

Global Trade Governance



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Abstract: This paper was prepared after the election of Donald Trump as US president for a second term and while Joseph Biden was still in office. The issues remain regardless of the attitude of the United States toward global trade governance. The paper explores the reasons for the inability of the World Trade Organization to fulfill its promise. The problem of the search for leadership in the trading system is explored. The paper summarizes the major forces guiding the trade policies of the major trading nations and addresses the institutional weaknesses of the WTO. The objectives are laid out for WTO reform, noting that the WTO was not the product of careful and exhaustive planning and negotiation: (1) finding a path forward to making the WTO a place where trade negotiations can and will occur, (2) deciding whether and in what form dispute settlement can become once again binding for all, (3) providing for the WTO's executive functions, for the members and for the Secretariat headed by the Director General, (4) providing for intelligence gathering and strategic foresight, and (5) making the WTO into truly a world trade organization. Each of these aspects of global trade governance is explored in turn. The durability of the liberal international order is then addressed.

- How did the World Trade Organization arrive at the difficult, perhaps existential, point at which it finds itself today?
- How can it be improved and be made more viable going forward?

The mission for WTO reform:

The WTO must become the primary place where multilateral, including open plurilateral, (potentially global) trade agreements are negotiated and administered, through which comprehensive global trade information can be accessed, where trade crises can be anticipated and trade solutions found, and where trade disputes can be settled.

Taking stock – the need for a reassessment, rejuvenation

There are compelling reasons for improving the framework for world trade provided by the World Trade Organization (WTO). Concerns arise from three main causes: First, there is a marked fall-off in the degree of dedication to the multilateral trading system shown by several of the principal WTO members. Second, the frequency with which members appear to be

ignoring the existing rules when they feel it is necessary or desirable to do so is increasing. Third, the global rules are in many respects demonstrably inadequate to meet vitally important emerging current global challenges, and they are not being updated.

Given the rise of populism in many countries and the declared intention to adopt a radically different trade policy by the recently elected next administration of the United States, this assessment, written before the US election, needs to be modified to reflect likely new realities. All the observations contained in the above paragraph remain valid. However, the global trading system is likely to be severely tested. The United States was a prime mover of the GATT-WTO rules-based liberal international trading system. If it ceases for a substantial time to perform that role, the durability of the current system is put into question. The WTO could go the way of the League of Nations.

The most serious question posed is not in my view necessarily whether the system devolves into two trading blocs, but whether it undergoes a severe fragmentation, with each country largely pursuing its own self-interest, perhaps holding the line only within existing and new regional arrangements. WTO members need to confront the issue of whether the global rules and level of liberalization will be maintained without the participation of the United States. Is the membership of a key country severable, in much the same way that the other provisions of a contract may survive when a major part of the agreement does not? At the extreme, does autarky increasingly become a national goal? How will the EU and China, and the mid-sized countries react? Do they rally to preserve the system without the participation for a time of the founding nation or feel the need to adopt their own defensive arrangements? Are the countries with large and long sustained trade surpluses willing to adjust their domestic economies to achieve a nearer balance with others for the sake of preserving a liberal trading system?

Leadership is an essential element of governance.

The public at large can be forgiven if it reads news reports that the “WTO” achieved some outcome or failed to do so. The WTO does nothing of the sort. Members of the WTO, or some subset of the 166 of them, join together and reach a result or do not do so. As a rule-making body, and as an organization charged with dispute settlement, the institution has no independent existence outside of its membership. It is particularly relevant to examine the role of the United States, WTO founder and past guarantor of the world trading system, as well as the roles of the largest participants, the European Union (EU), China and any of the more active members, those who facilitate as well as those who obstruct. Added to this is the body of developing countries, largest in numbers of people and needs. Granted more limited scope to contribute to a functioning world trade organization, but nevertheless important, the Secretariat through its reports has a voice that affects the effectiveness of this world trade organization.

Examining the roles of all of the more important players is beyond the scope of any paper. The focus here is to on governance and therefore, on institutions. Nevertheless, it is necessary to start with an overview of the players because they are key to making the system work.

American absenteeism

Collaboration for political-military defense among the Western democracies has deepened during the last eight or more years, but the US commitment to multilateralism waned. President Obama’s failure to obtain from Congress ratification of the Trans Pacific Partnership may have marked a turning point. After that, the trade policy of thirteen American presidents,

from Franklin Roosevelt to Barack Obama, fostering the liberal international order, was no longer being pursued.

Following in the direction laid out by the first Trump administration, the Biden White Houseⁱ derided the fifty preceding years of trade liberalization as “old policy”, basically a costly mistake. The US then ignored the trading rules when they were inconvenient, viewing them as unwelcome constraints, with its eyes fixed on what it saw as greater concerns -- rebuilding the US industrial base and infrastructure, fighting climate change and improving US national security. It adopted industrial policy measures that were on their face contrary to the agreed rules of the trading system, without attempting an explanation of their necessity. Presumably the measures were deemed justified for reasons of essential security, whether geopolitical (semiconductors) or environmental (for electric vehicles (EVs) and other green goods). However that may be, the case for the policy choices made, despite the system of rules the US had previously championed, was not fully articulated. If the rules needed adjustment to take into account new realities, the Biden Administration did not exert itself to show how this might best be done. It terminated the most prominent, although seriously flawed institutional arrangement of the WTO founded in 1995, an agreed form of binding dispute settlement. That by some lights was understandable. But then it did not propose a substitute for the system which had at its apex an appellate level of review. Moreover, it continued to block others’ attempts to restore binding WTO dispute settlement.

American trade policy was not, however, during the Biden years, thrown into reverse, opting for across-the-board protection. This remained to be proposed for a second Trump presidency. But it retreated from deeper engagement. Because international economic cooperation is essential to meet new global challenges as well as to complement geopolitical strategy, the US stance could be regarded as a pause, perhaps a long pause, rather than a permanent American rejection of joining in collaborative efforts to support world trade. The question is how long the pause will last, and whether the system will be maintained that would allow it to ultimately rejoin. Were this reconnection to occur, it would require far-reaching changes to the existing system.

Where else is leadership of the trading system to come from?

The primary partner of the United States for moving the trading system forward was the European Union (EU) since the latter’s establishment. Unfortunately, the EU has not found its footing to act as the first among equals to preserve and improve the trading system. It has spent the bulk of its energies, understandably its top priority, in seeking to build and strengthen the 27-member European Union. It then embarked on numerous bilateral negotiations, a plethora of them, including many FTAs. It has been instrumental in bringing back widespread discrimination into the trading system, albeit in the form of preferential free trade arrangements to a GATT that had ostensibly done away with this self-centered approach.

Now, commendably, the EU assigns great importance to dealing with the challenge of climate change, but it has not worked effectively with others WTO members to develop rules in the trading system to cover the carbon border adjustment measures (CBAM) that it sees as being essential. The trade measures it places in its arsenal are largely defensive in reaction to the difficult global trade policy environment. These include anti-subsidy remedies, an anti-coercion tool, and investment screening. The EU also utilizes competition policy and product standards to an extent that others do not, as a supplement (or substitute) for trade measures. It would likely say that this was a pragmatic response to the world as it is, and a policy direction that is

more productive than expending more energy on multilateralism. But this has not provided needed leadership for the multilateral trading system.

China, the world's largest trading country, has not chosen to take center stage as a leader at the WTO, although it has played a supporting role for the negotiation and conclusion of the Investment Facilitation for Development Agreement and is active with respect to discussions in the WTO to counter plastics pollution. Concerns on the part of its trading partners have existed since the time of its entry as a WTO member in 2001 about the very substantial role of the state in its economy and its emphasis on export-led growth at the expense of domestic consumption. These concerns have only grown. In addition, China's mixes trade policy with foreign policy, employing trade coercion measures when it sees fit to do so. It responds to trade restrictions with its own trade restrictions (threatening to limit cheese imports from the EU in response to EV antidumping duties). A shadow hangs over the willingness of WTO members to engage in further liberalization in substantial part due to heightened fears among members of China's manufacturing prowess, with allegations of China's creation of industrial overcapacity that leads to capture of foreign markets at the expense of other competitors. Its trade, like that of the US and the EU, is a primary target for the dispute settlement cases. The global trading system has not found balance given China's emphasis on export led growth.

Middle-sized and some smaller countries have come forward in the context of the Joint Statement Initiatives (JSIs) to advance negotiations at the WTO. Japan, Australia and Singapore, took on the daunting task, for example, of convening a coalition of the willing, a JSI, to begin the process of bringing the global digital economy within the rules of the multilateral trading system. Forward-leaning initiatives from middle-powers have been met with opposition from India and South Africa and some other members who seek to control what is done at the WTO by refusing to join a positive consensus to move forward. Ways have been found to conclude and implement modest agreements -- on Micro, Medium and Small Enterprises (MSMEs) and the Domestic Regulation of Services. The Agreement on Investment Facilitation for Development has been concluded but no way has been found to have it recognized as part of the WTO rulebook. Results are nearly in hand for an Agreement on E-Commerce, as a stable text has been achieved. In each case, the negotiation was led by middle-sized countries. The 103-member MSME [effort](#) was coordinated successively by the ambassadors of Chile, Uruguay and Barbados. Costa Rica coordinated the effort on Domestic Regulation of Services at its conclusion. But none of the proponents of these negotiated outcomes see themselves as having the political clout, even collectively, to force WTO adoption of the results of their efforts.

The GATT was largely about placing constraints on the trade conduct of parties to the Agreement. Contracting parties were to eschew the adoption of narrowly self-serving measures in the interest of promoting the common good. The WTO has increasingly moved toward soft law, without firm requirements, in recognition of the increasing difficulty of adding formal limits to members' freedom to restrict trade. This state of affairs is the way it is because it suits members to have it this way. A clearer vision of and commitment to achieving what is needed for the common good will be required for global trade governance to be effective.

Global Trade Governance -- WTO Reform – the path forward

There are a of series major areas of concern that need to be addressed: (1) finding a path forward to making the WTO a place where trade negotiations can and will occur, (2) deciding whether and in what form dispute settlement can become once again binding for all, (3) providing for the WTO's executive functions, for the members and for the Secretariat headed by

the Director General, (4) providing for intelligence gathering and strategic foresight, and (5) making the WTO into truly a world trade organization.

The WTO as an institution suffers from the accident of its birth. The Uruguay Round was not convened to create a new world trade organization (a WTO). It was not a constitutional convention. The one institutional point upon which the major trading nations agreed was that GATT dispute settlement would henceforth be binding. That was all, but for a few mandates for ongoing negotiations in specific fields, such as agriculture. Of equal or greater importance to binding dispute settlement, a clear path to negotiate trade agreements was apparently deemed unnecessary and was not provided. Nor was a substantive mandate given for the role of Director-General or an even an executive board. While provision was made for the role of the Secretariat in operating a forum for peer review of members' trade policies in a trade policy review mechanism (TPRM), a very good innovation, little else was specified. In short, the WTO had dispute settlement (in effect a court), but no fully functioning legislature, and, in terms of management of the trading system, no executive, just a committee of the whole, the General Council, operating under a succession of temporary chairs and an extensive array of subordinate subject-specific committees, each also a committee of the whole, not designed for achieving agreement. (There is a separate ad hoc structure of negotiating committees under a Doha Round mandate, but it struggles on as a relic of a long absent major negotiating round.)

The trading system arrived in this situation through historic happenstance. The treaty that was to establish an International Trade Organization (ITO) after a six-months drafting period in 1947/48, the Havana Charter, was to be the original institutional framework for the world trading system. But the US failed to ratify the agreement, and the ITO did not come into being. The ITO was designed to provide a proactive form of governance. It was to collect, analyze and publish information relating to international trade, make recommendations, and promote bilateral or multilateral agreements concerning measures designed to assure just and equitable treatment for foreign nationals and enterprises. It was to agree on measures designed to expand the volume and to improve the bases for international trade, including adopting measures designed to facilitate commercial arbitration and the avoidance of double taxation. It was to have promoted and encouraged establishment of centers for technical training relating to trade. More controversially, and in the end fatally, it was to investigate and prosecute restrictive business practices within member countries.

The ITO was to have had an 18-member Executive Board, with eight of the members being "of chief economic importance," determined by their shares of international trade. Each Executive Board Member would have one vote. For ten of the Board members -- those that were not representing parties of chief economic importance, each one of their votes would be cast on behalf of more than one member country. The ITO could enter into agreements for consenting members by a two-thirds vote. The ITO was to have had a Director-General and Staff. Unilateral measures were forbidden. Disputes could be settled by arbitration on terms agreed to by the parties, binding only on the parties to the dispute. Disputes could also be referred to the Executive Board. It could authorize the complainant to be freed of its obligations to the extent necessary to remedy "nullification or impairment" of benefits where serious injury had occurred. Appeal could be had to the "Conference", the body consisting of the whole membership. The decision of the Conference could be referred to the International Court of Justice, whose judgment would be binding.

In short, the design for a truly functional world trade organization was the ITO that never came into being. What was left¹ after the ITO failed to come into effect was a contract, the General Agreement on Tariffs and Trade (GATT). There followed in the GATT eight rounds of multilateral negotiations, the first six of which were concerned primarily with cutting tariffs. A secretariat was created with dubious legal status but consisted of a workable pragmatic fix. It was officially a secretariat not to the GATT but to the Interim Commission for the ITO. In those halcyon days (as they appear in the golden glow of memory), the Secretariat was lodged and the contracting parties met in three villas in a bucolic hillside setting on the grounds of the United Nations, Geneva. Eventually, when the GATT took over the building that the International Labor Organization (ILO) passed on to the GATT in 1977, it began to look like an institution, an organization, rather than a contract.

When it was decided late in the Uruguay Round to create a world trade organization, a lot of thought was given to providing for binding dispute settlement, with no effective provision made for the other aspects of governance more broadly – that is, how the WTO members were to organize themselves (no board was specified), no means to facilitate trade negotiations taking place, no duties assigned to the Director-General other than being the administrative head of the Secretariat, and no functions for the Secretariat (other than the TPRM). The Secretariat and Director-General were, as it turned out, to take on whatever assignments might arise.

What is on the table currently in Geneva under the heading of WTO reform largely consists of a strong desire on the part of nearly all members to restore binding dispute settlement applicable to all, a cause that has been set back at least four years if the United States is to be involved. The texts for many of dispute settlement's procedural provisions are informally agreed, but not whether there is an appellate level, which is a key to dispute settlement being final and binding on the litigants. There is also a general wish that the organization would be more productive in delivering negotiated trade agreements but not clear way forward to doing to, and there are some proposals for a more efficient operation of WTO committees. There is nothing relating to a more effective institutional means for the members to govern themselves, no proposals for a proactive executive under the Director-General, no mission statement for or delegations to the Secretariat and no review of the relationship of regional preferential trade agreements and bilateral trade agreements as part of an integrated world trading system. In short, there is no call from any WTO member for “root and branch reform”² of the WTO. But that is what is needed.

Negotiation.

A primary requirement for a reinvigorated WTO is to find the means for it to be a place where trade negotiations can and will occur. The WTO during its 30 years has had limited results. The gold standard in multilateral trade negotiations was reached with the Uruguay Round set of agreements. The Round extended the trading system to services and intellectual property (the latter not without continuing controversy), setting firm disciplines for agricultural trade, incorporating the Trade Policy Review Mechanism in its *acquis*, and creating a new international trade organization, the WTO. As compared with the accomplishments of the eight rounds of GATT negotiations, the WTO's results have been limited, although praiseworthy and valuable. The Information Technology Agreement (ITA), the Trade Facilitation Agreement (TFA), the agreement to end agricultural export subsidies, and the Fisheries Subsidies Agreements (Part I) stand out. But the GATT rulebook has not been substantially expanded by

¹ https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm.

² The former chief Nigerian trade negotiator, Chiedu Osakwe, did call for root and branch reform. <https://www.piic.com/sites/default/files/2022-09/2022-09-26wolff.pdf>.

the WTO. Nothing of the quality or breadth by comparison with the Agreement on Technical Barriers to Trade has been addressed successfully, nor has there been formal across-the-board trade liberalization.

The inability of the WTO's members to negotiate major new multilateral agreements was unexpected. Seven years into the life of the WTO, the members, meeting in the shadow of 9/11 (the attack on the United States bringing down the World Trade Center) and a struggling international economy, agreed to start a new round of negotiations, the [Doha Development Agenda \(DDA\)](#). They pledged to rekindle global economic growth through trade liberalization and to place the needs and interests of developing countries at the heart of the Work Programme they adopted. Reform and rulemaking were to continue as they had in the GATT era on a multilateral basis, it was assumed. The system also recognized the contribution of regional trade agreements. Promotion of the environment was also to be central; sustainability became a watchword. The WTO's 4th Ministerial Conference (2001) celebrated the completion of the accession work with respect to China and Chinese Taipei (Taiwan). Nearly two decades later, by 2017, it was clear to most WTO members that the DDA would never reach a successful conclusion. The DDA remains largely as a ghost inhabiting the WTO website. The era of major multilateral trade negotiating rounds was over.

All was not lost because a new era of plurilateral negotiations was initiated at MC11 in Buenos Aires and has borne fruit in three concluded agreements and one whose text is substantially concluded.

The principal structural barrier to progress and a threat to a vibrant future for the WTO is the consensus rule for decision-making as it has been interpreted to date. It has come to mean that unanimity is required to adopt an agreement as a formal part of the WTO *acquis*, or even to approve a meeting agenda. Hostage-taking has become the norm, with consent to a consensus regularly unreasonably withheld by a few holdouts (India in the lead in this regard, but others occasionally joining in playing the role of spoiler). This is an obstacle that needs to be surmounted. Agreements must be part of the WTO, negotiated and administered at WTO, for the organization to fulfill one of its primary purposes.

The clear legal path forward lies in the members agreeing (not objecting) as a matter of policy to accepting agreements as a formal matter as part of Annex 4 of the Marrakech Agreement. The diplomatic solution is the understanding of all that self-restraint is needed for the organization to function. A rule can be adopted defining the responsible use of the consensus, as Singapore has suggested. As this path so far remains blocked, the way must be cleared. Members do not wish to resort to voting. Nevertheless, the future of the WTO depends upon nonparticipants' objections being overridden. How can that occur?

The GATT had a tradition of pragmatism that could still serve the international trading system very well now. It itself was treated as an organization when as a formal matter it was not one. It was supported by a Secretariat to an Interim Committee for the ITO. The most practical solution will be considered inelegant by WTO purists, but the hiatus has been long enough. The following should take place as a last resort: If the Director-General (DG) polls the membership and declares on the DG's own responsibility that an agreement, in her view consistent with the purposes of the WTO, has received what the DG determines is sufficient support, the DG is to offer meeting space and secretariat support to implementation of the agreement, and it will be recognized *de facto*, likely by the vast majority of members, as a WTO agreement. This was the way in which the JSIs were accommodated by a former DG.

Acting in this manner, not following procedures for formal consensus or a vote, may have costs. The costs of inaction, however, would be far greater. Open plurilateral agreements must become the rule, not an exception. The crisis of inaction poses an existential threat.

There is a second aspect to the WTO becoming a truly world trade organization, and that is to accept regional trade agreements (RTAs) as an integral part of the world trading system. RTAs, which comport with the WTO rules, and which are deemed beneficial for nonsignatories and therefore the trading system in general, should be administered by the WTO if this is the wish of its signatories. Any budgetary impact can be underwritten by the RTA members. An RTA should also be able to elect to have disputes brought under the relevant agreement settled at the WTO. A test case could be through implementation of the AfCFTA, to which the WTO has pledged its support. To the extent the AfCFTA parties wish the administrative support of the WTO, it should be forthcoming.

Organizing the work of the members

A 166-member organization is too unwieldy to make progress generally meeting as a committee of the whole. But that is the format for most WTO activities, and the substantive output is, as might be expected, inadequate. There must be some degree of delegation of authority to a smaller representative body to bring about progress. The sister Bretton Woods organizations have Executive Boards to shepherd the business of these institutions, as the ITO would have had. The WTO needs to have the equivalent.

Role of the Director General

No examples come to mind of an organization, whether of a group of individuals joining for social purposes or to conduct a business, or for governments at any level above that of a small town, or for that matter a common enterprise of sovereign economies, that does not have an executive. A source of leadership at the OECD, the IMF and the World Bank, is the Secretary-General, the Managing Director, and the President, respectively. That individual is expected to have an opinion on matters of importance, to express it, and to make proposals for the good of the members. At the WTO there is instead an expectation of passivity in the name of neutrality from the Secretariat. Whether it is the Director-General (DG) or a committee chair, a reasonable amount of neutrality with respect to parties is called for, but not neutrality as to whether results are in fact achieved, results that are for the good of the whole.

Dispute settlement

The one signal institutional achievement of the Uruguay Round was not the creation of the WTO. Simply stating that there would be a WTO does not make it more than the renaming of the GATT (while providing an umbrella over the GATS and TRIPS). The institutional innovation consisted primarily of the creation of binding dispute settlement. The major trading nations of the day, those raised in the tradition of the liberal international order, sought to curb American unilateralism, and the US, for its part, sought to rein in the trade distorting behavior of the EU through its common agricultural policy. They accepted judgments of a panel and appeal system as being final in any dispute.

The Appellate Body was not supposed to be a court. The unmet challenge was to make its decisions final without appearing to give up the WTO members' right to have the final say in what the WTO rules meant. On paper the AB's determinations were no more than advisory. But an AB conclusion could only be rejected by a "negative consensus", whereby 100% of the

members would need to concur to nullify an AB outcome. This would never occur, because the prevailing party in a dispute would have to join in a result being ignored. Notional sovereignty retained by the members, became just that, only notional. The new dispute settlement system inadvertently created an independent court, not answerable to the WTO's members.

This flaw turned out to be fatal to the very existence of the AB and therefore to binding dispute settlement itself. The following is just one example.

US trade negotiators sought to deploy the doctrine of judicial deference to safeguard American rights in an international trade agreement at the time the WTO was created in 1995. They were worried that trade remedy cases, in particular dealing with anti-dumping, would not fare well under a new dispute settlement system that provided final judgments by a newly created court, the WTO Appellate Body. Acting on this concern, they negotiated a judicial standard of deference that was clearly designed to codify the Chevron doctrine³ (the American judicial standard of deference) as part of the new WTO Antidumping Agreement. It reads:

Where the [dispute settlement] panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

In a quarter century of interpreting the agreement, dealing with a very large number of antidumping cases (WTO members raised the Antidumping Agreement in 143 instances out of 621 disputes from 1995 through 2023), the WTO Appellate Body (AB) never found any ambiguity that would cause it to defer to national authorities. Applying "customary rules of interpretation of public international law", in each case it ruled that there was only one true and correct interpretation. There never was any deference paid to national administrators. The practical result was the creation of an imbalance in the trading system. The bargain used to obtain authority to liberalize trade, at least in the United States, was that if an industry was injured by trade, if firms and workers were harmed, appropriate measures would be available to curb the harmful trade. The bargain was quickly forgotten and could not be found in the Vienna Convention on the Law of Treaties.

The appropriate remedy where a domestic court reaches outcomes that are problematic is to write new laws superseding what the court decided. In an international setting, the corrective should be provided by an international agreement giving additional guidance to adjudicators. This corrective is not practically available: As noted above in this paper, the WTO trade negotiating process among 166 countries rarely produces agreed results. When the populist Trump administration took office in Washington in 2017, it blocked appointment of new Appellate Body (AB) members, causing that body to cease to exist as of December 11, 2019. This "cure" was and is considered too extreme by all other 165 WTO members.

Perhaps a future US administration well after the next Trump years will grapple with how to deal with judicial overreach at home and at the WTO. This would not be an issue for a Trump administration. It has not indicated any substantial interest in negotiating mutually beneficial trade agreements and is likely to act to preserve its freedom of action. At the same time, there is little incentive for the other members of the WTO to go past their interim arrangement, the MPIA, to try to meet fundamental US objections to the prior system, as this would be deemed "negotiating with ourselves". This is a recipe for stasis. At present dozens of

³ "Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc." *Oyez*, www.oyez.org/cases/1983/82-1005. Accessed 11 Oct. 2024.

WTO disputes are frozen, warehoused on the pretext that they are being “appealed” to the nonexistent and likely never to be brought back Appellate Body. To deal with past cases would require negotiating outcomes to each of them.

One possible path forward to the Appellate Body impasse was demonstrated in December 2022 by an arbitral panel operating under the Multi-party Interim Arrangement (MPIA). While the panel consisting of distinguished and experienced trade diplomats did not side with Colombia, the country applying antidumping duties in this instance, it provided reasoning that could mark a departure from decades of AB rejection of deference to national decision makers. The [panel stated](#): “different treaty interpreters applying the same tools . . . may, in good faith and with solid arguments in support, reach different conclusions on the ‘correct’ interpretation of a treaty provision.” This way forward will itself have to be put on ice to await a future administration that would have an interest in WTO reform.

Other possible ways to deal with the problem of deference have been suggested. WTO [scholars](#) have [proposed](#), for example, that a separate AB be created solely for trying trade remedy cases or, referring difficult matters of interpretation to the WTO’s members where coverage of the agreements is unclear. Had the AB been more flexible, deferring to national administrators’ permissible alternative interpretations of the rules, it might be in existence today. Why might any of these approaches this work? Those serving at an appellate level would have the lesson before them of the Uruguay Round agreed method of appealing disputes self-destructing. One approach to a solution is to have an all-parties interim dispute resolution mechanism on a trial basis, say for three years. Tom Graham, chair of the AB towards its end, unsuccessfully sought from the WTO’s members a short period to give the AB a chance to redeem itself for its overreach (see the US bill of particulars⁴, some of which were addressed by the Walker Proposals). That opportunity was not taken. Again, it is a potential idea for some time in the future.

The WTO members had pledged “to achieve the objective of having a fully and well-functioning dispute settlement system accessible to all Members by 2024”. This was not achieved and is unlikely to be successfully addressed any time soon given more serious challenges to the current system posed by the new US administration and the likely lack of appetite in these circumstances for the other WTO members to turn to issues of fundamental institutional reform. Admittedly, that is perhaps too negative a conclusion. International cooperation is required for so many global challenges – from dealing with climate change to pandemics -- that a means must be found to improving the world trading system’s primary institution, the WTO, rather than finding ways to work around it. To achieve a fully multilateral solution, American policy toward the world trading system, which it once led, will need a reset. This is not in the offing at present.

The practical solution, while deferring finding one that is applicable to all members, will be to continue to utilize the Multi Party Interim Arrangement (MPIA) and perhaps at some point, and perhaps among a select number of members, a tailored variant of it with the United States included. But that is for some time in the future, after 2019.

A caveat: the US problems with dispute settlement go beyond trade remedies being available, but also freedom to impose restrictions for reasons of national security (GATT Art. XXI) and freedom to respond to what it sees as needed actions in its geopolitical rivalry with China. Geopolitical issues can be addressed directly. A path to a solution, an agreement stating

⁴ USTR, Report on the Appellate Body of the World Trade Organization.
<https://ustr.gov/sites/default/files/enforcement/DS/USTR.Appellate.Body.Rpt.Feb2020.pdf>

that “invocation of national security cannot be reviewed unless it appears to be no more than a protectionist measure properly addressed by a trade remedy (safeguards, anti-subsidy or anti-dumping)”. A carve-out for the G-2 political rivalry or a broader definition of essential security might be needed.

The Secretariat

The WTO Secretariat today provides negotiation support, is the backbone of administration of multilateral trade agreements, and provides a substantial amount of oversight of trade measures taken by members, most visibly in the preparation of Trade Policy Reviews. More is needed. The Secretariat should provide members and the public with as complete transparency as possible, which requires it to have complete independence to understand and make clear the effects on trade of national trade measures. It should be a trade knowledge hub providing access to dispersed sources via the internet and be a digital store of knowledge as well as providing links to trade information everywhere. It should also provide strategic foresight, warning members of what is around the corner that must be dealt with.

Conclusion -- A philosophical question

A question posed by a senior trade official I visited with in Geneva in September of this year reveals much about the crisis of multilateralism. It is the following: Is human progress secular or is it cyclical. The former is represented by Sir Edmund Hillary climbing Everest and manned explorations in space. The latter is represented by the myth of Sisyphus.

The liberal international order, multilateralism, continuing international progress and global integration, was one vision of the trajectory of world economic interchange. It was preached by the United States and was a central tenet of US policy in the post world-war era, which began at the mid-point of the 20th century. That sermon ended early in the new century. Now, nearly 80 years from the conclusion of two world wars, and more recently, after the financial crisis and another global pandemic; the rise of populism and the resurgence of nationalism, we are left in doubt as to the future of international cooperation. The founder of the system no longer subscribes to the vision it had at the outset, in the 1940s.

The WTO was an experiment in global trade governance, as are the political and economic experiments of nations in regional groupings (including the European Union, and the regional preferential trading arrangements, the latest addition being the AfCFTA). I believe that international cooperation will follow an arc of history toward increasing global economic integration even if there are setbacks.

In the near term, central to the story will be how the other WTO members react to current rejection of international trade cooperation by the United States. The state of play six years ago was the following:

QUOTE OF THE DAY

Most important for the future of the world trading system is the fact that the United States has stepped back from its seven-decade long role of being the prime mover and the guarantor of the world economic order. Atlas has shrugged. —

Alan Wolff, deputy director-general of the [World Trade Organization](#). Wall Street Journal, Nov. 5, 2018

The United States was instrumental in the creation of the world trading system and then it abandoned its role, quietly, without fanfare. Worse has occurred since. America's rejection through deeds, through tariffs on all trade, is now promised.

I was asked very recently by a Wall Street Journal reporter whether the WTO would collapse and disappear if the United States left it (or adopted a trade policy completely at odds with its basic tenets). My answer was: I believe it would carry on without the US, whether the US formally withdrew from the organization or not. The trading system will persist because rules are needed, because freedom to trade, hard-won, and even if not consistently supported by the world's economies, makes good economic sense. In the end, as with physical laws of gravity, sound economic principles will continually prove themselves sound even if the lessons must be re-learned from time to time. But that will take the efforts of those who are convinced of the validity of this view.

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ⁱ Remarks of Jake Sullivan, National Security Advisor, at the Brookings Institution, April 27, 2023. <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution/>.

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