA varies depending on the type of trade deal being negotiated, but generally consists of three phases: the inception report, the interim report and the final report. All reports are released in draft form for feedback from stakeholders before being finalised. The Commission then prepares a position paper to give its views on the report and explain how the SIA conclusions have or will influence negotiations.

Despite the claims advanced by the European Commission with regards to the openness and transparency of the assessment, several calls have been raised to strengthen the current SIA, including by "providing more resources and improving methodologies for broad consultations of civil society and possibly affected people and communities within the EU and in partner countries."[267] In their recent contribution to the consultation of the European Commission on a 'Renewed Trade Policy for a stronger Europe' CIDSE and Miseror dedicated significant space to the SIA, stressing the importance of strengthening the role of SIA in steering the negotiations and the role of civil society organizations. According to the two organizations:

> "A comprehensive SIA should be conducted before the start of trade negotiations. They should substantially inform the debate on trade negotiation mandates in the Council. SIA should be updated before the conclusion of the agreement and be repeated after some period of the implementation of the agreements. Currently SIA start after the start of negotiations and are often concluded after the conclusion of these negotiations. In the case of the EU Mercosur agreement, the draft of the draft final report of the SIA was published in July 2020, more than one year after the agreement in principle between the EU and the Mercosur on the trade agreement. It is obvious that such SIA cannot have a meaningful impact on the outcome of trade negotiations."[268]

Similar critiques have been raised with regards to monitoring process, which are often embedded in the TSD chapters of trade agreements concluded by the European Union. Since the 2008 EU–CARIFORUM Agreement, TSD chapters have become a standard feature of EU trade agreements. They include provisions relating to monitoring the effect of a given agreement on sustainable development. The provisions can vary in strength from recognizing the importance of ongoing monitoring and assessment to imposing a positive obligation on each of the parties to "to review, monitor and assess the impact of the implementation of [the] Agreement on sustainable development in its territory in order to identify any need for action that may arise in connection with [the] Agreement Free-trade treaties should not take precedence over treaties that protect human rights, the environment, and the climate." As we mentioned with regard to the EU-Mercosur Agreement, the devil is often in the details and the effectiveness of the TSD chapters is often minimized by the lack of clear and binding references and by the establishment of weak enforcement measures (or the lack of them).

[266] European Commission, Sustainability Impact Assessment, available at: https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm#_methodology [last accessed 11 December 2020].
[267] Ibid.
[268] CIDSE and Miseror, CIDSE contribution to the consultation of the European Commission on: "A renewed trade policy for a stronger Europe", 8 September 2020.

If the 'trade and…' approach to liberalization as an opportunity was adopted and was successful, how would the Fair Trade world look like in 2030 and 2050? With no doubt, it would depend on the strength and effectiveness of the ex-ante and ex-post impact assessment mechanisms introduced by countries and at the international level. For sure, the movement should move away from the narrow focus on Fair Trade members and markets and engage in broader processes of assessing the compatibility of free trade agreements and investment policies with the principles of equality, justice and sustainability. This may be seen as a departure from the current activities of Fair Trade as a facilitator between producers and consumers, but would be closely aligned with the Fair Trade Charter, which clearly indicates the objective to transform trade so that it can deliver wellbeing not only for the people who actually participate in the Fair Trade network and their territory, but for everyone. Once this move is made, **Fair Trade is likely to face a dilemma when trade liberalization could favour Fair Trade producers in a country but could negatively affect other parties, for example workers in other sectors that will lose their jobs or consumers who will have cheaper access to junk food.** In this situation, the mandate of the Charter, it seems to us, is to reject any trade measure that could reduce equity, sustainability and justice, even if they bring economic advantages and an increase in wellbeing to the members of the Fair Trade movement. As a matter of fact, Fair Trade producers do not live and work in a vacuum, but are part of a broader society: if trade and investment agreements are making that society more unequal, unsustainable or unjust, Fair Trade producers are likely to be affected. Moreover, Fair Trade producers are also consumers, users of hospitals and public services and, more broadly, citizens: protecting the community from trade agreements that may have a negative impact on human rights and the environment is, therefore, a way to indirectly protect Fair Trade producers too.

However, shouldn't the Fair Trade movement also be worried about avoiding trade and investment agreements that increase global competitiveness between its own producers? If this is the case, a more systemic approach to trade liberalization must be adopted.

7.2.3 A systemic approach to the push towards more liberalization

A systemic approach to trade and investment liberalization should be based on the **complementary purpose of guaranteeing the respect of planetary boundaries while upholding social boundaries and achieving equity**.[269] This has not only to do with Fair Trade producers and consumers, but every people living on the planet and future generations. The Fair Trade movement should **support only those trade and investment measures that contribute to increasing equity, sustainability and justice for all, expanding the narrow focus on their own markets and future economic opportunities**. As a matter of fact, climate change is proving that society is as exposed to it as the most exposed of its members, while the Covid-19 pandemic has proved that we are all as vulnerable as the most vulnerable of our society. This approach to trade liberalization would require questioning not only the HR and environmental impact of multilateral and unilateral measures, but also enriching our approach with broad considerations on the historical, distributional and procedural characteristics of more international trade and investments.

[269] Kate Raworth, Doughnut Economics, supra n 54.

A systemic approach **would start with the environmental implications of more trade (discussed above) and agree with Olivier De Schutter and other experts who are recognizing that technological innovations and more efficient processes will not be capable of counter-balancing the impact of more international trade on the climate**.[270] More trade means more climate change which means worse conditions for the most vulnerable and exposed, against the aim and purposes of the Fair Trade Charter. Moreover, a systemic approach to liberalization **should also question how is it possible to increase the amount of trade without increasing the need for raw materials, water, etc**. As we discussed above, the amount of virtual goods (water, soil, etc.) needed for international trade has exponentially increased in the last decades, at a faster pace than trade itself. In addition, a systemic approach will realize that more goods traded also means more waste, i.e. more need for 'environmental sinks' where this waste is dumped and more need for global trade in waste (with an impact on GHG). The inevitable consequence would be to reject trade liberalization that is leading to more long-distance trading and rather focus on the need to strengthen local and regional commerce.

Secondly, a systemic approach to trade liberalization **would pose structural questions about the distributional effects of the reduction of trade and investment barriers**. The underlying principle behind liberalization is that of competition, comparative advantage, reduced control over industry and tariffs, less political space, efficient allocation of resources, cheaper goods for consumers and an increase in the availability of goods and services. The move towards liberalization is not defined by states' obligations to protect, respect and fulfil human rights, nor by the commitment to satisfy people's needs before consumers' desires. The priority towards economic growth, competitiveness and productivity has led to the problems that the Fair Trade Charter clearly identifies, including the constant erosion of fiscal revenues and the possibility for states to fulfil their international and national obligations.[271] Moreover, it has taken for granted centuries of colonialism and uneven development, and pretends that more liberalization without adequate countermeasures can address them.

If the goals are an equitable and just trade within the planetary boundaries, they cannot be achieved if trade pushes for more competition among farmers, workers and SMEs (for example, reducing tariffs for import of Brazilian coffee so that Brazilian producers have a tariff advantage vis-à-vis Colombian or Vietnamese farmers) **nor by strengthening the competition between large-scale players and small-players** (i.e. large coffee fazendas in Brazil and 0.7 hectares small-holds in Colombia). Already in 1985, Galtung warned us that a cosmopolitan approach to trade and investment justice requires to abandon a selfish and utilitarian approach to trade and investments measures.[272] When a policy is implemented

---

[270] See Olivier De Schutter, What role can trade policy play to advance the objectives of the Green Deal?, European Parliament, INTA Committee, 7 December 2020, available at: https://multimedia.europarl.europa.eu/en/committee-on-international-trade_20201207-1345-COMMITTEE-INTA_vd [last accessed 14 December 2020].

[271] Trade tariffs remain an important source of income for many countries in the global South and the reduction or elimination of tariffs can significantly reduce government revenue. In 2011 trade taxes accounted for, on average, 13% of revenue in Least Developed Countries compared to less than 1% of revenue for high-income countries. Because of this, trade liberalisation hits poorer countries hardest, particularly where other tax infrastructure is weak and where the reduction in trade taxes is accompanied by downward pressure on corporate tax rates and widespread corporate tax avoidance. Decreasing income from trade taxes limits the ability of governments to provide public services that are vital for women, including health, education, and water and sanitation. See [271] Trade Justice Movement, Patriarchy and Profit: a Feminist Analysis of the Global Trade System, Trade Justice Movement, 2018, available at: https://www.tjm.org.uk/resources/reports/patriarchy-and-profit-a-feminist-analysis-of-the-global-trade-system [last accessed 17 December 2020].

[272] Galtung, Towards a New Economics, 1985, supra n 57.

(unilateral, treaty, concession, etc), the Fair Trade movement could not only be concerned with what impact that agreement has in the country where producers reside and will have access to more market. The movement will have to look at the impact on the other trade partner and, more importantly, on the overall impact in terms of trade and investment dynamics.[273]

For **Donatella Alessandrini**, although "this might read as quite abstract, **a just trade would start from a different premise, not that of comparative advantage that requires the 'free' movement of the factors of production to maximise global wealth, but that of serving the needs of human and non-human beings inhabiting this planet, supporting life enhancing rather that life-destroying connections between people and resources**. The determination of these 'needs' would need to be a collective process, but we do have the means for enabling it (i.e participatory democratic models) and the means for limiting the power that transnational capital has acquired since the 1970s, and for radically transforming the relationship between capital, labour and what we consider the environment."[274]

How to do that? For **Jan Orbie**, this would imply a re-drafting of the existing rules of trade and investment and that "instead of voluntary fairtrade labels, priority could be given to arrangements that **regulate commodity markets** and guarantee sufficiently high and stable prices."[275] Of course, as long as commodity agreements are not only a way of maintaining a stable flow of raw material from the South to the North, but become an opportunity to retain more value at the origin of the chains and strengthen industrial processes and markets there. Why is the European Commission cocoa policy not based on this approach rather than a multi-stakeholder platform with Ghana and Ivory Coast? Why are commodity agreements off the table completely? Rather than only focusing on creating islands of fairness in a sea of unjust trade, the Fair Trade movement and Fairtrade shall thus join forces with groups and organizations that are advocating for alternative trade rules and opposing further liberalization. Lower tariffs may help exporting raw material from some of the countries where Fairtrade is sourcing, but the systemic impact and the consequences beyond the mere economic return for the producers, cannot be ignored. But this is not all.

During our interviews, a proposal for a radical transformation to the approach to fair trade was formulate by **Jesus Andrade**, a member of CONONORCA and La Via Campesina whose cooperative produces and sells Fairtrade certified coffee beans.[276] According to him, the **true partnership in international trade would be that where risk is distributed and where sales and purchases do not depend on the market's demand, but on the satisfaction of the needs and rights of the producers**. A systemic change, he claimed, would only be achieved when the relationship moves away from price and is embedded in solidarity, collaboration and – why not – a different contractual dynamic between producers and the Fair Trade movement. For him, a price based interaction operates within the same logic of neoliberal, capitalist: "if the international price is lower than a threshold, I receive more. If it's higher, I may get a premium. But at the end of the day this interaction is just about paying raw material and not

[273] Seattle to Brussels, Human rights, environment and climate protection before profits, 17 November 2020, available at: http://s2bnetwork.org/covidandtrade/ [last accessed 14 December 2020].
[274] Response to survey.
[275] Jan Orbie, Fair trade and covid-19: Resisting resilience?, available at: https://blogs.die-gdi.de/2020/07/01/fair-trade-and-covid-19-resisting-resilience/ [last accessed 18 December 2020].
[276] Jesus Andrade, CONONORCA, interview with the authors.

about distributing a relevant part of the value. There's a seller and there is a buyer. And the buyer is also worried about its own market and how to operate within a competitive market. So, the buyer may have an incentive in hording value."[277]

A 2020 study by FAO and Le Basic on the distribution of value across a chocolate bar chain suggests that: even when Fairtrade certification is involved, producers are receiving a small part of the value, which is strongly concentrated at the level of the retailer.[278] Rather than a true form of empowerment, "**the Fairtrade certification, when they are not combined with organic, appear to serve mainly as 'licences to operate'** in the eyes of many brands and retailers willing to demonstrate their conformity with social and environmental criteria while ensuring productivity (for UTZ/Rainforest), with difficulties in most cases to translate these commitments into higher prices to consumers when these certifications are not combined with organic."[279]

Figure 85. Distribution of value, for certified 'Premium' 'Private Label' plain dark chocolate tablets. Source: BASIC

Figure 4: Source, Le Basic

In addition, when the future of farmers depend on the existence of a buyer and a market, it is on them that falls risk of changes in purchasing practices, increase competition with other producers (like in the case of Brazilian coffee becoming cheaper to import to Europe after the EU-Mercosur agreement), the buyer deciding not to purchase from them, volumes going down (as for some commodities during the Covid-19 pandemic), etc. After years of investments, commitment, dedication and hope in the international market, a system that is

[277] Ibid.
[278] FAO and BASIC, Comparative study on the distribution of value in European chocolate chains, Paris, 2020.
[279] Ibid.

based on exchange dynamics, sale and purchase, marginal costs, etc. does not truly redress historical and present imbalance of power and opportunities.

For Jesus Andrade, it's important to **be transparent with producers about the distribution of value and to have a logic of association**. In his vision, Fairtrade shall operate like a sort of International Community Supported Agriculture Scheme, where every year the members (the Fair Trade movement and its clients, including retailers) guarantee an income to the farmers that is based on their needs, rights, the cost of production and the expected harvest. It would not be about the actual amount of products that will be sold and the price of the international market at the moment of the purchase. This would relieve from the farmers' shoulders the pressure of productivity and would be a truly redistributive approach and an approach that moves away from the idea that the world is only made of producers and consumers. "**When it comes to paying the price," Fairtrade needs to "be more transparent with the farmers. This is the profit that has been made across the chain**. And we are going to share it to support lives beyond the economic value of what is produced. This would be true transnational cooperative. The producer at the end of the day only has 1ha of coffee. They need subsidies: they can come from within the Fairtrade network in the form of a share of profit and a guaranteed purchase, or they can come from the state. But this requires political action and engagement."[280]

Along with the improvement and rethinking of private interventions, **there is a need for governments to put resources and focus into industrial policies, agricultural policies, regional policies and other plans to ensure that as many people as possible are able to benefit from the trade deal**. Even with certifications, most small scale farmers cannot live out of the products of their farm. In the chocolate sector, for example, "Premiums coupled to a certification scheme generally aren't higher than 10% of the world market price, resulting in a marginal impact on the cocoa farmer income. If they are to be a tool to solve this issue, premiums will have to be more flexible, and will have to be a lot higher than current levels."[281] Even if small-holders can live out of their production, they are often merely surviving. And workers are struggling too. For Jesus Andrade:

> "There's no product in the small-holding that will allow farmers to live out of it. Even if selling on the Fairtrade market. They are too small. They are not making a living out of the sole thing that they are producing. The campesino economy needs to be complemented by national subsidies. If you are a small producer of 3 to 5 hectares of coffee. You cannot live out of that. Without certification, Mexican farmers are receiving 6 pesos per kilo, i.e. 0.25 euro.[282] With all the certifications, the producers make 70 pesos per kilo of coffee, 2,8 Euro. 70 pesos por kilo per 57kg. 3,990 pesos per bag of coffee (164 euro). Each bag produces around 5000 cups of coffee. If a cup is sold

[280] Interview with Jesus Andrade.
[281] Vice Network, Raising Farm Gate Prices. Approaches to Ensure a Living Income for Smallholder Cocoa Farmers, Vice Network, 2017.
[282] Milenio Digital, Nescafé paga 6 pesos por 1 kilo de café a campesinos de hasta 63 años o más, November 2019, available at: https://www.telediario.mx/nacional/nescafe-paga-6-pesos-por-1-kilo-de-cafe-campesinos-de-hasta-63-anos-o-mas [last accessed 18 December 2020].

> for 40 pesos (1.3 euro), it means 200,000 pesos per bag (8220 euro, when the farmer receives 164). Certifications and international trade may mean a better income, but not more opportunities and not just distribution. Farmers have to invest this money into schools, health, inputs. The market alone will not give them prosperity and will not address structural inequalities."[283]

Public support to industries and workers has been central to the consolidation of the economic position of Western economies. And it continues to be crucial when trade agreements are concluded and competitiveness threatens national players. For instance, in anticipation that the EU-Canada trade agreement, CETA, will increase competition for cheese manufacturers, as part of its agriculture policy the Canadian government is investing millions in support for the Canadian dairy sector. Similarly, the EC is thinking about compensation that provides money to people who will lose their jobs because of the green transition. **Why not thinking about similar compensations, including for the past, for those people who will lose their income and industries who will go bust as a result of the trade deal?** So far, this is not what is going to happen in the case of the AfCFTA and not what the European Commission and other countries in the world envisage when they conclude bilateral trade agreements. But this is not set in stone. If a systemic approach is adopted, the Fair Trade movement and Fairtrade shall thus call for reparation and restoration rather than questioning whether liberalization can be good for members operating in specific countries.

Moreover, there is also need for a **development-friendly trading regime** that "enables poor countries to **experiment** with institutional arrangements while leaving room for them to devise their own, **possibly divergent, solutions** to the developmental bottlenecks that they face….It is one that evaluates the demands of institutional reform not from the perspective of integration ("what do countries need to do to integrate?") but from the p**erspective of development ("what do countries need to do achieve broad-based, equitable economic growth?")."[284]** One of this experimentation is that of rethinking trade and investments as limited by the social and environmental boundaries, but also rooted in historical processes of uneven development and inequality.

When social boundaries are considered, it appears clear that **fair, just and equitable trade is not about more liberalization, more circulation of international capital, more productivity and more competitiveness, but it is about better trade, rewarding trade, trade that guarantees living income and prosperous life conditions, and a trade that is defined by the needs of producers and workers, not the other way round**. Moreover, this is a kind of trade that challenges the legacy of colonialism (i.e. raw materials from the South and added value products from the North) and replaces it with self-reliant economies where countries trade regionally, horizontally and at equal terms. If we think that this is the goal, and if we realize that trade liberalization has deep transformative impacts that go beyond the niche market of Fair Trade products, we may want to look into supporting local and regional integration rather than large-scale chains.

[283] Ibid.

[284] Interview with SEATINI, 24 August 2020.

If we move away from more international trade, **relocalisation and socialisation of production** of goods become two crucial objectives. They mean to abandon the narrative of global trade as prosperity and international movement of goods and services and try, as much as possible and where environmentally logical, to act locally and support countries in the Global South to develop their own food and industrial production.[285] As recently discussed by the Seattle to Brussels network, "This can increase global resilience to internal and external shocks. In particular, the production of essential goods needed on a daily basis, as well as products needed to ensure high-quality public services, must be produced as locally as possible or at least within the macro-regions and based on strong adherence to social and labour rights."[286]

Regionalization and relocalisation are not an easy nor immediate process: it would require coordination with local partners (like CLAC and the other regional organizations that are active in the countries of origin) and will **inevitably have a political component**. Regionalizing is first of all about a different approach to international trade and the emphasis on long-distance chains as an opportunity for local development. However, it is not only about redefining the geographical scope of trade (shorter chains and more regional markets), but also advocating for public policies that support diversification of production, value adding processes, more efficient infrastructures that can facilitate local exchange, access to market (for example, by means of public procurement from local and national administrations in the countries of origin), **the use of Official Development Aid to finance the establishment of local enterprises for local markets,** etc. The transition cannot only be a matter of replacing international with regional. On the contrary, regional trade agreements have not proven to be an effective way to improve life in developing countries and often re-entrench unequal relations between countries.

A useful term of reference is represented by a short document published in 2020 by a group of economists and trade experts from Attac. In their report on '***From globalization to ecological and solidarity reshoring'*** the authors underline the socio-environmental problems behind international liberalization, but also the risks that a regionalization based on the same assumptions of free trade may have in terms of value distribution and greenhouse gas emissions. **Regionalization is not only about smaller markets that operate according to the same premises, but thinking at markets in a different way, mainly, as tools to satisfy planetary boundaries without overshooting the limits of our planet**. Consumerism, economic growth, productivity, more trade as economic prosperity, etc. are, therefore, assumptions that must be questioned. More importantly, reshoring is not only about producing elsewhere or less, it is also about supporting those actors who are going to be worse off because of the transformation in the structure of the market. In their words:

> "By reshoring, we refer, first of all, to the need to decrease the flow of financial capital and goods in order to reduce the role of sectors that are toxic to the biosphere (fossil fuels, chemicals and agro-industry, electronics, etc.) while providing enough to meet the needs of populations and territories. It is a long-term vision based both on the aspiration to no longer depend on globalization and on systemic policy vision which requires capacities for innovation, training and democratization of decision-making. In

[285] Seattle to Brussels, Human rights, environment and climate protection before profits, 17 November 2020, available at: http://s2bnetwork.org/covidandtrade/ [last accessed 14 December 2020].
[286] Id.

this perspective, the objective is not to repatriate textile factories from the suburbs of Hanoi or Dhaka that produce poor quality disposable clothing, but to rethink the need for clothing and to provide it through territorialized, socially just and ecologically sustainable channels.

It is a question of upgrading the range of products by completely reorganising production chains, enabling the creation of local, long-term, high-quality jobs, which would no longer depend on the evil power of transnational companies incapable of taking account of the general interest. In its “alterglobalist” version, reshoring means moving from "producing more, ever faster, anywhere, with less work and fewer environmental constraints" to "producing better, in order to satisfy the essential needs of populations, via local distribution channels, more quality jobs and production processes respectful of ecosystems". This challenge calls for developing all together a longterm and a short-term approach.

Substantial funding must therefore be secured to support the populations of countries that find themselves vulnerable to such a reshoring movement, in order to enable them to develop sustainable activities geared towards local needs. The factories that supply world markets must gradually be converted according to this direction. There is a need for a global fiscal revolution, so that all States can effectively bring in the outcomes of taxation, including those to be levied on transnational companies that too often dodge it, and so that States from the "North", in particular, can mobilize increased resources for international solidarity.”[287]

Moving away from North-South dynamics to favour North-North and South-South interactions, a systemic approach will require to make sure that historical inequalities are considered, that the different responsibilities for previous consumption and emission are addressed, and that legislative frameworks do not prevent the development of regional and just chains. So far, the 2021-2025 Global Strategy states what follows:

“Fairtrade will look beyond the traditional South to North (S2N) paradigm to create a local offer in both northern and southern markets in line with Fairtrade’s Mission to enable farmers and workers, wherever they are, to achieve decent livelihoods. We believe developing local Fairtrade markets in the Global North, will enhance opportunities for farmers and agricultural workers in the Global South by raising awareness of Fairtrade, making more Fairtrade products available in supermarket shelfs worldwide, driving demand for Fairtrade products from consumers everywhere. Meanwhile, a local offer in the Global South will support income diversification and enable market access.

South to South (S2S) – Fairtrade will work with its producer and commercial stakeholders to identify opportunities and outside of the box innovations for farmers to benefit from local Fairtrade markets, increasing their value capture in the supply chain. Innovation in Fairtrade’s approach will focus on creating additional benefits for farmers and workers, whilst flexing to ensure relevance to local/ regional market and

[287] Amélie Canonne, Maxime Combes, Aurélie Trouvé, From globalization to ecological and solidarity reshoring, in *Dessine-moi un pangolin*, Regards/Diable Vauvert, August 2020, available at: https://audiable.com/boutique/cat_document/dessine-moi-un-pangolin/, p. 6.

consumer priorities. Fairtrade will work to enable the next generation of Fairtrade brands, delivering on the expectation of the next generation of Fairtrade shoppers. S2S initiatives will be led by the individual PNs, all of which will explore business model variants appropriate to their specific local and regional contexts. All members will provide commercial advice and support as requested and NFOs and FI will assist the PNs in securing the funding needed to implement S2S initiatives.

In developing markets in the South, Fairtrade will explore the needs and wants of stakeholders, using the insights to develop concepts that allow local farmers to market and sell their products under improved commercial conditions to local or regional customers, improve the wellbeing of producers, and further trade done with respect for people and nature. Any new business model must result in improving incomes and wages for farmers (e.g. including a farm-wide, or a quality-based certification standard), but a S2S offer will explore opportunities beyond certification as well. Fairtrade realizes that consumers in the South may be driven by different needs and priorities and will adapt its approach accordingly.

North to North (N2N) – In current Fairtrade markets in the North, Fairtrade will use its expertise and brand position to develop local interventions in the agri-sector to enable farmers to set inclusive prices. Local differences will likely call for local solutions, so NFOs will have the autonomy to develop interventions that are tailored to local contexts – i.e. there will be no ‘one size fits all’ model.

- The offer shall be certification based, working with criteria and standards which may differ from those currently used
- Fairtrade will seek partnerships with complementary bodies, including local certification organizations which share a similar mission and values and already offer certification solutions for certain market segments.
- Costs of building a local offer will be carried by individual NFOs and will be met through partnerships with commercial partners and donor funding, and will not be drawn from existing S2N license fees.
- Starting with pilots, NFOs will share lessons learned and best practices and then proceed to scale up.”[288]

The content of the **Global Strategy seems to identify a desire to expand the current North-South dynamics**. However, is the effort building Fairtrade niches within the sea of unjust trade? Is it accompanied by an advocacy effort to challenge the past and present injustices of international trade while building bottom-up alternative? Is regional fair trade, both North-North and South-South, replacing or adding up to the classic North-South trajectories? Will an overall reduction of GHG linked to trade be achieved? What will be the implications in terms of added value and distribution of income? More importantly, **will the regionalization of the Northern markets be done in a way that does not frustrate the rights and expectations of the producers in the South, i.e. taking into account and internalizing the socio-economic costs that the establishment of North-North fair trade chains may have on producers in the South?**

A systemic approach would require to reject the neo-liberal trade and investment agreements (and therefore further levels of liberalization) and to work collectively to replace

[288] Fairtrade International, Global Strategy 2021-2025.

them by agreements that create a model of world trade that is sustainable, humane, compatible with human and labour rights, and that protects the environment and thus the climate. The Fair Trade Charter recognizes that the present of international trade and investment leads to injustice and unsustainability. Therefore, all international trade and investment institutions should be reorganized to prioritise climate protection, a healthy environment, human rights, resilient and sustainable economies and to allow the voice of the South to be heard.

Relocalisation and regionalization also mean 'diversification' and working on adding value at the origin for local markets. From a Fair Trade perspective, it would not only be a matter of contributing to the achievement of logistic and policy conditions for local production and distribution, but also to expand the basket of core products and strategically engage in the direct support to small, democratically organized producers, unorganized producers, the informal sector or private plantations as the most vulnerable in the market. Of course, regionalism raises the issue of availability of natural resources and the feasibility of economic, social and trade policies that support local production for local consumption. This is an issue that has been debated for centuries by academics, policy-makers and civil society organizations. **No universal and homogeneous answer exists as it is context specific, commodity specific and dependent on whether the attention is given to the satisfaction of needs or the generation of income**. The de-linking from international trade patterns, and in particular from the existing North-South uneven dynamics, would require to take these issues seriously. However, it shall not be forgotten that this transition away from global trade and investments shall also go hand in hand with the push for non-trade related policies. Even if this is not what the Fair Trade movement has historically done, this is already embedded in policies and actions that benefit people and communities beyond their participation to trade.

A systemic approach to trade and investment requires to **deal with power concentration at all phases of the chain: it is not enough to liberalize or to stop liberalization**. The question of how value is distributed at all levels of the chain and who is rewarded, becomes crucial. Plantations and big retailers seem to be incompatible with a reparatory and distributive vision of trade that takes both environmental and social justice into account.[289] Logistic, policy proposals, market access and financial support should not reproduce social inequality (for example, helping low hanging fruits or large-scale plantations) but be provided according to social analysis and social goals. Even if we were to assume the over-optimist idea of the rational consumers who are voting with their wallet and changing the food system one purchase at the time, the co-existence of multiple structures of production behind the logo is still a reality. As Coscione explains in his analysis on *'Comercio Justo en Clave Decolonial'*:

> "the failure to differentiate products according to their origin remains a 'stumbling block' for consumers of Fairtrade certified products, especially those who buy from supermarkets where the products (often with 'private' brands) have no information on their packaging about the producer organizations. Many small-scale producers and representatives of national coordinators emphasize that a clear distinction must be made between products from small-scale producer organizations and those from private plantations, because in the end the consumer must be clear about who he or she is really buying from."[290]

[289] Smith, For Love or Money, *Journal of Business Ethics* (2010) 92:257–266
[290] Marco Coscione, *Comercio Justo*, supra n 239.

The Fair Trade movement and Fairtrade shall not re-invent the wheel. On the contrary, they should **harness the processes, visions and alternatives that have already been built locally**. Social movements, farmers movements, civil society organizations around the world, including in the North, have been rethinking their relationships and the relationships between people and nature. In the words of Coscione: "Building a Fairtrade market in a country in the South will have to be built from the bottom up, from the same certified producers already present in that country for many years. Is the Fairtrade system ready for this new challenge? Is CLAC ready, and have the National Coordinators of Small Fair Trade Producers identified this as one of the challenges for the short and medium term future?"[291] From our interview with CLAC, and hearing about the work that they are doing on politicizing members and focusing on food sovereignty and diversification, it seems that they are ready to enrich the North-South dynamics with local forms of solidarity and sustainability.

However, there is no doubt that such shift will have to have an impact on the availability of Southern products in the North. And vice versa. Therefore, **an internal dialogue and a conversation between the Fair Trade movement and the other realities on the ground must happen**. How are we going to rethink markets and re-imagine the role of trade beyond international exchanges and further liberalization? In his book, Joe Osman praises the Fair Trade movement as the trade blazer, the front-runner that has been opening up a new path.[292] The idea of the trade blazer, however, is strongly embedded in the dynamics of international commerce, export led farming, North-South export led production, aspirations to the international market as the source of prosperity, competing within the country and competing with other countries, depending on international demand, logistic and sales. Although at better conditions than the average farmer.

A historically and just-based approach to international trade would claim that the **pathways that were opened through decades of international do not represent the vision, knowledge, needs, desires and context of the majority of the people who farm, work and make products possible**. Even in the context of premiums and extra support, the North-South trade pathways is built around the idea that consumerism and consumption are not problematic, that good living conditions can be achieved by working hard and have little to do with systemic and historical conditions, that economic growth is a solution, and that consumers in the North should always have access to whatever they want. In a nutshell, the move away from the inequalities of international trade and hyper-liberalization must be a move towards alternative geographies and forms of trade, some of which would inevitably change the role of the Fair Trade movement and its mission.

7.3 Trade and gender

Across the world, women experience widespread social and economic disadvantage, including higher levels of unemployment, lower pay, greater work insecurity, a disproportionate share of unpaid domestic and care work, and less access to land, credit and social benefits. So, **how is the relationship between trade and gender taken into account by the Fair Trade**

[291] Marco Coscione, *Comercio Justo*, supra n239.
[292] Joe Osman, Traidcraft, supra n 85.

movement and what approaches could be adopted in the move towards just, equitable and sustainable trade? In the 2009 Principles, for example, 'gender' is only mentioned as a basic principle that defines 'Decent working conditions', more precisely with reference to the *ILO Conventions Nos. 100 & 111,* according to which gender equality is defined as the achievement of equal conditions of employment along with other elements:

> "There is no discrimination in any aspect of employment, including hiring, remuneration, promotion or termination, based on race, caste, national origin, religion, age, disability, gender, marital status, sexual orientation, union membership or political affiliation. Improving the relative position of women and of other disadvantaged groups is a critical element in development."[293]

In this context, the Fair Trade movement indicates that its role should be to create "**Opportunities for groups that are underrepresented in skilled occupations or in leadership positions to develop their capacity for such work are actively pursued**. Women receive equal pay to men for equivalent work, and fully participate in decisions concerning the use of benefits accruing from production and from Fair Trade relationships."[294] **Gender equality is, therefore, defined through the lenses of productive work and, in particular, through the prism of equal pay for the same work of men and control over the income/salary that is received the work that has been realized**.

In 2015, Sustainable Development Goal #5 identified the achievement of gender equality and empowerment of all women and girls as one of the seventeen priorities for the public and private actors by 2030. The Fair Trade movement seems to have responded to this indication and adopted its approach towards gender equality, also in terms of space, self-awareness and attention that it has obtained in its official documents. In the 2016 Fairtrade Gender Strategy, it appears clear that the issue of gender had not received enough attention in the past and that the narrow focus on producing for an income could reinforce patriarchal dynamics. "Up to this point," we read, "gender analysis has not been systematically included in studies (internal and external) on the impact of Fairtrade, and so there is insufficient evidence to understand how Fairtrade is impacting on women and girls in comparison to men and boys."[295] At that time, the report highlighted a lack of explicit gender policies and implementation strategies among Fairtrade institutions and producer organizations, so that the structural barriers to women membership and participation remain unchallenged."[296]

The lack of systemic studies and specific data appeared as a significant obstacle to assess the value of the Fairtrade model on challenging patriarchal structures. Moreover, the document warned about the risk that a mere income-based approach could have on gender equality and women empowerment.[297] "Although tacitly the term 'producers' encompasses

[293] 2009 Fair Trade Principles.
[294] Ibid.
[295] Fairtrade International, Gender Strategy 2016-2020.
[296] Ibid.
[297] ActionAid International, CARE, Christian Aid, Concern Worldwide, Find Your Feet, Oxfam, Practical Action, Save the Children, Self Help Africa , What Works for Women: Proven approaches for empowering women smallholders and achieving food security, 2012, available at: http://www.care.org/sites/default/files/documents/CC-2012-What_Works_for_Women.pdf [last accessed 15 December 2020].

women as well as men," it states, "it is not always clear if or how Fairtrade considers gender when developing gender sensitive strategies, policies and operations. In fact, due to its focus on export or 'cash' crops, Fairtrade may even be unintentionally reinforcing existing gender inequalities in the agricultural sector."[298] In particular, "**Production for Fairtrade markets and the requirements of Fairtrade certification may increase the workload of women, adding to their already high work burden**."[299] For example, in banana smallholder organisations, restrictions on pesticide use can lead to an increased need for weeding. Arguably, this in turn has a disproportionate impact on women because of unrecognised unpaid care work responsibilities.[300]

Already **the 2018 International Fair Trade Charter seems to recognize the need for a more systemic approach to gender**, so that a specific section is dedicated to the role that trade can have in addressing gender inequality and guaranteeing equal rights. In the (short) chapter dedicated to 'Empowering Women', we read that:

> "Although women are often the main providers of labour, they are often restricted from accessing land and credit that would enable them to benefit fully from economic activity and opportunities for social and economic development. Women have the right to receive equal pay and treatment, and have access to the same opportunities, compared to men. Fair Trade Organizations not only respect this principle of non-discrimination but they work actively to promote gender equity within their own operations by including women in decision making and to influence positive change more widely.
> For millions of women, Fair Trade projects have provided the first opportunity to make decisions about household income, and evidence shows this improves outcomes in areas such as health, education and social development."[301]

Rather than just a matter of pay and decision-making power, gender inequality is also declined as a problem of access to the means of production, land and credit in particular, that requires the a political and regulatory reform based on the principles of equality, non-discrimination, a proactive attitude towards promotion of gender equity and stronger participation of women in decision making processes at all levels of the network (from producer organizations to the non-producing phases of the chain). This, of course, generates clashes between the Fair Trade vision and the social, economic and cultural context in which women operate. However, superficial and cosmetic interventions that do not address the roots of the problem may simply reproduce the problem (or intensify it) rather than addressing it.

Around the same time when the Charter was issued, the Fairtrade Foundation commissioned a literature review on 'Women's economic empowerment through Fairtrade', which highlighted the importance of bottom-up approaches that look at empowerment and

---

[298] Fairtrade International, Fairtrade Gender Strategy 2016-2020.
[299] Smith, S. (2011). Review of the Literature on Gender and Fairtrade (internal). Fairtrade International, Fairtrade Foundation
[300] Faitrade International, Faitrade Gender Strategy, supra n 297.
[301] Fair Trade Charter, supra n 74, p. 20.

not only at preventing discrimination, recommended to move beyond a formalistic focus on payment, and that stressed the need for dealing with the complexity and non-homogeneity of gender dynamics beyond income and entrepreneurship.[302]

The attempt to combine an economic approach to women's empowerment with the adoption of a broader political vision seems to have trickled into the current Fairtrade standards, which have a gender component that looks both at the relationship within Producer Organisations (POs) and at the implementation of programmes that go beyond the operational aspect and aimed at creating a stronger political basis. Current requirements for producer organizations include:

- No discrimination on the basis of gender or marital status
- Zero tolerance of behaviour that is sexually intimidating, abusive or exploitative
- No testing for pregnancy when recruiting workers
- Programmes to support disadvantaged and minority groups, such as women
- Developing and implementing a gender strategy.[303]

Fairtrade is also working beyond the Standards to increase women's role in Fairtrade producer organizations and to ensure they receive equal benefits.

- Producer networks are rolling out women's schools of leadership, enabling women to learn business, negotiation and finance skills. Many of these women go on to take on leadership and committee positions within their cooperatives and communities.
- Many Fairtrade Premium projects directly benefit women, enabling changes to decision making and governance structures in certified producer organizations, and improving economic opportunities. For example, the Del Campo nut cooperative in Nicaragua uses their Fairtrade Premium to support women's emerging businesses.
- Many producer organizations are undertaking gender analyses of their organizations and piloting new gender equality programmes, gender committees and policies.
- Through advocacy work and collaboration with trade unions and NGOs we are pushing for gender equality and interventions to enhance women's well-being and empowerment.[304]

The combination between operational standards and ad hoc programmes to empower women entrepreneurs is also reflected in the 2021-2025 Fairtrade Global Strategy, where gender and women empowerment are looked at through the lenses of partnership, market inclusion, investments and collection of targeted data. "While addressing the issue of improving household income," we read in the document, "**Fairtrade is well-positioned to integrate a gender and youth focus into existing programs and build on gender inclusion work done to date**. Commercial investment in women and young people will be made possible through comprehensive programs implemented in partnership with gender and youth

[302] Fairtrade Foundation, *Women's economic empowerment through*. *Fairtrade*: *A review of the literature,* Fairtrade Foundation, December 2018
[303] This criterium was amended by the 2019 Gender Strategy, See section 4.3.4, New criteria 2019, page 53, available from https://files.fairtrade.net/standards/SPO_EN.pdf
[304] Fairtrade, Gender Equality, available at: https://www.fairtrade.net/issue/gender-equality [last accessed 15 December 2020].

organizations, and by mobilizing donor and O2B funding, as well as increased gender- and-age disaggregated reporting by producer organisations."[305]

This focus on creating opportunities and strengthening women's leadership is also present in the 2021-2025 strategy, where a quantitative approach (% women and youth in Producer Organization management; % of Small-Scale Producer Organization members and workers who perceive that their organization is inclusive, by gender and age; gender index at PO level; % of women in trade union/worker organizations producers will be documented) is combined with the reinforcement of the role of Women's School of Leadership (or its equivalent in each Producer Network) as an "effective intervention to build knowledge, confidence and leadership among women and foster understanding and commitment to gender equality in Producer Organizations)."[306]

Yet, the Strategy also recognizes that the Women Schools of Leadership approach has been implemented with a minority of POs so far, and is a "relatively expensive intervention because it involves in-depth work with small groups of people, but there is potential to scale it up given interest among donors and commercial partners (the latter being particularly interested in supporting concrete, tangible interventions)."[307] With the successful implementation of these actions, the Global Strategy concludes, "producer and worker organizations will become better advocates of their constituents' needs, with the ability to negotiate for fairer prices, increase market access and mitigate supply chain risks."[308]

If this is the current background, **more detailed studies and investigations would be needed to assess whether the change in strategies has also been reflected by a change in the local dynamics**. Given that this is not the purpose of the present report, we will now offer some considerations to help the reader think about how the Fair Trade and Fairtrade approaches to gender equality and women empowerment (as presented in the documents that we analysed) fit in the broader context of the ongoing conversations on gender and the future of international trade and investments?

As a matter of fact, despite a general consensus on the benefits of addressing gender inequality, **not all approaches seem to be capable of bringing about systemic transformations**, for example by reducing the burden of care on women to enable them to share the responsibilities of unpaid household work and effectively participate in life-changing economic activities. For example, gender has been increasingly mainstreamed in the discussions at the WTO, World Economic Forum and other relevant venues where the rules of the international regime are defined. As an evidence, in December 2017, 118 WTO members supported a Joint Declaration on Trade and Women's Economic Empowerment at the WTO Ministerial Conference in Buenos Aires. This was the first WTO declaration to focus on

[305] Fairtrade Global Strategy 2021-2025, September 2020.
[306] Fairtrade Global Strategy 2021-2025, supra n 305, p. 13
[307] Ibid.
[308] Ibid.

gender.[309] In 2020, an Informal Working Group on Trade and Gender was established within the WTO. Moreover, some countries have also begun to include (non-binding) gender chapters in their bilateral trade agreements and there is a renewed dialogue on how trade rules can support women entrepreneurs and stimulate inclusive growth.[310]

For the WTO and other international organizations, **international trade is often seen as an opportunity for achieving gender equality through higher incomes and financial independence**, which seldom imply the redressal of the structural issues that determine marginalization, exclusion from the means of production, inequality and injustice. In these narratives, the link between economic development and women's empowerment is characterized by a focus on increasing the economic opportunities available to women. However, the 2016 Fairtrade Gender Strategy was already warning about the flaws of this market-based approach to the issue and invited to adopt a more systemic and holistic attitude that recognizes the complexity of socio-economic relationships and the intertwined nature of productive and reproductive (care) labour.[311]

In the next sub-sections we briefly introduce three possible approaches to gender, women's empowerment and trade and invite the reader to reflect where their organization is standing. It will then be up to the reader, and future researchers, to assess where Fairtrade and the Fair Trade movement currently position themselves and where they want to go. Before we move on, an annotation that shall be made – for further development – is that **'gendered' approaches to trade and investments, with the exception of the most progressive and systemic, tend to focus on men and women as the sole two genders**. Such dualism, although characteristic of several geographies and realities, would exclude the complexity of gender as distinct from sexuality and overlook the levels of violence, subordination and marginalization that are experiences by people not identifying themselves with the man/woman dichotomy.

The introduction of an article written by La Via Campesina's activist Paula Gioia to describe the food system represents can act as a call for a broader and more attentive approach towards genders: **"the struggle for the rights of LGBTTIQ[312] persons is largely silenced in the broader human rights movement, and in the struggle for food sovereignty and the human right to adequate food and nutrition**. [L]eaving out these persons is a denial of the multiple forms of discrimination they face. [We need] a dialogue between the feminist, queer-feminist and food sovereignty movements, thereby strengthening the potential for

[309] World Trade Organisation, *Joint Declaration on Trade and Women's Economic Empowerment*, 2017. Available at: https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf [last accessed 15 December 2020]

[310] See Chile – Uruguay Free Trade Agreement, 2016, available at: http://www.sice.oas.org/trade/CHL_URY/CHL_URY_Text_s.pdf; Canada-Chile Free Trade Agreement, 2017, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng; Canada-Israel Free Trade Agreement, 2018, available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/13.aspx?lang=eng

[311] Isabel Coche, Barbara Kotschwar and José Manuel Salazar-Xirinachs, *Gender Issues in Trade Policy-Making*, Organization of the American States Departament of Trade, Tourism and Competitiveness, Executive Secretariat for Integral Development (SEDI), 2006.

[312] Lesbian, Gay, Bi-, Transsexual, Transgender, Intersexual, Queer

understanding and collaboration. [A]ll these movements to join forces and embrace convergence in the collective struggle for human dignity and human rights."[313]

7.3.1 Business as usual: trade is gender neutral

The mainstream approach to trade and investments would not consider gender as a matter of concern. For the supporters of this position: "In theory, trade is gender-neutral; factors of production include 'land,' 'labour' and 'owners of capital' but not 'men' and 'women'."[314] Gender was certainly not a concern for Smith and Ricardo (two white men born living in the core of the British Empire who were already old when they published their work)nor for the participants to the Bretton Woods or The Havana conferences. **Mainstream economic theory recognizes that different groups are affected differently by changes in trade policy, for example when a tariff is reduced or a quota imposed on import**. However, the gender impact of these policies did not permeate mainstream thinking for decades and even today gender is often a blind spot. Consumers, producers and workers are affected by trade policies and trade decisions, but what matters for a classical approach to trade and investment is the overall increase in productivity, economic performances, competitiveness, etc. **If the Fair Trade movement was to adopt a purist approach to trade, based on the rules of comparative advantage and efficient allocation of the factors of production, it should not have a specific position on gender and should not promote any measure aimed at directing the market towards integration, empowerment, equality, etc.** Given the fact that this is not the case, we are not going to talk about this. Rather, we are discussing the mainstream approach to gender and trade, i.e. the vision that gender matters in trade because women are consumers, producers and workers.

7.3.2 Trade and: empowering through market access

There is not only one approach to international trade and gender. On the contrary, it is possible to identify a spectrum of engagements that depend on the importance that they give to the systemic causes of inequality and to the attention that they pay to the specific role of international trade and globalization in reproducing or breaking up with patriarchy. In the **more conservative approach, gender becomes of concern to the trade policymaker if the fact of being a man or a woman somehow affects the person's relationship to goods and services that are the object of a trade policy – that is, if the impact of the trade policy action in 'gendered.'** If being a man makes an individual more likely to fall into the category of the workers who will lose their job because of the reduction in import tariff, this is necessary information to the policymaker. If women as a group benefit more from consuming more of the good that is now cheaply available on the market, or if they are the group more likely to

[313] Paula Gioia, Coming Out! Gender Diversity in the Food System, Right to Food and Nutrition Watch, 2019, available at: https://www.righttofoodandnutrition.org/coming-out-gender-diversity-food-system [last accessed 15 December 2020].
[314] Isabel Coche, Barbara Kotschwar and José Manuel Salazar-Xirinachs, Gender Issues in Trade Policy-Making, Organization of the American States Departament of Trade, Tourism and Competitiveness
Executive Secretariat for Integral Development (SEDI), June 2006.

have previously benefited from government services financed by the tariffs that have been lifted, this is also important information for the policymaker.

Because trade policies are transformative of society as much as the economy (being the two the same thing), a mainstream trade and gender attitude would require policy makers to assess the gender-impact of multilateral agreements, unilateral actions and any other trade measure and – if they cannot be avoided - work to construct policies and programmes that can address the consumption, wage, and employment effects on specific groups. Moreover, this "can help policymakers reach their goals of promoting gender equity and effecting a successful transition to free trade."[315]

The premises of this intervention are based on the need to provide economic opportunities to women that can help them disenfranchise themselves from the position of subordination due to the role in which patriarchal societies have put them. Because of their reproductive role in society, women are taken away from productive activities for long time. They often conduct reproductive labour (housework, caregiving, cooking, etc.) on top of productive labour (if they are not asked to halt any productive labour to focus only on care giving). They are described as lacking the social and market opportunities to fill the economic gap with men and provide to their own economic wellbeing.

When inequality is described in terms of less economic opportunities and inferior remuneration, the solution is that of linking women to more market and to more benefits of a growing economy. The 2017 WTO Ministerial declaration, for example, asserts that trade agreements are engines of economic growth and the implementation of inclusive trade policies can improve gender equality and women's economic empowerment and contribute to poverty reduction.[316] The Declaration calls for members to share best practice on the collection of gender-disaggregated data and gendered analyses of trade policy, to identify and remove the barriers to women's participation in trade, and to direct aid for trade towards achieving more gender-responsive trade. "Members also committed to a series of seminars addressing issues that they identify as impacting on women's ability to participate in trade, including financial inclusion, public procurement, trade facilitation, the promotion of female entrepreneurs, and the inclusion of female-led businesses in value chains."[317]

The UK funded SHeTRades initiative is a good example of that. The initiative was launched by the International Trade Center, a joint agency of the WTO and the United Nations, and "aims to connect three million women to market by 2021 and rallies stakeholders around the world to work together on seven actions to address trade barriers and create greater opportunities for women entrepreneurs. It is supported by a web and mobile digital platform."[318] The aim of the programme is to support selected women-owned businesses,

---

[315] Ibid.

[316] "Acknowledging that international trade and investment are engines of economic growth for both developing and developed countries, and that improving women's access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development."

[317] Trade Justice Movement, Patriarchy and Profit: a Feminist Analysis of the Global Trade System, Trade Justice Movement, 2018, available at: https://www.tjm.org.uk/resources/reports/patriarchy-and-profit-a-feminist-analysis-of-the-global-trade-system [last accessed 17 December 2020].

[318] SHeTRades, available at: https://shetradescommonwealth.converve.io/ [last accessed 15 December 2020].

business support organizations and corporations with a wide range of opportunities to expand their business and jointly advance women economic empowerment.

For example, women-owned businesses will be:

- Connected to potential buyers, investors, suppliers and business support organizations;
- Learn new skills to boost your business potential through our free-of-cost and tailored e-learning courses, on-site workshops and webinars;
- Receive support to attend national, regional and international trade fairs;
- Participate in B2B meetings;
- Apply for fundraising opportunities;
- Increase your visibility and enlarge your network in international markets.

Business-Support Organization will be helped to:

- Increase their visibility and expand your network in the international arena;
- Benefit from customised capacity building activities;
- Expand their portfolio of services offered to women-led SMEs;
- Contribute to the Sustainable Development Goals and support women's economic empowerment;
- Share, exchange and learn from other institutions.

Corporation will be facilitated in reaching out to women entrepreneurs by receive support in:

- Being connected with over 3000 women-owned businesses from Bangladesh, Ghana, Kenya and Nigeria and expand your pool of suppliers;
- Identifying unique and innovative businesses opportunities;
- Learning, sharing and exchanging with key businesses, governments and institutions;
- Supporting the UN Sustainable Development Goals by empowering women;
- Develop new partnerships and increase your visibility in emerging markets.

More economic opportunities for women does not only mean to support entrepreneurs and business women, but also using international trade as a space to generate 'gendered' jobs and support the generation of an income/salary by women. Bangladesh's garment industry is often referenced an example of this trade-based empowerment, with the World Bank suggesting that the industry has been fundamental in "economically uplifting a large cohort of poor and vulnerable women," with knock on effects resulting in women having more "decision making power at home, voice in the social sphere and self-esteem."[319] **Countries' (and businesses) possibility to join global value chains is thus read through the lenses of employment and value creation for women**, concluding that international and national policies – along with private schemes of governance and forms of business organization - should not only look at generating economic growth but also at making sure that this is directed towards women.

[319] World Bank (2017) *In Bangladesh, Empowering and Employing Women in the Garments Sector*. Available athttp://www.worldbank.org/en/news/feature/2017/02/07/in-bangladesh-empowering-and-employing-women-in-thegarments-sector [last accessed 16/12/2020].

BOX 5 – A 'Trade and gender' approach to AfCFTA

The debate around the AfCFTA has been enriched by authors who see it as an opportunity for women empowerment through more market opportunities, more solid trade dynamics and higher returns. The points below have been raised in an Op-Ed by Asmita Parshotam on the Africa Portal.[320]

- Enabling women (as smallholder producers or via cooperatives) to be integrated into agricultural regional value chains by simple value-added agro-processing and partnering with larger companies. These business to business linkages enables smallholder women farmers to form cooperatives that can work with larger companies in accessing an outlet/market for their products, but also exposes them to quality inputs and technology, skills development and capacity building that will ultimately facilitate their long-term competitiveness and integration to agricultural value chains.

- Implementing industrialisation strategies that account for women moving into medium and higher-skilled manufacturing jobs, and not to be trapped in lowly skilled factory work only.

- Policies for informal cross border traders that enables them to formalise and ultimately expand their businesses. This includes enabling their access to finance through simpler banking requirements / via cooperatives, border infrastructure that is gender sensitive (for example, sex-disaggregated rest-rooms and overnight accommodation, and all-night lighting at border crossings) as well as technical assistance and capacity building in understanding cross-border trade regulations. This will not only promote women's agency, but further their ability to engage confidently, on an equal footing with trading requirements and border officials.

- Mechanisms that enables women to successfully operate SMEs through access to finance and appropriate business development support based on their respective needs and industry-specific requirements.

- Measures that address wage inequality and precarious employment activities can further stimulate women's participation in the formal economy on equal footing. This has to be done on a sectoral/industry basis with the requisite buy-in and support from private sector enterprises, which are ultimately responsible for creating equal employment opportunities for women, and reducing the gender wage gap.

[320] Asmita Parshotam, Policy considerations for gender equality and the AfCFTA, 1 November 2019, available at: https://www.africaportal.org/features/policy-considerations-gender-equality-and-afcfta/ [last accessed 17 December 2020].

If the satisfaction of rights and the reduction of the socio-economic gap are not seen as sufficient drivers for a change, **studies are also elaborated to present the business case for diversity and more attention to gender inequality by policy makers and boards of directors**. A study commissioned by the Business for Better World, Women Deliver and the Dutch Minister of Foreign Affairs on 'Women's Empowerment in Global Value Chains', for example, promotes the adoption of an integrated, holistic and strategic approach to gender equality not only because it is just, but also because diversity matters for the success of businesses and the return for investors. Not surprisingly, the number of studies looking at the 'profitability of a diverse workforce' is exponentially growing and trying to demonstrate that having high rates of women as employees or high levels of diversity increases net profit margin[321] and financial returns. [322]

The practices and strategies put forward by Fairtrade international in the 2021-2025 Global Strategy and by the International Fair Trade Charter appear rooted in this approach to women's empowerment through non-discrimination and equality of economic opportunities, although there is evidence of the intention to look more holistically at the problem and make sure that systemic issues are also addressed. Despite the attempts by the 2016 Gender Strategy to open up new spaces of reflection outside the trade framework, **it seems that core elements of the current approach to trade and gender is still represented by empowerment through international trade, mainly in the form of facilitating the entrance of more women into global value chains (as producers, farmers or employees), ensuring equal access to means of production, and training them as business-people and leaders**. From this point of view, the fight against gender inequality is associated with the fight for a 'gendered-trade' that recognizes the existence of unequal starting conditions and intervenes at the local level to create more opportunities for women to receive higher and better revenues.

The example of Café Femenino discussed by Coscione is often use as a term of reference of the way in which Fairtrade can favour the consolidation of existing practices and promote a social transformation through higher financial returns.

> "Through this international alliance," writes Coscione "only coffee that is processed, made and sold by women is marketed throughout the process. In addition to this direct incentive to work, which leads women to "renegotiate" with their partners both the ownership of the land and the production process in the field (and, more importantly, the marketing of the product), women producers are paid a further premium and offered additional support through various cooperation projects aimed at them and the community. Women do not have to create the organizational or productive structure from scratch, but rather, by reconverting it under female "management", they add greater ethical value to it. Marketing through this innovative circuit generates

[321] Marcus Noland, Tyler Moran and Barbara Kotschwa, Is Gender Diversity Profitable? Evidence from a Global Survey, 2015, The Peterson Institute for International Economics, available at: www.iie.com/publications/newsreleases/newsrelease.cfm?id=241 [last accessed 16 December 2020].

[322] Vivian Hunt, Dennis Layton and Sara Prince, Why Diversity Matters, 2015, available at: < www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters> [accessed 16 December 2020].

a difference of 30% compared to coffee produced by men. Furthermore, something very relevant, Café Femenino requires that women participating in the project have the ownership of the plot: the land has to be in their name, which causes a radical change, both symbolic-cultural and real-economic, in the relations between men and women in rural areas. The project not only generates a considerable increase in the number of women producers in the organisations participating in it, but also changes the awareness of the men in the community: little by little, they begin to accept that women should engage in the coffee business, that they should participate in the assemblies of the cooperatives, that they should speak in public, that they should participate in collective decision-making on the use of the prize; furthermore, they begin to dedicate more time to the home and to the children more radically."[323]

The Café Femenino example and the 2021-2025 Global Strategy point at three outstanding elements in the possible approach of Fairtrade to trade and gender. First, Fairtrade is recognizing that local transformations cannot only be achieved through more international trade, but they have to be supported by local political and social processes – better if defined, organized and led by the partners on the ground. In the words of the 2016 Gender Strategy: "Gender equality and women's empowerment will be promoted through work at all levels, and through a bottom-up and context driven approach. However, in accordance with the fundamental purpose of Fairtrade, most resources will be put into supporting gender equality and women's empowerment at the producer organization level."[324] **The bottom-up approach, the focus on the distribution of means of production, the attention to the way in which the revenues from trade are distributed and the decision to participate in local processes of awareness raising (both for women and men) shows that international trade and premiums are not enough**. It is important to create a socio-economic (and environmental) space of justice, equality and sustainability where market dynamics are embedded and can lead to an actual transformation of the local conditions.

Secondly, it is noteworthy that the Global Strategy is calling for a better understanding of the gender dynamics and gender structures behind trade. Gender is a complex issue that cannot be address with a one-size-fits-all approach.[325] This aligns with the call for more data on the gender impact of trade that was formulated in the Ministerial Conference of 2017 and indicates a clear way forward: make sure that Fairtrade is involved in thorough studies on the way in which the participation to Fairtrade schemes has changed gender dynamics but it also advocates for governments to carry out comprehensive ex ante and ex post gender impact assessments, together with human rights, environmental and sustainable development assessments, in order to identify any negative impacts of trade agreements and trade policies.

[323] Marco Coscione, supra n 239.
[324] Fairtrade International, 2016 Fairtrade Gender Strategy, supra n 298.
[325] Sally Smith, Fair trade and women's empowerment, in Laura Raynolds & Elizabeth A. Bennett (eds) *Handbook of Research on Fair Trade*, London: Edward Elgar, 2015, p.405-422. The rejection of a one-size-fits-all approach is also contained in Fairtrade International 2021-2025 Global Strategy. In the document, we read that: "For us no 'One Size Fits All Model'. Fairtrade recognizes that different stakeholders have different needs and commits to creating solutions that are specific and appropriate, developing a tier of offers that allow Fairtrade to meet the needs of producers in different development stages and commercial partners interested in light touch engagement, as well as those looking for greater involvement and partnership with Fairtrade along the supply chain." 2021-2025 Fairtrade Global Strategy, supra n **Error! Bookmark not defined.**.

Tools, such as *Implementing gender-aware ex ante evaluations to maximise the benefits of trade reforms for Women, developed by UNCTAD,* already exist to support governments to design gender-aware impact assessments.[326] Not only for women who are involved in Fairtrade or will be involved, but for all women who will be affected by the change in trade dynamics.

The 2017 '*Gender Sensitive Trade? A Feminist Perspective on the EU-Mercosur Trade Negotiations*' report carried out by Lea Kerr for Henrich Böll Stiftung represents a good term of reference for the kind of internal engagement that Fairtrade could have.[327] In the document, **the limited focus on production (jobs that will be created, opportunities for businesses) and the claim by the EU that the deal will be 'gender-neutral' are challenged by the author, who reminds us that women are much more than workers/producers and that trade deals also affect consumption patterns, access to means of production, public spending and the internal dynamics of families**. Thus, we are reminded that "besides the changes in employment structures and wages [we need to focus on] changes in prices of goods affect consumption patterns. Increasing import competition may lead to lower prices. Women may benefit in their roles as consumers and care-givers. At the same time these changes in consumption patterns might provoke a decline in demand of local products and small producers - often women - may suffer. The second effect not mentioned is on public services. Tariff reductions might lead to a loss of government revenues, resulting in privatisation and cuts for social programmes. Again women will be hit hardest because of their social obligations within family and society."[328] What could be good for women producers and entrepreneurs, may be bad for many other women (see below the systemic point for some reflections on this)

Finally, the Global Strategy and the Café Feminino example tell us that the **Fairtrade approach is strongly framed by access to international trade as an opportunity and that the call to more self-reflection contained in the 2016 Gender Strategy may have not been fully internalized**. In the document, it was recognized that the focus on 'cash' crops and the lack of a systemic approach to gender and empowerment beyond economic returns could worsen the condition of girls and women rather than improving it. Good practices and positive examples like the Café Feminino, therefore, shall be taken as examples but they should be embedded in the broader context of a gender policy that not only looks at the micro of trade (communities dynamics, percentage of women in the organizations, leadership, access to means of production, etc.) but also at the macro of how liberalization of international trade and investments unequally affects women and other vulnerable groups. If the goal of the Fair Trade movement and Fairtrade is to advocate and promote for just, equitable and sustainable trade, they cannot dismiss the way in which longer value chains, international competitiveness, large foreign direct investments and other elements of the global economy unequally disadvantage women and other vulnerable groups. For this, we believe that the Fair Trade movement and Fairtrade would be interested in exploring some of the critical considerations and approaches contained in the following section.

---

[326] UNCTAD, *Implementing gender-aware ex ante evaluations to maximise the benefits of trade reforms for women*, Policy brief no. 51, 2016, available at: http://unctad.org/en/PublicationsLibrary/presspb2016d7_en.pdf [last accessed 17 December 2020].
[327] Lea Kress, *Gender Sensitive Trade? A Feminist Perspective on the EU-Mercosur Trade Negotiations*, February 2017, Henrich Boll Stiftung, available at: https://eu.boell.org/en/2017/02/22/gender-sensitive-trade-feminist-perspective-eu-mercosur-free-trade-negotiations [last accessed 17 December 2020].
[328] Ibid.

7.3.3 Systemic approach to trade and gender

A systemic approach to trade and gender would be **based on two main premises: international trade and investments as sources of gender-based inequality; gender as one of several variables that determine power relations and social inequalities**. We use feminist approaches to international trade and investments to provide some elements of reflection in case the Fair Trade movement decided to move beyond its current approach to trade and gender in a way that looks beyond international trade as an opportunity for economic revenues and that adopts an intersectional approach to discrimination and inequality.

The starting point is the same as the 'trade and…' approach: "Across the world, women experience widespread social and economic disadvantage, including higher levels of unemployment, lower pay, greater work insecurity, a disproportionate share of unpaid domestic and care work, and less access to land, credit and social benefits."[329] However, a **systemic approach would claim that "international trade system plays an important role in maintaining and extending the economic model that creates this situation"[330] and that an approach that only focuses on the formal economy, trade and empowerment of women entrepreneurs intensifies the condition of invisibility and marginalization of women.**

The first point that is often raised, and that we already mentioned above, is that **liberalization policies have a negative impact on the collection of states' resources, which often leads to cutting projects and social services provisions that generally favour women and increase gender equality, as they are not considered to be a core matter**. The use of export tariffs can be a particularly important "source of revenue for governments to fund public services; subsidies can help support infant industries which may provide alternative employment for women; local content requirements can ensure that locally-based businesses (which are more likely to be run by women) can benefit from inward investment."[331] If trade must be just and equitable, can the Fair Trade movement and the Fairtrade embrace liberalization and more trade if this is going to affect the capacity of countries to respect their international and national obligations vis-à-vis women's rights?

A second point, already discussed, is the need to move beyond the assumption of trade as prosperity and conduct thorough analyses of the **impact that trade rules and agreements have on women and their experiences as producers, workers, consumers and the primary providers of unpaid care**. Far from facilitating women's economic security, poorly designed and gender-blind rules can **actually worsen their situation**, mainly because it is their unpaid care labour that internalize the cost of competitivity as a reduction of the costs of production. Moreover, although women are not a homogenous group and are impacted by trade policy in different ways depending on a range of socio-economic factors, there is strong evidence that free trade policies can have significant negative impacts for women irrespective of their context.[332] This can be seen in the quality of jobs that are created in global value chains, in the fact that most women in developing countries are not entrepreneurs and that higher competitiveness means that women often have to internalize part of the costs of production (including reproductive labour).

---

[329] Trade Justice Movement, supra n 317.
[330] Ibid.
[331] Ibid.
[332] Meghan Campbell, M, CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination, Working paper Vol. 2, No. 3, Oxford Human Rights Hub, Oxford University, 2016, p. 3.

We mentioned before that Bangladesh is presented by the World Bank as a positive case of women's empowerment. In terms of numbers, it is true that the fact that Bangladesh became one of the world's hubs for garment production has increased employment. On average, women represent 68% of those employed in the garment industry and 45-46% of those working in the textiles and footwear industries. However, **export-oriented sectors suffer from persistent gender discrimination and women are concentrated in low-skilled, labour intensive and temporary or insecure employment**. Working conditions are notoriously exploitative, collective bargaining and union rights are suppressed, employment often does not include sick leave, maternity leave or pension provisions, and informal and home-based work is widespread.

One study of the working conditions in clothing industries across ten Asian countries found that the average working week was 71 hours, and 66% of women worked more than six days in a row.[333] In addition, evidence suggests that women are being targeted as workers in export sectors because existing workforce discrimination means that they tend to accept lower wages than their male counterparts, and have less bargaining power and alternative employment opportunities, making them less likely to challenge exploitative working conditions. **By promoting international competitiveness, trade and investment rules push governments to adapt national regulations in order to attract more foreign direct investment and seize a share of the global market**: in this context, enforcing labour rights standards could reduce competitiveness, particularly when they believe that cheap labour is their 'comparative advantage' in the global market. "The result is that women workers in different countries are in effect pitted against each other in a race to the bottom on wages and conditions."[334]

Of course, the Fair Trade concept and Fairtrade labelling are there to redress the unjust payments, the harassments and the discriminations. However, **the improvement of the working conditions does not automatically mean an improvement in the conditions at home nor the redistribution of care labour**. In addition, the liberalization of trade and investments that favour Fair Trade products will favour the circulation of exploitative goods too. Moreover, liberalizing market may also increase the import of cheaper goods, reduce the space for the local informal economy and, eventually, have a negative impact on women. Thus, **an ex-ante and ex-post assessment of the gender impact, along with HR and environmental impact, shall be conducted, including of any strong social standards to be enshrined in the trade agreements** (because the standards may generate regressive consequences and favour larger players). However, the problem remains: if global markets and global competition are the way forward (even in a market that respects stringent social standards) women workers and women producers will compete against each other. Is competition the way forward for socio-economic and environmental improvement?

A final point that deserves consideration is the short-sighted nature of an approach based on 'women as entrepreneurs' and 'women in businesses'. In 2015-16, only 6% of the

[333] Vaughan-Whitehead, D (2011) How 'fair' are wage practices along the supply chain? Global assessment in 2010-11, paper prepared for the Better Work conference, 26-28 October 2011, Washington DC. pp. 16-17. Available at: https://link.springer.com/chapter/10.1057/9781137377548_4 [Last accessed 17 December 2020].

[334] Stephanie Barrientos, Gender, codes of conduct, and labour standards in global production systems, in Van Staveren, I., Elson, D,. Grown, C. and Çagatay, N. (eds), *The Feminist Economics of Trade*, New York: Routledge, 2007, p. 264.

female working age population in Europe and Central Asia were classed as 'entrepreneurs', whilst the figure for Sub-Saharan Africa is 26%. [335]The Trade Justice Movement thus reminds us that:

> "Because entrepreneurs make up only a small percentage of the female workforce, strategies that focus on improving female entrepreneurs' access to export markets and reducing barriers for female traders will only provide benefits for a limited proportion of the world's women. The evidence also suggests that there is a strong correlation between high rates of female entrepreneurship and the lack of alternative forms of decent employment. The risk is that in an increasingly insecure global economy, a focus on 'female entrepreneurship' can actually mask women's economic insecurity, with women engaged in highly insecure informal work reconstituted as entrepreneurs, without any real change in their social or economic conditions."[336]

Can the Fair Trade movement and Fairtrade claim to uphold just and equitable trade if the measures that they support are hurting women who are not part of the Fair Trade network (and probably will not be part of it at any time in the future)? Moreover, the use of trade agreements to globalize intellectual property regimes (the so called TRIPs+ embedded into Free Trade Agreements) is clearly detrimental to women because of the impact that they may have on access to health provisions, access to medicines and provisions needed for pregnancy and maternity, and because women face a disproportionate risk of poverty and violence. For these reasons, a systemic approach towards trade and gender should go beyond a gendered-version of international trade and allocating a large segment of the pie to women. It should question the broad implications of liberalization, competitiveness and export driven economies, increasing dependency on cash-crops and subordinating the empowerment of women to the fact of being actors of the productive economy. It should be, as required in the 2016 Gender Strategy, self-reflexive and aware of the potential risks hidden behind a universal approach to women as generators of economic value and participants in the global market for goods and services.

What does it all mean in terms of the 2030 and 2050 horizon for the Fair Trade movement? First of all, that **a complex understanding of gender as more than men and women shall occupy a central role in the Fairtrade Strategies** (rather than being now associated with youth). Moreover, it means that gender shall not be the only factor of violence/subordination to be assessed in a systemic and holistic way: the same should happen with the intricate web of contextual factors such as race, class, religious or ethnic identity, and disability. As mentioned in the 2016 Fairtrade International's Gender Strategy, "in promoting the rights of small-scale farmers and workers, and improving the conditions under which they produce and trade, it is important to understand how all these factors combine with gender to determine (or not) a fair distribution of responsibilities and benefits, including within producer organizations."[337] This should be translated into the **commissioning of studies,**

[335] Molyneux, M, Mothers at the service of the new poverty agenda: progresa/oportunidades, Mexico's conditional transfer programme, *Social Policy & Administration*, *40*(4), 2006, 425-449. K. Wilson, Towards a radical re-appropriation: Gender, development and neoliberal feminism, Towards a radical re-appropriation: Gender, development and neoliberal feminism, *Development and Change*, *46*(4), 2015, 803-832.

[336]

[337] Fairtrade International, 2016 Gender Strategy, supra n 295.

assessment and the collection of data about the intersectional impact of being a member of the Fair Trade community and part of a Fairtrade certification.

However, the push for a systemic approach to trade and gender shall assume a policy character and be oriented towards the content and the procedure of multilateral and bilateral trade and investment agreements. At least, the Fair Trade movement **should advocate for ex-ante and ex-post intersectional assessments of these policies, i.e. forecasts and evaluations of the way in which changes in the rules are impacting the most marginalized** (independently on the fact that they are part of the Fair Trade movement). But this is not all: the Fair Trade movement and Fairtrade **should challenge the compatibility between liberalization and addressing gender inequality**. As a matter of fact, competitiveness between countries and between producers is often obtained by shifting social costs on the most vulnerable, which is the opposite of what an equitable trade system should do. Donatella Alessandrini clearly points at it when she writes that:

> "the acquisition of competitive advantage (the ways firms or states come to be competitive) is a process already permeated by social inequalities. Underpinning gender inequalities in the labour market, as Folbre has argued, is the pursuit of competitive advantage by avoiding to pay the full costs of the reproduction of the labour force. For example firms may hire workers with fewer care responsibilities; establish themselves in jurisdictions where they pay less tax to support public education, health services or environmental regulation; or, to avoid incurring such 'costs', use contracts that shift the burden onto local contractors."[338]

Often, **jobs that are created in order to compete globally are inherently increasing the reproductive burden of women**.[339] Less public resources for states, more competitiveness within the country and with foreign producers and capitals, the increase in work realized by women (productive along with care labour), the change in agricultural and social dynamics due to the focus on cash crops and the appropriation of nature and health (through strong IP systems) are just some of the consequences of a more integrated trade regime. Of course, the Fair Trade movement and Fairtrade oppose all of that and provide better conditions for its members: but can the benefit for the members justify the sufferance of the rest of society?

By 2020, Fairtrade's Gender Strategy aimed to have:

- Significantly increased women's active and equal participation in Fairtrade certified smallholder and hired labour organizations
- Empowered more women and girls with opportunities to access equitably the benefits of Fairtrade
- Addressed systemic issues that hamper the realization of greater gender equality in Fairtrade supply chains

None of these priorities considered the possibility that trade and investment liberalization were systemic obstacles to gender equality. Moreover, they do not refer to intersectionality

[338] Donatella Alessandrini, Value-capture, Development and Social Reproduction in International Trade Law, Verfassungsblog, 4 March 2020, available at: https://verfassungsblog.de/value-capture-development-and-social-reproduction-in-international-trade-law/ [last accessed 17 December 2020].

[339] Sara Stevano and Rosimini Ali, Working in the Agro-Industry in Mozambique: Can These Jobs Lift Workers Out of Poverty?, IDeIAS, Bulletim n. 117, Maputo, 17 November 2020.

and the complexity of gender. In addition, they consider women only as producers, and not as consumers (of goods and services) and citizens. If a systemic approach wants to be adopted, a shift of gear is thus needed. By 2030, Fairtrade should aim at working with local partners, policy makers and other stakeholders to:

- **adopt an intersectional approach in its Gender Strategy** and transform it into an Intersectional Strategy;
- **map and identify systemic issues of intersectional inequality** that are generated and/or reinforced by trade and investment liberalization rather than accepting that the generation of financial return is always an improvement of life conditions;[340]
- **intensify the dialogue with local realities to gather data**, information and elements capable of giving an idea of the complexity of intersectional inequality;
- join **advocacy groups that are calling for the end to liberalized trade as unequally discriminatory of women and marginalized groups**;
- support advocacy groups calling for public interventions to address the systemic obstacles to gender equality (remembering that women are not only producers and formal employees, but also informal workers, consumers and citizens).

An intersectional approach to gender would also **reinforce the move away from global free trade into a social and ecological relocalization of trade**. By 2050, Fairtrade and the Fair Trade movement shall thus work in close collaboration with local partners to strengthen short, small-scale, just, equitable and sustainable that are not only empowering women as producers of international cash crops from distant markets, women as entrepreneurs and women as productive members of society, but that are based on the recognition that structural injustices affect multiple members of society and not all of them can be addressed through trade (if they are not reproduced by trade). Moreover, it shall work closely with activists, academics and policy makers to make visible reproductive and informal workers' enormous contribution to the generation of wealth across the globe (together with the exploitation and appropriation of environmental resources), "not so that it can be more accurately measured/counted and things can go on as usual (by simply internalizing some of the externalities) but so that the unsustainability of the current trade and investment regimes (the way in which they work for the benefit of the few) can be brought to the fore."[341]

This invitation to act locally and focus on the invisible contributions behind the visible economy **does not mean that Fairtrade and Fair Trade should introduce a new form of 'true cost accounting' that also internalizes the reproductive labour of women and the informal work done outside of the 'visible' economy**. On the contrary, this means that Fairtrade and the Fair Trade movement shall realize that the dynamics and performativity of the global economy pose challenges to the realization of a just, inclusive and equal society. The gendered impact of international trade is one of these examples. Rather than thinking about better standards for global trade, a gendered approach to international trade would require the movement to realize the importance of supporting other patterns and geographies of trade. This would imply the adoption of a qualitative understanding of the gendered impact of trade,

[340] Sara Stevano, The Limits of Instrumentalism: Informal Work and Gendered Cycles of Food Insecurity in Mozambique, *The Journal of Development Studies*, 55(1), 2019, 83-98.
[341] Donatella Alessandrini, reply to our survey.

the way in which unfair practices cannot be solved by only focusing on an increase in exchanges and income, and that there are structural issues (access to land, patriarchy, etc.) that are reinforced by international trade and global competitiveness rather than being solved. .

7.4 E-commerce as the Future of International Trade

E-commerce is defined by the WTO as "the sale or purchase of goods or services conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. Even though goods or services are ordered electronically, the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organizations. Included in these electronic transactions are orders made over the web, extranet or electronic data interchange. The type of transaction made is defined by the method of placing the order. Normally excluded are orders made by telephone calls, fax or manually typed e-mails."[342] **A growing share of e-commerce involves cross-border sales and therefore contributes to international trade**. For example, the share of the worldwide online shoppers that made cross-border purchases rose from 17% in 2016 to 23% in 2018.[343]

In some parts of the world, **covid-19 has clearly accelerated the use of e-commerce as a 'safer alternative to in person purchases' and digital technologies along value chains to improve traceability**. The fear of consumers and the widespread use of lockdowns as anti-pandemic measures determined that for months an increasing percentage of goods, food and services has been purchased online, in a trend that may redefine trade for much longer than the pandemic. The surge is clear and it is not only centred on high tech goods, toys or books, but increasingly involves goods for which availability is critical to a large share of the population, including groceries, medicine and other necessities.

According to the latest data produced by the OECD:

> "In the United States, retail and food services sales between February and April 2020 were down 7.7% compared to the same period in 2019. However, sales increased for grocery stores and non-store retailers (mostly e-commerce providers),1 by 16% and 14.8% respectively. In the EU-27,2 retail sales via mail order houses or the Internet in April 2020 increased by 30% compared to April 2019, while total retail sales diminished by 17.9%. The resulting shifts from brick-and-mortar retail to e-commerce are likely significant across countries. For example, while in the United States the share of e-commerce in total retail had only slowly increased between the first quarter of 2018 and the first quarter of 2020 (from 9.6% to 11.8%), it spiked to 16.1% between the first and second quarter of 2020. The development is similar for the United Kingdom, where

[342] World Trade Organization (2013) *E-Commerce In Developing Countries Opportunities and Challenges For Small And Medium-Sized Enterprises*, Geneva, Switzerland: WTO.
[343] Mukhisa Kituyi (2020) The intricacies, impact and opportunities of e-commerce for trade and development, UNCTAD, 22 June, available at: https://unctad.org/news/intricacies-impact-and-opportunities-e-commerce-trade-and-development [last accessed 6 November 2020].

the share of e-commerce in retail rose from 17.3% to 20.3% between the first quarter of 2018 and the first quarter of 2020, to then rise significantly to 31.3% between the first and second quarter of 2020. Similar changes are also observed for other regions, including the People's Republic of China (hereafter China), where the share of online retail in total accumulated retail sales between January and August 2020 reached 24.6%, up from 19.4% in August 2019 and 17.3% in August 2018."[344]

E-commerce is, at the moment, one of the most discussed topics at the level of international trade. Not surprisingly, a specific chapter on e-commerce was added to the RCEF Agreement concluded in November 2020 with the aim to foster and expand the use of e-commerce and limit barriers to exchange of data and information.[345] For some analysts, the surge in e-commerce is having a significant regressive impact as it moves value away from local shops into the financial streams of large transnational platforms like Amazon, Ebay, Alibaba, JD.com and Souq.com (owned by Amazon). On the other hand, **it has been suggested that e-commerce represents an opportunity for producers in the Global South because it offers the opportunity to cut intermediaries and retain a higher percentage of the final price**. Despite the role that e-commerce is having in redefining trade, the attention is not so much on the distributive/regressive impact of using the web, nor on the environmental cost of relying on longer chains and the digital infrastructure. Rather, the tensions around e-commerce depend on the value of the data that are obtained (i.e. mined) through each transaction.

At the national level, countries are actively drafting their own e-commerce laws. China, for example promulgated the electronic commerce law in August 2018 (see box below for more details on China and e-commerce).[346] At the international level, more than 70 countries are currently negotiating Plurilateral Regulations on E-Commerce, which concern the flow of data, the disclosure of source codes and algorithms, and that will have a significant impact on the structure of value chains, competition, the distribution of value and inequality, the construction and occupation of markets and the impact of trade on the lives of people (with particular impact on women) in both the Global South and the Global North. For example, e-commerce is included in the agenda of the African Continental Free Trade Agreement (AfCFTA) and seen by its proponents as a "way for African countries to set rules that can facilitate more regional, cross-border e-commerce and for Africa to become a global player in trade and have the voice of the continent heard."[347]

Two positions appear unfolding at the international level, the USA one that aims at reducing taxation, guaranteeing free flow of data and limit the possibility for countries to access source codes and algorithms. On the other hand, China is interested in controlling data

[344] OECD, OECD Policy Responses to Coronavirus (COVID-19): E-commerce in the time of COVID-19, 7 October 2020, available at: http://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8/ [last accessed 5 November 2020].

[345] The Chapter requires the Parties to adopt or maintain a legal framework which create a conducive environment for e-commerce development including protection of personal information of e-commerce users and provides protection for consumers using electronic commerce. The E-Commerce Chapter also addresses some data-related issues, through provisions on location of computing facilities and cross-border transfer of information by electronic means.

[346] http://www.npc.gov.cn/zgrdw/npc/lfzt/rlyw/2018-08/31/content_2060827.htm

[347] Mukhisa Kituyi (2020), see supra n 343.

but at the same time wants to expand market reach of their national champions and that may have a significant consequence on the possibility for other countries to enter into this sector.

BOX 6 – Chinese e-commerce law, trade agreements and WTO

Chinese electronic commerce law defines electronic commerce as the sales of product and the provision of service through information network such as internet. The core concern lies in the trade of goods, rather than digitalized transmissions and data flow. It covers e-commerce operators' obligations, the conclusion and the performance of e-commerce contract and the e-commerce dispute settlement. Among the Chinese free trade agreements, only those with Korea, Australia and Georgia include e-commerce sectors. Interestingly, the electronic commerce article is subsumed in the chapter entitled "areas of cooperation" and comprises soft law obligation of enhancing the two sides' cooperation in this area.

In its communication with WTO, China did not clarify its standing on the issue of source code and algorithm. Article 31 of the draft of Chinese Critical Information Infrastructure Security Protection Regulation, requires the network product and service purchased by the infrastructure operator pass security inspection. When the USA pressed the sale of TikTok, China accordingly amended its Catalogue of Technologies Prohibited or Restricted from Export and restricted the export of personalized information recommendation service technologies. Again, in China's communication to the WTO, China holds that the exemption of duties to electronic transmission should continue until the Ministerial Conference.

In the recent RCEP Agreement, to give an example, **e-commerce is identified as an opportunity in the Chapter on Small and Medium Enterprises**. Because the Parties recognise that SMEs, including micro enterprises, contribute significantly to economic growth, employment, and innovation, the "Chapter also aims to strengthen cooperation in the areas of e-commerce, intellectual property rights, access to markets, and innovation, among others." Given the expansion on the conversations around e-commerce and the way in which e-commerce is presented as a possibility for smaller players, it is thus crucial to look at the distributive implications of e-commerce and the way in which global market would be transformed by a shift away from brick and mortars in favour of online purchasing.

7.4.1 A business as usual approach to the globalisation of e-commerce

As mentioned above, e-commerce is at the centre of international discussions about the future of trade. **The mainstream approach looks at e-commerce negotiations as a matter of 'level playing field' and uniformity of rules**. Clearer, common and pro-trade rules are seen as the way forward if we want to ride the wave of e-commerce as the future of the global economy. In March 2020, for example, the President of the International Chamber of Commerce wrote a letter to G20 trade ministers asking to:

- Speed up the transition to digitally enabled trade. [R]ecognise the imperative of achieving a high-standard agreement on the trade-related aspects of e- commerce, built around common rules to ensure open, non-discriminatory access to digital and digitally enabled markets. Enable digital trade through standardisation.

- [P]romote greater economic inclusion through the development of open trade standards. … such as the ICC's Digital Trade Standards Initiative (DSI), that can help move trade from analogue to digital.

The idea behind this letter, and other calls for a public support to e-commerce is that regulation and public funds should build an efficient e-commerce landscape that delivers for everyone, favouring online transactions in areas such as digital connectivity, (international) logistics and trade, including in digital goods and services. E-commerce is seeing as an opportunity for the Global South thanks to its lower barriers to entry. In a 2013 WTO report, we read that e-commerce "Unlike the requirements necessary to run a business from a physical building, […] does not require storage space, insurance, or infrastructure investment on the part of the retailer. The only pre-requisite is a well-designed web storefront to reach customers. Additionally, e-commerce allows for higher profit margins as the cost of running a business is markedly less. Another advantage provided by e-commerce is that it allows for better and quicker customer service. […]. This helps provide good levels of customer satisfaction with very little effort from the side of the business."[348]

The business as usual approach supports e-commerce as an economic opportunity to increase productivity and revenues for producers all over the world, but also as an inevitable trend of the global world. It is constructed around three main pillars:

- Implementing uniform national and international rules that can favour the purchase of goods and services via digital platforms;
- Strengthen the logistic, i.e. investing in those phases of the value chain that make e-commerce possible, such as postal services, digital controls at the borders, contact-less delivery options (drones or parcel lockers) or by accepting that alternative proofs of delivery can replace a digital signature. Governments, private sector and donors shall therefore address the lack of financial, legal and physical infrastructure for the development of e-commerce.[349]
- For some organizations like the OECD, Governments also have a crucial role in promoting the purchase of digital devices that are needed for e-commerce and making access to digital networks affordable.[350] In some cases, governments have intervened to guarantee access to the internet by selected groups of citizens. In Uruguay, for example, the state telecommunications company announced on 24 March that in April, 120,000 houses will be benefited with free 50Gb to navigate and work from home.[351] In El Salvador, a presidential decree ordered the suspension of payments related to Internet and electricity for three months.[352] In Colombia, the Government issued a decree that recognises telecommunications services as essential and

[348] WTO (2013), see supra n 342, p. 7.
[349] Ibid, p. 11.
[350] OECD, OECD Policy Responses to Coronavirus (COVID-19), Leveraging digital trade to fight the consequences of COVID-19, Paris: OECD Publishing, 7 July, available at: http://www.oecd.org/coronavirus/policy-responses/leveraging-digital-trade-to-fight-the-consequences-of-covid-19-f712f404/ [last accessed 5 November 2020].
[351] TeleMundo, El gobierno resolvió aumentar a 50 gigas gratis el Plan Universal Hogares de Antel, TeleMundo, available at: https://www.teledoce.com/telemundo/nacionales/el-gobierno-resolvio-aumentar-a-50-gigas-gratis-el-plan-universal-hogares-de-antel/ [last accessed 5 November 2020].
[352] Griselda López (2020) Garantizan pago diferido de agua, luz y telecomunicaciones, entre otras medidas económicas como apoyo para salvadoreños, Asamblea Legislativa Republica El Salvador, 20 March, available at: https://www.asamblea.gob.sv/node/10195 [last accessed 5 November 2020].

> establishes that their provision cannot be suspended for lack of payment.[353] A similar provision has been issued by the Peruvian telecoms authority, OSIPTEL, for as long as the emergency status persists.[354] The South Africa's telecommunication regulator has requested mobile operators and pay-TV providers make their services free for the duration of the coronavirus emergency.[355]

Through these lenses, **governments are seen as actors that can actively support such solutions towards less obstacles to trade and an easier access to e-commerce**. The goal is to increase the amount of trade in goods and services that are purchased via internet, reduce the material and immaterial obstacles (signature, tariffs, diversity in regulation), and fill the digital gap. Although no date is provided, we could imagine that 2050 would represent a possible target for the presence of a worldwide digital market that can be accessed by billions of people and regulated by similar laws in terms of contracts, guarantees, data, etc.

7.4.2 A 'Trade and…' approach to e-commerce

When we look at figures on the increase in e-commerce, **we tend to forget the fact that for many people around the world (in particular in the Global South), the road to e-commerce is riddled with potholes**. Simply put, the growth of e-commerce is not automatic, and the spread of its benefits is not guaranteed. In this context, the 'trade and' approach would be associated with an **approach that pays attention to three aspects that go beyond making e-commerce easy and global**: a) closing the digital gap for consumers and protecting those who are most vulnerable; b) closing the digital gap for small and medium size enterprises; c) making sure that the intensification of e-commerce and the global exchange of data goes hand-in-hand with an intensification of the right to privacy of people. Central to this approach there are a human rights (to internet and privacy) consideration and a sort of 'procedural justice' that aims at assuring that all economic players have the possibility of competing on the digital market.

For what concerns consumers' right to participating into e-commerce, this approach is strong on the need of **closing the existing digital divides among individuals so that the 'global digital revolution' actually benefits the people who are now most marginalized**. The starting point is the discrepancy in global and local digital readiness, as demonstrated by the fact that in sub-Saharan Africa, for example, Kenya, Mauritius, Namibia and South Africa are the only countries where digital readiness (i.e. the level of digital skills, use of the internet and trust in

[353] Presidencia Argentina (2020) Decreto 311/2020, DECNU-2020-311-APN-PTE - Abstención de corte de Servicios en caso de mora o falta de pago, 24 March, available at: https://www.boletinoficial.gob.ar/detalleAviso/primera/227120/20200325 [last accessed 5 November 2020].

[354] OSIPTEL (2020) OSIPTEL reguló los servicios de telecomunicaciones durante el estado de emergencia, available at: https://www.osiptel.gob.pe/noticia/np-resolucion-estado-emergencia [last accessed 5 November 2020].

[355] Independent Communication Authority of South Africa (2020) ICASA engages with licensees to open their services to all South Africans as the country fights the scourge of the COVID-19 pandemic, 19 March, available at: https://www.icasa.org.za/news/2020/icasa-engages-with-licensees-to-open-their-services-to-all-south-africans-as-the-country-fights-the-scourge-of-the-covid-19-pandemic [last accessed 5 November 2020].

it) exceeds 8%. In most other sub-Saharan African countries it is below 5%, making e-commerce and digitalization an issue for a restricted elite (both of producers and consumers).

Solutions include, for example, **the expansion of affordable and quality broadband to rural and underserved areas, enhancing financial inclusion that gives access to digital means of payment, and fostering trust and the acquisition of skills to participate in e-commerce**. For example, the OECD highlights that "the elderly, a segment of the population that would particularly benefit from e-commerce-enabled physical distancing, have persistently been lagging behind in terms of e-commerce participation in many countries and are more exposed to scams and frauds.[356] Significant and persistent gaps also remain for low-income households or individuals with low education, which is concerning given the decreasing costs of connectivity, the ubiquity of digital technologies and the increasing scope of products available online. Besides closing these divides, governments also need to ensure that consumers, and in particular the most vulnerable, are sufficiently protected from unfair, misleading and fraudulent commercial online practices, which have been increasing in the current crisis.[357]

Another proposal that has been recently advanced by Google and experimented by the government of the State of Sao Paulo concerns the provision of a PlusCode address to people living in rural areas as a way to facilitate the reception of parcels. According to Google itself: "With Plus Codes, a village, town, city or even country can quickly and efficiently set up an addressing system. And unlike conventional addressing projects, once a Plus Code address is created it is immediately usable on platforms such as Google Maps and anywhere else that recognizes Plus Codes both online and offline. This means that new services (both digital and non-digital) are more readily available to traditionally underserved communities that lack proper addresses."[358] Rather than a matter of international trade law, the issue is thus constructed as a matter of national policies and – to some extent – Official Development Aid and investments in support of the Global South.[359]

The second element of this approach is more interesting for the Fair Trade movement because it **does not focus on consumers but on producers and recognizes the existence of a persistent gap in terms of e-commerce participation for firms, and in particular small and medium enterprises (SMEs)**. In both developed and developing countries, SMEs make up a majority of business and employ the majority of workers in both manufacturing and services sectors. SMEs cater mostly to their domestic market and their contribution to GDP may be significant in terms of employment and value production. However, the role of SMEs in

[356] OECD (2019), *Unpacking E-commerce: Business Models, Trends and Policies*, Paris: OECD Publishing, available at: https://doi.org/10.1787/23561431-en [last accessed 5 November 2020].

[357] OECD (2020), *Protecting online consumers during the COVID-19 crisis*, Paris: OECD Publishing, available at: https://www.oecd.org/coronavirus/policy-responses/protecting-online-consumers-during-the-covid-19-crisis-2ce7353c/ [last accessed 5 November 2020].

[358] David Martin (2020) How we're giving everyone, everywhere an address, 29 September, available at: https://blog.google/products/maps/google-maps-101-giving-everyone-everywhere-an-address/ [last accessed 5 November 2020].

[359] The General Director of UNCTAD, in a 2020 document, states that: "Unfortunately, only 1% of all funding provided by Aid for Trade – an initiative by World Trade Organization members to help developing countries improve their trading infrastructure – is currently being allocated to ICT solutions. Similarly, multilateral development banks are investing just 1% of their total spending on ICT projects, and only about 4% of this limited investment is being spent on policy development, work that is critical if digital economies are to be well regulated." See Mukhisa Kituyi (2020), supra n 343.

national economies varies significantly across geographies. While less than 6 per cent of the formal work force is employed in manufacturing in SMEs in Azerbaijan, Belarus and Ukraine, this share is more than 50 per cent in other developing countries such as Ghana, Turkey and Ecuador. Studies has indicated that countries with large SME sectors also tend to benefit from the significant contribution which SMEs make to GDP.[360]

According to a 2017 report realized by the OECD, however, the participation rate for SMEs in e-commerce in OECD countries was lower than half the rate for large firms. As a consequence, **the moment when bricks and mortars trade collapsed, SMEs in OECD countries demonstrated less flexibility and less resilience in dealing with the costs of reduced demand and local containment measures.[361]** Low levels of digitalisation and difficulties in accessing and adopting new technologies make it particularly difficult for those firms to change existing work processes, by introducing teleworking or an e-commerce sales channel. If we take into account the imbalance in infrastructures and digitalization that characterizes countries in the Global South, we may conclude that the shift towards e-commerce may significantly favour larger enterprises and – even more – larger enterprise/platforms located in the Global North.

In this regard, the **globalization of economic activity has a dual impact on SMEs. For some, it provides new opportunities for expansion and growth by taking advantage of international market potentials**. For the majority, however, growing economic globalization is increasing the competition with foreign enterprises and it is an inward process that brings competitive challenges and threats. For those SMEs globalizations brings risks that they unlikely survive in their present form without improving quality, cost competitiveness and management practices. In this scenario, the proponents of e-commerce as an opportunity for SMEs suggest that "it is up to SMEs to implement competitive business operating practices and business strategies. However, the option available to SMEs are also closely related to the quality of institutions, markets and organizations that constitute the business environment."[362]

A relevant example of this moderately optimism towards e-commerce as an opportunity to change the rules of international trade and leave producers with higher value is represented by a 2020 report realized by Jeffrey Sachs et al. on *Ensuring Economic Viability and Sustainability of Coffee Production*.[363] In the document, it is stated that:

> "E-commerce has the potential to reduce market concentration by providing a means for producers to add and capture more value through more direct-to-consumer sale models. Although currently niche, direct-to-consumer models have potential to scale with sustained institutional support. This could include aggregating producers for economies of scale, and making the administrative and logistical aspects feasible for

---

[360] WTO (2013), supra n 342.

[361] OECD (2020), "Coronavirus (COVID-19): SME Policy Responses", *OECD Policy Responses to Coronavirus (COVID-19)*, Paris: OECD Publishing, available at: https://read.oecd-ilibrary.org/view/?ref=119_119680-di6h3qgi4x&title=Covid-19_SME_Policy_Responses [last accessed 5 November 2020].

[362] Savrul M., Incekara, A., Sener, S. (2014) The Potential of E-commerce for SMEs in a Globalizing Business Environment, Procedia – Social and Behavioral Science 150, 35-45, p. 38.

[363] Sachs, J.D., Cordes, K.Y., Rising, J., Toledano, P. and N. Maennling (2020) *Executive Summary on Ensuring Economic Viability and Sustainability of Coffee Production*, New York, USA: Columbia Centre on Sustainable Investment, Available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/54 [last accessed 6 November 2020].

> many producers. [...] Because online retail is fiercely competitive, producers can be at a disadvantage given the high consumer loyalty to major brands. To break through the competition, significant offline investments would have to be made by producers and supporting institutions on marketing, quality control, and logistics."[364]

Although global e-commerce reinforces competition and the challenges posed by foreign competitors entering domestic markets and increases domestic competition by reducing the cost that national enterprises face to source internationally, the proponents of this approach conclude that "SMEs also may take the advantage of their being small in size by offering customized and specialized goods and services [and that they should] use electronic commerce technologies to expand their market size and to access global markets."[365] UNCTAD, the OECD, the WTO and international donors are mostly involved in this approach to e-commerce as the future of trade: they recognize the gaps and lacks of the current situation but claim that the interventions of states, private sectors and international organizations (with technical support, transfer of know-how, funding of infrastructural projects) can fill the gap. Whereas 2030 may be too soon to see the full integration of all producers and consumers into the digital market-place, it can be said that this approach envisages that in 2050 e-commerce will represent an even higher percentage of global trade and that national and international regulations will be supportive of electronic commerce as the new global marketplace.

7.4.3 A Systemic Approach to the e-commerce revolution

Because e-commerce represents an intensification of global market, **a systemic (restorative and climate justice-based) approach to e-commerce would not be satisfied with the idea that it is enough to fill the gaps that currently characterize the production and consumption sides of the equations**. Similarly, this approach would not limit its consideration to the distributive implications of the market (who wins and who loses), but would require particular attention to the issue of data generation and data mining.

Because of the role that e-commerce is doomed to play in the future of trade, a systemic, intersectional and distributive analysis of e-commerce and digitalization (block chain, etc.) must be developed. More precisely, it is claimed that **the development of e-commerce and digitalization cannot be disassociated from the ownership of the technology, its accessibility, the distribution of value and the working conditions of all those people that make the technology and e-commerce possible.** At a time when platforms operate in a regime of oligopoly, data are the most precious commodity in the world and the fear of Covid-19 is accelerating robotization, it is important to be careful and aware of the socio-environmental consequences that digitalization and e-commerce may have. And it is essential to think about possible alternatives and other forms of leveraging technology that are defined by the needs and rights of the people and the regeneration of the environment, not the desire of profit maximization, the belief in techno-fixes to structural issues and a vision of the world

[364] Id, p. 10.
[365] Savrul M., Incekara, A., Sener, S, supra n 362, p. 39.

that is produced by research and development units rather than by the people who are mostly being affected by the deployment of those technologies. .

Four considerations may explain the reasons behind the request for a deep understanding of the long-term implications of embracing e-commerce as the solution to the inequalities that characterize the contemporary system of global trade. Firstly, we know that **information and communications technology (ICT) goods play a crucial role in enabling the digitalization of our economies**: computers, mobile phones, tablets, etc. are the material foundations of the digital world and of the e-commerce. In 2017, ICT international trade amounted to almost $2 trillion. However, **this sector is highly concentrated**: the top 10 exporters are mainly from East Asia and some developed economies and account for more than 99% of all exports. Pushing for the e-commerce revolution means, therefore, supporting an economy based on a hyper-concentrated market that squeezes added value (for research and development, services provisions, etc.) in very few hands and in very few countries of the world, whereas natural resources (minerals in particular) are mainly sourced in the Global South.

Secondly, this approach would recognise what Kohavi et al. reported already in 2004, that: "**E-commerce is an important domain for data mining, with massive amounts of clickstream and transactional data that dwarf in size data warehouses from a few years ago."**[366] In a recent blogpost, the Secretary General of UNCTAD hinted at the issue of data concentration and data gathering, although did not seem to propose solutions beyond states and donors' interventions to fill the digital divide. According to Kituyi:

> "virtually every value chain, the ability to collect, store, analyze and transform data brings added power and competitive advantages. They are core to all fast-emerging digital technologies, such as data analytics, AI, blockchain, IoT, cloud computing and all internet-based services. Data are also intrinsic to e-commerce. These platforms can use the data they collect from buyers and sellers to offer better services. Unsurprisingly, data-centric business models are being adopted not only by digital platforms, but also, increasingly, by lead companies across various sectors. Digital platforms are increasingly important in the world economy. Some global digital platforms have achieved very strong market positions in certain areas. For example, Google has some 90% of the market for Internet searches. Facebook accounts for two thirds of the global social media market and is the top social media platform in more than 90% of the world's economies. Amazon boasts about 40% share of the world's online retail activity, and its Amazon Web Services accounts for a similar share of the global cloud infrastructure services market. In China, WeChat (owned by Tencent) has more than 1 billion active users and, together with Alipay (Alibaba), its payment solution has captured virtually the entire Chinese market for mobile payments. Meanwhile, Alibaba has been estimated to have close to 60% of the Chinese e-commerce market."[367]

The concentration of e-commerce and data platforms produces a range of new consumers harms that have been summarized by Nathan Newman in a paper on 'How Big Data Enables

[366] Kohavi, R., Mason, L., Parekh, R. and Zheng, Z. (2004) Lessons and Challenges from Mining Retail E-Commerce Data, Machine Learning Journal, Special Issue on Data Mining Lessons Learned.
[367] Mukhisa Kituyi, supra n. 343.

Economic Harm to Consumers, Especially to Low-Income and Other Vulnerable Sectors of the Population'. For Newman, there are three new harms for consumers/users that must be considered:

- **Individual surveillance** of users by employers, financial institutions, the government and other players that these platforms allow, with the possibility that consumers of some categorical groups could be discriminated and/or exploited (including by not being giving access to goods and services if they are not considered the relevant consumers).
- Secondly, user data is economically valuable, yet big data platforms manage to **extract data from users with little financial compensation**.
- Third, **information asymmetry** between big data companies and consumers is easily converted into economic inequality when one side of every transaction has so much more knowledge about the other during bargaining. The increasing information asymmetry in consumer markets, driven by data mining and facilitated by online services, may be an additional significant cause of this overall increase in economic inequality we have seen over the last four decades

Thirdly, the data on the expansion and impact of e-commerce reveals that **the shift from brick and mortars to digital may have regressive implications rather than equally benefit all players on the market**. According to the OECD 2020 report on the impact of Covid-19 mentioned above:

> "While dynamics likely vary across countries, these data suggest that despite the shift to e-commerce, a **significant share of e-commerce sellers are facing the same economic repercussions as traditional brick-and-mortar retailers, following reduced spending by individuals on items considered non-essential**. A sample of 200 000 third-party Amazon vendors in the Unites States suggests that by April 2020 around 36% of merchants were inactive, an increase from around 28% in February.4 Particularly affected were sellers with less than 1 500 product listings (ASINs), while sellers with over 3 000 listings saw positive upswings. This highlights how the COVID-19 crisis might have involved a shift in demand from small and specialised sellers to larger and diversified sellers."[368]

This information suggests that e-commerce tends to favour larger players and low hanging fruits, the opposite of what a distributive justice and equity approach to trade would require. Not to talk about the shift from labour intensive retailing to capital intensive e-commerce and digital marketplaces, which is often associated with a loss of employment among the categories that are already most marginalized and negatively affected by the economic scenario.[369]

Fourthly, the global digitalization and the expansion of e-commerce on a planetary level are fostering an increase in extractive practices and the related emission of GHG.

[368] OECD, supra n 361.

[369] The capital intensive nature of the digital economy is also recognized by Jeffrey Sachs and other economists who support the transition. See Jeffrey Sachs (2019) Some Brief Reflections on Digital Technologies and Economic Development, *Ethics & International Affairs*, 33, no. 2, pp. 159-167.

Computers, submarine cables, servers, antennas, and the rest of the 'digital' infrastructure are material goods that are made of minerals, metals and other materials that have to be extracted, traded, mobilized and assembled. Moreover, the construction and the functioning of the Information and Communication Industry (ITC), i.e. making and running computing devices (desktops, notebooks, LCD displays, CRT displays, smartphones and tablets), data centers (servers, communication, storage, cooling and power) and communications networks (office networks, telecom operator, cooling and power) requires an extremely high amount of energy that has been constantly increasing in the last two decades (including in the EU)[370] and could reach the 14% of global GHG emissions in 2040.[371] Furthermore, the creation of a global digital marketplace populated by companies and customers from all over the world is likely to increase the quantity and length of value chains, with a direct impact on the total amount of GHG linked to trade in goods. A climate justice approach to e-commerce would thus require to question the origin of the materials that make the digital market place possible along with the GHG contribution of shipping more goods, storing more data and increasing the use of ITC.

In light of these four points, we claim that **the identification of e-commerce as a solution to the development deadlock must also be analysed through the lenses of the digital divide, the distribution of value, the consequences of opening up to global digital competition, and the environmental impact of digitalization**. On the one hand, profiting from e-commerce in the context of increased competition requires access to the web, a high level of digital literature and the possibility of carving out of a competitive advantage vis-à-vis market's giants and players from all over the world that are operating on the same digital market. As we discussed, **the shift to digital and global tends to discriminate smaller players and those with limited resources and digital skills, and to favour incumbents that already have gained the familiarity and trust of consumers, and often intensifies the dependence on large-scale platforms that operate as gate-keepers and new 'digital intermediaries' between small players and consumers**. E-commerce exercised through Amazon, Alibaba and Souq.com, would strengthen dynamics of power and uneven distribution of value not dissimilar from brick and mortar's trade (with even less employees). On the other hand, a climate justice approach to e-commerce must also consider the environmental impact of digitalization.

If we were to adopt a systemic approach to e-commerce, we should thus follow the invitation of the European Data Protection Supervisor to think about the humans and nature behind digitalization on top of the distributive and socio-economic consequences that the digital global marketplace may produce. According to the EU institution:

> "behind the life cycle of our digital tools lies a vast network, involving human and natural exploitation, continuous energy consumption and pollution. The mines used to

[370] At the European level, the European Framework Initiative for Energy & Environmental Efficiency in the ICT Sector recently reported that the "ICTs account for **8-10% of the European electricity consumption** and up to 4% of its carbon emissions [although] nearly 70% the decision makers in the UK, France and Germany do not have a system in place to measure environmental impact." See Energy & Environmental Efficiency in the ICT Sector, available at: https://ictfootprint.eu/en/about/ict-carbon-footprint/ict-carbon-footprint.

[371] A 2018 study of the McMaster University in Canada that aimed at assessing the Greenhouse gas emissions (GHGE) from ICT in 2040 concluded that they could grow from roughly 1–1.6% of total GHG in 2007 to exceed 14% in 2040, accounting for more than half of the current relative contribution of the whole transportation sector. Belkhir, L. and Elemligi, A. (2018) Assessing ICT global emissions footprint: trends to 2040 & recommendations, *Journal of Cleaner Production* 177, 448-463.

> extract the raw materials needed to build digital devices are large, intrusive and a significant source of pollution. Those working in the mines do so under inhumane working conditions. Getting raw materials from the mine into the device, and then getting the device into our hands, involves a murky network of manufacturers and traders, as well as high levels of harmful emissions, caused by long-distance shipping and production plants. Remote data centres are required to run our interconnected devices, and they rely on the continuous absorption of vast amounts of energy to do so. Just as for mining and assembly, electronic waste is shipped to low-income countries in Africa and Asia, where the most disadvantaged find themselves forced to engage in informal e-waste recycling economies, involving the hazardous release of chemical pollutants."[372]

Therefore, this position requires to **advocate against a scenario of increased digitalization where producers of goods and services from all over the world compete through oligopolistic digital platforms, international shipments contributes to even more GHG than today and where data is mined and sold by tech giants**. Technology shall not be embraced uncritically but, in the spirit of the 'Slow Race' promoted by Melissa Leach and Ian Scoones, shall be understood as a cultural and social construction.[373] Rather than aiming at a universal technological fix, like e-commerce or worldwide digitalization of the marketplace to reward the most competitive actors and provide consumers with more goods, we shall ask who are going to be the winners and who are going to be the losers. And that also includes the planet and its ecological boundaries.

If we were to adopt this approach, we shall recognize that Governments, private sector and international donors **should not implement technological solutions without assessing their social, ecological and distributive impact**. That historical conditions, socio-economic dynamics and environmental implications shall be at the centre of the reflection and define what is done, how, by who and for whom. As Leach and Scoones write: "Technological fixes are not enough, and that social, cultural and institutional dimensions are also key. And [that] science and technology [must be] part of a bottom-up, participatory process of development, where citizens themselves take centre stage. Rather than being viewed as passive beneficiaries of trickle-down development or technology transfer, in this race, citizens are seen as knowledgeable, active and centrally involved in both the 'upstream' choice and design of technologies, and their 'downstream' delivery and regulation."[374]

7.5 Investment law and investment arbitration

A discussion around building a just, equitable and sustainable system of trade and investments must inevitably consider the role that Bilateral Investment Treaties, the Energy Charter and Investment Arbitration play in protecting the economic rights of foreign investors vis-à-vis the social, economic and cultural rights of citizens (and sometime also their civil rights). Because

[372] European Data Protection Supervisor, #DebatingEthics Conversation 3: The environmental impact of digitalization, available at: https://edps.europa.eu/data-protection/our-work/ethics/debatingethics-conversation-3-environmental-impact-digitalisation_en [last accessed 5 November 2020].
[373] Leach, M. and Scoones, I. (2006) *The Slow Race. Making technology work for the poor*, London: Demos.
[374] Ibid, 14.

a large share of international trade is connected with goods and services that are produced via foreign direct investments, because international investment law often has a chill effect on national industrial, social and environmental policies, and because the Energy Charter and BITs have been used to prevent or slow down the phasing out of the green transition, a position on just trade will have to be informed by a clear understanding of the main elements of International Investment Law (IIL) and of the reasons to rethink it. The area of investment would require, per se, a separate work of historical reconstruction, contemporary assessment, definition of key questions and possible scenarios. Given that part of this analysis has been done throughout the document, **we have decided to dedicate this section to some key considerations that should be at the centre of a future strategy/advocacy position on the issue of IIL.**[375]

IIL is not only about investment arbitration: In the last years, an increase level of attention has been paid to the fact that Bilateral and Multilateral Investment Treaties contain dispute resolution mechanisms, i.e. investment arbitration. The main critique has been that private arbitration is a bias mechanism of dispute resolution where commercial lawyers who are closely dependent on the international economic system are given the power to adjudicate whether or not the use of public authority (laws, regulations, administrative concessions, expropriation, default on bonds, etc) are aligned with the obligations that recipient states have undertook with the country of origin of foreign investors. **Whereas arbitration is certainly an issue, as we discuss below, it is important to keep in mind that international investment law is about much more than corporations suing states into private systems of adjudication**.

First of all, IIL introduces ad hoc obligations in favour of foreign investors (often including shareholders in companies and public bond holders) that put them in a better position than national capital, a condition that easily reproduce the historical inequality between the North (exporting capital) and the South (receiving capital). National Treatment, Most Favoured Nation, Prohibition of Direct and Indirect Expropriation, Non-Discrimination and Fair and Equitable Treatment are the substantive norms of Bilateral Investment Treaties that apply to foreign investors and strengthen their economic rights vis-à-vis the political space of governments. A land reform, or a less radical change in the regulatory framework that may affect the foreign investment (for example to support national champions and industrialization or the health of citizens), could lead to a breach of the international treaties and trigger arbitration. Along with the cases that are brought to a panel, it is thus important to think about all those regulatory actions that have not been undertaken for fear of a case (the so called regulatory-chill effect of international investment law).[376]

If IIL is about investment arbitration, it cannot only be when European countries may lose: The negotiations of the TTIP agreement between the EU and the USA represent a clear case where the general public and civil society organizations realized the negative potential behind a private system of dispute resolution contained in a Bilateral Investment Treaty. Statements,

[375] Cecilia Olivet and Pie Eberhardt, Profiting from Injustice, Transnational Institute, available at: https://www.tni.org/en/briefing/profiting-injustice [last accessed 21 December 2020].
[376] Laurens Ankersmit, Regulatory autonomy and regulatory chill in Opinion 1/17, *Europe and the World: A law review*, 4(1): 7, 2020; Christine Côté, *A chilling effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment*, PhD thesis, The London School of Economics and Political Science (LSE), 2014, available at: http://etheses.lse.ac.uk/897/ [last accessed 18 December 2020].

campaigns and actions were organized to challenge the fact that private arbitrators would assess the legitimacy of the operation of the European and American government (the protest was mainly in the EU). However, ISDS clauses have been introduced in Bilateral Investment Treaties since the 1960s and alternative mechanisms of dispute resolution are present in the latest agreements concluded by the EU (such as the one with Singapore). However, **the same level of resistance has not been raised in these cases, as the use of investment arbitration in conflicts between EU companies and non-Western governments did not represent an issue**. Considering that investment arbitration is a problem only when the regulatory space of 'developed' countries is at stake would be particularly problematic and would be oblivious of the way in which Bilateral Investment Treaties are utilized to perpetuate economic and political inequalities vis-à-vis the Global South.

Is a Court better than an arbitral panel? Because the focus is often on ISDS as the real problem of International Investment Law, suggestions have been raised to replace arbitration with other forms of adjudication. One of these is that of establishing public courts that would hear the cases of foreign investors against the host states. In the last years, the European Union has proposed a far-reaching reform which introduces an Investment Court System (ICS) as an innovative dispute settlement mechanism intended to address most of the core concerns raised against ISDS by combining elements of the traditional ISDS with judicial features. This model was proposed by the EU for the Transatlantic Trade and Investment Partnership (TTIP), is already included in the EU-Vietnam Free Trade Agreement and the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and more recently in the EU-Singapore Investment Protection Agreement and the EU-Mexico Trade Agreement. Is this model an improvement compared to the ISDS structure? Practically speaking, the ICS system introduces a permanent court and a court of appeal. This is presented as a response to the lack of transparency, the elitist and closed-circle of investment arbitration and the need to guarantee legal certainty and homogeneity.[377] Alternative solutions have also been promoted in South-South trade and investment agreements. For example, the AfCFTA introduces an appeal system aimed at reducing forum shopping and increase legal consistency (see box 7 below).

Although this change may seem a step forward, there is one question that we need to ask and that should be put at the centre of any advocacy campaign in this area: shall foreign investors be guaranteed a different treatment than national investors when it comes to the substance of their rights and the procedure to protect them? Why investors who wish to challenge a government measure should not do that so in domestic courts rather than being guaranteed standing in a separate dispute settlement mechanism?[378] Why shall their proprietary rights be guaranteed a stronger protection than the rights of national entrepreneurs, etc.? In a 2016 report, the Transnational Institute looked closely at the ICS system promoted by the European Commission, and concluded that: "There is nothing in the

[377] See generally, Colin M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 32 ICSID Rev.–For. Inv. L.J. 673, 682 (2017); European Commission Press Release, The EU and Vietnam Finalize Landmark Trade Deal (Dec. 2, 2015), *at* http://trade.ec.europa.e/ocli/res/ndex.cfm?id=1409; European Commission Press Release, EU and Mexico Reach New Agreement on Trade (Apr. 21, 2018), *at* http://trade.ec.europa.e/ocli/res/ndex.cfm?id=1830 ("the agreement … includes the EU's new Investment Court System"); Juan Pablo Charris-Benedetti, The proposed Investment Court System: does it really solve the problems?, Rev. Derecho Estado no.42 Bogotá Jan./Apr. 2019.

[378] Gabrielle Kaufmann-Kohler and Michele Potestà, Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future Outlook, *European Yearbook of International Economic Law*, 2020.

proposed rules that prevents companies from challenging government decisions to protect health and the environment. And there is nothing to prevent arbitrators from deciding in their favour, ordering states to pay billions in taxpayer compensation for legitimate public policy measures."[379] The general narrative is that this is to attract more foreign investments, but the success that China and Brazil have had in attracting foreign capital without having any special protection for investors proves this argument wrong. Thus, **extra protection is not justified by any other reason if not the will of investing countries to exercise through law the same protection that they exercised in the past with gunboats and other forms of hard or soft diplomacy**. As long as the law considers foreign capital as more precious than national actors and a national economy, it will inevitably represent an incentive towards longer value chains, consolidation of oligopolistic markets and clashes between producing for the international or the local markets.

BOX 7 Dispute Settlement in the AfCFTA

Article 20 of the AfCFTA establishes the DSM. The DSM shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes ("Dispute Protocol"). The procedure for the settlement of disputes under the AfCFTA consists of Consultations; Good Offices, Conciliation or Mediation; Panels; and an Appellate Body. Disputing parties can explore arbitration at first instance as a means to settling their disputes.[380] The Dispute Protocol applies to disputes between State Parties relating to their right and obligations thereunder, subject to such special and additional rules and procedures on dispute settlement contained in the AfCFTA. To guard against forum shopping, where a State Party has initiated a proceeding under the Dispute Protocol regarding a specific matter, the State Party shall not invoke another forum for dispute settlement on the same matter.[381] The Dispute Protocol establishes a Dispute Settlement Body (DSB) and provides for the settlement of dispute in a transparent, accountable, fair, and predictable way that is consistent with the provisions of the establishing agreement.[382] The DSB will comprise of the representatives of the AfCFTA State Parties and shall have a Chairperson to be elected by the State Parties. The DSB has authority to establish Dispute Settlement Panels and an Appellate Body; adopt Panel and Appellate Body reports, maintain surveillance of implementation of the rulings and recommendations of the Panels and the Appellate Body; and authorize the suspension of concessions and other obligations under the Agreement. Decisions to be taken by the DSB shall be by consensus. The Chairperson of the DSB shall be elected by the State Parties and will meet as often as necessary to discharge its functions.

[379] Cecilia Olivet, Natacha Cingotti, Pia Eberhardt, Nelly Grotefendt, Scott Sinclair, *Investment Court System put to the test*, Amsterdam: Transnational Institute, 2016.
[380] Art. 27 of the Dispute Protocol
[381] Article 3(4), Ibid. Also see, Olabisi D. Akinkugbe, "What the African Continental Free trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution", Afronomicslaw Blog, April 9, 2019; Online: http://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/
[382] Article 2 (*Objective*) of the Dispute Protocol

Shall arbitrators deal with human rights and environmental law? Another point of discussion is whether arbitral tribunals invested of a controversy between investors and states shall be also considering international human rights and environmental obligations that states have assumed through international agreements. The thesis that support this approach is that the implementation of bilateral investment agreements, as any other bilateral agreement, shall never contradict or frustrate the implementation of international obligations contained in multilateral treaties. If this is the case, arbitrators could not adjudicate in favour of an investor if this would mean breaching underlying human rights and environmental obligations. At the same time, states would retain the political space needed to protect, respect and fulfil human rights and environmental obligations and decisions made in that sense should not lead to the compensation of investors' property/economic rights. **The gap between international investment law and human rights shall be closed by bringing international human rights law into the arbitral sphere.** The thesis, initially opposed by most of the mainstream international investment law, is slowly taking pace and being promoted.[383] As a matter of fact, expanding investment arbitration's jurisdiction is a safe response to the challenges that the institute shall be scrapped.

The Investment Court System (ICS) contained in investment treaties concluded by the EU should have jurisdiction to uphold human rights, but its actions still have to be seen in practice. However, the crucial point is – in our opinion – not so much if arbitral courts should have the power to introduce human rights and environmental considerations to limit the rights of investors. **The true matter is whether or not arbitral courts or special courts should exist and have special jurisdiction in cases brought by foreign investors against states.** If we think that foreign investors need/have the right to special forums, thus we shall at least have human rights considerations in the adjudication. However, this poses the problem of how human rights will be interpreted, defined and balanced by non-human rights lawyers (i.e. arbitrators who often have a commercial background) and a commercial setting. If we believe that foreign investors shall have the same procedural rights as any other investor, thus the question of human rights is irrelevant.

IIL is not only about protecting investments but also opening up markets: Another preliminary element to be taken into consideration when discussing IIL is the distinction between rules that facilitate the access to a country's market by foreign investments and those that protect these investments once they are realized. Most of the attention in IIL has gone towards the use of national/regional law to protect strategic assets, but it is important to realize that the combination between trade liberalization (less barriers to export from a country) and the investment regime (better regulatory treatment and more protection when you invest in that country) clearly has an impact on the opening up of economies that is a precondition to the protection of the investments. **When we engage with IIL, we should not only think about the resolution of disputes between private and public parties, but consider**

[383] Nicola Paert and Nastasja Suhadolnik, Closing the gap between human rights and investment protection: what role for human rights impact assessments?, Thomson Reuters, 26 May 2017, available at: http://arbitrationblog.practicallaw.com/closing-the-gap-between-human-rights-and-investment-protection-what-role-for-human-rights-impact-assessments/ [last accessed 21 December 2020].

the way in which the entrance of foreign capitals into a country can significantly transform their socio-environmental dynamics.

IIL is transformative of the economy, society and the environment: Therefore, our understanding of IIL must be informed by the recognition of the transformative impact that foreign investments can have on the economy, society and the environment: foreign investments can intensify productivity, but they can also redirect local production, increase the use of natural resources, and represent an unbeatable competitor for national incumbents. As a consequence, **the free flow of capital and investments can challenge the achievement of national priorities, such as food security or the availability of Personal Protective Equipment and other medical devices**. The role that IIL may have in changing national economies has been clearly recognized by the European Commission, which has recently adopted guidelines on foreign direct investment, free movement of capital and the protection of Europe's strategic assets (and will soon adopt a EU's FDI Screening Regulation).

The first element of the Guidance focuses on "protecting the EU's strategic assets."[384] They called on the Member States "to take all necessary measures to protect strategic assets and technology from foreign investments that could threaten legitimate public policy objectives". They underlined that "this will contribute to the EU's strategic autonomy, during the crisis and afterwards." However, the protection on national assets and productive facilities is what international investment law and trade law are aimed at challenging, mainly on the basis that states' interventions are always distortive of the market and prevent the most efficient allocation of resources. **While the European Union and few countries in the world may oppose the sale of their national industries and restrict the entry of foreign capital, this is often not possible for the rest of the world**. Like in the case of international trade (where the EU is pushing for the Strategic Autonomy, for example), a double standard is also arising in the context of International Investment Law.

Lack of Transparency: Trade and investment agreements alike have been severely criticized because of the lack of transparency and public participation that characterizes the negotiation phase. The secrecy of negotiations is often justified with the state's desire not to reveal its cards to the other party, an attitude that demonstrates that these treaties are not aimed at redressing problems and weaknesses, but exploiting them in the most utilitarian way. **The lack of public participation was one of the main elements of the campaign that was launched against the TTIP**, which was accused of subverting the European regulatory framework in the absence of public scrutiny and in violation of the distribution of powers between the Commission (that is the negotiating body for the EU), the Parliament and the Member States. Transparency is undoubtedly an issue and proposals have been made to increase the possibility for civil society organizations, members states and interested parties to publicly contribute to the negotiations (we imagine that there is already a significant but invisible contribution by private lobbies when it comes to the definition of the clauses).

However important, the issue of transparency must be preceded by two considerations: a) are we equally calling for transparency when a country in the Global North

[384] Phil Hogan, Introductory statement by Commissioner Phil Hogan at Informal meeting of EU Trade Ministers, 16 April 2020, available at: https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/introductory-statement-commissioner-phil-hogan-informal-meeting-eu-trade-ministers_en [last accessed 17 December 2020].

(or the EU) is concluding trade and investment treaties with a country in the Global South? Or we take for granted that when a country in the North is negotiating with a country in the South there will not be the same problems that a North-North agreement may raise? **Are we capable of creating solidarity relationships with the producers, consumers, unions, etc. that will be disadvantaged by the conclusion of an investment agreement that favours the privatization of their economy by capital originating from the Global North?** B) If our call is only for transparency, are we not focussing on procedural issues (participation) rather than substantive matters (liberalization of capital flow and the establishment of a system that provides foreign capital with more protections and rights than national capital – and, in some cases, host countries?)

No space for communities and third parties: Similar to the lack of participation during the negotiations, International Investment Law and arbitral proceedings have been also criticized because **they allow almost no participation to affected communities once a controversy arise between foreign investors and the State**. This is especially the case of the International Centre for Settlement for Investment Disputes (ICSID), which deals with most of the arbitral controversies arising from a Bilateral Investment Treaty (BIT). The limits to the participation of third parties is codified in Sections 32(2) and 37(2) of the ICSID Regulation and justified on the assumption that the claim is mainly between the investors and the states and that the latter is the legitimate representative of the interests of its constituency (including local communities). As a consequence, it is ruled that third parties can intervene in the dispute to provide arguments (but not as a party) only if they have a significant interest and – and this is the devilish detail – they are independent.[385]

Throughout the years and all along cases, we thus see that investment arbitrators have been adjudicating on aspects that crucially affect citizens, communities, indigenous groups, etc. However, **affected parties have not been invited or – at best – they have been asked to provide elements and considerations to support the reasoning of the court**. As Nicolas Perrone elaborates in his recent academic work, communities are central to the investment regime project, but they are invisible. In his words: "A look at many foreign investment disputes, particularly in the natural resource extraction sector, shows that local communities are also central protagonists of foreign investment projects. These communities have a lot at stake but have remained almost invisible to the international investment regime. Apart from the ability to submit *amicus curiae* briefs, they have neither rights nor remedies in this regime."[386]

The imbalance in the ISDS discipline consolidates the imbalance of power between foreign investors and the socio-legal-economic space in which they operate. However, the exclusion of third parties and local communities also strengthens the inequality between states and citizens, promoting a false idea that states will always be on the side of their own constituency. Not only the risk of investment arbitration becomes an opportunity for governments to deny much needed interventions in favour of its citizens (the chill-effect that

---

[385] See Tomaso Ferrando, Investment Arbitration: Restricted Area, Critical Legal Thinking, 16 July 2012, available at: https://criticallegalthinking.com/2012/07/16/investment-arbitration-restricted-area/ [last accessed 21 December 2020].

[386] Nicolas Perrone, The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime, *AJIL Unbound* , Volume 113 , 2019 , pp. 16 – 21, DOI: https://doi.org/10.1017/aju.2018.92; Nicolas Perrone, *Investment Treaties and the Legal Imagination. How Foreign Investors Play By Their Own Rules*, Oxford: Oxford University Press, 2020.

we discussed above), but the resolution of a state-investor controversy can also become the moment when governments dismiss traditional and customary rights in favour of public ownership. This is often the case of controversies surrounding the privatization of land: investors may claim that the land has been given them by means of a public concession, while the state defendant may respond that the land is publicly owned. The fact that the land is historically occupied, used and owned by local communities and indigenous communities is willingly dismissed, and these actors are not given the possibility of presenting their arguments.

Therefore, the outcome of the arbitration can only be twofold and always contrary to the rights of the communities: the panel recognizes that the land was leased or the panel recognizes that the land is publicly owned. Reforms of the adjudicatory system in favour of participation and access to remedy and access to remedies are thus advanced. However, the assumption must always be questioned: are we aiming for an ad hoc system of private (or court-based) adjudication of states-investors disputes that guarantees more space to third parties, or we challenge the existence of a separate system of justice for foreign investors and call for their subordination/acceptance of domestic courts? As we discussed throughout this section, answering this preliminary question would allow us to decide where we are standing in the debate around liberalizing foreign direct investments and giving international law protection to private capital.

7.6 Blind spots and missing pieces: taxation, public procurement, informality, public services, financialization of global commodity chains, etc.

So far, we have been discussing specific areas of debate and concern that directly relate to the international trade and investment regime. The selection has been suggested by the desire to depict a broad panorama while being as close as possible to the area of activity of Fairtrade and of the Fair Trade movement. However, **we hope that it is clear by now that international trade and investments are not only about international law and – more importantly – are not only about trade and investments.** We already provided some element when we discussed the 'Trade and Gender' approach: international rules of trade and investment have a transformative impact on society (reinforcing or challenging patriarchy, hierarchy, etc.), but they are not the sole space of intervention if we truly want to contribute to an improvement of the material conditions of people and avoid the planetary meltdown. In the case of 'Trade and Gender' we mentioned the importance of working bottom-up, of promoting anti-patriarchal structures of governance and of giving visibility to the invisible sphere of care work and reproductive labour. However, the conversation must be broader than combining an international trade and investment approach from above with a transformative approach from below.

We believe that there are some other areas of public policy that Fairtrade and the Fair Trade movement should be looking at and shall be developing a policy and advocacy position on. They are more or less directly connected with international trade and investment. However, they are certainly capable of affecting the living conditions of people at the beginning of the Fair Trade chains and the intensity of the extraction of natural resources. This is because they are based on the recognition that markets are not mere ‘private spaces’ determined by the invisible hand of demand, supply and rational behaviours. On the contrary, markets are filled with regulation, built around the public authority and the legal recognition of property and contract, defined by the redistributive or regressive intervention of states in the form of taxation and provision of public services, nudged by the use of public prerogatives to purchase goods and services, and shaped by the enforcement of obligations and accountability. In the next sections, we present some areas of interest and briefly sketch their relevance also for organizations that are mainly focused on international trade.

7.6.1. Property, contracts and distribution of productive assets

Our report has highlighted that the international trade and investment regime have a transformative impact on people and planet. At the same time, trade and investments create connections between people and geographies, producers and consumers, countries of origin and countries of destination, etc. International trade and investments facilitate extraction of resources, the mobility of goods, the provision of services across boundaries, etc. This is made possible by the combination of property and contract, two legal pillars of the global economic system. Property and contract are not one thing. They assume different connotations in different places: property can be collective and be linked to the commons, but also individual and be aimed at individual exploitation and maximization of revenues. At the same time, contracts can be the expression of a continuous relationship between partners, based on the distribution of risk and a long-term perspective, or can be a sale-purchase interaction that is over once the goods are provided and the money paid.

As a network that is fully embedded in the trade and investment regime, we believe that **it would be important for Fairtrade and for the Fair Trade network to reflect on the kinds of property and contract that are at the basis of their experience and how their actions (both in terms of private choices and advocacy) are aimed at supporting forms of property and contract that are aligned with the idea of just, equitable and sustainable trade. Is the movement contributing to broad access to land and factors of production?** Is it using its logistic, economic and legitimacy strength to support small-scale realities that are struggling for emancipation, or are they reproducing historical inequalities in the distribution of resources? Are contracts empowering and creating long-term trust that go beyond sale, or are they replicating classic business transactions?

To this extent, it is important to recognise that the new Fairtrade standards acknowledge the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) and that Fairtrade International has supported the UNDROP process. Thus, **it is now time to assess whether their activities and their engagement with public and private actors are supporting the aspirations and goals of the Declaration**. What makes the Declaration relevant is that it recognizes specific rights that must be upheld and obligations for States (and not for private actors) to contribute to the improvement of the livelihood of peasants and other people working in rural areas. **Access to the means of production, access to land, access to financial services, self-determination, spaces of political engagement and representation**. These are all areas where the Fair Trade movement is active and the Declaration could be used as an ally in requiring more accountability for states at all levels of the chain, from the origin to the place of consumption. The Declaration, and the network that is fighting hard for it, could be strong allies for Fairtrade and the Fair Trade movement to integrate elements of the broad engagement with systemic change at the basis of trade and investment.

Article 17 is emblematic, as it recognizes that:

> 1. Peasants and other people working in rural areas **have the right to an adequate standard of living for themselves and their families**, and to facilitated access to the means of production necessary to achieve them, including production tools, technical assistance, credit, insurance and other financial services. They also have the right to engage freely, individually and/or collectively, in association with others or as a community, in traditional ways of farming, fishing, livestock rearing and forestry and to develop community-based commercialization systems.
> 2. **States shall take appropriate measures to favour the access of peasants and other people working in rural areas to the means** of transportation, and processing, drying and storage facilities necessary for selling their products on local, national and regional markets at prices that guarantee them a decent income and livelihood.
> 3. States shall take appropriate measures to **strengthen and support local, national and regional markets** in ways that facilitate, and ensure that peasants and other people working in rural areas have, full and equitable access and participation in these markets to sell their products at prices that allow them and their families to attain an adequate standard of living.
> 4. States shall take all appropriate measures to ensure that their **rural development, agricultural, environmental, trade and investment policies and programmes contribute effectively to protecting and strengthening local livelihood** options and to the transition to sustainable modes of agricultural production. States shall stimulate sustainable production, including agroecological and organic production, whenever possible, and facilitate direct farmer-to-consumer sales.
> 5. States shall take appropriate measures to **strengthen the resilience of peasants** and other people working in rural areas against natural disasters and other severe disruptions, such as market failures.
> 6. States shall take appropriate measures to ensure fair wages and equal remuneration for work of equal value, without distinction of any kind.

7.6.2 Taxation

Taxation is central to redistribution and redirection of production/consumption patterns: in the section on trade and climate we mentioned that the border adjustments and taxation are two of the most discussed trade mechanisms that state could be introducing to improve the quality of international trade (see section 3.5 above). They are forms of taxation that countries can introduce to make it more expensive to import goods and services that are considered incompatible with the Paris commitment and therefore a way of indirectly incentivize the production and circulation of low carbon goods and services.[387] We mentioned how these unilateral decisions (that can also be multilateral when they are embedded in a trade agreements) could create regressive consequences of making it harder for small players to participate into international trade and need public support as in the case of the EU just transition.

What border taxes demonstrate is that public authority can shape and define the contours and content of trade and investments by controlling their borders rather than only opening them up. At the same time, the use of taxation to define the ‘permeability’ of borders by goods and services can be complemented by another tactical use of the fiscal prerogatives within the state, i.e. the use of taxation to create incentives or disincentive to certain forms of production and consumption that happen locally. One measure that has been raised already within the Fair Trade movement is that the network could **advocate for public authorities at the national and European levels to introduce differentiated VAT rates to encourage the transition of consumption and production patterns toward more sustainable ones**. By making sustainable, fair and equitable products more accessible, governments would be creating a monetary incentive to increase the consumption of certain goods and – indirectly – redefine the value chains behind those goods and those that will be more expensive.

Reducing VAT for sustainable products would increase accessibility to segments of society that would normally have less financial means. At the same time, **this measure would reduce the financial capacity of states that derives from taxing consumption**. Moreover, the risk of reducing VAT only on the basis of environmental performances rather than social component of the business may have a regressive effect, i.e. favouring large-scale actors over small-scale players, given that large players have more resources to spend to implement environmental standards. In addition, in the context of concentrated value chains, **a reduction on VAT for sustainable products may be matched by a reduction in profits/revenues and not really lead to a significant change in the environmental and social practices, but just a further race to the bottom by reducing the costs of production of non-sustainable goods**. Furthermore, a change in VAT would not automatically represent an incentive to more added value at the place of origin. Finally, **cheaper goods from afar may not be compatible with the need of reducing the overall GHG emissions of our economy**. Thus, as much as a campaign aimed at a sustainable use of VAT is welcome, it would be essential to engage it in a holistic, integrates and structured way that considers not only the carbon impact of production, but the whole lifecycle of the product (including transportation and disposal) and the social impact of a change in financial dynamics both for the value chain and for the countries that would leverage a lower amount of financial revenues. The fact that no reference to VAT is contained in the 2021-2025 Global Strategy of Fairtrade International is, therefore, a matter that raises questions.[388]

---

[387] It is worth noting that Fairtrade Germany addresses the role of taxation in its Coffee Tax Campaign, currently on hold due to Corona. VAT has also been discussed, but was shelved due to lack of capacities. See https://www.fairtrade-deutschland.de/service/ueber-transfair-ev/was-wir-tun/advocacy-arbeit-kooperationen/debatte-zur-kaffeesteuer.

[388] Fairtrade International, 2021-2025 Global Strategy, supra 305.

An interesting example – with no social assessment - has been proposed by some European scholars, who tried to respond to the concerns that the European Commission had raised after a 2008 study on the role that market-based measures (such as a reduction in VAT) could have in supporting sustainable consumption.[389] According to this model, called DaVAT, **a proportionate, non-discriminatory taxation system is introduced that is based on objective criteria and that addresses human health, ecosystem diversity, and natural resources.** Each good would receive a score by aggregating and weighting impacts in a variety of areas including climate change, stratospheric ozone depletion, human toxicity, ecotoxicity, ionising radiation, photochemical smog formation, acidification, eutrophication, land use and fossil-energy demand. DaVAT thus adapts the present VAT system for goods and services to include a cost based on a Life Cycle Assessment. Rather than only promoting incentives, **DaVAT makes goods more or less expensive, thus reducing the leakage and displacement of pollution on specific goods that will be always equally taxed but also preventing erosion of the taxation base, protecting competitiveness of sustainable goods and meeting the requirements of social justice and equity**.[390] However, an ex-ante analysis of the social impact/implications of a redefinition of financial incentives-disincentives must be associated with the assessment of the environmental/life cycle quality of each good and service.

7.6.3 Public procurement

Public authorities are not only regulators. They are large-scale buyers of goods and services. In the EU, in 2017, the public purchase of goods and services was estimated to be worth some €2 trillion or 13,3% of GDP.[391] Some actors in the Fair Trade movement are already active in dialoguing with public authorities (from cities to the regional level) to favour the use of these funds in favour of enterprises that adopt high standards in both the environmental and social sphere. Our recommendation is for this **dialogue to be intensified and to push further in the strategic use of public procurement as a leverage for trade that is equitable, just and sustainable.** An expansion of the share of public purchases that directly support this kind of trade would require several steps: better understanding of the existing regulations and their limits; advocacy for regulatory transformation; mapping of best practices; training of the public actors who are involved in the definition of the procurement procedures; organizations of small-scale producers so that they can participate in large-scale bids; assessment of the distributive implications and the social consequences of the redefinition of the flow of public funds.

The fact that the 2021-2025 Global Strategy issued by Fairtrade International does not identify public procurement as one of the priority areas is another issue that triggers some reflections (the word ‘procurement’ is only mentioned as one of the areas where a change in policy shall be pursued in order to achieve high-level aspirations). Of course, we are aware that public procurement is mainly a national issue and that national members may have this

[389] European Commission, DG Environment, The use of differential VAT rates to promote changes in consumption and innovation, European Commission, 2008

[390] Benoit Timmermans and Wouter Achten, From value-added tax to a damage and value-added tax partially based on life cycle assessment: principles and feasibility, *The International Journal of Life Cycle Assessment*, 23(11), 2018, 2217–2247. DOI: 10.1007/s11367-018-1439-7.

[391] DG GROW, Public Procurement Indicators 2017, European Commission.

as a priority for their engagement, but we believe in the importance of a coordinated campaign that is capable of creating convergence, alignment and exchange of valuable theoretical and material learnings. **The promotion of green, just and equitable public procurement (it is important not to dismiss the social components) would provide a safer and more reliable market for goods and services obtained according to environmental and social standards.** It would reduce (although not completely eliminate) volatility and risk faced by producers. It would offer, as in the case of Sao Paulo's public canteens, a strong ally in the establishment and fortification of local chains and in the relocalization of production and consumption. It gives the opportunity to establish long-terms relationships and to fulfil states' obligations towards a sustainable planet and human rights. It would reduce the role of intermediaries and increase the opportunities for a more equitable distribution of value across the chain, in particular upstream. Thus, it represents an undiscussed opportunity for achieving a just, equitable and sustainable trade. Public procurement shall be, therefore, strongly pursued by Fairtrade and the Fair Trade movement. Of course, it should be used to favour diversification of production and streams of income, and not to make producers dependent on the fact that the public administration will buy their goods and services.

7.6.4 Provision of public services and universal basic income

One of the main assumptions behind the establishment of an international trade and investment regime is that market actors and capital perform best when they are untamed and free to express their competitive potential. Decades of failures of the system and increase in inequality, hunger, relative poverty, insecurity, precariousness, dependency, etc. and the recent failure of the market to provide for the basic needs of people (producers and consumers alike), reveal that there are parts of our society that cannot be left to the 'invisible hand'. Food, health, education and a salary that allows to satisfy the socio-economic needs of our existence, for example, are essential components of life. **Market dynamics and the principle of efficient allocation of resources, however, would not distribute them according to the need of the individuals, but according to their willingness and ability to pay. You cannot pay, you do not eat**. Even if that means starving. You want to sell your goods in order to gain some money, you would rather lower the price to be competitive, even if this means that you will be selling below the cost of production and lose money.

Covid-19 has proved that state intervention is essential to guarantee the survival of our society. However, the pandemic has also proved that this kind of action is possible in the Global North but very unlikely in the Global South. If we truly want to build an equitable trade system, we need to work to create socio-economic conditions that give farmers, producers and workers the choice whether to participate in trade or not, whether to engage in certain activities or not, whether to sell or not, and to make sure that they can thrive out of their activities. **The provision of living income/wage through the purchase of the harvest is one option.** However, this makes the achievement of that economic condition dependent on the quality of the harvest, the quantity of the goods produced, etc. A very different way of looking at the relationship between people and their needs is to say that they shall be covered by the state through the provision of public services and goods. Thus, workers, farmers and producers would not be dependent on their work in order to receive what is (at least) essential for living. This may sound radical, but it is the way in which welfare state has been operating for decades around the world, with countries in Europe that continue to use taxation to pay for healthcare and education (but not food).

The quest for a just, equitable and sustainable trade regime must be the quest for a market place that producers opt to be involved with, not one that represents their sole alternative. **Fairtrade and the Fair Trade movement shall thus explore more the interactions with groups, movements and organizations that are asking for a stronger role of the state in providing public services (including food).** Of course, to provide public services it is important that states have a strong fiscal capacity, which means that they have to raise funds through taxation wealthy individuals, corporations and – more importantly – on the movement of goods and services across boundaries.

A step further vis-à-vis the provision of essential services is the correspondence of a **monthly sum of money to reduce the economic pressure on individuals and families**. Once again, this may sound radical, but it has already the case in France and Belgium, where governments contribute to the economic conditions of workers who have lost their employment, and has been proposed in a broader form (the Universal Basic Income) in Spain. This is not the platform to talk about the pros and cons of the Universal Basic Income (or about the possibility to tag the use of the funds to specific purchases, therefore indirectly steering the market with public funds), but **this is a conversation that Fairtrade and the Fair Trade movement shall not avoid.** Firstly, they shall actively join groups advocating for states in the Global South to have enough resources to provide citizens with what is their right to receive (this means less liberalization, but also that international debt shall be forgiven). Secondly, the network may want to advocate for the provision of essential services at least to the most marginalized and excluded, who often are potential participants in the Fair Trade network, so that their lives not only depend on the outcome of the harvest or on the provision of their labour in factories and large-estates. **If high quality schools, health and food were publicly provided in the country of origin of goods and services, the power dynamics between the different actors in the value chains would radically change.** Finally, the movement may want to dialogue with the organizations, academics and policy makers who are promoting the idea of a Universal Basic Income, making sure that it has a progressive character and is connected – as much as possible – to the promotion of just, equitable and sustainable trade.

7.6.5 Informality

According to a 2018 ILO report, two billion people – more than 61 per cent of the world's employed population – make their living in the informal economy. In Africa, 85.8 per cent of employment is informal. The proportion is 68.2 per cent in Asia and the Pacific, 68.6 per cent in the Arab States, 40.0 per cent in the Americas and 25.1 per cent in Europe and Central Asia. This means that 93 per cent of the world's informal employment is in emerging and developing countries. People living in rural areas are almost twice as likely to be in informal employment as those in urban areas. Agriculture is the sector with the highest level of informal employment – estimated at more than 90 per cent.[392]

Informality is, therefore, a key component of the economies where Fairtrade and the Fair Trade movement operate, often representing the invisible backbone of those formal activities that are part of the visible value chain. Informality often means precarious works, lack of social security, lack of stable contracts (or of contracts), unequal bargaining power, economic and social violence. In a 2020 assessment of the Fairtrade banana chain, the conclusion was that “Despite good employer practices around the sector, many banana workers in Ecuador do not have a formal contract. No official figures are available, but the report cites estimates that around 40 percent of workers in Ecuador’s banana sector are informal. Without formal registration it is hard for authorities to ensure their rights are fully respected.”[393]

Although formalization is often presented as the solution, **informality is often the sole way in which people can make a living and support themselves and their family**. The multiple lockdowns and the restriction on mobility/logistic/interactions imposed all over the world made it clear: non-formalized labour is central to the economic fabric of societies, but often the most exposed to volatility and precarious.[394] For sure, the 2 billion people working in the informal economy and their lives are invisible to international trade agreements, impact assessments, and the imagination of the way in which liberalization of trade and investment will improve a country.

Different positions exist vis-à-vis the space of informality and the role that public and private actors shall have towards it. We believe that it is important for Fairtrade and the Fair Trade movement to engage with this multiplicity of visions and adopt an approach that is aligned with the desire to build a system of trade that is just, equitable and sustainable. In particular, we follow Jeemol Unni’s invitation to think about informality as a condition that takes various forms in countries and new forms over time, and about regulation as a tool that can crystallize conditions of subordination or emancipate, depending who is inspiring the norm.

For Unni:

> “there can be no “one size fits all policy” to regulate or improve the conditions of informal workers. Governments tend to regulate to its advantage, for example to gain

---

[392] Florence Bonnet and Vicky Leung, Women and men in the informal economy: A statistical picture. Third edition, Geneva: International Labour Organization, 2018, available at: https://www.ilo.org/global/publications/books/WCMS_626831/lang--en/index.htm [last accessed 22 December 2020].

[393] Fairtrade International, Fairtrade stresses the importance of decent work at International Banana Convention, 16 October 2020, available at: https://www.fairtrade.net/news/fairtrade-highlights-importance-of-decent-work-at-international-banana-convention [last accessed 22 December 2020].

[394] This international project is one of the first in the world that tries to provide a sophisticated and bottom-up understanding of informality at the time of covid-19: COVID-19 precipitates international research collaboration to address precarity in the informal economy. More info at: https://blogs.kent.ac.uk/law-news/covid-19-precipitates-international-research-collaboration-to-address-precarity-in-the-informal-economy/.

> revenue through taxes. We call this the capital view of formalization. Workers need to benefit from moving from informal to formal arrangements. The labour view of formalization is that the fundamental right of workers and entrepreneurs must be recognized. […] The debate on formalizing the informal economy can be seen from the lens of capital or the lens of labour. We argue that the capital view is only normalizing the enterprises, while the labour view is actually formalizing, with inclusion of workers in formal systems."[395]

Informality is the invisible backbone of trade, both local and international.[396] Most of the Fair Trade chains are indissolubly linked to informal labour (along with reproductive labour), which does not receive sufficient attention and that does not lead to a strong policy engagement. On the other hand, Fairtrade standards aim at "doing away with informality and reducing it as far as possible," with the risk of turning a blind eye to all activities that are not considered as formal and that – although not visible – are central to the socio-economic texture of societies around the world. It is not up to us to identify whether the purpose to transform all informal work into formal work is part of the solution, or not. We believe, however, that **the Fair Trade movement and Fairtrade should develop a clear and sophisticated position on informality, based on the understanding of the role that these activities play along with care labour and reproductive labour**, as we mentioned above, and on the fact that formalization inevitably has redistributive implications. As stated in 2015 by Elaine Jones, director of WIEGO, we think that it is important for the Fair Trade movement to have a more nuanced understanding of the formal/informal (often artificial) divide and the living/working conditions all along the food chain. For Jones:

> "While we have to acknowledge that these informal workers benefit from the incomes they receive from being part of the Fair Trade system, we also argue for the need for Fair Trade Organizations to have a more nuanced understanding of the employment status of the workers who produce and process the goods that are marketed as Fair Trade or Fairtrade. This will allow FTOs to better understand the rights and responsibilities of workers and employers in the Fair Trade system."[397]

However, the words 'informal' and 'informality' do not appear in the 2018 International Fair Trade Charter nor in the 2021-2025 Global Fairtrade Strategy. **The lack of specific attention, we believe, risks to intensify the condition of invisibility of a phenomenon that is central to the Fair Trade network and that has significant repercussions on the life of billions of people around the world**. A better, more sophisticated, integrated and bottom-up understanding of the role of informality in the Fair Trade movement is, therefore, needed in the pathway towards just, equitable and sustainable trade.

---

[395] Jeemol Unni, Formalization of the Informal Economy: Perspectives of Capital and Labour, *The Indian Journal of Labour Economics*, 2018, p. 1.

[396] For a unique account of the way in which informal and formal contribute to the international market of the most expensive mushrooms in the world, see Anna Tsing, The Mushroom at the End of the World. On the Possibility of Life in Capitalist Ruins, *Princeton: Princeton University Press*, 2015.

[397] WIEGO, *The Fair Trade movement for Informal Workers*, WIEGO, 25 May 2015, available at: https://www.wiego.org/blog/fair-trade-movement-informal-workers [last accessed 22 December 2020].

7.6.6 Financialization of global commodity markets

Fairtrade and the Fair Trade movement openly challenge the way in which prices for international commodities are often insufficient to guarantee the full enjoyment of producers and workers' rights. We already mentioned before the role that international commodity agreements may have in institutionalizing (again) more stable prices and reduce volatility. Moreover, we suggested that the movement and Fairtrade may decide to adopt an approach to price fully embedded in the concept of solidarity, and fix prices that are completely delink from the international commodity price and are capable of guaranteeing a prosperous living standards to its members. However, if low and unpredictable prices are the target, there is also another area where Fairtrade and the Fair Trade movement could intervene: **the role of financial speculators and financial institutions in manipulating commodity markets and building prices that are not only disconnected from the needs and rights of producers, but also from the global demand and offer for that commodity.**[398]

As a matter of fact, the price of several food stuffs (coffee, cocoa, etc.), minerals and other commodities are dependent on financial interventions and speculations that capital rather than addressing problems of equity and justice. The recent scandal of Hershey, that used future markets to buy cocoa eluding the Living Income Differential established by international agreement between Ghana and Ivory Coast, is just the last examples of the role that financial markets can play in constraining the regulatory power of countries and supporting dynamics that are incompatible with the goals of Fairtrade and the Fair Trade movement.[399] If "Fair Trade is based on modes of production and trading that put people and planet before financial profit,"[400] it is **thus important that Fairtrade and the Fair Trade movement acquire a stronger understanding of the role of financial capital in the determination of commodity prices and dialogue with organizations and individuals who have been strongly advocating against the financialization of food and other resources**.[401] International prices for commodities shall not be taken as neutral and a given. On the contrary, Fairtrade and the Fair Trade movement may want to be at the forefront of the critique of how these prices come to be and how the unequal distribution of financial tools is negatively affecting the most vulnerable in the value chains.

---

[398] Tomaso Ferrando, Financialisation of the transnational food chain: from threat to leverage point?, *Transnational Legal Thinking*, 9:3-4, 2018, 316-342, DOI: 10.1080/20414005.2018.1563434; Jennifer Clapp, 'Financialization, Distance and Global Food Politics', Journal of Peasant Studies, 41(5), 2014 797; SOMO, Building a coalition against food speculation, 2011, online: <www.somo.nl/building-a-coalition-against-food-speculation>; Oliver De Schutter, 'Observations on the current food price situation', Background note, January 2011; Oliver De Schutter, 'Food Commodities Speculation and Food Price Crises: Regulation to reduce the risks of price volatility', United Nations, Briefing Note 02 (2011); Luigi Russi, Hungry Capital: The Financialization of Food, Zero Book, 2011; Steve Wiggins and Sharada Keats, Grain Stocking and Price Spikes (Overseas Development Institute, 2011; David Burch and Geoffrey Lawrence, 'Towards a Third Food Regime: Behind the Transformation', 2009, 26 (4) Agricultural and Human Values 267.

[399] Antony Myers, Hershey move of buying cocoa on futures market threatens LID agreement with Ghana and Cote d'Ivoire, 23 November 2020, available at: https://www.confectionerynews.com/Article/2020/11/23/Hershey-move-of-buying-cocoa-on-futures-market-threatens-LID-agreement-with-Ghana-and-Cote-d-Ivoire [last accessed 22 December 2020].

[400] The 2018 International Fair Trade Charter, supra n 74.

[401] Public Eye, Trade Finance Demystified, 2020, available at: https://www.publiceye.ch/en/publications/detail/trade-finance-demystified [last accessed 22 December 2020].

7.6.7 Accountability and enforcement of duties/obligations

Finally, we believe that Fairtrade and the Fair Trade movement shall pay particular attention to the ongoing legislative and political debates on transnational corporate accountability. This point is an issue in its own rights and goes beyond the scope of this study, but is indissolubly linked with the construction of advocacy campaigns and practices that promote a just, sustainable and equitable form of trade. There are several approaches to this topic, which would require a longer discussion than the one that can be provided here. What is important to highlight is that the struggle for corporate accountability is happening in various forums (private codes of conduct, multi-stakeholder endeavours, the European Parliament and the European Commission, national legislators, but also the United Nations) and that the introduction of transnational forms of accountability can operate with various forms of intensity.

Corporate impunity for human rights (and environmental) violations is certainly one of the aspects that make international trade and investments most incompatible with the principles of justice, equity and sustainability. Along with working to establish fair chains, it is thus important that Fairtrade and the Fair Trade movement strengthen their position on this issue and create spaces of dialogue and reflection to understand the implications of the multiple forms of addressing the problem. It is different, to give few examples, to look at transnational accountability as a matter of due diligence (ticking the box exercise, as in the case of the *Loi de Vigilance* in France), information to investors and consumers (like in the case of the 2014 Modern Slavery Act in the United Kingdom) or as a structure of legal accountability that guarantees access to court in the country of destination of the product, that finance mechanisms of auditing and assessments, and that introduces forms of remuneration and compensation for the victims of the abuses.

From the 2021-2025 Global Strategy, we understand that **Fairtrade International has decided to move along the lines of private labelling for human rights and strengthen its position in the market for fair products by "creating a Human Rights Due Diligence (HRDD) offering**, including, as a key sub-component, Environmental Rights Due Diligence (ERDD) [that] would ensure that producer rights are being protected, creating safer, fairer and more sustainable conditions for farmers and workers. Fairtrade will innovate to ensure that workers and farmers are at the heart of its proposition, exploring partnerships with other organizations (tech partners, trade unions, NGOs), to ensure that Fairtrade's HRDD proposition is effective and constantly learning and evolving. As part of the implementation plan of the strategy a Human Rights Impact Assessment will be carried out in the initial twelve months of implementation. Pilots with new HRDD solutions and a Human Rights report will be produced within three years of approval of the strategy"[402]

Although we appreciate the attention that Fairtrade International is giving to human rights and their respect in the context of the chains that they certify, we believe that **an approach to trade based on justice and equity requires a strong position with regards to accountability and the fight against impunity**. More precisely, we believe that a systemic fight against power imbalances, inequalities and the systemic obstacles to the achievement of

[402] Fairtrade International, 2021-2025 Global Strategy, p 24.

human rights requires the intervention of public authorities and the enforcement of legal obligations. Thus, we believe that Fairtrade and the Fair Trade movement, unique players in the global fair trade scenario, should create strategic alliances with the actors calling for hard laws, strong accountability and the redressal of violations beyond the market mechanisms of certification and labelling. This should start, we believe, from the ongoing debate at the European level, where due diligence, precautionary measures, procedural schemes and ticking the box exercises are the most politically appealing solution to the violations that occur across value chains. These mechanisms are popular because this is the way businesses can commit to improvement without the risk of significant sanctions.

In the specific case of the EU, we believe that the Fair Trade movement and Fairtrade International **should advocate for a strong Human Rights and Environmental Legislation that goes beyond procedural requirements and duties of information.** In line with the EU Timber Regulation, the new discipline shall oblige EU companies to respect human rights and the environment by foreseeing administrative sanctions in cases of human and environmental abuses committed across the chain, sanctioning the import of goods that are produced in violation of HR and environmental standards, establishing civil liability of European corporations for damages when these companies cause or contribute to human rights violations, opening its forums to complaints from victims, and providing standing to organizations acting on behalf of victims. Moreover, the movement and Fairtrade may want to intensify their position with regards to the ongoing negotiations on the UN Treaty on Business and Human Rights with similar rules and that clarifies the primacy of human rights over trade agreements. Of course, Fairtrade and the Fair Trade movement are actively engaged in promoting chains where there is no violation of human rights and the environment is sustainably respected: but, as we mentioned throughout this document, is it enough to create islands of fairness in a sea of abuses, violations and subordination?

8. Conclusions: What space for voluntary standards and labelling in the quest for a just, sustainable and equitable trade and investment regime?

The present report has been written by four International Economic Lawyers who have spent several years undertaking critically analyzing and discussing the legal construction of the contemporary trade regime and its impact on people, economy and the environment. With this document, we aimed at providing a systemic and critical answer to the question of "**How do we build just, fair and equitable trade**" as the objective of the 2018 Fair Trade Charter.

When we started the research, the covid-19 pandemic was unfolding and people from all over the world were calling for a radical transformation of the economy that was capable of putting people and the planet at the center. The idea that "**We shall not go back to normality because normality was the problem**" was getting traction and was also concerning global trade relations and the reliability of the international market.

Several months later, it is clear that some of the initial energy has been dissipated and lost under the heaviness of a health crisis that has become a socio-economic crisis, and that in certain parts of the world is far from being tamed and controlled. However, some of the discussions about the future of trade are still ongoing, mainly alimented by the stall of the EU-Mercosur negotiations and by the desire by two of the largest economies in the world (the EU and the USA) to transform the multiple crises into an opportunity to **redefine their dependence on China and to create new opportunities for regional economic growth and employment**.

Now more than ever, when the EU is pushing for 'Strategic Autonomy' and the EU Green Deal as a global policy, the USA is going to 'Build Back Better' and China is committing to Carbon Neutrality by 2060, it is important that Fairtrade and the Fair Trade movement get actively involved in the assessment and definition of trade and investment laws that may significantly impact the life of millions of people around the world. Now more than ever, **it is important to adopt a systemic, critical and complex understanding of international trade law and policy as much more than a set of technicalities and regulations**: international trade law and policy is a political arena that has profound connections with multiple areas of the economy, the society and the ecological balance of the planet.

With this report we aimed at providing the Fairtrade and the Fair Trade movement with critical inputs and reflections that may help their members in better understanding their current position on trade and in formulating future policy and advocacy strategies that may be informed by the social, legal, political and environmental complexity of trade. In order to set the scene, we have taken three initial steps that we invite everyone to take:

- We have decided to **discuss the international trade regime along with the international investment regime**, as the two often operate hand-in-hand and are mutually reinforcing. Opening borders and territories to international trade is often associated with an influx of Foreign Direct Investments, an intensification of the use of local resources (land, employment, minerals, soil, water, etc.) and an increase in the export of commodities. It is only when trade and investment regimes are analysed together that we can depict a systemic picture of who benefits from the globalization of the market and the push towards more interconnection between countries, companies and individuals.

- We have asserted the **importance of being historically aware and of embedding current trade and investment patterns into centuries of colonization, uneven development and unfair distribution of economic, social and environmental costs (and benefits).** Once the current legal, economic and political dynamics behind international trade and investments are presented as historically constructed and not inevitable, it becomes easier to imagine and work towards alternative, fair and ecological visions of international trade. We believe that there is no just, fair and equitable future that is not built on the recognition of the past and in a serious attempt to redress it. Not necessarily through monetary compensation, but as a matter of awareness, policy formulation and redefinition of the way in which we look at the notions of 'level playing field', 'trade as prosperity', 'comparative advantage between countries', 'global competitiveness', etc.
- We have adopted a **perspective that recognizes trade and investment laws as much more than a system of governance**. Laws and policies in these areas are not only regulating, they have a **transformative impact on people and planet**: they shape them and define them. Among other things, they increase people's exposure to global competition, they are used to implement stronger regimes of intellectual property, they contribute to the surge in greenhouse gas emissions, they intensify the burden on women and they provide incentives for more extraction of natural resources; they allocate power to certain actors (those who can navigate the new international market, such as traders) and take it away from other actors (those who are exposed to an intensification of competition); they create incentives to increase the extraction of natural resources and to transform territories in the way that best fits the need of the international market rather than those of people and the ecosystem, often creating a vicious circle of dependency that cannot be easily broken up.

With this in mind, we have mapped three different ways in which Fairtrade and the Fair Trade movement could engaged with the future of international trade and investment law in order to achieve fairness, sustainability and equity. We called them "**business as usual**" (based on the allocative efficiency of the market), "**trade and…**" (that recognizes the need for more public intervention in addressing the externalities of the global market, but does not challenge the premises of international trade and investment), and "**systemic**" (which is aware of the historical construction of the contemporary trade and investment regimes, questions their social and environmental impact, and challenges the way in which the global circulation of goods, services and capital has been normalized and labelled as inevitable).

In order not to be too theoretical and to give a more pragmatic character to our report, we have identified six 'hot topics' in the trade and investment policy arena for Fairtrade and the Fair Trade movement to test their current approach to trade and investment and where they would like to go. The issues that have been selected do not exhaust the entirety of the challenges that lie ahead of us, but offer a good representation of the substantive and procedural differences that exist between the three approaches to fair, sustainable and equitable trade: business as usual, trade and... and the systemic approach are based on different premises, propose different tools and have different ambitions. In this way, for each topic the readers can position themselves along the spectrum of approaches from business as usual to systemic and reflect on the opportunities and limits of their current vision.

From our point of view, if the aim is the **creation of a fair, sustainable and equitable trade, the combination between approaches and topics lead to the adoption of a systemic attitude towards the future of trade and investments**. As we discuss in the final part of the report, Fairtrade and the Fair Trade movement **should not accept that the existing narrative and mechanisms of the international economy are neutral and inevitable**, neither that they will provide a solution that addresses the root causes of the problem that the Fair Trade Charter highlights.

If this was the approach, Fairtrade and the Fair Trade movement would implicitly accept the historical violence and inequality of colonialism and uneven development that are at the basis of the global system of trade. They would dismiss the role that global trade has in piercing the planetary boundaries and they would accept that contemporary social problems shall be addressed by making the pie larger rather than adequately redistributing what is already available.

At the same time, Fairtrade and the Fair Trade movement **should not create a parallel market for fair and sustainable products**, because this would simply carve out islands of fairness in a sea of degradation and violence, which sooner or later would also swallow those few bubbles (unless they can be reproduced thanks to the support of an elite interested in fair and sustainable products). International trade and investments are characterized by an inherent expansionist tendency and constantly need to stretch their frontiers, compete for resources and ensure a larger share of consumers. Turning the back to the transformative impact of the mainstream trade and investment regime would not spare the people that Fair Trade works with, nor the planet.

Given that the aim is that of implementing justice, equity and sustainability, we thus **suggest ten principles/recommendations that we invite Fairtrade and the Fair Trade movement to use when they think about their approach to international trade and investments, their campaigns and their position vis-à-vis the concrete issues raised in the report.** They are based on the identification of different historical responsibilities across countries and the need for redressal, the need for a solid 'rethinking of the concepts, space and role of international trade and investment' in light of the social and planetary boundaries, and on the invitation to abandon the inevitability of international trade and the active promotion of socially and climate just regional exchange patterns (including South-South) based on a just, fair and equitable distribution of resources. The ten recommendations are to:

1. **Acknowledge that trade and investments are much more than techno-legal forms of governance: they are transformative and political tools;**
2. **Put at the center a systemic and intersectional approach to justice, trade and investment**
3. **Embrace a bottom-up and producers-based vision of "just, sustainable and equitable trade and investments" and promote dignity, autonomy, self-sufficiency and solidarity;**
4. **Recognize that international trade and foreign direct investments are just one way of connecting territories and people to markets and financing;**
5. **Question words and concepts that are too often taken for granted and limit our imagination: level playing field, competitiveness, comparative advantage, etc.**
6. **Recognize that the history of the trade and investments' regime matters;**
7. **Question the inherent impact of international trade and investment on the planetary boundaries, greenhouse gas emissions, loss of social and biological diversity, deforestation;**
8. **Replace the 'trade and climate' approach with a climate justice approach to trade and investment;**
9. **Challenge the use of unilateral and bilateral trade measures when they are silent to past and present patterns of unevenness and unequal distribution of resources, or reproducing them;**
10. **Work across areas and beyond fragmentation by establishing strong alliances with movements, organizations and actors who are active in the trade arena and in areas that are directly affected by the transformative power of trade and investments;**