Attachment I

CHALLENGES TO THE RULES-BASED ORDER

Additional Reading Material

1. *How a World Order Ends and What Comes in its Wake*, Richard Haass, *Foreign Affairs:* When a stable world does arise, it tends to come after a great convulsion that creates both the conditions and the desire for something new.

2. *How to Save the World Trading System*, Mari Pangestu: Indonesia's former Trade Minister suggests how to manage the Trump Administration's disruption to the global trading system.

3. *What Sort of World are We Headed For?,* Stephen Walt, *Foreign Policy:* The liberal world order never really existed. Great-power politics are here to stay.

4. *International law cannot save the rules-based order*, Malcolm Jorgensen, the Interpreter.

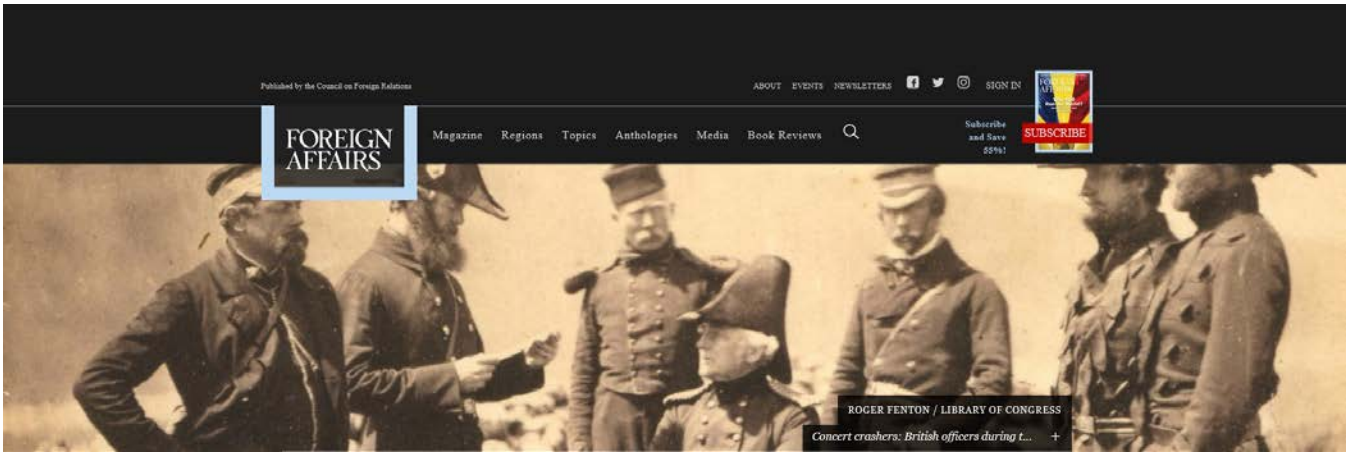
5. *The Year in Multilateralism: Three Trends and One Surprise Stand Out in 2018,* Richard Gowan, *World Politics Review*: What happened in the multilateral system in 2018? Looking back over the year, it is possible to identify three strategic trends and a last-minute political surprise that may resonate in the future.

6. *The Committee to Save the World Order: America's Allies Must Step Up as America Steps Down*, Ivo H. Daadler and James M. Lindsay, Foreign Affairs, September 2018

7. *Might Unmakes Right the American Assault on the Rule of Law in World Trade*, James Bacchus, Centre for International Governance Innovation, May 2018

8. *Revitalizing Multilateral Governance at the World Trade Organization* (Policy Brief), Bertelsmann Stiftung, 2018

9. *The Functioning of the WTO: Options for Reform and Enhanced Performance*, Manfred Elsig (on behalf of the E15 Expert Group on the Functioning of the WTO), January 2016



How a World Order Ends

And What Comes in Its Wake

By Richard Haass

A stable world order is a rare thing. When one does arise, it tends to come after a great convulsion that creates both the conditions and the desire for something new. It requires a stable distribution of power and broad acceptance of the rules that govern the conduct of international relations. It also needs skillful statecraft, since an order is made, not born. And no matter how ripe the starting conditions or strong the initial desire, maintaining it demands creative diplomacy, functioning institutions, and effective action to adjust it when circumstances change and buttress it when challenges come.

Eventually, inevitably, even the best-managed order comes to an end. The balance of power underpinning it becomes imbalanced. The institutions supporting it fail to adapt to new conditions. Some countries fall, and others rise, the result of changing capacities, faltering wills, and growing ambitions. Those responsible for upholding the order make mistakes both in what they choose to do and in what they choose not to do.

But if the end of every order is inevitable, the timing and the manner of its ending are not. Nor is what comes in its wake. Orders tend to expire in a prolonged deterioration rather than a sudden collapse. And just as maintaining the order depends on effective statecraft and effective action, good policy and proactive diplomacy can help determine how that deterioration unfolds and what it brings. Yet for that to happen, something else must come first: recognition that the old order is never coming back and that efforts to resurrect it will be in vain. As with any ending, acceptance must come before one can move on.

In the search for parallels to today's world, scholars and practitioners have looked as far afield as ancient Greece, where the rise of a new power resulted in war between Athens and Sparta, and the period after World War I, when an isolationist United States and much of Europe sat on their hands as Germany and Japan ignored agreements and invaded their neighbors. But the more illuminating parallel to the present is the Concert of Europe in the nineteenth century, the most important and successful effort to build and sustain world order until our own time. From 1815 until the outbreak of World War I a century later, the order established at the Congress of Vienna defined many international relationships and set (even if it often failed to enforce) basic rules for international conduct. It provides a model of how to collectively manage security in a multipolar world.

That order's demise and what followed offer instructive lessons for today—and an urgent warning. Just because an order is in irreversible decline does not mean that chaos or calamity is inevitable. But if the deterioration is managed poorly, catastrophe could well follow.

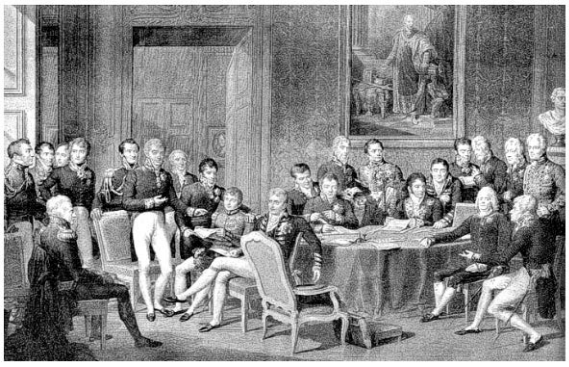
OUT OF THE ASHES

The global order of the second half of the twentieth century and the first part of the twenty-first grew out of the wreckage of two world wars. The nineteenth-century order followed an earlier international convulsion: the Napoleonic Wars, which, after the French Revolution and the rise of Napoleon Bonaparte, ravaged Europe for more than a decade. After defeating Napoleon and his armies, the victorious allies—Austria, Prussia, Russia, and the United Kingdom, the great powers of their day—came together in Vienna in 1814 and 1815.

At the Congress of Vienna, they set out to ensure that France's military never again threatened their states and that revolutionary movements

never again threatened their monarchies. The victorious powers also made the wise choice to integrate a defeated France, a course very different from the one taken with Germany following World War I and somewhat different from the one chosen with Russia in the wake of the Cold War.

The congress yielded a system known as the Concert of Europe. Although centered in Europe, it constituted the international order of its day given the dominant position of Europe and Europeans in the world. There was a set of shared understandings about relations between states, above all an agreement to rule out invasion of another country or involvement in the internal affairs of another without its permission. A rough military balance dissuaded any state tempted to overthrow the order from trying in the first place (and prevented any state that did try from succeeding). Foreign ministers met (at what came to be called "congresses") whenever a major issue arose. The concert was conservative in every sense of the word. The Treaty of Vienna had made numerous territorial adjustments and then locked Europe's borders into place, allowing changes only if all signatories agreed. It also did what it could to back monarchies and encourage others to come to their aid (as France did in Spain in 1823) when they were threatened by popular revolt.



JEAN-BAPTISTE ISABEY

An engraving of the Congress of Vienna, 1814.

The concert worked not because there was complete agreement among the great powers on every point but because each state had its own reasons for supporting the overall system. Austria was most concerned with resisting the forces of liberalism, which threatened the ruling monarchy. The United Kingdom was focused on staving off a renewed challenge from France while also guarding against a potential threat from Russia (which meant not weakening France so much that it couldn't help offset the threat from Russia). But there was enough overlap in interests and consensus on first-order questions that the concert prevented war between the major powers of the day.

The concert technically lasted a century, until the eve of World War I. But it had ceased to play a meaningful role long before then. The revolutionary waves that swept

Europe in 1830 and 1848 revealed the limits of what members would do to maintain the existing order within states in the face of public pressure. Then, more consequentially, came the Crimean War. Ostensibly fought over the fate of Christians living within the Ottoman Empire, in actuality it was much more about who would control territory as that empire decayed. The conflict pitted France, the United Kingdom, and the Ottoman Empire against Russia. It lasted two and a half years, from 1853 to 1856. It was a costly war that highlighted the limits of the concert's ability to prevent great-power war; the great-power comity that had made the concert possible no longer existed. Subsequent wars between Austria and Prussia and Prussia and France demonstrated that major-power conflict had returned to the heart of Europe after a long hiatus. Matters seemed to stabilize for a time after that, but this was an illusion. Beneath the surface, German power was rising and empires were rotting. The combination set the stage for World War I and the end of what had been the concert.

WHAT AILS THE ORDER?

What lessons can be drawn from this history? As much as anything else, the rise and fall of major powers determines the viability of the prevailing order, since changes in economic strength, political cohesion, and military power shape what states can and are willing to do beyond their borders. Over the second half of the nineteenth century and the start of the twentieth, a powerful, unified Germany and a modern Japan rose, the Ottoman Empire and tsarist Russia declined, and France and the United Kingdom grew stronger but not strong enough. Those changes upended the balance of power that had been the concert's foundation; Germany, in particular, came to view the status quo as inconsistent with its interests.

Changes in the technological and political context also affected that underlying balance. Under the concert, popular demands for democratic participation and surges of nationalism threatened the status quo within countries, while new forms of transportation, communication, and armaments transformed politics, economics, and warfare. The conditions that helped give rise to the concert were gradually undone.

Because orders tend to end with a whimper rather than a bang, the process of deterioration is often not evident to decision-makers until it has advanced considerably.

Yet it would be overly deterministic to attribute history to underlying

conditions alone. Statecraft still matters. That the concert came into existence and lasted as long as it did underscores that people make a difference. The diplomats who crafted it—Metternich of Austria, Talleyrand of France, Castlereagh of the United Kingdom—were exceptional. The fact that the concert preserved peace despite the gap between two relatively liberal countries, France and the United Kingdom, and their more conservative partners shows that countries with different political systems and preferences can work together to maintain international order. Little that turns out to be good or bad in history is inevitable. The Crimean War might well have been avoided if more capable and careful leaders had been on the scene. It is far from clear that Russian actions warranted a military response by France and the United Kingdom of the nature and on the scale that took place. That the countries did what they did also underscores the power and dangers of nationalism. World War I broke out in no small part because the successors to German Chancellor Otto von Bismarck were unable to discipline the power of the modern German state he did so much to bring about.

Two other lessons stand out. First, it is not just core issues that can cause an order to deteriorate. The concert's great-power comity ended not because of disagreements over the social and political order within Europe but because of competition on the periphery. And second, because orders tend to end with a whimper rather than a bang, the process of deterioration is often not evident to decision-makers until it has advanced considerably. By the outbreak of World War I, when it became obvious that the Concert of Europe no longer held, it was far too late to save it—or even to manage its dissolution.

A TALE OF TWO ORDERS

The global order built in the aftermath of World War II consisted of two parallel orders for most of its history. One grew out of the Cold War between the United States and the Soviet Union. At its core was a rough balance of military strength in Europe and Asia, backed up by nuclear deterrence. The two sides showed a degree of restraint in their rivalry. "Rollback"—Cold War parlance for what today is called "regime change"—was rejected as both infeasible and reckless. Both sides followed informal rules of the road that included a healthy respect for each other's backyards and allies. Ultimately, they reached an understanding over the political order within Europe, the principal arena of Cold War competition, and in 1975

codified that mutual understanding in the Helsinki Accords. Even in a divided world, the two power centers agreed on how the competition would be waged; theirs was an order based on means rather than ends. That there were only two power centers made reaching such an agreement easier.

The other post–World War II order was the liberal order that operated alongside the Cold War order. Democracies were the main participants in this effort, which used aid and trade to strengthen ties and fostered respect for the rule of law both within and between countries. The economic dimension of this order was designed to bring about a world (or, more accurately, the non-communist half of it) defined by trade, development, and well-functioning monetary operations. Free trade would be an engine of economic growth and bind countries together so that war would be deemed too costly to wage; the dollar was accepted as the de facto global currency.

The diplomatic dimension of the order gave prominence to the UN. The idea was that a standing global forum could prevent or resolve international disputes. The UN Security Council, with five great-power permanent members and additional seats for a rotating membership, would orchestrate international relations. Yet the order depended just as much on the willingness of the noncommunist world (and U.S. allies in particular) to accept American primacy. As it turns out, they were prepared to do this, as the United States was more often than not viewed as a relatively benign hegemon, one admired as much for what it was at home as for what it did abroad.

Both of these orders served the interests of the United States. The core peace was maintained in both Europe and Asia at a price that a growing U.S. economy could easily afford. Increased international trade and opportunities for investment contributed to U.S. economic growth. Over time, more countries joined the ranks of the democracies. Neither order reflected a perfect consensus; rather, each offered enough agreement so that it was not directly challenged. Where U.S. foreign policy got into trouble—such as in Vietnam and Iraq—it was not because of alliance commitments or considerations of order but because of ill-advised decisions to prosecute costly wars of choice.

SIGNS OF DECAY

Today, both orders have deteriorated. Although the Cold War itself ended long ago, the order it created came

apart in a more piecemeal fashion—in part because Western efforts to integrate Russia into the liberal world order achieved little. One sign of the Cold War order's deterioration was Saddam Hussein's 1990 invasion of Kuwait, something Moscow likely would have prevented in previous years on the grounds that it was too risky. Although nuclear deterrence still holds, some of the arms control agreements buttressing it have been broken, and others are fraying.

Although Russia has avoided any direct military challenge to NATO, it has nonetheless shown a growing willingness to disrupt the status quo: through its use of force in Georgia in 2008 and Ukraine since 2014, its often indiscriminate military intervention in Syria, and its aggressive use of cyberwarfare to attempt to affect political outcomes in the United States and Europe. All of these represent a rejection of the principal constraints associated with the old order. From a Russian perspective, the same might be said of NATO enlargement, an initiative clearly at odds with Winston Churchill's dictum "In victory, magnanimity." Russia also judged the 2003 Iraq war and the 2011 NATO military intervention in Libya, which was undertaken in the name of humanitarianism but quickly evolved into regime change, as acts of bad faith and illegality inconsistent with notions of world order as it understood them.

The liberal order is exhibiting its own signs of deterioration. Authoritarianism is on the rise not just in the obvious places, such as China and Russia, but also in the Philippines, Turkey, and eastern Europe. Global trade has grown, but recent rounds of trade talks have ended without agreement, and the World Trade Organization (WTO) has proved unable to deal with today's most pressing challenges, including nontariff barriers and the theft of intellectual property. Resentment over the United States' exploitation of the dollar to impose sanctions is growing, as is concern over the country's accumulation of debt.

The UN Security Council is of little relevance to most of the world's conflicts, and international arrangements have failed more broadly to contend with the challenges associated with globalization. The composition of the Security Council bears less and less resemblance to the real distribution of power. The world has put itself on the record as against genocide and has asserted a right to intervene when governments fail to live up to the "responsibility to protect" their citizens, but the talk has not

translated into action. The Nuclear Nonproliferation Treaty allows only five states to have nuclear weapons, but there are now nine that do (and many others that could follow suit if they chose to). The EU, by far the most significant regional arrangement, is struggling with Brexit and disputes over migration and sovereignty. And around the world, countries are increasingly resisting U.S. primacy.

BAZ RATNER / REUTERS

Russian soldiers in military armored personnel carriers on a road near Sevastopol, Crimea, March 2014.

POWER SHIFTS

Why is all this happening? It is instructive to look back to the gradual demise of the Concert of Europe. Today's world order has struggled to cope with power shifts: China's rise, the appearance of several medium powers (Iran and North Korea, in particular) that reject important aspects of the order, and the emergence of nonstate actors (from drug cartels to terrorist networks) that can pose a serious threat to order within and between states.

The technological and political context has changed in important ways, too. Globalization has had destabilizing effects, ranging from climate change to the spread of technology into far more hands than ever before, including a range of groups and people intent on disrupting the order. Nationalism and populism have surged—the result of greater inequality within countries, the dislocation associated with the 2008 financial crisis, job losses caused by trade and technology, increased flows of migrants and refugees, and the power of social media to spread hate.

Meanwhile, effective statecraft is conspicuously lacking. Institutions have failed to adapt. No one today would design a UN Security Council that looked like the current one; yet real reform is impossible, since those who would lose influence block any changes. Efforts to build effective frameworks to deal with the challenges of globalization, including climate change and cyberattacks, have come up short. Mistakes within the EU—namely, the decisions to establish a common currency without creating a common fiscal policy or a banking union and to permit nearly unlimited immigration to Germany—have created a powerful backlash against existing governments, open borders, and the EU itself.

The United States, for its part, has committed costly overreach in trying to remake Afghanistan, invading Iraq, and pursuing regime change in Libya. But it has also taken a step back from maintaining global order and in certain cases has been guilty of costly underreach. In most instances, U.S. reluctance to act has come not over core issues but over peripheral ones that leaders wrote off as not worth the costs involved, such as the strife in Syria, where the United States failed to respond meaningfully when Syria first used chemical weapons or to do more to help anti-regime groups. This reluctance has increased others' propensity to disregard U.S. concerns and act independently. The Saudi-led military intervention in Yemen is a case in point. Russian actions in Syria and Ukraine should also be seen in this light; it is interesting that Crimea marked the effective end of the Concert of Europe and signaled a dramatic setback in the current order. Doubts about U.S. reliability have multiplied under the Trump administration, thanks to its withdrawal from numerous international pacts and its conditional approach to once inviolable U.S. alliance commitments in Europe and Asia.

MANAGING THE DETERIORATION

Given these changes, resurrecting the old order will be impossible. It would also be insufficient, thanks to the emergence of new challenges. Once this is acknowledged, the long deterioration of the Concert of Europe should serve as a lesson and a warning.

For the United States to heed that warning would mean strengthening certain aspects of the old order and supplementing them with measures that account for changing power dynamics and new global problems. The United States would have to shore up arms control and nonproliferation agreements; strengthen its alliances in Europe and Asia; bolster weak states that cannot contend with terrorists, cartels, and gangs; and counter authoritarian powers' interference in the democratic process. Yet it should not give up trying to integrate China and Russia into regional and global aspects of the order. Such efforts will necessarily involve a mix of compromise, incentives, and pushback. The judgment that attempts to integrate China and Russia have mostly failed should not be grounds for rejecting future efforts, as the course of the twenty-first century will in no small part reflect how those efforts fare.

The United States also needs to reach out to others to address problems of

globalization, especially climate change, trade, and cyber-operations. These will require not resurrecting the old order but building a new one. Efforts to limit, and adapt to, climate change need to be more ambitious. The WTO must be amended to address the sorts of issues raised by China's appropriation of technology, provision of subsidies to domestic firms, and use of nontariff barriers to trade. Rules of the road are needed to regulate cyberspace. Together, this is tantamount to a call for a modern-day concert. Such a call is ambitious but necessary.

The United States must show restraint and recapture a degree of respect in order to regain its reputation as a benign actor. This will require some sharp departures from the way U.S. foreign policy has been practiced in recent years: to start, no longer carelessly invading other countries and no longer weaponizing U.S. economic policy through the overuse of sanctions and tariffs. But more than anything else, the current reflexive opposition to multilateralism needs to be rethought. It is one thing for a world order to unravel slowly; it is quite another for the country that had a large hand in building it to take the lead in dismantling it.

All of this also requires that the United States get its own house in order—reducing government debt, rebuilding infrastructure, improving public education, investing more in the social safety net, adopting a smart immigration system that allows talented foreigners to come and stay, tackling political dysfunction by making it less difficult to vote, and undoing gerrymandering. The United States cannot effectively promote order abroad if it is divided at home, distracted by domestic problems, and lacking in resources.

The major alternatives to a modernized world order supported by the United States appear unlikely, unappealing, or both. A Chinese-led order, for example, would be an illiberal one, characterized by authoritarian domestic political systems and statist economies that place a premium on maintaining domestic stability. There would be a return to spheres of influence, with China attempting to dominate its region, likely resulting in clashes with other regional powers, such as India, Japan, and Vietnam, which would probably build up their conventional or even nuclear forces.

A new democratic, rules-based order fashioned and led by medium powers in Europe and Asia, as well as Canada, however attractive a concept, would simply lack the military capacity and domestic political will to get very far. A more

likely alternative is a world with little order—a world of deeper disarray. Protectionism, nationalism, and populism would gain, and democracy would lose. Conflict within and across borders would become more common, and rivalry between great powers would increase. Cooperation on global challenges would be all but precluded. If this picture sounds familiar, that is because it increasingly corresponds to the world of today.

The deterioration of a world order can set in motion trends that spell catastrophe. World War I broke out some 60 years after the Concert of Europe had for all intents and purposes broken down in Crimea. What we are seeing today resembles the mid-nineteenth century in important ways: the post–World War II, post–Cold War order cannot be restored, but the world is not yet on the edge of a systemic crisis.

Now is the time to make sure one never materializes, be it from a breakdown in U.S.-Chinese relations, a clash with Russia, a conflagration in the Middle East, or the cumulative effects of climate change. The good news is that it is far from inevitable that the world will eventually arrive at a catastrophe; the bad news is that it is far from certain that it will not.

Source:
https://www.foreignaffairs.com/articles/2018-12-11/how-world-order-ends

EASTASIAFORUM
Economics, Politics and Public Policy in East Asia and the Pacific

How to save the world trading system from Trump

15 October 2018

Author: Mari Pangestu, University of Indonesia

Despite expectations that the US Federal Reserve would raise interest rates, capital flows to the United States have led to the appreciation of the US dollar against most major currencies.

The hardest hit countries are Argentina and Turkey, which are experiencing fiscal issues complicated by their political situations. Brazil, South Africa and the emerging countries in Asia have also been affected — albeit at a lower rate of depreciation of their currencies in the 10 to 12 per cent range. Even Australia and China have experienced depreciations of around 8 per cent and 5 per cent respectively.

The level of depreciation experienced by different economies reflects how investors perceive their different fundamental macroeconomic conditions, especially the level of their current account and fiscal deficits and policy outlooks.

The rising US dollar raises questions about the capacity of emerging economies to service their dollar-denominated debts and the vulnerabilities this could expose in their financial systems. Even if the current economic conditions point to a low potential for contagion from Argentina and Turkey, IMF Managing Director Christine Lagarde recently warned that 'these things could change rapidly'. The uncertainty that already exists is a clear and present danger.

The uncertainty in the world economy has been increasing since Brexit and the election of President Trump in 2016, and in 2017 as the United States left the Trans-Pacific Partnership and announced many threats to impose trade restrictions. This uncertainty has heightened since January 2018 when US President Donald Trump made good on his threats to remedy bilateral trade deficits — what he sees as 'unfair trade' practices against the United States — by imposing tariffs on imported solar panels and washing machines, followed by aluminium and steel.

Since March, the greatest uncertainty has been from the brewing tit for tat trade conflict between the United States and China, which started with the imposition of 25 per cent tariffs on US$50 billion worth of China's exports to the United States. China retaliated with the same sized tariffs on the same amount of trade from the United States. Trump then escalated the trade war further in September with the announcement of 10 per cent tariffs on US$200 billion worth of China's exports to the United States.

The US–China trade conflict and the uncertainty surrounding it is expected to have knock on effects on global trade and investment flows. The impact of the reduction in China's exports to the United States on China's growth will reduce China's imports, which in turn will impact the many countries that China has become a major trading partner for.

This means that China and other countries facing US trade restrictions will look for new markets for their goods. The situation has already led some countries to impose restrictions or initiate trade remedy investigations, for instance on steel. This uncertainty has and will continue to influence trade and investment, as businesses evaluate how the increased restrictions will affect their supply chains.

It is too early to tell how large the disruption will be, as it is not easy to dismantle supply chains. But the costs down the line could be great as businesses re-evaluate their trade and investment decisions to insulate themselves from tariffs rather than to maximise their competitiveness.

The most concerning aspect of all this is that, after 75 years of being its greatest advocate, the United States is now the biggest threat to the future of the rules-based trading system that has provided predictability and fairness in the way the world engages in trade. There is no clear light at the end of the tunnel.

The key question is: what is Trump's intention? Is it to change the rules of the game to benefit the United States and address China's 'non-market-oriented policies' or is it just anti-trade and America First? Assuming it is the former, there are at least three important responses needed.

First is safeguarding the stability of the World Trade Organization (WTO) as the overarching framework to provide predictability, fairness and stability. To this end, it is vital that the WTO dispute settlement mechanism continues to operate. The test case is the Chinese and EU case against US steel and aluminium tariffs and getting past the blocking of panel judge nominations by the United States.

Ensuring that the United States does not use blunt unilateral instruments to address its concerns also means that reforms to the WTO rule book are needed. More must be done to address concerns around intellectual property rights, investment, the environment, labour, competition policy, subsidies, tax, digital data and the treatment of developing countries.

Second, the process of opening-up must continue, with or without the United States. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership is a good start. And it is of the utmost importance that the Regional Comprehensive Economic Partnership negotiations are concluded in November this year. These are all important processes to signal the continued commitment of East Asia to expanding markets and fostering flows of trade and investment.

Third, and what most will agree is the most important process, is unilateral reforms. Given increased global uncertainty and limited policy space for fiscal stimulus, structural reforms are a must for East Asian countries, especially China. These range from trade and investment reforms, as well as reforms related to competition policy, intellectual property, the role of state-owned enterprises and sustainability. As in the past, unilateral reforms are more successfully undertaken when there is peer pressure and benchmarking from international commitments.

Without concerted effort and a coalition of willing leadership, including from the EU and East Asia, the future of the rules-based trading system will remain under threat.

Mari Pangestu is former Indonesian trade minister and Professor at the University of Indonesia.

This article appeared in the most recent edition of East Asia Forum Quarterly, 'Asian crisis, ready or not'.

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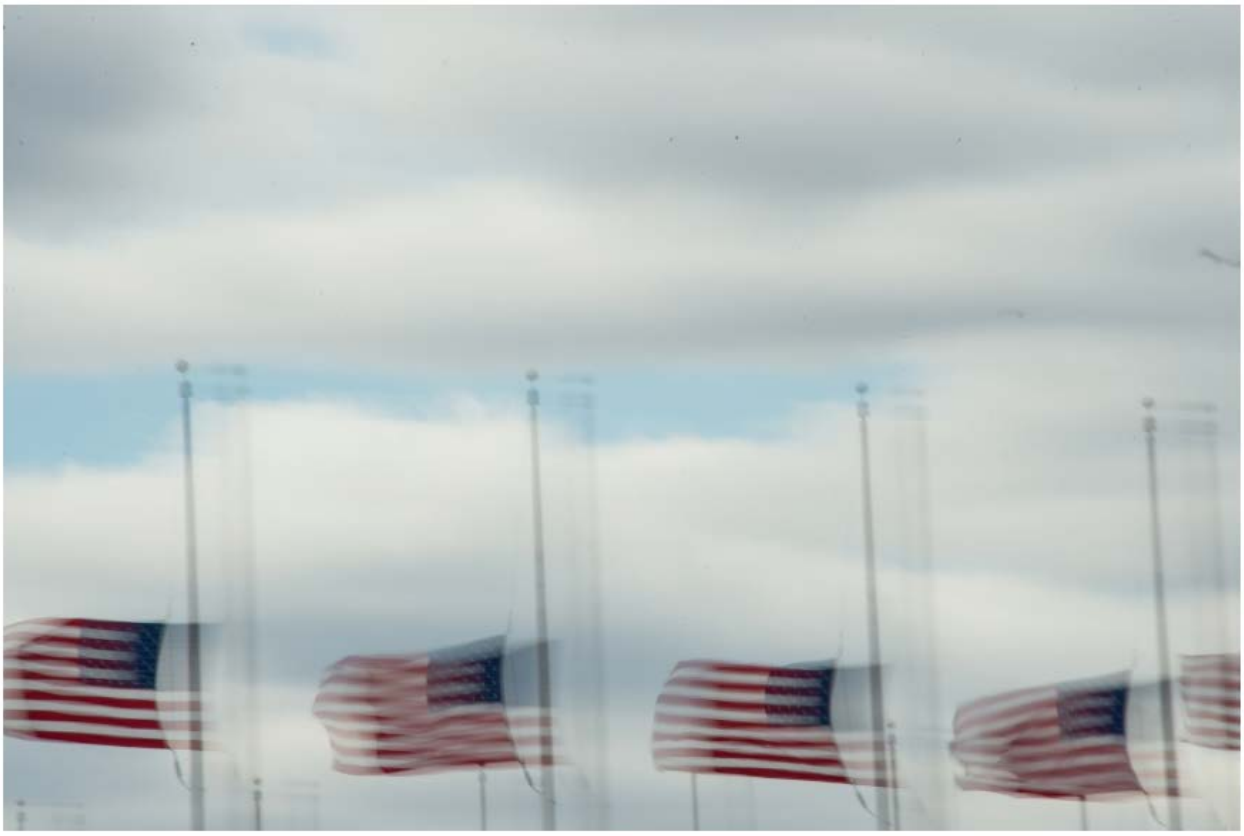
http://www.eastasiaforum.org/2018/10/15/how-to-save-the-world-trading-system-from-trump/

VOICE

What Sort of World Are We Headed for?

The liberal world order never really existed. Great-power politics are here to stay.

BY STEPHEN M. WALT | OCTOBER 2, 2018, 9:04 AM



U.S. flags flutter in strong wind in front of the Washington Monument in Washington, D.C., on March 2. (Nicholas Kamm/AFP/Getty Images)

Lately, international relations hands such as Patrick Porter, Graham Allison, Thomas Wright, Robert Kagan, Rebecca Lissner, Mira Rapp-Hooper, yours truly, and a host of others have been caught up in a lively discussion about the current world order. Much of the debate has centered around whether that order was, is, or will be "liberal." IR theory mavens out there could spend several days sifting through the various contributions and pondering who makes the better case. But to be honest, I'm not entirely convinced it would be worth your time.

Why? Well, for starters, I've never fully understood what "world order" means. Plenty of authors use the term—the

statesman Henry Kissinger even wrote a fat doorstop of a book with that ponderous title—and I confess that I've used it myself on occasion. Yet it remains a vague and fuzzy concept on which there is little consensus.

Is "world order" merely the configuration of power in the world? And if so, how is power being defined?

Is it the distribution of power *plus* whatever system of formal or informal rules and norms the strongest states devise and enforce, except for those occasions when they decide to ignore or rewrite them? Is the term meant to signify a more or less predictable pattern of behavior among key global actors, where the observer gets to decide which players and behaviors matter most, or is it just a lazy catchall term pundits use to refer to a particular international system at a particular point in time?

If nobody really knows what "world order" actually means, let's lower our sights a little. Instead of trying to figure out what the—*portentous drum roll*—"world order" is, we could just try to anticipate what the central features of global politics are likely to be in a few years' time. In other words, if somebody asked you to describe the main features of world politics in 2025, what would you tell them?

As it happens, someone did ask me that question recently. My answer focused primarily on the implications for the United States, but for what it's worth, here's what I said.

Overall, the world of 2025 will be one of "lopsided multipolarity." Today's order isn't a liberal one (a number of key actors reject liberal ideals), and 2025's won't be either. The United States will still be the single most consequential actor on the planet, because no other country will possess the same combination of economic clout, technological sophistication, military might, territorial security, and favorable demography. But its margin of superiority will be smaller than it used to be, and the country will still face long-term fiscal problems and deep political divisions. China will be the world's No. 2 power (and it will exceed the United States on some dimensions), followed by a number of other major players (Germany, Japan, India, Russia, and so on), all of them considerably weaker than the two leading states.

In this system, the United States will need to be more selective in making commitments and using its power abroad. It will not revert to isolationism, but the hubristic desire to remake the world, which characterized the unipolar era, was fading long before Donald Trump became U.S. president. It is not coming back, no matter how many nostalgic neoconservatives try to rescue it.

As is already clear, U.S. foreign and defense policy will focus mainly on countering China. In addition to trying to slow China's efforts to gain an advantage in a number of emerging technologies, the United States will also seek to prevent Beijing from establishing a dominant position in Asia. In practice, this will mean maintaining, deepening, and if possible expanding America's alliance ties there, even as China tries to push the United States out and bring its neighbors into its own loose sphere of influence. Maintaining the United States' position in Asia will not be easy, because the distances are vast, America's Asian allies want to preserve their current economic ties with China, and some of those allies don't like each other very much. Holding this coalition together will require deft U.S. diplomacy, which has been in short supply of late, and success is by no means certain. But

neither is failure, because China will face accumulating problems of its own, including that most of its neighbors do not want Beijing to dominate the region.

But as realists have been warning for more than 15 years, the emerging rivalry between the United States and China will be the single most important feature of world politics for at least the next decade and probably well beyond that.

By contrast, no country presently threatens to dominate Europe. For this reason, the U.S. role there will continue to decline (as it has since the end of the Cold War). Despite alarmist fears about a resurgent Russia, it is too weak to pose the same threat to Europe as the bad old Soviet Union. The case for a major U.S. commitment to the region is therefore much weaker than it was during the Cold War. Europe has a combined population in excess of 500 million people, whereas Russia's population is roughly 140 million, is aging rapidly, and is destined to shrink in the near future. Europe's combined economy is about $17 trillion—Germany's alone is about $3.5 trillion—and Russia's is worth less than $2 trillion. Most telling of all, NATO's European members spend three to four times what Russia does on defense every year. They don't spend it very effectively, but what Europe needs is defense reform, not open-ended U.S. subsidies. And the real problems Europe faces—such as defending its borders against unregulated immigration—are not things the United States can solve for it.

Moreover, Europe and NATO simply won't have much of a role to play as Washington focuses more and more on Asia. European countries will not want to give up profitable economic ties with China and will be neither willing nor able to do much to balance Beijing. If Sino-American competition heats up, as I expect it to, this issue will be another point of friction between the United States and its European partners. Trump could accelerate this process by continuing to bash Europe on trade and by foolishly imposing secondary sanctions on European states that are trying to keep the Iran nuclear deal alive, but even if he doesn't, the slow devolution of trans-Atlantic relations will continue. There's nothing surprising or tragic about this, by the way; it is simply the gradual but inevitable consequence of the collapse of the Soviet Union and the rise of Asia.

As for Europe itself, it will continue to punch below its weight. The EU project remains deeply troubled, the outcome of the Brexit process is uncertain, economic growth on the continent is uneven, and extremist parties are flourishing in several countries. The EU has become too large and heterogeneous to make rapid and bold decisions, and it faces opposition from illiberal and xenophobic elements within. Given the millions of young people in Africa and the Middle East who face dim economic prospects at home and will keep trying to migrate elsewhere, the refugee issue, which has convulsed domestic politics throughout Europe, is not going away.

Look to Europe to be looking inward for quite some time.

There is, however, one wild card for the continent, which also involves the United States. That wild card is the possibility of detente—or even rapprochement—with Russia. After all, it would be in Europe's interest if Russian interference in Ukraine diminished, its meddling in European politics ended, and the potential threat to the Balkans declined. It would be in Russia's interest if

sanctions were lifted and if Moscow no longer worried about the EU or NATO moving farther east. And it would be in the United States' interest to wean Russia away from its growing relationship with China and to avoid further commitments to countries that are neither vital interests nor easy to defend. The two giants are not natural allies, and one suspects that Russian President Vladimir Putin likes being Chinese leader Xi Jinping's junior partner about as much as Mao liked being Khrushchev's.

Here we have the raw material for a mutually beneficial deal, and it's possible that Trump wanted to play nice with Russia not because Putin has something on him but because it makes sound geopolitical sense. But Trump and his minions' tangled dealings—and their inability to tell a straight story about them—have left the U.S. president compromised and unable to do much on this front. A strategic breakthrough with Russia will have to wait for a second term or a new president (whichever comes first).

With no potential hegemon in sight, expect the United States to revert back to the approach it followed from the end of World War II through the early 1990s.

As for the Middle East, it will remain a boiling cauldron for many years to come. In addition to facing its own demographic challenges, the region is now divided along multiple dimensions: Sunni vs. Shiite, Arab vs. Persian, Saudis vs. Qataris, Israel vs. Palestinians, Kurds vs. Turks, jihadis vs. everyone (and each other)—the list goes on. Plus, there are now deeply dysfunctional states (or no state at all) in Iraq, Libya, Syria, and Yemen, with outside powers meddling in each.

One obvious implication: No country is going to be able to "dominate" the Middle East. The United States couldn't manage the region at the peak of the unipolar moment, and it is risible to claim (as some hawks do), that Iran is in the process of taking over. Tehran lacks the economic and military capacity to dominate the Middle East, particularly because it faces so many opponents in so many places. That's true of the other regional players, too, including Egypt, Israel, Saudi Arabia, Turkey, and the United Arab Emirates.

Back then, the United States had a strategic interest in Middle Eastern oil and security commitments to different countries, but it kept its own military presence to a minimum. Instead, it relied on other states or local allies to uphold the regional balance of power. That policy shifted with Operation Desert Storm in 1990 and the adoption of "dual containment" in 1993, and even more so with the invasion of Iraq in 2003 and the ill-fated attempt at regional transformation that followed. Die-hard neoconservatives may not have learned the right lesson from that debacle, but the rest of the country did. Looking ahead, the United States will continue to draw down its military presence—as it is already doing today. It will rely instead on local clients, backed up by U.S. airpower, drones, or special forces when absolutely necessary. But barring a major threat to the regional balance of power, the U.S. presence in the Middle East will continue to decline, no matter who sits in the Oval Office. And that tendency will accelerate if the world begins to rely less on fossil fuels, thereby reducing the region's overall strategic importance.

With no potential hegemon in sight, expect the United States to revert back to the approach it followed from the end of World War II through the early 1990s.

It is a mistake, by the way, to call this shift a "retreat," a loaded word that implies a cowardly loss of will or purpose. Whether in Europe or the Middle East, it is more accurate to describe this broader trend as a sensible, hard-headed realignment of interests and commitments after a period of overextension, and thus as a rational response to the emerging configuration of power.

What sort of world order (oops, there's that term again!) am I depicting? A messy one, to be sure. I've left a lot out—climate change, cybersecurity in all its manifestations, artificial intelligence, most of Africa, and Latin America—along with various black swans that are easy to imagine. But at the risk of seeming old-fashioned, I'd argue that none of these features will alter the basic nature of world politics.

Then-U.S. presidential candidate Bill Clinton once said that "the cynical calculus of pure power politics … is ill-suited to a new era," and then-Secretary of State John Kerry criticized Russia's seizure of Crimea by saying, "You just don't in the 21st century behave in 19th-century fashion." Alas, they were wrong, as countless optimists have been in the past. Great power politics is alive and well, and that means we are headed toward a world of competition and suspicion, where cooperation continues but is always delicate and leaders' follies often result in unnecessary suffering. Or, to be more precise: into a world we never really left.

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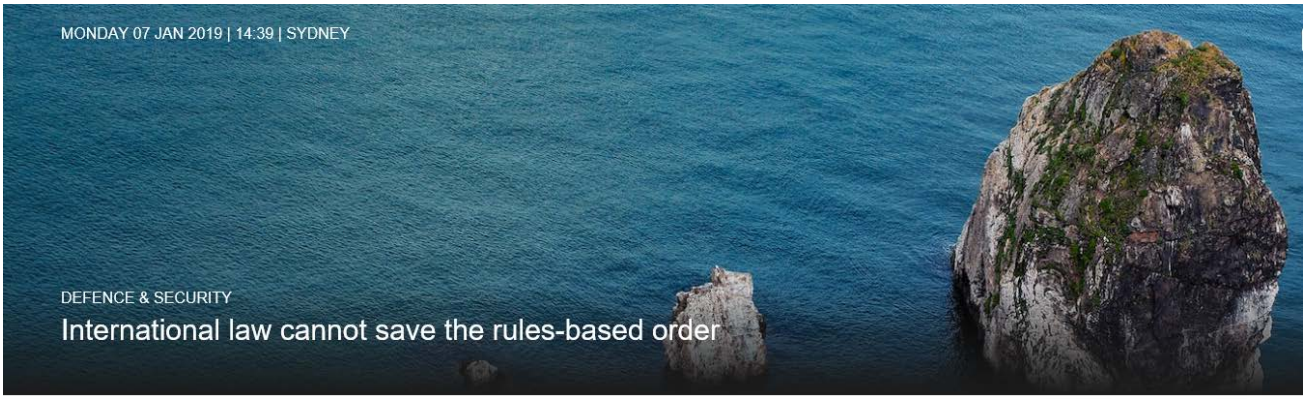

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the interpreter

BY
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A curious aspect of the many accounts about meanings and significance of the "rules-based order" has been the relative silence from international lawyers.

The most authoritative rules on which global order is based are precisely those agreed between states to have legally binding status. It is primarily political voices that advocate for the "rules-based order" however, they often assume that they also embody lawyers' commitment to the "international rule of law." Yet, focusing directly on international law, it is increasingly clear that the legal core of the overburdened rules-based order may already be irreparably fractured.

> *"It is increasingly clear that this core aspect of the rules-based order, stability fixed on universal legal rules, is now all but unattainable in the Indo-Pacific."*

Perennial efforts to more precisely define the rules-based order, and related concepts such as "liberal international order," gravitate toward key normative principles and post-Second World War institutions, but without settling on a definitive agreed meaning. Such efforts have striking parallels in international legal scholarship, which is engaged in an equally fraught discourse to define the "international rule of law" in response to seemingly unprecedented challenges. In practice, both are quests for an unattainable holy grail, since the central concepts embody the very disputes and tensions that have necessitated interrogation of global and legal order in the first place.

A defining structural ideal is nevertheless embedded in both concepts; that the rules governing the global political and legal order should remain unified within the constraints of a single coherent system.

International legal scholarship has long studied threats of "fragmentation," whereby presumptively universal legal rules diverge between different institutions, and increasingly between different regional contexts. One of the most discussed books in the academy is currently Anthea Robert's *Is International Law International?* in which she persuasively demonstrates that powerful states conceive and interpret the most fundamental rules and ideals of international law in divergent and often conflicting ways.

Advocates for variations of the rules-based order equally appeal for coherence in the authority and sources of rules. The anxiety of policymakers and scholars alike is not that rules will disappear from key domains of global politics, but rather that fragmented and competing bodies of rules will emerge in which rights and obligations of states vary across regions, incapable of reconciliation within an agreed system.

More specifically, predominantly Western voices have sought to confirm that unified understandings are properly to be found in the institutions and understandings of law defining the post-Second World War, and especially post-Cold War, status quo of international order.

It is increasingly clear that this core aspect of the rules-based order, stability fixed on universal legal rules, is now all but unattainable in the Indo-Pacific.

In a working paper published this month for the Berlin Potsdam Research Group, I made the case that China is establishing a new regional equilibrium between its geopolitical power and distinctive national conceptions of law. This comprises a rising Chinese "geolegal order": a subsystem of rules designated by China as "law" are increasingly effective in structuring security and political relations within the geographical confines of East and Southeast Asia but fragmented from global legal order.

The research explores fragmentation in three key areas of maritime rules: freedom of navigation; the authority of third-party and judicial settlement; and, territorial claims under UNCLOS.

Rising Chinese power is carving out a geolegal order within which states are incentivised to acquiesce and undertake decisions by reference to Chinese rather than universal interpretations of the law. Calls to recommit to an "*international law based order*" may thus perversely have a more contested meaning than a "rules-based order" in these cases, since the latter is informed by recognised legal interpretations of UNCLOS long held by the US and its allies.

Claims by a rising China for altered rules and institutions of international law were never a threat to overturn global legal order as a whole, but rather of fragmentation in areas crucial to Chinese security and strategic interests. These narrower aims have led Greg Raymond to argue that, although "China clearly wishes to establish an exception" to UNCLOS in the South China Sea, in so doing "they will not pose a threat to the fundamental integrity of the international system". Yet fragmentation confined to the most consequential security and geopolitical domains seems a pyrrhic victory, premised on an eviscerated international rule of law and thereby rules-based order.

The Australian Department of Foreign Affairs and Trade has refocussed on competitive logics in the region, observing that whereas "the pursuit of closer economic relations between countries often diluted strategic rivalries", the perceived return of "geo-economic competition could instead accentuate tension." In light of these trends, DFAT announced

the creation of a section devoted to promoting geoeconomic interests. The escalation of strategic rivalry applies no less to regional geolegal competition, which thus demands an equivalent institutional comprehension and strategic response if Australia is to promote its conceptions and interpretations of international law.

Since completing my working paper, the evidence of a rising and increasingly effective Chinese geolegal sphere is mounting.

Despite the Philippines' success in the 2016 South China Sea Arbitration, at the most recent ASEAN summit President Rodrigo Duterte criticised US freedom of Navigation operations aimed at defending those same claims: "China is already in possession. It's now in their hands. So why do you have to create frictions, strong military activity that will prompt a response from China?" In the contest to define and defend the regional rules-based order, it is "increasingly fanciful" to act as if China will be dislodged from its maritime claims and the region returned to relations agreed through a universal system of international law.

China's rising geolegal order cannot yet, and should not, be ordained with the status of law so long as it remains a system of self-judging edicts, and its subjects obey solely by virtue of political and economic self-interest.

Yet, through history, it has been the fate of effective rules-based orders for conspicuous applications of raw power to recede from view, and to be transformed into systems of legal obligation shaped by a leading global power. The confluence of shifting regional power balances and competing legal conceptions have already fragmented the international rule of law in the Indo-Pacific. In that sense, the most authoritative element of the rules-based order has already failed where it mattered most.

Source: https://www.lowyinstitute.org/the-interpreter/international-law-cannot-save-rules-based-order

The Year in Multilateralism: Three Trends and One Surprise Stand Out in 2018

Richard Gowan Monday, Dec. 17, 2018
https://www.worldpoliticsreview.com/articles/27009/the-year-in-multilateralism-three-trends-and-one-surprise-stand-out-in-2018

What happened in the multilateral system in 2018? Looking back over the year, it is possible to identify three strategic trends and a last-minute political surprise that may resonate in the future.

The big trends in multilateralism included a hardening of the Trump administration's opposition to international cooperation, a concomitant increase in China's efforts to influence bodies like the United Nations, and worrying signs of European splits over the value of internationalism. The surprise was an unexpected, and arguably almost accidental, revitalization of humanitarian politics over Yemen.

Let's start with the trends. By the end of 2017, it was clear that the U.S. had taken an anti-internationalist turn under President Donald Trump. Yet, while Trump had already renounced the Paris climate change deal, his administration's attacks on globalism were curiously haphazard. Many leading members of his team, including U.N. Ambassador Nikki Haley and then-National Security Adviser H.R. McMaster, seemed quietly determined to limit the harm to multilateral institutions.

The influential Haley, as I noted in January, seemed uncertain as to whether she should be "a force for moderation on the margins of the Trump administration" or a "hardliner in lock-step with Trump on the need to talk and act tough on many security issues." In the end, she never had to make a decisive choice one way or another. Trump shook up his foreign policy team in the first quarter of 2018, replacing McMaster with the inveterate U.N. critic John R. Bolton and selecting the hawkish Mike Pompeo as secretary of state. Those picks ensured the administration would shift toward a firmer unilateralist line, and Haley subsequently tendered her resignation, effective early next year.

With the new foreign policy team in place, the U.S. disowned the Iranian nuclear deal, left the U.N. Human Rights Council, ratcheted up its criticisms of the International Criminal Court—a long-standing bugbear for Bolton—and even threatened to quit the venerable Universal Postal Union. You know that an administration really hates international cooperation when it is ready to expend political capital on the price of stamps.

Most of these decisions clearly bear Bolton's imprimatur. The national security adviser is the worst enemy the U.N. could have, because perhaps the only thing that exceeds his hatred of the organization is his knowledge of how it works. In all likelihood, the White House will continue to target the U.N. system's vulnerabilities with disturbing astuteness.

The more it does so, the more it will create political space for China to bid for

leadership. Beijing has been working to boost its influence in the U.N. for some years and redoubled these efforts in 2017 to take advantage of global doubts about the Trump presidency. It ramped up these efforts further in 2018, lobbying developing countries and European states in New York and Geneva to build closer ties. While Russia continues to stir up trouble in the Security Council, U.N. diplomats and officials broadly agree that China's growing clout is the far more important trend.

This is both a source of hope and trepidation. While China objects to established U.N. norms on issues like human rights, it is crucial to any progress in the fight against climate change. And at a moment when the U.S. appears set on stoking economic and political tensions with Beijing, it is reassuring that the Chinese still want to work through multilateral bodies, not undercut them.

Beijing's path to multilateral influence is not uncomplicated, however. Many smaller powers worry about replacing their loyalties to the U.S. with diplomatic dependence on China. This should benefit the European bloc, which has long trumpeted its commitment to "effective multilateralism" as part of its political brand and can now offer itself as an alternative to both the U.S. and China at the U.N. While Brexit may briefly upset European diplomacy in New York, as the British have shaped a lot of their partners' thinking on issues like development, the EU can still emerge from the current turmoil as a leading defender of global cooperation.

But just as the Europeans see this political opportunity opening, internal bickering is hampering their ability to grasp it. A well-intentioned U.N. effort to forge a new Global Compact on Migration—formally endorsed in Marrakech, Morocco, last week—highlighted the EU's divisions over multilateral diplomacy. Internationalists such as German Chancellor Angela Merkel loudly welcomed the pact, but nationalists such as the leaders of Hungary and Poland have refused to back it. The Belgian and Estonian governments publicly split over the agreement, and over 5,000 right-wing protesters attacked EU buildings in Brussels this weekend to protest the Marrakech conference.

This unpleasant process may lead to exaggerated concerns about Europe's commitment to multilateralism. As I have recently noted, there are positive signs that EU members of the Security Council are consolidating and coordinating their diplomacy better. But the migration story has highlighted that even traditional friends of the U.N. cannot be totally relied upon.

If there are lots of reasons to worry about the trajectory of multilateralism, there are still occasional moments for optimism. The most notable of these has been a recent outpouring of concern over the war in Yemen, an atrocious crisis that most international leaders and large swaths of the general public have ignored for some years. The Yemeni situation, along with the Syrian bloodbath, have seemed to signal the end of the "humanitarian imperative" in global politics, as governments of all types have failed to confront Saudi Arabia over the human costs of its intervention.

Yet the murder of journalist Jamal Khashoggi in the Saudi Arabian consulate in Istanbul in October has unleashed a wave of criticism of Riyadh and heightened scrutiny over its involvement in the Yemeni war in particular.

Last week, the U.S. Senate called on the White House to cease its support for the Saudi campaign, while U.N. talks in Sweden made unexpected progress toward ending the violence. It is just possible that humanitarian arguments still have some capacity to shape multilateral affairs.

That may be the best news coming out of 2018 for those who care about international institutions. Those who worry about how multilateral diplomacy will fare in 2019 should look out for the next edition of this column on New Year's Eve, which will foretell events in the year ahead.

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The Committee to Save the World Order
America's Allies Must Step Up as America Steps Down
Ivo H. Daalder and James M. Lindsay

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This essay is adapted from their forthcoming book, The Empty Throne: America's Abdication of Global Leadership *(PublicAffairs, 2018).*

The order that has structured international politics since the end of World War II is fracturing. Many of the culprits are obvious. Revisionist powers, such as China and Russia, want to reshape global rules [1] to their own advantage. Emerging powers, such as Brazil and India, embrace the perks of great-power status but shun the responsibilities that come with it. Rejectionist powers, such as Iran and North Korea, defy rules set by others. Meanwhile, international institutions, such as the UN [2], struggle to address problems that multiply faster than they can be resolved.

The newest culprit, however, is a surprise: the United States, the very country that championed the order's creation. Seventy years after U.S. President Harry Truman sketched the blueprint for a rules-based international order [3]to prevent the dog-eat-dog geopolitical competition that triggered World War II, U.S. President Donald Trump has upended it. He has raised doubts about Washington's security commitments to its allies [4], challenged the fundamentals of the global trading regime, abandoned the promotion of freedom and democracy as defining features of U.S. foreign policy, and abdicated global leadership.

Trump's hostility toward the United States' own geopolitical invention [5] has shocked many of Washington's friends and allies. Their early hopes that he might abandon his campaign rhetoric once in office and embrace a more traditional foreign policy have been dashed. As Trump has jettisoned old ways of doing business, allies have worked their way through the initial stages of grief: denial, anger, bargaining, and depression. In the typical progression, acceptance should come next.

But the story does not have to end that way. The major allies of the United States can leverage their collective economic and military might to save the liberal world order. France, Germany, Italy, the United Kingdom, and the EU in Europe; Australia, Japan [6], and South Korea in Asia; and Canada in North America are the obvious candidates to supply the leadership that the Trump administration will not. Together, they represent the largest economic power in the world, and their collective military capabilities are surpassed only by those of the United States. This "G-9" should have two imperatives: maintain the rules-based order [7] in the hope that Trump's successor will reclaim

Washington's global leadership role and lay the groundwork to make it politically possible for that to happen. This holding action will require every member of the G-9 to take on greater global responsibilities. They all are capable of doing so; they need only summon the will.

Economic cooperation is a good place to start, and G-9 members are already creating alternatives to the trade deals Trump is abandoning. But they will have to go further, increasing military cooperation and defense spending and using a variety of tools at their disposal to take over the U.S. role as the defender and promoter of democracy, freedom, and human rights across the globe. If they seize this opportunity, the G-9 countries will not just slow the erosion of an order that has served them and the world well for decades; they will also set the stage for the return of the kind of American leadership they want and that the long-term survival of the order demands. Indeed, by acting now, the G-9 will lay the basis for a more stable and enduring world order—one that is better suited to the power relations of today and tomorrow than to those of yesterday, when the United States was the undisputed global power.

The World America Made

The emergence of a rules-based order was not an inevitability but the result of deliberate choices. Looking to avoid the mistakes the United States made after World War I, Truman and his successors built an order based on collective security, open markets, and democracy. It was a radical strategy that valued cooperation over competition: countries willing to follow the lead of the United States would flourish, and as they did, so, too, would the United States.

"The world America made," as the historian Robert Kagan has put it, was never perfect. During the Cold War, the reach of American influence was small. The United States at times ignored its own lofty rhetoric to pursue narrow interests or misguided policies. But for all its shortcomings, the postwar order was a historic success [8]. Europe and Japan were rebuilt. The reach of freedom and democracy was extended. And with the collapse of the Soviet Union, the U.S.-led postwar order was suddenly open to all.

But that success also created new stresses. The rapid growth in the movement of goods, money, people, and ideas across borders as more countries joined the rules-based order produced new problems, such as climate change and mass migration, that national governments have struggled to handle. Economic and political power dispersed as countries such as Brazil, China, and India embraced open markets, complicating efforts to find common ground on trade, terrorism, and a host of other issues. Iran and Russia recoiled as the U.S.-led order encroached on their traditional spheres of interest. And the U.S. invasion of Iraq in 2003 and the global financial crisis of 2007–8 raised doubts about the quality and direction of U.S. leadership.

Upon leaving office in 2017, U.S. President Barack Obama urged his successor to embrace the indispensability of U.S. leadership. "It's up to us, through action and example, to sustain the international order that's expanded steadily since the end of the Cold War, and upon which our own wealth and safety depend," he wrote in a note he left in the Oval Office. Trump took the opposite approach. He campaigned on a platform that global leadership was the source of the United States' problems, not a solution to them. He argued that friends and allies had played Washington for a sucker, free-riding on its military might while using multilateral trade deals to steal American jobs.

At the start of Trump's tenure, his selection of proponents of mainstream foreign policy, such as James Mattis as secretary of defense and Rex Tillerson as secretary of state, for top national security jobs spurred hopes at home and abroad that he would temper his "America first" vision. But by withdrawing from the Trans-Pacific Partnership (TPP), the Paris agreement on climate change, and the Iran nuclear deal; embracing mercantilist trade policies; and continuing to question the

value of NATO, Trump has shown that he said what he meant and meant what he said. He is not looking to reinvigorate the rules-based order by leading friends and allies in a common cause. They are the foes he wants to beat.

Trump's preference for competition over cooperation reflects his belief that the United States will fare better than other countries in a world in which the strong are free to do as they will. But he fails to understand that doing better than others is not the same as doing well. In fact, he is forfeiting the many advantages the United States has derived from the world it created: the support of strong and capable allies that follow its lead, the ability to shape global rules to its advantage, and the admiration and trust that come from standing up for freedom, democracy, and human rights.

Worse, by alienating allies and embracing adversaries, Trump is providing an opening for China to rewrite the rules of the global order in its favor. "As the U.S. retreats globally, China shows up," Jin Yinan, a top Chinese military official, gloated last year. Beijing has positioned itself as a defender of the global trading system, the environment, and international law even as it exploits trade rules, builds more coal-burning power stations, and expands its control in the South China Sea. This bid to supplant the United States as the global leader is hardly destined to succeed. China has few friends and a lengthy list of internal challenges, including an aging work force, deep regional and economic inequalities, and a potentially brittle political system. But a world with no leader and multiple competing powers poses its own dangers, as Europe's tragic history has demonstrated. The United States will not be the only country to pay the price for a return to such a world.

The New Guard

The consequences of the United States' abdication of global leadership have not been overlooked abroad. If anything, Trump's policies have highlighted how much other countries have invested in the rules-based order and what they stand to lose with its collapse. "The fact that our friend and ally has come to question the very worth of its mantle of global leadership puts in sharper focus the need for the rest of us to set our own clear and sovereign course," said Chrystia Freeland, Canada's foreign minister, early in Trump's presidency.

That recognition has driven repeated efforts by U.S. allies to placate Trump. They have looked for common ground despite deep substantive disagreements—not to mention Trump's ham-handed tactics, petty insults, and unpopularity among their own citizens. But so far, these efforts to compromise haven't worked, and they aren't likely to for one simple reason: what U.S. allies want to save, Trump wants to upend.

The United States' friends and allies—with the G-9 countries in the lead—need to act more ambitiously. They must focus less on how to work with Washington and more on how to work without it—and, if necessary, around it. As German Foreign Minister Heiko Maas told a Japanese audience in Tokyo last July, "If we pool our strengths . . . we can become something like 'rule shapers,' who design and drive an international order that the world urgently needs."

Of the potential areas for G-9 cooperation, trade holds the greatest promise, as the G-9 pulls significant economic weight and has already looked for ways to blunt Trump's protectionist policies. The G-9 countries clearly have the capacity to push their point. Collectively, they generate one-third of global output, more than double China's share and nearly 50 percent more than that of the United States. And they account for roughly 30 percent of global imports and exports, more than double both China's and the United States' share.

As important as the economic pull of the G-9 countries is the willingness they have already shown to counter Trump's mercantilist policies. After Trump withdrew the United States from the TPP shortly after taking office, Australia, Canada, and Japan led the effort to salvage the trade deal as a counterweight to China. In early 2018, the 11 remaining members agreed on a revised pact [9] that

preserved most of the deal's market-opening provisions; it will create a free-trade zone of 500 million people that will account for about 15 percent of global trade. Colombia, Indonesia, South Korea, and Thailand are among the nations that have expressed an interest in joining the so-called TPP-11, broadening its potential clout. The EU is also a logical partner for the TPP-11 countries. It has already negotiated separate trade agreements with Canada, Japan, and South Korea and has begun negotiating one with Australia; the EU-Japanese deal created a market of 600 million people, the largest open economic area in the world.

The TPP-11, the EU-Japanese free-trade agreement [10], and similar deals will intensify competition between the G-9 and the United States. The agreements give G-9 exporters an advantage over their U.S. counterparts in terms of market access and standards. But even with the growing need to work around or without the United States, the G-9 should still explore ways to cooperate with Washington. One example is the need to reform the World Trade Organization. Trump has repeatedly criticized the WTO, at times suggesting he might pull the United States out. That's likely an empty threat, because leaving would decidedly disadvantage U.S. firms. But Washington and the G-9 share legitimate concerns about the global trading regime, particularly when it comes to China's predatory practices. They might, for example, work to limit the sorts of subsidies that give state-owned enterprises in China and elsewhere a competitive advantage, replace the current system of "self-graduation" with objective standards for when developing countries must shoulder their full WTO obligations, and revamp the dispute-settlement process so that decisions are rendered more quickly and adhere more closely to the rules member countries have agreed on.

Cooperation Is Key

Security cooperation will be more challenging. European allies have the necessary mechanisms for cooperation through NATO and the EU, but they don't spend sufficiently on defense. Asian allies spend more on defense, but they lack an equivalent to NATO or the EU. Yet if G-9 members can make good on commitments to invest more in their own security, the potential waiting to be tapped is impressive. The G-9 represents a military power second only to the United States. In 2017, G-9 countries together spent more than $310 billion on defense, at least a third more than what China spends and more than four times what Russia spends. Every G-9 country ranked in the top 15 of the largest military spenders in the world.

When it comes to defense, much of Trump's criticism of U.S. allies is misguided, if not outright wrong. Despite Trump's griping that allies don't pay their fair share, they in fact cover a substantial part of the cost of the United States' military presence in their countries: Germany contributes 20 percent of the cost, South Korea contributes 40 percent, and Japan pays half. What is more, the integrated command structures of U.S. and NATO forces act as a force multiplier to deliver a far bigger punch than would be possible if the United States had to act on its own. It should also not be forgotten that large numbers of allied troops have fought and died alongside Americans in Afghanistan and elsewhere.

But Trump's complaint about free-riding allies—which several of his predecessors shared but expressed more diplomatically—has some merit with regard to both European and Asian allies. No alliance can survive if its members refuse to carry their own weight, and many U.S. allies, especially in Europe, depend too heavily on Washington for their security. They conceded as much in 2014, when every NATO member pledged to spend at least two percent of GDP on defense by 2024. Although the United States' global security responsibilities require it to spend far more, the two percent target would still represent a significant increase for many countries and allow Europe to carry its fair share of the overall defense burden.

If all of NATO's European members met the two percent target, their combined annual defense spending would jump from about $270 billion to $385 billion—an increase nearly twice the size of Russia's total defense budget. An increase of that scale would allow for a major upgrade in military

capabilities, especially if new funds were spent with an eye toward enhancing cooperation and connectivity among the armed forces. That is precisely the goal of the EU's Permanent Structured Cooperation, founded earlier this year, which aims to deepen European defense cooperation. The challenge is to make sure that the aggregation of this military potential adds up to more than the sum of its parts by avoiding duplication, consolidating research-and-development expenditures, and procuring complementary military capabilities.

When it comes to military cooperation, U.S. allies in Europe have an edge over those in Asia. Asia has no equivalent to NATO and is unlikely to develop one anytime soon. U.S. allies there are, however, strengthening their defense and security cooperation in the face of China's growing power and concerns over the reliability of the United States as a military partner. In January 2018, Australia and Japan pledged to work together more closely, including by allowing joint exercises of their armed forces. The two countries are also developing ties with India and exploring ways to conduct joint naval exercises. These early steps toward collaboration could evolve into regular planning, training, and cooperation on defense research, development, and procurement.

The lack of deep, multilateral military cooperation among Asian allies is partially offset by their willingness to invest in defense. Australia and South Korea both spend at least two percent of GDP on their militaries. Australia and New Zealand have long sent forces in support of major military operations in Afghanistan, the Middle East, and even Europe, demonstrating their belief that their own regional security is linked to security worldwide. Japan spends just one percent of GDP on defense, in accordance with its unique pacifistic constitution drafted by occupying U.S. forces after World War II. In spite of constitutional constraints, the Japanese military [11] is one of the most capable in Asia, and Prime Minister Shinzo Abe has opened an important national debate about changing the constitution and increasing the country's military capabilities.

For the G-9 to function as a unit when it comes to security, European and Asian countries will need to collaborate more directly. Although the major European military powers are unlikely to take on a large defense role in Asia, they can and should do more. The threat posed by North Korea has long preoccupied European capitals, and European forces continue to be part of the UN command established at the onset of the Korean War. China is a major concern as well. Europe has a critical interest in ensuring freedom of navigation throughout the Asia-Pacific region and sustaining a balance of power there. Strengthening defense ties between Europe and Asia will be key to counterbalancing China's rise. During a May 2018 visit to Sydney, French President Emmanuel Macron had this goal in mind when he called for an alliance among Australia, France, and India, saying, "If we want to be seen and respected by China as an equal partner, we must organize ourselves."

Stepping Up

Liberal democracy has come under assault after many decades of advancing across the globe. Led by China, authoritarian countries are openly challenging global rules and ideas about freedom and making the case that their sociopolitical systems work better than liberal democracy. The rise of populist movements in many Western countries has led to increased support for illiberalism even within established democracies. A growing refugee and migration crisis is challenging liberal norms regarding tolerance and diversity. But the loss of the United States as a strong global leader is perhaps the biggest change.

For 70 years, Western allies shared a commitment to democracy, freedom, and human rights and a belief that advancing them globally was an essential contribution to international peace and prosperity. The G-9 needs to carry on this work, even if Washington bows out. It can start by taking the lead in international institutions, such as the UN and the World Bank. Washington's voice has fallen silent in these forums. The G-9 countries must speak up loudly, clearly, and in unison in favor of democracy and freedom wherever and whenever these are challenged.

Political exhortation is unlikely to be sufficient on its own. The G-9 needs to flex its economic muscles, too. For example, it could use trade preferences and development assistance as leverage (a strategy China never shies away from). In 2017, the G-9 spent more than $80 billion on official development assistance, well over twice what the United States spent. Conditioning aid on the protection and promotion of democracy, freedom, and human rights would be a powerful way for G-9 countries to defend and extend these core values.

The G-9 will also have to use military force independent of Washington. France and the United Kingdom have already led military interventions for humanitarian purposes, mainly in northern and western Africa. In June 2018, together with seven other EU allies, the British and the French agreed to establish a joint military force to intervene in times of crisis. This is another small but important step that could serve as a model for similar collaborations.

Protecting The Order

To be effective, the G-9 will have to institutionalize in some form. Annual leader summits and regular meetings of foreign, defense, and other ministers will be needed to give the group's efforts weight and significance. The G-9 could also form an informal caucus in international institutions, such as the UN, the WTO, and the G-20. In strengthening formal ties and cooperation, the G-9 should avoid appearing exclusive; it should at all times welcome the participation and support of like-minded countries, including the United States. The goal should be to uphold and rejuvenate the existing order, not to create a new, exclusive club.

The primary obstacle the G-9 will face, however, isn't likely to be institutional; it will be a lack of political will to step up and defend the order. Washington has exhorted its European and Asian allies to carry more weight for years and has been met mostly with shrugs and excuses. Meanwhile, countries such as Germany and Japan have grown comfortable complaining about U.S. policy but remain unprepared to take on more responsibility. European countries have tended to look inward, and U.S. allies in Asia have preferred to deal with Washington bilaterally rather than work with one another.

U.S. allies are also tempted to avoid taking action by the hope that Trump might not actually do what he threatens or that a new president will take office in January 2021, and the storm will pass. But Trump's first 20 months in office suggest that he believes his nationalist, unilateralist, and mercantilist policies have produced "wins" for the United States. And even if Trump serves only one term, his successor may pay a political price for trying to reclaim a global leadership role for the United States. Although recent polls [12] by the Chicago Council on Global Affairs and others have shown that the American public rejects critical parts of "America first"—support for an active U.S. role in the world, for trade deals, and for defending U.S. allies has increased markedly since Trump took office—the idea that lingering resentment toward ungrateful allies propelled Trump to victory has become conventional wisdom in some circles. Without evidence that the United States' partners are doing their fair share, a new president may choose to remain on the sidelines of international politics and focus on domestic issues.

The G-9 must act now to prepare for such risks. Yet at the same time, it should recognize that without U.S. help, it can sustain the order for only so long. In the long run, the best the G-9 can hope to accomplish is to keep the door open for the eventual return of the United States. The challenges to the postwar order are too broad and the task of collective action too great to expect G-9 members to sustain alliances, maintain open markets, and defy democratic regression indefinitely. Unlike the United States, the G-9 consists of nine different political entities (including one that represents 28 nations), each of which faces distinct political pressures and requirements. Their ability to act in concert and to lead globally will invariably be less effective than that of a single great power.

Fortunately, "America first" need not become America's future. Instead, it could be a productive detour that reminds Washington and its allies why the order was created in the first place. Indeed, by investing more in that order and carrying a greater share of the burdens and responsibilities of global leadership, the G-9 may not only help sustain the order but also place it on a more stable and enduring foundation. The outcome may be one many U.S. leaders have long sought—a more balanced partnership with European and Asian allies in which everyone contributes their fair share and has a say in how the order should evolve to meet the new challenges.

Allied leaders know that they need to take more action. They understand that although the demise of the liberal order will cost the United States dearly, it will cost them even more. Great-power competition will intensify, predatory trade practices will spread, and the democratic reversal already under way will pick up speed. "The times when we could completely count on others, they are over to a certain extent," German Chancellor Angela Merkel remarked [13] a few months after Trump came to office. "We Europeans really must take our fate into our own hands." Now is the time for Germany and the other G-9 countries to match deeds to words. If they settle for complaints and laments, they will have more than Trump to blame for the passing of the rules-based order.

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[13] https://www.politico.eu/article/angela-merkel-europe-cdu-must-take-its-fate-into-its-own-hands-elections-2017/

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Might Unmakes Right

The American Assault on the Rule of Law in World Trade

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About the Author

James Bacchus is a senior fellow with CIGI's International Law Research Program, as well as the Distinguished University Professor of Global Affairs and director of the Center for Global Economic and Environmental Opportunity at the University of Central Florida. He was a founding judge, twice chairman and chief judge of the Appellate Body at the World Trade Organization in Geneva. He served as a member of the United States Congress and as an international trade negotiator for the United States. Currently, he is a senior counsellor to the International Center for Trade and Sustainable Development in Switzerland, and an adjunct scholar of the Cato Institute in Washington, DC. He served on the high-level advisory panel to the Conference of the Parties of the United Nations Framework Convention on Climate Change, chairs the Global Commission on Trade and Investment Policy of the International Chamber of Commerce, and chaired the Global Sustainability Council of the World Economic Forum. For more than 14 years, he chaired a global law practice that is the largest in the United States and one of the largest in the world. He is the author of the books *Trade and Freedom* (2004) and *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (forthcoming July 2018, Cambridge University Press). He is a frequent writer in leading publications and a frequent speaker on prominent platforms worldwide. The views expressed in this paper are solely his own.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

As Thucydides taught in his Melian Dialogue, there are always those who believe that might makes right. The human struggle has long been to prove that it does not. Our tool in this struggle is the rule of law. Through the rule of law, right becomes might. Long a champion of the international rule of law, the United States of America, under the leadership of President Donald Trump, has now embraced the belief that might makes right, and is using its might to unmake right by assaulting the rule of law in world trade. Trump, and those who serve him, are taking illegal, unilateral actions and pursuing other trade policies that circumvent and threaten to undermine the rules-based world trading system. They are also engaged in a stealth war against the continued rule of law in the World Trade Organization (WTO) dispute settlement system through intimidation of those who serve at the apex of the system: the judges on the WTO Appellate Body. The other members of the WTO must not yield to the unilateral ultimatums of the Trump administration or to its actions of intimidation that threaten to halt WTO dispute settlement. In the near term, the other WTO members should circumvent the recalcitrance of the United States by using arbitration under article 25 of the WTO Dispute Settlement Understanding as an alternative form of WTO dispute settlement. In the long term, they should eliminate the possibility of intimidation of WTO judges by the United States, or by any other country, by removing the design flaw of the possibility of reappointment to a second term for any member of the WTO Appellate Body. At the same time, the Appellate Body should be recast as a full-time, standing tribunal of judges who will serve longer single terms and will have the resources sufficient to improve the performance of the WTO dispute settlement system. These changes in the WTO in the near term and in the long term will prevent might from unmaking right in world trade.

The Timeless Appeal of Might Makes Right

In 416 BCE, after nearly two decades of intermittent conflict, the Peloponnesian War between Athens and Sparta was going badly for the Athenians.[1] The moderate and the temperate no longer held sway in the unruly popular assembly in Athens. Reason had succumbed to the impulses of passion. An ancient form of populism prevailed. Alone, the Greek inhabitants of the tiny Aegean island of Melos had "stubbornly maintained their independence" and their neutrality, and had refused to join the Athenian-led league.[2] This "allowed them to enjoy the benefits of the Athenian Empire without bearing any of its burdens."[3] Today, we would say that Melos was a "free rider."

As recalled by Thucydides, the great historian of that long-ago conflict, those leading Athens, frustrated with their endless war and fed up with Melos, sent a military expedition to bring Melos forcibly into the Athenian empire. The Melians accused the invading Athenians of coming "to be judges in your own cause" and asked what would happen to them "if we prove to have right on our side and refuse to submit."[4] Bluntly, coldly, succinctly, the Athenians replied, "You know as well as I do that right, as the world goes, is only in question between equals in power, while *the strong do what they can and the weak suffer what they must.*"[5]

In other words, might makes right.

Firmly believing they were in the right, the Melians refused to submit. The Athenians then besieged Melos for a number of months. As Thucydides tells it, eventually the siege was "pressed vigorously," and "the Melians surrendered at discretion to the Athenians, who put to death all the grown men whom they took, and

1 John H Finley Jr, *Thucydides* (Cambridge, MA: Harvard University Press, 1942) at 210.

2 Donald Kagan, *The Peloponnesian War* (New York: Penguin Books, 2003) at 247–49.

3 *Ibid*.

4 Robert B Strassler, ed, *The Landmark Thucydides* (New York: The Free Press, 1996) at 351.

5 *Ibid* at 352 [emphasis added].

sold the women and children for slaves, and subsequently sent out five hundred colonists and settled the place themselves."[6] The Athenians did what they could to the Melians simply because they could. In the dispute between Athens and Melos, might, in the end, did make right.

Because of Thucydides, we still remember today, millennia later, what would be "an otherwise forgotten act of aggression."[7] No one has ever done more to explain why we need the international rule of law. What is known as his Melian Dialogue illustrates the danger of the arbitrary exercise of power in the absence of the rule of law. The timeless lesson it teaches is that, in the unending struggle between right and might, right can make might only if the strong are not the judges of their own cause and only if the strong and the weak are made "equals in power." This is only possible through the rule of law. The rule of law equalizes the strong and the weak by establishing and upholding rules that apply equally to all and that treat all equally before the law. The arbitrariness of power is thus replaced by the security and the predictability of impartial rules enforced by impartial judges.

The American Turn to Protectionism and Mercantilism

In 2018, the Athenian generals are once again invading Melos, and once again their aim is to prove that might makes right. This time, sadly, the invaders are from the United States of America. This time they are seeking to make might into right in the judicial rulings on the treaty obligations of WTO members in the internationally agreed rules of the WTO. Since its transformation from the General Agreement on Tariffs and Trade (GATT) into an international institution in 1995, the WTO has done much to establish the rule of law in international trade, and thus has done much also to accord reality to the cooperative global enterprise of establishing the international rule of law overall. These institutional achievements are due in no small part to the United States' steadfast support through the years for the mission and the work of the WTO. But now, American support for the WTO is much in doubt as one manifestation of the ascendancy of a plutocratic populist with protectionist inclinations to the presidency of the United States.

If there is one consistency among all the myriad inconsistences in the distorted worldview of President Donald Trump, it is his opposition to free trade. Trump has long been a full-throated (if ill-informed) voice for protectionism. If there is another consistency in his generally erratic thinking, it is his disregard for global cooperation through multilateralism. He prefers confrontation to cooperation. Thus, he has long been an exponent of unilateralism — of the short-term view that the best choice for Americans is to abandon or ignore the international institutions that Americans have done so much to help create and, instead, go it alone in global affairs, sure in the knowledge that the economic and martial might of the United States can be used as leverage to get other countries in the world to do as the United States desires.

Given these personal predilections of the president of the United States, it should come as no surprise that, in his first 16 months in office, he has made no secret of his utter disdain for the WTO and for the architecture of international cooperation through multilateralism that created and sustains it. He has been increasingly vocal about his preference for one-on-one bilateral trade deals, in which the United States can often impose its will on smaller countries, over the multilateral regional and global deals that produce vastly more gains from trade for everyone and that have, in the past, been generally preferred by US presidents, Republican and Democrat alike. Global and other "mega" trade deals are equally and almost universally preferred by economists, trade advocates and, not least, all the 163 other countries that, like the United States, are members of the WTO.

In his tumultuous first 16 months in the White House, Trump has abandoned the Trans-Pacific Partnership, negotiated and signed by his predecessor with 11 other countries on the Pacific Rim. Finding the negotiations with the European Union on a proposed Trans-Atlantic Trade and Investment Partnership in impasse when he took office, he has left them in a frozen limbo. Following repeated campaign threats to unravel and perhaps even withdraw from the North American Free Trade Agreement (NAFTA) with Mexico and

6 *Ibid.*

7 Finley, *supra* note 1 at 209.

Canada, he has entered into trade negotiations with America's two closest neighbours, with the ostensible goal of modernizing NAFTA, but in which the US negotiating position seems to be largely "my way or the highway" with shrill, tweeted threats of a US pullout still heard. He has coerced South Korea into renegotiating the recent Korea-US Free Trade Agreement at a time when tensions remain high on the Korean Peninsula. In going alone, increasingly, Trump and those who serve him have left the United States standing alone in world trade — with not one new bilateral trade deal to show to his supporters as he approaches the half-way point of his first term as president.

In a presidency increasingly clouded by criminal investigations and hindered by instability in politics and in policy, President Trump's advocacy of protectionism in trade has been one of the few constants. Now he has moved from threats to actions, and these actions have displayed a deep and disturbing indifference on the part of the Trump administration to the constraints of the rules-based world trading system overseen by the WTO. In early March, the president employed a long-unused provision of the US Trade Expansion Act of 1962 — section 232 — to impose 25 percent tariffs on imports of steel and 10 percent tariffs on imports of aluminum.[8] In late March, he used a long-abandoned provision of the US Trade Act of 1974 — section 301 — to impose up to US$60 billion in tariffs on imports of about 100 products from China in retaliation for what the United States sees as costly widespread infringement in China of US intellectual property rights.[9] In the midst of taking these two actions, the president boasted that he was striking back at "free-trade globalists."[10]

In acting unilaterally under both section 232 and section 301, the Trump administration has not bothered to go first to the WTO to seek a remedy for the allegedly unfair actions of US trading partners it claims to be addressing. This is a violation by the United States of international trade law. Where the matters in dispute fall within the scope of the WTO treaty, taking unilateral action without first going to WTO dispute settlement for a legal ruling on whether there is a WTO violation is, in and of itself, a violation of the WTO treaty. Article 23.1 of the WTO Dispute Settlement Understanding (DSU) establishes mandatory jurisdiction for the WTO dispute settlement system for all treaty-related disputes between and among WTO members.[11] The WTO Appellate Body has explained, "Article 23.1 of the DSU imposes a general obligation to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and *not through unilateral action.*"[12]

The United States has not abandoned WTO dispute settlement altogether. The Trump administration continues to defend complaints made against the United States in the WTO, and it has also initiated a few complaints. In 2017, the United States filed a complaint against Canada relating to measures of the province of British Columbia governing the sale of wine in grocery stores.[13] In March 2018, while busy also imposing the unilateral trade restrictions under sections 232 and 301, the United States requested consultations with India on a range of Indian export subsidies.[14] Further, in its trade confrontation with China, the Trump administration has filed one WTO complaint, alleging that the Chinese are violating WTO intellectual property rules by failing to enforce the patent rights of foreign patent holders.[15] At the same time, the United States has refrained from initiating additional and broader WTO cases against Chinese intellectual property practices, instead preferring to

8 Jacob M Schlesinger Jr, Peter Nicholas & Louise Radnofsky, "Trump to Impose Steep Aluminum and Steel Tariffs", *The Wall Street Journal* (2 March 2018).

9 Mark Landler & Alan Rappeport, "Trump Plans to slap tariffs and investment restrictions on China", *The New York Times* (22 March 2018).

10 Josh Dawsey & Damian Paletta, "Assailed for remarks on trade, Trump doubles down on claims about Canada", *Washington Post* (16 March 2018).

11 WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 1869 UNTS 401, 33 ILM 1226 (1994), art 23.1 [*DSU*], online: <www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>.

12 *United States–Certain EC Products* (2001), WTO Doc WT/DS165/AB/R at para 111 (Appellate Body Report) [emphasis added]. It should be noted that, while a member of the Appellate Body, I was the chair of the division in the appeal in that dispute. The Appellate Body has since reiterated and reinforced this ruling in *United States–Canada–Continued Suspension* (2008), WTO Doc WT/DS231/AB/R at para 371 (Appellate Body Report).

13 *Canada–Measures Governing the Sale of Wine in Grocery Stores (second complaint)*, WT DS531.

14 *India–Export Related Measures*, WT DS541.

15 *China–Certain Measures Concerning the Protection of Intellectual Property Rights–Request for Consultations by the United States* (2018), WTO Doc WT/DS542/1.

pressure China with steep unilateral tariffs.[16] And, tellingly, the United States has not followed through to pursue a WTO complaint filed against Chinese aluminum subsidies by the Obama administration just one week before Trump's inauguration.[17] Instead, the president chose to levy the unilateral tariffs outside the legal framework of the WTO.

As president, Trump has increasingly recycled his campaign rhetoric that the WTO is "horrible" and has reiterated his campaign threat to withdraw the United States from membership in the WTO. It can only be hoped that this is merely a hollow threat. Even with so capricious a president and so self-destructive a presidency, a formal American pullout from the WTO would be an economically suicidal move. If President Trump does decide to pull the United States out of the WTO, then every other country in the world with which the United States does not have a free trade agreement will be free to discriminate against all American trade in goods and services in any way it chooses. The United States has free trade agreements with just 20 countries.[18] In contrast, US next-door neighbour Mexico has concluded free trade agreements with 45 countries.[19] Therefore, more than 140 members of the WTO will be given a free pass to discriminate against all US trade if the United States leaves the WTO.

Freedom from such trade discrimination is one vital benefit to the United States and to every other member of the WTO from having agreed in the WTO treaty to be bound by the foundational rule of most-favoured-nation (MFN) treatment. The MFN obligation is at the heart of the WTO-based world trading system and can be traced back six centuries to 1417 as the fundamental tool for lowering barriers to international trade.[20] As a core of the GATT, this basic trade rule of non-discrimination has prohibited discrimination between and among the like traded products of other countries for the past 70 years, and has thereby lowered barriers to trade and helped lift the flow and the value of world trade by trillions of dollars annually throughout those seven decades.[21] The president's secretary of commerce, Wilbur Ross, has cast aspersions on the operation in the WTO of the MFN rule, calling it a "significant impediment to anything like a reciprocal agreement."[22] His knowledge of what would happen to US trade without the security blanket of the MFN rule outside the legal shelter of the WTO may be one reason for his preemptive criticism of the rule. Someone should explain to the current occupant of the White House, albeit belatedly, "This, Mr. President, is how MFN works."

At various times during his first 16 months in office, President Trump and assorted members of his new administration have threatened to withdraw from the WTO, ignore the WTO, go around the WTO and refuse to comply with adverse WTO rulings.[23] At home, these and his many other threats to disrupt trade and dismantle trade agreements have thrilled his economic nationalist political base. In Geneva, these threats have generated both dismay at the US renunciation of its long bipartisan tradition of supporting international trade rules and trade and other international institutions, and mystification at what, setting aside the rhetoric, the actual unfolding trade policy of the United States might be. A peculiar combination of US disregard and indifference to the WTO by President Trump has only added to the long-standing difficulties of the members of the WTO in concluding trade negotiations on almost anything. At the WTO Ministerial Conference in Buenos Aires, Argentina, more and more of those from other countries who are engaged in the work of the WTO were asking, "What does the United States want?" With the United States largely on the sidelines, very little of note was agreed in Buenos Aires.

16 See James Bacchus, "How the World Trade Organization Can Curb China's Intellectual Property Transgressions" (22 March 2018) *Cato at Liberty* (blog), online: <www.cato.org/blog/how-world-trade-organization-can-curb-chinas-intellectual-property-transgressions>.

17 *China—Subsidies to Producers of Primary Aluminum*, WT DS519.

18 See Office of the United States Trade Representative, online: <www.ustr.gov/trade-agreements>.

19 ProMexico, online: <www.promexico.gob/my/en/mx/tradados-comerciales>.

20 *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153, art I:1 (entered into force 1 January 1995). John H Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill, 1969) at 245.

21 See "The Case for Open Trade", online: WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm>.

22 Office of the Press Secretary, The White House, Press Release, "Press Briefing by Secretary of Commerce Wilbur Ross on an Executive Order on Trade against Violations and Abuses" (28 April 2017).

23 Editorial, *The New York Times* (27 February 2017); Damian Paletta & Ana Swanson, "Trump suggests ignoring World Trade Organization in major policy shift", *Washington Post* (1 March 2017); Shawn Donna & Demetri Sevastopulo, "Trump team looks to bypass WTO dispute system", *Financial Times* (27 February 2017); Alex Lawson, "Trump Will Not Comply With Adverse WTO Rulings" (1 March 2017) *Law 360* (blog).

On September 19, 2017, in his first speech to the United Nations, President Trump (in between threatening to destroy North Korea and casting doubt on the legal right of the United Nations to second-guess sovereign states) took time to rail against the WTO without directly mentioning it. "For too long," he said, "the American people were told that mammoth multinational trade deals, unaccountable international tribunals, and powerful global bureaucracies were the best way to promote their success. But as those promises flowed, millions of jobs vanished and thousands of factories disappeared."[24] The president cited no evidence, however, that global trade deals had caused the effect of the job losses in the United States, and he did not mention the US jobs gained from those trade deals. Nor did he zero in on precisely which "unaccountable international tribunals" and which "powerful global bureaucracies" he had in mind.

On October 25, 2017, during a televised interview on Fox Business by the virulently protectionist broadcaster Lou Dobbs, the president got more specific in his denunciations of the WTO and especially of WTO dispute settlement. "They have taken advantage of this country like you wouldn't believe," he complained. The United States, he went on, has lost "almost all the lawsuits" it has brought to the WTO "because we have fewer judges than other countries. It's set up as you can't win. In other words, the panels are set up so that we don't have majorities." [25] The president said he is persuaded that the WTO is "set up for the benefit of taking advantage of the United States."[26] Despite these criticisms, though, he did not say what he proposed for or wanted from the WTO.

Then, on November 10, 2017, at the annual Asia-Pacific Economic Cooperation Forum meeting in Da Nang, Vietnam, President Trump unleashed in full to the assembled Asia-Pacific regional leaders his frustrations with multilateral trade agreements in general and with the WTO specifically. "We are not going to let the United States be taken advantage of anymore," he said. "I am always going to put America first, the same way that I expect all of you in this room to put your countries first....What we will no longer do is enter into large agreements that tie our hands, surrender our sovereignty and make meaningful enforcement practically impossible.... [I will] aggressively defend American sovereignty over trade policy....Simply put, we have not been treated fairly by the World Trade Organization."[27]

Trump may not have read — or even have heard of — the Melian Dialogue. It does not appear in his musings on the art of the deal.[28] But whether he knows it or not, he is channelling the edicts of the ancient Athenian generals on Melos. In trade, as in much else, he is saying that might makes right, and, in his recent unilateral trade actions outside the legal structure of the WTO, he is trying to prove it.

The Trade Views of the United States Trade Representative

In his attacks on the WTO-based world trading system, President Trump has the more subtle, but equally ardent, support of his hand-picked trade ambassador, United States Trade Representative (USTR) Robert Lighthizer. A highly intelligent and highly skilled trade lawyer, an experienced trade negotiator and a long-time trade counsel for the protectionist-minded in the US steel industry, Lighthizer lends a leaven of reflective trade philosophy to the uninformed bluster of the president. More subdued than the president he serves, he espouses, beneath a thin veneer of gratuitous pro-trade euphemism, a deeply felt belief in the virtues of protectionism and mercantilism that seems to animate almost all his actions on behalf of the Trump administration.

Lighthizer rightly denounces protectionism and mercantilism in other countries — notably China, which is touting free trade while turning more and more economically nationalist. Yet he

24 "Remarks of President Trump to the 72nd Session of the United Nations General Assembly" (Address delivered at the United Nations, New York, 19 September 2017), online: The White House <www.whitehouse.gov/briefings-statements/remarks-president-trump-72nd-session-united-nations-general-assembly/>.

25 Interview of President Trump by Lou Dobbs (25 October 2017) on *Fox Business*.

26 *Ibid*.

27 Ashley Parker & David Nakamura, "At summit, Trump return to tough stance on trade", *Washington Post* (11 November 2017); John Wagner & David Lynch, "On Trump's trade trip to Asia, nations keep his one-on-one dance card empty", *Washington Post* (15 November 2017).

28 Donald Trump, *The Art of the Deal* (New York: Random House, 2004).

advocates both protectionism and mercantilism for his own country in the guise of a Trumpian version of a misguided, short-sighted and inward-looking industrial policy. Lighthizer echoes the view, dating back to some of the ancient Greeks, that all of us in our country will be better off if we discriminate in favour of our own producers while limiting competition from imports from other, "foreign" countries.[29] He claims he is committed to "working with other members to improve the functioning of the WTO"[30] and, further, to increasing "the WTO's ability to promote free and fair trade."[31] But, whatever soothing reassurances he may offer about supposedly supporting the WTO, Lighthizer, on behalf of his president, is pursuing a protectionist and mercantilist agenda that, if it is fully implemented, and, if it is not resisted, could well destroy the WTO-based world trading system.

The USTR is not new to his views, which he has long professed. After nearly 25 years, Lighthizer remains unreconciled to the decision by the US Congress in 1994 to support inclusion of the establishment of a binding dispute settlement system as part of the WTO, when approving the Uruguay Round trade agreements.[32] As a former trade negotiator who had effectively wielded a unilateral club, he did not think it wise for the United States to relinquish its legal right to take unilateral trade actions in exchange for a binding WTO dispute settlement system in which trade rules and trade rulings could be enforced through economic sanctions in the form of the "last resort" of a loss of previously granted trade benefits.[33]

Moreover, Lighthizer did not believe then that it was a good idea for the United States to agree to be bound by the judgments of what would often be foreign judges, whom he feared would be biased against the United States and whose delegation of global legal authority, as he saw it, amounted to a surrender of a slice of American sovereignty. During the rowdy run-up to the congressional approval of the Uruguay Round trade agreements, he pushed unsuccessfully for the establishment of a domestic commission to review WTO decisions whenever the United States lost a case. He would have required the United States to consider leaving the WTO if — in the view of this commission — the United States lost three cases it should not have lost in any period of five years.[34] He has given no reason now for anyone to think he has abandoned this view.

The USTR preferred then — and he looks "wistfully" back on now — the pre-WTO system of GATT dispute settlement, in which a GATT panel ruling was not binding unless all the countries that were contracting parties to the GATT agreed that it should be.[35] This meant that, for a ruling to be legally binding, the country that lost the legal ruling in the dispute had to agree to make it binding. This meant, as well, the preservation of more national control over disputed trade outcomes and, therefore, to Lighthizer's way of thinking, the preservation of more national sovereignty. In contrast, in WTO dispute settlement, a WTO panel ruling, as amended by the WTO Appellate Body, is binding unless every WTO member agrees that it should not be binding. This means that, for a ruling not to be binding, the country that won in the dispute has to agree to set its winning verdict aside.[36] Not surprisingly, after more than two decades, this has never happened.

During the Uruguay Round, decades of frustration with enforcing winning panel verdicts in the GATT led US trade negotiators to push hard for a binding dispute settlement system in the WTO. They sought rules that could be upheld. They wanted to be able to enforce international legal judgments against other countries that had violated WTO rules, backed by economic sanctions authorized by the WTO. But, unlike many at the time, Lighthizer realized that the United States would lose cases as well as win them in the WTO. He may also have foreseen that the United States would be most likely to lose WTO cases (including cases involving his steel clients) when defending the expansive and highly discretionary US anti-dumping and anti-subsidy trade remedies that would be indefensible under the new and binding

29 James Romm, "Greeks and Their Gifts", *The Wall Street Journal* (23 May 2015).

30 Bryce Baschuk, "U.S. Pledges Work to 'Improve' WTO Rather Than Destroy It", *Inside US Trade* (9 June 2017).

31 Eduardo Porter, "Trump's Endgame Could Be the Undoing of Global Rules", *The New York Times* (31 October 2017).

32 It should be acknowledged that I was one of the six original co-sponsors of the implementing legislation for the Uruguay Round trade agreements and, thus, have long been on the opposite side of Ambassador Lighthizer in the debate over whether the national interest of the United States is best served by participating in the WTO dispute settlement system.

33 *DSU*, *supra* note 11, art 3.7.

34 Shawn Donnan, "Fears for free trade as Trump fires first shots to kneecap WTO", *Financial Times* (9 November 2017).

35 *Ibid*.

36 *DSU*, *supra* note 11, art 16.4.

trade remedies rules in the WTO Agreement.[37] What is more, based on his experience in the 1980s at the USTR in challenging Japan (the commercially insurgent "China" of the time) with singular trade threats, Lighthizer was very much inclined to stick with the old GATT system that left the United States free to go on the offence aggressively in trade by taking unilateral trade actions without any international legal constraint.

Since 1994, Ambassador Lighthizer's opposition to the basic legal underpinning of the WTO dispute settlement system has remained unrelenting. In January 2001, at a seminar on Capitol Hill, he voiced anew his long-held view that it was a "mistake" for the United States to agree to a binding system that infringed on US sovereignty instead of retaining its previous unilateral discretion to assert its sovereign will. He said then that WTO panels are often comprised of jurists who are "not qualified." [38] Shockingly, he then went so far as to say that he suspected that some WTO jurists "may be crooked, although I have no evidence of it."[39] In making such a serious ethical charge on what he admitted was no evidence whatsoever, he was a Trumpian before Trump's time. Even if the panels were "fair arbiters," he contended, they would still be "a threat to sovereignty," for "our laws are being threatened in a very serious way."[40]

In 2003, in a bit of trade irony, Lighthizer, perhaps the most fervent and outspoken critic of the WTO dispute settlement system, and someone who had professed that WTO jurists "may be crooked," was one of two candidates nominated by the United States to become one of the seven members of the WTO Appellate Body. When confronted with this irony at the time by a journalist, Lighthizer was reported as asking himself aloud, "Do you criticize the system and hope to kill it, or do you think it is worthwhile to go to Geneva and apply a strict constructionist's perspective, and add a certain credibility?"[41] He was not selected by the members of the WTO.

Five years later, invoking the economic nationalist spirit of one of America's foremost founding fathers, Alexander Hamilton, Lighthizer derided free traders in a fervent opinion column in *The New York Times*:

> Modern free traders embrace their ideal with a passion that makes Robespierre seem prudent. They allow no room for practicality, nuance or flexibility. They embrace unbridled free trade, even as it helps China become a superpower. They see only bright lines, even when it means bowing to the whims of anti-American bureaucrats at the World Trade Organization. They oppose any trade limitations, even if we must depend on foreign countries to feed ourselves or equip our military. They see nothing but dogma — no matter how many jobs are lost, how high the trade deficit rises or how low the dollar falls.[42]

By 2010, Lighthizer was telling the US-China Economic Security and Review Commission, "Trade policy discussions in the United States have increasingly been dominated by arcane disputations about whether various actions would be 'WTO-consistent' — treating this as a mantra of almost moral or religious significance....WTO commitments are not religious obligations."[43] He maintained it made little sense to have "an unthinking, simplistic and slavish dedication to the mantra of 'WTO-consistency.'"[44] Rather, he recommended that "where a trade relationship has become so unbalanced that the threat of retaliation pales in comparison to the potential benefits of derogation — it only makes sense that a sovereign nation would consider what options are in its own national interest (up to and including potential derogation from WTO stipulations)."[45] In other words, if you wish to do so, ignore the WTO.

37 WTO, *Agreement on the Implementation of Article VI of GATT 1994*, 1868 UNTS 201 [*Anti-dumping Agreement*]; WTO, *Agreement on Subsidies and Countervailing Measures*, 1869 UNTS 14.

38 Greg Rushford, "Bob Lighthizer, WTO Jurist?" (October 2003) *The Rushford Report*, online: <www.rushfordreport.com/2003/10_2003_Publius.htm>.

39 *Ibid*.

40 *Ibid*.

41 *Ibid*.

42 Robert E Lighthizer, "Grand Old Protectionists", *The New York Times* (6 March 2008).

43 Robert E Lighthizer, "Evaluating China's Role in the World Trade Organization Over the Past Decade" (Testimony before the U.S.-China Economic and Security Review Commission, 9 June 2010) at 33, online: <www.uscc.gov/sites/default/files/6.9.10Lighthizer.pdf>.

44 *Ibid* at 35.

45 *Ibid* at 33.

The American Attempt to Unmake Right in the WTO

Little wonder that Lighthizer was appointed as the USTR by Trump. Now, thanks to President Trump, he is doing his best to turn back the clock in world trade to a time when the United States could employ its considerable leverage without the inconvenient constraint of WTO rules, and often did so. While taking reckless unilateral and other highly publicized trade actions outside of Geneva, at the same time, inside Geneva, Trump and his atavistic acolytes have been waging a "stealth war" against the WTO, cleverly disguised by Lighthizer and his lieutenants at the USTR as an arcane procedural challenge to the appointment and the reappointment of the members of the WTO Appellate Body. The European trade minister, Cecilia Malmström, speaks for a great many worried WTO members in warning that this procedural challenge by the United States risks "killing the WTO from the inside."[46] Continued success in this stealth war could turn out to be all the United States needs to topple the WTO.[47]

This stealth war was not started by Trump and Lighthizer. For the past 12 years, dating back to the second term of President George W. Bush and then continuing and gradually intensifying under the administration of President Barack Obama, the United States, through the USTR, has voiced concerns about some of the rulings and about some of what the United States perceives as the aggrandizing inclinations of the seven members of the WTO Appellate Body, the final tribunal of appeal in the WTO. The United States tried unsuccessfully to raise some of its concerns in the failed Doha Round of multilateral trade negotiations. They voiced their concerns from time to time within the councils of the WTO. Unfortunately, over time they succumbed to the temptation to apply inappropriate pressure outside the legal norms of the system, but, for the most part, they worked within it to try to resolve their professed concerns.

As he has done in so many instances, Trump has, in the WTO, seized on an inherited conflict and has made it immeasurably worse by making it his own. Trump, Lighthizer and other political appointees at the USTR have used the pretext of this pre-existing and low-key controversy as a convenient cover for what has become their systematic assault against rules-based multilateralism and dispute settlement. Within the broader geopolitical context of the overall direction and disruption of Trump trade policy, this previously arcane internal debate largely among trade diplomats and trade legal theorists has been transformed and elevated by Lighthizer and his USTR colleagues since Trump's inauguration into a political wedge issue against the WTO as an international institution. They have eagerly enlisted in this stealth war against the WTO and escalated it to the point where it now poses an existential crisis for the WTO.

Substantively, as voiced, the concerns raised by the United States have, during most of the past 12 years, been mainly about the Appellate Body rulings in a long string of "zeroing" and other trade remedies disputes in which the United States has repeatedly ended up on the losing side.[48] Zeroing is a methodology used by US trade agencies to determine whether a foreign producer is dumping and to calculate the margin of dumping; WTO panels and the Appellate Body have consistently ruled that the use of zeroing does not result in the making of a fair comparison between the export price and the normal value of an imported product, as required by the WTO Anti-Dumping Agreement.[49] This series of WTO rulings has had the effect of limiting the latitude of US trade agencies in finding the existence of dumping and in levying high anti-dumping duties — not a result that has been welcomed by Lighthizer and other US trade lawyers for steel and other trade-sensitive and trade-exposed US industries.

46 Eduardo Porter, "Trump's Endgame Could Be the Undoing of Global Rules", *The New York Times* (31 October 2017).

47 Gregory Shaffer, Manfred Elsig & Mark Pollack, "Trump is fighting an open war on trade. His stealth war on trade may be even more important", *Washington Post* (27 September 2017).

48 See *United States–Zeroing (EC)* (2006), WTO Doc WT/DS294/AB/R (Appellate Body Report); *United States–Zeroing (Japan)* (2007), WTO Doc WT/DS322/AB/R (Appellate Body Report); *United States–Zeroing (Japan)* (2007), WTO Doc WT/DS/322/21 (Article 21.3(c) Arbitration Report); *United States–Zeroing (Japan)* (2009), WTO Doc WT/DS322/RW (Article 21.5 Panel Report); *United States–Zeroing (EC)* (2009), WTO Doc WT/DS294/AB/RW (Article 21.5 Appellate Body Report); and *United States–Zeroing* (2011), WTO Doc WT/DS402/R (Panel Report). The initial dispute in which the Appellate Body ruled against the use of zeroing methodology in determinations of the existence of dumping and of dumping margins was *European Communities–Bed Linen* (2001), WTO Doc WT/DS141/AB/R (Appellate Body Report), in which the United States was not a party to the dispute. It should be noted that I was one of the members of the division of the Appellate Body in that appeal.

49 See *Anti-dumping Agreement*, *supra* note 37, art 2.4.

Procedurally, as voiced, these US concerns, throughout the past 12 years and continuing now, have been mostly about what the United States has increasingly seen as a gradual expansion by the Appellate Body of the scope of its jurisdiction beyond what is mandated in the WTO treaty. In the deliberations of the WTO Dispute Settlement Body (DSB), the United States has, throughout those 12 years, from time to time, charged the Appellate Body with exceeding the bounds of its treaty mandate by either adding to or subtracting from the obligations in the WTO-covered agreements in violation of the terms of the DSU.[50] In the view of the United States, these alleged procedural excesses of the Appellate Body are creating an unhealthy imbalance among the internal bodies within the WTO, an imbalance that could have serious substantive consequences.

The United States has been frustrated in addressing these substantive and procedural concerns by the rules-based reality of WTO dispute settlement — a reality the United States played a major role in shaping during the Uruguay Round of trade negotiations that led to the establishment of the WTO and WTO dispute settlement. When a panel report is appealed, the Appellate Body must hear the appeal.[51] It has no discretion not to do so. When a legal issue on appeal claims a violation of a WTO obligation, the Appellate Body must render a judgment clarifying the meaning of that obligation, and it must do so even when the trade negotiators who wrote it may have left its meaning less than crystal clear.[52] Again, the Appellate Body has no discretion not to do so.

The appellate judges can rule only on those legal issues that are appealed. They cannot wander from those legal issues into mere conjecture on others that have not been appealed. Their job is to answer the legal questions they have been asked — nothing more and nothing less. The frustration of the United States is found in the instructions the members of the WTO — including the United States — have given the Appellate Body on how it must answer legal questions when they are appealed. The members of the Appellate Body have been told by the WTO members in the dispute settlement rules that they must fulfill their mandate in strict accordance with the "customary rules of interpretation of public international law."[53] Although those customary rules exist independently of any treaty because of their status as customary international law, they find reflection in the Vienna Convention on the Law of Treaties[54] (the Vienna Convention). Article 31.1 of the Vienna Convention states the general rule of treaty interpretation: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[55] These interpretive rules assume not only that treaty obligations have a meaning; they also assume that they have one meaning — a single meaning that must be clarified by the Appellate Body when a legal issue is appealed that requires a judgment on the meaning of an obligation.

From this requirement springs the bulk of the American accusations of "overreaching" and "gap-filling" by the Appellate Body. But what the United States derides as overreaching and as gap-filling is almost always only the Appellate Body doing its job for the members of the WTO according to its specific instructions in the WTO treaty. For instance, when the legal issue is, say, whether a fair comparison has been made between the export price and the normal value of a product when making a dumping determination in a process called zeroing, as is required by article 2.4 of the Anti-Dumping Agreement, then the Appellate Body has no choice but to decide what a fair comparison is, and then to apply that decision to the measure in question, given the facts as found by the panel in that appeal. No one argues for the infallibility of the Appellate Body in making legal judgments — least of all those who serve on it. The Appellate Body may be right or wrong in the eyes of others in any given judgment — like any other tribunal in the world. But the act of judging and applying the meaning of, in this example, a fair comparison is not overreaching or gap-filling. It is simply the Appellate Body fulfilling its mandate by doing the job it is supposed to do.

In fulfilling their mandate, the seven members of the standing Appellate Body must use their own

50 *DSU, supra* note 11, arts 3.2, 19.2.

51 *Ibid*, art 17.1.

52 *Ibid*, art 17.12.

53 *Ibid*, art 3.2.

54 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) [*Vienna Convention*].

55 *Ibid*, art 31.1.

judgment. Under the dispute settlement rules, they "shall be unaffiliated with any government."[56] Furthermore, under those rules, Appellate Body members "shall not participate in the consideration of any disputes that would create direct or indirect conflict of interest."[57] The WTO Rules of Conduct reinforce these treaty requirements. As a "Governing Principle," the Rules of Conduct state, "Each person covered by these rules… shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest."[58] The Rules of Conduct go on to say, "Pursuant to the Governing Principle, each covered person, shall be independent and impartial."[59] Furthermore, "such person shall not incur any benefit that would in any way interfere with, or which would give rise to, justifiable doubts as to the proper performance of that person's dispute settlement duties."[60] These Rules of Conduct explicitly apply to the members of the Appellate Body.[61] Indeed, the Appellate Body adopted these Rules of Conduct in 1995 even before the rest of the WTO did.

Significantly, the DSU provides that the members of the WTO, acting together in their dispute settlement role as the DSB, "shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once."[62] This is the institutional source and pivot of the current crisis involving the Appellate Body. As with virtually all decisions by the WTO, a decision on a reappointment of a member of the Appellate Body is made by consensus.[63] Apparently, the treaty drafters during the Uruguay Round negotiations that created the Appellate Body overlooked that this beckoning possibility of reappointment puts those members of the Appellate Body who have not yet been reappointed in the highly uncomfortable position of sitting in judgment on appeals involving countries whose support they need to help make the consensus that is required for their reappointment.[64]

Oversight or not, the possibility of reappointment for a member of the Appellate Body is a design flaw in the architecture of the WTO dispute settlement system.[65] Clearly, there is no right to reappointment for any member of the Appellate Body. Clearly as well, a decision on whether to approve a reappointment is a decision reserved for the members of the WTO, and solely for the members of the WTO. No one member of the Appellate Body has any role in this decision, nor does the Appellate Body as a whole. Should the members of the WTO be unable to reach a consensus on reappointment of a sitting member of the Appellate Body, then that member will not be reappointed. Moreover, because of the necessity for a consensus, any one country among the 164 that are members of the WTO — whether it be the United States or any other WTO member — can block the reappointment of a member of the Appellate Body.[66] Yet evidently unforeseen by the designers of the DSU was that this provides every WTO member with the potential of employing the leverage of its right to veto a reappointment as a tool for trying to influence the actions of those members of the Appellate Body desirous of reappointment.

For the first decade and more of WTO dispute settlement, the reappointment of members of the Appellate Body occurred entirely without controversy. Although members had no right to reappointment, no one member who sought reappointment was denied it. Despite the inevitable disappointments of some WTO members with Appellate Body legal judgments that went against them, not one member of the WTO interjected such disappointments into the reappointment process. This show of mutual self-restraint for the sake of the entire cooperative enterprise of the WTO contributed much to the establishment of the legitimacy and the credibility of the WTO dispute settlement system worldwide. But human nature is human nature. One who has a post will tend to want to keep it. One who

56 *DSU*, *supra* note 11, art 17.3.

57 *Ibid*.

58 WTO, *Rules of conduct for the understanding on rules and procedures governing the settlement of disputes* (1995), WTO Doc WT/DSB/RC/1, art II.1 [*Rules of Conduct*].

59 *Ibid*, art III.2.

60 *Ibid*.

61 *Ibid*, art IV.1.

62 *DSU*, *supra* note 11, art 17.2.

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

64 *Ibid*, art IX.1. The late Julio Lacarte-Muro, who chaired the dispute settlement negotiations during the Uruguay Round, was the principal author of the DSU and was also a founding member and the first chair of the Appellate Body, lamented to me on numerous occasions that this was indeed an oversight.

65 I owe the phrase "design flaw" to my friend and CIGI colleague, Hugo Perezcano Díaz.

66 *WTO Agreement*, *supra* note 63, n 1.

has leverage will be tempted to use it. Under the cumulative domestic pressures of losing politically sensitive WTO trade disputes, the United States has yielded to this temptation and has, for the past 12 years, sought to exploit the all too human tension felt by sitting WTO judges between their devotion to responsibility and their desire for reappointment in the United States' accelerating stealth war against the WTO.

Since long before the Trump ascendancy, the United States has been trying to intimidate both aspiring judges who have been nominated for vacant seats on the Appellate Body and sitting judges on the Appellate Body who have been candidates for reappointment by attempting to pressure them into ruling the way the United States wants them to rule as the price for US consent to their appointment or reappointment. The first inklings of the US campaign of intimidation were heard during the second Bush administration at a time when the United States had become increasingly vocal in its complaints about adverse Appellate Body rulings in various trade remedies disputes. The first public confirmation of US intimidation occurred in 2011 during the Obama administration, when the USTR informed a sitting judge from the United States that, because of continued adverse Appellate Body rulings in trade remedies disputes, the United States would not support her for reappointment. She protested publicly, but she was not reappointed.

Emboldened by this experiment in judicial intimidation, during Obama's second term (from 2013 through 2016) the USTR broadened the sweep of its pressure tactics in Geneva to include sitting Appellate Body members from countries other than the United States, employing such tactics as requests for one-on-one *ex parte* meetings to discuss their candidacies for reappointment. The United States and any Appellate Body members who chose to participate in these *ex parte* meetings were, of course, both to blame for the harm these meetings threatened to the WTO dispute settlement system. Such *ex parte* meetings between Appellate Body members and individual WTO members pose possible legal conflicts in violation of the WTO Rules of Conduct and should be specifically prohibited by an amendment to the Appellate Body working procedures. Over time, other WTO members became aware of these dubious US tactics and were increasingly disturbed by them. However, to avoid embarrassing the United States and further risking the integrity of the world trading system, they chose not to say anything publicly about these US tactics, while working quietly and informally to fashion a reappointment process consistent with the rule of law and acceptable to all.[67]

Then, in 2016, the United States stoked the intensifying conflict by announcing that it would not support the reappointment of Appellate Body member Seung Wha Chang of South Korea. The United States maintained that Appellate Body divisions on which he had served had exceeded the bounds of their jurisdiction by overreaching in their judgments in some disputes during his tenure. An uproar ensued in the DSB, with many other WTO members protesting the US action. Nevertheless, while Obama was still president, the United States succeeded in preventing Chang's reappointment by blocking the required consensus. Other WTO members ultimately acquiesced because of the legal straitjacket of the consensus rule. This only encouraged the United States to persist in its bullying inside the councils of the WTO.

As the jurisprudence of the schoolyard teaches us, if not stopped, bullying only begets more bullying. The inauguration in January 2017 of a president unabashedly inclined toward bullying only intensified the US campaign of intimidation of WTO judges and, more broadly, of other members of the WTO. Eventually, the US pressure tactics were broadened to extend to stonewalling the appointment of any new Appellate Body members to fill the vacancies occurring on the seven-member tribunal. In the normal course of regular turnover, as some of the incumbent judges completed their allotted mandates, more vacancies opened up on the Appellate Body. Seeing a chance in the second half of 2017 to link its long-standing grievances to the process of judicial reappointment, the United States decided to hold the Appellate Body hostage. These vacancies have not been filled.

Moreover, the United States opened a new front in its stealth war by contesting for the first time the long-standing practice — set out for more than 20

67 I rely here, in part, on my personal knowledge of these events. Among numerous accounts, most of them in the trade press, see e.g. "Pressure on U.S. Mounts as it maintains link between Appellate Body seats, WTO reform", *Inside US Trade* (15 September 2017); Alex Lawson, "WTO Dispute Roundup: Appellate Body Impasse Persists" (29 September 2017) *Law 360* (blog); "Dispute Unsettlement", *The Economist* (23 September 2017); Alex Lawson, "WTO Members Clash Over Appellate Body Reappointment" (23 May 2016) *Law 360* (blog) [Lawson, "WTO Members Clash"].

years in the Appellate Body Working Procedures following due consultations with the DSB — of having retiring judges complete their work as members of divisions on pending appeals when their mandate ends before the Appellate Body report is submitted.[68] Until the United States raised its objection in 2017, this practice had enjoyed the universal support of WTO members since the inception of the WTO as the most practical way of proceeding to the goal identified in the WTO treaty of a "positive solution" of pending trade disputes.[69] This US objection is not without merit. At the outset, the seven founding members of the Appellate Body sought consultations with the DSB on this issue to make certain that the practical extension of the service of a departed member to complete a pending appeal would not raise issues of legal jurisdiction.[70] Urged to do so by the DSB so as to facilitate the resolution of disputes, the Appellate Body adopted the working procedure permitting such temporary holdovers of judicial authority. But much has changed since then. Holdovers that, for many years, lasted only a few weeks are now, amid a proliferation of more complex and more prolonged disputes, lasting for months on end. This is a legitimate issue for due attention by the DSB.

This said, the way in which the United States has chosen to address this issue in the DSB is far from being legitimate. In late September 2017, when an appellate report was circulated that was signed by two judges whose terms had already expired and was therefore not signed by three sitting judges, the United States went so far as to suggest that this was grounds for reviving the old GATT practice of permitting any one member to veto a dispute settlement ruling.[71] Although this retro US gambit likely gladdened the heart of Lighthizer, there is no legal basis for this view in the DSU or elsewhere in the WTO treaty. It could conceivably be argued with some merit that an appellate report signed by fewer than three sitting members of the Appellate Body does not fulfill the requirement in article 17.1 of the DSU that each appeal be decided by "three persons."[72] Presumably, and logically, the three persons to whom this requirement applies must all be members of the Appellate Body. The DSU does not, however, permit a singular veto of an Appellate Body report by the United States or any other one member of the WTO. Under the so-called reverse consensus rule, "an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members."[73]

This may or may not have been an idle threat. The United States has, in the past, been known from time to time to utter such sentiments in part to encourage other WTO members to pay more heed to US frustrations with the dispute settlement system. Ultimately, the United States agreed to join in the consensus to adopt that appellate report. The mere mention, though, of reviving the rejected GATT practice of dispute settlement by allowing just one WTO member among all the 164 WTO members to block the adoption of a WTO ruling "set off alarm bells in Geneva from trade officials who are already worried that the U.S. is trying to undermine the WTO's dispute settlement system."[74] Many WTO members saw flashbacks to the frustrating days before the creation of the binding WTO dispute settlement system, when a country that lost before a GATT panel could single-handedly block the implementation of a ruling against it. This happened in a number of major GATT disputes. Ironically, the American consternation with this less-than-binding GATT practice led the United States to lead the charge for a binding dispute settlement system in the Uruguay Round.

All the while, throughout Trump's first year, the United States continued to use the WTO dispute settlement system and take part in the sessions of the DSB. But the new administration of the United States seemed determined at the same time to paralyze the rules-based system. As their condition for getting on with the necessary task of supporting the continued resolution of international trade disputes by appointing new Appellate Body members, Lighthizer and other politically appointed and like-minded minions of Trump at

68 Shawn Donnan, "WTO chief warns of risks to world peace", *Financial Times* (1 October 2017); see WTO, *Working Procedures for Appellate Review* (2010), WTO Doc WT/AB/WP/6, Rule 15 [*Working Procedures*].

69 *DSU*, *supra* note 11, art 3.7.

70 This is based on my personal recollections as a participant in those discussions with the DSB at the time.

71 Bryce Baschuk, "U.S. Claims Right to Veto any Errant WTO Dispute Rulings", *International Trade Daily* (29 September 2017).

72 *DSU*, *supra* note 11, art 17.1.

73 *Ibid*, art 17.14.

74 Baschuk, *supra* note 71.

the USTR demanded of other WTO members what they described as "reform" of the WTO dispute settlement process. But they refrained from saying what they meant by reform. Hence the increasingly widespread question asked by more and more WTO members: "What does the United States want?"

At year-end in 2017, three of the seven Appellate Body seats were open, leaving only four members, and there were fears that, if the stalemate on appointment continued, the Appellate Body would be reduced in 2018 to three members, just enough to comprise the division of three required by the DSU to hear an appeal.[75] If the appointments impasse continues beyond December 10, 2019, when two more members are due to complete their second terms, the Appellate Body will be reduced at that time to just one member and will be rendered incapable of forming a division. Meanwhile, as 2018 began, facing an avalanche of appeals and approaching appeals, including some with myriad legal complexities, the Appellate Body and WTO panels alike laboured with inadequate financial and personnel resources, leading to a lengthening of the times taken to render judgments and diminishing the timely responsiveness of the system in resolving trade disputes. As the United States continued its intimidation and intransigence, there were growing fears that the work of the Appellate Body would be undermined and the entire WTO dispute settlement system would grind to a halt. All in all, it appeared to many that the United States, under the sway of Trump, was bent on using American might to unmake the right of the rule of law in world trade.

Making Right into Might through the Rule of Law

In its ever-increasing pressure tactics in the WTO, the United States, as led by Trump and enabled by Lighthizer, seems to think that it has enough power to get its way, and that because it has this power, it is entitled to use it, whatever that may do to the supposedly equal power of every other member of the WTO. This goes against all the United States has long asserted and defended internationally.

The rule of power is the very opposite of the rule of law. With the rule of power, power alone is all that matters. The law is uncertain and arbitrary. The law means only what those with power say that it means for any one person on any one issue at any one time. With the rule of law, power is subdued. The law is certain and not arbitrary. The law is written and the rules are known in advance. The law is written to apply to all equally, and all — in practice — in reality — are equal under the law and before the law. No one — no one — is beneath the concern of the law, and no one — no one — is above the law. Anything less than this cannot rightly be called the rule of law.

Through all the long centuries of experience since the sad events on Melos, four basic elements have been identified as a "core definition of the rule of law." First, the power of the state must not be exercised arbitrarily. There must be the rule of law and not the "rule of men." Second, the law must be applied to sovereign and citizens alike, with an independent institution such as a judiciary "to apply the law to specific cases." Third, "the law must apply to all persons equally, offering equal protection without prejudice or discrimination. Furthermore, for there to be the rule of law, the law must be of general application and consistent implementation; it must be capable of being obeyed."[76] Words in a statute book or in a judicial ruling are not enough. The words must have reality. What matters is not only what the law *says* but also, even more, what the law *does*. The rule of law is more than simply "law in words;" it is "law in action."[77] These four considerations, to my mind, apply as much to law between nations as to law within nations.

A tendency in some places is to speak of "rule *by* law" instead of the "rule *of* law." But the two are not the same. Rule by law is a means for imposing the power of the state. Not surprisingly, it is favoured by authoritarian rulers in authoritarian states. The rule of law is a means of ensuring individual freedom, including freedom from the arbitrary say of the state. Compliance with the caprice of some potentate as expressed in law is not the rule of law. Where the law is subject to the whim

75 *DSU*, *supra* note 11, art 17.1.

76 Simon Chesterman, "An International Rule of Law?" (2008) 56 Am J Comp L 331 at 342.

77 This description in this paragraph paraphrases the classic definition in Roscoe Pound, "Law in Books and Law in Action" (1910) 44 Am L Rev 12; see also AW Bradley & KD Ewing, *Constitutional and Administrative Law*, 12th ed (New York: Longman, 1997) at 105.

of whoever happens to be wielding the power of the state at the time, there may, as a useful expedient of autocratic rule, be rule by law, but there is no rule of law. This distinction between rule by law and the rule of law applies equally to every country — to Russia, China, Turkey, Poland, Hungary, Venezuela and the Philippines — and also to the United States of America.

The truest test of whether there *is* the rule of law is whether there is an independent judiciary. As Anne-Marie Slaughter has explained, "The definition of an 'independent judiciary' is a judiciary that is not the handmaiden of State power, that answers to law rather than to the individuals who make it."[78] Those who advocate rule by law favour subordinating the judiciary to those who hold power in the executive branch of governance. In contrast, those who favour the rule of law understand that it can only exist if there is a strict separation of the judicial powers from the executive and the legislative powers of governance. Judges can be impartial in applying the rule of law only if they are independent, and judges can be independent only if they are free from all outside control and influence — including that of those who appointed them.

During the Enlightenment of the eighteenth century, Baron de Montesquieu of France was one of the first to see the need for an independent judiciary as being at the very core of the rule of law. "There is no liberty," he said, "if the power of judging be not separated from the legislative and executive powers."[79] In 1788, Alexander Hamilton — the American founding father whose views on trade are much admired by Lighthizer — quoted this assertion by Montesquieu approvingly in one of his contributions published in *The Federalist Papers*, the essays written in support of the ratification of the United States Constitution.[80] Today, in the institutional context of the WTO, the separation of powers is that between the WTO panellists and Appellate Body members fulfilling their mandates to the members of the WTO sitting as the DSB (the judicial branch) and all the rest of the endeavours of the members of the WTO sitting as the WTO General Council and overseeing the WTO Secretariat (the executive and legislative branches).

There is no lack of those in the world today who continue to believe, like the Athenian generals on Melos, that the strong, because they have power, should be able to use it as they choose — including by wielding power arbitrarily over the weak. All of human history through all of the centuries since the Peloponnesian War can be seen as a commentary on the events on Melos — as a struggle to curb and tame the worst in our nature by replacing the arbitrary exercise of power with the rule of law.[81] Might does not make right where there is the rule of law. In our pursuit of something worthy of being called human civilization, we can choose the arbitrary rule of might in all its manifestations, or we can choose the lawful rule of right through the rule of law. On this central issue, there can be no in between, and there can be no compromise. Anything less than the rule of law is only the rule of power as described long ago by Thucydides in the Melian Dialogue.

Not long ago, the United States was among the foremost in the world in understanding and in communicating all of this. The United States has long preached the need for the rule of law and for the international rule of law to the world's unpersuaded. But, when Lighthizer and other appointees of the current US president invoke the rule of law now, their words ring hollow. Their words are betrayed by many of their actions. Under the sway of its wayward president, the United States is not only failing to speak up against authoritarian actions abroad,[82] it has succumbed to the lure of arbitrary executive actions on the outer edges of lawfulness at home.[83] The WTO is only one of a growing number of arenas — domestic and international alike — in which, under the mercurial auspices of Donald Trump, the executive branch of the federal government of the United States seems in sad retreat from the rule of law.

78 Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 Eur J Intl L 503 at 511, n 18.

79 Baron de Montesquieu, "The Spirit of the Laws" (1748), as quoted in Alexander Hamilton, *The Federalist Papers, Number 78* (1788).

80 *Ibid*.

81 I first explored this point in James Bacchus, "The Rule of Law: Reflections on Thucydides and the World Trade Organization" Winter/Spring 2000 Vanderbilt Magazine 16. I have made it many times since on numerous platforms and in numerous other appearances worldwide. For a broader discussion of this point, see James Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (Cambridge, UK: Cambridge University Press, 2018) ch 4.

82 Declan Walsh, "As Strongmen Steamroll Their Opponents, U.S. Is Silent", *The New York Times* (1 February 2018).

83 See e.g. Bob Dreyfus, "Trump's All-Out Attack on the Rule of Law", *The Nation* (1 February 2018); Yascha Mounk, "Donald Trump Just Asked Congress to End the Rule of Law", *Slate* (30 January 2018); Jeffrey Toobin, "Donald Trump and the Rule of Law", *The New Yorker* (6 January 2018).

Defending Right against Might in the WTO

Missing in the US assault on the WTO and especially on the WTO dispute settlement system is the strong support for the rule of law that results from taking the longer and more enlightened view of the self-interest of the United States. The shorter, myopic view is that the American self-interest lies in reserving the right to throw America's weight around unilaterally in world trade. The longer, better view is that the American self-interest lies in relinquishing the right to act unilaterally outside the bounds of law by supporting a binding dispute settlement system with the authority and the ability to uphold and enforce trade rules on which all the countries comprising the world trading system have agreed. The shorter view favours the rule of power. The longer view favours the rule of law. In taking the shorter view, the United States is turning back toward Melos.

The animus of President Trump and his administration against the WTO and against WTO jurists seems to be an end product of their visceral belief that the United States should never allow itself to be second-guessed by foreigners. Instead, they think the United States should cling to the solitary preserve of their perception of American sovereignty. Trump and his followers appear to believe that any national decision to defer to the judgment of an international tribunal or some other international institution is a subversion of national sovereignty. This helps explain why the president mentioned "sovereign" or "sovereignty" 16 times in his first speech to the United Nations.[84] In explaining Trump's new trade policy, the USTR put this concern this way in March 2017, soon after the president took office: "Ever since the United States won its independence, it has been a basic principle of our country that American citizens are subject only to laws and regulations made by the U.S. government — not rulings made by foreign governments or international bodies. This principle remains true today. Accordingly, the Trump administration will aggressively defend American sovereignty over matters of trade policy."[85]

John Bolton, President Trump's latest national security adviser and a former US ambassador to the United Nations, who seems to oppose the very idea of multilateral cooperation through the United Nations, has had high praise for Trump's condemnation of the WTO and, in particular, of WTO dispute settlement. It is not clear that Ambassador Bolton has ever read the GATT. Yet he assumes the trappings of a legal authority on trade in denouncing the "faulty decisions" of WTO jurists in the WTO's "faltering" dispute settlement system. He tells us, "Although technical, even arcane, the DSU is dear to the hearts of global governance advocates. The Trump administration is right to criticize its performance... The unspoken objective is to constrain the U.S., and to transfer authority from national governments to international bodies...The common theme is diminished American sovereignty, submitting the United States to authorities that ignore, outvote or frustrate its priorities....U.S. sovereignty is at stake."[86] In recruiting Bolton as his national security adviser, Trump is simply enlisting an echo. His own stress on the sanctity of national sovereignty has been equally insistent and equally strident. In such a singular stress on such a narrow view of the notion of sovereignty, Trump rejects the very foundation of the liberal international order, which is based on a sharing of national sovereignty through international cooperation.

Those now in the ascendancy in the United States cite their contorted view of national sovereignty as an excuse for employing America's considerable economic leverage to try to bully other countries into doing as the United States demands on trade. They impose illegal unilateral trade actions. They issue ultimatums. They threaten more unilateral actions. They tell other countries, in so many words, to take it or leave it. They see the rules of trade as tools they can choose to acknowledge or not, ignore or not, in the singular exercise of an American commercial *realpolitik*. Internationally, they answer to no one but themselves — not to their allies or their friends, not to the previous promises of their predecessors, not to the

84 Philip Zelikow, "The Logic Hole at the Center of Trump's U.N. Speech", *Foreign Policy* (20 September 2017).

85 "New USTR agenda dismisses WTO dispute settlement authority, says U.S. to stress 'sovereignty'", *Inside US Trade* (1 March 2017).

86 John Bolton, "Trump, Trade and American Sovereignty", *The Wall Street Journal* (7 March 2017).

commitments of their predecessors as participants in international institutions, and not to their trading partners and to the rules and obligations of the global trading system that the United States long helped lead the world in creating. They are in the thrall of might makes right.

But bullying will get them only so far. Although still considerable, the economic leverage of the United States is not, relatively speaking, what it used to be. Other countries have growing economic leverage in a world in which the US share of global GDP has declined significantly since the first decades after the Second World War. The United States accounted then for about half of global GDP. Now it accounts for about one-fifth. Other developed countries have long since recoverd from that global conflict and have continued to grow. Developing countries have emerged from poverty and grown as well. All the trading countries of the world have become not only interconnected through a global division of labour and the fragmented production of global supply chains, they have also become interdependent, economically and in many other ways. The initial response from some countries to the economic bullying of Donald Trump and his cohorts may be a reluctant acquiescence. But, in time, the limits of this acquiescence will be reached, and other countries will in turn assert their own significant economic leverage against the United States. If there is not a return to multilateralism through the WTO, the results of such a mutual descent into unilateralism will be fateful for the rules-based world trading system.

One problem with the Trump administration's constricted view of sovereignty in the twenty-first century is that it will not work. Not for the United States. Not for any other country. And certainly not in world trade. This is a century in which economic and other concerns are increasingly global in nature and in which many of those concerns can therefore only be addressed through cooperative international action. The late John Jackson, the greatest of all trade law scholars, pointed out soon after the dawn of this century that "[i]n the area of trade policy…and…in the real world of today's 'globalization,' there are innumerable instances of how actions by one state (particularly an economically powerful nation) can constrain and influence the internal affairs of other nations."[87] In such a world, a stubborn, insistent invocation of an insular sovereignty solves no problems, globally or — often — domestically. Cooperative international action is necessary, and such action is usually much more likely to succeed if the United States is actively engaged and is helping point the way toward a solution.

The WTO is one example of cooperative international action to solve a global problem — that of easing and increasing the flow of trade worldwide so that all in the world can have the opportunity to share in the gains from trade. Together, the 164 members of the WTO have rightly resolved that this problem can best be solved if they agree on rules for trade as part of a global framework enabling trade. And they have rightly realized that the rules on which they have agreed in the WTO treaty will not truly be effective as international laws unless they are upheld and enforced in accordance with the rule of law in a binding dispute settlement system. This is why we have the WTO, and this is why we have WTO jurists, including those on the WTO Appellate Body.

The WTO is a realization of what Jackson called "sovereignty-modern."[88] It is not a subversion of national sovereignty. It is an expression of their national sovereignty by each of the members of the WTO — including the United States of America. The WTO is a sharing of sovereignty resulting from 164 sovereign decisions to take the longer view of national self-interest. With the death of distance, the advance of transport, the ubiquity of instant communication, the emergence of digital trade and the arrival of global value chains that cross the globe back and forth many times over, it is simply not the case that, in the absence of the WTO, individual nation-states would, in the consoling sanctuaries of their sovereign territories, be able to achieve their national economic goals by acting alone. In the twenty-first century, almost every national issue is also international in its causes and in its effects. Joshua Meltzer has it right in saying that "growing interdependence and globalization has reduced the ability of states to achieve optimal policy outcomes acting alone."[89]

87 John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge, UK: Cambridge University Press, 2006) at 69.

88 *Ibid* at 61.

89 Joshua Meltzer, "State Sovereignty and the Legitimacy of the WTO" (2014) 26:4 U Pa J Intl L 693 at 702.

To maximize outcomes for the people of every trading country — including the United States — global rules for trade within an enabling global framework for trade are essential. The only alternative to acting alone is to design and to support the WTO — or something very much like it. In the absence of the WTO, we would soon have to reinvent it. Ironically, in the light of the recent US rhetoric, one reason why we would be engaged in this reinvention would be to preserve our national sovereignty and to make the most of it. Every nation-state in the twenty-first century faces the challenge of proving anew that the Westphalian system of nation-states established in the seventeenth century remains the best way to organize and to govern the world. In this globalized world in this twenty-first century, where so much of what happens that affects each of us seems to be out of our reach and beyond our control, it falls to nation-states to reaffirm their relevance by demonstrating their continued effectiveness. This aim can only be achieved if nation-states work cooperatively and in concert toward shared aspirations. Thus, the continued success of the WTO does not undermine national sovereignty; it reaffirms it. The WTO makes sovereign states stronger, not weaker. It proves that national independence is still possible in an interdependent world.[90]

A binding dispute settlement system in which the rules are upheld and enforced is imperative to providing the "security and predictability" WTO members seek through the enabling WTO framework.[91] WTO rules are the guiding rules for the daily conduct of WTO trade. Agreement on trade rules creates an atmosphere of certainty that helps advance the flow of trade. Awareness that trade rules can be enforced and that there will be an economic price to pay for not following them encourages trading countries to comply with the rules. As a result, almost all WTO members comply with almost all WTO trade rules almost all the time.[92] By far, this has been the biggest success to date of the WTO. Although they draw most of the public attention, international trade disputes are rare exceptions to the day-to-day conduct of world trade within the agreed rules. The media is endlessly fascinated by the prospect of trade wars; the WTO-based world trading system prevents trade wars every day — and has been doing so for 70 years. But, without a binding dispute settlement system in which all sovereign states are equal in power and equally subject to the rule of law, and without a continuing willingness by the United States and all other members of the WTO to keep their treaty commitments to resolve all their trade disputes in that system, the current security and predictability in world trade will vanish, with grave economic consequences for all the members of the WTO, not least the United States. We would be left with only might makes right, in a wary world of reduced trade gains and diminished economic possibilities.

But what of President Trump's trumpeting that the WTO and the WTO dispute settlement system are rigged against the United States? Here the president is indulging, as he often does, in the fabrication of alternative facts. He claims that the WTO is "set up for taking advantage of the United States," and that Americans "have not been treated fairly by the World Trade Organization."[93] This utterly unfounded assertion must surely amuse many other members of the WTO, who are long accustomed to the United States playing an outsized role in the doings of the WTO. The United States did at least as much as any other country to set up the WTO, and, by any credible and rational economic measure, the United States must be numbered among the major beneficiaries of the WTO. As what President Trump would quite rightly call a "huge" trading nation, the United States benefits "hugely" from the fact that world trade flows more smoothly, more quickly, in greater volumes and in greater value because it is conducted within the enabling WTO rules framework.

Does the United States, as Trump alleges, lose almost all the lawsuits? Far from it. With an army of accomplished trade attorneys in the USTR, and with the frequent outside assistance of equally accomplished private attorneys, the United States is far better equipped than the vast majority of other WTO members to win WTO disputes. And it does win. Several similar studies have reached slightly different conclusions due to differing

90 I have made this same point in "A Few Thoughts on Legitimacy, Democracy, and the WTO" (2004) 7:3 J Intl Econ L 667 at 670.

91 *DSU*, *supra* note 11, art 3.2.

92 Here, of course, I echo the famous dictum of Louis Henkin half a century ago that "[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Frederick A Praeger, 1968) at 42.

93 Parker & Nakamura, *supra* note 27.

methodologies. They come, however, to the same conclusion: in WTO disputes, complainants mostly win, and respondents mostly lose. In this, the United States, the most frequent litigant in the WTO, has done somewhat better in both roles than the average. In data compiled by Bloomberg, the United States, as complainant, has won 86 percent of the time, slightly more than the WTO average, and the United States, as respondent, has lost 75 percent of the time, less than the WTO average of 84 percent. By comparison, since becoming a member of the WTO in 2001, China has won six of the nine cases it has brought and has lost all but one case when a case has been brought against it.[94] Yet China remains a strong supporter of WTO dispute settlement (no doubt in part because China knows that, without the shelter of WTO rules against non-discrimination, Chinese trade would be singled out for discrimination all over the world).

The fact is, WTO members do not file a complaint in WTO dispute settlement unless they think they have a very good chance of winning. The political fallout back home from initiating a dispute and then losing it can be high. Often, as well, WTO members resort to WTO litigation only after years of trying unsuccessfully to resolve a dispute without litigation. Why do negotiations fail? Often, it is because the political cost of changing the offending measure is considerable. On occasion, a WTO member has even been known to suggest that another WTO member file a complaint against it so that it can lose in the WTO and, in losing, secure the political leverage back home to change what the member knows is an illegal measure. As Louise Johannesson and Petros Mavroidis have said, "WTO Members pick winners, and do not litigate *ad nauseum*."[95]

It should come as no surprise, then, that complainants usually prevail in WTO cases. But what really is a win? Is there a win only if the complainant prevails on *all* the legal claims it makes? What if the complainant prevails on more legal claims than not? What if it prevails on only one legal claim, but that verdict results in the alteration or withdrawal of the contested measure? This raises yet another question: can there be a win only if the contested measure is altered or withdrawn? And what about the nature of the legal claims? Are they all equal? Or are some claims more significant than others? Is winning a legal claim that there has been a denial of national treatment more significant than winning a claim that the respondent has not filed a required notification? Most members of the WTO would say "Yes." Like many others, the president of the United States likes to win. But when does he know he has won? It is not at all unusual in the WTO for both sides to claim victory.

What is more, the fact is that every WTO case is actually two cases. It is the discrete dispute over the unique facts of a particular instance of trade in a specific good or service, and it is the dispute over the legal principles that are the focus for resolving that discrete dispute. Thus, a win can be a win in the particular dispute before a WTO panel and the WTO Appellate Body, or it can be a win in the interpretation and the clarification of the legal principles brought to bear in that single dispute resolution. Often, in a given dispute, it will be both. But not always. A win in the dispute at hand involving trade in some specific widget is, of course, pleasing and beneficial. It is vital to the success of the trading system for WTO members to know and see that WTO obligations will be upheld. But a win on a legal principle may prove over time to be far more valuable to the prevailing WTO member and to WTO members as a whole.

Sometimes, as well, a complainant will be better off over the long term if it *loses* on a legal principle at issue in a dispute. In a natural desire to prevail in the immediate legal battle over the widget at hand, there will sometimes be a temptation to take a legal position on the meaning of a WTO obligation that, while it may be helpful in winning in that widget dispute, may not, in the eyes of an objective outside observer, serve the overall interest of the complaining WTO member in the long term. To be sure, WTO members are free to determine for themselves what is or is not in their national interest. But, take, for example, the United States. If the United States were to prevail in defending a sanitary or phytosanitary measure that was not based on scientific principles and that was maintained without sufficient scientific evidence, then what would happen next? Other WTO members would line up to apply trade restrictions

94 Andrew Mayeda, "Trump's No Fan of WTO, but U.S. Lawyers Often Win There", *Bloomberg* (29 March 2017).

95 Louise Johannesson & Petros C Mavroidis, "The WTO Dispute Settlement System 1995-2016: A Data Set and Its Descriptive Statistics" (2016) European University Institute Working Papers RSCAS 2016/72 at 24.

on all kinds of US agricultural exports for equally phony scientific reasons.[96] Is that truly a win?

In toting up the wins and the losses of the United States in WTO dispute settlement, there is also, unavoidably, the sore subject of US trade remedies. As Rufus Yerxa, president of the National Foreign Trade Council and a former deputy director-general of the WTO, has explained about US losses in WTO dispute settlement, "Most of the…losses were a result of the United States refusing to change its anti-dumping methodology even after it lost cases, thereby incurring repeated rulings against them for continuing the same practice. If you take those cases out, the United States has a better record as a defendant than China or most others."[97] Behind the scenes of the American stealth war against the WTO, the issue of US discretion in the employment of trade remedies is — in my considered judgment based on several decades of legal and political immersion in these matters in the United States and worldwide as negotiator, legislator, lawyer and judge — the true core of the grievance of much of the current leadership of the United States against the WTO and against WTO dispute settlement.

In brief, the Trump administration wants to retain the freedom to do whatever it wishes to do in applying trade remedies without the annoying constraints of WTO rules. The president supports a broad sway for applying anti-dumping and other trade remedies for one compelling reason: the businesses and workers that desire them are centred mostly in the Midwest political swing states that gave him his narrow presidential election, and he will need the support of those same voters in those same states to get re-elected. Lighthizer and other highly experienced trade attorneys he has assembled at the USTR take the same position for the same political reason. Also, their previous legal experience has been largely in the specialized trade silo of representing US steel companies and other US industries that want to use trade remedies more freely as a tool against their foreign competition.

Their problem is this: WTO rules on which the United States agreed long ago govern the application of all trade remedies, and a refusal to comply with these largely procedural rules can lead to losses in WTO dispute settlement and to the possibility of economic sanctions in the form of the loss of previously granted trade concessions that can in some cases add up to billions of dollars annually. "WTO jurists have engaged in an all-out assault on trade remedy measures," Lighthizer claimed back in 2007, when he was leading the charge for steel protectionism while still in private practice.[98] Since then, US trade remedies have suffered even more of a beating in the WTO. This is not due to any actions initiated by the WTO or by WTO jurists. The WTO cannot bring WTO cases. The WTO is only the members of the WTO acting together as something they have chosen to call the WTO in a pooling of their national sovereignty. Only members of the WTO can bring cases. When they do, the WTO jurists are required to rule on all the legal issues on which they must rule "to secure a positive solution to a dispute."[99] And the fact is that the United States often acts inconsistently with WTO rules in applying trade remedies. Thus, other WTO members have brought a series of cases against the United States, and, according to the calculation of Dan Ikenson of the Cato Institute, since 1995, and as of 2017, WTO jurists have found it necessary on 38 occasions to find aspects of US trade remedy measures inconsistent with WTO obligations.[100]

The disregard for the WTO treaty obligations of the United States that is sometimes shown by US agencies when applying trade remedies guarantees that, when those actions are challenged in the WTO, the United States will lose. What is it that keeps the United States from simply complying with the WTO rules? In part, it is the tacit assumption by many in the US government that the United States is somehow not bound by the strictures of the rules that apply to everyone else. Other countries must, of course, comply. The United States need not. Dan Ikenson, an astute American trade observer, rightly sees this US sentiment as Orwellian, harking back to the barnyard animals in *Animal Farm*: "Agreeing that 'all animals are equal,' then adding the famous caveat, 'but some are more equal than others' is what is

96 WTO, *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, 1867 UNTS 493, art 2.2 (entered into force 1 January 1995), online: <www.wto.org/english/tratop_e/sps_e/spsagr_e.htm>.

97 Robert Farley, "Trump Wrong About WTO Record" (27 October 2017) *FactCheck* (blog).

98 Council on Foreign Relations, "Is the WTO Dispute Settlement System Fair?" (26 February 2007), online: <www.cfr.org/article/wto-dispute-settlement-system-fair>.

99 *DSU*, *supra* note 11, art 3.7.

100 Dan Ikenson, "US Trade Laws and the Sovereignty Canard", *Forbes* (9 March 2017).

meant by 'defending our national sovereignty.'"[101] Seemingly, in the current view of the United States, all members of the WTO are equal, except for the United States, which is more equal than others. This is not the rule of law. This is the rule of power.

What, then, of Trump's charge that the United States is "losing" in the WTO "because we have fewer judges than other countries"? This charge is an expression of either demagoguery or ignorance. Either the president knows the facts and is simply disregarding them for inflammatory political purposes or he is ignorant of the rules of the WTO dispute settlement system and how they work. Either way, the rule of law in world trade is jeopardized by the recklessness of such a charge, and, once again, the view of the current US president and his administration is revealed as merely a flexing of might as the would-be maker of right in world trade. In making this charge, President Trump seems to assume that all WTO jurists will always rule in favour of their own countries in WTO disputes. There is no evidence whatsoever in more than two decades of WTO dispute settlement to support this assumption — and plenty to refute it. There are numerous instances where members of the Appellate Body have found it necessary to rule against their own countries because their own countries had not fulfilled their WTO treaty obligations in a particular dispute.[102]

The fact is that the number of judges of any one nationality is of absolutely no significance in WTO dispute settlement. WTO jurists — wherever they may happen to be from — serve the world trading system as a whole and not their own countries. The "independence" of jurists is mandatory under the dispute settlement rules.[103] The seven members of the Appellate Body, as already noted, "shall be unaffiliated with any government."[104] The WTO Rules of Conduct reinforce these treaty requirements by insisting on both the independence and the impartiality of all WTO jurists.[105] Indeed, at the WTO panel level, nationality is in fact a bar to being a panellist, which means that — unless the parties to a dispute agree otherwise (which rarely happens) — no one from any of the disputing parties or the third parties to a dispute will be eligible to serve on the panel.[106] Nationality is not a bar to judging a dispute on the WTO Appellate Body. If it were, Appellate Body members from the United States, the European Union, China and Japan — which, as the largest trading countries, are parties or third parties in most WTO disputes — would rarely be permitted to judge an appeal in a dispute. Furthermore, the fact is that every new member of the Appellate Body leaves the cloak of nationality behind when crossing the threshold of the Appellate Body. Any one of the seven members of the Appellate Body who ever so much as uttered even the slightest hint of national bias would lose all credibility with the rest of the Appellate Body forever.

Apparently, President Trump wants WTO judges who are partial, not impartial, and who are, especially if they are Americans, dependable parrots of the American point of view at any given time, and not independent in their judgments. This attitude is not original with Trump. It originated in the two previous American administrations as the United States was put more and more on the defensive during the depths of the Great Recession about its errant application of a series of largely politically motivated trade remedies in WTO dispute settlement. The blame for this departure from the traditional American view that respect for the independence of the judiciary is central and indispensable to the rule of law must be put in part on Presidents Bush and Obama.

This acknowledged, it is Trump who has intensified the US attack on the independence and impartiality of WTO jurists to the point where it threatens the future of the world trading system. First, under Bush and Obama, the United States sought, through its tactics of intimidation, to impose its will *on American judges* — based evidently on the premise that, because they were American, they should be shills in the judicial deliberations of the Appellate Body for every argument made by the United States in every dispute. Emboldened by the lack of pushback from other WTO members against these tactics, next, under Obama, the United States sought to impose its will *on Appellate Body members from other countries* by blocking or threatening to block their reappointments. Now, under Trump, the

101 *Ibid*.

102 While a member of the WTO Appellate Body, I found it necessary to do so on a number of occasions myself.

103 *DSU*, *supra* note 11, art 8.2.

104 *Ibid*, art 17.3.

105 *Rules of Conduct*, *supra* note 58, arts II.1, III.2, IV.1.

106 *DSU*, *supra* note 11, art 8.3.

United States is paralyzing the WTO appointment and reappointment process altogether by refusing to cooperate in any kind of process to replenish the thinning ranks of Appellate Body members.

Not only the United States, but also all the members of the WTO, afford far too much emphasis to nationality in the process of selecting Appellate Body members. Certainly, the seven members of the Appellate Body must be "broadly representative of membership in the WTO."[107] And it would be naïve for anyone — especially a former politician — to think that politics (diplomacy by its real name) never plays a role in the international selection of judges.[108] But the fact is that nationality is irrelevant to the actual work of the Appellate Body. Far more important in the selection process should be ensuring that those appointed to the Appellate Body are "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" — no matter where they may happen to be from.[109] (To my mind, this means, for future appointments, that Appellate Body members must, at a minimum, be lawyers.) Has the United States, as Trump claims, had "fewer judges than other countries" on the Appellate Body? In fact, more Americans have served on the Appellate Body than citizens of any other country (primarily due to the dissatisfaction of the United States with some of the Americans who have served).

In a letter provoked by the intimidating tactics of the United States even before Trump became president, all of the 13 living former members of the Appellate Body at the time wrote to the DSB in May 2016:

> There must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgments in the WTO's rule-based system of adjudication. As our revered late colleague Julio Lacarte once said of any action that might call into question the impartiality and the independence of the Appellate Body, "This is a Rubicon that must not be crossed." The unquestioned impartiality and independence of the Members of the Appellate Body has been central to the success of the WTO dispute settlement system, which has in turn been central to the overall success of the WTO. Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the future of the entire WTO trading system at risk.[110]

In explaining US actions, Ambassador Lighthizer has said, "We think the Appellate Body has not limited itself…to precisely what's in the agreement."[111] In this statement, Trump's trade ambassador has not expressed a novel view for the US government. A statement submitted by the Obama administration to the DSB in 2016 attempting to justify the administration's opposition to the reappointment of Seung Wha Chang offers detailed criticisms of a number of appellate reports as supposedly exemplifying a pattern of overreaching in rendering legal judgments by the Appellate Body.[112] The United States did not mention in this statement any of the zeroing disputes it had lost. With respect to the several disputes it did mention, the United States emphasized that "the US position on this issue is not one based on the results of those appeals in terms of whether a measure was found to be consistent or not."[113] The United States acknowledged that, in WTO dispute settlement, "there can always be legitimate disagreement over the results."[114] Instead, the United States insisted in its statement to the DSB that its "concerns with the adjudicative approach" of the Appellate Body are "systemic

107 *Ibid*, art 17.3.

108 I am, I confess, a former member of the Congress of the United States.

109 *DSU*, *supra* note 11, art 17.3.

110 Letter from 13 former Appellate Body members to Ambassador Xavier Carim, chairman of the DSB (31 May 2016) [May 31 Letter], online: <http://worldtradelaw.typepad.com/files/abletter.pdf>. I was one of the 13 former Appellate Body members who signed the letter.

111 Interview of Ambassador Robert Lighthizer by John J Hamre, "U.S. Trade Policy Priorities" (18 September 2017) at the Center for Strategic and International Studies, online: <https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative>.

112 Statement by the United States to the DSB (22 May 2016) [May 22 US Statement]. The four appellate reports referenced by the United States were *Argentina—Financial Services* (2016), WTO Doc WT/DS453/AB/R (Appellate Body Report); *India—Agricultural Products* (2015), WTO Doc WT/DS430/AB/R (Appellate Body Report); *European Communities and Certain Member States—Large Civil Aircraft* (2014), WTO Doc WT/DS347/AB/R (Appellate Body Report); and *United States—Countervailing and Anti-Dumping Measures (China)* (2014), WTO Doc WT/DS449/AB/R (Appellate Body Report).

113 May 22 US Statement, *supra* note 112.

114 *Ibid*.

concerns."[115] Professedly for these reasons, the United States opposed the reappointment of Chang, explaining that "we do not think his service reflects the role assigned to the Appellate Body by WTO Members in the WTO agreements."[116]

Although only the three members of the Appellate Body sitting as a division "serve on any one case" and sign the Appellate Body report in that case, all seven of the members of the Appellate Body engage in an exchange of views in every case.[117] The purpose of the exchange of views in an appeal is to reach a broad consensus among the seven on the legal issues appealed that will inform the decision of the three on the division while ensuring — in the words of the DSU — "security and predictability" for the WTO trading system.[118] The aim of the exchange, for example, is to avoid having a basic trade principle such as "national treatment" be interpreted in one way by a division in one case and in another way by a division in another case.[119] Furthermore, any separate opinions expressed in an Appellate Body report by individuals "shall be anonymous."[120] With the Appellate Body speaking almost always by consensus, with all seven of the Appellate Body members working in some fashion on every appeal and with any dissents required to be anonymous, how confidently can the individual views of any one member of the Appellate Body be discerned and somehow distinguished from those of the other six?

With respect to the Chang reappointment in 2016, the United States said, "We have reviewed carefully his service on the divisions for the various appeals and conducted significant research and deliberation. Based on this careful review, we have concluded that his performance does not reflect the role assigned to the Appellate Body by Members of the DSU."[121] So far as this US assessment of Chang's performance was based on the recommendations and rulings he signed, and given how the Appellate Body is structured and works, this statement could as easily have been made by the United States about any of the members then serving on the Appellate Body. In their letter to the DSB, the Appellate Body members serving at the time noted this and added, "We are concerned about the tying of an Appellate Body Member's reappointment to interpretations in specific cases. The dispute settlement system depends upon WTO members trusting the independence and impartiality of Appellate Body Members. Linking the reappointment of a Member to specific cases could affect that trust."[122]

In other words, intimidation could possibly lead to accommodation and capitulation in rendering appellate judgments. Moreover, even the appearance of bowing to the will of the United States in an appeal could undermine the continuing credibility of the entire dispute settlement process and thus of the whole WTO. Given all that has already happened, going forward from here, when the Appellate Body rules in favour of the United States — as it often does — will it do so because the United States is correct on the legal merits or, instead, because some members of the Appellate Body desire the support of the United States for reappointment? Inevitably, this question will be asked. Due to the pressure tactics of the United States, some extent of institutional damage has already been done.

The 13 former Appellate Body members made much the same point, but more bluntly: "A decision on the reappointment of a Member of the Appellate Body should not be made on the basis of the decisions in which that Member participated as a part of the divisions in particular appeals, lest the impartiality, the independence, and the integrity of that one Member, and, by implication, of the entire Appellate Body, be called into question. Nor should either appointment or reappointment to the Appellate Body be determined on the basis of doctrinal preference, lest the Appellate Body become a creature of political favor, and be reduced to a mere political instrument."[123] South Korea was even more straightforward in its statement to the DSB: "This opposition is, to put it bluntly, an attempt to use reappointment as a tool to rein in Appellate Body Members for decisions they may make on the bench. Its message is loud and clear: 'If AB Members make

115 *Ibid*.

116 *Ibid*.

117 *DSU*, *supra* note 11, art 17.1; *Working Procedures*, *supra* note 68, Rule 4.

118 *DSU*, *supra* note 11, art 3.2.

119 *Ibid*.

120 *DSU*, *supra* note 11, art 17.11.

121 May 22 US Statement, *supra* note 112.

122 Quoted in Lawson, "WTO Members Clash", *supra* note 67.

123 May 31 Letter, *supra* note 110.

decisions that do not conform to U.S. perspectives, they are not going to be reappointed.'"[124]

In its statement to the DSB about the Chang reappointment, the United States said as well, "We are concerned about the manner in which this member has served at oral hearings, including that the questions posed spent a considerable amount of time considering issues not on appeal or not focused on the resolution of the matter between the parties."[125] If loquaciousness were a cardinal sin in judges, we would have many fewer judges. Often, too, it may be necessary to ask questions that do not seem to be to the legal point to litigators but are nevertheless very helpful to judges in doing their job. Ninety percent of judging an appeal in a WTO dispute is deciding what judgments *not* to make so as not to pre-judge future disputes. Sometimes, this may lead to questions in an appellate oral hearing that may not seem legally relevant to those of whom the questions are asked. There is also this: the United States assumed that the questions asked by Chang were his own questions reflecting his own views of the legal issues in the dispute on appeal. This is an assumption. Who can say with any assurance that Chang was asking his own question and not asking a question of another Appellate Body member? And since when has the Socratic method of questioning that should be familiar to all legal advocates everywhere been a method that necessarily reveals the personal views of the one doing the questioning?

In its 2016 statement, the United States stressed that it was not contesting the outcomes of any disputes. Should the United States or any other WTO member ever want to contest a legal outcome, the 13 former Appellate Body members have pointed in their letter to the DSB to an alternative course provided in the WTO Agreement:

> Should WTO Members ever conclude that the Appellate Body has erred when clarifying a WTO obligation in WTO dispute settlement, the Marrakesh Agreement establishing the World Trade Organization spells out the appropriate remedial act. Article IX:2 of the Marrakesh Agreement, on "Decision-Making," provides, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" by a "three-fourths majority of the Members." Any such legal interpretation would, of course, be binding in WTO dispute settlement. We observe that, to date, the Members of the WTO have not seen the need to take any such action.[126]

Of course, as these 13 jurists know, the path to approval of such an authoritative legal interpretation is far from an easy one. This is undoubtedly one reason why this path has yet to be taken. Nevertheless, this is an appropriate avenue set out by the members of the WTO in the WTO treaty.

Whatever the merits of the concerns professed by the United States about the performance of the Appellate Body, engaging in tactics that threaten to shut down the whole WTO dispute settlement system is not the appropriate way to address these concerns. Instead of assaulting the continued rule of law, the United States should work within the rule of law. To be sure, before Trump became president, the United States tried and failed to forge a consensus on proposals to change the DSU to address its concerns. That failed, an effort should now be made to resolve the US concerns — where they are legitimate — within the DSB through improvements that do not require changing the DSU. Ideally, this should be done after consultations with the Appellate Body. If legitimate US concerns cannot be resolved in this way, and, if other WTO members agree, then the concerns should be resolved by revising the dispute settlement rules to provide added clarity to the instructions given to the Appellate Body for rendering appellate judgments. If the United States cannot find support for its positions among other WTO members — if other WTO members do not share the US view that the Appellate Body has been increasingly overreaching the bounds of its proper jurisdiction and engaging in inappropriate gap-filling — then that speaks for itself as to the merits of the US concerns.

It is inappropriate for the United States to use its professed dispute settlement concerns as an excuse to slow the WTO dispute settlement system toward a halt. It is even more inappropriate to do

124 Lawson, "WTO Members Clash", *supra* note 67.

125 May 22 US Statement, *supra* note 112.

126 May 31 Letter, *supra* note 110.

so if the underlying goal is to intimidate Appellate Body members into allowing the United States, in effect, to be the judge of its own cases. That would be the very opposite of the rule of law.

Options for Ending the Appointments Impasse for the Near Term

In every way they can find, the strong in power in the United States are doing what they can in the WTO to assert their ascendancy. Must the weak suffer what they must? As the campaign of US intimidation has intensified, increasingly, some of the most influential voices in world trade have protested. Pascal Lamy, a former director-general of the WTO and also a former European trade minister, has said that, of all Trump's scattered flurry of trade initiatives, the real risk is the destabilization of the WTO dispute settlement system. In Lamy's judgment, "This is the only manifestation so far of a clear danger for the (global trading) system."[127] Speaking of WTO dispute settlement, the current director-general of the WTO, Roberto Azevêdo, has cautioned, "If we compromise this pillar (of the trading system), we will be compromising the system as a whole. There is no doubt about that."[128]

Yet, so far, the increasingly firm opposition of what appears to be, at the least, almost all other WTO members to the pressure tactics of the United States has yielded no result in ending the WTO impasse over Appellate Body appointments. While some have suggested that there may be room for compromise if other WTO members agree to address what the United States has described as its systemic concerns,[129] other WTO members seem disinclined to negotiate on these concerns with the United States unless and until it removes its roadblock to the continued working of the WTO dispute settlement system. The media, when not ignoring the impasse, is mostly portraying it as an arcane political sideshow to Trump's more bombastic threats and actions on trade when, in truth, it should be centre stage. When journalists do report on the impasse, they treat it mainly as a political tug of war between the United States and its trading partners without addressing the critical fundamental issue at stake. What is more, back in the United States, not one single member of either party in the House of Representatives or in the Senate has denounced this assault by their country on the rule of law in world trade.

For the near term, a number of respected WTO scholars and experienced WTO lawyers who are concerned about the future of the WTO dispute settlement system and of the WTO trading system have suggested various creative means, largely within the existing rules of the WTO trading system, that the 163 other WTO members might employ to circumvent and thereby to overcome the continued adamant opposition of the United States to appointments and reappointments of Appellate Body members. One proposal, by Steve Charnovitz, a leading thinker on the knottier questions of international trade law, is that "the Appellate Body amend Rule 20 of the (appellate) Working Procedures to state that in the event of *three or more expired terms* in the Appellate Body membership, the Appellate Body will be unable to accept any new appeals."[130] WTO rules give the Appellate Body sole control of its working procedures.[131] Appellate "[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information."[132] There is, however, no requirement that the Appellate Body consult with the DSB as a whole or that the DSB as a whole approve the appellate working procedures. Therefore, the United States does not have a veto over the working procedures.

Charnovitz contends,

> Although the Appellate Body does not have the right to formally take away the right to appeal, it does have the right to

127 Tom Miles, "WTO Is Most Worrying Target of Trump's Trade Talk: Lamy", *Reuters* (14 November 2017).

128 Donnan, *supra* note 68.

129 Robert McDougall, "Standoff on WTO tribunal is more about the scope of intergovernmental adjudication than Trump unilateralism" (12 January 2018) International Centre for Trade and Sustainable Development.

130 Steve Charnovitz, "How to Save WTO Dispute Settlement from the Trump Administration" (3 November 2017) *International Economic Law and Policy* (blog) [emphasis in original].

131 *DSU*, *supra* note 11, art 17.9.

132 *Ibid*.

> declare in advance that under extreme circumstances, the "completion of the appeal" will occur automatically on the same day that any new appeal is lodged. In other words, by removing itself from the dispute process for new cases, a disabled Appellate Body will step aside so that the panel decision can automatically be adopted by the WTO Dispute Settlement Body on a timely basis. For a depleted Appellate Body bench to continue processing new cases would necessarily cause huge delays, thus frustrating the Uruguay Round goals of a prompt dispute system.[133]

The United States may well be perfectly content, of course, for this to happen when the United States prevails before a panel. But the United States will not prevail before every panel. Like any other WTO member, it will want to preserve its right of appeal. Moreover, while on some of the most contentious current legal issues, the United States has been satisfied with simply a panel result, on others, it may prefer to have a result that has been vetted by the Appellate Body. Recall that every WTO case is really two cases, the immediate dispute and the legal principles involved, and the fact — decidedly contrary to the Trump telling — that the United States wins the vast majority of the cases it takes to the WTO. As Charnovitz puts it, "By limiting the potential damage to WTO dispute settlement in this way, the Appellate Body could, in effect, call the Trump Administration's bluff."[134] Does the United States want to continue to be able to use the appellate process in WTO dispute settlement, or does it want to shut it down?

A second proposal, by Peter Jan Kuijper, a former principal legal adviser to the WTO, is that, to circumvent the US intransigence, the other members of the WTO resort to majority voting. He maintains that "recourse to majority voting is perfectly legal, once it is clear that consensus cannot be reached."[135] Just so, article IX:1 of the WTO Agreement provides that "where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting," and that "[d]ecisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreements."[136] This option has rarely been used by the members of the WTO. They prefer always, if they can, to operate by the general rule of consensus. Yet, Kuijper advises, "This is no small matter, it is a true emergency. Times of emergency justify emergency measures, also in the law of international organizations."[137] He contends, "Direct appointment of AB members by the General Council applying majority vote, under the strict limitation that this is an exceptional one-off measure connected to the threat of malfunctioning of the Appellate Body, and accompanied by explicit openness to further discussions with the United States, seems to be the best possible option for action inside the WTO. Ideally, merely the threat of majority voting may create leverage to arrive at consensus."[138]

Kuijper also offers an alternative to majority voting, saying that "if WTO Members are so strongly opposed to majority voting as to shy away from action inside the WTO, they will have to seek a solution outside the WTO."[139] For guidance, he points us to the customary rule of international law on fundamental change of circumstances, reflected in article 62 of the Vienna Convention on the Law of Treaties.[140] Article 62 provides that a fundamental change of circumstances that has occurred with regard to those existing at the time of the conclusion of a treaty, and that was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from a treaty or suspending the operation of a treaty unless: the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; the effect of the change is radically to transform the extent of obligations still to be performed under the treaty; the treaty does not establish a boundary; and the fundamental change is not the result of a breach by the party invoking it either of an obligation under

133 Charnovitz, *supra* note 130.

134 *Ibid*.

135 Peter Jan Kuijper, "Guest Post from Peter Jan Kuijper on the US Attack on the Appellate Body" (15 November 2017) *International Economic Law and Policy Blog* (blog).

136 *WTO Agreement*, *supra* note 63, art IX:1.

137 Kuijper, *supra* note 135.

138 *Ibid*.

139 *Ibid*.

140 *Vienna Convention*, *supra* note 54, art 62.

the treaty or of any other international obligation owed to any other party under the treaty.[141]

On the basis of a change in circumstances, Kuijper argues that all the members of the WTO *except the United States* could negotiate and conclude *outside the WTO* a new treaty that would essentially duplicate the appellate provisions of the DSU or even the entirety of the DSU. "Then [t]he sitting members of the Appellate Body would resign and be taken over as members of the Appellate Tribunal of the new treaty, to be joined by new selected members. On a voluntary basis, the Members of the Appellate Body Secretariat could leave the WTO as well and join the new Appellate Tribunal."[142] He adds, in another innovation, that "this new Tribunal could be opened up as an Appeals Tribunal from decisions of the dispute settlement mechanisms of regional FTA agreements."[143] The costs would be defrayed by member contributions which, he predicts, would be offset by declines in contributions to the WTO budget due to the WTO no longer having to pay for the Appellate Body or perhaps even for dispute settlement.[144] In sum, the WTO dispute settlement system could be recreated outside the legal framework of the WTO — while excluding the United States.

A third proposal — by Scott Andersen, Todd Friedbacher, Christian Lau, Nicolas Lockhart, Jan Yves Remy and Iain Sandford — resembles Kuijper's proposal for a new dispute settlement treaty based on changed circumstances outside the WTO, but it has the practical virtue of, in effect, creating an identical parallel dispute settlement system *within the WTO*. These private practitioners of WTO law — who have also previously worked for governments and for the WTO itself — are steeped in knowledge of how the WTO dispute settlement system works. Confronted by this impasse, they point to article 25 of the DSU, a hitherto largely neglected legal provision that relates to arbitration.[145] Article 25.1 of the DSU expresses the agreed treaty view of the members of the WTO that "[e]xpeditious arbitration with the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties."[146] Article 25.2 provides, "Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed."[147] Other members may become parties to the arbitration with the agreement of the parties that have decided to arbitrate.[148] Arbitration awards shall be binding and notified to the DSB.[149] Furthermore, the usual DSU rules relating to the implementation of recommendations and rulings under article 21 of the DSU and to compensation and the suspension of concessions under article 22 of the DSU will apply.[150]

As Andersen and his colleagues see it, "Article 25 is drafted in terms that are sufficiently flexible to allow a process that replicates closely the essential features of the appellate process under Article 17 of the DSU."[151] Article 25 does not define arbitration. Therefore, arbitration can be defined as WTO members may choose to define it consistently with the provisions of article 25, which say nothing about not duplicating the usual WTO dispute settlement procedures, including the procedures for appeals. The arbitration under article 25 thus need not follow the familiar parameters of private arbitrations around the world, but can mirror the more truly adjudicatory dimensions of WTO dispute settlement. What is more, under article 25 (which, ironically, was first proposed by the United States during the Uruguay Round[152]), "[a]rbitration...does not depend on any action by the DSB...and the binding character of an arbitration award does not depend on adoption or approval by the DSB. Instead, an award must simply be notified to the DSB and the relevant WTO Councils and Committees."[153] Thus, the United States could not block an arbitral award by refusing to join in a consensus to approve it. Much like Kuijper, Andersen and

141 *Ibid*.

142 Kuijper, *supra* note 135.

143 *Ibid*.

144 *Ibid*.

145 *DSU*, *supra* note 11, art 25.

146 *Ibid*, art 25.1.

147 *Ibid*, art 25.2.

148 *Ibid*, art 25.3.

149 *Ibid*.

150 *Ibid*, arts 21, 22.

151 Scott Andersen et al, "Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals" (2017) Center for Trade and Economic Integration Working Papers CTEI-2017-17 at 1.

152 GATT, *Improved Dispute Settlement: Elements for Consideration: Discussion Paper Prepared by United States Delegation*, GATT Doc No MTN.GNG/NG13/W/6 (25 June 1987) at 2.

153 Andersen et al, *supra* note 151 at 2.

his colleagues envisage that the arbitrators could be "selected randomly from an agreed roster of individuals comprising current and previous Appellate Body members, with membership of the roster being broadly representative of WTO membership."[154] In their proposal, Andersen and his colleagues spell out in some detail how this alternative process of what they call "appeal-arbitration" would work in practice.[155]

There are legal quibbles aplenty, mainly about the first two of these proposals. The provisions of the WTO treaty are rarely without legal nuance, and there are legal nuances yet to be resolved. With the first proposal, the United States would likely argue that the singular authority of the Appellate Body to adopt its working procedures does not extend to, in effect, denying the legal right of appeal mandated by the DSU, even if the Appellate Body is unable to hear the appeal. With the second proposal, the United States would likely insist that the provisions of the DSU requiring a consensus trump (if you will) the provisions in article IX:1 of the WTO Agreement allowing for majority voting. As Charnovitz, Kuijper and others have set out at some length, counter-arguments can be made to both of these potential US arguments.[156] With the third proposal, arbitration, it is more difficult to discern an argument on which the United States could base an objection. Where in article 25 does it say that any one WTO member can object to any other WTO members having recourse to arbitration? And where does it forbid WTO members having recourse to arbitration to duplicate the existing WTO appellate procedures and employ whomever they choose as arbitrators? For these reasons, the third proposal may be the best way to proceed with the ongoing work of WTO dispute settlement within the existing WTO rules for the near term.

154 *Ibid* at 5.

155 *Ibid* at 4–8.

156 See the illuminating exchange of views among scholars and practitioners on the *International Economic Law and Policy Blog*.

Reinforcing the Rule of Law in WTO Dispute Settlement for the Long Term

For the long term, more must be done. For the long term, the existing rules must be improved. The sturdiest frames in the enabling framework of WTO dispute settlement have been those raised by the rulings of the WTO Appellate Body. The Appellate Body has a unique and unprecedented authority for an international legal tribunal. Yet, after the still short span of slightly more than two decades, its authority remains fragile, and it remains dependent on the continued willingness of all WTO members to comply with the rule of law and otherwise to uphold the rule of law. The continued success of the WTO requires that the Appellate Body continue to be true to its treaty mandate so that it will continue to have the strong support of the members of the WTO against those both within the WTO and without who would undermine its necessary judicial authority. Moreover, through further WTO rule making, the WTO must be strengthened to the task of continuing to serve its members while meeting the new challenges facing the world trading system in the twenty-first century.

The members of the WTO should make the standing WTO Appellate Body a full-time instead of a nominally part-time tribunal. Serving on the Appellate Body has never really been a part-time job. It is certainly not one now. The rules must be changed to acknowledge this. As full-time jurists, given the nature of their work, Appellate Body members need not necessarily be resident full-time in Geneva. As it is now, they will need to be in Geneva only for hearings and deliberations. (A legal brief and a panel record and report can be read anywhere.) Moreover, as members of the highest court of world trade, the members of the Appellate Body should be given pay and benefits appropriate to their high standard of service on an international tribunal dealing with trillions of dollars in trade disputes. Currently, they make in a day with the WTO what they could make as international arbitrators in an hour. In addition, Appellate Body members and WTO panellists alike should be given the full extent of the financial, personnel and other resources they need to get the job done. In its first year, 1996, the Appellate Body was given a budget for its legal library for the entire year of

just 50 Swiss francs.[157] Things have changed since then but, all considered, not all that much. The WTO is hardly the biggest financial drain among international institutions on the limited treasuries of WTO members. The time when the members of the WTO could afford to run a worldwide international dispute settlement system on the cheap has long since passed. In the end, as with so much else, with the international rule of law, in the long term, we are likely to get what we pay for.

"What remains essential," the 13 former members of the Appellate Body wrote in 2016 to the DSB, is "the unflinching independence of the Members of the Appellate Body in fulfilling their pledge to render impartially what they see as the right judgments in each dispute by upholding the trade rules on which all WTO Members have agreed."[158] Will precedes law. Law builds institutions. Will, then, must sustain both law and institutions. An indispensable part of the expression of such will is the ongoing exercise of restraint. Mutual self-restraint is the underpinning of the framework of law and of the institutions that make law and aim to uphold law through the rule of law. The ultimate test of the show of such self-restraint in a system dedicated to the resolution of international disputes is when a dispute is *lost.* A legal loss in any one dispute, or even in a series of disputes, should not lead a country to undermine the upholding of the rule of law that is the transcendent purpose of an international dispute settlement system, and that is in the long-term interest of every country. Real respect for the rule of law is shown by what you do not when you win, but when you lose.

It can be hoped that those entrusted, for now, with leading the American people will remember in time why the United States has long supported a rules-based world trading system and the rule of law in world trade. Perhaps this is too much to expect from Trump and those who pay obeisance to him. Yet America is bigger and better than those who may happen to govern it at any given time. In time, America will rediscover the better angels of its nature. When it does, it would be best for the WTO simply to remove the continuing temptation for the United States — or for any other WTO member — to engage in the tactics of intimidation to which the United States has descended lately. The possibility of reappointment for Appellate Body members should be eliminated. This one change in the dispute settlement rules would end this form of intimidation and would reinforce the essential independence and impartiality of the Appellate Body.

Two options for implementing this change in the current WTO rules seem most attractive. There could continue to be seven members of the Appellate Body, but with each appointed for a single seven-year term and with one of the seven rotating off the tribunal each year. Or, as an alternative, the size of the Appellate Body could be increased to nine members, with each one appointed for a single nine-year term and with one of the nine departing each year. The first option, by preserving the current number of seven judges, would do more to ensure the continued collegiality of the Appellate Body in working toward a desired consensus in each dispute. The second option, by adding two more judges, would do more to make the Appellate Body representative of the membership of the WTO, given that there are many more members of the WTO now than when it was established in 1995. Provisions could be made in the transition to retain the current members of the Appellate Body on new and revised terms.

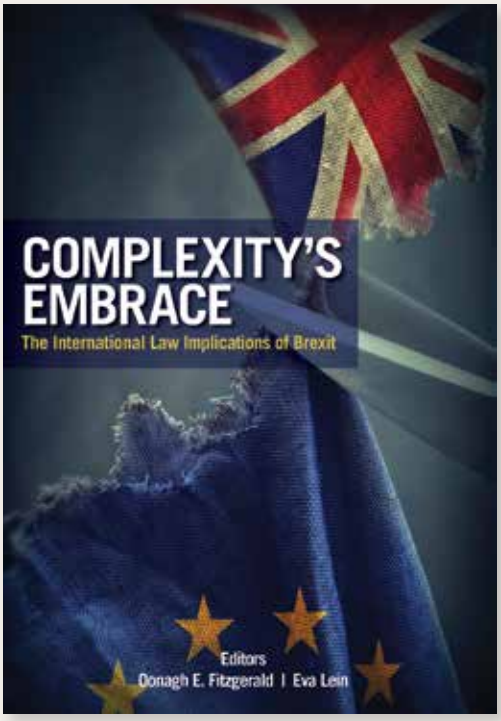
With either of these two options for improving the existing WTO dispute settlement rules, the original design flaw permitting the possibility of the reappointment of a member of the Appellate Body would be eliminated. No longer could the United States or any other errant WTO member risk undermining the rule of law in world trade over Appellate Body appointments and reappointments because it had been lured by low political motives into forgetting the enduring lesson of Melos — that might must never be allowed to make right. No longer could might threaten to unmake right as it is doing now so sadly in WTO dispute settlement.

157 Alas, this is a personal recollection.

158 May 31 Letter, *supra* note 110.

THE UNITED KINGDOM'S JUNE 2016 BREXIT VOTE

sent shockwaves throughout the European Union and the world.



Complexity's Embrace: The International Law Implications of Brexit

Oonagh E. Fitzgerald and Eva Lein, Editors

An unprecedented political, economic, social and legal storm was unleashed by the United Kingdom's June 2016 referendum vote and the government's response to it. Brexit necessitates a deep understanding of the international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. *Complexity's Embrace* looks into the deep currents of legal and governance change that will result from the United Kingdom's departure from the European Union. The contributing authors articulate with unvarnished clarity the international law implications of Brexit, providing policy makers, commentators, the legal community and civil society with critical information needed to participate in negotiating their future within or outside Europe.

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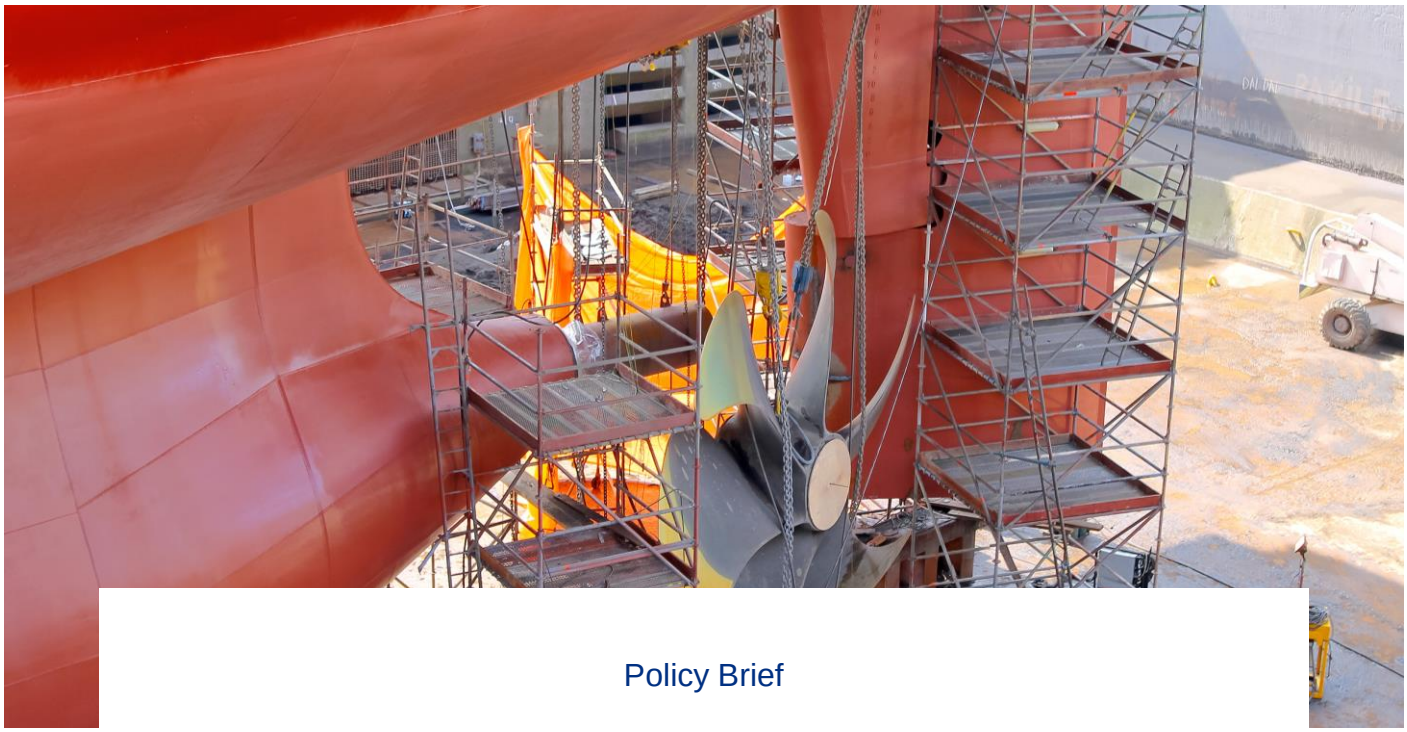

Policy Brief

Revitalizing Multilateral Governance at the World Trade Organization

Policy Brief based on the Report of the High-Level Board of Experts on the Future of Global Trade Governance

Preface

If international trade is not governed by rules, mere might dictates what is right. The World Trade Organization (WTO) serves as a place where trade policy issues are addressed, disputes arbitrated, legal frameworks derived and enforced. Through these functions, the WTO ensures that the rules of trade policy are inspired by fairness and reciprocity rather than national interest. It is more important than ever to vitalize the global public good that it represents against various threats that have been undermining it.

Therefore, the Global Economic Dynamics project of the Bertelsmann Stiftung has called into life a High-Level Board of Experts on the Future of Global Trade Governance. Composed of eminent experts and seasoned trade diplomats, it elaborated a series of feasible policy recommendations that will increase the effectiveness and salience of the WTO. We hope that this Report provides helpful suggestions in a time marked by increasing trade disputes and protectionism and instead contributes to stronger multilateral institutions and fora.[1]

Aart De Geus
CEO and Chairman
Bertelsmann Stiftung

Andreas Esche
Director, Megatrends
Bertelsmann Stiftung

[1] The analysis and suggestions made in this document reflect the dominant view among the members of the Expert Board. Members of the Board participated in meetings on a personal basis – the views expressed should not be attributed to any of the organizations Expert Board members are affiliated with.

Introduction

The global trading system has helped many countries to increase economic growth and reduce poverty. Many countries, both developed and developing, have greatly expanded their participation in international trade, benefitting from lower prices, greater variety and higher productivity. The rapid growth in global trade shares of developing economies and the underlying increase in output have been associated with rising average per capita incomes and reductions in rates of poverty.

The global trade regime is a major success story of multilateral cooperation. But success has also brought challenges in its wake. The rapid increase in global output and trade shares of emerging economies, especially China, has given rise to perceptions that this is due in part to commercial practices that distort trade. Competition between governments to stimulate domestic economic activity has led to increasing trade tensions. Unilateral imposition of protectionist measures and retaliatory responses constitutes a systemic threat to the trade regime.

Rising public concern in many countries that trading partners use policies that advantage national firms – policies that seek to induce companies to 'make it here,' not 'in the world' – prompts calls for revisiting the bargains struck at the time the World Trade Organization (WTO) was created (1995) and China acceded to the organization (2001). Updating the rulebook is also required to bolster the governance framework for cross-border flows of services and digital products associated with the development and use of new technologies such as artificial intelligence, 3D printing, and automation.

WTO members are doing too little to confront and address these challenges. The organization is stalled. The core negotiation, transparency, and conflict resolution functions are increasingly questioned, undermining the credibility of the institution and its ability to support cooperation on trade matters:

- WTO members failed to conclude the first round of multilateral trade negotiations launched under WTO auspices in 2001: the Doha Development Agenda.
- There is increasing recourse to trade-distorting measures by some WTO members.
- Since 2016, deadlock on the negotiation front has been complemented by an inability to obtain the consensus needed for new appointments to the WTO Appellate Body, threatening the dispute settlement function.
- Many WTO members are not living up to their notification commitments, reducing transparency of their trade policies and impeding the effectiveness of many WTO bodies in overseeing implementation of WTO agreements.
- Members have not been willing to discuss a new work program for the organization that spans both outstanding 'Doha subjects' such as agricultural support policies and matters not on the Doha agenda that are giving rise to trade tensions.

The trading system is in crisis. Urgent action is needed to revitalize the WTO. Such action must come from its members in a bottom-up process and be based on renewed multilateral dialogue on the deployment and effects of trade-distorting policies in both developed and developing nations. Dialogue is also required to resolve conflicts regarding the operation of the dispute settlement mechanism.

All WTO members stand to gain from concerted efforts to cooperate on trade-related policies and address the underlying source of trade tensions. This applies as much to the US as it does to China, India, other Asian nations, African countries, the EU or any other WTO member:

- Large OECD trading powers such as the EU, Japan and the US need a functioning multilateral trade regime because most of the concerns they have raised regarding foreign trade practices cannot be addressed effectively – or efficiently – on a bilateral basis. Any deal with one country will be eroded by a mix of market forces that drive investment towards other countries. Many trade practices that create negative spill-over effects are not unique to one country.
- Large emerging economies need a functioning multilateral trade system because they do not have bilateral or regional trade agreements with their main trading partners and have not participated in recent efforts to conclude deeper economic integration arrangements. The WTO provides the primary locus where they can join in setting the rules for new areas of policy where they have a substantial stake – such as e-commerce or digital trade and investment.

- Developing countries need a functioning multilateral trade regime because they have little market or negotiating power vis-à-vis large trading nations or blocs. The rules-based multilateral trading system provides the foundation for the efforts of many developing countries to integrate markets on a regional basis. An important example is the African initiative to create a continent-wide integrated regional market for goods and services.

- Citizens of countries concerned with ensuring that trade supports societal goals and sustainable development need a functioning multilateral trade regime that upholds and bolsters the ability of governments to take actions to achieve these objectives.

Many countries have turned to preferential trade agreements (PTAs) to strengthen the governance of their commercial relations. Efforts to negotiate such agreements are prevalent in all parts of the globe. Some PTAs cover policies in areas such as e-commerce, competition policy and digital trade. Some are also used as an instrument to pursue external policy objectives, including in areas such as labour and environmental standards. Participating in trade agreements offers a complementary vehicle for cooperation to countries willing to deepen integration of markets, but this is not a viable alternative for many developing countries and risks fragmenting the rules that apply to global value chains. Nor will such agreements discipline key trade-distorting instruments such as subsidies. PTAs offer only partial solutions to companies seeking less policy uncertainty and fragmentation of regulatory regimes. Moreover, they depend on the strong foundation of basic rules provided by the WTO.

A basic function of the WTO is to provide a platform for countries to agree on rules for trade-related policies that damage trading partners and to support their implementation. The fact that it is not fulfilling this purpose matters for the global economy. Safeguarding the WTO is important for all its members, large and small, but especially for the latter. Only the multilateral trading system offers small countries the opportunity to influence the development of new trade rules.

What could be done? Six recommendations

Re-vitalizing the WTO as a venue for multilateral cooperation requires a willingness on the part of members to identify and discuss perceived problems and explore potential solutions. The WTO provides extensive flexibility for members' engagement with each other. WTO members need to utilize this flexibility to address the underlying sources of trade tensions and deadlock, focusing on trade-distorting non-tariff policies in both developed and emerging economies that are not or are only incompletely covered by WTO disciplines. The prospects for doing so will be enhanced by initiatives to improve organizational performance as regards implementation of agreements and dispute settlement.

1. Policy dialogue on policies affecting competitiveness

Escalation of the bilateral conflicts that give rise to unilaterally determined trade policies constitutes a serious threat to a rules-based trade regime. Resolving current trade tensions requires the major players to use the WTO for its original purpose: a forum for discussion, negotiation and dispute resolution. It is in the interest of all WTO members to make concerted efforts to revisit the current rulebook and working practices – including the dispute settlement mechanism. The situation that has arisen with new appointments to the Appellate Body is one, urgent, example illustrating the need for open and frank dialogue on perceived problems and suggested solutions. The WTO dispute resolution system plays a vital role in sustaining cooperation between WTO members. Dealing with concerns regarding how that system functions without undermining the dispute settlement process's operation must be a priority for the WTO membership.

The first order of business for the WTO membership is to pursue efforts to defuse current trade conflicts, including the dispute regarding the Appellate Body. Whatever choices are made by WTO members in either launching or responding to trade policy actions, the appropriate path to contest perceived violations of WTO commitments is via the dispute settlement procedures.

Sources of disagreement on issues and policies of systemic import require dialogue. A common understanding of the magnitude and incidence of negative spill-over effects of contested policies is a precondition for cooperation and potential rule-making efforts. Similarly, a process of open deliberation is required to agree on a roadmap for addressing concerns about how the Appellate Body operates.

Such processes require a willingness by the major players to engage with each other. There is no compelling reason for them not to do so, nor are there good reasons why any WTO member should seek to block such engagement. This should be the bread and butter of the WTO – it is a core function. The aim should be to identify a work program to define an

agenda and roadmap to resolve recent trade tensions associated with the use of non-tariff policies, as well as outstanding subjects on the Doha Round agenda of great importance to many WTO members.

Deliberation must be informed by factual assessments of the specific features of policies or situations giving rise to concern, and by analysis of the magnitude and incidence of any negative effects they generate. This is best done through working groups, supported by the secretariat with relevant information and objective analysis. Secretariat support is important as in practice only a small group will engage on most complex issues. Good information is critical to this process. Moreover, greater transparency promoting better understanding of an issue area is a public good.

It is critical that dialogue encompass issues that matter greatly to developing countries. Efforts to block deliberation on non-Doha issues arise not because countries do not see their salience for the WTO but because of a desire to see progress on policies that are priorities for many developing countries – such as tariff escalation in agricultural and natural resources sectors. Balance is vital.

Geopolitical tensions and associated national politics may preclude a consensus on launching the necessary dialogue and eventual negotiations. WTO members should not permit consensus to be a constraint in launching a process of policy dialogue. In many areas, it may be feasible to proceed on a plurilateral, critical mass basis. This may be a stepping stone towards an eventual broadly-supported agreement, but it may also be the best approach for some types of issues – e.g., instances where there are significant differences in social preferences or societal goals.

2. Foster substantive deliberation in WTO bodies

The WTO is a 'member-driven' organization. It works through many WTO Committees and other bodies in which all its members participate, subject to their choice. Bolstering the regular work of WTO bodies is one avenue for revitalizing the organisation's deliberative function. These entities provide venues for members to discuss policies relevant to the respective subject areas covered by existing agreements and how these are changing. They provide opportunities for policy dialogue and consideration of options to avoid or limit adverse trade effects of policies that are not, or only partially, covered by current WTO agreements and member commitments.

Self-reflection should include policy dialogue on emerging issues and areas of opportunity and more generally seek to (re-)establish a common understanding of whether and how WTO bodies can be more useful to the government departments in national capitals that deal with each of the issue areas they cover. One element of such a process is for WTO members to determine what information they need to engage productively with each other in different WTO bodies. Non-compliance with many of the notification requirements included in WTO agreements in a timely or comprehensive manner has become a source of contention. Rather than seeking to enforce compliance with all existing notification requirements, it would be more constructive for WTO Committees to ask themselves what information is needed to fulfil their mandate and most usefully help economic actors and citizens navigate and understand the trading system.

Shifting the focus from a "business as usual" approach centred on defending long-standing positions on mandates and work programs of Committees and other WTO bodies to one that starts with members asking what each entity's activities (tasks) should be and how they can more effectively pursue them may make the 'normal business' activities of WTO bodies more salient to the constituencies with a stake in the subject areas covered by the different WTO agreements.

A greater emphasis on jointly determining (learning about) what constitutes good practice in each of the policy areas covered by a Committee through sharing of national experiences, supported by background papers and analysis from the secretariat, could also form the basis of a more effective approach to dealing with economic development concerns. As each Committee brings together officials responsible for specific trade policies, they offer the opportunity to engage in deeper substantive discussions on what types of policies will foster sustainable development.

A development-focused policy dialogue in the various WTO bodies could consider factual questions: What kind of treatment could help countries develop industries in sectors where they have comparative advantages? A basic focus of such discussion should be on identifying the scope for greater differentiation among developing countries on an issue-by-issue basis.

The Committees are also appropriate venues for discussion of what can be learned from the operation of PTAs in their respective policy areas. PTAs may pursue innovative approaches towards cooperation on trade policies. A regular focus at Committee level on national experiences with different PTAs would not only improve transparency, but more important, support a process of learning about approaches that might

be multilateralized through instruments such as a reference paper that countries could sign on to.

It is vital that policy dialogue is framed as an open process with a view to consider whether there is a problem and to learn from experience as opposed to starting from the premise that this reflects a search for rules. The latter may well be a solution, but first it is necessary for there to be a common understanding of an issue and whether and how rules are needed to address it. The process should not be framed as a prelude to negotiations, as this is a key factor why some WTO members have opposed policy dialogue on new matters in the first place.

3. Open plurilateral initiatives among WTO members

Lack of consensus to discuss issues not covered by extant WTO agreements or included on the agenda of the Doha Round has been a factor impeding use of the WTO as a forum for policy dialogue. A partial solution to this problem is for groups of members to cooperate on an open, plurilateral basis and, where feasible, launch initiatives for specific sectors or policy areas. Open plurilateral initiatives can be a vehicle for countries to consider adoption of common policy principles such as regulatory coherence or to agree to new policy disciplines. Open plurilateralism has two key elements: any WTO member with an interest in participating is permitted to do so and the benefits of agreements are applied on a non-discriminatory basis to all WTO members (insofar as benefits are not conditional on joint action by countries). Open plurilateralism is a complement and alternative to the pursuit of PTA-based cooperation, which has the systemic disadvantage of being discriminatory in nature.

Open plurilateral initiatives may not be feasible for policy areas where free riding is a significant concern. However, they offer an opportunity for countries to cooperate on issue areas where the nature of the problem is to identify what constitutes good practice that will benefit participating countries independent of what non-participants do. Areas where this is likely to be the case include certain types of regulatory cooperation (where the focus is good practice) and 'behind the border' policies that apply equally to national and foreign firms or products.

One area where open plurilateral initiatives could serve a useful function in supporting cooperation is as a means for members of PTAs to multilateralize specific 'behind the border' features of their PTAs – for example, cooperation on competition policy, adoption of good practice for sector-specific regulation, or initiatives aimed at establishing the equivalence of policy regimes or mutual recognition. More generally, they can help countries exchange information on good practice and become focal points for international regulatory cooperation within specific sectors.

The policy areas that could be the subject of open plurilateral initiatives must be determined by (groups of) WTO members. Four such efforts were launched at the WTO Ministerial Conference in Buenos Aires in December 2017: on e-commerce, micro, small and medium-sized enterprises, investment facilitation and domestic regulation of services. The suggested processes of policy dialogue on matters of systemic import and self-reflection at the level of WTO Committees and other WTO bodies (recommendations 1 and 2 above) will help identify policy areas that may lend themselves to open plurilateral initiatives.

The scope for open plurilateral initiatives where benefits are applied on a non-discriminatory basis is likely to be limited to issues that are either insensitive to free riding concerns or policy areas where a critical mass of WTO members participates. How much scope there is for such cooperation is an open question but may be greater than is often assumed, especially for technical issues where cooperation can reduce trade costs.

Even where no agreement proves possible, the associated deliberations are useful as they will help inform decisions on the set of issues that could be considered within a broader effort to construct a forward-looking agenda on updating rules that will apply to all WTO members. This could be supplemented with a transition-oriented approach that may combine elements of TFA and the telecom reference paper, i.e. a phase-in of obligations linked to some pre-accepted criteria from a list of obligations that combine mandatory and voluntary options.

4. Use the Secretariat more effectively

A corollary of the WTO being a 'member-driven' organization is that the secretariat is given very little voice. Member-driven means members are responsible for conducting the WTO (i.e. taking decisions) but this need not translate into a monopoly on the right to voice views and supply relevant information to WTO members. Strengthening the secretariat's ability to provide knowledge and analytical inputs to the members will make it more useful to the constituencies that have a stake in enhancing the performance of WTO bodies.

These constituencies are critical in sustaining political support for the organization. They are mostly located in the capital cities of WTO members. Enhancing the secretariat's capacity to engage substantively on

trade-related policy areas of interest to national constituencies may increase the perceived salience of – and political support for – the organization. There is substantial scope for reallocating available technical assistance funds to bolster engagement with national government agencies and broader constituencies that have an interest in different areas of trade policy.

Committees and other WTO bodies and working groups need information synthesizing current knowledge on a range of trade-related areas, including on policies that are not, or only partially, covered by WTO agreements. Some of the inputs that Committees may identify as being needed as part of the self-reflection process suggested above may be hard for members themselves to provide. Empowering the secretariat to provide more support for the work of WTO bodies will permit the realization of economies of scale and scope, and increase the rate of return on the financial resources provided by WTO members.

Knowledge and analysis is particularly needed for 'new' policy areas and to support subsets of WTO members that have decided to pursue open plurilateral initiatives on specific policy areas or sectors. More cooperation with other international organizations dealing with different aspects of trade policy and related regulation, as well as increasing engagement with international business organizations, sectoral regulatory communities and representative NGOs, can help to leverage what the secretariat can do in generating and synthesizing available information and knowledge.

Many citizens of WTO member states are concerned about the distributional effects of trade integration. While improving equity of outcomes and helping workers and firms that incur adjustment costs are matters for national policy, more can and should be done to both monitor and assess the economic effects of implementation of WTO agreements. Academic research tends to focus on trade impacts of WTO accession or the consequences of changes in specific national trade policies. What is missing is objective analysis of the effects of the rules-based trading system more broadly, including regular ex post monitoring and careful examination of the implementation of WTO agreements. This is a knowledge product that could be provided by the secretariat and that would help strengthen communications and outreach efforts (see recommendation 6 below).

5. Review organizational performance

The WTO is unique among international organizations in not having an independent evaluation office or an internal review mechanism that assesses its operation. At present there is too little focus on the functioning and performance of WTO bodies. As part of its oversight function, the WTO General Council conducts a year-end review of WTO activities, based on the annual reports of its subsidiary bodies, but the latter simply summarize meetings and topics discussed. There is little substantive discussion in the General Council on the operating modalities of subsidiary bodies.

Periodic assessments of institutional performance can foster learning about what works well and what does not. Formal review mechanisms can act as a mirror for members, presenting them with facts they may not be fully aware of, as well as provide useful information for constructive engagement in considering what might be done to improve performance.

Assessing the performance of the WTO as an organization and identifying areas where more regular interaction between WTO bodies can fill gaps or exploit synergies can make the organization more responsive and effective. Review of the regular work of the Committees can help identify differences in performance and the reasons for this, as well as inform assessments whether successful practices might be emulated in other areas. Consideration could be given to developing and reporting indicators of participation by members and engagement with stakeholders. The WTO annual report includes some measures of participation – such as the number of specific trade concerns raised in Committees and participation in dispute settlement – but more specific metrics of performance could help identify opportunities for improvement.

Collecting information that helps to apprise business and other national constituencies how governments are engaging and using the WTO would complement annual reporting by subsidiary bodies and the proposed regular review of the latter's operation to inform an annual discussion in the General Council as part of its broader appraisal of the functioning of the trading system.

6. Outreach strategies

Building on the previous suggestions, consideration should be given to re-thinking how the WTO community – national political leaders (Ministers), WTO senior management, national trade officials, business representatives, trade scholars – presents and discusses the purpose and performance of the multilateral trading system. Too often, public outreach and advocacy is framed in terms of the additional exports and jobs that will be generated by a new agreement. Sometimes this is based on economic models that may be easy targets for groups that oppose international trade cooperation and further integration of product markets.

WTO objectives range far beyond trade policy disciplines. The preamble of the WTO Agreement mentions improvement of living standards, preservation of natural resources, and attainment of sustainable development, among other goals. Communication strategies should be based on what the WTO does (has done) to attain these common objectives – and where it has failed to do so. Given that a key function is to provide a platform for its members to establish rules and enforce them, greater attention should be given to the role played by the organization in reducing uncertainty for firms and providing a mutually agreed governance framework that helps governments pursue welfare-enhancing policies. This extends far beyond the narrow interest of exporters – it benefits all citizens. Systemic stability and transparency about what governments do both in terms of national policies and of engagement in the WTO matters for citizens as well as firms.

Several of the recommendations made above will generate information and data points that can feed into more effective and outreach strategies. What is missing is rich knowledge (evidence) on the 'system at work'; how the procedural rules intended to reduce uncertainty for traders do so; how this affects actual investment decisions by specific firms; what the WTO system does to help members address trade concerns raised by firms; what it does to give consumers access to better products and greater choice; etc. Such an exercise can leverage the review and self-assessments advocated above to highlight what is not working well and to do more to point out areas where WTO members could do more to support the organization's operation.

The resurgence in unilateral trade policy by the United States and its refusal to agree to new appointments to the Appellate Body have increased awareness of the potential consequences of greater use of trade-distorting measures. But this has not translated into a concerted defence of the rules-based trading system by the business community. It has become a platitude that world trade is organized in international supply chains and production networks, but the implications of this are imperfectly understood by workers, voters and politicians. Documenting at the firm/supply chain level how much local suppliers matter and how much employment is dependent on participation in production networks can help counteract calls for protectionism. Many policymakers and citizens do not understand the interdependence that is part and parcel of supply chain-based production and how much the associated web of contracts and investments is premised on a functioning system of rules and low and predictable trade costs. This is an area where business leaders can and should do more to provide such information to their workers and other stakeholders.

Greater engagement by businesses may be encouraged by actions to promote more participation in the WTO's activities, including the normal working of the Committees and other WTO bodies. This already happens to a small extent in some Committees. Such interactions will help delegations to better understand how WTO agreements affect businesses, where there are concerns. Conversely, they may offer an opportunity for representatives on Committees to convey their perceptions or requests for information to the business community. Initiatives on these lines can put business to work in helping the WTO stay relevant for the global trade community collectively.

Leadership

The success of the multilateral trade regime in the post-Second World War period was attributable in large part to US leadership and the fact that the organization was dominated by broadly like-minded countries. Today, the US continues to participate actively in normal WTO work, but it is casting itself in a different role than in the past, calling for the WTO membership to pursue a reform agenda. It laid out its view of key elements of such an agenda at the 11th WTO Ministerial Conference in Buenos Aires, stressing a need to focus on compliance with WTO obligations, for greater differentiation among developing countries, and action to ensure that litigation is not used as an alternative to negotiation. In May 2018 President Macron of France called for the largest trading powers to launch talks on WTO reform, to agree on what is wrong with the current system and to develop a roadmap for new rules that address the distorting effects of subsidies and industrial development policies and measures to attain non-economic objectives.

Policy dialogue, analysis and self-reflection are critical inputs into any WTO reform effort. A necessary condition is willingness to do so. A coordinated effort by large trade powers to invest more of their soft power to support initiatives on subjects that dialogue reveals are priorities for many WTO members can change the dynamics. Prospects for a successful WTO reform scenario to materialize will very much depend on whether China is willing to discuss possible approaches to addressing concerns regarding distortions to competition in its markets and levelling the playing field for foreign companies.

Due in part to the rise of global value chains and the growth of emerging economies, many more countries are today participating in international trade. This creates opportunities for groups of WTO members to take on a greater role. Different possibilities may exist to constitute a critical mass large enough to provide leadership. For instance, three of the four largest trading

powers – China, the EU and Japan – account for more than one-third of world trade in goods and services and more than half of the WTO budget. Jointly they can do much to respond to the challenges confronting the organization and revitalize the WTO. But leadership cannot come from large trading powers alone. Safeguarding the WTO is particularly important for smaller countries, not least because only the multilateral trading system offers them the opportunity to influence the development of new trade rules.

Economies pursuing deep integration of markets are best placed to play a complementary role. Examples include the eleven members of the Comprehensive and Progressive Agreement on Trans-Pacific Partnership, the Pacific Alliance countries, the East Asian countries in the Regional Comprehensive Economic Partnership, and, more broadly, the WTO 'Friends of the Multilateral System' group of smaller economies. Taken together with the EU, these countries collectively account for over 75 percent of world trade. They constitute a critical mass that is more than adequate to sustain multilateral cooperation and drive the trading system forward.

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The Functioning of the WTO: Options for Reform and Enhanced Performance

Policy Options Paper

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The Functioning of the WTO:
Options for Reform and Enhanced Performance

Manfred Elsig
on behalf of the E15 Expert Group on the Functioning of the WTO

January 2016

Note

The policy options paper is the result of a collective process involving all members of the E15 Expert Group on the Functioning of the WTO. It draws on the active engagement of these eminent experts in discussions over multiple meetings as well as an overview paper and think pieces commissioned by the E15Initiative and authored by group members. Manfred Elsig was the author of the report. While a serious attempt has been made on the part of the author to take the perspectives of all group members into account, it has not been possible to do justice to the variety of views. The policy recommendations should therefore not be considered to represent consensus and remain the responsibility of the author. The list of group members and E15 papers are referenced.

The full volume of policy options papers covering all topics examined by the E15Initiative, jointly published by ICTSD and the World Economic Forum, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade.

The E15Initiative is managed by Marie Chamay, E15 Senior Manager at ICTSD, in collaboration with Sean Doherty, Head, International Trade & Investment at the World Economic Forum. The E15 Editor is Fabrice Lehmann.

E15Initiative

Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15Initiative was established to convene world-class experts and institutions to generate a credible and comprehensive set of policy options for the evolution of the global trade and investment system to 2025. In collaboration with 16 knowledge partners, the E15Initiative brought together more than 375 leading international experts in over 80 interactive dialogues grouped into 18 themes between 2012-2015. Over 130 overview papers and think pieces were commissioned and published in the process. In a fast-changing international environment in which the ability of the global trade and investment system to respond to new dynamics and emerging challenges is being tested, the E15Initiative was designed to stimulate a fresh and strategic look at the opportunities to improve the system's effectiveness and advance sustainable development. The second phase of the E15Initiative in 2016-17 will see direct engagement with policy-makers and other stakeholders to consider the implementation of E15 policy recommendations.

E15Initiative Themes
- Agriculture and Food Security
- Clean Energy Technologies
- Climate Change
- Competition Policy
- Digital Economy
- Extractive Industries*
- Finance and Development
- Fisheries and Oceans
- Functioning of the WTO
- Global Trade and Investment Architecture*
- Global Value Chains
- Industrial Policy
- Innovation
- Investment Policy
- Regional Trade Agreements
- Regulatory Coherence
- Services
- Subsidies

* Policy options to be released in late 2016

For more information on the E15Initiative:
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Abstract

The multilateral rules-based trading system has been crucial in helping states to cooperate and gradually open up borders to encourage trade and investment for development. It has contributed to temper unilateral approaches and to integrate emerging economies over time. Yet the WTO is currently at a crossroads and is facing an "adaptability" crisis. The world economy has changed since the organization was created, and new and complex challenges are quickly adding to an already loaded agenda. A key question is whether the WTO is capable of responding to these challenges or whether there is instead a need to revisit the basic foundations on which the multilateral trading system has evolved over the past six decades. The present paper analyses potential avenues for reform to ensure the future success and relevance of the WTO. It offers policy options for consideration in three areas: the negotiation function of the WTO; the role of committees within the organization; and the involvement of the business sector. First, in order to improve the negotiation function, the paper advocates that a grand bargain be reached to create a package that allows the Doha Round to be concluded, which would be constructed by combining commitments where progress has been made with an explicit acceptance of the move towards using plurilateral approaches within the ambit of the WTO. The latter would be accompanied by a new committee or working group whose mandate would be to work out optimal design features for these plurilateral approaches. Second, recommendations are put forward to increase the role and impact of committee work, with the objective of enabling the system to mature and deliberate on new avenues for rule-making. Third, in order to enhance the involvement of the business sector with the WTO, new platforms for institutionalized interaction are proposed. These include the creation of a Business Forum and Business Advisory Council to establish a formalized dialogue between business and the intergovernmental system. The paper concludes by outlining practical policy steps to implement the proposals in each of the three areas.

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Abbreviations

BAC	Business Advisory Council
BBF	Bali Business Forum
BF	Business Forum
DG	Director-General
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
MFN	most favoured nation
NAMA	non-agricultural market access
PA	plurilateral agreement
PTA	preferential trade agreement
RTA	regional trade agreement
SPS	sanitary and phytosanitary
TBT	technical barriers to trade
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
WTO	World Trade Organization

Executive Summary

The WTO is at a crossroads. Not only are the multilateral trade negotiations stuck, but overall rule-making has made little progress while alternative trade pacts, not least the mega-regional arrangements, have clearly challenged the position of trade multilateralism. The organization is currently facing what can be called an "adaptability" crisis. The world economy has changed since the WTO was created back in the mid-1990s, and new challenges are quickly piling on top of the old ones. The rise of emerging countries and the relative decline of traditional economic powers, their various negotiating demands and approaches, the proliferation of preferential trade agreements, and the need to deal with complex new issues, such as climate change and food security, are all shaking the foundations on which the WTO was built some twenty years ago.

A key question is whether the WTO is capable of responding to these new and complex issues or whether there is instead a need to revise the basic foundations on which the multilateral trading system has evolved over the last 60-plus years. Should the WTO's current mandate be expanded? Or is it best to complete the unfinished business of the Doha negotiations before taking up new negotiating initiatives? What should be done to strengthen the multilateral trading system and to ensure the future success of the WTO?

These are some of the multifaceted questions addressed by the E15 Expert Group on the Functioning of the WTO, jointly convened by ICTSD and the World Economic Forum with the support of the World Trade Institute as knowledge partner. The overall mandate of the Expert Group was to identify and propose for consideration a set of policy options to strengthen the negotiating, monitoring, and deliberative functions of the WTO. The present paper, which is the outcome of this expert dialogue process, lays emphasis on the negotiation and deliberation capacities of the multilateral system and also focuses on the relationship between the business sector and the WTO. These are governance challenges that the system needs to address in the years to come.

Background

Over the past six decades, the multilateral trading system has provided an unprecedented level of stability and predictability in the way WTO members conduct their trade operations. It has also provided—particularly since the establishment of the WTO—a credible and solid mechanism to adjudicate trade disputes, one that is guided by law rather than power. Developing countries, most of which steered clear of the system during the GATT years, have for the most part joined the WTO, making the system a truly universally accepted set of values and rules, and not the rather limited "club" that it used to be.

A renewed sense of international cooperation among WTO members is essential for dealing, first and foremost, with the unfinished business of the Doha negotiations. Completing the Doha Round would allow the WTO to focus on some of the most pressing challenges the system now faces: defining a new set of negotiating modalities for the future, strengthening its institutional framework—i.e. the functioning of its various committees, and revisiting the traditional approach to the participation of the private sector.

The paper sketches a number of challenges to multilateralism in general, which impact the way WTO members negotiate and deliberate. It then suggests a number of incremental reforms that could help re-energize the negotiation function of the WTO and increase the potential of committee-related work, in particular in view of agenda-setting and preparation for rule-making. Finally, support of private actors, such as business groups, is important to sustain the system. Concrete ideas on how to institutionalize these relations are outlined.

Policy Options

In order to improve the performance of the negotiation function, the paper advocates an extra effort to create a package that allows the Doha Round to be concluded. This consists of a grand bargain to agree on what it is possible to achieve while allowing, strengthening, and channelling new plurilateral approaches. The latter would be accompanied by a new WTO committee, or working group, whose mandate would be to work out optimal design features for these plurilateral approaches.

In addition, the paper suggests increasing the role and impact of committee work. A set of objectives are listed that might allow the system to further mature and elaborate the "Geneva-way" through consultation, elaboration, debate, and deliberation on new avenues for rule-making. These include better data management, improving committee leadership and overall coordination, using more in-house expertise, improving the quality of exchange to allow for more deliberation, bringing on board more domestic decision-making, and reaching out to the public.

Finally, in order to enhance the involvement of the business sector, new platforms for interaction are advocated that could assist in building a shared understanding of challenges and policy options, allowing for critical feedback and the elaboration of new ideas for regulatory innovation in rule-making. Two institutional proposals stand out. First, the creation of a Business Forum which would meet around the time of the ministerial meetings; and, second, the creation of a Business Advisory Council to establish a formalized interaction between interested businesses and the intergovernmental system.

Next Steps

The majority of proposals outlined in the paper can be implemented in the short to medium term if the WTO members show willingness. None of the policy options would require major institutional changes. What is clear is that the initiative to address governance issues needs to grow from within the organization. In light of this, the paper concludes by describing potential policy steps to implement the proposals in each of the three areas the Expert Group focused on.

1. Background Challenges

The multilateral trading system has been crucial in helping states to cooperate and gradually open up borders to encourage trade with a view to fostering sustainable development. A rules-based system has contributed to temper unilateral approaches and to integrate emerging economies into the global trading system over time. A key aspect of the multilateral system is how it functions and how governance is organized. Needless to say, the legitimacy of the WTO is strongly affected by how well it functions, how it aggregates the different interests, how it allows for deliberation, and how it interacts with outside actors (Elsig 2007).

The E15 Expert Group on the Functioning of the WTO, jointly convened by ICTSD and the World Economic Forum with the support of the World Trade Institute as knowledge partner, focused on how the WTO makes decisions and develops new rules. It follows in the footsteps of past research and policy work, most prominently the analyses and recommendations of the so-called Sutherland Group (WTO 2004) and The Warwick Commission (2007).[1] While many outside experts have lamented the slow progress in negotiations, there has been little "official" debate about this within the system. The Ministerial Conference in 2009 was set up partially to review WTO governance issues; however, only a few countries made formal submissions and those that were presented were largely general in nature and did not lead to much engagement and discussion in the Ministerial gatherings.

The Expert Group chose to lay emphasis on the negotiation and deliberation capacities of the system. It did not address other key aspects such as the dispute settlement system, which seems to work rather well, nor technical assistance, capacity building, outreach activities, or research and statistics. Also, the Group focused on the business sector as a key outside constituency to highlight the limits and the potential of increased interaction. These lessons can be illustrative for other interested stakeholders and their relations with the system, such as civil society organizations. The deliberations of the Expert Group were organized under the following categories.

1. The negotiation function
2. The role of committees
3. The involvement of the business sector

While little progress in new multilateral WTO deals has been made in recent years, some movement has been observed in plurilateral negotiations since the single undertaking principle was questioned from within the system. The Uruguay Round's single package approach is not working in the Doha Round and new types of negotiation modes have been advocated. The single package approach was *de facto* given up at the Ministerial Conference of 2011. In WT/MIN(11)/11, page 3, Ministers' agreed text states: "Ministers acknowledge that there are significantly different perspectives on the possible results that Members can achieve in certain areas of the single undertaking. In this context, it is unlikely that all elements of the Doha Development Round could be concluded simultaneously in the near future. (….) In this context, Ministers commit to advance negotiations, where progress can be achieved, including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking."

As to the committee work, its effects have been largely overlooked (see for instance Wijkström 2015). This is an area where potential scope for incremental progress exists.

Finally, whereas the business sector has not withdrawn from the WTO system, it has clearly lost its enthusiasm. New ways of involving the business sector could prove instrumental for achieving progress in rule-making in the future.

A number of background challenges impact on how the WTO functions. Six challenges that affect the WTO regime management stand out.

First, until the 1990s, the world trading system was characterized as a club in which trade diplomats met behind closed doors to agree on gradual liberalization. The creation of the WTO led to a deepening of trade concessions and provided WTO members with a highly legalized dispute settlement system to support implementation. As a result of this move towards market integration and legalization, many new actors brought their issues and concerns, sometimes only partially linked to trade, to the WTO. They were encouraged by the fact that the Uruguay Round Agreement gave rise to a number of areas which were not previously considered as directly relevant to trade, such

[1] There are numerous contributions by experts and scholars that focus on issues related to governance (for example Deere-Birkbeck and Monagle 2009, Steger 2009, Elsig and Cottier 2011, Narlikar et al. 2012, Meléndez-Ortiz et al. 2012).

as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) or the Agreement on Trade-Related Investment Measures (TRIMs). Since the late 1990s, the WTO has undergone an adjustment process in reacting to this increasing scale of public attention. Incrementally, the organization has become more transparent and has worked on its inclusiveness (in particular with internal stakeholders). Yet finding the right balance between allowing WTO negotiators some wiggle room and providing a flow of information on the negotiations has proven difficult. Put differently, open and fully inclusive negotiations will make it difficult to negotiate effectively.

Second, the General Agreement on Tariffs and Trade (GATT) system created in 1947 was dominated by the US and embedded within a strong liberal consensus (Ikenberry 2006, Ruggie 1982). During the last successful trade round, the leadership became more broadly shared. On the one hand, the European Union, represented by the European Commission, started to become more assertive in trade negotiations and on the other hand, the QUAD group (which included, in addition to the transatlantic partners, Japan and Canada) served as an important informal platform for agreeing on major issues enabling the round to move forward. Today, we have clearly moved towards a multipolar trade world. In particular, China, Brazil, and India play an important role in the system, acting on their own or as part of coalitions (Narlikar 2011). The impasse of the Doha Round is not so much a result of transatlantic disagreement as a situation in which highly industrialized countries and large developing countries disagree over the type of market access and protection of vulnerable sectors of the economy.

Third, the new preferential trade agreement (PTA) landscape offers a challenge to the organization. Most WTO members have turned their attention towards this negotiation venue, driven largely in many circumstances by exporter discrimination concerns (Dür 2007, Manger 2009, Elsig and Dupont 2012). In addition, strategic, geopolitical, or regional political aspirations affect the choice of partners and the overall ambitions. As a consequence of this evolving domino effect, if countries improve selected market access through small group deals, the appetite for negotiating ambitious multilateral solutions might well decrease. In particular, initiatives, such as the concluded Trans-Pacific Partnership (TPP) Agreement and the ongoing negotiations on a Transatlantic Trade and Investment Partnership (TTIP) show new potential sources of discrimination on the horizon. This new type of mega-regionals will most likely lead to additional efforts among states to remedy potential disadvantages emanating from these agreements. They will play a central role in creating new templates, in affecting the location and development of global value chains, and shaping the content of future PTAs. Whatever the complementarity to the multilateral trading system, potential substitution effects, or emerging discrimination, this “new regionalism” will require a different response from the WTO than the current one.

Fourth, the WTO is faced with the legacy of the Uruguay Round grand bargain (market access for developing countries in agricultural products and textiles vs. services liberalization and intellectual property rights protection for developed countries) described by Sylvia Ostry (2002). For many developing countries, however, this deal was later perceived as asymmetric, because many countries have not yet reaped the benefits that should have resulted from the original bargain. In addition, many low-income developing countries continue to struggle to meet their WTO obligations. This phenomenon has further increased the expectation held by developing countries that the Doha Round will mainly need to deliver on development. These expectations contrast with demands by industrialized countries to significantly improve market access in larger developing countries. Therefore, it is difficult for the WTO to deliver, given the sharp differences in countries’ expectations of the objectives of the round. This unfolding expectation–capacity gap continues to loom large in the current environment of negotiations.

Fifth, we have witnessed important changes in the way goods production and services provisions are organized across borders. The increasing reliance on production networks and outsourcing has led to a growing importance of the existing behind-the-border rules. This creates new challenges in the negotiation process. While in the early days of multilateral trade liberalization, progress in negotiations occurred within a framework of reciprocal lowering of trade barriers, such as tariffs (a form of so-called negative integration), we have now moved towards addressing barriers that exist behind the border. These obstacles range from non-tariff barriers to specific investment clauses, different intellectual property rights regimes, and diverging competition norms (WTO 2011). The unfolding challenge consists in finding the optimal degree of positive integration (in agreeing standards that are acceptable to all parties involved). This type of agreement on regulatory cooperation and coherence has been at the heart of the negotiations in the TPP and TTIP. In addition, new challenges of positive integration are waiting to be resolved pertaining to 21st century trade topics, ranging from technological advances and tradable services to questions related to data protection.

Sixth, we deal with a somewhat unintended consequence of legalization. The enforcement mechanism of the WTO (“the jewel in the crown”) has led to dynamics that additionally impact on trade negotiations. Under the shadow of a strong dispute settlement system, where concessions can actually be enforced, parties are sometimes reluctant to commit to future deals, and this has important distributional consequences as domestic interest groups grow more vigilant (Goldstein and Martin 2000).

2. Three Areas for WTO Reform

In the following we describe the challenges related to the three areas the Expert Group focused on: the negotiation function, the role of committees, and the involvement of the business sector.

2.1. The Negotiation Function of the WTO Remains Comatose

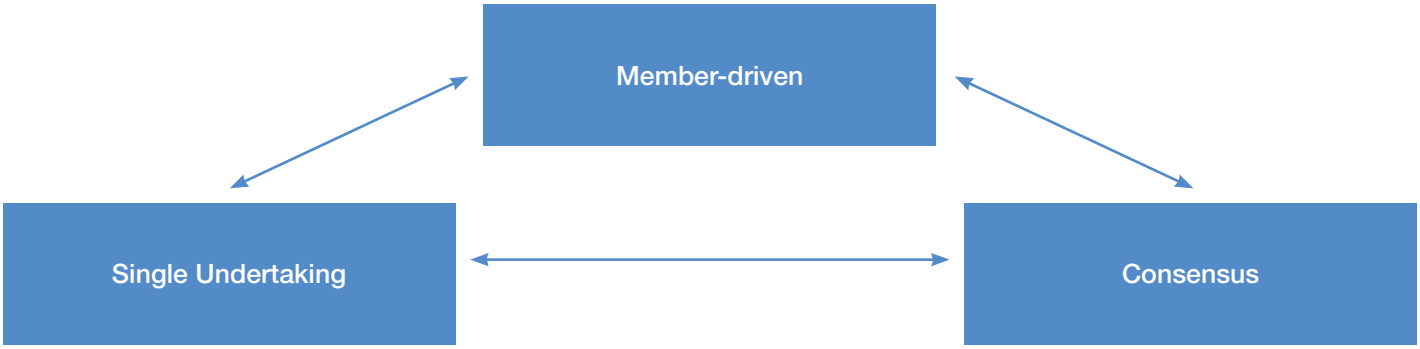
For a long time, it was conventional wisdom that the negotiation function is the most important activity of the WTO within its mandate. Now that we are fourteen years into the Doha Round, this assessment regrettably needs some qualification. The WTO has produced few outcomes in negotiations since the late 1990s when it concluded the Information Technology Agreement, the Basic Telecommunications Agreement, and the Financial Services Agreement, which were mainly characterized by a "critical mass" approach. In addition, a part of the membership negotiated and concluded a plurilateral, club-like agreement on public procurement. These outcomes resulted from Uruguay Round left-overs that were successfully tackled. Most recently, we witnessed the conclusion of an adapted agreement on information technology and some progress on the issue of trade facilitation has been achieved. In fact, the Agreement on Trade Facilitation, which was reached in 2013 and will enter into force once two-thirds of the WTO membership have ratified, has been the only noteworthy multilateral agreement outcome since the creation of the WTO. Most negotiations in the Doha Round, however, have been deadlocked for a number of years.

What has changed? What can be observed is that there is more participation. In particular, the growing importance of some large developing countries in decision-making has diminished the previous significance of the US and the EU in this context. The information asymmetry between different contracting parties has also decreased, expertise is more widely spread among the membership, and the formal small group meetings allow for broader participation reflecting the interests of additional parties. There seems to be greater inclusiveness, yet, not surprisingly, many deals continue to be discussed in informal small group meetings, mostly outside the WTO premises. Small group outcomes are still pivotal for success, but are not sufficient for progress to be made. Before agreement in the core group can be multilateralized in the Geneva process, opportunities need to be provided for input from the membership at large. Judging from the evolving processes, one could argue that the system has incrementally adjusted (without rule changes) to demands for more participation. Also, there has been less criticism about a lack of inclusiveness than in the past. However, other parameters have impacted negatively on the negotiation function, as described above—i.e. more interests leading to collective action problems, need for positive integration, legalization's effect on commitments, outside options through PTAs, and disagreement on development objectives.

One view is that the decision-making triangle is incompatible with the new challenges. Elsig and Cottier (2011) picture the WTO system as relying on three pillars: the single undertaking, consensus decision-making, and the member-driven character of the organization (see Figure 1). They argue that this triangle has become unsustainable. Presenting a counterfactual argument, they investigate the effects of loosening one of the three pillars. They briefly develop three different scenarios. In scenario one, the WTO gives up a strict reading of the single undertaking and moves towards a system that allows for more plurilateral approaches. This scenario has somewhat become reality. Of the proposals that have been put forward, the critical mass initiative has received most attention. Other proposals included the possibility to allow for early harvest or moving towards a legislative system where issues would be taken up as they arise, a path that currently seems unlikely. Scenario two would foresee a system in which the consensus principle would be weakened by moving towards qualified majorities in selected negotiation areas. While key decisions could still be taken by consensus, other lower-level (or secondary) decisions could be negotiated under some form of voting. It is important to note that voting is already allowed in the WTO system. It is not used because it is based on a one-state one-vote principle, which the US and other large economies would not embrace, and also because the consensus principle has become the accepted means of decision-making. This "we-don't-vote-in-this-organization-mantra" blocks discussions on adjusting the voting system. Finally, the third scenario assumes that a big obstacle to tabling concessions rests on sovereignty concerns embodied in the member-driven character of the organization. This reluctance to delegate keeps the autonomy of chairs in the negotiations (who are recruited among the membership) limited.[2,3] In addition, member dominance keeps the WTO Secretariat (who could potentially play the role of guardian of the multilateral rules) on the sidelines in the negotiation process. The

[2] In earlier trade rounds, even Secretariat officials were tasked to chair negotiation groups (Elsig 2011).
[3] In the GATT era, GATT contracting parties attempted to set up a smaller group composed of capital-based officials to provide guidance in the negotiation process and to limit the number of parties as a means of partial delegation; see consultative Group of 18 (Blackhurst and Hartridge 2005 and Abbott 2013).

Figure 1: The Incompatible Triangle



Source: Adapted from Elsig and Cottier 2011

members see themselves as the guardians. Are there ways to empower some actors to address the problem of lack of incentives for individual members to table concessions and move from value-claiming to value-creating negotiation strategies (see also Odell 2009)? This third scenario also seems highly improbable.

Looking at these scenarios, there is evidence, as mentioned above, that the single-undertaking pillar has been weakened. The "single undertaking" is no longer a negotiating tool. It could be argued that the principle has become a way for those countries least willing to take on new commitments to hold the negotiations hostage. If the GATT negotiating history is to offer any lessons, it is that every negotiating round has always left aside some pending issues, with the goal of addressing them later on in future rounds. Even the Uruguay Round, despite being based on the "single undertaking," was not an exception to this rule, as it left aside a number of issues in agriculture and trade in services—the famous "built-in agenda"—with the goal of addressing them later in a post-Uruguay Round environment. Thus, the practice and new understanding of the "single undertaking" has made progress in negotiations difficult.

As a result, plurilateral approaches have undergone a revival. Four types are evident: new mega-regionals (in particular TPP and TTIP), which are negotiated under the exception rule for so-called regional trade agreements (RTAs); plurilaterals within the ambit of the WTO excluding most-favoured-nation (MFN) treatment (e.g. public procurement) or providing MFN treatment for non-participants (e.g. information technology agreements); and plurilaterals which are linked to, but still separate from, the WTO system (e.g. Trade in Services Agreement—TiSA). Notwithstanding limited progress tangential to the Doha Round negotiations, there needs to be some form of conclusion of these talks. The negotiation arm can no longer remain comatose.

2.2. The Potential of Committees is not Fully Exploited

In the shadow of the stalled negotiations, important activities occur within numerous WTO committees. While the mandates of the regular or special committees might differ, they all operate towards managing the regime. They do so by exchanging information, collecting data, overseeing notification processes where WTO members inform each other about national developments, and in particular by assisting in implementing the WTO obligations which parties committed to. In addition, these interactions might often lead to an exchange of views on best practices and eventually to the elaboration of new norms. An interesting question is how the work of regular committees has been impacted by the stalled round and to what degree various committees could be used as platforms to rekindle the interest in certain areas of trade regulation. What are the possible ways to strengthen the work of the regular WTO committees, enabling them to break away from a business-as-usual approach?

An important element in all committees is the focus on increasing transparency regarding the trade policy measures implemented by states. While some committees actively oversee conventional notification requirements about planned regulatory reforms (e.g. the Committee on Technical Barriers to Trade (TBT) for technical standards and the Committee on Sanitary and Phytosanitary (SPS) Measures for issues of food safety and animal and plant health), the committees also allow for discussion and reflection. This latter function is important in committees; however, the mandates are not always clear as to the degree to which discussion should lead to more deliberation and eventually to the elaboration of new shared norms. The question arises whether and how regular committees could initiate a discussion on pressing challenges which are not really addressed in the negotiations (e.g. climate change and trade, exchange rates, or high and volatile food prices).

While the focus of the regular committees is on compliance, a question is what would be needed to use existing institutional venues to go beyond this role and offer a more deliberative function?

Some of the literature suggests increasing the potential impact of committees (Wijkstrom 2015). Lang and Scott (2009) emphasize the creation of shared knowledge that could lead to the elaboration of new shared norms. One committee that has received attention is the RTA Committee. Given the importance of the growing numbers of PTAs, the WTO membership has given new tasks to this committee. Overall, however, the question remains how to improve the overall impact of committees.[4]

2.3. The Lack of Institutionalized Exchange of Information with the Private Sector

During the past decade, the willingness of private sector actors to invest time and resources in multilateral trade negotiations seems to have been eroded. This increasing ambivalence towards multilateral trade reforms is due to a combination of complacency (i.e. taking the free flow of goods and services for granted), discontentment with the slow pace of WTO discussions in general and the standstill of the Doha Round in particular, and a growing feeling that the WTO does not effectively respond to today's business concerns, such as the operations of global supply chains. As a result, private actors have been actively pushing national policy-makers to explore venues other than the WTO to fulfil their trade policy needs. Especially notable in this regard is the shift in lobbying efforts from multilateral trade deals to bilateral agreements, as the latter take much less time to negotiate and are usually shaped in such a way that they include more of the issues regarded important by the business community.

If the WTO wants to reverse this trend of private actors partly turning their back on multilateralism, it seems vital for the organization to engage much more than it does at present with large and small businesses in both developed and developing countries. This is important for several reasons. For one, private actors' involvement and support could play a crucial role in re-energizing the Doha Round. Second, the more active involvement of private actors could make the WTO more effective and strengthen its legitimacy. After all, by taking on board the input of businesses, the WTO would involve one of the groups that is most influenced by decisions on global trade rules. Third, it can help to promote an understanding of the core principles of the WTO if private actors have the feeling that their interests and concerns are taken into account. Fourth, it would enable the WTO to tap the expertise and knowledge of private actors. By engaging more with private actors, the WTO has the opportunity to enrich the nature and the quality of the information it receives at all stages of its decision-making and in all its functions.

The best way to ensure more active involvement of private actors with the WTO is to set up a system which enables the WTO and the private sector to interact much more systematically and in a more structured manner than is currently the case. The WTO and its members have acknowledged in the past that the participation of private actors is perfectly in line with the intergovernmental character of the organization (WTO 2004). However, the current engagement is essentially based on a series of *ad hoc* mechanisms and practices. In 1996, for instance, the General Council adopted guidelines which were aimed at, among other things, enhancing transparency and developing communication with private actors and other non-state actors. What is more, over the years, the WTO has organized an increasing number of outreach events in which it engages with private actors, such as briefings for non-state actors on WTO council and committee meetings, plenary sessions of ministerial conferences, and symposia on specific issues, which private actors and other non-state actors can attend, and the annual public forum, which the WTO has been hosting since 2001 (between 2001 and 2005 it was called the public symposium). The WTO also runs training programmes in different parts of the world to train the private sector on specific WTO-related issues. Despite the WTO's efforts to engage with private actors, the multilateral trading system still lacks, in the words of Deere-Birkbeck (2012, 123), "adequate routine mechanisms and processes for the constructive engagement of stakeholders, whether from unions, nongovernmental organizations, academia, or the business sector, in ways that feed into decision-making processes to ensure trade rules respond to public concerns and expectations."

[4] Most contributions focus on the Trade Policy Review Committee and suggest a widening of its mandate (e.g. Chaisse and Matsushita 2013, see also Abu-Ghazaleh 2013), on bringing in more stakeholders (Hoekman 2012), on being tougher on the WTO members (e.g. Keesing 1998, Zahrnt 2009) or on discussing the reports in the countries concerned (Zahrnt 2009).

3. Policy Options to Improve the Functioning of the WTO

3.1. Improving the Performance of the Negotiation Function

It is clear that for the WTO to matter in the years to come it needs to produce tangible results through negotiations. At the same time, the non-conclusion of the Doha Round presents a big challenge because it reminds those inside and outside the system that the WTO cannot deliver. Therefore two proposals are put forward. One is to finish the round and seek—if possible—another more sustainable grand bargain. The other suggestion is to actively provide more guidance for plurilateral approaches (beyond the PTAs and mega-regionals).

3.1.1. Seeking a final grand bargain

The new deal could be constructed by combining specific commitments where progress has been made over time with an explicit acceptance of the move towards using plurilateral approaches within the ambit of the WTO (and therefore putting an end to the single undertaking approach once and for all). One side of the bargain would therefore be composed of major elements of the Doha agenda based on existing results where near universal support exists in areas such as agriculture, non-agricultural market access (NAMA), rules, and trade facilitation. At present, of all the Doha issues, an agreement on NAMA—i.e. on the market access negotiations on goods—is the one that holds the promise of moving the negotiations towards a final deal. The situation that WTO members face today is not unlike the one faced by GATT members in the early rounds, namely the need to reach an acceptable level of tariff cuts among the key trading partners, including China and the other emerging economies. Thus, strange as it may seem, tariff cuts may help to alleviate the paralysis in the other areas of the negotiations and the finalization of a global pact, just as they have traditionally done. It may seem ironic that a protectionist device that most analysts have written off as insignificant and outmoded could continue to play such an important role in today´s negotiations. However, the reason may lie not in the intrinsic value of tariff protection, but rather in the visibility that it would give to a negotiating package. In politics, reality almost always takes a back seat to perception, and in developed countries the perception that some countries are “free riding” in the negotiations has taken a strong hold.

This first side of the bargain would be conditional on a second side—authorization of future negotiations of a specified list of plurilateral agreements (PAs) (Odell 2013). Article II.3 of the WTO Agreement authorizes such agreements that bind only the states that sign them.[5] Designers of the package could select particular PAs in part to generate the interest of disaffected constituencies. For instance, they could include pacts to liberalize services trade in general, PAs on particular services such as telecommunications beyond basic services, and zero for zero tariff deals in particular sectors of goods trade.

3.1.2. Designing optimal plurilaterals to save the negotiation function

Related to the above, the creation of a committee or a working group on the institutional development of PAs is suggested; it would be tasked with elaborating suggestions on how to move forward with different types of plurilateral approaches. Given the proximity to PTAs, the work could also be carried out by the Committee on RTAs. If a special committee is established it would have to consult closely with RTA Committee, but the mandate could be much more ambitious. This committee would be tasked with elaborating rules for the different types of PAs, namely:

- PAs that extend benefits to all WTO members on an MFN basis (that is, unconditional plurilaterals);
- PAs that extend benefits only to signatories (that is, conditional non-MFN plurilaterals); and
- Rules for sectoral agreements (not yet linked to the WTO—e.g. TiSA).

Beyond the procedural rules, the committee should work towards finding the appropriate approach and set-up for specific market access demands. This re-examination should also pay particular attention to the potential impacts on those that choose not to participate (Vickers 2013). The committee should be chaired by the Director-General (DG) and should be able to take decisions by supermajority vote. It could also be useful to explore whether the committee could be formed under the Trade Negotiations Committee, which is already chaired by the DG.

[5] Art. X.9 of the Agreement on Establishment of the World Trade Organization, which requires consensus for plurilaterals, might need to be revisited.

3.2. Strengthening the Role and Impact of Committee Work

As outlined above, the WTO membership should seek to increase the potential impact of the work carried out collectively by committees (Elsig 2013b). The following objectives in particular might allow the system to further mature and elaborate the "Geneva-way" through consultation, elaboration, debate, and deliberation on new avenues for rule-making.

3.2.1. More systematic data management

One of the challenges is how to organize, present, and disseminate the wealth of available information. The WTO, as the leading multilateral trade institution, should prioritize and optimize processes of information management and explore the specific usefulness that an information portal has for potential users. The WTO should serve as a key information hub on regulatory matters based on its existing experience as a venue where notifications are collected and trade policy reviews conducted. The information compiled needs to be used for specific benchmarking exercises following agreed indicators. Existing attempts, such as monitoring potentially protectionist measures during economic and financial crises, are a step in the right direction, but need to be more systematic in particular with regard to increasing the impact for the users. There is a demand for more surveillance of new trade-policy relevant developments in WTO members' constituencies. In order to do this, more resources should be devoted to data compilation, statistics, and data management.

3.2.2. Improving leadership and coordination

Generally, the WTO suffers from a lack of leadership in the sense that too little attention to committee work and too much rotation affect group cohesiveness. One way to address this is to devote more resources and allocate more time to chairs of committees. Currently, many committee chairs are selected for a one-year term. This is not long enough to create an optimal working environment for achieving the goals outlined above. Chairs should be elected for a three-year period and receive additional support from Secretariat officials.[6] Secretariat officials could be organized in a new division for committee-related work or the existing support could be further consolidated. In addition, an official standing body of chairs should be created to ensure that the information exchange among chairs, and with the WTO DG, which currently follows an informal approach, is further improved.

3.2.3. Making more use of in-house expertise

What is striking about the WTO compared to other international economic organizations, such as the International Monetary Fund and the World Bank, is how little use is made of the in-house expertise. WTO officials could do more than occasionally write non-papers to summarize the issues at stake. The chairs should be allowed a mandate to create *ad hoc* working groups that are chaired by Secretariat officials or jointly with member representatives. More systematically involving (and empowering) WTO staffers is important as they are the guardians of the multilateral system and have the required expertise.

3.2.4. Improving the quality of exchange and creating more room for deliberation

A precondition for moving towards high-quality deliberation is the availability of sufficient relevant information. If the circle of experts is too small, there is a danger that crucial information will be lacking. It is important to invite key experts to internal meetings to share their experience and expertise during the deliberations. For instance, in the case of the RTA Committee, it is necessary for chief negotiators of these PTAs to visit Geneva regularly to share their experience and discuss how they deal with issues such as WTO compatibility of PTA obligations, and to allow for input and feedback from other WTO members. The SPS Committee, for example, could intensify its relations with standardization bodies beyond existing exchanges and seek more interactions with health experts. Initiatives for cross-institutional cooperation with other international organizations should be encouraged. For deliberation to occur, good quality information is required. Another necessary condition is the creation of an environment for informal gatherings (alongside more formal meetings) to build trust and understanding between participating actors. The chairs of the groups have a pivotal role in depoliticizing discussions and buffering against existing hierarchies. If necessary, chairs can initiate the creation of *ad hoc* brainstorming or drafting groups, propose walks in the woods, and demand assistance and advice from outside experts and mediators in order to allow for deliberative processes to occur.

3.2.5. Locking in domestic decision-makers

There needs to be greater involvement and buy-in of domestic decision-makers. Committees need to devise a strategy on how to engage with capital-based officials and members of parliament. Their selective participation in some of the committees should be further increased. In the case of the trade policy reviews, the results of these reports should be discussed more prominently in the countries concerned. It helps that parliamentarians have started taking a greater interest in these reviews. Different ministries (for example, finance, tax, or environment) and members of parliament should be further encouraged to participate in some way in the deliberations when reports are discussed. Trade ministers should be more involved in certain committee activities either as facilitators or as friends of the committee.

[6] While this raises some practical problems with the lengths of diplomats' stay in Geneva, more continuity is needed to enable chairs to play a role beyond structuring the debate.

3.2.6. Building bridges to the public

The public's support is important for the legitimacy of the system. There are various ways to engage with the public. While informal exchanges behind closed doors are important to allow for deliberation and to build trust, targeted initiatives to engage with the wider public are needed. These could range from providing live coverage of certain events that are managed by a committee, to allowing for a public debate when meetings take place outside Geneva and to inviting online feedback on ongoing work. Written submissions to the committees by accredited business and non-governmental actors should also be encouraged. These briefs should be disseminated among WTO members.

3.3. Enhancing the Involvement of the Business Sector

Although the WTO is an intergovernmental organization and decisions are taken exclusively by member governments acting collectively, the business community has an important stake in the organization's performance. It is mainly businesses, not governments, which engage in international trade, and they are bound to be affected by WTO operations. In practice, business and government interact in the WTO in many different ways, sometimes advancing the negotiating agenda and at other times ensuring that governments abide by their multilateral commitments. The support of the business sector is key to the success of the system. While many informal and formal channels of interaction exist in domestic political settings, at the WTO there is a need for more engagement. This interaction should be designed as an open, two-way process to assist in building a shared understanding of challenges and policy options, allowing for critical feedback and the elaboration of new ideas for regulatory innovation in rule-making. Two institutional proposals stand out (Eckhardt 2013). These are developed below.

3.3.1. The creation of a Business Forum

The first idea would be to organize a formal Business Forum (BF) at the same time as (or perhaps starting a few days earlier than) the ministerial meetings, where business leaders could meet to share and learn from one another, and interact with heads of state as well as government and high governmental officials. The prime purpose would be to present concrete suggestions to decision-makers. More specifically, like the B20 (an event organized during the G20 meetings), the BF would put forward recommendations and would engage in issuing relevant commitments from the business leaders and business organizations to deal with current issues. Ideally, it would function as a reality check for governments, since they need business sector support for their negotiations as well as for the ratification of the results agreed. It could be possible to build on a first experience in Bali, where a pilot test for a Business Forum was organized (Box 1).

Box 1: The Bali Business Forum

At the Ninth WTO Ministerial Conference that took place in Bali, Indonesia, from 3 to 7 December 2013, the International Chamber of Commerce (ICC), the Evian Group@IMD, and the International Centre for Trade and Sustainable Development (ICTSD) decided to jointly organize a day-long event to focus on issues of particular interest to business representatives from WTO member countries. This event—the Bali Business Forum (BBF)—which was the first of its kind, took place on 5 December 2013.

The BBF provided an open forum where the business community could examine the most critical issues in the international trade agenda and interact with ministers and other high-level officials to contribute towards a constructive outcome in Bali. The agenda of the BBF included issues such as: (i) the quantitative benefits of a Doha deal (or costs of a Doha non-deal); (ii) the impact of mega-regional agreements (e.g. TPP and TTIP) on the WTO; (iii) the complementary nature of trade in services, trade facilitation, and global value chains; and (iv) the role of the private sector in the WTO.

An accompanying high-level luncheon focused on the topical issues at the intersection of the WTO and digital economy; and a business/ministerial roundtable wrapped up the ambitious day-long agenda in a high-level setting. Throughout the panel discussions, representatives of the private sector and government officials, including CEOs and key ministers engaged in an open dialogue on the above-mentioned topics.

The ICC, the Evian Group@IMD, and ICTSD acted as the core co-conveners of the BBF, in partnership with the Inter-American Development Bank and the International Trade Centre. The BBF also had the support of relevant business organizations and associations, such as the Washington-based National Foreign Trade Council (NFTC), the Coalition of Services Industries (CSI), the European Services Forum (ESF), and the Federation of Industries of São Paulo (FIESP).

Through engagement and dialogue between business executives and policy-makers from all over the world the BBF helped to facilitate a better understanding of the possibilities of enhanced multilateral cooperation, and on the need for a dynamic WTO.

3.3.2. The creation of a Business Advisory Council

A more far-reaching (and perhaps more controversial) proposal is to establish a WTO Business Advisory Council (BAC).[7] The BAC could promote the interests of the business community by advising and engaging with the WTO Secretariat and WTO members on a broad range of issues. Ideally the BAC and the BF would be complementary—that is, organizing the BF could be one of the key activities of the BAC. Other activities the BAC could undertake would be to:

- Actively follow the regular committee work;
- Identify priority areas for consideration by WTO and its members;
- Advise on setting the agenda for the ministerial meetings;
- Provide policy recommendations to the WTO and its members;
- Provide the WTO and its members with timely information on WTO policies and their implications for business and industry; and
- Respond when the various WTO forums request information about business-related issues or to provide the business perspective on specific areas of cooperation.

[7] If such an Advisory Council were to be set-up, a similar body could be envisaged channelling the different voices of civil society groups.

4. Priorities and Policy Steps

The majority of proposals outlined in this paper can be implemented in the short to medium term if the WTO members show willingness. None of the policy options would require major institutional changes. What is clear is that the initiative needs to grow from within the organization. It could be that different informal coalitions are formed that start a consultation process to gather support among the membership for addressing governance issues. Ideas emanating from such discussions should be then discussed at the level of ministers in order to receive a mandate to develop concrete proposals.

Let us consider the measures in order of their urgency and describe potential policy steps to be taken.

4.1. Negotiations

First, the negotiation arm has to be re-energized. There needs to be a strong new coalition (the Friends of the Doha Agenda) which substitutes for missing leadership in the negotiations. At this stage conclusion is more important than ambition, and similar to the development at the end of the Uruguay Round, extraordinary circumstances need out-of-the-box solutions. The DG should receive a special mandate to propose the contents (not just the contours) of the Doha package deal. A built-in agenda for a limited number of unresolved issues (analogous to the Uruguay Round) should be created to allow some form of flexibility for states (but opt-outs need to be limited) and future multilateral and plurilateral negotiation approaches for issue areas (that are excluded from the round) should therefore be defined. The package would consist of agreed commitments on selected areas and a detailed agenda of topics as well as the necessary process to be followed through alternative variable geometry approaches. This should also be done under the responsibility of the DG in consultation with the chairs of the key negotiation groups.

Second, and related to the grand bargain, a special committee is to be created that focuses on how best to design plurilateral approaches, both those following MFN logic and those that restrict MFN. Such a group should be composed jointly of Geneva-based and capital-based officials and one of the Deputy DGs should chair the committee. It should be limited to 20–25 participants reflecting the broad WTO membership, both in terms of regional representation and level of development. This committee should meet regularly, every second meeting being held in one of the main WTO member's capitals, and a small group of Secretariat officials should be asked to support the work.

For both initiatives to materialize, WTO members will need to show willingness and courage—without delegating some tasks to both chairs of the negotiations and the DG progress is not possible.

4.2. Committee Work

Two things need to be done in order to improve further the functioning of committees. First, a review should be conducted by the WTO Secretariat under the supervision of the DG to make a factual assessment of the inner workings of the committees. Then, a group of independent academics should be appointed to carry out a survey of WTO members to collect systematically the views and opinions of those participating in various committee activities. Both types of information can provide the basis for an assessment of how well the different committees function and what can be done to improve the situation. The DG should then prepare a report for the attention of the WTO members for additional input.

Second, in light of the proposals outlined above, the DG would hold informal consultations with all the committee chairs before elaborating an action plan on how to move forward to increase the capacity of the committees. The findings would be presented to the entire WTO membership and discussed before the official start of a ministerial meeting to foster understanding and support from capital-based officials.

In the pilot phase, a group of independent experts would be invited to the meetings of some selected committees to support the chairs in the implementation of the proposals. After (a test period of) 12 months, another review conducted by a group of external experts involved in the committee work would be planned to take stock of the progress made and the possible wider application to more committees.

4.3. The Business Sector

In order to pursue the initiative to find common platforms of exchange between the ministers, the negotiators, and the business sector, large conferences should be organized both in Geneva and in universities worldwide where WTO chairs have been created. The purpose of the conferences would be to collect additional information on the exact needs of business actors for increased interaction and to share insights on existing practices. Government representatives could discuss potential best practices from their own perspectives. The conferences should also help business leaders to agree on the appropriate representation by business groups. The ICC and the World Economic Forum could jointly chair this process. Selection should take into account the type of business sector, the size of the companies (providing a strong representation of sectors characterized by small and medium-sized enterprises), as well as regional characteristics.

Following these bottom-up "caucuses," the next step would be for the business sector to put forward a roster of representatives from which it could appoint up to 30 participants for the Business Advisory Council. The participants would serve on the council for a term of three years (non-renewable). Members of the BAC would be invited by the chairs of negotiation groups for informal gatherings and exchanges and would be encouraged to interact regularly with WTO ambassadors. There would also be two formal meetings a year at which the DG and the chairs of the committees represent the WTO membership. The chairs would informally share the content of the discussions with all members of the respective committee.

This proposal might only be feasible if the WTO membership also explores the possibility of a Civil Society Advisory Council that would have a similar function to that of the BAC.

Once the BAC is up and running, it could be tasked to organize the Business Forum to be held alongside the ministerial meetings.

In summary, the above institutionalized relations between the business sector and the WTO will only bear fruit if at the same time progress is made in negotiations and in the committee work.

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Overview Paper and Think Pieces
E15 Expert Group on the Functioning of the WTO

Abbott, Roderick. 2013. *WTO in Times of Major Change.* E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Eckhardt, Jappe. 2013. *The Decreasing Interest of Business in the WTO: Why Should We Care and How Can We Solve It?* E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

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Elsig, Manfred. 2013b. *WTO Comitology: Unleashing the Potential of Governance Dimensions.* E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Odell, John S. 2013. *A Grand Bargain to Save the WTO from Declining Relevance*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Vickers, Brendan. 2013. *The Relationship between Plurilateral Approaches and the Trade Round.* E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

The papers commissioned for the E15 Expert Group on the Functioning of the WTO can be accessed at http://e15initiative.org/publications/.

Annex 1: Summary Table of Main Policy Options

Policy Option	Timescale	Current Status and Gap	How to Get There
Improving the performance of the negotiation function			
1. Break the stalemate with a new grand bargain including major elements of the Doha Round and authorization for a defined set of non-MFN plurilaterals	Short term	– Greater inclusiveness less information asymmetry – Mismatch in expectations from the Doha Round – Most negotiations under the Doha Round have been deadlocked for a number of years – The notion of single undertaking is questioned – Enhanced focus on plurilateral approaches (e.g. TiSA, ITA II, EGA)	– Build a coalition of "friends of the Doha Round" – DG could receive a mandate to propose bridging solutions to close the Doha Round – Create a built-in agenda and define approaches for issues currently excluded from the Round
2. Create a committee or working group focusing on plurilaterals to monitor and guide, particularly when not MFN	Short term		– Establish a special committee made of 20-25 Geneva-based and capital-based officials chaired by one Deputy DG meeting both in Geneva and capitals focusing on how best to design plurilateral approaches (both inclusive and exclusive ones)
Strengthening the role and impact of committee work			
3. Strengthen the role of the Secretariat by: – Enhancing data management – Making more use of in-house expertise	Short term	– Dominance of WTO members keeps the Secretariat on the sidelines of negotiations – Unmet demand for surveillance of new development in trade policy (e.g. monitoring of protectionist measures) – Limited use of in-house expertise	– Enhance resources devoted to data compilation, statistics, and data management – Develop information portals/ creation of information hubs on regulatory matters – Chairs should be allowed to create *ad hoc* working groups chaired by Secretariat with members.
4. Improve leadership and coordination	Short term	– Limited attention paid to committee work – High rotation of chairs (one-year term) – Informal coordination among different committee chairs	– Initiate a review by the Secretariat under the supervision of the DG providing a factual assessment of the inner workings of the committees – Initiate an independent survey collecting the views of members about the functioning of the committees – Based on those reviews and a report by the DG, initiate informal consultations with all the committee chairs and elaborate an action plan to be approved by members
5. Beyond compliance, improve the quality of exchange in committee work and create more space for deliberations	Medium term	– Current focus of committees remains on compliance with limited space to initiate a discussion on new challenges (e.g. climate change, exchange rate, food price volatility) – Limited use of external expertise (e.g. other IGOs) – Limited space for informal/ depoliticized debate	

Policy Option	Timescale	Current Status and Gap	How to Get There
6. Improve the buy-in of domestic decision-makers	Short term	– Limited involvement of capital-based officials, non-trade ministries, or members of parliaments (MPs)	– Discuss trade policy review reports more broadly with domestic constituencies (e.g. different ministers, MPs).
7. Build bridges with the public	Short term	– Limited opportunities for targeted discussions with the wider public outside of Geneva	– Provide live coverage of certain WTO events – Allow for public debate when meetings take place outside Geneva – Invite online feedback on ongoing work – Allow written submission to certain committees by business/NGOs
Enhancing the involvement of the business sector			
8. Create a "Business Forum" at the margin of WTO ministerial meetings	Short term	– Willingness of private sector to invest time and resources in multilateral negotiations has partly shifted to regional negotiations – Current interaction though informal/formal processes at the domestic level and in an *ad hoc* manner at the WTO but no institutionalised mechanism for routine interaction at the WTO	– Replicate and perpetuate first experience of the Bali Business Forum organised in 2013 by ICC, the Evian Group and ICTSD
9. Create a Business Advisory Council to channel interaction between the private sector and the multilateral trading system	Medium term		– Convene a series of large conferences in Geneva and in universities where WTO chairs have been created, to collect information about business needs and discuss best practices (these could be chaired by the World Economic Forum or ICC) – Business to propose a roster of representatives from which to appoint 30 participants elected for three years – Establish similar process for a Civil Society Advisory Council

Annex 2: Members of the E15 Expert Group

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* The experts all participated in their personal capacity. The views and recommendations expressed in the policy options paper are not attributable to any institution with which members of the E15 Expert Group are associated.

International Centre for Trade and Sustainable Development

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The International Centre for Trade and Sustainable Development (ICTSD) is an independent think-and-do-tank, engaged in the provision of information, research and analysis, and policy and multistakeholder dialogue, as a not-for-profit organisation based in Geneva, Switzerland.

Established in 1996, ICTSD's mission is to ensure that trade and investment policy and frameworks advance sustainable development in the global economy.

The World Economic Forum – committed to improving the state of the world – is the International Organization for Public-Private Cooperation.

The Forum engages the foremost political, business and other leaders of society to shape global, regional and industry agendas.

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