



REFORM OF THE WTO
AEGIS Europe Preliminary Analysis and Position

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About AEGIS Europe

AEGIS Europe is an industry alliance that brings together around 23 European manufacturing associations committed to free and fair international trade ensured by an effective international level-playing field.

Our members account for more than €500 billion in annual turnover, as well as for millions of jobs across the EU.

AEGIS Europe Members include the following European industry sector associations:

- Association of European ferro-alloy producers (EUROALLIAGES)
- Association of European Wheel Manufacturers (EUWA)
- European Aluminum
- European Association of Technical Fabrics Producers (TECH-FAB Europe)
- European Bicycle Manufacturers Association (EBMA)
- European Ceramic Industry Association (Cerame-Unie)
- European Container Glass Federation (FEVE)
- European Domestic Glass (EDG)
- European Federation of Rope, Twine & Netting Industries (EUROCORD)
- European Federation of Steel Wire Rope Industries (EWRIS)
- European Glass Fibre Producers Association (GLASS FIBRE EUROPE)
- European Industrial Fasteners Institute (EIFI)
- European Man-made Fibres Association (CIRFS)
- European Non-ferrous Metals Association (Eurometaux)
- European Organisation of the Sawmill Industry (EOS)
- European Rail Industry (UNIFE)
- European Steel Association (EUROFER)
- European Steel Tube Association (ESTA)
- Fertilizers Europe
- European Shipbuilding and Maritime Equipment Manufacturers (SEAEUROPE)
- Sustainable Solar Energy Initiative (EU PRO SUN)
- Medicine for Europe



AEGIS Europe Objectives

AEGIS Europe is an alliance of European industrial sectors promoting manufacturing, investment, employment, growth and innovation in an environment of fair competition and a level playing field in the EU and abroad.

The alliance was created in 2016 to address the critical question whether the EU should recognize China as a Market Economy for the purpose of EU anti-dumping policy.

In line with the alliance's overall objective, AEGIS Europe sectors increasingly experience the critical need to expand their focus beyond EU trade defense policy and measures dealing with the effects of international economic and trade distortions, towards the root causes of the distortions and the unfair competition.

Well-designed and enforceable international rules that reflect today's realities are critical for this purpose. The WTO is the regulatory institution capable of effectively framing and enforcing an international level playing field for manufacturing industry. AEGIS Europe considers that a rules-based multilateral trade regime benefits all economies. However, the modernization of the WTO is necessary to address international distortions and tensions caused by competing economic and political systems.

AEGIS Europe supports the EU ambition to modernize and make the WTO more effective by introducing more transparency, new rules and disciplines and stronger enforcement mechanisms.

I. Executive Summary

The need for reform of the WTO is acknowledged globally.

The general views and positions of the three major economies (EU, U.S.A and China) are known: the U.S.A. fundamentally criticises the functioning and performance of the WTO as being unable to address distortions from state-led economies and policies and now taking strong unilateral action, the EU confirming its fundamental loyalty to the spirit and rules of the WTO while stressing the need to modernize the system by revitalizing the WTO capacity to negotiate new rules, improving transparency and re-establishing the functioning of the dispute settlement system, and China confirming its support for the WTO insisting on a *status-quo* while blaming the crisis on rising unilateral and protectionist practices by other WTO members.

Absent a formal agenda, the views on reform are crystalizing around three major issues including (i) strengthening of industrial subsidy disciplines, (ii) the right for economies to self-declare “developing country”-status availing themselves special treatment and (iii) the re-activation of dispute settlement regime including a functioning appeal mechanism.

A most important development for AEGIS Europe sectors facing massive global excess manufacturing capacity is the joint EU-USA-Japan statement on industrial subsidies. Going beyond intentions and objectives, the three economies developed an innovative set of technical subsidy discipline improvements fitting within the WTO Agreement on Subsidies and Countervailing Measures. Concretely, the trilateral agreement identifies new types of subsidies to be prohibited *as such*, imposes an obligation to withdraw certain subsidies presumed to cause serious harmful effects, qualifies unnotified subsidies as *prohibited subsidies*, considers capacity distorting subsidies *as such* causing serious prejudice therefore actionable and includes a broad definition of the notion of “public body” expanding the possible use of the anti-subsidy instrument.

Both the U.S.A. and the EU consider a review of the right of special and differential treatment for developing country based on self-declaration as a critical condition for the effective functioning of the existing rules and the negotiation of new rules. Unsurprisingly, in contrast, major emerging countries like China and India consider the preservation of the declaration-based S&D treatment as a key condition for any WTO reform.

The blocking of the Appellate Body is the ultimate consequence of the deep, long-standing frustration of the U.S.A. with several procedural and functional Appellate Body practices considered breaches of the dispute settlement mandate and obligations, such

¹ The analysis here presented does not reflect on the possible impact of the unprecedented global economic crisis caused by the Covid-19. For a first global government response, refer to the G-20 Trade Ministers communiqué of 30 March emphasizing the importance of transparency in the current environment and commitment to notify the WTO of any trade related measures taken, all of which will enable global supply chains to continue to function in this crisis, while expediting the recovery that will follow.

as non-respect of deadlines, fact-finding beyond reviews of the law, law-making and substantive overreach. The EU acknowledges the procedural concerns raised by the U.S.A. as well as the concern about the Appellate Body practice of advisory opinions and *obiter dicta*. The EU appears to support the precedent function of Appellate Body case law as supporting legal predictability. Considering the two-step dispute settlement regime essential, the EU has agreed with 15 WTO members to set up an interim appeal procedure in the form of an arbitration arrangement.

AEGIS Europe preliminary position:

- **The open, fair market orientations of WTO rules have been profoundly undermined by China's pervasive state-led economy which has grown exploiting WTO openness. AEGIS Europe sectors, plagued by massive excess capacities, market-disrupting subsidies and other support measures, are the first victims of this development.**
- **Sectors including steel and aluminium have experienced the near impossibility to have WTO actions initiated tackling China's subsidies and SOE's at the root (prohibitive evidence and injury requirements to take action under the WTO Agreement on Subsidies and Countervailing Measures). The *status quo* is not an option anymore. If the current WTO cannot contribute to the solution, then it risks becoming part of the problem.**
- **The EU-US-Japan statement on industrial subsidies (January 2020) is a first, important step in addressing the problem at the root. A broader alliance of like-minded economies needs to be formed pushing this critical topic as a reform priority.**
- **Self-declared development status is exempting an important group of emerging economies from WTO existing obligations and undermining negotiations of new rules. Self-declaration is a one-off event when joining the WTO. We need a mechanism that ensures countries to move to developed status in line with macro-economic as well as sectoral developments.**
- **A major cause of the disruption of the Appellate Body relates to trade defense actions. A regime within the WTO dispute settlement system specifically for these actions could be envisaged as a way to de-block the functioning of the Appellate Body.**
- **Overall, AEGIS Europe considers that true geopolitical leadership is needed leveraged by reciprocal and fair access to markets. The EU must work closely with the US and Japan and other like-minded WTO members on root and branch reform of the WTO. Without these actions the basis for the maintenance of European values risks to be undermined by the gradual decline of European manufacturing.**

II. AEGIS Europe Analysis

The view that reform of the WTO is needed to keep this organization and its rules relevant is shared by most significant economies. On substance, major divergences have appeared among the 3 major economies including the EU, the U.S.S and China. These divergences are most visible in the area of industrial subsidies, development status and the Dispute Settlement (Appeal Body). At this early stage of political awareness, some general reflections can be developed by European industries adhering to AEGIS Europe Objectives (see above)

A. Positions of major economies

U.S.A.

Fundamental criticism of the WTO functioning and performance in light of China's state-led economy and policies

- The U.S. is stepping away from the multilateral rules-based trade order preferring unilateral actions and managed trade for various reasons related to China's state-led economic model, national security concerns, U.S. massive trade deficit and industrial policy objectives (deal with China, S232 steel tariff to reduce U.S. imports by around 13 million tonnes, Huawei restrictions...)
- **The U.S. has been sharply analysing, exposing and severely criticising situations undermining the purpose, capacity and functioning of the WTO**, and has taken strong unilateral actions in this respect. Fundamentally, these situations include (i) failure of the WTO to address the rise of non-market-oriented policies and practices (driven by large emerging economies notably China) that have led to severe overcapacity and create unfair competitive conditions, (ii) self-declared development status exempting a broad group of "developing countries" from WTO existing and future obligations (negotiations) and (iii) alleged overreach by the Appellate Body².

EU

Fundamental loyalty to the rules and spirit of the WTO at the same time joining substantive parts of U.S. criticism; the EU claims leadership in reforming the WTO

- The EU is a staunch supporter of the multilateral trading system framed by the WTO. The EU sees the critical need for reform to restore the system by (i) revitalising its capacity to negotiate new rules, (ii) ensuring transparency and monitoring and (iii) improving dispute settlement. **The EU's ultimate objective is to prevent the multilateral trade system from collapsing.**
- Concretely, the EU proposal for WTO reform focuses on (i) solving the Appeal Body crisis (short-term), as well as (ii) developing new rules and disciplines on

² For a recent concise overview, see statements by the U.S. Ambassador Dennis Shea at the General Council of March 3th, 2020 - <https://geneva.usmission.gov/2020/03/03/statements-by-ambassador-dennis-shea-at-the-march-3-2020-general-council-meeting/>

industrial subsidies and forced technology transfer and (iii) creating transparency by improving compliance with notification obligations (a condition for monitoring and enforcement)³. On new rules such as on industrial subsidies, transparency and self-declared development status, the EU and the U.S.A developing similar positions (see hereunder).

China

Strong support for the WTO functioning and rules – China’s interest lies in keeping the status quo (defensive)

- **Blames the crisis of the WTO on rising unilateral and protectionist practices undermining multilateralism and free trade (U.S.)**
- Considers the following area’s for reform (most of China’s positions are just reflecting the status quo): To enhance the notification requirements on unilateral trade measures, to carry out multilateral reviews of such measures, to authorise affected members to take prompt counter-measures and accelerate dispute settlement, to contain misuse of trade defense actions by better clarifying the relevant WTO rules on AD, AS and SFG, to preserve and enhance the self-declared status of Developing Country entitled for Special & Differential Treatment under WTO negotiations and rules and obligations (interests of developing countries at the core of WTO); fundamentally, to respect the diversity, the uniqueness of economic and development models including economies where the state has a significant role in allocating land, labor, energy and capital; no discrimination against or special disciplines on SOE’s in trade and investment policies; finally, to maintain the consensus-based decision-making in setting the reform agenda and conducting negotiations

B. Key area considered for reform

The G-20 Summit in Buenos Aires (2018) recognized the necessity and urgency of WTO reform but there is no formal mandate for such reform adopted by WTO members.

Instead, fragmented, competing actions and initiatives have been taken by individual countries and country groups. Of most interest for industries like steel:

a) **Strengthening industrial subsidy disciplines**

The recent EU/US/Japan Ministerial statement develops stronger disciplines targeting subsidies distorting capacities and trade that are the most harmful for industries:

- a. **New types of “as such” prohibited subsidies** (unlimited state guarantees, subsidies to insolvent producers, subsidies to producers unable to attract private investment or financing in situations of overcapacity, debt forgiveness)

³ See the Commission’s Concept Paper https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf

- b. **Obligation to withdraw certain subsidies presumed to cause serious harmful effects** unless the subsidising country can demonstrate the opposite (such as excessively large subsidies, subsidies creating massive manufacturing capacity, subsidies lowering input costs domestically...)
- c. **Non-notified subsidies considered prohibited subsidies** (transparency)
- d. **Subsidies distorting capacity considered as such causing serious prejudice therefore actionable** (WTO dispute settlement and ultimately retaliation)
- e. **Broad definition of the “public body”** notion expanding the scope and improving the accessibility of the anti-subsidy instrument (current restrictive definition of “possesses, exercises or is vested with governmental authority”)

b) Self-declared development status

- The U.S. heavily criticizes the unconditional right taken by numerous countries to avail themselves of special treatment to take weaker WTO commitments (existing and future rules) by designating themselves as “developing countries” (around 2/3 of WTO membership): **Many such self-declarations can be considered unjustified in light of their economic size and growth** (China, India, Brazil, Turkey, South Korea, Mexico...)
- Special treatment includes situations such as longer timeframe for safeguard measures, longer transition periods, softer tariff cuts, procedural advantages for dispute settlement. Moreover, many advanced and top-trading economies have used developing-country status as an excuse not to comply with basic notification and transparency requirements. Most importantly, these countries are consistently seeking weaker commitments in ongoing negotiations (one of the principal reasons why WTO negotiations of new rules are not moving towards conclusion, see negotiations fisheries subsidies)
- **The U.S. insists on the need for advanced economies to take the full WTO commitments as a critical condition for any WTO reform negotiation** (4 criteria: OECD country, G-20 country, high income country World Bank, => 0.5% global trade of goods)
- Through Presidential decree, the U.S. reserves the right to no longer treat a country as a “developing country” that in its judgement is improperly declaring itself to be so. The U.S. will publish a list identifying such countries. Also, the U.S. has stated that it will not anymore accept S&D provisions in WTO negotiations unless “certain members” forego the use of those provisions.
- The EU fundamentally agrees with the U.S. criticism and the critical importance of reforming the special and differential treatment of developing countries. **For the EU, flexibilities need to properly reflect the different levels of development, assessed case-by-case, based on evidence and time-limited.**

c) Blocking of the Appellate Body

- In a recent report, the U.S. clarifies its deep and long-standing frustration with the evolution of the Appellate Body's functioning culminating in the blocking of this WTO body end of last year (by refusing appointment of new Appellate Body members). The report⁴ identifies:
 - a. Procedural breaches: mandatory deadlines not respected, former A.B. members allowing to continue to decide appeals
 - b. Functional breaches: **fact finding (going beyond its mandate limited to legal review), making law (through advisory opinions and binding precedent)**
 - c. **Substantive overreach**: The report provides examples having **“prejudiced the ability of market economy countries to take measures to address economic distortions caused by the non-market economies”**:
 - i. restrictive interpretation of the concept of “Public body” in the WTO Subsidies Agreement favouring subsidisation of State-Owned Enterprises in non-market economies
 - ii. restrictions to WTO ability to deploy the anti-dumping, anti-subsidy and safeguard instruments
- The U.S.A. insists on other members first to acknowledge the dysfunctioning of the A.B. as a prior condition for developing solutions.
- The EU position acknowledges the procedural concerns expressed by the U.S. Also, the EU follows the U.S.A. concerns about the A.B.'s practice of advisory opinions or “obiter dicta”. However, **the EU appears to support the precedent function of A.B. reports. On substantial overreach, the EU position remains unclear.** Overall, the EU considers the binding nature of WTO dispute settlement, the two-step panel/appeal system and the independence of the adjudicator as essential.
- On 30 April, the EU with 18 other countries notified to the Dispute Settlement Body a “Multi-Party Interim Appeal Arbitration Arrangement” ensuring that effective dispute settlement can continue including the availability of an independent and impartial appeal stage. Among these countries, seven represent significant economies including, in addition to the EU, Australia, Brazil, Canada, China, Mexico and Ukraine. However, many major economies did not sign up (among which important EU FTA partners) notably U.S.A., Japan, South Korea, Russia, India, Turkey, Indonesia, South Africa, Taiwan... The arrangement takes up some of the U.S. concerns stating that an appeal

⁴ USTR Report on the Appellate Body of the World Trade Organisation, February 2020
https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf

shall be limited to issues of law covered by the WTO Panel report, that arbitrators shall only address those issues that are necessary for the resolution of the dispute and sticking to the 90 day time-period unless otherwise agreed by the parties.

C. AEGIS Europe comments

1. The underlying assumption of the WTO is that countries participate in a world trading system based on open, market-oriented policies, or at least agree to gradually implement such policies. With China, given its size and pervasive state-led economy, clearly this function has been undermined profoundly. AEGIS Europe sectors, plagued by massive excess capacities, market-disrupting subsidies and other support measures, are the first victim from this evolution.

2. AEGIS Europe sectors including steel and aluminium have experienced the difficulty to tackle through the WTO China's subsidies and SOE's at the root: unlike in the case of Chinese technology transfer issue, evidence and injury effect requirements made it impossible to take action under the WTO Subsidy and Countervailing Agreement (TBR file on China steel subsidies and SOE's); the aluminium sector experienced a similar situation in the U.S. Current WTO becoming part of the problem rather than part of the solution? A status quo – the position held by China - is not an option anymore. (Unlike the WTO dispute settlement

3. An important positive evolution for our sectors is the recent EU-US-Japan ministerial statement on industrial subsidies. More than general intentions and objectives, the statement presents a set of innovative disciplines technically fitting in the WTO subsidy agreement.

4. How to bring other major economies into this subsidy template (and other major area of WTO reform)? Why would China and other emerging economies - developing their economy through industrialisation - even consider to negotiate stronger subsidy disciplines? Last December, China walked away from the voluntary Global Forum on Steel Excess Capacity working on excess capacity and government policies.

What is the leverage the U.S.A, EU and Japan can/want to deploy for that purpose? The current U.S. administration is determined to escalate the pressure by taking unprecedented, unilateral actions and restrict access to the US market for Chinese goods. Is this a strategy capable of producing the leverage needed to get a meaningful WTO reform? If not, what is the right strategy that can produce meaningful progress?

5. A second priority for AEGIS Europe is a reconsideration of the self-declared developing country status exempting a large part of WTO membership from taking up full commitments and obligations. In this area also, steel has experienced imbalances distorting market and competition conditions: a large group of significant

steel producing and exporting countries, self-declared “developing country”, are exempted from the current EU steel safeguard under certain thresholds. Moreover, these countries have been using the safeguard instrument frequently and for periods longer than the 3 years without the obligation for compensation.

6. Because the WTO cannot effectively tackle unfair, market-disrupting policies at the root, unfortunately, legitimate defensive actions have become existential for several of our sectors suffering from worsening global excess capacity. In this context, we have been concerned about WTO Dispute Settlement case law creating precedents restricting the use of the anti-dumping, anti-subsidy and safeguard instruments (dumping margin calculations, restrictive notion of “public body” making it difficult to catch SOE’s in subsidy actions, condition of “unforeseen circumstances” to justify a safeguard action...). The U.S.A has called this unacceptable “overreach” and has acted accordingly by blocking the Appellate Body. As a reaction, the EU is now setting up interim arbitration arrangements (for appeal) with different WTO partners as an alternative. Are these arrangements going to take over the existing restrictive A.B. jurisprudence as binding precedent? If so, this would create a “legal distortion” for the European industry remaining subject to the restrictive WTO-based jurisprudence in TDI matters compared to the U.S. industry.

7. Given the U.S. unilateral actions creating trade disputes, these are expected to become more negotiated than adjudicated through an objective, impartial dispute settlement system (see bilateral deal US – China, upcoming EU – US negotiations on Boeing/Airbus).