

23-5 Can the World Trade Organization Be Saved? Should It?

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INTRODUCTION

Heads of state, trade ministers, and academics have repeatedly called for reforming the World Trade Organization (WTO), the institution charged with the stewardship of the global trading system.¹ The durability and worth of the WTO are being increasingly questioned² despite the fact that by almost all objective measures, it has been a great success, with world trade growing much faster than global GDP over the last 75 years.

However, past success does not guarantee future performance. The challenges of 1948, when the trading system was created with the General Agreement on Tariffs and Trade (GATT), and of 1995, when the WTO was founded, are not the same as those of today. Trade needs to play a role in addressing climate change, food insecurity, and future pandemics. The rules of the trading system need to be able to respond to future existential crises. Rulemaking in the WTO must also prevent the global digital economy from fragmenting, provide more effective disciplines for subsidies, and support progress in delivering both fairness and economic growth in all segments of the world economy where trade plays an important role—in agriculture, manufactured goods, natural resources, and services. The trading system must deliver benefits for workers and entrepreneurs, enabling continued economic growth worldwide. The effectiveness of the WTO has been called into question as it has fallen short of expectations over the last quarter century.

This Policy Brief examines the institution's most serious defects and the multitude of challenges it faces. It suggests that the institution needs to evolve to reach broad-based international trade agreements, adding much needed new rules to the world trade rulebook and developing effective means to settle disputes that would render the rules of the system enforceable once again.

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1 Many of the subjects raised in this piece are addressed in greater detail in my forthcoming book, *Revitalizing the World Trading System*, Cambridge University Press (expected publication June 2023).

2 This was the theme of a panel discussion at the [Global Trade Academy](#), Georgetown University Law School, on March 31, 2023.

THE GRAND SUCCESS OF THE MULTILATERAL TRADING SYSTEM

The WTO, which consists of 164 members, a Director-General, and a Secretariat, is the caretaker of the world's trading system. By objective measures, the multilateral trading system founded in 1948 and administered by the WTO since January 1, 1995, has been phenomenally successful. The system was designed to promote international trade and has done so. By volume, trade is 45 times the level it was in 1948, and two-thirds of that growth occurred during the WTO era.³ By value, trade has grown almost 400 times based on what it was in 1950, and 80 percent of that growth took place during the WTO's existence.⁴

Ninety-eight percent of world trade flows based on WTO rules. That includes the 20 to 25 percent of international trade that takes advantage of free trade agreements (FTAs) and is therefore largely free of customs duties,⁵ since all FTAs have the WTO rules as their foundation. The WTO rulebook generally requires nondiscrimination (also known as the most-favored-nation principle, MFN), transparency, fixed tariffs, limited quantitative restrictions, and standards that are not more restrictive than necessary (among other requirements). International trade rules also foster trade facilitation (i.e., cutting red tape as goods seek to cross borders). In 2022, \$32 trillion worth of trade coursed through the arteries of the global economy, setting a new record.⁶

These numbers by themselves are not proof of the WTO's efficacy. No counterfactual can be presented with all other variables held constant. During the last 28 years, many other factors enhanced the flow of international trade. Foremost among these were major technological advances. Super container ships and wide-body jets came into full use, facilitating the physical transfer of goods across great distances. Information technology and the omnipresence of the internet revolutionized how we live, quickly bringing goods and services from remote locations to customers located anywhere. For much of the world, apps (applications for use of smartphones, tablets, and computers) freed entrepreneurial activity from geographical limits. For the United States alone, the digital economy is growing at four times the rate of the rest of the economy.⁷ For India, this figure is 2.4 times the rate of growth of the rest of its economy.⁸ Global commerce has flourished against this backdrop of technological transformation.

As important as technological advances are, they do not alone account for international exchanges of goods and services often moving seamlessly across borders. A system of rules was required to create the environment in which this economic progress could be made. It performed near miracles, lifting literally hundreds of millions out of poverty. During the COVID-19 pandemic, supply chains proved remarkably resilient in delivering essential goods from where

3 World Trade Organization, [Evolution of Trade Under the WTO: Handy Statistics](#).

4 Ibid.

5 World Trade Organization, "The WTO." The estimate for MFN versus preferential trade is based on preference utilization. World Trade Organization, [DDG Wolff: WTO Reform Crucial to Restoring Confidence in the Trading System](#), September 21, 2020.

6 United Nations Conference for Trade and Development, [Global Trade Set to Hit Record \\$32 Trillion in 2022, but Outlook Increasingly Gloomy for 2023](#), December 13, 2022.

7 Jessica R. Nicholson, [New Digital Economy Estimates](#), US Department of Commerce, Bureau of Economic Analysis, August 2020.

8 *Economic Times*, "Digital Fastest Spinning Wheel of India's Economy," December 21, 2022.

they were produced to where they were needed.⁹ Due to the war in Ukraine, the closure of the Black Sea temporarily cut off 10 percent of supply to the world wheat market, 15 percent of the corn market, and 13 percent of the barley market.¹⁰ Forty percent of the wheat distributed by the World Food Programme had been sourced in Ukraine.¹¹ Agricultural trade from alternative sources prevented starvation in a number of food-importing countries until trade could be restored through the Black Sea.¹²

Although trade has flourished during the WTO's existence, the institution's record is mixed. Some of its most serious defects are the subject of this brief. But before getting to those, it must be said that all would acknowledge that some parts of the institution work well. The WTO has a highly experienced, professional, and expert Secretariat. Its reporting is reliable and extremely useful, particularly during the recent pandemic. Members report on their standards in draft to allow other members to comment. All members sit for a peer review of their trade policies. Despite the headlines generated when there are major departures from the rules, members generally live up to their obligations. The surest sign of the organization's value is that an additional 24 countries and customs territories seek to join it, and none of the current 164 members seek to leave.

The WTO and its rulebook are due a significant amount of credit for the prosperity the world has experienced.

WHAT WENT WRONG? INSTITUTIONAL SHORTCOMINGS

Among those who believe that international trade is good and those who cheer for its growth,¹³ there is nevertheless dissatisfaction. For this audience, the benefit of the multilateral trading system is not at issue; the question is whether the WTO as an institution has been successful compared with how it might have performed had it lived up to expectations, and whether it can be an effective means for international cooperation moving forward. The primary deficiencies that are most often cited fall broadly into two categories. First, can the WTO produce new agreements to meet new challenges? Can it craft rules for the emerging global digital economy, address the trade aspects of pandemics, and institute a plan to

9 World Trade Organization, [DDG Wolff: Trade Is the Best Option for Ensuring Supply of Essential Goods](#), September 29, 2020.

10 Joe Janzen and Carl Zulauf, [The Russia-Ukraine War and Changes in Ukraine Corn and Wheat Supply: Impacts on Global Agricultural Markets](#), *Farmdoc Daily* 13, no. 34, February 24, 2023. DW News, [Five Facts on Grain and the War in Ukraine](#), November 1, 2022.

11 Wilson Center, [Forty Percent of the World Food Program's Wheat Supplies Come from Ukraine](#), June 2, 2022.

12 Joseph Glauber, [Ukraine One Year Later: Impacts on Global Food Security](#), International Food Policy Research Institute, February 23, 2023.

13 There is growing polarization among those contemplating appropriate trade policies. There has always been a protectionist school of thought. Populists do not favor openness to competition from abroad. Nor do they seek market access to permit domestic businesses to compete abroad. Their retrograde policy position is lightly masked by calls for "localization" (primarily of manufacturing), "onshoring," and a "worker-centered trade policy" as new priorities. Resisting the expansion of the reach of international rules is justified as a call for "policy space" while governments consider their policy options. But it is also a means to preserve the ability of each country to restrict international trade. Serving inward-looking national objectives will always be antithetical to attaining the objectives of the multilateral trading system.

harness trade policy to reduce the harms that will occur due to climate change? Second, can the rules of the international trading system be enforced through binding dispute settlement?

Negotiation. In its 28-year history, the WTO has produced only two formal multilateral agreements. The first, the Trade Facilitation Agreement (TFA), introduced no formal trade liberalization. It differed from all prior agreements in that it offered each member the option to choose its degree of obligation, a format perhaps ill-suited for dealing with e-commerce or agricultural and industrial subsidies but which may be adaptable for deploying the system to help deal with the trade aspects of global challenges, such as future pandemics and climate change. The second multilateral agreement, providing disciplines with respect to fisheries subsidies, took more than 20 years to negotiate and is not yet complete, containing only half of the disciplines sought.

This is a relatively limited record of accomplishment compared with the GATT period.¹⁴ The GATT era produced eight rounds of trade negotiations, yielding major new additions to the global trading system's rulebook and reaching beyond trade in goods to services and intellectual property rights. In contrast, the WTO cannot claim credit for concluding any multilateral agreements providing for formal trade liberalization with respect to tariffs or nontariff barriers. The only major trade round it attempted, the Doha Development Agenda, ended in failure. Negotiations to expand liberalization of trade in services moved outside the WTO and then petered out. The negotiation of an environmental goods agreement reached an impasse and was suspended at the end of 2016.

It could be claimed, correctly, that some of the challenges to the multilateral trading system during that GATT era (1948-94) seemed simpler in retrospect—dealing with the reduction of tariffs, customs valuation, the beginning of moving government procurement in the direction of greater openness, and subjecting standards-making to international rules and procedures. In that earlier period, the United States, soon joined by the European Economic Community (EEC) and its later versions (the European Communities [EC] and the European Union [EU]), played a dominant role. Increasingly the barriers to trade were no longer at the border, but embedded in the way countries regulated and organized their economies. The setting of the WTO era (1995 to present) was more complex, with many more countries actively having a say in the evolution of the trading system. The emergence of the BRICS (an acronym for Brazil, Russia, India, China, and South Africa) and the slow pace of economic development in the Global South, the rise of China with its differing economy, and most recently, geopolitics, made the challenges all the more daunting. In addition, both the GATT and WTO periods have failed to adequately discipline domestic subsidies.

To criticize the relative paucity of accomplishments of the WTO era is not to underestimate the importance of the TFA. It liberalized trade by facilitating the movement of goods across borders, especially by cutting red tape.¹⁵ The agreement has been credited with increasing world trade by \$230 billion during

14 The GATT was a contract that over time became an unofficial organization after the failure of the ITO to come into being.

15 World Trade Organization, "Trade Facilitation." Estimates show that full implementation of the TFA could reduce trade costs by an average of 14.3 percent and boost global trade by up to \$1 trillion per year, with the biggest gains in the poorest countries.

2017-19.¹⁶ But the TFA left in place all remaining traditional border measures, including tariffs and quotas. Agreements on formal trade liberalization of that kind has not taken place in the WTO's 28-year history, other than for newly acceding countries. The latter is not insignificant: The 36 countries that have joined the WTO since it was founded include, for example, China and Russia.

A point in the WTO's favor that needs to be recognized is that negotiations are in fact taking place that have close to 100 members participating. A key problem is that these activities are not given any formal recognition within the institution. They are styled as "Joint Statement Initiatives" (JSIs) and "structured discussions."¹⁷ It is unclear at present whether they will be accepted to become part of the formal WTO set of agreements, its *acquis*.

Dispute Settlement. The WTO dispute settlement mechanism, as constructed by the Dispute Settlement Understanding (DSU), was functionally ended in 2019. There are still panels being convened and disputes being settled, but only when there is agreement among litigants to accept an outcome. The universal enforceability of WTO dispute settlement that is applicable to all WTO members has disappeared. The end of the agreed dispute mechanism came about because the United States blocked nominations to fill vacancies in the Appellate Body. On December 11, 2019, there were no longer the required three Appellate Body members left to hear an appeal. In acts of either hope or cynicism, a number of members that lost a case at the panel stage began to file "appeals into the void" to a defunct Appellate Body. The effect was to nullify the system's ability to deliver final outcomes. While an "appeal" was pending, a panel result would be in limbo until the appeal was heard, increasingly a very remote possibility.

The cynicism of appealing into the void proved contagious. By late 2022, 15 cases had been appealed, with no prospect of being heard by an Appellate Body. For example, in November 2022, the president of Indonesia was quoted by the press as saying, "Even though we lost at the WTO on this nickel issue... it's okay. I have told the minister to appeal."¹⁸ This meant that Indonesia would follow in the footsteps of Russia, the United States, and others to appeal to an Appellate Body that no longer exists in order to keep a result from being final. These actions vividly illustrate the failure of WTO members to negotiate a solution to the impasse and find a way back to binding dispute settlement. The enforceability of rules and the trading system itself consequently continue to deteriorate.

Were a poll taken, negotiation and dispute settlement would be the two deficiencies of the WTO most often named by a majority of its members. For many, perhaps these are the only two challenges that come to mind. But if there is to be a serious effort at WTO reform, two further major institutional shortcomings must be addressed.

The Executive Branch. Actually, the WTO does not have one. The WTO has nothing like the executive functions present in any of its sister organizations such as the International Monetary Fund, the World Bank, or the Organization

16 World Trade Organization, [Trade Facilitation Agreement Has Increased Trade by over US\\$230 Billion, New Study Finds](#), March 22, 2023.

17 For example, 71 participants are involved in the JSI on e-commerce. World Trade Organization, [Joint Initiative on E-commerce](#).

18 Reuters, [WTO Backs EU in Nickel Dispute, Indonesia Plans Appeal](#), November 30, 2022.

for Economic Co-operation and Development. The WTO Director-General does not chair the governing body of country representatives. She is not expected to devise an agenda, provide a draft work program, or table negotiating proposals. In fact, were she to do so, this would be unwelcome by many members. The Marrakesh Agreement establishing the WTO stipulated that members would later determine the duties of the Director-General. That never happened.¹⁹ Governance of any complex organization—whether governments of states, nations, economic unions, nongovernmental organizations, or corporations—may or may not have dispute settlement, but they almost always have the means to adopt new rules (a legislative function) and they will always have an executive. The WTO should be no exception.

Intelligence Gathering. An essential ingredient of the multilateral trading system is transparency, which enables members to understand the barriers and distortions that affect international trade. The WTO membership collectively relies on each member's notifications of these measures, which the Secretariat seeks to verify and make information about them widely available. In practice, notifications fall far short of the reporting requirements contained in the agreements. Equally problematic is the fact that this WTO Secretariat function is hobbled by its members. Driven by political sensitivities, members prevent the Secretariat from probing too deeply into the reasons for aberrations in trade patterns—where trade is failing to take place or taking place in a manner or amount that would not be expected were trade unimpeded or undistorted. Currently, shortcomings in the availability of information under WTO rules most often concern the granting of subsidies, but other types of trade-distorting policies and measures are also obscured, lacking visibility and therefore review. These gaps include instances where state influence in a non-market-oriented economy or toleration of anticompetitive practices distort trade.

WHY HAVE THE SHORTCOMINGS NOT BEEN OVERCOME? HOW DID THEY ARISE?

Sovereignty versus International Cooperation

Why is the WTO as an institution not more robust? There are many reasons, including that its members generally do not agree that the institution *should* be more effective. This is an expression of sovereignty, an attribute of members, most of which are nation-states.²⁰ It is evident in the repeated calls for “policy space” to preserve future freedom of action by more than a few members when new disciplines are suggested. From the beginning, participants in the multilateral trading system faced domestic political constraints in dealing with disciplines regulating agriculture, including granting market access. This is considered a cause of the failure to conclude the Doha Development Agenda. There is also sensitivity to granting greater openness to imports of industrial goods, manifested in members preventing an agreement on duty-free treatment for environmental goods (the Environmental Goods Agreement). Serious hurdles

19 World Trade Organization, [Article VI: Marrakesh Agreement Establishing the World Trade Organization](#).

20 When a member is not a nation-state, it nevertheless has control of its customs territory, and likewise will often seek to preserve a high degree of autonomy.

persist to providing disciplines on subsidies, including those given to support the use of fossil fuels. The inability of the most recent Ministerial Conference (MC12) to reach a complete agreement for fisheries subsidies after more than two decades of negotiation is emblematic of the challenges of seeking greater disciplines on subsidies.

The Accidental Conception

The imperatives of sovereignty and preserving policy space are underlying conditions that will affect any discussion of institutional reform for the WTO, but the institution's defects also have a more pedestrian explanation. Few international institutions or examples of governance in international relations have ever had the degree of inattention that appears to have accompanied the conception of the WTO. The Uruguay Round was not the equivalent of a constitutional convention to consider and deliberate on what sort of international trade institution was needed. There was none of the deep reflection on governmental institution-building that is to be found, for example, in the US Federalist Papers.

In the beginning, during the Uruguay Round—the last great round of successful multilateral trade negotiations that created the WTO—there was no particular focus on institutional arrangements with one large exception: dispute settlement.²¹ The round's conclusion was not the equivalent of Bretton Woods, giving birth to the World Bank and the International Monetary Fund. Nor was there anything like the 1948 meeting of trade ministers in Havana that created (on paper) the International Trade Organization, or the 1945 San Francisco Conference that created the United Nations.

In December 1993, at the final substantive ministerial meeting that brought the Uruguay Round to its conclusion, the exciting news consisted primarily of the conclusion of four new landmark agreements: (1) the extension of trading system rules to services (the General Agreement on Trade in Services, GATS); (2) the protection of intellectual property (the Agreement on Trade-Related Aspects of Intellectual Property, TRIPS); (3) the provision of real disciplines and the granting of market access for agriculture for the first time (the Agreement on Agriculture, AoA); and (4) putting into place binding dispute settlement (the DSU). Hardly any attention was paid to creating a new world trade organization, in part because the new organization was to be in most respects much like the informal organization that administered the GATT, with a few technical changes to accommodate the new agreements just listed. This is how the press at the time treated the WTO's creation.²² The headline in the *New York Times* was that the United States and the European Union found a way to resolve their differences, not that a new institution for world trade was being created.

21 Not categorized here as part of the round's institutional focus was the requirement of the "single undertaking," dragooning all participants into the new set of agreements without any choice, a serious design flaw.

22 *New York Times*, [The World Trade Agreement: The Overview; U.S. and Europe Clear the Way for a World Accord on Trade, Setting Aside Major Disputes](#), December 15, 1993.

Two major deficiencies occurred because there was no particular focus on creating a mechanism that would smooth the way for future negotiations, nor was there discussion of whether the WTO should have an executive branch. The failure to clearly provide for two of the three essential characteristics of governance—rulemaking and executive functions—resulted in the third element of governance, the judicial function, expanding over time to fill the void. The Appellate Body became a court. There were no checks and balances. In the view of one very important member, the United States, this amounted to a *kritarchy* (rule by judges). In this view, dispute settlement panels and the Appellate Body overachieved, never finding a ruling they could not make or a question they could not answer, until the United States finally ended its existence,²³ leaving a number of members to institute an interim alternative mechanism led by the European Union: the Multi-Party Interim Arrangement (MPIA). Others in many cases were left with noncompliance.

The Leadership Vacuum

While all WTO members agree that reform is needed, there is little agreement on *what* changes should be adopted. There is a lack of leadership from the largest trading members. The United States has pulled back. China has never stepped forward and there is a question as to whether it would have the vision to provide the necessary leadership that would earn the trust of others. While the European Union is the closest of the three to perhaps becoming an effective sponsor of multilateralism, it does not see itself as a force sufficient to drive the trading system forward. For the United States there may be a shortfall in perceived interest, for China in vision, and for others, self-confidence. The middle powers such as Japan, Canada, Australia, and Singapore have not fully filled the gap.

Leadership is even more important in an organization that contains members of vastly different capabilities and perceived needs. GDP per capita within the WTO membership ranges from under \$500/year for the poorest to over \$90,000/year for the most economically well-off.²⁴ Leadership is crucial to bridging the many lines of division among this diverse membership.

Original Design Flaws

An overachievement of the Uruguay Round that proved problematic was the “single undertaking.” Originally this term was about inclusiveness—all GATT members were welcome to participate fully in all of the multiple negotiations that were underway simultaneously in the round. But it became more. In the end, all participants had no option but to join everything, all agreements, regardless of their level of development, capacity, or policy preferences, because the prior agreement, GATT 1947, was terminated. The developed countries, led by the United States and the European Union, agreed that the GATT 1947 would no longer exist, giving developing countries no option but to join the full set of WTO agreements, including the GATT 1994. With 20/20 hindsight, this was a major

23 An action by the United States roundly criticized by all other members.

24 World Bank, [GDP per Capita \(Current US\\$\)](#). At one end of the scale, a few countries in Africa, and at the other, Switzerland.

defect built into the new trade organization. There is lingering bitterness on the part of developing countries stemming from the way in which the WTO emerged from the GATT era.

This error was compounded by continuing the practice of requiring consensus (which has become a requirement of unanimity) for making most decisions, including for the negotiation of new agreements, especially when not all welcomed them. The flexibilities of the GATT 1947—having agreements that not all needed to join and from which not all received the benefits, such as the Government Procurement Agreement—disappeared. If forward progress in the WTO is to remain in effect a convoy system, with all members expected to accept all WTO agreements at the same time, there will be little forward movement. The record of having only two fully multilateral agreements—the TFA and the Agreement on Fisheries Subsidies—over the life of the WTO is not very encouraging. And even the Fisheries Agreement is only partial and temporary, in that if it is not completed, its sunset provision will take effect. Each of these agreements moved from conception to execution (conclusion of the agreement) in a time frame measured in decades. The notion that all must agree to everything—including recognizing the legitimacy of agreements to which they are not and do not wish to be a party—is unworkable.

Finding the Way Forward

The institutional defects of the WTO are now largely baked in, and root-and-branch reform is needed. Nothing of the sort is currently being contemplated.

This is not a cause for despair. The lesson of the MPIA and JSIs is that if there is sufficient will, there can be results, albeit sometimes suboptimal. Recall that the GATT itself was not recognized by the US Congress for several decades. Indeed, as a formal matter, there was no GATT Secretariat. Legally, it was a Secretariat to an Interim Committee for the International Trade Organization (ITO), a body that never came into being. Pragmatism saved the multilateral trading system. Countries that wished to do so created a world order for trade with a Secretariat to an interim committee administering an interim agreement (the GATT). The institutional framework was a fiction that lasted nearly 50 years. It was serviceable enough to enable its “contracting parties,” as its participants were named, to make very substantial progress.

Scientists do not know but can theorize as to how life on this planet came into being.²⁵ The opposite is the case with the trading system. Political scientists and trade historians do not need to speculate on the origins of the system and later the WTO. In the 1940s, the victors of the Second World War did not want to repeat the errors of the past and wished to assure a foundation for peace through reconstruction and economic development, which included a global trade agreement as a central element. In the 1990s, in a world free from the Cold War and with a large new package of agreements to administer, special circumstances existed for the provision of institutional arrangements, resulting in the WTO. Special circumstances are once again occurring through the existential threats of climate change and future pandemics. Multilateral cooperation will be needed. The rules of the trading system are directly relevant, and they will need to become more responsive to these global challenges. Making changes

25 University of Chicago News, [The Origin of Life on Earth, Explained](#).

to multilateral rules must take place at the WTO for the organization to remain relevant, but more importantly, for challenges to be met for the common good.

WHAT DOES THE GLOBAL TRADE REGIME STAND FOR? WHAT ARE ITS FOUNDATIONS?

It is well worth assessing the objectives that the WTO serves, in order to motivate its members to retain and improve it.²⁶ Some of these were identified as being shared by all G20 Members in a 2020 exercise conducted by Saudi Arabia entitled, “The Riyadh Initiative on the Future of the WTO.”²⁷

In my own list, there are six key attributes:

- First, the multilateral trading system stands primarily for the promotion of **efficiency**, or the division of labor.

This sounds cold, dispassionate, impersonal, and uncaring, but it underwrites increasing overall global prosperity, what Franklin Delano Roosevelt called “freedom from want.”²⁸ This June will mark the 300th anniversary of the birth of Adam Smith. The WTO, the multilateral trading system, is one of his most important legacies. He wrote:

It is the great multiplication of the production of all the different arts, in consequence of the division of labour, which occasions, in a well-governed society, that universal opulence [which extends itself to the lowest ranks of the people].

Every workman has a great quantity of his own work to dispose of beyond what he himself has occasion for; and every other workman being exactly in the same situation, he is enabled to exchange a great quantity of his own goods for a great quantity, or, what comes to the same thing, for the price of a great quantity of theirs. He supplies them abundantly with what they have occasion for, and they accommodate him as amply with what he has occasion for, and a general plenty diffuses itself through all the different ranks of society. (The Wealth of Nations, I.i.10)

This is the most basic foundation for international trade. A rising tide does not lift all boats. A stagnant pond raises none. The G20 members did not mention this common value. One presumes that in the current political environment, efficiency is out of style, and to espouse it might be mistaken as not caring about the health of the planet or lifting up the least economically developed nations.

- Second, the multilateral trading system was constructed as a **peace** project, following the bloodiest half century in human history. It still is.
- Third, international commerce is to be governed by global **rules**, to provide **fairness** and **balance**, through regulating how governments influence or interfere with the flow of international trade.

²⁶ The questions and answers in this section stem from my participation in a panel at the Georgetown University Law Center on April 13, 2023, as part of a day-long program on “Re-thinking World Trade 2023,” cochaired by Jennifer Hillman and Katrin Kuhlman.

²⁷ Appended to the chair’s summary.

²⁸ Annual Message to Congress.

- Fourth, the system is to provide **nondiscrimination**.
- Fifth, by providing **transparency**.
- Sixth, by providing **enforceability of commitments**.

The total effect of these elements of the system is that it provides a degree of **certainty** that enables those engaged in commerce to enable the movement of goods and services to reach foreign markets.

Most would have included economic development on this list. However, economic development is a vitally important byproduct of these attributes, in the view of this author (and of one of the finest GATT scholars, Robert Hudec). It is in this derivative sense that the multilateral trading system stands for development.

Which of These Aspects of the Trading System Should Be Retained?

Efficiency cannot be discarded without defeating the primary purpose of the trading system, which is to promote economic growth. Nevertheless, it will be leavened to take into account other growing concerns. In the United States, the first of these is national security, driven by the rivalry with China. This is reflected in the Biden administration's choices in industrial policy and government procurement. In the European Union, the primary concern is climate change, and the need to make trade greener and avoid carbon leakage. In the developing world, issues of food security loom large for food-importing countries, and all developing countries are concerned with industrial development, including greater participation in the digital economy.

The **market-oriented** basis of the trading system should be acknowledged as the common principle upon which the trading system rests.²⁹ The rules of the system cannot be effective if government fiat rather than market forces is allowed to determine competitive outcomes.

The **peace project** remains an important part of the trading system, although largely unrecognized. It is no longer about reintegrating Japan and Germany into the world economy, but about raising the standard of living and increasing stability in conflict-affected countries, such as Afghanistan, Ethiopia, Liberia, Somalia, South Sudan, Sudan, and Timor-Leste. As such, the peace project is an ongoing and vital part of the trading system. Peace is not guaranteed, as we know from experience. But it can be made more possible.

Fairness. For example, for the developing economies, there needs to be a reassessment of how development and fostering adherence to the global rules can best be advanced, including for the least developed. Special and differential treatment should be precise, effective and operational. Trade remedies must be restored to provide balance to the system, realizing that resolving inequalities of the distribution of benefits is primarily a matter for domestic national policies to address. Distribution of benefits and obligations among WTO members needs to be kept current, in part because acceding countries bear heavier obligations than original members and because economic capabilities change over time.

²⁹ This was explicitly *not* agreed by the G20 in the Riyadh Initiative.

Nondiscrimination is still a foundational goal, but it will increasingly be moderated by other, mostly unavoidable, factors. For example, providing benefits to nonsignatories may not be considered suitable in every plurilateral agreement. Examples where nondiscrimination may not be the rule included the following:

- A large swath of trade between the two geopolitical rivals, the United States and China, is far less than MFN; that is, they each discriminate against the trade of the other. For the trading system, it is best if national security measures are targeted when doing so is consonant with their objectives, rather than applicable to all.
- Discrimination is also inherent in so-called free trade agreements, which are at a bilateral level more about trade distortion; that is, favoritism, rather than trade creation for all. It should not be too late to scrutinize bilateral FTAs.
- The longer the WTO remains in a log jam and is unable to move forward, regional arrangements such as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the China-centered Regional Comprehensive Economic Partnership (RCEP) will be the rule rather than the exception.
- It is not yet clear whether climate change will be dealt with by the formation of discriminatory climate clubs,³⁰ and whether the rules set for the emerging digital economy will be nondiscriminatory.
- Discrimination in terms of special and differential treatment should be a temporary, needs-based exception, with the goal being that all members would have the capability to enjoy both the full benefits and the full obligations of the system.

The exceptions should not overwhelm the general rule of nondiscrimination if global economic growth is not to be stifled. This does not mean that progress should not be made where it is better than MFN treatment, on a regional basis, which includes Association of Southeast Asian Nations (ASEAN), RCEP, CPTPP, and the African Continental Free Trade Agreement (AfCFTA).

Transparency needs to be enhanced, with greater cooperation from members and greater independence given to the WTO Secretariat.

Enforceability needs to be restored through binding dispute settlement to which all subscribe.

HOW SHOULD THE WTO ADAPT AND RESPOND TO THE CHALLENGES OF THE 21ST CENTURY?

There are seven key challenges to the system over the next 20 years:

- 1 Deal with the trade aspects of climate change, primarily addressing food security, but also facilitating the free movement of remediating goods and services across borders.
- 2 Prepare the trading system for the next pandemic.

³⁰ William Nordhaus, "Climate Clubs: Overcoming Free-Riding in International Climate Policy," <https://ycsg.yale.edu/sites/default/files/files/nordhaus-climate-clubs.pdf>. He defines a climate club as "an agreement by participating countries to undertake harmonized emissions reductions."

- 3 Preserve as open a trading system as possible in the face of strategic decoupling of the democratic capitalist countries, or at least the United States, from state capitalist ones.
- 4 Extend the rules of the system to the global digital economy before that world fragments.
- 5 Reform the WTO by making sure that open plurilaterals are fully part of the system, creating the executive branch (including independent intelligence assessments), and restoring binding dispute settlement.
- 6 Regulate subsidies for both industry and agriculture.
- 7 Find leadership to carry the trading system forward. This can be the European Union combined with mid-level countries, including Australia, Canada, Japan, Singapore, etc. The United States and China can join in as they are able to see self-interest in avoiding being left out.

Was MC12 a Turning Point and Will MC13 Head in the Right Direction?

MC12 provided a respite from loss of confidence. There is hope for a good conclusion to the fisheries subsidies negotiations, whether at MC13 in Abu Dhabi in February 2024 or later. None of the other issues mentioned in this paper are ripe for closure, with a fully adequate level of accomplishment.

The bottom line is that we cannot tell if MC12 was a turning point -

- until the United States reengages or the others move on without the United States;
- unless the JSIs can be made a recognized part of the whole *acquis*;
- until there is substantive delivery from the most important JSI, e-commerce;
- until the moratorium on customs duties on electronic transmissions is made permanent;
- until serious agriculture negotiations get underway;
- until something meaningful is done on trade and health (future pandemics);
- until root-and-branch reform is even contemplated, including a true executive; and
- until the DSU is repaired or a solution is found to bring all litigants back into binding dispute settlement.

How Should the 21st Century Trade Policy Be Reconceived So It Serves the Interests of All?

The G20 should be more than decorative. Heads of state should renew their trade vows and provide ministers with direction to act on that basis. A rededication is needed. Members should build on the Riyadh Initiative. Ministers should take on the hard work of negotiation.

WHAT NEEDS TO BE DONE AT THE WTO?

To be successful, trade negotiators must be pragmatists. They can accomplish institutional reform largely by forging ahead.

Restoring the Negotiating Function

It is essential that like-minded members be able to conclude agreements that are consistent with the WTO's objectives and have them administered within the WTO. There must be clear path to bypass the current veto that any recalcitrant nonparticipant member has over those who wish to move ahead toward concluding agreements within the WTO. It should be made clear that negotiations will take place within the WTO among willing members as long as their prospective agreements are consistent with the objectives of the institution, funded by the participants, and open to nonparticipants joining. The negotiated results should be formally incorporated into the WTO's body of agreements.

A good analysis of how additional commitments are in the normal course to be added to the WTO body of agreements (its *acquis*) is found in a paper by Hamid Mamdouh, a former senior member of the WTO Secretariat.³¹ A new plurilateral agreement could be added by consensus to Annex 4 of the Marrakesh Agreement. But not all members may agree to a consensus being formed. Thus, there need to be workarounds. For the Agreement on Domestic Regulation of Services, the members added their commitments to their GATS schedules. This step required no approval of the membership. It is less clear how to schedule other commitments where there are no existing schedules into which new obligations are to be incorporated.

How would it be possible to lodge an entirely new agreement, a plurilateral to which not all subscribe, within the WTO?

There may be the collective political will to add new stand-alone multilateral agreements (to which all agree, or at least approve), perhaps when the threat is dire enough (such as climate change or food insecurity that is several orders of magnitude greater than at present). This threshold was apparently not reached in the recent pandemic. In some cases, a multispeed agreement to which all subscribe could be concluded within the framework of the WTO, if there is wide enough latitude for the degree of obligation and clear benefits involved in participation by countries at all levels of economic development, as was the case with the TFA. Perhaps these two motivations will come together to improve the rules of the trading system to deal with climate change.

Otherwise, the way forward must be with plurilaterals. The institutional question is whether clubs of countries can dock their agreements at the WTO and have the WTO as the venue for their administration, in the absence of acquiescence from the entire membership. It is clear that more than a few members will argue that there must be prior acceptance by all for this to take place. They would argue that this is what the WTO is about as a legal and policy matter, that this is inherent in a truly "multilateral" organization. This introduces

31 Friends of Multilateralism Group, [Plurilateral Negotiations and Outcomes in the WTO](#), April 16, 2021.

a degree of rigidity that presents little opportunity for progress. The convoy system and the tyranny of the veto must be overcome if the WTO is to be fit for purpose with evolving requirements that need to be met by trade.

There is a way to circumvent the apparent veto over any forward motion at the WTO: It is an idiosyncrasy of the veto that if no issue is put to a vote, there is no clear opportunity to block. This freedom of action occurred at the initiation of the JSIs, which were simply accepted by the Director-General and supported by the Secretariat. The same is true of the creation of the MPIA. This is the default method by which to proceed if consensus cannot be found. It is unlikely that most members would choose actual voting, as provided in the WTO Agreement. No country has stated that it wishes to surrender operation by consensus with its possible single member veto overhanging every decision, except with respect to decisions to adopt panel reports in the Dispute Settlement Body, where a negative consensus is the mandated procedure.³²

Other steps can be taken to strengthen the legislative (rulemaking) function of the WTO. The European Union has tabled modest suggestions to improve the deliberative functions of WTO committees. The chairs of the General Council, the Dispute Settlement Body, the Trade Policy Review Body, and key committees should be chosen to serve for terms that are longer than one year. Chairs should understand that their neutrality in an honest broker role does not extend to indifference as to whether results are achieved. They must become partisans of the institution.

Making Trade Agreement Obligations Fully Enforceable

At the 2022 Ministerial Conference WTO members agreed to hold discussions aimed at “having a fully and well-functioning dispute settlement system accessible to all Members by 2024.” At some point, a person who is missing can be declared legally dead. In some US states, the stipulated timeline is five years. The period can be a lot shorter for determining that a person in a vegetative state has no future. By way of analogy, the Appellate Body exists only on paper; it matters not whether the body is dead or permanently comatose. The WTO Director-General should announce now that as of 2024, she will consider that the Secretariat no longer has the authority to accept further appeals to the Appellate Body, which ceased to exist on December 11, 2019, *unless instructed by members to continue to do so*. The practical effect would be to end the current charade. Members would have to (1) come to an agreement on a single form of final dispute settlement for all; (2) make their own alternative arrangement, such as by joining a Multi-Party Interim Appeal Arbitration Arrangement; (3) acknowledge at the outset of any dispute that they will accept panel decisions as being final; or (4) adopt by consensus a decision that the Director-General is to continue to accept appeals to the nonfunctioning Appellate Body. The basis for the WTO Director-General to take this course of action is that a correct reading of the Dispute Settlement Understanding is that in the absence of providing an alternative agreed means of dealing with a panel report, without a functioning Appellate Body, decisions of panels should henceforth be deemed final and binding.

³² All must disapprove for a panel report to be rejected.

The best approach for the WTO as an institution is that the members agree to a dispute settlement system acceptable to all who are likely to be active litigants. For full coverage of dispute settlement, there would no doubt have to be agreement on further substantive disciplines, including with respect to subsidies and the practices of state-controlled or influenced enterprises. Since that is unlikely to occur, exclusions by subject matter may have to be considered from a reconstituted WTO dispute settlement system. Another means of reaching broader coverage of binding dispute settlement is to allow for nonapplication between two parties. Given current differences over whether the WTO is based on its members being market-oriented economies, there might also be an additional MPIA for market economy countries. Invocation of the national security exception can be made nonreviewable as long as it is also not cost-free. Those members whose trade is adversely affected would have the right to restore the balance of trade concessions.

An essential ingredient to the restoration of dispute settlement is that members find a way to give a substantive role to the Dispute Settlement Body to provide oversight over panel outcomes. Without checks and balances, independent dispute settlement can readily become irresponsible (in a literal sense). It is in the interests of the organization that the Executive also plays a role in preventing dispute settlement from drifting from its intended role to becoming a legislative, rulemaking body.

Institutional Balance: Explicitly Recognizing Executive Functions

Both the negotiating function and the dispute settlement function suffer from the lack of an officially recognized executive branch. The Director-General should be given a role equivalent to that of similar heads of multilateral economic organizations, chairing the WTO General Council, suggesting negotiating agendas, and bringing forward negotiating proposals. Governance is best when all three of its constituent functions are recognized and effective—legislative, judicial, and executive. A number of Directors-General have overcome to a significant degree the institutional weaknesses of the position, but that is not a reason for inaction on institutional reforms regarding this role.

The Secretariat should be expected to provide substantive input for any negotiations. The Secretariat should be empowered to be fully independent in its analysis of the conditions that shape international trade flows. It should engage on behalf of its members in strategic foresight to identify future challenges and policy planning to meet current and future issues. The Secretariat should be provided with a secure and independent base of funding for the WTO to fulfill its mandate and avoid weaponization of the budget by individual members to control the organization's activities.

Identifying Common Ground

The work to identify common ground in the form of agreed principles began under the Riyadh Initiative on the Future of the WTO, introduced by Saudi Arabia during its G20 presidency. The initiative sought to identify and expand the list of values adhered to by the WTO's largest members, and this effort should be continued.

When specific global challenges are identified, such as another pandemic or a crisis in food security, special task forces should be appointed. Points of difference should be debated. Deliberation has to become usual, and not exceptional. It should take place throughout the WTO committee structure.

The WTO is about providing disciplines over individual members' actions. It somewhat narrows the scope of sovereignty in exchange for the freedom of action of other members being equally curtailed. The overriding objective is to have all members fulfill all obligations and benefit from all rights. In the process of arriving at this outcome, members should endeavor to provide the resources needed to enable the least and lesser developed countries to join agreements, with no permanent substantive exclusions, recognizing that being subject to WTO obligations is the institution's primary benefit and the reason for its existence.

IS THE WTO WORTH REFORMING OR IS IT AN UNNECESSARY RELIC?

The future prosperity of the world and all of its nations depends on a functioning international trading system, with enforceable rules and the ability to make additional rules as needed, rules that the WTO will administer. It is in the fundamental interest of all nations benefiting from the system to keep the WTO in place and make it more effective.

There are existential global challenges to which the WTO's members must respond for the common good by working together within a multilateral framework:

- Climate change cannot be effectively addressed with only unilateral, bilateral, or regional solutions. It is a global problem requiring a global solution. Trade must play its part.
- The AoA needs to be amended to assure that support for agriculture has as a guiding principle increasing the efficient and sustainable use of land and other natural resources.³³
- Members should coordinate financial support to meet the common problem of global food security, and fund promising research and technical assistance.
- Export restrictions placed on food should provide for the equitable sharing of national supplies internationally.
- Fossil fuel subsidies need to be regulated. Carbon border adjustments need to be understood and regulated, and frictions avoided.
- The environmental goods and services negotiations should be revived and the agreement facilitating this trade concluded.

Trade must be ready to deal with future pandemics. Preparations should begin now.

- Cross-border trade needs to be facilitated.
- Any export controls must provide for an equitable share for the rest of the world.

³³ Joseph Glauber, [Revising Public Agricultural Support to Mitigate Climate Change](#), Policy Commons, May 4, 2020.

A great current and future benefit for the world economy is the advent of digitalization and e-commerce. That world is about to fragment with the adoption of national regulations that will become a handicap for world economic growth. A global solution is required.

WTO rules and procedures must be reviewed to take into account new realities, such as stronger emphasis on sustainability, concerns about benefits for workers, and a range of emerging environmental issues such as plastics pollution.

A new emerging problem consists of the resort to subsidies as a primary means of achieving national objectives, often at odds with the interests of others. It is essential that there be a greater degree of cooperation, adopting rules to avoid excessive trade distortions and waste, with coordination of subsidies to meet global challenges where that would be more effective.

Even the subject of relative peace between global economic rivals can be assisted through multilateral rules. The challenge of maintaining world trade to the maximum extent possible for nonstrategic goods in a time of strategic decoupling needs to be squarely faced.

Binding dispute settlement for all, curing past defects, must be established.

The only sure way for the WTO to demonstrate the capability to make rules, to negotiate new agreements, is to do so. The partial disciplines included in the interim Agreement on Fisheries Subsidies served as a down payment on this endeavor. It must be successfully concluded. Momentum will be built by achieving a series of successful negotiated outcomes, meeting common challenges with agreed solutions, and making basic improvements to the WTO as an institution.

It is entirely possible to improve the trading system and make it more equal to the challenges that are presented. Doing so depends on members' dedication to fostering common objectives. Common ground must be found, and it will be, because there is no acceptable alternative.

It will be argued that there are alternative fora in which to make progress. The negotiations of regional agreements, such as the CPTPP, are places where progress can be made among those closer to being like-minded. Such agreements can be laboratories for the multilateral trading system. But in the end, solutions to the largest problems need to be global. Submultilateral negotiations should always have as an objective improving the world trading system. Otherwise, they can further fracture the system and drain energy from it.

Failure to revitalize the WTO to administer a single set of rules to which all can aspire could result at worst in a dystopian future and at best slower global economic growth for all.

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