

Centre for International
Governance Innovation

Modernizing the World Trade Organization

A CIGI Essay Series



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Introduction

Modernizing the World Trade Organization

Oonagh E. Fitzgerald

 n the twentieth anniversary of the World Trade Organization (WTO) in 2015, the outlook was sanguine as negotiators, trade practitioners and academics around the world reflected on the success of the Uruguay Round and the WTO's achievements and contemplated its future at celebratory international conferences. Discussion tentatively turned to a possible future reform agenda but with little sense of urgency. Reform was seen more as potential embellishment rather than necessity.

With the adoption of the United Nations Sustainable Development Goals in 2015 and the Paris Agreement on climate change that same year, the world seemed to bask in a warm and inspiring glow of global solidarity. It seemed that the international community was recognizing that assuring our future prosperity depended not only on liberalizing trade but also on achieving environmental sustainability, social and economic equality, political stability and access to justice. But this cooperative spirit proved short-lived and long-simmering dissatisfactions with trade resurfaced, followed by convulsive reversals and a surprising return to protectionism.

In 2016, the United Kingdom voted to leave the European Union, and Donald Trump won the presidency of the United States on a campaign of “America first” in an election in which neither Republican nor Democratic party leaders supported free trade. Despite the evident and widely distributed gains from global trade,¹ populism was fuelling political upheaval and bringing to the fore growing discontent about impacts of trade that had been festering for many years: the hollowing out and decay of once great industrial cities and the individual loss of well-paid and steady factory work. The US administration channelled the popular discontent into nationalist foreign policy, distrust of the rules-based international order, disregard of international ties and commitments, and resort to security exceptions, tariffs and trade wars. The global trading system has been battered by this approach, with growth slowing in 2019 to three percent, according to the International Monetary Fund. And while nations cooperated to resolve the 2008 financial crisis, that urge to work together to solve global issues has been subdued.²

Today, the WTO is experiencing a crisis of legitimacy — its Appellate Body (AB) effectively shut down by the United States blocking consensus on new appointments — and hegemonic trade wars seem to have replaced the steady pace of diplomacy and reasoned argumentation. The WTO finds itself struggling to respond effectively to the challenges of rapid economic, political, social, technological and environmental change, seemingly lacking the infrastructural resilience needed to weather today’s geopolitical storms.

Today, the WTO is experiencing a crisis of legitimacy.

The global trading system, which only a few years ago was being lauded as the model of effective multilateralism, now seems locked in an out-of-date governance paradigm, in need of a new program of work with which to start to break impasses and address the urgent and encompassing challenges of the twenty-first century. Part of the WTO’s challenge is figuring out just how to start such a reform initiative when there are such strongly opposing factions to be drawn into consensus.

This essay series grows from earlier work done by CIGI on the WTO: a consultation on the Canadian government’s Ottawa Group initiative on WTO reform³ and two essay series on reshaping trade through women’s economic empowerment⁴ and mainstreaming gender in trade agreements.⁵ Launched as the AB was about to become non-functioning in December 2019, this series casts its net more broadly than the dispute settlement issues while acknowledging that the WTO’s challenges are all deeply interconnected. The essays explore the potential for more comprehensive WTO reform to imagine a new program of work and a way to embark upon that work, and thereby to help invigorate discussions for the next Ministerial Council meeting.

The growing trade tension has sparked important conversations at the WTO and in nations’ capitals about potential WTO reform.

Both the European Union⁶ and Canada with the Ottawa Group⁷ (comprised of Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, South Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, and notably not including China, India and the United States) have put forward ideas for WTO reform, as have others. Canada’s discussion paper focused on improving the monitoring of existing rules, safeguarding and strengthening the dispute settlement function, and modernizing trade rules for the twenty-first century.

This series looks at the issue of reform and modernization from a variety of angles. While some contributors focus on how to keep the lights on in dark times, others offer ideas on how to restart productive negotiations, how to reform and restore the rules-based dispute settlement system (DSS), how to make trade more inclusive, whether to narrow the WTO’s focus to trade basics to leave more flexibility to nations for their own development, and how to update and reshape the WTO to deal with today’s interconnected global challenges.

Dispute Settlement

On the DSS, Bernard Hoekman and Petros Mavroidis observe that even with there no longer being a multilateral forum to hear new appeals due to the United States blocking new appointments to the AB, WTO members continue to express confidence in the DSS because dispute panels continue to be established. The authors note, however, that the United States is not alone in having concerns about the adjudicative function of the WTO, and while it may be the WTO’s “crown jewel,” the failure of the membership collectively to address its imperfections in a timely manner through the Dispute Settlement Understanding (DSU) review has allowed that “jewel to crack.”

Thomas Cottier observes that since its inception in 1995, the WTO DSS has established itself as a prime instrument of international law conflict management. Unfortunately, it worked so well that members overused it, instead of resolving issues through international negotiations. He considers how to recalibrate the WTO DSS by focusing on the relationship between first instance panels and the AB, proposing a more deferential

standard of review while allowing the AB to lead on fundamental issues.

Giorgio Sacerdoti provides an international law perspective on the important innovation of the 1995 DSU in providing for compulsory, exclusive, law-based and binding dispute settlement and appellate review. Noting that recourse to the DSS quickly became systematic and massive, with appeals occurring in two-thirds of panel decisions, he suggests institutional reform is needed, but urges restraint so as not to damage the fundamental benefits of the adjudicative system.

Valerie Hughes examines managerial and alternative approaches to cope with the absence of a functioning AB. Use of DSU article 25 as an interim appeal arbitration procedure for future disputes, as long as the AB has insufficient members to hear appeals, was agreed between the European Union and Canada in the summer of 2019, then between Norway and the European Union in the fall of that year. Fourteen additional members agreed⁸ to such arrangements in January 2020. She notes the AB's closure has made DSU modernization so urgent that it might finally push the membership to the needed consensus for change. Another approach may be resort to dispute settlement mechanisms under free trade agreements (FTAs), some of which may allow for more nuanced reconciliation of trade and sustainable development obligations.

Inclusive Trade

There are growing concerns that while international trade benefits multinational corporations, it tends to leave many behind, as it is much less accessible for micro, small and medium enterprises and businesses led by women and Indigenous peoples. The December 2017 Buenos Aires Joint Declaration on Trade and Women's Economic Empowerment launched a process of reflection, research and action by WTO members to find ways to measure the gender impact of trade, understand and remove barriers that prevent women from participating in trade, and implement positive measures that foster women's inclusion in trade and economic empowerment.

Laura Lane and Penelope Naas focus on women's rights to entrepreneurship, rights to ownership (assets) and freedom of movement

(mobility), and make recommendations for how the WTO could integrate gender issues into many of its functions. This year marks more than two years of engagement and activity in furtherance of the Buenos Aires Declaration and one year since the Canada-Chile FTA with its gender chapter came into force. Considerable progress has been made, but much more needs to be done at the national and international level to facilitate women's successful participation in trade.

Risa Schwartz and Judy Whiteduck discuss the importance of finding ways to include Indigenous peoples in international trade through specific Indigenous chapters in trade agreements, carve outs for procurement from Indigenous-led businesses and explicit protections for traditional knowledge, and including Indigenous perspectives on issues of sustainable development to inform trade and investment policy. The authors propose that like-minded states such as Canada, Chile and New Zealand launch a joint declaration for trade and Indigenous peoples to reaffirm the United Nations Declaration on the Rights of Indigenous Peoples and the 2030 Agenda for Sustainable Development goal of eradicating poverty, including through inclusive and sustainable trade.

Trade's Intersections

In this increasingly interconnected world, one of the key questions is how WTO modernization should deal with the intersection of trade and other issues, such as labour, the environment, climate change and intellectual property (IP).

Jim Stanford expresses skepticism that side agreements and appendices on labour standards in trade deals amount to anything more than token efforts to put a human face on trade deals that almost inevitably result in job displacement for some workers. He suggests that the WTO needs to have genuine solutions to the legitimate fears of workers that their livelihoods will be undermined by trade liberalization. He argues that current crises such as social divisions, mass migration and environmental catastrophe cannot be addressed by keeping government on the sidelines of the economy, and proposes well-managed, mutual and balanced trade as part of a broader commitment to inclusive, sustainable economic and social development.

On climate change, the existential issue of our time, Aaron Cosbey and Andrei Marcu consider whether emissions trading schemes, carbon markets and internationally transferred mitigation outcomes under article 6 of the Paris Agreement are more likely to succeed within or outside of WTO disciplines. The authors note that, currently, the services involved in trading emissions allowances may be covered under WTO law on trade in services, but the actual trade in emissions allowances is not. They ask whether the benefits of WTO protections such as non-discrimination are worth the risks of having rules impede the functioning of measures designed to advance climate objectives.

Chin Leng Lim and Spyros Maniatis consider those “complicated creatures” — intellectual property rights (IPRs) — as exclusionary and anti-competitive, covering assets that are ethereal and dynamic, and impacting on health, human rights and the environment. The authors note IPRs’ unusual fit in the WTO system and ask whether the WTO should reinvent itself as a forum to influence businesses to address their impact on human rights and the environment. They wonder how artificial intelligence (AI) will influence the way we perceive IP and apply IPRs.

Digital Trade

Dan Ciuriak argues that the digital transformation and the data-driven economy will call into question numerous aspects of the WTO rules-based system. He suggests that “the current trade and technology war between the United States and China” means there is little chance of success for a new full-fledged digital round of multilateral negotiations. While technical regulation in many areas, such as privacy, IP and competition policy, will be developed in parallel processes, these will need to interface with trade, and this will necessitate a complete review and update of WTO rules and governance innovation to find “solution space.”

Mira Burri discusses some of the challenges in classifying digital services, where the flows of data are not necessarily linked to one particular service or good but involve multiple back-and-forth data flows, and how rules for the data economy can be multilateralized. With cross-border data flows now generating more economic value than traditional flows of

traded goods, many complex questions arise related to control of data, protection of privacy, national security, jurisdiction and sovereignty. She suggests WTO law is not fit for purpose for governing digital trade because of the classification issues and members’ tailored commitments, so countries are developing regulatory solutions through preferential trade agreements. She argues that the WTO could play an important role in optimizing the regulatory conditions for the data-driven economy by bringing greater coherence to these developments.

Development and Trade

Henry Gao writes that when China joined the WTO in 2001, it was anticipated that accession would help transform China from communism to capitalism, with more freedom to the people in both economic and political spheres. China made substantial commitments and was rewarded with exponential economic and trade growth, but its economic system presents challenges for the world trading system. He urges a China-neutral approach to WTO modernization while nonetheless addressing China-specific issues such as firm structure and public ownership and control.

Balakrishnan Rajagopal connects the ongoing crisis of the AB to the overall existential problems of the WTO as a whole, arguing that the WTO’s problems are partly the result of its own success. He suggests that to survive, it will need to reject some of that legacy. The success of the Uruguay Round has led to backlash from within the South from those who have become losers in the move toward trade liberalization and market integration, and a second level of backlash against the rise of the South from the labouring and commercial classes in the developed world, who have lost out due to outsourcing of jobs. He suggests these issues may need to be addressed by reverting to a less ambitious rules-based system.

Negotiating Strategies

With respect to negotiating considerations and strategies, Debra Steger explores how to update the architecture of rules-based trade cooperation and the WTO’s institutional mechanisms. She suggests that the “key tenets of WTO culture” (member-driven, negotiations within rounds, single undertaking

of multilateral negotiations and consensus decision making) lead to dysfunctions that must be fixed for the WTO to modernize.

Chios Carmody describes important characteristics of the Agreement Establishing the World Trade Organization that promote interdependence and international trade: the flexibilities it offers to member countries in shaping their trade relations, legality and compliance in WTO law being relative phenomena, and the alternating contractual and constitutive aspects of the agreement. Suggesting that the success of WTO dispute settlement should be assessed against persistent non-compliance in other areas, he argues the WTO's enduring strength is as a forum of compromise, where consensus results may sometimes be suboptimal but continue to promote interdependence.

Amrita Narlikar points out that new technologies, different economic models and environmental challenges all present opportunities for divergent approaches to trade and are making it difficult to find consensus solutions at the WTO. She suggests that trade negotiators will need to determine whether it is best to cordon off certain areas from the WTO, in order to still have a trading system that is universal in membership, even if limited in scope, or work on a plurilateral basis with countries that share similar values and achieve deep, but exclusionary, integration among those like-minded allies. These are hard choices and, clearly, it will not be business as usual for the WTO in the future.

Conclusion

Rohinton P. Medhora concludes the essay series with a discussion of reasons for both optimism and pessimism in the face of rapid change and geopolitical competition. Noting the proliferation of issues that intersect with trade in complex ways, he wonders whether the WTO may have already served its central purpose of laying a strong foundation for global trade. He suggests other fora may exist (for example, the Group of Twenty) or may develop that are better suited to launch exploratory discussions about how to break deadlocks and develop a new program of work for the WTO.

The WTO finds itself at a critical point where its legitimacy and authority are eroding and

there is an urgent need for restoration. This essay series makes clear there is no shortage of enthusiasm, expertise and excellent ideas to reinvigorate negotiations over trade and revise and modernize the rules-based architecture of the global trading system.

NOTES

1 World Bank, "World Bank, IMF, and WTO Stand Together for Global Trade" (19 October 2016).

2 Andrea Shalal & Heather Timmons, "Fallout from Trump's trade wars felt by economies around the world", *Reuters* (19 October 2019).

3 "CIGI Expert Consultation on WTO Reform" CIGI, Special Report, 12 September 2019.

4 "Reshaping Trade through Women's Economic Empowerment" CIGI, Special Report, 15 June 2018.

5 "Mainstreaming Gender in Trade Agreements" CIGI, Essay Series, 8 October 2019.

6 European Commission, "WTO modernisation: Introduction to future EU proposals" (September 2018).

7 Global Affairs Canada, "Ottawa Group and WTO reform" (23 May 2019).

8 EC, Commission, "Statement by Ministers, Davos, Switzerland, 24 January 2020", online: <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf>.

ABOUT THE AUTHOR

Oonagh E. Fitzgerald was director of international law at CIGI from April 2014 to February 2020. In this role, she established and oversaw CIGI's international law research agenda, which included policy-relevant research on issues of international economic law, environmental law, IP law and innovation, and Indigenous law. She has extensive experience as a senior executive in the federal government, providing legal services and leadership in international law, constitutional law and human rights law. In her last posting before joining CIGI in 2014, Oonagh served as national security coordinator for the Department of Justice. Oonagh has a B.F.A. (Hons.) from York University (1977). She obtained her LL.B. from Osgoode Hall Law School (1981) and was called to the Bar of Ontario in 1983. She obtained an LL.M. from the University of Ottawa (1990), a doctorate of juridical science (S.J.D.) from the University of Toronto (1994) and an M.B.A. from Queen's University (2007). She has taught various courses in the Faculty of Law (Common Law) and Telfer Business School at the University of Ottawa and in the Department of Law at Carleton University.



Recalibrating the WTO Dispute Settlement System: Strengthening the Panel Stage

Thomas Cottier

Since its inception in 1995, the World Trade Organization (WTO) dispute settlement system (DSS) has evolved into a prime instrument of judicial conflict management in international law. Between 1995 and 2019, 593 disputes were filed. More than 350 disputes were dealt with by panels and the Appellate Body (AB) — more than in any other area of public international law. The overall process of legalization in dispute resolution was remarkable. While the General Agreement on Tariffs and Trade used to be dominated by trade policy experts, lawyers and due process of law increasingly played a crucial role. It became tempting to address in dispute settlement what international negotiations failed to settle.

Over time, the lack of effective legislative response exposed the final word of the AB. In its tradition of exceptionalism, the United States increasingly took issue with rulings in the field of trade remedies and objected to the reappointment of AB members. Finally, under the Trump administration's mercantilist and protectionist agenda, the United States, claiming national sovereignty and backed by the importance of the US market and the US dollar for world trade, unduly blocked in principle the appointment of new members, rendering the AB non-operational by the end of 2019.

The AB brought the WTO much closer to public international law and other regulatory areas.

While majority voting in the appointment of new AB members could legally overcome the current impasse in the General Council, the roots of the problem go somewhat deeper, beyond trade remedies and the United States' "America first" approach to trade. The problem, instead, stems from the crucial relationship between WTO panels and the AB. Whatever the outcome of the current WTO AB crisis, this relationship deserves consideration.

Evolution and Original Design

The first 25 years of the DSS were characterized by increased prominence and influence of the AB. As a new institution, the AB had to build its reputation and influence, step by step. Within a decade, the AB developed the attitudes of a full court of law, both in terms of proceedings and legal reasoning. Composed of eminent trade diplomats, lawyers and experienced judges, the AB brought the WTO much closer to

public international law and other regulatory areas. The AB left reasoning limited to the WTO agreements behind, recognized the application of the Vienna Convention's rules on treaty interpretation, and engaged with panels in completing lacunae on procedural and substantive law. The AB famously held that WTO law cannot be dealt with in clinical isolation (*US-Gasoline*). The case law in particular relating to environmental concerns spearheaded legal developments. And the AB's findings are of lasting importance in view of the challenges of climate change mitigation and adaptation today, preparing the ground to properly deal with process and production methods in coming years.

Beyond the great constitutional questions, the AB also made its mark in more specialized areas of WTO law, often adopting a narrowly focused textual and literal interpretation, even referring to English language dictionaries, despite the three lingual settings of the WTO, including French and Spanish. The AB often confirmed panel findings on particular points. Frequently, the AB overruled panels, and even more frequently (reflected in the number of times the AB "modified" as opposed to "upheld" or "reversed" panel findings), it substituted its legal reasoning without changing outcomes. The judicial attitude of the AB toward the panels' work and reports clearly was shaped by what lawyers call full *de novo* review of panel findings on legal issues, while it practised deference on procedural issues and had to accept factual determinations made by panels.

As a result, by 2014, 72 percent of all panel reports since 1995 were appealed and cross-appealed by the parties¹ — a much higher rate than in any other system of appeal. More frequently, panels came to be considered as a first step of legal assessment, following failed consultations, and panel reports were deemed preliminary. The interim review increasingly focused on factual amendments, while keeping legal arguments for the appellate stage, thus prolonging settlements. Increasingly, panels assumed a role comparable to the administrative law judge in US law in preparing — but not disposing — the case. Indeed, parties were almost bound to appeal, just in order to gain time for the defendant, and to make sure that all legal remedies were exhausted before legal or policy changes could be successfully implemented at home.

Financial incentives to refrain from appealing do not exist. Except for parties' own costs, including external lawyers, no fees arise. The costs of increasing appeals are borne by the membership, including growing staff needs in the AB Secretariat in order to handle the case load.

The resulting system — which places the AB at the heart of the system and works toward a fully independent International Trade Court — is impressive, but not in line with the original design. At the time, negotiators had a more modest role in mind, which is evident in a number of existing AB characteristics. For example, members of the AB are not full-time, but operate under a retainer fee. Appeals should ideally focus on particularly contentious points — they were not designed to be of a general nature. As stated in article 17.5 of the Dispute Settlement Understanding (DSU), cases should be dealt with in three months, which practically excludes the perception of comprehensive appeals in complex cases. The original AB Secretariat was small. The main function assigned to the new body was intended to make sure that the authorization of suspension of concessions was well-founded in law. It was not meant to replace the central importance of the panel stage.²

Panels: The True Heart of the System

A crucial question of WTO reform as it relates to dispute settlement emerges: should the AB or panels be at the heart of the system? Defenders of current practices strongly build upon the AB, as it brought about the necessary balance of market access, non-trade concerns and domestic policy space, overcoming the neoliberal logic of the Uruguay Round results

following the Seattle protests. To the extent that reforms are considered necessary in response to US criticism, they mainly relate to the appellate stage. Much less attention is paid to the panel stage.

To some extent, the dominant role that the AB assumed during the first decades of its work can be partly attributed to weaknesses at the panel stage. These weaknesses should be openly addressed. It is submitted that both stages in reform need to be considered in tandem.

While panels are ad hoc, supported and advised by the WTO Secretariat, the AB is permanent in composition. This creates an institutional imbalance in the sense that the AB has no ongoing relationship with particular panels in a way that would inform its consideration of the issues before it. Except for article 21.5 DSU arbitrations, the same panel composition is unlikely to return to the file. It would seem that the AB, for such reasons, never looked at longer-term institutional costs of reversing panel findings. An important argument to support the role of the AB lies in the alleged risk of weak ad hoc panel composition and too much power being thus given to the WTO Secretariat, which, in turn, could influence or steer the process behind closed doors. Members do not fully trust ad hoc panels and therefore insist on a process of trial and error being potentially subject to appeal. It is for such reasons that I suggested³ introducing permanent panel chairs, which provide continuity and respect by the Secretariat and the AB alike. Partial professionalization of the panel stage would also allow for introducing remand powers in complex cases. As for the eligibility of members of the panel, current restrictions due to third country participation should be left behind; members or panels work in

Views of the AB prevail because it institutionally claims the last word on the matter, and not because the interpretation inherently is more convincing.

their personal capacity. Much like members of the AB, panel members do not represent governments. As I argued in a 2007 article,⁴ the Secretariat should be represented by legal counsel in defence of the public interest of the multilateral trading system. This would give a voice to the institution, which the reports would officially reflect in a transparent manner.

Reshaping Standards of Appellate Review

The DSU clearly entails powers of full and *de novo* review of panel findings by the AB. Article 17.6 of the DSU provides for review of legal issues covered in the panel report and legal interpretations developed by the panel. The question is whether full powers should be used in all cases and at all times, or whether a certain degree of deference should be contemplated in relation to the reasoning and findings of panels. Full review of the AB should focus on what we termed constitutional issues at the outset, while exercising more restraint on more technical questions such as trade remedies or tariff issues. Interpretative differences between panels and the AB often remain within the margin of possible reasonable interpretations. Views of the AB prevail because it institutionally claims the last word on the matter, and not because the interpretation inherently is more convincing.

In the same vein, Robert McDougall suggests,⁵ as a minimum, that the AB might employ a higher (and more deferential) standard of review of factual findings under article 11 of the DSU, exclude interpretations of national laws and avoid statements of interpretation

dispensable to the case at hand (*obiter dicta*). More ambitiously, he suggests considering certiorari powers of the AB, “based on broadly defined circumstances such as when panel reports risk creating inconsistency, demonstrate evidence of manifest legal error, involve matters of significant public interest or of systemic interest to the trading system, or disputes over imprecise obligations.”⁶

A number of factors, therefore, can be considered in adopting and defining an appropriate appellate standard on a case-by-case basis:

- the constitutional importance of the issue for the multilateral system;
- the number of third parties presenting views on the legal issues involved as an indication of the systemic relevance of, and interest in, the matter; and
- the political sensitivity of the case in the context of ongoing negotiations.

Judicial restraint vis-à-vis panel rulings, on the other hand, may be indicated in disputes of a typical bilateral nature and interest, less involving third-party interests, and those relating to technical matters in the field of tariff and non-tariff barriers unrelated to issues of non-discrimination. In such situations, the AB should respect and protect interpretations developed by the panel. Upon review, legal reasoning and findings are upheld if found to be properly argued and substantiated, even though a different — and perhaps even preferable — view exists. In other words, the AB could adopt what lawyers call a “rule of reason” in such cases, specifically tailored to the two-tier WTO system. Such a standard would

Such a standard would balance the system and reduce unsustainable rates and incentives to appeal for the sake of winning time, exhausting legal remedies at the expense of the WTO's scarce resources.

balance the system and reduce unsustainable rates and incentives to appeal for the sake of winning time, exhausting legal remedies at the expense of the WTO's scarce resources. At the same time, this allows parties to challenge panel findings and recommendations they consider to be inconsistent and demonstrably incorrect.

NOTES

- 1 WTO, "Dispute Settlement: Statistics", online: <www.wto.org/english/tratop_e/dispu_e/stats_e.htm>.
- 2 See also Office of the United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (Washington, DC: Executive Office of the President of the United States, 2020), online: <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf>.
- 3 Thomas Cottier, "The WTO Permanent Panel Body: a Bridge Too Far?" (2003) 6:1 J Intl Econ L 187.
- 4 Thomas Cottier, "Preparing for Structural Reform in the WTO" (2007) 10:3 J Intl Econ L 497.
- 5 Robert McDougall, "Crisis in the WTO: Restoring the Dispute Settlement Function" CIGI, CIGI Papers No 194, 16 October 2018, online: <www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function>.
- 6 *Ibid* at 15.

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Dispute Settlement

Dispute Settlement at the WTO: Now What?

Bernard Hoekman and Petros Mavroidis



The dispute settlement system of the World Trade Organization (WTO) — long held to be the crown jewel of the multilateral trading system — is in crisis, potentially endangering the future of the WTO. The United States has been blocking new appointments to the Appellate Body (AB), which plays a key role within the WTO's compulsory third-party adjudication process, as the terms of sitting members expired. The United States' official justification is its dissatisfaction with the AB's performance. At least three AB members are needed to consider an appeal of a dispute panel report, but at the time of writing, the number of AB members stands at one, making the appeals function of the WTO impossible to use. As a result, there is no longer a multilateral forum to hear new appeals. For the moment, dispute panels continue to be established, suggesting that WTO members retain confidence in the dispute settlement system overall, even if it does not include a functioning AB. However, there is uncertainty about how these disputes will be resolved if the panel's recommendations

are appealed. Some WTO members are seeking to self-insure against this risk by developing alternative appeal mechanisms. A prominent example is an EU-Canada initiative to have panel reports heard by an ad hoc appellate process.¹ Such initiatives are patchy solutions at best. They risk creating a multi-tier system across WTO members, as some will participate in an appellate process, and some will not. This is unlikely to result in an internally coherent jurisprudence, the *raison d'être* of any appellate process. While most WTO members oppose the US decision to block new appointments to the AB,² a recent survey of WTO delegations and practitioners³ reveals that the United States is not alone in having concerns about the performance of WTO adjudicating bodies.⁴ While dispute settlement may be the crown jewel of the WTO, it has imperfections. This is neither surprising nor contested. The problem is that the WTO membership collectively has been unable — and unwilling — to make timely repairs, and thus allowed the jewel to crack.

Because the Uruguay Round's WTO Dispute Settlement Understanding (DSU) was a major innovation for the trading system — creating an appellate function and removing losing parties' ability to block the adoption of rulings — the negotiators built in a formal review of the DSU's operation. "The DSU Review" was duly initiated in 1998. Over the years, many suggestions to improve the operation of WTO dispute settlement were made by WTO members. A core substantive concern of the United States regarding the operation of the AB (that the AB has sometimes overreached its mandate) was raised in the DSU Review almost two decades ago. In 2002, the United States and Chile put forward a proposal on "improving flexibility and member control in WTO dispute settlement,"⁵ which aimed to address US concerns regarding AB rulings on anti-dumping that targeted zeroing, a US practice designed to inflate dumping margins, and more generally to create "some form of additional guidance to WTO adjudicative bodies."⁶ Whether engagement with this proposal would have helped avoid the current AB crisis cannot be known, but other WTO members rejected the suggestion. Other proposals made in the DSU Review (for example, the European Union's suggestion that a permanent panel body be established — a true court of first instance, which could have reduced the need for appeal) might also have helped prevent the current AB crisis, if they'd been taken up.

Whether engagement with this proposal would have helped avoid the current AB crisis cannot be known, but other WTO members rejected the suggestion.

In fact, many reform proposals were made during the DSU Review, and not one of them was adopted. The WTO's working practice, in particular its consensus-based decision making,

is likely the reason. Waiting on consensus also permitted the United States to block AB appointments. Although some WTO members sought to discuss matters raised by the United States during the DSU Review, the need for consensus prevented a flexible response to changed circumstances and priorities and made the DSU Review an exercise in futility.

The specific issues raised by the United States regarding the functioning of the AB eventually became the focus of a separate process launched by the General Council in December 2018. Ambassador David Walker (New Zealand) was appointed as "facilitator," with a mandate to explore resolution of a number of issues raised by the United States, which arguably should have been addressed well before the crisis erupted, during the DSU Review. The consultative process proved to be too little too late; by that time, the key protagonists were deeply entrenched in their positions. These consultations were forced to address the relatively insignificant procedural issues raised by the United States, diverting attention from the core issues falling under the broad heading of "WTO Member control" in the DSU Review discussions.

The quintessential US criticism concerns the AB's alleged overstepping of its mandate, most notably exemplified in the haphazard treatment of the idiosyncratic standard of review embedded in the WTO Anti-Dumping Agreement (article 17.6).⁷ This provision, introduced at the insistence of the US delegation in the Uruguay Round, was meant to act as a deferential standard in favour of interpretations adopted by investigating authorities, if panels found that more than one permissible interpretation were possible in any given dispute. The US delegation's understanding was that article 17.6 served as a green light for zeroing. The AB was required to give meaning to article 17.6, but the US critique is that the AB only paid it lip service, and frankly, this critique is well founded. Panels and the AB have routinely said that the article 17.6 standard of review is not at odds with the generic standard of review, and so they have not seriously engaged with article 17.6. Arguably, nothing would have changed with respect to zeroing case law had the AB approached the interpretative issue from the angle of article 17.6, and it is unfortunate that they did not do so.⁸

The AB was required to give meaning to article 17.6, but the US critique is that the AB only paid it lip service, and frankly, this critique is well founded.

Renegotiation of the zeroing issue is probably the wisest path forward, as case law continues to be erratic on this matter (in April 2019, the panel on US-Price Differential Methodology went head-on against 25 years of AB case law and found that zeroing can be WTO-consistent). Where they are not clear, rules should be clarified by the WTO membership. One way to encourage such clarification would be for the WTO membership to require the AB to send cases where the rules are unclear to the WTO bodies responsible for implementing the agreements invoked in a dispute.

If this could be agreed, it would still need to be recognized that panels and the AB unavoidably will have substantial discretion, as they must interpret one incomplete contract (the WTO) by using another incomplete contract (the Vienna Convention on the Law of Treaties, which does not assign specific weights to its various elements). If it were possible to write a more complete contract, that would have happened. Against this background, what is needed is to better select those entrusted with adjudication, and to pay more attention to the organizational aspects of adjudication.

Elements for Future Negotiation on Reforming WTO Dispute Settlement Procedures

A Roster of 15–20 Permanent Panellists

- Panellists should serve for one term of eight to 10 years.
- Depending on criteria to be defined (new issues, value of disputes and so forth), disputes should be heard by divisions of three panellists (for relatively less important cases), or

divisions of seven panellists (for relatively more important ones).

- Decisions should be taken by majority.
- Dissenting opinions should be published.

An AB of Nine Members

- Each AB member should serve one term of eight to 10 years.
- The AB will decide cases in divisions of three members.
- The AB will decide by majority voting.
- Dissenting decisions will be published.
- The collegiality requirement will persist.

Deciding Appointments

- WTO members will decide on the establishment of a commission of eminent experts well-versed in General Agreement on Tariffs and Trade/WTO dispute settlement who will be entrusted with the task to screen the proposed panellists, as well as the AB members put forward by the members of the WTO.
- WTO members should decide the experts for the commission by consensus agreement but should be allowed to decide on panellists and AB members with a qualified majority vote.
- The AB members, as well as the panellists, will have the right to appoint their clerks. The number of clerks serving each judge will be decided *ex ante*, and AB members may select only one clerk of their own nationality.

There is, of course, much more to think about when determining how to regulate the WTO adjudicating bodies more comprehensively. The above could serve as basic axes to help address some important dimensions, such as the quality of judges, the incentives of adjudicators to please their nominating party

and the confusion of functions of the WTO Secretariat. These suggestions complement the so-called Walker Principles put forward by Ambassador David Walker to address US concerns with the operation of the AB and to ensure that:

- appeals are completed within 90 days;
- AB members do not serve beyond their terms;
- precedent (case law) is not binding;
- facts cannot be the subject of appeals;
- the AB be prohibited from issuing advisory opinions; and
- the AB's findings cannot add obligations or take away rights provided by the WTO agreements.⁹

pertinent disciplines, if rulings hinge on the interpretation of the invoked provisions of a WTO agreement in instances where there are gaps or where rules are unclear.¹⁰

One lesson from recent events is that more interaction between WTO members and a reconstituted AB is needed. In doing so, it is useful to distinguish between substantive and procedural rules. Procedural changes in the implementation of DSU by the institution lie at the heart of any resolution of the AB crisis. Such changes require deliberations and decisions by the membership to implement specific reforms to improve the operation of the DSU. If necessary, such process-related changes should be subject to a vote, as envisaged by article IX of the Marrakesh Agreement.¹¹ Doing so is not in the DNA of

One lesson from recent events is that more interaction between WTO members and a reconstituted AB is needed.

These principles are fully consistent with — and indeed often echo — what is already in the DSU. For this reason, they should be amenable to all WTO members and serve as the basis for the substantive agreement needed to address the core US concern: credible measures to ensure the AB will stick to its mandate.

Some type of advisory review body, as proposed by the US business community, with a mandate to assess and report on compliance by the AB with the Walker Principles may help provide greater assurance that matters relating to the performance of the AB can be given greater attention in the DSB. However, at the end of the day, if WTO members believe the AB is exceeding its mandate, they will have to address the problem by renegotiating the substantive provisions of specific agreements. As mentioned, this work could, in part, be facilitated by putting the burden on the shoulders of the membership as opposed to the adjudicative function by stipulating — as a procedural matter — that the AB should request the relevant WTO bodies to clarify the

the organization, for good reason. We strongly support the principle of consensus-based decision making when it comes to substantive rules and negotiated rights and obligations. But we are also of the view that voting on procedural reforms that improve the operation of the institution without affecting the rights and obligations of WTO members should not give rise to concerns that this is a slippery slope. If procedural reform proposals are well prepared — informed by consultations and supported by the good offices of the director-general — voting may not be needed in any event. If the membership is bold enough to adopt proposals along the lines indicated here, we might start seeing some light at the end of the tunnel.

AUTHORS' NOTE

This essay draws on work in progress by the authors.¹²

NOTES

1 See EU, Commission, "Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement" (25 July 2019), online: <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2053>>. In January 2020, Australia, Brazil, Chile, China, Colombia, Costa Rica, Guatemala, South Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland and Uruguay agreed to participate in this initiative. See Philip Blenkinsop & Luke Baker, "EU, China and 15 others agree temporary fix to WTO crisis", *Reuters* (24 January 2020), online: <www.reuters.com/article/us-trade-wto/eu-china-other-wto-members-agree-temporary-body-to-settle-disputes-idUSKBN1ZNOWM>.

2 Clearly reflected in the proposal supported by 119 members calling for launching the selection processes for the six vacancies in the AB. See WTO, "Members urge continued engagement on resolving Appellate Body issues" (18 December 2019), online: <www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm>.

3 Matteo Fiorini et al, "WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences" (2019), online: *Bertelsmann Stiftung* <www.bertelsmann-stiftung.de/en/publications/publication/did/wto-dispute-settlement-and-the-appellate-body-crisis/>.

4 Robert McDougall and Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J. Schott provide excellent discussions of US concerns and options to address them. See Robert McDougall, "The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance" (2018) 52:6 *J World Trade* 867; Tetyana Payosova, Gary Clyde Hufbauer & Jeffrey J Schott, "The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures" (2018) Peterson Institute for International Economics Policy Brief No 18-5, online: <www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures>.

5 WTO, Dispute Settlement Body, Special Session, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement, Contribution by Chile and the United States* (held on 23 December 2002), WTO Doc TN/DS/W/28, online: <docsonline.wto.org>.

6 Heinz Hauser & Thomas A Zimmermann, "The Challenge of Reforming the WTO Dispute Settlement Understanding" (2003) 38:5 *Intereconomics: Rev European Economic Policy* 241 at 242.

7 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*, 1868 UNTS 201.

8 Petros C Mavroidis & Thomas J Prusa, "Die Another Day: Zeroing in on Targeted Dumping — Did the AB Hit the Mark in *US–Washing Machines?*" (2018) 17:2 *World Trade Rev* 239.

9 WTO, General Council, *Informal Process on Matters Related to the Functioning of the Appellate Body — Report by the Facilitator, H.E. Dr. David Walker* (held on 15 October 2019), WTO Doc JOB/GC/222.

10 Payosova, Hufbauer & Schott, *supra* note 4.

11 *Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995).

12 Bernard Hoekman & Petros C Mavroidis, "Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?" (2020) Robert Schuman Centre for Advanced Studies Research Paper No RSCAS 2020/06.

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Approaches to Modernizing the Dispute Settlement Understanding

Valerie Hughes

The Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted in April 1994, called on World Trade Organization (WTO) members to undertake a complete review of the dispute settlement rules and procedures and to decide, by January 1999, whether to continue, modify or terminate them. By that time, it would have become clear whether the rules were fit for purpose or, instead, needed adjustment or a wholesale rewrite. Discussions on potential reforms began in 1998 and have continued on and off for more than 20 years as various deadlines came and went.

Despite extensive discussions covering every step in the dispute settlement process, not one of the hundreds of proposed amendments has ever been adopted. The technical reason is that it has not been possible for members to arrive at a consensus decision to do so. The practical reason is that the system had been working reasonably well and that specific problems — such as the proper sequencing between Dispute Settlement Understanding (DSU)¹ articles 21 and 22 — were often addressed through informal arrangements as agreed between affected members.²

Current Efforts to Reform the WTO Dispute Settlement Mechanism

The current efforts to modify the DSU, however, are of a different nature than previous reform exercises. First, they are being conducted in the shadow of the Appellate Body (AB) crisis (namely, the inability since December 11, 2019, of the AB to hear appeals because there is only one sitting AB member and there must be three to hear an appeal). This situation has come about because the United States has refused, since early 2017, to join a consensus to start the process of selecting AB members to replace those who were finishing their terms of service. The United States' action is in response to its long-time dissatisfaction with what it describes as the failure of the AB to carry out its functions in conformity with the rules set forth for it by WTO members.

process is inoperative. Finally, and most significantly as a measure of their importance to the WTO more generally, the efforts are currently being led by the WTO director-general himself.

Whether these distinctions from the previous set of circumstances surrounding DSU reform efforts will make a difference such that modernization of the DSU will finally be achieved is difficult to predict. In the meantime, members have had to be creative in coming up with workarounds to cope with the absence of the AB.

Workarounds

Several members have worked to find alternatives to “appeals into the void” once the AB would shut down. An appeal into the void would occur where a member who loses a dispute avoids having to comply with the

It has been argued that this focus is misplaced because it detracts from much-needed efforts to reform other areas of the dispute settlement mechanism.

Second, the discussions are narrower: rather than covering all steps of a dispute, they are focused on modifications to appellate review. It has been argued that this focus is misplaced because it detracts from much-needed efforts to reform other areas of the dispute settlement mechanism (as well as reform of other areas of WTO work). While it is true that appellate reform is occupying much, if not most, of the “reform space,” a properly functioning dispute settlement mechanism is fundamental to a well-functioning WTO more generally, and the future of the AB is a central question in addressing this issue.

Third, the reform efforts are more urgent: WTO members continue to bring new disputes, yet one of the main steps in the

panel report by filing an appeal under DSU article 16, with the result that the panel report “shall not be considered for adoption by the DSB until after completion of the appeal.”³ This effectively blocks the member that has challenged a measure and won the dispute from acting on its victory for as long as the AB does not have sufficient members to hear appeals. (The first appeal into the void occurred on December 18, 2019, when the United States appealed the compliance panel report in *United States—Carbon Steel (India)*).

No-appeal Agreements

One such workaround is the no-appeal agreement. Under such agreements, disputing members agree prior to receiving a panel

report that neither of them will appeal the report. Indonesia and Chinese Taipei signed such an agreement in their compliance dispute *Indonesia–Safeguard on Certain Iron or Steel Products*, as did Indonesia and Vietnam for their compliance dispute *Indonesia–Safeguard on Certain Iron or Steel Products*.

It is unlikely that no-appeal agreements will be used very often because there is little incentive for a defending party to enter into one. This is because if a panel finds that there is no violation, the defendant’s measure will remain in place regardless of whether the complainant files an appeal into the void or refrains from doing so under an agreement. If, on the other hand, the panel finds that there is a violation, a no-appeal agreement prohibits the defendant from appealing into the void and depriving the complainant of its victory.

Interim Appeal Arbitration

Another workaround approach put in place by several WTO members is the interim appeal arbitration procedure. This initiative was spearheaded by the European Union as an interim arrangement to replicate as closely as possible the current WTO appellate process. Under the interim procedure, appeals would be conducted under DSU article 25.

Article 25 provides for “expeditious arbitration” as an alternative to the usual panel and AB processes, provided that both disputing parties agree to use that procedure. In addition, the provision permits disputing parties to develop their own rules and procedures, including with respect to the selection of arbitrators. Parties agree to abide by the arbitration award, which is notified to the Dispute Settlement Body (DSB), but unlike panel and AB reports, no mention is made of the need for adoption by the DSB.

On July 25, 2019, Canada and the European Union entered into an agreement (amended slightly on October 22, 2019) to resort to article 25 as an interim appeal arbitration procedure for any future disputes between the two members, should the AB not have sufficient members to hear the appeal. Norway and the European Union entered into a similar agreement on October 21, 2019. Fourteen additional members agreed on January 24, 2020, to put in place similar arrangements, noting that any WTO member can do the same.

DSU article 25 has been resorted to only once in the 25-year history of the WTO. In *United States–Section 110(5) of US Copyright Act*, the United States and the European Union used article 25 at a late phase of the dispute for the determination of the level of nullification or impairment to the European Union caused by the WTO-inconsistent US legislation. The reasons members have not used article 25 more often are not entirely clear, but might include the inability of parties to agree on using a mostly untested procedure, as well as concerns that any decision of an article 25 arbitration panel may not carry the same legal weight as a regular panel or AB report since it would not be adopted by the DSB. Neither of these elements will be present in connection with possible use of article 25 under the new procedure put in place by Canada and 16 other WTO members, or any other WTO members that might sign on to this process, because agreement to use the procedure is already in place and any ruling could not readily be judged as legally weaker because the AB is not able to issue rulings.

Some members and WTO experts⁴ questioned the wisdom of entering into these arbitration agreements. In their view, establishing an alternative to appeals before the AB would undermine the possibility of restoring the AB itself and would operate not as an interim fix but rather as a permanent solution. Other critics questioned the practical utility of this alternative approach, given that Canada, the European Union and Norway — the only participants until recently — have not been involved in many disputes with each other. Both positions have merit. Nevertheless, this is an important development. The initiative is clearly described as a temporary alternative to WTO appellate review, and participants have signalled a strong desire to restore and return to using the AB. Moreover, the now 17 WTO members participating in this procedure include some of the most active

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It cannot be overlooked, however, that some of the most active members in WTO dispute settlement are missing from the list.

participants in WTO dispute settlement, namely Australia, Brazil, Canada, China, the European Union, South Korea and Mexico. The likelihood of this alternative mechanism being used has increased considerably and, as a consequence, the United States may have lost some of its leverage in its effort to keep the AB in limbo for a long period of time. It cannot be overlooked, however, that some of the most active members in WTO dispute settlement are missing from the list. These include Argentina, India, Japan, Russia and, most importantly, the United States. If, how and by whom the alternative mechanism is relied upon in the next several months will determine whether its proponents will be able to restore a measure of confidence about the future of WTO dispute settlement. These will also be important indicators of how close or far WTO members are from returning to appellate review under article 17 of the DSU, which governs appeals to the AB.

Resort to Dispute Settlement Mechanisms under Free Trade Agreements

Another possible workaround to the current paralysis of the WTO AB is to avoid the WTO dispute settlement mechanism altogether and bring cases instead under dispute settlement mechanisms found in existing free trade agreements (FTAs). Although it has been suggested from time to time that resort to dispute settlement at the WTO would eventually wane in favour of FTA mechanisms, so far, this has not been the case, and FTA mechanisms have, for the most part, seen relatively little use. However, this may be changing, and the AB shutdown could further this trend.

The European Union recently launched disputes under its FTAs with the South African Customs Union (SACU), South Korea and Ukraine. This is not necessarily as a result of the current situation in the WTO. The dispute with South Korea concerns the country's obligations related to labour standards, which are not found in the WTO agreements. Therefore, the WTO is not the right forum to pursue such a dispute. However, the disputes against Ukraine and SACU deal with a temporary export ban and a safeguard measure on frozen chicken, respectively. These matters may well fall under WTO obligations and thereby could be subject to challenge in the WTO.

Another reason the European Union may appear more active in FTA dispute settlement going forward is that the European Commission determined in February 2018 that it would step up its use of dispute settlement procedures in FTAs, especially in connection with trade and sustainable development obligations. This was in response to calls for more assertive enforcement of commitments under FTA trade and sustainable development chapters and criticism that dispute settlement mechanisms in FTAs had not been triggered for this purpose.

It is possible that Canada, the United States and Mexico may resort to the dispute settlement mechanism under the recently concluded Canada-United States-Mexico Agreement (CUSMA) once it comes into force later this year. All three countries are frequent users of the WTO dispute settlement system, including for disputes among themselves. The WTO has been a much-preferred venue for dispute resolution to the state-to-state dispute settlement procedure under chapter 20 of the North American Free Trade Agreement (NAFTA); the latter has not been used once in the last 20 years. This is due, at least in part, to the fact that the NAFTA dispute settlement mechanism is flawed: the panel selection procedures operate in such a way as to enable a party to block the establishment of a NAFTA panel to resolve disputes. The dispute settlement mechanism under CUSMA does not include the procedural flaw found in NAFTA, thus opening the door to reliable dispute settlement under that agreement.

It remains to be seen whether dispute settlement mechanisms under FTAs will enjoy increased usage as WTO members continue to grapple with the AB impasse. It is far from clear, however, if WTO members will give up their much-preferred dispute settlement mechanism easily. It cannot be ignored that no FTA dispute settlement mechanism will be able to offer all of the features found in the WTO system, some of which are, no doubt, responsible for the considerable success enjoyed by the system for much of the past 25 years. These features include the ability of every WTO member to participate as a third party in a dispute, which can benefit not only the third-party participant but also the disputing parties who may benefit from significant third-party support for their position; monthly surveillance of implementation by the entire WTO membership at meetings of the DSB, which explains, at least in part, the very high level of compliance in WTO dispute settlement; and a highly experienced Secretariat staff that has been assisting disputing parties and adjudicators for 25 years with close to 600 disputes.

Conclusion

The shutdown of the WTO AB in December 2019 was long foreseen by WTO members, yet they continued to bring disputes (20 new ones in 2019) to the WTO for resolution. This demonstrates members' continued faith in the system to resolve trade irritants in a fair and impartial manner. Nevertheless, members have also long recognized the need to adjust the dispute settlement mechanism to fill lacunae (for example, sequencing between DSU articles 21 and 22) or respond to other concerns (such as calls for increased transparency, enhanced rights for third parties, streamlining procedures and member control). Previous efforts at reform failed because the system was working reasonably well and there seemed to be no urgency to make changes. With the closure of the AB, modernization of the DSU has now become urgent, which might be just what the membership needs to push it toward the ever-elusive consensus required to bring about change.

NOTES

- 1 *Understanding on Rules and Procedures Governing the Settlement of Disputes, Agreement Establishing the World Trade Organization* (1994), 1867 UNTS 154, 33 ILM 1144, Annex 2 [DSU].
- 2 For an explanation of the sequencing issue, see WTO, "The process — Stages in a typical WTO dispute settlement case", online: <www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p2_e.htm>.
- 3 DSU, *supra* note 1, art 16.
- 4 See e.g. Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?* (Washington, DC: Georgetown University Law Center, 2018) at 6–7; Joost Pauwelyn, "WTO Dispute Settlement Post 2019: What to Expect?" (2019) 22:3 J Intl Econ L at 312–15.

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Dispute Settlement

The Challenge of Re-establishing a Functioning WTO Dispute Settlement System

Giorgio Sacerdoti



Thanks to several procedural innovations introduced by the Dispute Settlement Understanding (DSU) in 1995 (as compared to the previous non-binding, conciliatory General Agreement on Tariffs and Trade [GATT] framework), the dispute settlement system (DSS) of the World Trade Organization (WTO) is *compulsory, exclusive, law-based* and *binding* in its outcomes. The respondent party can neither block the establishment of a panel nor avoid the finality of the panel's recommendations to withdraw or amend the measure challenged in the dispute and found in breach of the respondent's WTO obligations. This is due to the "reverse consensus" by which the Dispute Settlement Body (DSB) adopts panel and Appellate Body (AB) reports, thus rendering adoption in practice automatic. An important aspect

is the multilateral framework of the dispute settlement system, since any WTO member can participate as third party to any dispute.

Another key innovation has been the establishment of an "appellate review" of decisions contained in panel reports by a permanent AB (in substance, an adjudicatory court). This is a small body (just seven members), appointed for a short term (four years, renewable just once) by the DSB by consensus and to reflect a geographical balance, among qualified independent experts proposed by WTO members. The AB is entrusted with the tasks of addressing in appeal the legal findings and conclusions of panels, and of upholding, modifying or reversing them as needed.

Shortly after the WTO agreements entered into force, recourse to the DSS became systematic and massive. Contrary to the expectations of the drafters, who thought appeal would be occasional,¹ about two-thirds of the panel reports have been appealed. At the end of 2019, 593 cases had been registered, resulting in 258 panel reports and 145 AB reports issued. Thirty-four cases were pending at the panel stage at the end of 2019.²

The AB's development of a consistent case law has been key in contributing to the purpose of the DSS — that of being “a central element in providing security and predictability to the multilateral trading system.”³ Contrary to the US accusation of “judicial activism,”⁴ the AB's jurisprudence has been characterized by a great care in applying the principles of interpretation of public international law almost maniacally: text (ordinary meaning); immediate and broader context (other WTO agreements); and object and purpose, with rare references to other non-WTO sources.

The DSS has been, in a certain sense, a victim of its own success.

The DSS has been, in a certain sense, a victim of its own success, compared with the failure of multilateral negotiations in the ambitious Doha Development Round (2001–2016). Recourse to the settlement system is not an alternative to elaborating new rules or revising existing ones through negotiations. In any case, it has been used or resorted to by all sorts of economies, large and small, developed and developing, giving rise to a number of complex disputes involving challenges under a growing number of WTO provisions.

This development has put strain on the system. Notably, panels and the AB have not been able to respect the short time limits laid down in the DSU to issue reports, leading to frustration and criticism from WTO members rightly seeking the prompt settlement of disputes (but mostly unwilling to provide the necessary additional resources). Delays have been more substantial at the panel level (the process

taking an average of 511 days versus the 180-day DSU deadline) than at the appellate stage (112 days versus 90).

The DSS without an Operational AB

Let's come now to the US criticism of the AB, which has led the United States to the unprecedented step of forcefully intervening in the selection process (in 2017) and eventually blocking it altogether (in 2018–2019), availing itself of the de facto veto right afforded by the positive consensus required to select and appoint AB members. Besides claiming that the AB has improperly engaged in “judicial activism” (whatever this may mean, considering that the AB decides only cases which are appealed to it, resolving the claims submitted by the parties), the United States has accused it (sometimes in unusually harsh terms) of improper “gap-filling” of provisions left vague by negotiators, and of “over-reach” by exercising functions beyond its mandate,⁵ notwithstanding that the self-imposed interpretive restraint of the AB mentioned above is generally recognized to be the contrary.

The United States has also objected to the AB's lack of respect for the 90-day limit to issue its reports (although delays have been due to the complexity of many cases and the limited human resources available in the AB), and to individual AB members remaining in office beyond their terms to complete appeals entrusted to them (although such extensions are provided for under rule 15 of the AB Working Procedures, and have been practised for more than 20 years). The United States has advocated for the use of more judicial economy to avoid decisions of issues raised in appeal but not strictly necessary to resolve the dispute (which the United States has labelled “*obiter dicta*” and “advisory opinions”⁶). The United States has denied that panels must — or perhaps more accurately, are expected to — follow the precedents of the AB “absent cogent reasons,” as the AB has stated. The role of past decisions of the AB as guidelines for the panels is, however, the natural consequence of the review and clarification functions entrusted to the AB, also keeping with the objective of stability and predictability in the application and interpretation of the rules spelled out in the DSU.

It is significant that the US criticisms are not addressed to key aspects such as the independence, impartiality and competence of the AB (which, if they had been, would be worrisome). Rather, they address operational features that do not hamper the AB functioning. The practices of the AB that the United States criticizes have, on the contrary, helped the smooth operation of the AB. Most WTO members do not share these criticisms and have objected to the blocking of the appointments by the United States for these reasons. They have, however, refrained from labelling the US attitude as abusive and contrary to good faith (as it is) — a cardinal principle underlying dispute settlement that is spelled out in article 3.10 of the DSU. They have preferred, understandably, to deal with the US position in diplomatic negotiating terms rather than by confronting the United States. At the end of 2018, various groups of WTO members tabled at least 18 proposals⁷ to address the issues raised by the United States with a view to finding solutions and unblocking the appointment process before the disappearance of an operative AB at the end of 2019.

The United States has refused to engage on those proposals and has refrained from tabling its own proposal of reforms, notwithstanding the repeated invitations of other members to do so. The United States claims that the WTO membership must first clarify “why” the AB “has felt free to disregard the rules of the DSU,” exceeding its authority and “straying from the role agreed for it by the WTO Members.”⁸ This is a hefty, unsupported accusation directed at more than 25 distinguished lawyers, diplomats, judges, academics and national senior trade experts from 16 different countries whom the WTO members have chosen by consensus over 20 years to settle their disputes (and who did so with general satisfaction!).

In order to try to reach an agreement, the General Council at the end of 2018 appointed the senior New Zealand ambassador David Walker (currently chairman of the DSB) as a facilitator. His confidential report (October 2019) includes compromise proposals that address the concerns raised by the United States and would tackle them without impairing the operations of the AB.⁹

What If the Current Situation Consolidates and the United States Succeeds in Its Exceptionalism?

Even these modest “quick-fix” proposals have not been considered by the United States as a meaningful basis for starting negotiations. Due to the protracted lack of appointments to the AB as a consequence of the blockage of the selection process by the United States, the demise of the AB, a cataclysmic event — unprecedented in any international organization — materialized on December 11, 2019, with just one AB member remaining in office. Ten appeals have been left pending without any clear perspective of how, when and by whom they would be decided in order to bring the underlying disputes to conclusion.

Furthermore, the United States blocked the approval of the WTO 2020 budget until it had obtained the suppression of almost all the AB allocation. The stranglehold on the AB is liable, in turn, to paralyze the panel phase as well, since panel reports appealed “in the void” can neither be adopted by the DSB nor finally decided at the appellate stage. Disputes would (and will) remain unresolved and breaches would not be sanctioned. The whole WTO system of reciprocal rights and duties risks becoming unenforceable. Such paralysis of the binding WTO rule-based DSS appears to be coherent with the trade policy objectives of the current US administration. It is well known that its preference goes to unilateral protectionist measures and to bilateral deals, often obtained by bullying the other parties and threatening to foreclose them from the US market. In the present situation, no authority will be able to review and sanction any such WTO non-compliant measures.

In order to avoid not only the paralysis of the appellate process but also the consequent paralysis of effective panel proceedings and

Disputes would (and will) remain unresolved and breaches would not be sanctioned.

indeed of the whole DSS, the European Union announced in June 2019 the launch of an “interim solution” to cope with the absence of the AB. The proposal suggests that parties to a dispute would agree beforehand, on a reciprocal bilateral or plurilateral basis, on an alternative “appeal arbitration” under article 25 of the DSU, to be resorted to as long as the AB is inoperative. Canada joined first, then Norway, and the initiative continues to gain momentum. In January 2020, at the margins of Davos, the European Union announced that it had reached agreement with 14 additional WTO members, including China, Brazil, South Korea and Mexico, for the interim alternative appeal arbitration.¹⁰ However, even if accepted by many WTO members, this alternative has several shortcomings and would not be applicable to the United States. It would lead to a bifurcated regime within the WTO, with some countries remaining subject to a binding dispute settlement system, and others escaping effective enforcement of its rules.

Even with the EU solution in place, a situation where any major player is not bound by compulsory rule-based dispute settlement risks making the whole WTO framework a sham of what was intended in 1995, without any shared reason to debilitate the system.

Renouncing independent rule-based adjudication and going back to the GATT system, where ad hoc panel reports did not establish a consistent jurisprudence and were little more than advisory opinions or non-binding conciliation proposals, would not be effective within a multilateral system. Nor would such an approach be consistent with the carrying out of international trade under a legally predictable framework, as demonstrated in the current “trade wars.”

The first reality check will be the destiny of pending appeals: Will appellants renounce

them, possibly against some negotiated compensation with the winning party? Will the parties agree on arbitration, or will they wait to see whether the AB stalemate will be resolved? Or will they follow the United States, which, in appealing a panel report in a dispute with India¹¹ just after the demise of the AB, made the announcement that the United States “will confer with India so the parties may determine the way forward in this dispute, including whether the matters at issue may be resolved at this stage or to consider alternatives to the appellate process”? India appears to have accepted, in part, the US position, since both parties announced shortly thereafter that they would keep any appeal and cross-appeal on hold until “an Appellate Body Division can be established to hear and complete any appeal.”¹²

Would a Debilitated Appellate Review Be an Acceptable Reform?

Changes — even substantial ones — of the DSU, which governs the DSS, are possible without a need to formally amend the WTO agreements, and without cumbersome domestic parliamentary ratification. There are two avenues to this end, but both require political will. First, minor changes to any WTO agreement (including the DSU) are possible through majority-adopted “authoritative” binding interpretations by the Ministerial Conference and the General Council under article IX(2) of the WTO Agreement. This could be a proper instrument to adopt Ambassador Walker’s proposals, as possibly revised, preferably by consensus. Second, the DSU itself could be amended through a facilitated procedure set forth in a Ministerial Decision taken within the Uruguay Round negotiations in 1993, which allows DSU modifications by the WTO Ministerial Conference.

Even if accepted by many WTO members, this alternative has several shortcomings and would not be applicable to the United States.

The real issue, of course, is substance. Why should the WTO members abolish the appellate review and accept living with possibly contradictory panel decisions, as was the case under the GATT? Would such a situation (which would be similar to the much-criticized investment arbitration system under bilateral investment treaties) make sense within a multilateral treaty such as the WTO? Can one envisage replacing the AB and its rule-based adjudicatory function by a looser form of non-binding review, such as by a committee of non-independent ambassadors or experts? These approaches would throw the baby out with the bathwater (in a context where the bathwater is not really dirty), just to please and keep the United States on board.

Any reform to the WTO DSS should preserve the system's compulsory, impartial, rule-based, enforceable nature, of which the appellate review is an integral element.

One wonders whether a solution may possibly emerge in parallel with the reform of some substantive provisions of the Agreement on Subsidies and Countervailing Measures (ASCM) advocated in a joint statement of the United States, the European Union and Japan in January 2020.¹³ The proposals include broadening the concept of state-owned enterprises, sidelining the current AB restrictive interpretation of the term “public body” in the ASCM — another possible reason for the United States to block the AB.

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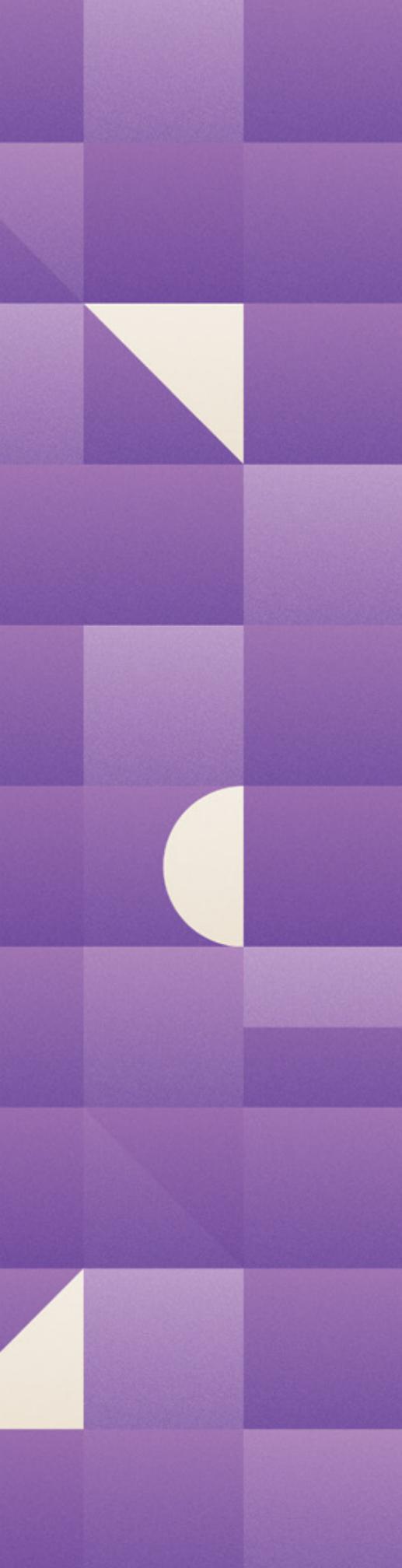
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Inclusive Trade

Women in Trade Can Reinvigorate the WTO and the Global Economy

Laura Lane and Penelope Naas

Where there's a will, there's a way. And anyone who has looked at the global economic forecast lately is probably willing to consider a few ways to ensure that GDP growth doesn't slow to a grinding halt.

Thankfully, there is a way to promote increased prosperity that will be widely shared by all through increased exports, more jobs, greater consumer choice and a broader, more diversified supplier network. Rather than allow a slowdown, we can supercharge the global economy by unlocking the power of women entrepreneurs and ensuring they can trade their products around the world.

As the World Economic Forum's *Global Gender Gap Report 2020*¹ notes, there is a "strong correlation between a country's gender gap and its economic performance."² Further, the report highlights that "countries that want to remain competitive and inclusive will need to make gender equality a critical part of their nation's human capital development."³

Women's Economic Empowerment Isn't Just the Right Thing to Do — It's the Smart Thing, Too

The McKinsey Global Institute says the world would experience a \$28 trillion — or 26 percent — increase⁴ in GDP if men and women were to participate equally in the global economy, making women's economic empowerment a logical first step to unleash real growth around the world.

Much of that potential, however, remains untapped if not everyone is given equal access to engaging in international trade.

In many economies, women disproportionately face obstacles to owning and growing their own businesses, despite the significant economic payback their empowerment brings in terms of job creation, poverty alleviation and economic growth. New global commercial trends such as e-commerce have allowed companies of all sizes to tap into international business and trade like never before, spurring job growth and stability for their domestic economy. Much of that potential, however, remains untapped if not everyone is given equal access to engaging in international trade. In the words of the World Bank, "An economy

cannot operate at its full potential if half of its population cannot fully contribute to it."⁵

On a macro level, women's entrepreneurship and exports can drive growth and economic success, as illustrated by the fact that women-owned businesses that export⁶ are more productive, employ more workers, pay higher wages and report higher-than-average sales. On a micro level, this suggests that increasing export participation by women-owned businesses and entrepreneurs may be one route to expanding the middle class and boosting household incomes, especially in developing countries.

If we ensure all people have equal access to the right tools, we can empower women entrepreneurs and open the door to proven catalysts for economic growth. In this regard, we need to build the case for which areas of trade must be addressed in order for individual women and the collective global economy to benefit, and how women's economic empowerment could be addressed through creative and flexible negotiating tools.

While the law should be the last word on gender parity, we know that secular and religious norms and traditions are often more influential.⁷ That said, changing the law can be an important first step toward this economic and moral imperative. Additionally, while trade and entrepreneurship are not the only ways to contribute to the economy, they are opportunities for women to independently sustain themselves and their families. Empowering women to build their own businesses and to trade allows them to succeed despite well-documented workplace discrimination and inequality.⁸ Society and its institutions *should* continue to fight discrimination against women in the workplace, and entrepreneurship is not a substitute for workplace equality. However, women deserve another option — and one that provides even greater individual⁹ and societal benefits than traditional employment.

How to Advance Women's Entrepreneurship and Participation in the Global Marketplace

In order to truly lead a business, a woman needs to be able to establish and own her

The WTO is uniquely positioned to take action in order to bolster women's participation in the global marketplace and allow the world to benefit from the resulting prosperity.

business outright, access financial tools to invest in its growth, and freely meet with suppliers and customers, be they on the other side of town or the other side of the world. This puts a premium on women's rights to entrepreneurship, rights to ownership (assets) and freedom of movement (mobility).

Sixty WTO members and observers — representing more than 84 percent of global GDP — have gender-equal legal rights in these three categories, but domestic changes will not drive the exponential growth that global adoption of these freedoms could precipitate. For this reason, the WTO is uniquely positioned to take action in order to bolster women's participation in the global marketplace and allow the world to benefit from the resulting prosperity. The following list illustrates the variety of ways in which the WTO can explicitly promote gender equality in trade.

Anti-discrimination: Members can support the ability of women to participate in international trade by making a horizontal commitment in their General Agreement on Trade in Services (GATS) schedules, stating that none of the GATS commitments that countries have made will discriminate against individuals based on gender.

Services sector liberalization: Members should pay particular attention in negotiations to how sector bias will negatively impact the ability of women entrepreneurs to engage in trade and prevent discrimination based on gender or marital status to access trade in services. Governments should review the tools that are widely used by small businesses, in particular those that are women-owned, as they look to grow and expand their

international reach in order to protect and foster the provision of those services among all trade partners.

Import licensing: In 2017, more than a dozen members¹⁰ called for an article on gender equality that covers elements of domestic regulation within the scope of GATS article VI.4 as part of the Working Party on Domestic Regulation negotiations, stating: "Where a Member adopts or maintains licensing requirements, licensing procedures, qualification requirements or qualification procedures, the Member shall ensure that such measures do not discriminate against individuals on the basis of gender."¹¹ Members should encourage the adoption of this article in the domestic regulations negotiations to prohibit discrimination with respect to licensing measures.

Tariffs and tariff schedules: Members should review their tariff schedules, taking into account the specific impact on women traders or consumers as they commit to tariff reductions on imports, which is often overlooked in negotiations. This approach will help foster the success of women-owned businesses without causing them unintentional harm and also lower the cost of products used by women, including, for example, hormone-based contraceptives, pharmaceutical or hygienic items (including sanitary pads), or other tradeable goods that are exclusively used by women.

Sanitary and phytosanitary measures: The WTO Sanitary and Phytosanitary Agreement (SPS Agreement) has as a stated goal to prevent members from adopting or enforcing arbitrary or unjustifiable discriminatory measures or disguised restrictions on trade. The agreement, therefore, should take into

account the gender-specific impacts of SPS measures. Reviews and harmonization across member countries would mitigate the obstacles that are specific to women traders in terms of compliance with such measures.

Addressing technical barriers to trade: The Declaration for Gender Responsive Standards and Standards Development, developed by the United Nations Economic Commission for Europe, provides a basis on which members could build commitments ensuring that standards are gender-responsive. The WTO Technical Barriers to Trade Agreement (TBT Agreement) established the TBT Committee, which would serve as a body to address specific member concerns about the gender-based discriminatory nature of certain technical regulations, standards or conformity-assessment procedures.

Intellectual property rights: A government's imposition of strong intellectual property rights (IPRs) fosters entrepreneurship, and studies have shown that the stronger the IPR protections, the stronger the measures of gender equality in a market.¹² In trade negotiations, members must consider how IPRs affect the flow of commerce, in particular for small and women-owned businesses, in order to eliminate discrimination.

Trade facilitation: According to research by the German development agency GIZ, women are particularly vulnerable at the border, due in large part to disproportionately low levels of literacy and access to information on regulations and procedures, coupled with intimidation practices often deployed through bribes and corruption.¹³ As members coordinate with National Trade Facilitation Committees and the WTO Committee on Trade Facilitation, they should formalize

a feedback mechanism for women traders, for example, through women's business associations, to apply a gender lens to trade facilitation reforms.

Digitally enabled trade: Prioritizing the digitization of customs processes will help to mitigate harassment of women at the border by reducing physical interaction and enabling a one-stop shop for information and document submissions. Moreover, the digital divide between men and women is still wide in many markets, often caused by cultural and social norms that impede access to devices and limit technological literacy. This hinders women traders from availing themselves of e-commerce tools, in particular as those tools are vital to reaching consumers across borders. As members negotiate the Joint Statement Initiative on Electronic Commerce, an important aspect to incorporate is enabling all traders to access the benefits of internet-enabled business — and not just those that are already online.

Market access: In negotiations, members should apply a gender lens to market access provisions to ensure that there are no protectionist measures that adversely affect women traders more than men.

Labour: Workers in labour-intensive sectors are not homogenous, and while trade agreements seek to establish provisions to protect workers, the protection is often not equally applied to men and women. Members should commit to pursuing equal trade benefits for men and women workers, with commitments such as equal pay, equal access to skills training and equal promotion opportunities.

The digital divide between men and women is still wide in many markets, often caused by cultural and social norms that impede access to devices and limit technological literacy.

The issue has failed to rise as a critical, enforceable priority for the WTO.

Procurement: As women entrepreneurs seek to grow, winning government contracts is a critical way for them to showcase their innovation and build their credentials. Members should examine their current procurement statistics to determine how many contracts are currently being awarded to women-owned or women-run businesses, and subsequently establish an inclusive system to boost women's participation and reduce gender gaps. For example, Chile and the Dominican Republic are clear examples of how public procurement has registered a marked increase in women's participation in the market, thanks to capacity-building strategies and their inclusive systems.

Dispute settlement: Experts point out that, between 1995 and 2016, out of the 276 individuals selected to serve on panels, only 14 percent were women, and out of the 268 panels, only six percent were chaired by women.¹⁴ With greater representation by women on dispute resolution panels, in particular in leadership positions, greater consideration will be paid to issues that, to some extent, hinder women's ability to engage in trade.

Capacity building: If women entrepreneurs are given the tools, such as webinars, export training and other targeted trade programming, to navigate international trade, it will be easier for them to participate in the global marketplace.

The following recommendations aim to enhance transparency within the WTO:

- **Monitoring and measurement:** Members should commit to establishing a mechanism for monitoring and measuring progress for women in international trade. Only through establishing a current baseline will the WTO be able to gauge the effectiveness of members' efforts and identify best practices that have the maximum impact on enabling women traders.
- **Trade policy reviews:** The Joint Declaration on Trade and Women's Economic Empowerment, signed at the WTO Ministerial Conference in Buenos Aires in December 2017, includes the voluntary inclusion of gender-related information in WTO trade policy reviews (TPRs). The parties to the agreement should make the sharing of gender-related information a mandatory component of TPRs, thereby holding members accountable for instituting tangible reforms.
- **Consultations:** Members should ensure that their trade policy development process considers women traders' perspectives as part of trade policy consultation processes, utilizing domestic business associations and other women's professional groups to solicit feedback on ongoing trade negotiations.

Creative and Flexible Negotiating Tools to Fuel Women's Economic Empowerment among WTO Members

In 2017, WTO members and observers endorsed the Joint Declaration on Trade and Women's Economic Empowerment, a first-ever collective initiative to increase the participation of women in trade. Even with more than 120 members endorsing this declaration, the issue has failed to rise as a critical, enforceable priority for the WTO. WTO members should embrace creative ways to hold themselves accountable for providing equal economic opportunities to women and men.

To that end, the WTO has a number of flexible and non-traditional negotiating tools at hand.

One option that "reforming economies" and those that champion equality could both undertake is unilateral commitments, for

example, as part of their GATS schedules. This unilateral approach allows governments to make appropriately ambitious commitments on trade in services. This option is a flame starter — while it does not raise the *global* obligation, it demonstrates to other WTO members a commitment to equality and thus encourages them to also take unilateral action.

Another approach is a WTO plurilateral agreement on women in trade, through which willing WTO members could come together to codify the elimination of discrimination against women in trade. Such an agreement would eliminate domestic laws that perpetuate such discrimination and ensure compliance with the principles of equal access and opportunity for trade.

Now – when the world needs growth and opportunity the most – is the time to act.

While such an option would be most effective among similarly ambitious economies, it would institutionalize important commitments that other countries could agree to and be held accountable for upon signing.

In closing, the World Bank sums up women's economic empowerment best: "Although many economies have acted to reduce barriers to women's economic participation over the last 50 years, the progress made cannot be equated with success."¹⁵ The WTO plays a crucial role in driving women's economic empowerment through the construction of a more inclusive trading system that fosters women's ability to reach their full potential in the global marketplace.

WTO members must continue to advocate for making women's economic empowerment an enforceable principle of trade. Now — when the world needs growth and opportunity the most — is the time to act.

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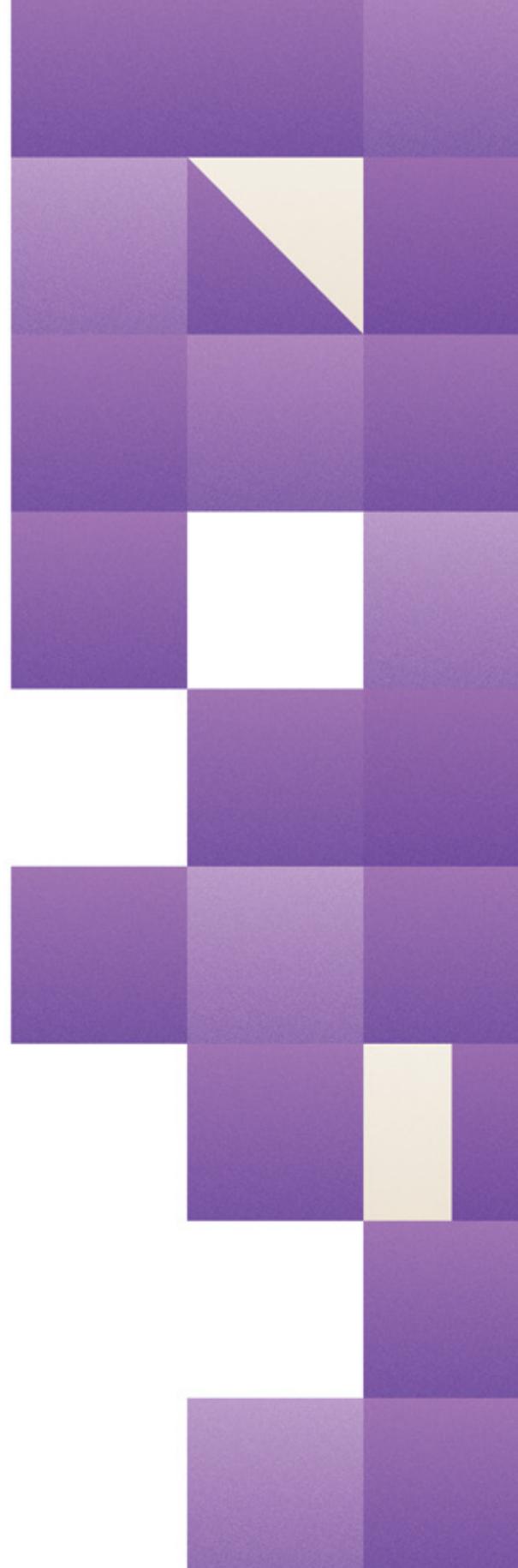
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A Proposal for a Joint Declaration on Trade and Indigenous Peoples

Risa Schwartz and Judy Whiteduck

The relationship between Indigenous rights and international trade has started being recognized in economic agreements. Yet, a comparison between the World Trade Organization (WTO) agreements and regional trade agreements illustrates how the multilateral system is falling behind in its promotion of inclusive and equitable trade provisions for Indigenous peoples. When trading partners enter into more formal agreements to deepen trade, they must consider the relationships that they are establishing — or impacting — with the Indigenous peoples of that territory. Here, New Zealand has led the way; the addition of a Treaty of Waitangi exception in trade agreements¹ has protected the nation's treaty with Māori for almost 20 years. New Zealand also negotiated the first Indigenous peoples cooperation chapter in its agreement with Taiwan.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which came into force in 2018, is another example of the growing recognition that the relations between states and Indigenous peoples must be recognized in international trade agreements. The CPTPP is the first regional trade agreement to recognize Indigenous rights in its preamble. As well, the recently ratified Canada-United States-Mexico Agreement (CUSMA) provides an opportunity for all three member states to deepen relations with Indigenous peoples by protecting Indigenous rights with a general exception and with provisions that can help stimulate Indigenous economies. These improvements over its predecessor, the North American Free Trade Agreement, have been recognized by National Chief Perry Bellegarde of the Assembly of First Nations, who described CUSMA as the “most inclusive international trade agreement for Indigenous peoples to date.”²

Indigenous Peoples and the WTO

While regional trade agreements are beginning to develop models for Indigenous inclusion in trade, and have developed exceptions to protect Indigenous rights, they remain as islands in the sea of international agreements. The WTO agreements, in contrast, contain only a few exclusions and notifications that reference Indigenous peoples. However, these notifications do provide some indication of the enormity of the political and economic relationship between Indigenous peoples and WTO member states. For example, Canada has recently updated its notification for the Cabinet Directive on Regulation. This policy directive sets out the process for developing federal regulations, including the legal duty to consult Indigenous peoples if the proposed regulation has the potential to adversely impact asserted or established Aboriginal or treaty rights³ as affirmed in section 35 of Canada's Constitution.

In 2015, New Zealand provided the WTO with notification of new provisions in its Patents Act 2013, pursuant to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Notification of Laws and Regulations under article 63.2, which included the establishment of a Māori Advisory Committee.⁴ This committee will advise New Zealand's commissioner of patents on patent applications for inventions involving traditional knowledge or indigenous plants and animals. The committee's role includes providing advice on "whether the commercial exploitation of such inventions would be offensive to Maori."⁵

Some members have also provided for exclusions for Indigenous peoples in Annex 7 ("General Notes") to the Agreement on Government Procurement (GPA). For example, Canada's exclusion states, "This Agreement does not apply to any measure adopted or maintained with respect to Aboriginal peoples. It does not affect existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada under section 35 of the *Constitution Act*, 1982."⁶ New Zealand and Australia also have Annex 7 exclusions for Indigenous peoples, while the United States excludes set-asides for minority businesses.

The exclusions to the GPA are arguably the most economically significant provisions for Indigenous peoples, as they provide certain WTO members with flexibility to create set-asides for government procurement opportunities. The United States and Australia have developed successful Indigenous procurement programs that stimulate Indigenous economies. Both New Zealand and Canada have made commitments to improve upon their procurement policies by, for example, setting mandatory set-aside targets so that Indigenous businesses can access procurement contracts.⁷ However, there is scope for innovation to Indigenous procurement as highlighted by a New Zealand expert panel report, which speaks to utilizing government procurement as a means of "lifting the prosperity of indigenous groups. Potentially this creates new opportunities for partnerships between Māori and other indigenous groups."⁸

Although references relevant to Indigenous peoples in the WTO agreements are only found in exclusions and notifications, Indigenous peoples have been impacted by panels established pursuant to the WTO Dispute Settlement Understanding (DSU). However, as they are not WTO members, Indigenous peoples do not have the mechanisms available to effectively assert agency. Both the Inuit in *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* and the First Nations in *US—Softwood Lumber IV* were economically affected by the measures taken by member states.⁹

The *EC—Seal Products* decision of the disputes panel and the Appellate Body (AB) looked at the effectiveness of an exception for Inuit hunters without understanding the importance of the seal hunt to the social, cultural and economic fabric of their lives. Although the European ban on seal pelts devastated the way of life of Northern hunters and their families, it was found to be justified under the WTO exception to protect public morals, yet the discussion about the destruction of an important livelihood for Inuit was never looked at through the lens of morality. A documentary film from filmmaker Alethea Arnaquq-Baril, *Angry Inuk*, is a window into the impacts on Inuit of the ban on seal pelts,¹⁰ a context that the AB was not privy to, as the dispute was brought by Canada, with no direct interventions by Inuit.

Indigenous peoples make up about five percent of the global population, but 15 percent of those who live in extreme poverty.

The Interior Alliance of Indigenous Nations, a First Nations organization, submitted an *amicus curiae* brief in 2002 in the WTO softwood lumber dispute. The brief argued that Canada's failure to recognize Aboriginal title and failure to appropriately remunerate First Nations for timber harvested on title lands could be considered unjustifiable subsidies on the resource. Although the panel received the Interior Alliance's brief, there is no evidence that their arguments had any impact on the decision.

The 2030 Agenda and the UN Declaration on the Rights of Indigenous Peoples

The global population of Indigenous peoples is approximately 400 million people, living in more than 90 countries. According to the World Bank, Indigenous peoples make up about five percent of the global population, but 15 percent of those who live in extreme poverty.¹¹ The 2030 Agenda for Sustainable Development (2030 Agenda) is a UN Resolution that was adopted by the General Assembly in 2015. The 2030 Agenda is the blueprint for an ambitious agenda to eradicate poverty, including extreme poverty. Indigenous peoples are specifically referenced six times in the 2030 Agenda.¹² However, many of the 17 Sustainable Development Goals (SDGs) resonate with Indigenous peoples, including SDGs 1 (end of poverty); 2 (end of hunger); 3 (health); 4 (quality education); 5 (gender equity); 6 (clean water and sanitation); 8 (inclusive and sustainable economic growth); 13 and 15 (climate change and environment); and 16 (peaceful and inclusive societies and justice for all).

Another relevant instrument to the modernization of the WTO is the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).¹³

The UN Declaration was adopted by 143 UN members in the General Assembly in 2007. Since then, the four UN members that initially voted against the Declaration have now endorsed it, which means that it has the support of a significant majority of WTO members, including the United States. The UN Declaration is an important human rights instrument, but the Indigenous rights set out in its 46 articles can also be categorized as social, cultural and economic rights. Articles 3, 21 and 36, when read within the context of the UN Declaration, speak to the economic self-determination of Indigenous peoples, including the right to establish trade relations among their own members, including those separated by international borders. Modernizing the WTO in a manner that provides for inclusive distribution of economic benefits is not only consistent with the economic rights of Indigenous peoples in the UN Declaration, but would also be a step toward achieving the goals of the 2030 Agenda for Sustainable Development, so that "no one will be left behind."¹⁴

A Joint Declaration for Trade and Indigenous Peoples

More research, engagement and policy leadership are needed at the global level to protect Indigenous peoples' rights and interests. Since the creation of the WTO, the global economy has evolved, and with changes come opportunities to assess and implement course adjustments for inclusive and equitable trade policy. The reform of the WTO agreements would be best undertaken in a new round of negotiations. The modernization of the WTO agreements requires an examination of intersections between multilateral trade and Indigenous peoples' lands, resources, knowledge and cultural heritage to provide for inclusion, equity and protection of Indigenous peoples' rights. An overhaul to the TRIPS

Agreement is needed to ensure that it does not violate Indigenous peoples' jurisdiction over their traditional knowledge and cultural heritage. Greater transparency requirements are needed to revise the DSU, including expanding the scope for intervenors to provide participatory rights for Indigenous peoples in disputes that affect Indigenous rights. New agreements, such as on the environment and sustainable development, would provide for consistency in the multilateral trading system and bring it in line with modern regional trade agreements. As well, modernization of the WTO needs to provide for impact assessment on human rights and Indigenous peoples' rights, as well as the environment, including global trade's contribution to climate change. More than just creating new agreements and amendments, modernizing means the WTO needs to re-examine how obligations are created and who is invited into the room for negotiations. Effective reform must include the participation of those who have traditionally been excluded from core decision-making mechanisms, to allow for the restoration of legitimacy to, and for enhanced confidence in, the multilateral trading system.

Unfortunately, the current political climate does not support ambitious multilateral actions, as the impasse with the AB at the WTO has demonstrated. However, an approach that has found success for inclusive trade at the WTO is the Joint Declaration on Trade and Women's Economic Empowerment, which was supported by 121 WTO members and observers at the WTO Ministerial in Buenos Aires in 2017.¹⁵

The joint declaration pledges to remove barriers, support women's economic empowerment and promote economic growth for women through trade. In the two years since the declaration, the WTO Secretariat has created the position of a "trade and gender focal point," a role tasked with coordinating the work of the WTO and creating awareness of the link between trade and gender. Much of the approach behind the joint declaration could be directly applied to advancing WTO action for Indigenous peoples and trade, especially regarding the generation and collection of data on the impact of trade on Indigenous peoples.

A joint declaration on trade and Indigenous peoples should reaffirm the UN Declaration

and the 2030 Agenda goal of eradicating poverty, including through inclusive and sustainable trade. Ideally, an Indigenous peoples joint declaration proposed by like-minded states, including Canada, Chile and New Zealand, could launch a new program of work at the twelfth WTO Ministerial Council.

An Indigenous peoples joint declaration might include provisions such as the following:

- Encourage WTO members of the GPA to explore policies that would create reciprocal incentives to procure goods and services from Indigenous peoples by expanding procurement opportunities and promoting Indigenous partnerships and inter-Indigenous Nation trade.
- Reaffirm WTO member commitment to the UN Declaration and to the 2030 Agenda on Sustainable Development and the SDGs.
- Create an Indigenous peoples contact point at the WTO as a clearinghouse of information to monitor and evaluate opportunities and benefits created by the Indigenous peoples joint declaration.
- Establish a symposium on trade and Indigenous peoples at the WTO to invite the participation of Indigenous experts to explore further reforms in an open dialogue with WTO members. The symposium could include a focus on expanding areas of effective participation and increased transparency for Indigenous peoples in the multilateral trading system, including through dispute settlement and ensuring that the TRIPS Agreement does not violate the knowledge and cultural rights of Indigenous peoples.
- Examine the intersections between multilateral trade and Indigenous peoples' lands, resources, knowledge and cultural heritage to provide for inclusion, equity and protection of Indigenous peoples' rights.
- Explore opportunities to include a text in the WTO agreements to ensure that the rights of Indigenous peoples are respected and protected.

It is time for the WTO to move forward on trade policies and programs for Indigenous peoples, so that trade liberalization is a benefit to all. A joint declaration on trade and Indigenous peoples would serve as a launching pad for further discussion and research on trade policies to lessen barriers and provide export opportunities for Indigenous businesses. Modernizing the WTO through the lens of the UN Declaration and the 2030 Agenda is a foundation for inclusion and equity as well as for protection of Indigenous peoples' rights within the multilateral trading system.

NOTES

1 See e.g. *Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation*, 10 July 2013, NZTS 2013-11 c 24, art 6 (entered into force 1 December 2013), online: <www.nzcio.com/assets/ANZTEC/ANZTEC-Final-Text-10July-2013-NZ.pdf>.

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13 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

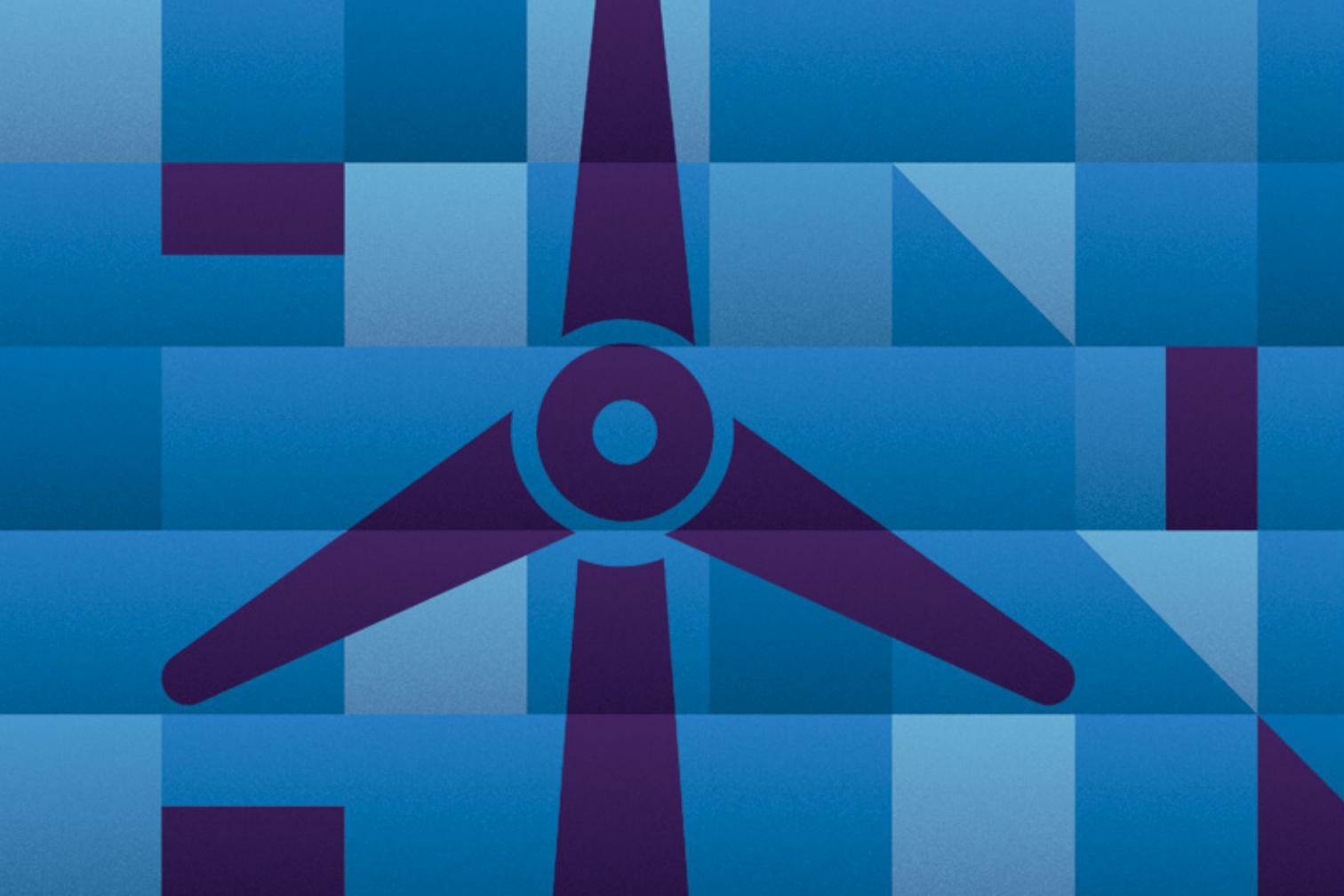
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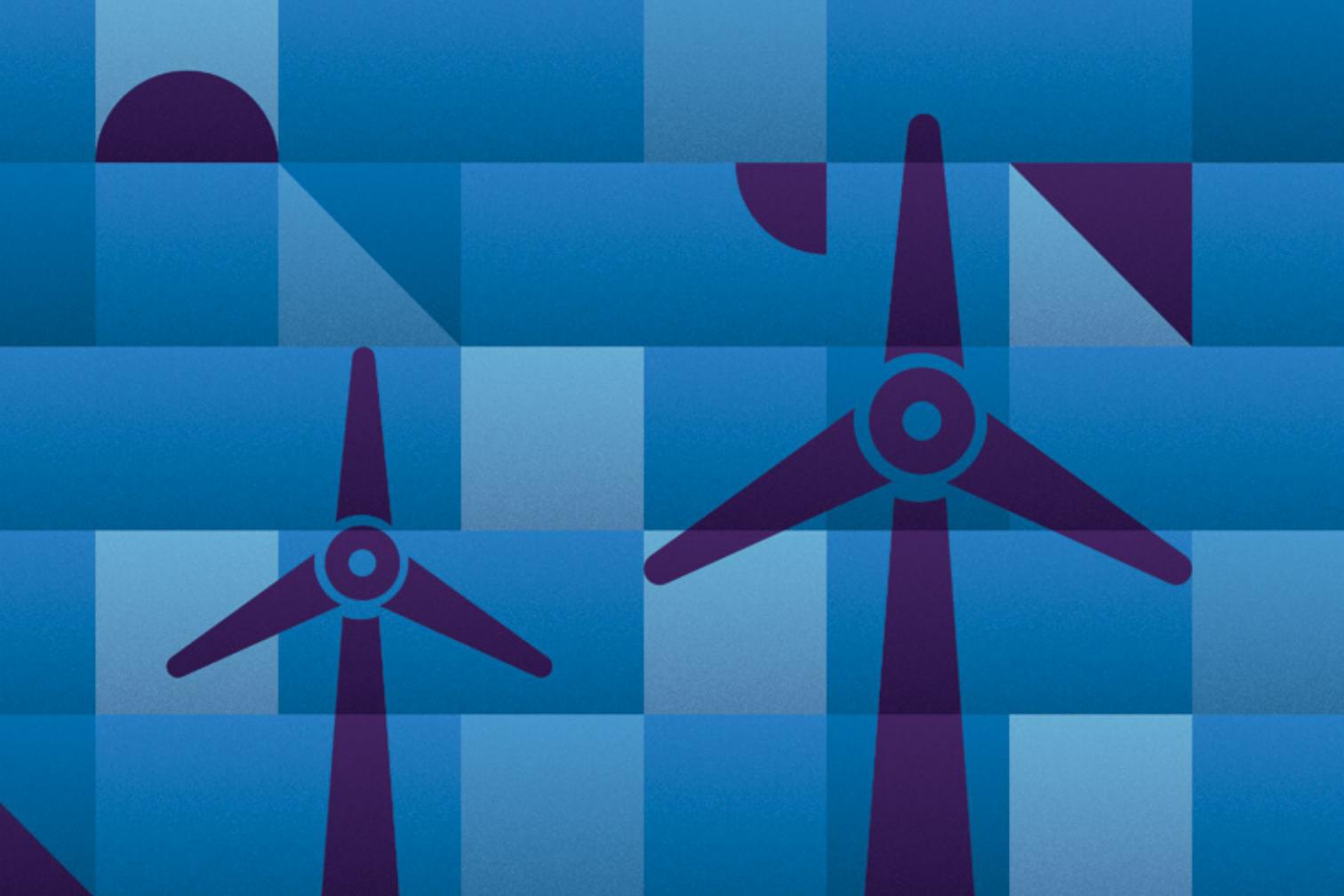
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Trade's Intersections

The Paris Agreement's Article 6 and the WTO: Points of Convergence

Aaron Cosbey and Andrei Marcu



Climate change is one of the defining challenges of our time. That is, it is becoming ever clearer that relative global success or failure in addressing this challenge will fundamentally dictate the nature of humanity's future. As such, it behooves us to think of the ways in which all areas of policy might contribute to efforts to address climate change. In the area of trade law and policy, this boils down to two types of actions: amending trade law or policy that unduly impedes climate action, and formulating new trade laws or policies that proactively support climate change objectives such as mitigation or adaptation. This essay will explore the first type of option: the links between World Trade Organization (WTO) law and article 6 of the Paris Agreement.

The Paris Agreement,¹ adopted at the twenty-first Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change in 2011, is the pre-eminent global agreement on international action to address climate change. Among other things, the agreement sets a target of “holding the increase in the global average temperature

to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”²

Article 6 of the Paris Agreement establishes three forms of voluntary cooperation between countries in pursuit of their nationally determined contributions to fighting climate change, with the aim of allowing higher ambition in their mitigation and adaptation options, and by which countries might promote sustainable development and ensure environmental integrity.

Two of these forms of cooperation are market-based. Article 6.2 allows for parties to use internationally transferred mitigation outcomes (ITMOs) to meet their mitigation commitments. Any exchanges occurring under this provision would take place under bilateral governance (that is, under the terms of an agreement between the country of sale and the country of purchase), but in accordance with guidance to avoid double counting — which was agreed upon by the parties to the Paris Agreement. Activities under article 6.4 exchanges, by contrast, would probably look

more like what took place under the Kyoto Protocol's Clean Development Mechanism (CDM), taking place within a system of rules and institutions established by the parties.

While ITMOs are compliance instruments created under article 6.2, article 6.4 units will also be treated as ITMOs under Paris Agreement rules, once issued. The only question is whether they will be ITMOs from the moment they are issued or after the second transfer — a debate that is not relevant in the context of this essay. Ultimately, both articles 6.2 and 6.4 would involve trade in carbon permits that could be used to comply with emission-reduction commitments in the country of purchase. The final details are meant to be worked out at COP26 in 2021.

Given that article 6.2 and 6.4 transactions involve trade of carbon credits that facilitate achieving the objectives of the Paris Agreement, there would seem to be a natural connection between article 6 and the WTO. In fact, however, WTO rules are generally held³ not to cover such trade.

Any exchanges occurring under this provision would take place under bilateral governance.

Legal scholarship⁴ from the time of the Kyoto Protocol noted that its internationally traded emissions allowances lacked the basic characteristics of products — they were created by government fiat to denote compliance with international obligations and lacked physical presence — and they more closely resembled financial instruments or currency than they did goods. According to this reasoning, while the services involved in trading emissions allowances (brokerage, for example) may be covered under WTO law on trade in services,

the actual trade in emissions allowances was not covered under WTO law. Such an interpretation may also be in line with the findings of the (unadopted) 1985 General Agreement on Tariffs and Trade (GATT) Panel Report entitled *Canada—Measures Affecting the Sale of Gold Coins*. This report distinguished between products, which were understood to be covered by GATT law, and legal tender, which was not. That said, the WTO agreements never defined “products,” and a definitive interpretation of the WTO agreements on this matter can only be rendered by the members and the bodies created by them, including the Dispute Settlement Body.

If we are assessing the ways in which WTO law might be linked to the Paris Agreement, one possibility would be a formal understanding that the carbon permits generated under articles 6.2 and 6.4 are considered goods for the purposes of the GATT.

Along similar lines, the WTO's fourth Ministerial Conference in 2001 produced the Declaration on the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) and Public Health. The declaration asserted that WTO law needed to be part of the wider national and international action to address critical problems such as HIV/AIDS, tuberculosis and malaria, and reiterated the members' common interpretation of certain provisions of the TRIPS Agreement. In that context, it was clear that such an interpretation would help the international effort to combat disease by making medicine more affordable. The question is whether a declaration to the effect that ITMOs are goods — and thus covered under WTO law — could result in a similar contribution to internationally agreed upon goals.

The most obvious consequence of covering ITMOs as goods would be that their trade would be covered by the GATT provisions on non-discrimination. Most importantly, per the GATT provisions on most-favoured-nation (MFN) treatment (article I), members could not provide less favourable treatment to imports of carbon credits from any WTO member as compared to imports of “like goods” from any other WTO member. This applies to import duties, charges, internal

It is possible that some parties may feel the need to supplement the final rules with guidelines of their own that discriminate among carbon credits.

taxes, all rules and formalities associated with import and, significantly, “all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

This would be a significant obligation because, while it is not yet clear exactly how the rules of article 6.4 transactions will play out, it is possible that some parties may feel the need to supplement the final rules with guidelines of their own that discriminate among carbon credits.

For example, some parties might refuse to grant their nationals compliance credits for ITMOs purchased from countries with low climate ambition, on the basis that such ITMOs are simply “hot air.” If carry-over credits are allowed from the Kyoto Protocol mechanisms into the Paris Agreement (a contentious issue), those that were opposed to the idea might similarly discriminate against them — despite the Paris Agreement rules. It is also worth noting that in the context of the CDM, the European Union defined what it saw as “acceptable” certified emissions reductions from the CDM, for example, by freezing out credit for reductions of HFC-23 (a type of greenhouse gas) that it saw as flooding the market. Some parties to the Paris Agreement are already expressing concern about such practices, as reflected in the draft text for operationalizing article 6, where they have introduced provisions that would prohibit such unilateral discriminatory measures.

The WTO’s MFN obligations might not allow this sort of discrimination if trade in these goods were covered. However, it would depend on whether carbon credits from “undesirable” sources were considered like carbon credits from approved sources. If both sources followed the Paris Agreement rules, this would be a strong argument for likeness,

in particular as the Appellate Body (AB) has, in the past, been careful to situate trade law within the broader context of international law. But this specific line of argument falls outside existing WTO case law, although it closely parallels old arguments over whether members could discriminate on the basis of how goods are produced. These arguments were, more or less, put to bed by the AB ruling⁵ in the case of *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, which allowed for such discrimination, in principle, in accordance with the WTO’s General Exceptions (article XX), but set a number of requirements on the practice to ensure it served environmental — rather than protectionist — objectives. In other words, even if MFN disciplines applied, discrimination might be allowed if the measure in question were properly articulated and implemented in accordance with article XX.

One issue to consider is that article 6.2 credits might not be so clearly like each other as article 6.4 credits. While the latter will be subject to common “rules, modalities and procedures” adopted by the parties, the former will be subject only to “guidance” with respect to accounting and the avoidance of double counting. Governments are likely to have significantly different national rules for how article 6.2 credits can be created and certified.

It’s time to come back to the question posed above: would coverage for article 6.4 carbon credits as goods under the GATT help advance the Paris Agreement objectives? Some would argue that eliminating policy space for discrimination actually works against these objectives. The stated aim of the examples described above is, after all, increased climate ambition, so national policy space for discrimination is, at least by this argument, a good thing. Others would counter that discrimination based on purely environmental

grounds is likely to be found acceptable under the GATT's article XX, and that the protection of trade law coverage would be a useful shield against discrimination that is arbitrary, unjustifiable or amounts to disguised protection. From an economic perspective, by this argument, discrimination leads to unreasonable market segmentation that will be detrimental to market liquidity and the achievement of the Paris Agreement goals.

Ultimately, it is worth asking whether the benefits of such protection are worth the risks. On the benefits side, are there, in fact, legitimate threats to the functioning of the article 6.4 carbon markets from "unfair" discrimination? On the costs side, how much are we willing to risk false positives — having the rules trip up measures that were, in fact, meant to advance climate objectives?

It is also worth reflecting on the negotiating dynamics that such coverage might entail. If WTO legal coverage were proposed for ITMOs before the article 6 negotiations had finished, would that add another challenge to completion? Parties that might have been planning discriminatory measures might instead become more insistent in the negotiations on their definition of quality credits. If WTO coverage were proposed after the article 6 negotiations had finished, those same parties might reject the idea, arguing that it materially changed the rights and obligations to which they had thought they were signing on when concluding article 6.

In considering the possibility of a Paris Agreement-WTO linkage on article 6, this brief piece raises more questions than it can answer. Our intent is to at least ask the right questions and stimulate thought on a set of issues that has not yet been well explored.

NOTES

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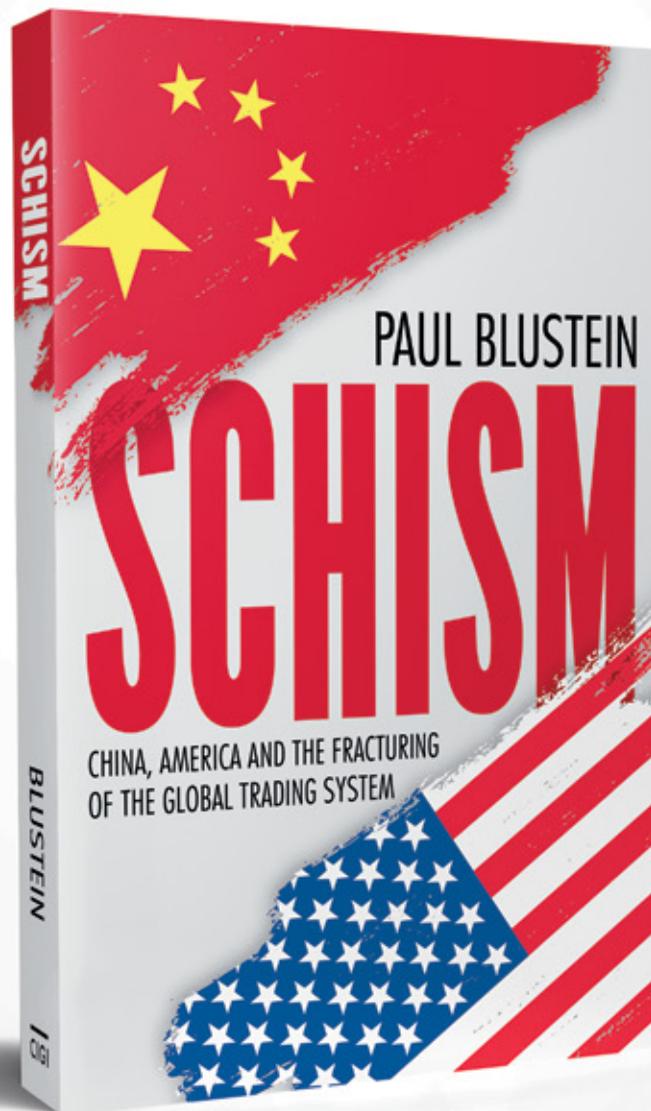
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Intellectual Property Rights Are Complicated Creatures

Chin Leng Lim and Spyros Maniatis

Intellectual property rights (IPRs) are complicated creatures. They are property rights, exclusionary in nature, covering assets that are ethereal and dynamic. Often these rights are controversial, even paradoxical. They are territorial, but their subject matters defy borders, and their aim to protect the ingenuity and investment of their creators requires international cooperation. They are structural elements of monopolistic webs and, at the same time, the tools that enable competition: they bring to the surface innovations that would have otherwise remained covered by secrecy, but also, by being part of a broader market regulatory context, they protect against unfair competition, on the one hand, and defend competition, on the other. They are engines for growth and development as well as weapons, disguised as rights, used in trade wars and power games. Be that so, they cover all aspects of our economies and daily lives, the whole gamut from aestheticism to applied industry to product origin.

Rules-based World Order: The World Intellectual Property Organization and World Trade Organization

Diplomatic attempts to deal with these issues at the international level culminated in two twentieth-century milestones. First, in 1967, the Stockholm Conference adopted the revised versions of the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property, and created a new agency of the United Nations, the World Intellectual Property Organization (WIPO), a coalescing body that brought together diverse, sometimes antithetical, approaches, aims and traditions. WIPO built a consensus around the definition, scope and extent of protection of IPRs that kept on growing, updating the two conventions and building new agreements at the periphery of traditional IPRs.

During the 1980s, it became clear that intellectual property had to become part of the trade framework operated by GATT.

The creation of WIPO was evidence of a world trying to overcome the traumas of the two world wars, create a new world order, and revitalize development and trade on a stable foundation of commonly adopted, longer-standing rules rather than on raw, ephemeral might. Recognizing that creating the conditions for enduring peace and security depended on respect for human rights and opportunities for economic development, the community of nations made the revitalization of trade its first priority following the conclusion of World War II. Thus, the first step toward the creation of the United Nations and the adoption of the UN

Charter in 1945 was a multilateral system facilitating the flow of trade across borders as agreed at Bretton Woods in 1944. However, between 1948 and 1950, an attempt to create the International Trade Organization failed because of congressional resistance in the United States. During the 1948–1994 period, global trade was facilitated through a covenant among governments, the General Agreement on Tariffs and Trade (GATT). That position was overturned in 1994 when the World Trade Organization (WTO) was finally created, following the long Uruguay Round negotiations, as a body that would function between 1995 and 2019 not only as a forum for global trade negotiations but also as the most successful example of an international dispute settlement system.

During the 1980s, it became clear that intellectual property (IP) had to become part of the trade framework operated by GATT. In essence, the system allowed the application of IP legislation at the national level, provided that it would not be “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”¹

The exceptionalism of IP meant that lawyers and state officials could argue for years whether patent laws and procedures constituted a disguised restriction and, if they did, the extent to which they would have to be amended.²

The prevalence of IP in international trade meant that unless it became part of the agreements on trade, the system in its entirety risked paralysis. Negotiations that started during the second half of the 1980s and engaged governments as well as WIPO resulted in the development during the Uruguay Round of an additional Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), adopted at Marrakesh in 1994.

Daniel Gervais describes the complexity and intricacies of an uncertain negotiating process constantly tilting between North and South.³ But during this period, all parties recognized that the world trade system could not function without integrating IP. The controversies and paradoxes surrounding IPRs were resolved diplomatically in the form of a trade-off, with the promise of increased agricultural market

access for the developing countries. With that last jigsaw puzzle piece in place, a new WTO was established in Geneva on January 1, 1995.

What started as a noisy forum ended with a comprehensive agreement that appeared to hijack WIPO's agenda by providing the element missing from WIPO's own consensus: enforcement. And so it was that the TRIPS Agreement and the introduction of the WTO became the second milestone; the TRIPS Agreement adopted the then-current status quo in IP, completed gaps that had been left open, extended protection to new rights and, most importantly, required that member states would also have to introduce adequate enforcement measures. A second aspect of enforcement focused on the enforcement of the agreement itself; members that failed to honour their obligations could find themselves at the receiving end of a dispute resolution system, one that, as we've observed already, has now stalled. At the same time, the extent of the TRIPS Agreement's application would vary according to the level of a member's economic development, and there are compulsory licensing mechanism options available covering public health and similar cases.

The WTO's website⁴ provides a wealth of information on the history of the negotiations, current issues and reviews of dispute settlements involving IP. The relatively small number of disputes, 42, and the fact that a large number were resolved through mutual agreement show that the system works. There is criticism, of course: such issues as the balance between patent protection for pharmaceutical products and access to generic drugs in developing economies or the limitations that health regulations can impose to trademark rights for tobacco products are not easy. Attacks come from diametrically opposed quarters: there are constant cries both against too much protection and for higher standards or more intrusive regulation.

Challenges and Opportunities

Nonetheless, there are two fundamental challenges that could also be viewed as opportunities.

The first has to do with the position of the WTO against a shifting global political

Still, the WTO is evidence of a rules-based architecture: ignore it, knock down walls according to interest and might, and the unintended consequences of unilateralism could be to bring the whole house down.

environment. Looking at what is happening under the aegis of the WTO is not enough. Bilateral trade agreements use IP as either a sword or a barrier; members move toward territorial arrangements rather than international agreements; tariff and non-tariff barriers are threatened without too much consideration for their knock-on effects; both real and exaggerated concerns regarding sovereignty and the role of the Appellate Body have brought the dispute resolution mechanisms of the WTO into a state of quasi paralysis. The list of geopolitical challenges is long. Still, the WTO is evidence of a rules-based architecture: ignore it, knock down walls according to interest and might, and the unintended consequences of unilateralism could be to bring the whole house down. Should the WTO reinvent itself as a bastion of rules-based systems and redefine itself as a forum that influences businesses to address their impact on human rights and the environment? This question applies as much or more to IPRs as it does to other areas.

The second challenge is linked with the effects of artificial intelligence (AI) — and here there are a couple of issues to consider. The first is how AI will influence the way we perceive IP and apply IPRs, focusing in particular

on copyright and patents. From a copyright perspective, we dealt with aspects of the “who is the author or the inventor” question when at the turn of the century we considered computer-generated works. That problem was easy to resolve: the machines were following programs created by humans; they were preprogrammed by humans, unable to exercise their own choices. But how far would we be willing to link the work of a machine with the creator of the machine if the machine itself could exhibit intelligent behaviour, similar to that of a human? Alan Turing, the father of theoretical computer science who came up with the Turing test, once said, in terms of what were then hypothetical creations that

would appear obvious following an analysis executed exclusively by a machine.

It may be that these questions can be answered within the current parameters of copyright and patent law; but, equally, one could argue that there is a fundamental shift in terms of what we want to protect: should the law give IP protection to pure outcomes rather than to the results of human creativity? Such a shift could mean that the way we view IP will change so radically that the TRIPS Agreement will become irrelevant. It is the regulation of AI and the flow of data at a global level that will become the new essential requirements for international trade. But, as always in a

Perhaps the WTO, supported by WIPO and other international bodies, is the right forum in which to explore these existential IP questions.

could pass off as human, “The isolated man does not develop any intellectual power. It is necessary for him to be immersed in an environment of other[s]...The search for new techniques must be regarded as carried out by the human community as a whole, rather than by individuals.”⁵ There is a debate to be had here, between communitarianism and liberalism, as philosophers call it, but for the skeptic the answer may be hidden in the second part of Turing’s statement. Who, now, is an individual?

From a patent law perspective, there is a related “inventive step” consideration; determining what would appear obvious to a person skilled in the art is challenging when that person is aided by machines that can intelligently analyze enormous amounts of data. This is a fundamental issue, in terms of the scope of protection, when the inventor is aided by the machine, but also from the perspective of patent validity, when much more

challenge, there is a hidden opportunity. Perhaps the WTO, supported by WIPO and other international bodies, is the right forum in which to explore these existential IP questions and, if required, to come up with a new architecture for preserving free trade.

Plurilateralism and the introduction of non-state actors under the WTO umbrella and a paradigm shift in terms of regulatory context are ideas that might appear today as farfetched as the TRIPS Agreement appeared in the 1980s. One potential model for the WTO could be the meetings currently going on in Working Group III of the United Nations Commission on International Trade Law, where there is a significant representation of non-state entities as observers in the discussions on the reform of investor-state dispute settlement.

NOTES

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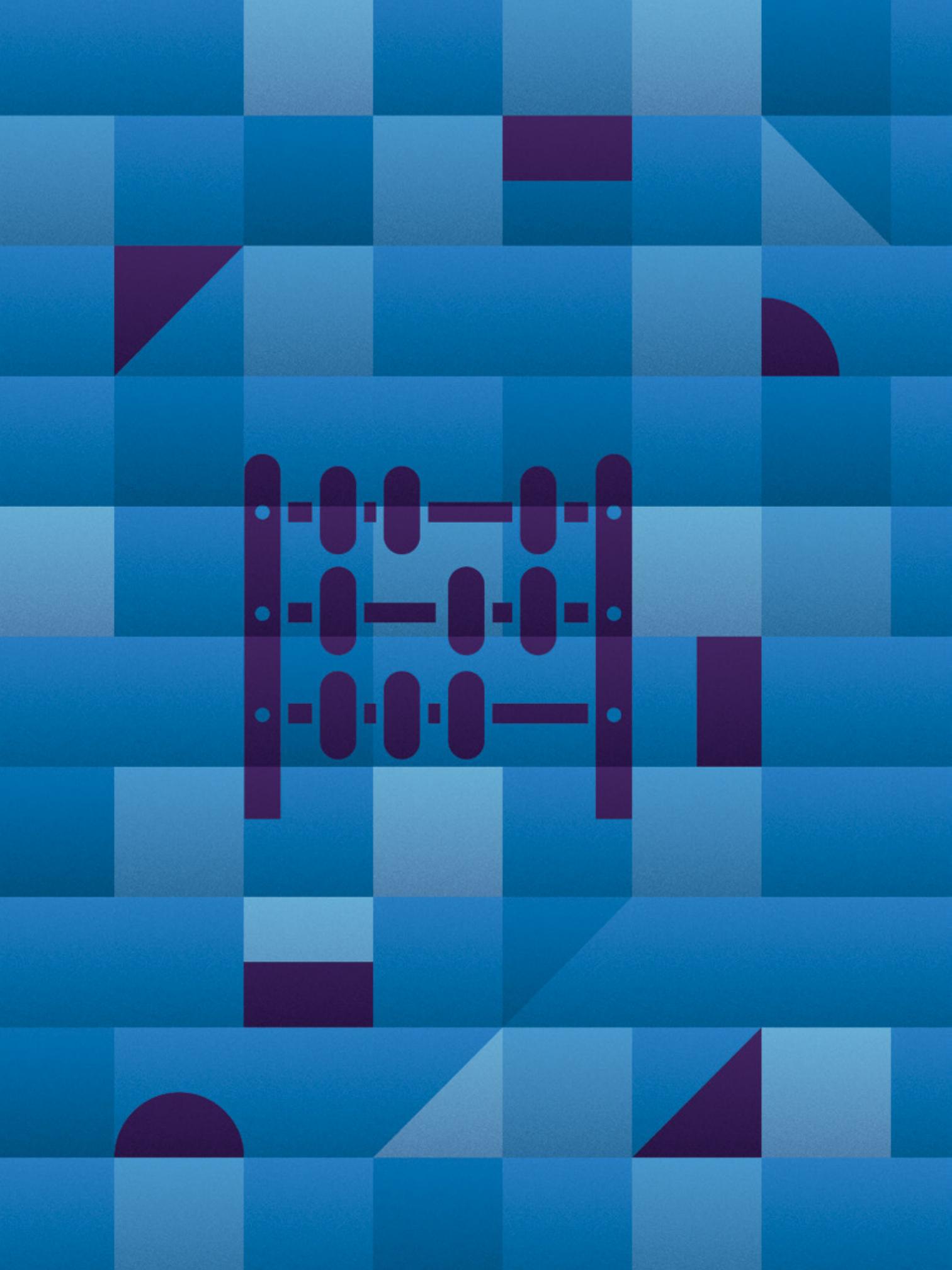
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Back to Basics for World Trade Policy

Jim Stanford

When it works, two-way international trade can be a powerful engine of growth, job creation, productivity and consumer welfare. Indeed, during the expansionary postwar decades of the 1950s through the 1970s, rapidly growing global trade reinforced economic expansion, industrial development and rising incomes in Canada and other industrial countries.

More recently, however, both the scale and the mutuality of the gains from trade have petered out. Trade has slowed dramatically, and trade imbalances have become large and chronic, undermining production and employment in the deficit countries (such as Canada).¹ With countries fighting for larger slices of a stagnant pie, trade has become a beggar-thy-neighbour

contest, no longer the mutually beneficial engine of earlier decades. Vast numbers of people have experienced falling incomes and opportunity,² while a well-off minority have captured most of the new income and wealth.

Globalization was not the only cause of this economic and social polarization, but it was an important contributing factor. Defenders of free trade policy, claiming globalization was not the problem and that people were actually better off than they felt they were, have responded to this disaffection by trying to “educate” the public about the supposed true benefits of trade.³ Predictably, this public relations campaign failed miserably. Long-festered resentment has since burst forth in unhelpful expressions — such as Brexit and the election of Donald Trump.

Most industrial countries, including Canada, have experienced forms of popular (and often populist) rejection of globalization and its institutional and political hierarchies. For years the World Trade Organization (WTO) was deadlocked by fundamental conflicts over the direction and scope of future policy. Now it has been paralyzed by the United States' refusal to populate its top judicial body.⁴ Other bilateral and multilateral trade policy initiatives have similarly stalled; existing trade deals are grappling with internal conflict and fragmentation (such as in North America and the European Union), and few economically significant new agreements are being pursued.

Predictably, this public relations campaign failed miserably.

The first thing to note about the current paralysis of trade policy is that the economic problems that are sparking so much political trouble were not supposed to happen.⁵ In conventional free trade theory, automatic market adjustments are expected to guide all economies toward positions of mutual specialization and improved efficiency. In this happy world, free trade is always a win-win opportunity. The idea that entire regions or countries could be sidelined or impoverished by globalization, creating a powerful incubator for populist backlash, was never admitted.

Indeed, the quasi-empirical mathematical models (called “computable general equilibrium models”) trotted out to promote each new trade deal incorporated far-fetched assumptions about automatic and mutual benefits right into their mathematical code. The models assumed full employment, incomes that automatically rose with productivity, smooth and costless inter-industry adjustments, and a society composed of so-called “representative households” — whereby anything that was good for the nation was automatically good for everyone in it.⁶ This approach simply wished away all the problems of unemployment, job

loss, inequality and stagnation that are now bedeviling trade policy. It simply ignored the many ways (acknowledged in high theory, but not in real-world policy debates) in which trade liberalization can hurt: by undermining net aggregate demand, facilitating capital outflows, stimulating perverse specialization (in industries with falling productivity or deteriorating terms of trade), and exacerbating inequality.

The reality is that global competition (like any other kind of competition) produces both gains and losses, winners and losers — and those differential effects are unevenly distributed across sectors, regions, occupations and entire countries. Not only does conventional free-market theory fail to contemplate the possibility of losses from trade liberalization but, worse yet, free trade deals, in their more aggressive modern incarnations, have handcuffed the capacity of national governments to prevent or ameliorate those losses. In that light, the tendency of free trade policy since the 1990s to exceed its original mandate and go beyond tariff reduction into much broader areas of policy has contributed to its own demise.

The overreaching of trade policy became evident with the Canada-US free trade agreement in 1988, which was extended to the North American Free Trade Agreement (NAFTA) in 1994. These were among the first trade deals to include broad provisions addressing topics that had little to do with “trade,” as conventionally defined. These included new requirements for patents and intellectual property;⁷ new limits on government regulation of foreign investment; powerful new adjudication processes, including parallel investor-state judicial processes that jeopardized the traditional rule of law;⁸ and bizarre provisions such as the Canada-US energy-sharing agreement (thankfully, jettisoned in the new Canada-United States-Mexico Agreement⁹).

With the formation of the WTO in 1995, this mission creep was globalized. The WTO undertook far-reaching efforts to deregulate service industries (even those whose output never crossed national boundaries), codify laissez-faire investment rules, strengthen intellectual property, and further extend the application of quasi-judicial dispute settlement and arbitration (including to debates over

investor rights and national investment policies¹⁰). Other bilateral and multilateral trade deals (including a worldwide network of investment treaties that ensnares countries in a permanent business-friendly web of rules¹¹) followed suit. Modern free trade agreements have little to do with actual trade: tariff reduction and other traditional trade promotion measures are typically described by just one or two chapters of each massive deal. Instead, these deals are more aptly described as international business agreements,¹² aimed at enhancing the scope, security and profitability of private business in general — whether it's engaged in international trade or not.

One unintended but profound consequence of this overreaching was the deep split (largely along north-south lines) that soon enveloped the WTO. Many developing economies rejected the deregulatory and business-friendly bias of this more expansive mission;¹³ this conflict resulted in the collapse of the Doha Round, the failure to expand the General Agreement on Trade in Services and the collapse of the Multilateral Agreement on Investment (and subsequent initiatives). But this broader and more aggressive vision of free trade policy has also failed at the national level.

Consider how domestic economic policy has been curtailed in Canada by the strictures of the new generation of more intrusive and prescriptive trade agreements. For example, the Canada-US Auto Pact arguably generated more economic benefits for Canada than any other trade deal.¹⁴ Yet, an important early decision of the new WTO was to rule that agreement completely out of bounds,¹⁵ because its requirements for proportional production violated the WTO's new, far-reaching national treatment provisions. Since then, Canada has fallen from the world's fourth-largest auto producer (in 1999, when the WTO initially overturned the Auto Pact) to twelfth today — and our industry is still shrinking. The economic and social repercussions from the loss of auto production and related manufacturing have been enormous, and are ongoing.¹⁶ The knee-jerk free trade claim that those jobs would quickly be replaced by other, more productive occupations better reflecting our “national comparative advantage” has been proven hollow. The WTO decision was not the only factor in the auto industry's fall from grace; other free trade deals (notably NAFTA) also played an important negative role. The

industrial destruction wrought by trade liberalization has been profound and painful.

There are other examples of how the intrusive and biased ambition of trade policy after the 1990s undermined Canadian economic opportunity. Canada's disproportionately large and successful aerospace industry was built on the strength of active industrial policies (including public ownership, public procurement, mandated production sharing and more)¹⁷ that have also been curtailed under this new generation of trade agreements. Active policy efforts to foster new and high-tech industries (such as renewable energy equipment and pharmaceuticals¹⁸) have also been hindered or upset by the edicts of free trade bodies. The overreaching of trade rules has affected other policy decisions in Canada, too: from environmental regulations to prescription drug policies to Canadian content laws.¹⁹ Supposedly inspired by liberalism, modern free trade deals seem to spend more time telling countries what they can't do than what they can.

Modern free trade agreements have little to do with actual trade.

Some suggest that widespread concerns over the social and environmental dimensions of globalization could be addressed by expanding the scope of trade deals even further to include measures addressing labour standards, human rights or ecology.²⁰ Examples include the “side deals” in many trade agreements committing participating countries to limited, mostly symbolic labour and environmental measures — usually simply promises to enforce their own labour and environmental laws.²¹ The economic incentives that push certain countries to weaken those national standards to attract more private investment are unaltered. And the ability of other jurisdictions to protect themselves against that competitive race to the bottom is still strictly constrained.

A more realistic approach would be for trade agreements to abandon this effort to

micromanage so many disparate dimensions of economic and social policy. Trade agreements should be limited to facilitating trade in a narrower sense, rather than trying to enforce a one-size-fits-all template for a business-dominated, deregulated economy.

Under this more limited scope for trade policy, national and subnational governments would retain the authority to undertake active policies to enhance the industrial, economic and social well-being of their respective societies, for example:

- sectoral development policies²² aimed at enhancing a jurisdiction's footprint in desirable sectors;
- technology, innovation and skills programs to expand the technological capacities of a country and its firms;
- financial and capital market policies to stimulate productive investment, and to empower government to regulate or deter unhelpful capital flows, including foreign investment and international financial flows²³ in the public interest;
- environmental policies to foster decarbonization and sustainable practices by all companies selling into a domestic market, including border adjustments²⁴ to ensure that imported products are subject to the same standards; and
- active macroeconomic policies to push the economy closer to its productive potential and to facilitate trade-related (and other) adjustments between industries and occupations. It is much easier to adjust to job losses in one industry when decent work is amply available in other sectors, as was the case in the postwar era. A commitment to full-employment would, in fact, move the economy closer to the supply-constrained equilibrium that is assumed in those computer trade models but that rarely exists in practice.

Trade agreements, in this vision, should be limited to reducing tariffs, facilitating trade promotion and trade infrastructure, harmonizing product standards while respecting genuine safety and environmental goals, and taking other initiatives to foster genuine trade — rather than promoting an all-encompassing vision of a private, deregulated, business-led economy. By sticking

to its knitting, trade policy would abandon the more intrusive, deregulatory agenda it has pursued since the 1990s. It would reaffirm both the legitimacy and the capacity of national governments to actively promote a more balanced, inclusive and equitable economy. That refocusing could start the long process of rebuilding public confidence in the value of international trade — as well as affirm the public's legitimate expectation that government will protect their interests, rather than invoke trade agreements as an excuse for inaction. For a generation after World War II, the successive rounds of the General Agreement on Tariffs and Trade (GATT) pursued a limited but successful agenda of pragmatic, mutual liberalization very similar to this vision. It focused its attention on the mutual reduction of tariffs and other obvious trade barriers, in the context of sustained full-employment macroeconomic policy that kept people employed, and their incomes rising, as trade-related adjustments took place. No populist backlash occurred; indeed, most citizens would not have even heard of the GATT. Trade liberalization wasn't a goal in its own right; the GATT didn't attempt to impose a holistic and ideological vision on participating nations. Instead, trade policy played a limited role, offering back-up support to the larger mission of postwar redevelopment and welfare state capitalism.

Given the economic failures and the current political stalemate of modern free trade, it's time for trade policy to get back to these basics. If the WTO is to regain the legitimacy and the buy-in that are essential to its future, it has to abandon its broader ambition to enforce a worldwide pro-business agenda. It is time to reimagine a more focused and feasible mandate for trade policy. In a world in which national governments are compelled to actively confront increasingly unstable social divisions, mass migration and environmental catastrophe, the starting assumption of current trade policy — that the economy works best when government is forced to the sidelines — is no longer tenable. Well-managed, mutual, balanced trade can be part of the solution. But first it has to relearn its place — as just one component of a broader commitment to inclusive, sustainable economic and social development.

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How Should the WTO Respond to the Data-driven Economy?

Mira Burri

Digital trade is not something abstract but has become an essential part of everyday life — think of the numerous Amazon packages delivered every day or the countless iTunes songs streamed on daily commutes. Digital trade, however, encompasses more than selling goods and services online and includes more complex transactions, where the flows of data are not necessarily linked to one particular service or good but involve multiple flows. The back-and-forth data flows associated with financial services or physical activity-tracking devices are good examples.

Over time, data flows have radically changed the picture of global trade. Data is said to be the “new oil” and, like other factors of production, such as natural resources and human capital, it is increasingly the case that much of modern economic activity, innovation and growth cannot occur without data. Recent studies show that cross-border data flows now generate more economic value than traditional flows of traded goods. This is a remarkable development, given that the world’s trade networks have developed over centuries, while cross-border data flows are relatively young. Data flows are also said to be more inclusive and allow the participation of micro-, small and medium-sized enterprises (MSMEs), including those in developing countries.

In the context of trade policies, data's growing economic importance has one crucial implication: data must flow across borders. Things such as the provision of digital products and services, cloud computing applications, the Internet of Things and artificial intelligence (AI) would not function if cross-border data flows were restricted. This critical interdependence puts trade policy under

to such an argument because it is, in many aspects, both in the substance and in the procedure, flexible and resilient. There are multiple rules with regard to the application of the basic principles of non-discrimination, standards, trade facilitation, subsidies and government procurement that do operate in a technologically neutral way and can accommodate new situations.

Data's growing economic importance has one crucial implication: data must flow across borders.

pressure and demands urgent and clear-cut solutions. Finding those solutions may not be easy, however.

The use of data opens many questions related to the control of data and the protection of privacy and national security. Furthermore, when data leaves the country, many jurisdictional issues arise, and countries no longer feel that they are in a position to secure adequate protection for their citizens. This has, on many occasions, motivated governments to prescribe diverse measures that localize the data, its storage or suppliers, so as to keep these components within the state's sovereign space. This approach has had repercussions for the divergent digital trade strategies of different countries on the international scene.

Is Existing Trade Law Dated?

Unfortunately, the answer to this question is yes. A lot of existing trade law is out of date. The World Trade Organization (WTO) agreements,¹ which form the basis of international trade law, were adopted during the Uruguay Round (1986–1994) and came into force in 1995. Despite some adjustments — such as the Information Technology Agreement (ITA, updated in 2015) and the Trade Facilitation Agreement, the WTO is still very much in its pre-internet state. One could, of course, argue that laws need not change with each and every new technological invention. Indeed, WTO law lends credence

The evolution of the case law of the WTO dispute settlement system may also support a path of legal adaptation. The *US–Gambling*² case is illuminating in this context: not only did this case confirm that the General Agreement on Trade in Services (GATS)³ commitments apply to electronically supplied services but it also clarified key notions of services regulation, such as the application of the likeness test and the scope of the “public morals/public order” defence under the general exceptions of GATS article XIV.

It is, however, flawed to assume that these positive features of WTO law suffice. Indeed, there are many reasons for skepticism. Some relate to the ways WTO rules — and, in particular, the GATS provisions — were designed to allow WTO members to tailor their commitments. Others relate to outdated, pre-internet classifications of goods, services and sectors, upon which these commitments were based and which are becoming increasingly disconnected from trade practices. For instance, as WTO law presently stands, it is unclear whether previously unknown offerings, such as online games, should be categorized as goods or as services. Online games, as a new type of content platform, could also fit into a number of categories: computer and related services, value-added telecommunications services, and entertainment or audiovisual services. It is equally unclear when the electronic data flow is intrinsic to the service and whether

this flow should be classified separately or as part of the traditional service. Classification is by no means trivial; each category may imply a completely different set of duties and/or flexibilities. The classification dilemma — which is particularly critical for digital trade — is a revealing example of the WTO's paralysis, but it is by far not the only one. Many other issues, although discussed in the framework of the 1998 WTO Work Programme on Electronic Commerce,⁴ have been left without a solution or even a clarification.

Against the backdrop of pre-internet WTO law, many of the disruptive changes underpinning the data-driven economy have demanded regulatory solutions outside the ailing multilateral trade forum. States around the world have used, in particular, the venue of preferential trade agreements (PTAs) to fill in some of the gaps of the WTO framework, clarify its applications, address the newer trade barriers and accommodate their aspiration for seamless digital trade. Yet, the framework that has emerged as a result and now regulates contemporary digital trade is not coherent, evenly spread across different countries or otherwise coordinated. The WTO can, in this sense, play an important role in optimizing the regulatory conditions for the data-driven economy.

Where Is Reform Needed and Where Is It Feasible?

When considering changes to the multilateral rules to address digital trade, two types of questions can be asked. First, how can adjustments to the WTO agreements be made to remedy the existing problems of inadequacy, inconsistency and legal uncertainty with regard to burgeoning electronic commerce? Second, is the international trade governance system fit to face both the current digital challenge and the ones yet to come? The first question can be addressed with some incremental changes, while the second demands more innovative legal engineering, which is likely to transcend issues of market access, elimination of tariffs or the concrete classification of a digital good or service.

So far, countries have disagreed on both questions and, as a result, reforms are not readily available. On some issues, however, the advancements made in preferential trade venues — in particular with the more recent

and highly sophisticated templates such as those of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)⁵ and the Canada-United States-Mexico Agreement (CUSMA)⁶ — may enable solutions at the multilateral level.

PTAs as a Stepping Stone toward a Multilateral Agenda on Digital Trade

One preliminary, but critical, issue will be to have a shared understanding of digital trade as a broad rather than a narrow policy topic. In the latter sense, digital trade is plainly equated to commerce in products and services delivered via the internet — a view supported by China in the ongoing negotiations. The broader conceptualization of digital trade goes beyond online trade and has to do with enabling innovation and the free flow of information in the digital networked environment — a view shared by the United States and other WTO members.

One preliminary, but critical, issue will be to have a shared understanding of digital trade as a broad rather than a narrow policy topic.

When one looks at the level of commitments and rule creation in PTAs, which have in the last two decades increasingly dealt with digital trade⁷ in this broad sense, one can observe that despite certain variations across treaties, there are important levels of regulatory convergence on key objectives and principles. The customs duty moratorium on electronic transmissions is one good example, as it has been covered by

almost all PTAs and made permanent in the treaty texts. Other rules that show convergence and could be multilateralized are those that support the facilitation of e-commerce, the reduction of unnecessary barriers and the needs of MSMEs, as well as the rules around transparency, paperless trading and electronic authentication.

PTAs have also permitted some innovative rule making that is meant to specifically address the new set of concerns in the context of data protectionism. Next to the new generation of critical norms on data that ban localization measures and bind parties to a regime that must allow the free flow of information, there are some other rules worth mentioning. If we take CUSMA, for instance, algorithms are, for the first time, included in the digital trade chapter and have been added to the ban on requirements for the transfer of access to source code (article 19.16). A second innovation refers to the recognition of “interactive computer services” as particularly vital to the growth of digital trade (article 19.17[2]). A third and rather liberal commitment of the CUSMA parties regards open government data.

Protecting Data While Keeping It Open

It should be noted that in the area of data governance, significant differences across countries remain, in particular with regard to the treatment of cross-border data flows, data localization and personal data protection. In this context, it should be acknowledged that while governments do have the right and the responsibility to protect interests and values important to

their citizens, they also have a variety of tools available to achieve these goals, and many of them can be congruent with the functional nature of the internet while fostering an open and innovative data economy.

Here, two paths are important to consider, especially when developing digital trade rules that are also politically feasible. The first such avenue is to address cross-border data issues in trade agreements horizontally, and not in a manner directly related to a discrete service or a discrete transaction. There are various ways to do this: as part of the horizontal commitments of the services schedules; in the form of a reference paper attached to the schedules as an additional commitment under GATS article XVIII; as part of a plurilateral trade in services agreement or more radically; or as part of a dedicated digital trade agreement, which can either work on a most-favoured-nation (MFN) basis, like the ITA, or benefit only the signatories on a non-MFN basis, like the Agreement on Government Procurement.

A solution must also provide working mechanisms that can counterbalance the free flow of data and the non-economic concerns raised by cross-border data transfers. Personal data protection is likely to be critical here. In this context, it may be apt to differentiate between types of data, such as business, personal or sensitive data. While such an exercise may allow for a special treatment and higher levels of protection of personal data and more liberal treatment of the rest, the exercise comes with many pitfalls. Big data poses serious challenges to conventional privacy safeguards and puts into question the very distinction between personal and non-personal data.

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The Role of Trade Law

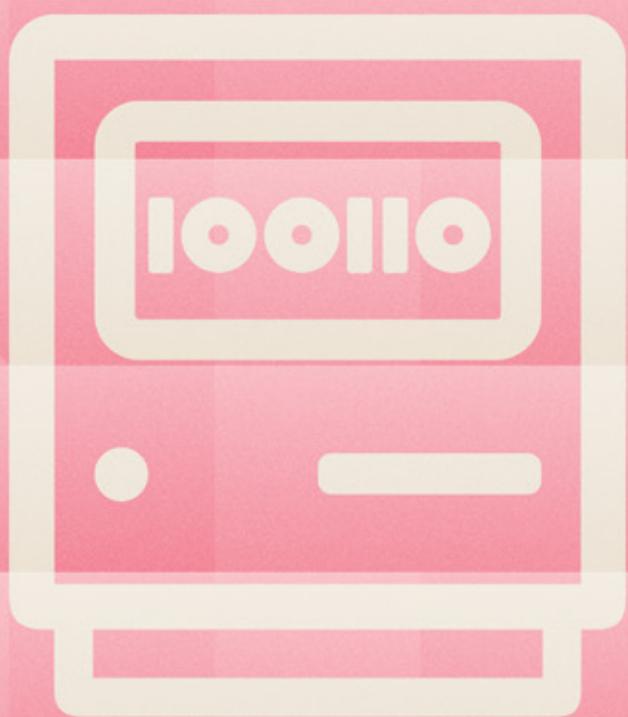
As the WTO faces the challenge of evolution, we must not forget that trade law has, over the years, provided for flexible and well-working mechanisms to reconcile different values. The General Agreement on Tariffs and Trade⁸ article XX and GATS article XIV are great examples in this context, as they provide possibilities for permitting certain violations of WTO commitments, when these pursue public policy objectives and do not unjustifiably restrict trade. Other agreements — such as CUSMA and the CPTPP in particular — have also helped to pave the way. States have increasingly realized the value of data and the critical importance of cross-border data flows. Even the most skeptical and cautious parties are rethinking their positions with regard to digital trade. For instance, the recent EU-Japan free trade agreement provides that “the Parties shall reassess the need for inclusion of an article on the free flow of data within three years of the entry into force of this Agreement.”⁹ This is a novel approach and signals that the topic of free data flows has been intensely discussed between the two partners. More generally, this means that the discourse on data flows is evolving and that we are bound to see more deliberate action and commitments in future trade agreements. The recent US-Japan Digital Trade Agreement and the Digital Economy Partnership Agreement between Chile, New Zealand and Singapore confirm this trend. Overall, there is a profound need to better understand the implications of the data-driven economy and to curb digital protectionism — policy makers must ensure a sustainable regulatory environment in the age of big data and AI.

NOTES

- 1 WTO, “Understanding the WTO: The Agreements”, online: <www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm>.
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- 5 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 (entered into force 30 December 2018).
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- 7 Mira Burri & Rodrigo Polanco, “Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset” (2020) 23:1 J Intl Econ L.
- 8 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194 art XX (entered into force 1 January 1948).
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Digital Trade

The WTO in the Digital Age

Dan Ciuriak

The digital transformation is driving profound changes in business models and the structure of economies, creating new sources of wealth and disrupting established ones. It is also reshaping the context in which business takes place, including how people interact socially, how domestic politics play out and how national interests align in the geopolitical arena. All these developments have implications for international commerce, including the conditions for competition between economies and the distribution of the benefits from trade.

This raises questions about the rules for international commerce as codified under the Agreement Establishing the World Trade Organization¹ (WTO Agreement) and other international treaties. Do these rules hold up in the new evolving digital context (with suitable updating), or is there a need for more fundamental revision and, indeed, a renegotiation of WTO members' commitments?

From a day-to-day business perspective, the existing framework has, so far, accommodated change reasonably well. WTO rules are technologically neutral, so the introduction of new ways to conduct trade does not change members' rights or obligations. Moreover, the digital economy is booming. Electronic commerce (e-commerce) has been growing by leaps and bounds, with numerous institutions providing the basic legal infrastructure by establishing conventions for things ranging from governance of internet protocols (domain names, net neutrality and so forth) to authentication of electronic contracts and recognition of electronic signatures.

Comprehensive enabling frameworks for e-commerce between nations have been articulated and embedded in regional trade agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the Canada-United States-Mexico Agreement (CUSMA) that is set to replace the older North American Free Trade Agreement. And a negotiation is under way under the auspices of the WTO to create a broader multilateral agreement along these same lines.

However, a more general updating of the trade regime is needed to address the many points of friction that have emerged as the digital transformation has progressed. Reflecting this, negotiations have been launched by Chile, New Zealand and Singapore toward a Digital Economy Partnership Agreement (DEPA). In addition to the technicalities of facilitating electronic commerce (including access to the internet, online consumer protection and digital identities), the draft DEPA addresses a range of contentious issues such as customs duties on digital products, data localization and cross-border data flows, cyber security and national security exceptions to normal course digital trade, protection of personally identifiable information, cooperation in competition policy and new issues such as the regulation of artificial intelligence (AI).

The limited development of many of the chapters in the initial draft of the DEPA signals the extensive work that remains to be done in fleshing out this regime. Moreover, the DEPA does not address all the hot button issues that are threatening to undermine the multilateral trading system. The following is a brief description of the key issues that need to be addressed at the broader multilateral level to make the WTO fit for purpose to regulate digital trade in the modern innovation-intensive, knowledge-based and data-driven economy.

Governance of Data Flows

In thinking about digital trade, there are many unresolved categorization challenges, but for present purposes, just consider the distinction between conventional intellectual property (IP) in digital form (for example, a song, book or movie) and the commercially valuable information about who bought it, when and where. Today, such data, captured and stored in

massive quantities and analyzed with advanced tools, constitute the motherlode of the data-driven economy.

Clearly, data that are constituent parts of the electronic transmission of commercial services need to flow unimpeded across borders, consistent with WTO General Agreement on Trade in Services (GATS) commitments on technological neutrality of services delivery. However, it is unrealistic to expect countries to accept that GATS commitments on digital services also entail commitments on the asset value of data generated within their jurisdiction.

Importantly, these data flows represent a new mode of trade that is not covered by the WTO — an implicit barter exchange of data for “free” internet services. The fact that these data can be captured and commercially exploited by companies that have no physical establishment in the source country also means they escape taxation in the source jurisdiction under current international tax conventions. Who gets to capture the value of data is one of the major points of friction in the digital economy; this can only be sorted out through a negotiation that would subsume the current WTO negotiations on e-commerce, the review of the moratorium on tariffs on electronic transmissions and the initiative of the Organisation for Economic Co-operation and Development on the taxation of profits generated in the digital domain.

Legitimate Public Policy Exceptions to Free Flow of Data

The networked world is generating new demands for governance that will reshape how societies regulate themselves. Social concerns are being raised by ubiquitous surveillance (by both corporations and states) and the erosion of privacy, misinformation and fake news, political interference and manipulation of electorates, and commercial exploitation of people’s vulnerabilities (including of children). In addition, the digital transformation raises vulnerability to psychological operations (or “psyops”), which can be used to destabilize countries from within through targeted disinformation and manipulation of social media memes. This “informationalization”

of warfare raises the need for informational defence, which, in turn, will mean data fences.

Various types of responses are being contemplated. For example, some cities have banned the use of facial recognition technology for corporate or police surveillance.³ Some observers have called for the advertising-driven business model of social media platforms to be replaced by subscription services as a remedy to socially toxic outcomes of the present business models. And bans have been proposed on personally targeted political advertising during election campaigns.

the intangible infrastructure of the digitalized economy has emerged as a major battleground issue in the technology war between the United States and China, in which the United States has banned China's Huawei from any participation in the buildout of its 5G network and pressed its allies to do likewise.

Existing WTO disciplines (article XXI) were not designed to deal with these kinds of issues. Notably, the CUSMA text on national security exceptions to trade commitments repeats the existing WTO language, but drops the examples that were top of mind for

This “informationalization” of warfare raises the need for informational defence, which, in turn, will mean data fences.

WTO rules (article XX) provide for “legitimate” exceptions from trade commitments, but these issues require more treatment than assertions of a “right to regulate” in a trade agreement, which would ultimately leave the determination of what is legitimate and what is disguised protectionism to be decided *ex post* by dispute resolution panels.

National Security Exceptions

The “backbone” economic infrastructure comprised of telecommunications, transportation, energy and financial services has traditionally been closely regulated by national governments because of national security concerns. With digitalization and the buildout of the Internet of Things (IoT), this infrastructure is transformed from a passive framework into a veritable nervous system for the digital economy, raising the stakes of vulnerabilities to cyber attacks.

National governments are unlikely to accept the unbounded risks to national sovereignty from the level of intrusion into the national infrastructure system that free flow of data across borders in the new IoT environment would potentially allow. Indeed, the security of

the framers of this text back in 1947 when it was committed to paper: trade in fissionable materials, active kinetic war and transport of munitions. The security issues in the digital realm are completely different. New language will be needed in a multilaterally agreed text to provide guidance to future dispute settlement panels.

Most Favoured Nation in the Digital Sphere

A foundational principle of the WTO is that of “most favoured nation” (MFN). This states that preferences given to one country must be given to all WTO members. This is the core principle for non-discriminatory trade. At the same time, the WTO requires that “substantially all trade” be liberalized as a condition for such preferences (article XXIV). How is this to be transposed to the digital realm? For example, the European Union is developing its Digital Single Market, which, in principle, provides discriminatory access to digital markets within the European Union to member states.

The Group of Twenty has articulated the concept of “free flow of data with trust,”³ and analysts have outlined possible architectures

for common data areas based on trust.⁴ Given the possibility of the fracturing of the digital economy into walled-off and possibly warring data realms,⁵ suitable ground rules will need to be articulated as to what MFN treatment means and what are grounds for derogation from MFN as the digital economy expands its coverage of global commerce.

Economic Re-regulation

Almost across the board, economic regulatory reforms are likely to be implemented at the national level to address the issues raised by the digital transformation, given the characteristics of the data-driven economy,⁶ which features numerous sources of potential market failure. The regulatory challenges are complex. There is no historical analogue for an economy built on a capital asset with the characteristics of data, which does not come with recognizable ownership rights⁷ and is not traded in structured markets with transparent prices, yet is the most valuable asset in the world and flows across borders with no royalty. Nor is there a precedent for a society in which individual transnational corporations have more clients than the populations of China, the European Union and the United States combined. The vast amount of information held by these corporations, without checks or balances and shielded from all transparency as “trade secrets,” poses serious policy issues for national governments and the international community. Potential divergence in policy

responses is likely and may require new accommodation within the WTO framework.

Competition

The rise of globally market-dominating “superstar firms” in the data-driven economy raises competition concerns that become inextricably entwined with market access. In view of a mounting number of transnational cases alleging anti-competitive behaviour, and national initiatives such as Germany’s to revamp competition law to address the issues raised by the digital economy,⁸ the lack of a broadly accepted WTO mechanism to mediate in this area is becoming increasingly problematic.

Governance of AI

The governance of AI is an area of extraordinary activity and ferment at the moment. Principles to govern the development of AI regulation have been articulated.⁹ As AI applications proliferate and are deployed in international commerce, the regulatory framework for these applications will become a major challenge for the rules-based system in terms of standards, interoperability, disguised barriers to trade, mutual recognition and so forth. In many ways, AI regulation promises to be as contentious in the digital realm as sanitary and phytosanitary standards have proven to be in agricultural trade.

IP Rights

The advent of machine learning changes the economics of innovation in various ways, for example, in terms of the pace of innovation, the proliferation of machine-generated “works,” an implied further rise in the value of intangible assets, and a much-increased reliance on trade secrets to capture benefits. IP rights have been a major battleground issue in trade negotiations and are at the heart of the trade and technology war between the United States and China. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights will need to be updated, with wide open questions as to how.

Investment

Investment has been the area of economic interdependence that has probably been most disrupted by the trade and technology war

Nor is there a precedent for a society in which individual transnational corporations have more clients than the populations of China, the European Union and the United States combined.

and the ensuing decoupling. Investment, both inward and outward, is a major avenue for technology dissemination, which is vital to economic convergence and development. The WTO Agreement on Trade-Related Investment Measures limits itself to addressing trade impacts of measures such as local content requirements. Issues such as technology transfer requirements were hotly contested in the Uruguay Round but could not be resolved and were excluded. Arguably, this is an area where the data-driven economy requires a comprehensive rethinking,¹⁰ especially given that the “servicification” of trade requires multi-faceted market access.

Future Prospects

The digital transformation calls into question numerous aspects of the framing of the rules-based system. Much of the technical regulation in areas ranging from privacy to competition policy to IP will be developed through parallel processes. But how these regulatory developments interface with trade will require elaboration, which, in turn, will require a thorough review of WTO rules.

The immediate future is not propitious for the launch of a new full-fledged digital round of multilateral negotiations. Judging by the current trade and technology war between the United States and China, the contest between the major digital economies for capture of the lucrative markets promised by the digital transformation is likely to be fierce.

However, as initiatives such as the DEPA negotiations signal, the rules-based system will require a comprehensive review, and there is much thinking to be done on how the rules should be reframed. For the WTO, the time may be out of joint, but it is not short of work.

NOTES

1 *Agreement Establishing the World Trade Organization* (1994), 1867 UNTS 154, 33 ILM 1144 [WTO Agreement].

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Dan Ciuriak joined CIGI in April 2016, focusing on the innovation and trade research theme. At CIGI, he is exploring the interface between Canada’s domestic innovation and international trade and investment, including the development of better metrics to assess the impact of Canada’s trade agreements on innovation outcomes. Based in Ottawa, Dan is the director and principal of Ciuriak Consulting, Inc. He is also a fellow in residence with the C. D. Howe Institute and an associate with BKP Development Research and Consulting GmbH of Munich, Germany. Previously, he was deputy chief economist at Canada’s Department of Foreign Affairs and International Trade (DFAIT) (now Global Affairs Canada), with responsibility for economic analysis in support of trade negotiations and trade litigation, and served as contributing editor of DFAIT’s Trade Policy Research series (2001–2007 and 2010 editions). He has also held several other positions at DFAIT, including as deputy to the chair of the Asia-Pacific Economic Cooperation Committee and as finance counsellor at Canada’s embassy in Germany.



Development and Trade

Economic Development and Trade: The Challenge of a Rising China

Henry Gao



Globalization was in its heyday when China joined the World Trade Organization (WTO) in 2001. It was widely believed that WTO accession would help to transform China from communism to capitalism, with more freedom granted to the people in both economic and political spheres. While China had to undertake substantial commitments itself, it was able to harness the opportunities brought by greater access to world markets and saw exponential growth in its exports.

In 2009, China became the world's top goods exporter. Four years later, China unseated the United States as the top trading nation in the world. In contrast to the ascent of China, the United States and Europe have been suffering from economic decline since the 2008 global

financial crisis. China regards its rise as a long overdue restoration of its rightful position as the world's largest economy, which it has occupied for most of history, except for the past 150 years. The West, however, views China's rapid development with suspicion, attributing China's success mostly to its state-led development model, with state-owned enterprises, massive subsidies and heavy government intervention playing a major role.

The most notorious example of the Chinese development model is the Made in China 2025 plan, which was created in 2014 by more than 50 academicians from the Chinese Academy of Sciences and the Chinese Academy of Engineering under the leadership of China's Ministry of Industry and Information Technology, along with

the National Development and Reform Commission and 20 other ministries and agencies. Officially adopted by the State Council in 2015, the plan sought to move China up the value chain of industrial activities, turning the country into a manufacturing power that would control core technologies in key sectors by 2025. In particular, the plan aimed to achieve 70 percent self-sufficiency in high-tech industries by 2025, and a dominant position in global markets by 2049 — the centennial of the People’s Republic of China. To achieve these goals, the plan employed problematic tactics such as direct government intervention, huge subsidies, investments and acquisitions in foreign markets by state-owned enterprises (SOEs), and forced technology transfers. These practices led to widespread criticisms of the plan by many foreign governments, which regarded it not only as economic aggression but also a potential national security threat.

To achieve these goals, the plan employed problematic tactics.

To counter the Chinese threat, the United States led a concerted effort by like-minded countries to “level the playing field.” Building on “China, Inc.,” an influential paper by Harvard law professor Mark Wu,¹ the US-led coalition argues that the existing WTO rules are insufficient in dealing with the problems created by China’s state capitalism. At the eleventh WTO Ministerial Conference in Buenos Aires, Japan, the European Union and the United States issued a joint statement condemning “severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state-owned enterprises, forced technology transfer, and local content requirements and preferences”² as “serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy.”³ To address these concerns,

they vowed to “enhance trilateral cooperation in the WTO and in other forums.”⁴

Since then, the trilateral group has intensified its work with six more joint statements (the latest one was issued on January 14, 2020). In turn, these statements have morphed into WTO reform proposals, with the key players all chipping in on the issue.

Proposals for Reforming the WTO

The first set of proposals, entitled “WTO modernisation: Introduction to future EU proposals,” was issued by the European Union in September 2018. Three days later, Canada followed suit with its own discussion paper on “Strengthening and Modernizing the WTO.” The United States has not issued any comprehensive proposal, but used stand-alone proposals to address many specific issues directly. In addition, Canada also convened a series of meetings with a group of like-minded countries. Informally referred to as the Ottawa Group,⁵ the group includes most of the key players in the WTO, except China, India and the United States.

While they all differ from each other, the proposals by Canada, the European Union, the United States and the Ottawa Group as a whole share a lot of commonalities — especially regarding three categories of particular relevance to China.

First, the proposals align on the need to update the substantive rules of the WTO. This includes clarifying the application of “public body” rules to SOEs, expanding the rules on forced technology transfer and addressing barriers to digital trade. All of these are long-standing issues that have been litigated in the WTO.⁶ They each reflect a major concern about China’s trade and economic systems, which employ measures that are perceived as unfair trade practices. This first basket of issues includes concerns about China’s unique state-led development model, which emphasizes the role of state-owned firms in the Chinese economy, often blurring the boundary between the state and the firm. Other issues of concern include China’s overzealous drive to obtain and absorb foreign intellectual property rights, where foreign firms are met with explicit or implicit demands to trade their technologies for access to markets. Another concern touches

the core of China's authoritarian regime, especially its tight control over information and the internet.

The second category addresses the procedural issue of boosting the efficiency and effectiveness of the WTO's monitoring functions, especially those relating to compliance with the notification requirements of the WTO, such as those on subsidies. While no WTO member may claim a perfect record on subsidy notifications, China's failure in fulfilling the obligation is deemed particularly egregious. This seems to be a perennial problem that the US Trade Representative has been complaining about ever since China's accession to the WTO.⁷ To address the problem, the joint draft on strengthening the notification requirements (authored by Canada, the European Union, Japan and the United States) proposed some rather drastic measures, such as naming and shaming the delinquent member by designating it as "a member with notification delay," curtailing the member's right to intervene in WTO meetings and nominations to chair WTO bodies, and even levying a fine at the rate of five percent of the member's annual contribution to the WTO.

The third category of issues relates to development. Again, this is another long-standing issue stemming from the call by the European Union and the United States for more "differentiation" among WTO members. The underlying rationale is that, while developed countries are willing to extend special and differential treatment to smaller developing countries, they are rather reluctant to extend the same treatment to large developing countries such as China, which are economic powerhouses in their own right. Thus, in their proposals, Canada and the European Union call for the replacement of "blanket flexibilities"⁸ for all WTO members by "a needs-driven and evidence-based approach"⁹ that "recognizes the need for flexibility for development purposes while acknowledging that not all countries need or should benefit from the same level of flexibility."¹⁰ The United States' proposal is the most radical. It proposes the automatic termination of special and differential treatment for members that fall into any of the following four categories: a member of the Organisation for Economic Co-operation and Development, a member of the Group

of Twenty (G20), being classified as "high income" by the World Bank, or having at least a 0.5 percent share of global goods trade. Such a classification system would strip many WTO members of their developing-country status, especially China, as it meets two criteria (G20 membership and having a large share of trade).

Given the mounting pressure on China, however, most of the Chinese proposals directly address the aforementioned reform proposals.

China's Response

Realizing that it has become the unnamed target of WTO reform, China quickly responded with two documents. The first is a position paper on WTO reform issued in November 2018, which set out China's three principles and five suggestions for WTO reform. In May 2019, China submitted a formal proposal on WTO reform, which further elaborated the main issues of concern for China, as well as the specific actions that need to be taken. In the two documents, China adopts an interesting strategy. While many of the suggestions directly respond to the China-related reform proposals mentioned earlier, China also tries to turn the table against developed countries by launching its own offensive. For example, China suggests that the first priority should be solving the existential issues facing the WTO, such as the impasse over the Appellate Body member appointment process, the abuse of the national security exception and the resort to unilateral measures. Given the mounting pressure on China, however, most of the Chinese proposals directly address the aforementioned reform proposals.

First, China expresses willingness to consider some of the issues (such as electronic

commerce and investment facilitation), but it objects to many other issues. For example, one of the five suggestions in China's position paper is the need to "respect members' development models," which means that China "opposes special and discriminatory disciplines against state-owned enterprises in the name of WTO reform."¹¹ This is duly reiterated in the reform proposal itself, listed under the heading of "Principle of Fair Competition in Trade and Investment." One might wonder why China takes such an adamant position on the SOE issue, but it is not surprising at all, given that SOEs bolster two of China's three core interests, as famously defined by State Councillor Dai Binguo in 2009.¹² Moreover, even on issues where China seems to agree with the other members, the Chinese position sometimes comes with a different twist. Electronic commerce is one such example: the Chinese proposal focuses on "cross-border trade in goods enabled by the Internet, as well as on such related services as payment and logistics services."¹³ This is very different from the position taken by the United States, which emphasizes the digital transmissions and the associated issue of free flow of data.¹⁴

To move forward, however, China's concerns also need to be taken into account.

Second, on the procedural issue of subsidy notifications, China adopts a dual-track approach. On the defensive side, China proposes that developing countries should only comply with the notification obligations on a best-endeavour basis, and that they should receive more technical assistance. On the offensive side, China throws the ball into the court of developed countries by calling on them to "lead by example in submitting comprehensive, timely and accurate notifications"¹⁵ and to "improve the quality of their counter-notifications."¹⁶

With regard to the third basket of development issues, China is taking a flexible

approach. As a matter of principle, it made clear that special and differential treatment is an "entitlement" that China "will never agree to be deprived of."¹⁷ At the same time, China also indicated its willingness to "take up commitments commensurate with its level of development and economic capability."¹⁸ This approach is consistent with what China has been doing for some time, such as its active participation in the negotiations on trade facilitation.

The Way Forward

It is often said that the multilateral trading system is all about the blind pursuit of free trade, but this could not be farther from the truth. As both the Havana Charter for an International Trade Organization and the Marrakesh Agreement Establishing the WTO explicitly recognized, promoting economic development is one of the key objectives of the multilateral trading system.

With its stellar record in economic and trade growth, the Chinese model provides an attractive alternative to other developing countries. At the same time, China's unique economic system also raises challenges for the world trading system. Such challenges need to be properly addressed within the multilateral trade framework, lest the wrong lessons be learned by other countries. In this regard, the current reform discussions in the WTO are a good start. To move forward, however, China's concerns also need to be taken into account. In particular, the rules need to be neutral regarding the ownership structure of the firms that might constitute "public bodies," so that it would not be perceived as China-specific. This is also in line with the evolution of WTO jurisprudence, where ownership is only one of the factors taken into consideration.

While the rules are being negotiated, the other WTO members may also consider better utilizing existing WTO rules to challenge Chinese trade barriers and practices. Recent developments within China, especially initiatives to build Communist Party cells in Chinese firms, have made it easier to fulfill the public body requirement in WTO litigation.¹⁹ This, in turn, requires the restoration of the WTO dispute settlement mechanism; without it, all rules — old or new — are little more than words on paper.

NOTES

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8 European Commission, "WTO modernisation: Introduction to future EU proposals" (2018) at 6.

9 *Ibid.* at 7.

10 WTO, General Council, *Strengthening and Modernizing the WTO: Discussion Paper — Communication from Canada* (2018), WTO Doc JOB/GC/201 at 5.

11 Ministry of Commerce, People's Republic of China, "China's Position Paper on WTO Reform" (2018).

12 The three core interests are: preserving China's basic state system and national security, national sovereignty and territorial integrity, and the continued stable development of China's economy and society. See Michael D Swaine, "Part One: On 'Core Interests'" in Michael D Swaine, *China Leadership Monitor no. 34*. State-owned economy is the basic economic system, according to articles 6 and 7 of the Chinese Constitution, which also state that public ownership and state-owned economy shall be the leading force in the economy.

13 WTO, General Council, *China's Proposal on WTO Reform: Communication from China* (2019), WTO Doc WT/GC/W/773 at 5.

14 Henry S Gao, "Digital or Trade? The Contrasting Approaches of China and US to Digital Trade" (2018) 21:2 J Intl Econ L 297.

15 Ministry of Commerce, *supra* note 11.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 Weihuan Zhou, Henry S Gao & Xue Bai, "China's SOE Reform: Using WTO Rules to Build a Market Economy" (2019) 68:4 ICLQ 977 at 1015–20.

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To Be, or Not to Be? The WTO, Trade and Development in 2020

Balakrishnan Rajagopal

The World Trade Organization (WTO) — and the postwar order of open trade — is seemingly in crisis, largely induced by its richest and most powerful member, the United States. The WTO Appellate Body (AB) has ceased to function, having been reduced to only one member from its full strength of seven, due to US intransigence. The United States has pulled out of trade agreements such as the Trans-Pacific Partnership (TPP), is fighting an ongoing tariff war against China and other major trading partners, and has declared, through a 2019 presidential memorandum,¹ that it intends to object to the way developing-

country status has been accorded in the WTO. Other signs of crisis include the moribund Doha Development Round. The negotiation and decision-making process at the WTO has broken down, and the last ministerial meeting in Buenos Aires concluded without a consensus on an outcome document. Many countries are resorting to bilateral, regional and mega-regional trade agreements to pursue trade integration and thus bypass the WTO. The overall picture is one of gloom and doom about the continuation of a rules-based international order, symbolized by the WTO, governing international economic relations.

Yet the evidence is also undeniable that the South has boomed in merchandise trade facilitated by the WTO since its establishment. Even if we put aside the question of whether this boom in trade in the South has actually led to reductions in global poverty and inequality — a question on which there are divergent views — the rise of the South in merchandise trade cannot be denied. The latest available figures (from 2018) from the United Nations Conference on Trade and Development show, for example, that global exports of trade in goods between the North and the South were distributed in almost equal

which were sought to be included through the back door; second, the structural inequalities in WTO decision making, which marginalized small developing states; and third, the extraordinary normative demands imposed by the “iron straight jacket” of the WTO agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, which did not allow for enough “policy space” or normative wiggle room to adjust to the new order demanded by the WTO. Fuel was added to this fire by the Seattle protests, which introduced an entirely new revolutionary dimension

The protests against the WTO in Seattle witnessed a novel coalition of marginalized voices from the South and the North.

shares.² Developing and transition economies were net exporters, whereas developed economies were net importers. The United Nations Development Programme notes that, as a share of world merchandise trade, South-South trade more than tripled between 1980 and 2011, while North-North trade declined.³ While these trade trends slowed or declined in 2019, partly due to the trade wars unleashed by northern countries, the evidence is obvious that, for at least three decades, coinciding with the establishment of the WTO, the South grew exponentially in trade. It must be noted how, in both merchandise trade and trade in services, the larger Asian and Latin American countries have disproportionately garnered their shares, while the smaller countries, including most African countries, have done relatively less well, thus raising the question of whether the entire South benefited from the boom in trade.

Despite or because of these apparent successes, the relationship between trade, the WTO and development has been extremely contentious, certainly since the launch of the Doha Round. There was simmering discontent among the countries of the South because of at least three factors: first, over the issues from the Singapore round, including on government procurement,

in international relations, by revealing the power of social movements to challenge and contest global normative regimes. The protests against the WTO in Seattle witnessed a novel coalition of marginalized voices from the South and the North — farmers, workers, environmentalists and others — who wanted to wrest back control from the WTO and what it symbolized: a global order of elites. The result of the Seattle protests, combined with the discontent of the southern states, led to the Doha Round being stillborn. From this start, it never recovered. The WTO’s legitimacy had been shattered, and while many rounds of talks were held — in Cancun, for example — each round witnessed a reassembling of the same forces: discontent from the southern states, along with protests from those marginalized outside of the WTO meeting venues.

A new round of discontent and opposition to the Doha Round and, by extension, to the broader question of how development objectives and the WTO will coexist, comes from the United States, which is pursuing multiple strategies. These include tariff wars with China and others in order to rebalance trade; renegotiating or renouncing treaties, such as the North American Free Trade Agreement and the TPP; grinding the

WTO AB to a halt; and questioning the status of many countries that claim developing-country status. As the United States explains in its 2019 presidential memorandum,⁴ seven out of the 10 wealthiest economies in the world (measured in terms of purchasing-power parity), such as Qatar and Singapore, or the countries that belong to the Group of Twenty or the Organisation for Economic Co-operation and Development (OECD), such as South Korea, claim developing-country status. The United States takes central aim in this memo at China, which it has never accepted as a developing country, given China's economic size, dominance in trade and so forth. The memorandum threatens to take action against any country that claims this status unfairly, including by opposing its status in the WTO as it applies to trade with the United States and even membership in the OECD.

What the above account illustrates is the following: the rise of the South in trade has led to backlash at two levels. First, the backlash has come from within the South itself, from those who have been losers in the move toward trade liberalization and market integration (the fisher folk, farmers, small and medium producers, and so forth). They have seen their incomes plummet and their livelihoods destroyed at a rapid clip and have found themselves unable to cope with the pace of change. These countries have reacted by organizing and protesting against the WTO and other global rules such as the failed Multilateral Agreement on Investment. A second level of backlash against the rise of the South has come from within wealthy countries in the West, from the labouring and commercial classes, who have lost out due to outsourcing, changes in supply chains, and competition due to imports from countries with more competitive "factors of production," especially labour. The key country here has been China, although competition has come from many other countries, including Mexico, South Korea and others. But the backlash against the competitive pressures of goods and services from the South, as well as restructuring and deindustrializing countries in the North, has come from the labouring and commercial classes, which has, in turn, fuelled the rise of populism in politics and opposition to rules-based trade and free trade, illustrated most clearly in the attitudes and actions of the Trump administration.

How do we resolve these multiple sources of discontent? Is there a future for an international economic order that is rules-based and anchored in the WTO? Will development and trade objectives ever be reconciled at the WTO? Is it possible to reform the WTO to overcome these enormous barriers?

"To be, or not to be," in the immortal words of Shakespeare's Hamlet, is an apt expression in thinking about this dilemma.

I would suggest that we face a dilemma: the sheer breadth and width of the rules-based system of trade, epitomized by the WTO, produces failure and backlash at domestic as well as international levels. The current WTO crisis is a fallout of that dilemma. "To be, or not to be,"⁵ in the immortal words of Shakespeare's Hamlet, is an apt expression in thinking about this dilemma. Countries must choose whether to insist on maintaining an extremely ambitious, risky and lopsided, rules-based system such as the WTO's and risk backlash at two levels, or to revert to a less ambitious rules-based system that may not maximize the economic gains from international economic relations in the conventional sense but may reduce backlash, provided further changes are made to redistribute gains from trade more fairly. The key issue is this: increasing trade relations, as with all economic changes, produces winners and losers, and neither the rules governing trade nor other rules of international law have, thus far, been successful in figuring out how to fairly distribute the gains and protect the losers.

At a minimum, the WTO and its members need to consider a number of changes if they want a rules-based system to survive. First, while dispute resolution is very important

and a way must be found out of the current imbroglio, as a coalition of countries has proposed to do, the WTO must transition to being more of a negotiating forum, closer to the General Agreement on Tariffs and Trade structure. The excessive costs and burdens associated with the dispute resolution forum and the sense that without it, the WTO is close to collapse, must be avoided. While dispute resolution must be optional, the WTO must focus more on trade facilitation and negotiation.

Second, all countries that claim developing-country status must be subjected to a sunset clause, as all wealthy countries with a developed-country status must be subjected to a sunset clause for all of their subsidies to agriculture, industry or services. Both of these sunset clauses must be conjoined: progress on one should depend on the other.

Third, all countries must be mandated to report trade impact assessments that measure gender, human rights and environmental/climate change impacts of trade as well as mitigation plans annually, to develop a better database for measuring the distributive consequences of trade measures.

Fourth, incentives must be developed, linked with the United Nations and global financial system, and linked to the United Nations Sustainable Development Goals, to help countries that require assistance in dealing with the negative consequences revealed by trade impact assessments.

Fifth, countries that have had a negative trade balance as well as a negative balance of payments during the last three years, must be allowed a “transitional period” during which they can opt out of specific WTO treaty commitments, except the core commitments of most-favoured-nation status and so forth. This may provide some policy space and flexibility to all countries, whether they are self-classed as developing or developed. Thus, whether the country is Greece or Ghana, there must be some flexibility.

Sixth, and finally, least-developed countries, or countries that are in the bottom half of poverty measurements such as the multi-dimensional poverty index, must be allowed sunset clauses that are much longer and that are specifically linked to trade facilitation assistance.

While none of the above changes are adequate by themselves to bring about a harmonious coexistence of development and trade at the WTO or make the Doha Round successful, it is also obvious that the international community went too far during the Uruguay Round in imagining the WTO and did not anticipate properly either the intended or unintended consequences of “success.” Indeed, the WTO case is one of “failure through success,” as I have suggested here: the WTO’s problems are partly the result of its own success, and to survive, it must reject part of its own legacy.

NOTES

1 White House, Presidential Memorandum, “Memorandum on Reforming Developing-Country Status in the World Trade Organization” (26 July 2019).

2 United Nations Conference on Trade and Development, “Statistics”, online: <<https://unctad.org/en/Pages/statistics.aspx>>.

3 United Nations Development Programme, “The rise of the South”, online: <<http://hdr.undp.org/en/content/rise-south>>.

4 White House, *supra* note 1.

5 William Shakespeare, *Hamlet*, 3.1.55.

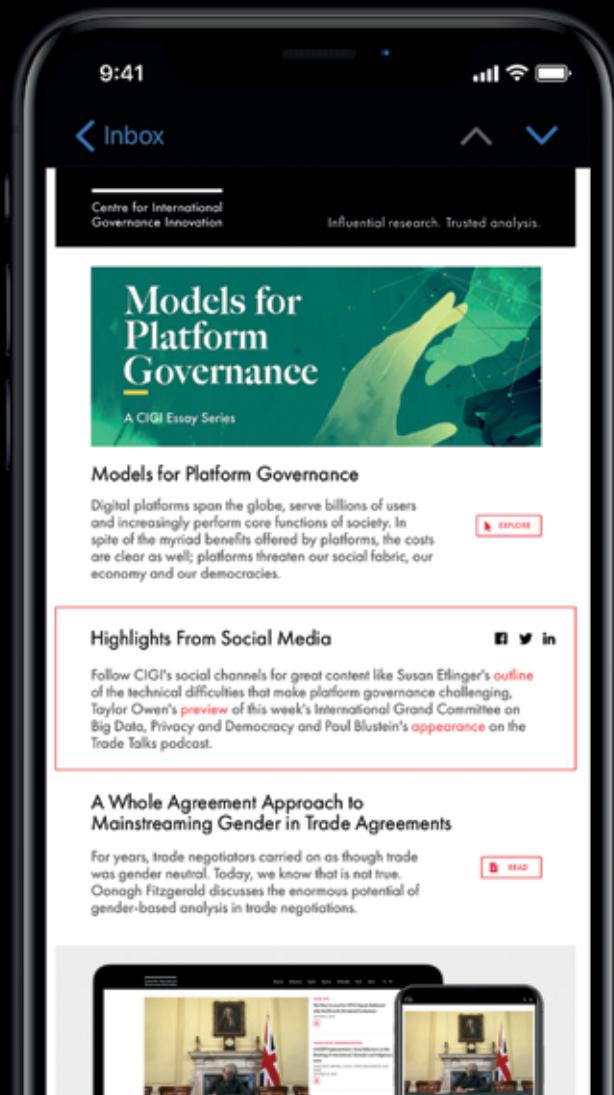
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Pragmatism and the WTO Agreement

Chios Carmody

Current events in the World Trade Organization (WTO) make the organization and its treaty, the Agreement Establishing the World Trade Organization (WTO Agreement),¹ look hobbled and close to collapse. Three points need to be kept in mind regarding WTO reform and modernization.

First, the WTO Agreement offers a number of flexibilities for WTO member countries to exercise in shaping their trade relations. At a time of doubt about the value of interdependence, more vigorous assertion of rights under WTO law is to be expected. Second, legality and compliance in WTO law are relative phenomena. The WTO Agreement mandates compliance with the treaty, but not “compliance at any cost.” Third, alternate contractual and constitutive visions of the WTO Agreement are discernible. After the constitutionalism of the treaty’s founding phase, we may be moving toward a more “contractualist” era as the treaty matures. All of these points suggest the WTO Agreement may wax and wane — and possibly wax again. Patience and a long-term perspective on the treaty’s future are required.

It is worthwhile examining each of these points in greater depth in order to assess how they might contribute to WTO reform and modernization.

The WTO Agreement was founded in 1995 on a belief in the value of interdependence and international trade. Twenty-five years on, much of this original motivation is forgotten — or may simply be taken for granted. The conception of the value of interdependence has changed. A number of central disciplines of the WTO Agreement — notably those on non-discriminatory application of tariffs — are being flouted. Defences to action under the national security provisions are suddenly popular. There is increased use of trade-restrictive measures such as anti-dumping, countervailing and safeguards. In a few instances, there has also been a return to “managed trade.” Finally, an impasse has arisen over the role of the WTO Appellate Body (AB), which, as of late 2019, has suspended operation because the United States refused to appoint new members due to perceptions of judicial activism.

All of this presents a complex and contested picture of the “balance” of rights and obligations under the treaty. A new equilibrium — a “great rebalancing” — appears to be occurring, and along with it, there is a new-found sense of the value of WTO rights. Some actions could be taken to counter this trend, such as more intensive and regular review of trade protection measures by WTO committees, deeper plurilateral arrangements, and public and private leaders’ statements supportive of a rules-based trading system. However, to some degree, the existing state of affairs may have to be accepted for what it is: an emblem of loss of faith in the value of interdependence.

A second — and related — point to keep in mind regarding efforts at WTO reform and modernization concerns compliance with

WTO rules. The much-vaunted WTO dispute settlement system’s record of adjudicating complaints about breaches of those rules must be measured against countries’ ambivalence toward compliance.

There are many indications that legality and compliance are relative concepts in the WTO Agreement. The WTO Dispute Settlement Understanding² leaves open the possibility of temporary non-compliance. In addition, a number of settlements of disputes in the system have been plainly non-compliant. For instance, a number of aspects of the settlement reached between Canada and the United States to end the softwood lumber dispute of 2001–2006 (“Lumber IV”) plainly contravene the WTO Agreement. Moreover, the passive nature of the dispute settlement system, in which only the issues complained about are dealt with, means that the question of compliance in the treaty is addressed unevenly and on an ad hoc basis. All of these factors suggest that while compliance remains important, it is tacitly understood that compliance in WTO law does not mean compliance “at any cost.” At best, compliance is supplementary to the law’s chief function of promoting interdependence.

This realization can help to temper the oft-repeated view of WTO dispute settlement as phenomenally successful. It is successful, but the dispute settlement system’s record must be assessed against persistent non-compliance in many areas. This is evident, for instance, with respect to regional trade arrangements and subsidization — areas that the existing system has not dealt with satisfactorily and that have become flashpoints in recent trade discussions.

This set of observations is also a useful corrective to the view that WTO dispute settlement — the WTO’s crown jewel — is now irretrievably tarnished by suspension of the AB’s work. The WTO Agreement is a rules-based system, but only as long as member

However, to some degree, the existing state of affairs may have to be accepted for what it is: an emblem of loss of faith in the value of interdependence.

countries *want* the system to be governed by rules. In an age of rebalancing and vigorous assertion of rights, some governments appear to remain conflicted about the value of legality.

A third and final point in efforts at WTO reform and modernization is the reality of conflict and coherence. Beneath the images of both contract and constitution in the WTO Agreement are contradictory (yet complementary) visions of unilateralism and multilateralism. In light of this, the recent reports inferring that the WTO system is in imminent danger of collapse seem to be taking a glass-half-empty approach.

What is apparent now is the way things have always been, if perhaps a little more evidently. To consider the WTO Agreement to be a neat, harmonious arrangement at all times is wishful thinking. Instead, it is the treaty's ability to tolerate stress — if not outright contradiction — that is most remarkable. This was, in fact, the record of the General Agreement on Tariffs and Trade, which, during its existence from 1948 to 1994, experienced intervals of latency and activity, stagnation and renewal.

What does all of this portend for WTO reform? First, the idea of balance in the WTO Agreement suggests that countries do not take their WTO commitments completely seriously. In many areas of coverage, there is an aspirational quality to the WTO Agreement that is only partly fulfilled. If countries do not regard WTO arrangements as an expression of perfection, then why should negotiators? In thinking about paths for WTO reform, the best that may be attainable is some consistency, not *total* consistency. Countries will continue to assert rights occasionally and in a manner that is at odds with their WTO commitments. This is a given.

A second thought to keep in mind is that law plays a supplementary role in the WTO. Despite the desire to live by rules, legality is not pre-eminent in the treaty environment. The WTO remains very much a “member-driven” organization. The open-endedness of the WTO dispute settlement system is an indicator of this fact. Its bare requirement of “compliance” reveals how much goes on in the shadow of the law that is not, strictly speaking, fully compliant. Countries can be expected to adhere to certain WTO rules, but not others.

Third, the treaty is not purely constitutive and absolute nor purely contractual and independent. It achieves something of a middle ground between these two extremes in being interdependent. The most important consequence of interdependence is that member countries calibrate their behaviour to the extent that other countries are prepared to do the same. In all of this, there is an astute appraisal of reciprocal behaviour. For instance, it is hard to avoid the impression that WTO member countries have recently taken record numbers of safeguard actions because the United States — long the undisputed leader in WTO arrangements — has liberally done so, too.

Above all, it is important to keep in mind that, despite the current mood and sense of crisis, no one is suggesting that the WTO Agreement be dismantled. It provides a valuable forum where consensus can be hammered out, even if the results are not always economically or politically optimal.

This set of realizations can help to systematize understanding in a challenging environment.

NOTES

1 *Agreement Establishing the World Trade Organization* (1994), 1867 UNTS 154, 33 ILM 1144.

2 WTO, “Understanding on rules and procedures governing the settlement of disputes”, online: <www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>.

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A Grand Bargain to Revive the WTO

Amrita Narlikar

That the World Trade Organization (WTO) is beset with challenges has been evident for some time. The Doha Development Agenda (DDA) — the first round of trade negotiations, following eight successful trade rounds under the General Agreement on Tariffs and Trade (GATT) — was launched with high hopes in 2001 and a promise of completion by 2005. The DDA was the round that was supposed to finally address the development concerns voiced by the Global South and bring some wins to developed countries. But almost 20 years of persistent delay and recurrent deadlock have led the round to its unmarked grave.

More recently, US President Donald Trump's supposedly "good, and easy to win" trade wars¹ — exactly the kind of unilateral behaviour that the system of multilateral trade rules had been designed to curb — have further eroded the WTO's credibility. The damage is worsened by the fact that these unilateral actions stem from the world's largest economy, which had served as the guardian of the system. The transparency function of the WTO is also not in the rudest of health: members are often remiss in fulfilling notification requirements, and the monitoring function of the Trade Policy Review Mechanism is also handicapped in a variety of ways (for example, on the reporting of subsidies). The organization further finds its Dispute Settlement Mechanism (DSM) paralyzed. The DSM — once regarded as the pride and joy of the WTO — has ceased to function since December 2019, most immediately because the United States has refused to back down on its decision to block the appointment or reappointment of members of the Appellate Body.

With its three core functions — negotiation, transparency and dispute settlement — facing an unprecedented set of serious problems, the WTO is clearly in crisis. And while it is easy to blame the Trump administration for the current miseries of the organization, the problems of the WTO run deeper and predate Trump's arrival on the scene.

Were the organization to cease to function, the costs would be high for the system as a whole. After all, the WTO has provided reliable and enforceable rules for international trade, which in turn has served as an engine for growth and development and helped lift millions out of poverty. Saving the system matters, especially if one is concerned for the well-being of not only the global poor, but also the poor in rich countries.² However, given the high levels of dissatisfaction with the current multilateral trading system, merely resuscitating the WTO is not enough: it is in urgent need of reform and updating.

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Some attempts at reform are under way — for instance, via the creation of a parallel DSM that countries can choose to sign on to — but these efforts are piecemeal and would at best paper over the cracks. A more ambitious and holistic “grand bargain” may be necessary, and one that turns out to be more sustainable than the one that had ensured the completion of the Uruguay Round.³ Below are three essential steps toward developing such a holistic approach to reform. Each step serves as a solution to a corresponding problem that affects the working of the WTO. Together, they could help constitute a sustainable grand bargain.

Negotiate a new deal that accommodates and encourages social welfare programs within countries. Although international trade — and the system of rules that underpins it — has helped generate growth, it is also true that inequality has risen within many countries. For those who find themselves economically worse off (in absolute or relative terms), trade is an easy scapegoat, even if the causes of their adversities lie elsewhere (for example, the absence of social welfare programs or retraining programs, or the loss of employment due to technological developments in the workplace). While a WTO that could intervene within the domestic economies of states is probably neither politically feasible nor advisable, one can conceive of a reformed WTO that could allow for, encourage and possibly even advise member states to pay greater attention to the distributive consequences of trade within their societies.

In taking on this task, the WTO could work with other organizations and fora such as the United Nations and the Group of Twenty (G20). The G20’s foray into the idea of “legitimate trade defence instruments,” along with the declaration in Hamburg in 2017 that emphasized the importance of having a fair and sustainable globalization that works for all, was a potentially important step in this

direction.⁴ It serves as valuable context that at least some members of the WTO could pick up on to embed some social values into an updated trade deal.

Build a convincing narrative in favour of trade multilateralism. An important reason why we see such a strong backlash against trade multilateralism today lies in the fact that some politicians (from both the Left and the Right, and also the Greens) have successfully harnessed (and sometimes fanned) the disappointment and anger of those who believe that the gains from trade have passed them by, to build a persuasive anti-trade narrative. President Trump’s “America first” narrative is an example of this, and one that appeals to a large proportion of the American electorate because it claims to take their pain seriously. In contrast, many narratives about the benefits of having a rules-based multilateral trading system have been solid but largely technocratic in content. Such a technocratic focus renders these narratives vulnerable to the charge that they stem mainly from the so-called “global elite” and are disconnected from the people affected. As such, these narratives — even when grounded in data and fact — risk exacerbating prior anti-trade/anti-multilateralism sentiments and stand little chance against populist ones.⁵

Coming up with a perfect new deal that effectively addresses concerns of inequality and distribution (highlighted under the first step above) is unlikely to suffice on its own. Having a clear narrative that explains the value of the system for individuals will be indispensable for the sustainability of any such deal.

Devise a tighter set of rules that limits the “weaponization” of interdependence.⁶

An underlying assumption of the postwar economic system was that prosperity and peace were inextricably interlinked, and that economic interdependence would contribute to increasing peace. Both the GATT and the WTO were founded on this assumption. But the world that we live in today presents us with a new set of challenges relating to a phenomenon that Henry Farrell and Abraham Newman call “weaponized interdependence.”⁷ The fact that production is integrated through global supply chains means that certain advantaged states can use their positions in crucial hubs of networks to “extract informational advantages vis-à-vis

adversaries,” and they can also “cut adversaries off from network flows.” Farrell and Newman investigate the ability of the United States to control financial transactions and internet flows as cases of weaponized interdependence. But other actors are also recognizing their own potential to exercise control in other sectors, such as China’s road map (the “Made in China 2025” plan) on integrated circuits and semiconductors.⁸ Neither the GATT nor the WTO was designed to deal with such a world.

If the WTO is to function meaningfully in a context where interdependence can be weaponized, it needs to develop a tighter set of rules on issues such as subsidies, state-owned enterprises, data protection and so forth. Additionally, certain issue-areas could be cordoned off from trade liberalization, for instance, when there are direct and clear security repercussions (such as in the case of digital technology).

Limiting the reach of trade liberalization in key emerging areas may be somewhat antithetical to the norms of the WTO. It may result in some decoupling, cause disruption to existing global supply chains and reduce the size of the aggregate economic pie. But this economic pain may come with some security gain.⁹ And by cordoning off certain areas from the WTO, it may be possible to still have a system that is universal in membership, albeit limited in scope. The alternative would be to limit membership to countries that share the same first-order values — pluralism, free markets, liberalism, democracy — and work on the basis of plurilaterals that facilitate deep integration among like-minded allies. But, as things stand in terms of geoeconomics, it is difficult to imagine business as usual at the WTO; between universal membership or expansive coverage, something will have to give.

NOTES

1 Donald J Trump, “When a country (USA) is losing many billions of dollars on trade with virtually every country it does business with, trade wars are good, and easy to win.” (2 March 2018), online: *Twitter* <<https://twitter.com/realDonaldTrump/status/969525362580484098>>.

2 See Amrita Narlikar, “A Trade War on the Poor? How a collapse of the WTO would hurt the worst off”, *Foreign Affairs* (5 March 2018).

3 Sylvia Ostry, who referred to the Uruguay Round as the result of a “grand bargain,” had also recognized that the so-called grand bargain had turned out to be a “bum deal” for many developing countries. See Sylvia Ostry, “The Future of the World Trading System: Beyond Doha” in John J Kirtan & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade* (London, UK: Routledge, 2016).

4 G20 Information Centre, Munk School of Global Affairs & Public Policy, “G20 Leaders’ Declaration: Shaping an Interconnected World” (8 July 2017), online: <www.g20.utoronto.ca/2017/2017-G20-leaders-declaration.html>.

5 On how to build winning and sustainable narratives, see Amrita Narlikar, *Poverty Narratives and Power Paradoxes in International Trade Negotiations and Beyond* (New York: Cambridge University Press) [forthcoming in May 2020].

6 This section draws on a recently published policy brief: Amrita Narlikar, “As multilateral as apple pie: Managing a world of weaponized interdependence”, *The Security Times* (February 2020) 34, online: <www.the-security-times.com/managing-a-world-of-weaponized-interdependence/>.

7 See Henry Farrell & Abraham L Newman, “Weaponized Interdependence: How Global Economic Networks Shape State Coercion” (2019) 44:1 *Intl Security* 42. See also Thomas Wright, “Sifting through Interdependence” (2013) 36:4 *The Washington Quarterly* 7.

8 Dan Kim & John VerWey, “The Potential Impacts of the Made in China 2025 Roadmap on the Integrated Circuit Industries in the U.S., EU and Japan” (2019) USITC Office of Industries Working Paper No ID-061, online: <www.usitc.gov/research_and_analysis/staff_products.htm>.

9 The author made this point in a survey conducted by *Foreign Affairs*. See Amrita Narlikar, “Who Is Winning the Trade War?”, *Foreign Affairs* (16 December 2019), online: <www.foreignaffairs.com/ask-the-experts/2019-12-16/who-winning-trade-war>.

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Strengthening the WTO Rulemaking Function

Debra Steger

The World Trade Organization (WTO) is a relatively new international organization, established only 25 years ago, yet it has a pedigree reaching back to the end of World War II. While it appeared to have a short honeymoon in its first few years, the rapid expansion of its membership, the accession of China and the launch of the Doha Development Round in 2001 have proved serious challenges for the governance of the WTO.

This essay explores the following questions: Does the WTO have the organizational structures and underpinnings to allow it to survive in the current world economy, characterized by rising populism, increasing protectionism and rapidly changing political and economic dynamics? Can the WTO be strengthened to enable multilateralism to thrive in the future? What are the strengths and weaknesses of the decision-making and rulemaking procedures in the WTO, and how can they be improved? Does the WTO need institutional reform to its governance structures to improve negotiations and rulemaking?

The WTO was not a utopian dream designed to function only in good times. The functions of the WTO are set out in its founding charter, the Agreement Establishing the World Trade Organization¹ (the WTO Agreement). The negotiation of the WTO and its dispute settlement system was not an accident or an experiment. Negotiators purposefully created an international organization — an institution — in which members can negotiate, administer and review the rules, and resolve disputes under the rules. The WTO is not a cluster of agreements with differing levels of participation serviced by different committees and secretariats, as was the case under the old, fragmented General Agreement on Tariffs and Trade² (GATT) system. It is a unified system involving one treaty, one organization, one dispute settlement system and one secretariat.

Rulemaking under the WTO

The Uruguay Round texts were a monumental achievement: more than 60 agreements and decisions comprising more than 550 pages. These were accepted by WTO members as a single undertaking, meaning that they had to accept all of the obligations contained in these legal texts. WTO rules purport to treat all members equally, in that all obligations apply to all members, and each member has an equal voice in decision making and rulemaking through the principle of consensus. However, the reality is that the burden of implementing WTO rules fell more heavily on developing countries, and they did not reap the benefits that they expected to receive from the results, especially in agriculture and textiles. WTO members, locked in a GATT mindset, attempted too soon to launch a major round of negotiations, first, unsuccessfully, in Seattle in 1999 and then, successfully, in Doha in 2001. After several years of protracted and difficult negotiations, the Doha Development Round failed.

There have been modest rulemaking successes in the WTO's 25-year history, including the Agreement on Basic Telecommunications Services (Basic Telecoms Agreement), the

Information Technology Agreement (ITA), the Protocol Amending the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Amendment), the Protocol Amending the Agreement on Government Procurement (GPA Amendment) and the Trade Facilitation Agreement. Plurilateral negotiations have been under way for some time on trade in services, green goods and fisheries subsidies. The successful negotiations in the WTO have been plurilateral. The current negotiations on substantive and reform issues also involve limited numbers of members.

Strengths and Weaknesses of WTO Rulemaking

The WTO's rulemaking strengths are also its weaknesses. The principle of equality of members — which is manifested in the consensus decision-making rule and the one-member, one-vote rule — is a good example. The Ministerial Conference, as well as all councils and committees, are open to all 164 members. The WTO is governed by the members acting in plenary all the time. While this may be an equitable way to govern an international organization, it has also led to stagnation in decision making and rulemaking.

As the WTO has grown from 128 members in 1995 to 164 members today, it has become very difficult, if not impossible, to find common ground on subjects for negotiation and, ultimately, agreement on the final texts. There is also a pronounced lack of coordination of efforts to negotiate modifications to the rules and new agreements. Initiatives arise from individual members or groups of members, and it is often difficult to achieve multilateral consensus sufficient to move a proposal forward.

WTO Culture

To understand the reasons for the difficulties with the WTO's negotiating and rulemaking mechanisms, it is important to recognize that

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the WTO has an organizational culture that has carried over from the GATT. Adherence to this culture is pervasive and prevents members from taking advantage of all of the rulemaking options available to them.

Key tenets of WTO culture include the following:

- the WTO is a member-driven organization;
- multilateral negotiations must be conducted within rounds;
- multilateral negotiations must be accepted pursuant to a single undertaking; and
- all decisions must be taken by consensus.

Member-driven organization: The WTO is nothing more, nothing less than the collectivity of its members. In this respect, it resembles its predecessor, the GATT. The WTO's power and authority rest with the members acting in plenary as the Ministerial Conference, or its delegated body, the General Council. Participation in all councils and committees is open to all WTO members. Each member has an equal say in decision making in that any member can block a consensus decision from being made. The WTO lacks formal management or governance structures; it does not have an executive board as do other international organizations, such as the International Monetary Fund (IMF) or the World Bank. The powers and the authority of the director-general, as well as the functions and responsibilities of the Secretariat, are limited compared to other international organizations. WTO members carefully guard their control over administration, decision making, negotiations and rulemaking within the organization.

Rounds: Since the GATT was agreed in 1947, major multilateral negotiations have taken place within rounds. However, Uruguay Round negotiators specifically contemplated that these negotiations could be conducted outside of the context of rounds. The WTO Agreement does not say anything about rounds; it simply says that the WTO is to be “the forum” for multilateral trade negotiations relating to matters under the WTO agreements among its members. Some WTO agreements had “built-in” agendas mandating negotiations to take place (for example, in the

General Agreement on Trade in Services on domestic regulation, emergency safeguards and subsidies). The specific amending formulae in article X of the WTO Agreement also imply that members could amend one agreement. Several negotiations have been completed in the WTO, such as the Basic Telecoms Agreement, the ITA, the TRIPS Amendment, the GPA Amendment and the Trade Facilitation Agreement, that did not occur within a round.

Single undertaking: The Uruguay Round agreements were negotiated, agreed and accepted as part of a single undertaking — an all-or-nothing package. The idea of the single undertaking was developed to repair the fragmentation in the GATT 1947 system that resulted from the Tokyo Round of multilateral trade negotiations. In the old GATT system, there were different levels of obligations because of the Tokyo Round codes, each of which had different memberships.

The WTO is nothing more, nothing less than the collectivity of its members.

The WTO has already moved away from the single undertaking in several key decisions that have been taken since 1995. The ITA (1998) and the Basic Telecoms Agreement (1997) were, in effect, plurilateral understandings that were implemented by means of commitments in certain members' schedules. The GPA Amendment and the Trade Facilitation Agreement are plurilateral agreements. There are plurilateral negotiations currently under way among WTO members on trade in services, green goods and fisheries subsidies. How these agreements would be implemented, should they be successful, has not yet been determined.

There have been several proposals for reform of the WTO negotiating machinery to allow, for example, plurilateral agreements, variable geometry and critical mass. The WTO

Agreement allows for some flexibility in these respects that has not yet been fully explored.

Consensus decision making: The most pervasive myth in the WTO is that most decisions (except for certain key dispute settlement decisions) must be taken by consensus. However, the WTO Agreement rules, while providing for decisions to be taken by consensus, also provide that if it is not practicable to decide by consensus, in most cases, members can choose to vote. Except for rare cases in approving accessions, voting has not been used as a basis for decision making in the WTO.

There are procedures in the WTO Agreement for members to adopt a binding interpretation, a waiver or an amendment of an agreement with a decision taken by a vote, rather than by consensus. These are means by which members could adopt modifications to an agreement or respond to a dispute settlement ruling that they do not approve. However, these procedures have not been explored or used to date because of the overwhelming support of members for the consensus principle.

The Way Forward

The difficulties with rulemaking and decision making in the WTO may not lie in the rules themselves but rather in the culture or attitudes of the members. Flexibilities provided in the decision-making and amendment rules in the WTO Agreement have not been fully explored by members. Consensus decision making was made a rule in the Uruguay Round, however, it is not absolute. Where consensus is not practicable, members may vote, but members have been reluctant to use voting procedures to date.

Members should explore rulemaking on an ongoing basis, not just during major rounds. However, they may need to develop more formalized processes at the front end for rulemaking proposals to move forward. It is not the final phase of adoption of a legislative proposal that causes the delays and blockage in the WTO system, but rather the lack of formal mechanisms at the initial and intermediate stages of the rulemaking process.

The WTO lacks governance structures for strategic planning and policy making. The absence of a management or executive

body with a specific role in agenda-setting or supervisory functions, analogous to the executive boards of the IMF and World Bank, contributes to the lack of direction and drift in the WTO.

The drafters of the Havana Charter for an International Trade Organization contemplated creating an executive board that would have had both executive and supervisory functions. The GATT Consultative Group of Eighteen was established in the early 1970s, became a permanent body in 1979 and continued until 1988. It was a limited-membership, representative body that addressed existing and emerging trade policy issues. Topics included trade and structural adjustment as well as trade and development.

It is time to establish a formal executive board to provide direction in strategic goal-setting and policy planning in the WTO. Such a body should be specifically designed to be representative of the membership of the WTO, accountable to the members, legitimate and effective. With a rotational, representative system for selecting members of the board and built-in transparency mechanisms, an executive board could provide the leadership and direction that the WTO sorely lacks.

The roles of the director-general and the Secretariat of the WTO should also be enhanced. The Secretariat should be permitted and encouraged to take a more proactive role in conducting research and developing proposals. The authority, responsibilities and powers of the director-general should be specifically delineated, and accountability mechanisms should be established.

Members are currently engaged in important discussions in the WTO on reform issues, such as transparency, notifications and improving the effectiveness of committees. Excellent proposals have been made on these issues and incremental reforms appear achievable.

However, the lack of leadership in strategic planning and policy making is the major problem in the WTO. It cannot be cured by incremental, administrative changes to transparency, notification or committee procedures, or reforms to voting rules. Leadership was not a problem in the GATT when the United States and the European Communities were the dominant trading partners. In the WTO, there are several

powerful economic members, none of whom acts as a clear leader individually or collectively. The WTO has a multitude of members, a rulemaking system that cements their equality, no leaders, and no executive body that provides strategic planning and management direction. Is it surprising, therefore, that the WTO is rudderless and adrift? Members are in charge of steering the ship. They can set it right by establishing an executive board with strategic planning and management capabilities. Multilateralism is at stake.

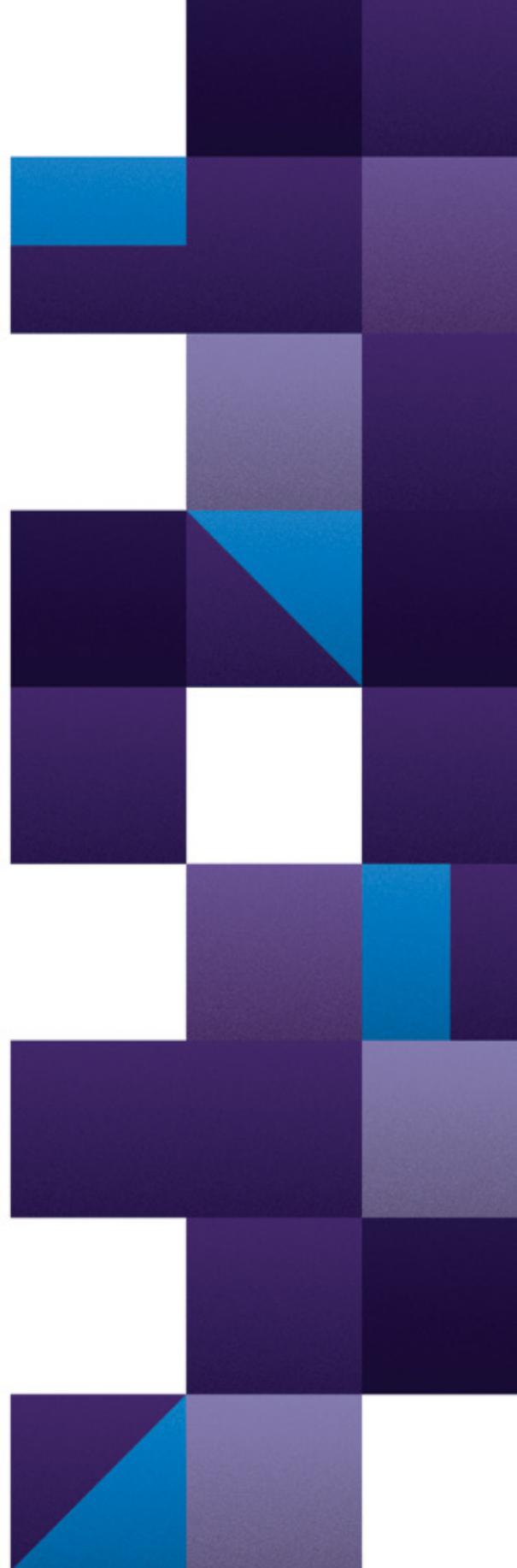
NOTES

1 *Agreement Establishing the World Trade Organization* (1994), 1867 UNTS 154, 33 ILM 1144.

2 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194, TIAS 1700 (entered into force 1 January 1948).

ABOUT THE AUTHOR

Debra Steger is professor emerita at the University of Ottawa's Faculty of Law and a senior fellow at CIGI and the C. D. Howe Institute. She was the first director of the Appellate Body Secretariat of the WTO. During the Uruguay Round, she was Canada's principal legal counsel and senior negotiator on dispute settlement and the establishment of the WTO. She has been general counsel of the Canadian International Trade Tribunal and practised international trade, investment and competition law with national law firms in Canada. Debra has served as a chair and a panellist in dispute settlement cases in the WTO, the North American Free Trade Agreement (NAFTA) and the Canadian Agreement on Internal Trade, has been appointed to dispute settlement rosters under trade agreements, and has acted as counsel in WTO and NAFTA disputes. She is vice president of TradeLab (www.tradelab.org), a global network of law school clinics connecting students with developing countries, small and medium-sized enterprises, and non-governmental organizations. She has managed major international research networks relating to emerging economies and trade negotiations. She serves on several editorial, educational and advisory boards, and has published extensively on international trade and investment law, the WTO and international dispute settlement.





Conclusion

The WTO: Ever Mutating, Planned Obsolescence or Unplanned Obsolescence?

Rohinton P. Medhora

Developments of the 1960s raise sober doubts as to the permanence of GATT...The Kennedy Round may emerge in the perspective of history as the twilight of the GATT.¹

— John W. Evans, assistant special representative for trade in the Executive Office of the President of the United States

When the founding fathers² gathered at Bretton Woods, New Hampshire, in July 1944, there emerged two-and-a-half pillars of modern global economic governance. The International Monetary Fund and International Bank for Reconstruction and Development (better known as the World Bank) were full-fledged, treaty-based organizations with defined governance structures. The putative International Trade Organization (ITO) never got off the ground in the same manner. Although negotiations for an ITO were successfully completed in the Havana Charter in March 1948, the charter was not ratified by the US Congress, on the grounds that it intruded into domestic economic issues. Instead, the General Agreement on Tariffs and Trade (GATT) became operational on January 1, 1948, with 23 members, including the United States. The GATT was a far-reaching document for its time. It was designed to overcome resistance and might have built in a planned obsolescence.

Customs unions were permitted as the main exception to the most-favoured-nation principle, on the grounds that some tariff reduction among willing countries was still better than none, so long as tariffs around the group's perimeter did not increase. Although this logic got the economics partially wrong — Jacob Viner's pioneering work distinguishing between trade creation and trade diversion did not appear until 1950 — the nod to historical and political exigencies was pragmatic and necessary.

On quantitative restrictions, the economics was more solid, and they were understood to be inferior to equivalent tariffs. But here, too, the practical question of protecting politically powerful agricultural sectors in Europe led to acquiescence by the framers of GATT so that the larger, longer-term enterprise of baking trade liberalization into global economic affairs — and creating a European bulwark against the Soviet Union — was not derailed.

The mild strictures on state trading enterprises in article XVII were followed in the next article by what, at the time, must have seemed big-hearted concessions to developing countries³ and the process of economic development in many war-torn signatory nations. Temporary deviations from the GATT articles — albeit with scrutiny and permission from the other contracting parties — were permitted in the interests of a poor country seeking to raise its level of development.

Balance-of-payments crises and spikes in imports that unduly hurt domestic producers of the same product were also grounds for a country to deviate from its GATT obligations.

Article XX lists 10 general exceptions to GATT obligations that resonate even (or especially) today. The key ones are worth listing:

- the protection of public morals;
- the protection of human, animal or plant life or health;
- the protection of patents, trademarks and copyrights;
- the avoidance of the use of prison labour;
- the protection of national treasures of artistic, historic and archaeological value;
- the conservation of exhaustible natural resources; and
- the maintenance of adequate domestic stocks of key commodities and products.

Additionally, article XXI provides for exemptions for reasons of national security and war.

Against this institutional background, and with tariffs on goods averaging 22 percent at the end of World War II, the first GATT rounds, starting with Annecy in 1949, concentrated on lowering tariffs on manufactured goods, the proverbial low-hanging fruit. By the end of the Tokyo Round in 1979, average tariffs on industrial goods stood at 4.7 percent. The Tokyo Round took on other imperatives — non-tariff barriers, Japan's business model and crunchier issues that inevitably led "behind the border" — which implied that progress would be a slower slog, irritating more and varied constituencies across a membership that now numbered more than 100.

The Uruguay Round lasted a long time (1986–1994) and yet did not deliver on all of its ambition precisely because — to their credit, but also because they had no choice, tariff reduction having run its course — member countries added subjects left over from the Tokyo Round and added others. These included services, financial flows, textiles, agriculture and intellectual property (IP). The round resulted in the creation of the World Trade Organization (WTO) in 1995. The change from a negotiating forum to a full-fledged, treaty-based international institution systematized international trade governance. Trade in services and IP lay within its remit, the dispute resolution system became binding on all members, small and large, and the

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institutional edifice meant that consideration of new issues and mission creep were built into the structure. Such a system was necessarily and inevitably going to “fill in” missing bits and adjudicate “grey areas.”

The Doha Round that started in 2001, while mostly a failure (and technically still ongoing), was termed the Doha Development Round, but also included issues raised earlier at the 1996 Ministerial Conference in Singapore: competition, investment, government

rounds floundered on account of the weight and unwieldiness of this approach, and it is harder still to imagine an organization tasked with monitoring commitments to this wide range of issues, much less adjudicating disputes around them. It starts with framing. The “trade and...” moniker might itself be the wrong way around. It may be more a concern about how trade rules risk tripping up important public policy objectives in such areas as labour, climate change and the digital economy.

But it is hard to visualize the WTO – or any single multilateral organization – dealing with these issues in their entirety, starting with the negotiation.

procurement and trade facilitation. Developing countries successfully lobbied against the inclusion of the first three topics, arguing that they did not belong in a development agenda. There has been partial progress here — a modernized version in 2014 of an agreement on government procurement first introduced in the Tokyo Round, and one on trade facilitation that came into force in 2017. In this period of mixed success, the notion of the WTO process dealing with norms rather than tariff reduction was now embedded in international trade governance — and is proving to be its undoing.

As the essays in this series demonstrate, the global trade governance agenda is almost entirely a “trade and...” agenda. The list is a daunting one, including labour, women, Indigenous peoples, climate change (and the environment more broadly), data and digital issues, and IP, ideally crowned by a reformed dispute resolution process.

But it is hard to visualize the WTO — or any single multilateral organization — dealing with these issues in their entirety, starting with the negotiation. Clearly, the “single undertaking” approach, where all manner of topics were pooled to make broad-based progress while allowing for trade-offs between issues, is dead — and should be. The last two

The case of data governance vis-à-vis e-commerce is indicative of the dilemma. In the absence of a meaningful multilateral framework on e-commerce, regional trade agreements (RTAs) are forging ahead. In the Americas, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Pacific Alliance and the Canada-United States-Mexico Agreement (CUSMA) have provisions for e-commerce. Since one of the reasons to have RTAs is their “hot house” nature to experiment and innovate, it is possible that in the absence of multilateral rules, RTAs establish precedent and practice, which might eventually become the multilateral norm.

There are two areas where seeming technocratic e-commerce-related provisions mask deeper and more sensitive issues of power and national sovereignty. One is data localization; the other is the capacity of national authorities to hold multinational digital platforms accountable for the content they carry. The CUSMA provision on data localization (article 19.12) is short and not so sweet, at least for those who read more into such policies than simply the enabling of trade: “No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.”

If data is seen only through a commercial lens and not as an aspect of personal protection and privacy, the logic of ever more openness makes sense. But examples abound of the non-economic dimensions of data, lost when data is treated strictly through the trade agreement medium. While some in the human rights community have raised concerns about forced data localization in countries with authoritarian regimes,⁴ it is safe to say that the categorical language on data localization in CUSMA is not driven by such concerns in relation to Canada, the United States or Mexico. However, this does highlight the quandary of placing a deeply conflictual social issue in the lap of global trade governance.

The possibility of the WTO fading into the background as other issues and better adapted fora rise to pre-eminence should not be overlooked.

CUSMA also uses the “safe harbour” provision to liberate digital platforms from responsibility for the content they carry. There is currently a lively discussion ongoing on how best content on digital platforms might be managed.⁵ Safety must be balanced with freedom of speech. Models of content regulation ranging from none to purely government-imposed to self-regulating and public-private partnerships (such as Facebook’s Oversight Board) are currently being evaluated. It is entirely likely that one size does not fit all in this case, and that the political economic process in different countries might arrive at different solutions.

The US projection of this political economy, via RTAs, into other countries removes their ability to view this situation differently. The RTA entry point is used to manage

policy space for areas that go well beyond e-commerce. In effect, RTAs act as a ratcheting mechanism, locking-in norms and practices negotiated by powerful players (whose power is even further enhanced in a regional setting) that stand to become a multilateral standard. This may well be where a “modernized” WTO is headed, but it is no longer an international trade governance organization — and it might no longer be global, if the result is a fragmented internet, what Sean McDonald and An Xiao Mina term the “war-torn web.”⁶

The flexibility and pragmatism built into the GATT articles, coupled with the rise of the “[name your issue] and trade” agenda, have led to a stage where the WTO either mutates drastically or becomes obsolete. There are many strategic choices awaiting the WTO: for example, become a niche organization that provides governance in a single sector such as data or climate change; act as a repository for RTAs and forum to discuss the spaghetti bowl of ideas generated therein; host a more modest trade dispute resolution process for participating countries; or choose a default option and serve as an institution adjudicating trade among the many in areas that are not hyper charged. The WTO will no longer be the high-profile go-to organization of the past quarter-century. And it will remain relevant for a huge percentage of conventional commerce, but not regulate the division of rents in the intangible economy. Unlike 1944, in the Group of Twenty today, we have a ready-made forum that balances inclusivity, diversity and efficiency in decision making. Such a forum might be useful in helping to choose among the options and setting a realistic course for WTO modernization.

The implications of the quote cited at the beginning of this essay — that once tariffs were lowered, what was left for multilateral trade negotiations to achieve — was just as true when it was written in 1971 as it is today. The possibility of the WTO fading into the background as other issues and better adapted fora rise to pre-eminence should not be overlooked.

AUTHOR’S NOTE

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NOTES

1 John W Evans, Assistant Special Representative for Trade in the Executive Office of the President of the United States, cited in Alasdair I MacBean & P Nicholas Snowden, *International Institutions in Trade and Finance* (London, UK: Allen & Unwin, 1981) at 78.

2 They were mostly men. Not one of the 44-country delegation chairs was a woman, and a scrutiny of the list of attendees put together by Kurt Schuler and Mark Bernkopf suggests that more than 90 percent of the national delegations were male. The proportion was slightly lower among members of the international press covering the conference and, of course, lower still among support staff. See Kurt Schuler & Mark Bernkopf, "Who Was at Bretton Woods?" (2014) Center for Financial Stability Paper in Financial History, online: <www.centerforfinancialstability.org/bw/Who_Was_at_Bretton_Woods.pdf>.

3 Although, in practice, they were not big hearted, as David Malone and I, summarizing the key literature in this regard, argue. See David M Malone & Rohinton P Medhora, "Development Advancement through International Organizations" CIGI, CIGI Papers No 31 at 7–10, online: <www.cigionline.org/sites/default/files/cigi_paper_31.pdf>.

4 Arindrajit Basu et al, *The Localisation Gambit: Unpacking Policy Measures for Sovereign Control of Data in India* (Centre for Internet and Society, India, 2019), online: <<https://cis-india.org/internet-governance/resources/the-localisation-gambit.pdf>>.

5 For a sense of this discussion, see Susan Etlinger, "What's So Difficult about Social Media Platform Governance?" in *Models for Platform Governance*, CIGI Essay Series, 29 October 2019, online: <www.cigionline.org/sites/default/files/documents/Platform-gov-WEB_VERSION.pdf>; Kate Klonick, "Does Facebook's Oversight Board Finally Solve the Problem of Online Speech?" in *Models for Platform Governance*, *ibid*.

6 Sean McDonald & An Xiao Mina, "The War-Torn Web", *Foreign Policy* (19 December 2018), online: <<https://foreignpolicy.com/2018/12/19/the-war-torn-web-internet-warring-states-cyber-espionage/>>.

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The World Trade Organization (WTO) is experiencing a crisis of legitimacy — trade wars rage on and the Appellate Body is unable to function. With negotiations at a standstill and disagreements on fundamental issues widening, the WTO is struggling to respond effectively to the challenges of rapid economic, political, social, technological and environmental change. Overcoming these urgent challenges will require a great deal of political will and international cooperation from member states. In this essay series, authors examine where the WTO is falling short, consider the opportunities that lie ahead and discuss options for a modernized WTO.

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