

TRADE INTEGRATION IN TURBULENT TIMES

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ABSTRACT

The WTO has been going through an existential crisis, from which it is like that it will not exit unscathed. If it is to remain an organization of universal membership, it will have to content itself to shallow integration. Its continuing policy relevance, will largely depend on the choices it will make about the nature of its own integration process. The good news is that no one can simply walk away from globalization. The downside (for the WTO) is that globalization is being increasingly administered through bilateral contracts.

I. THE END OF HISTORY AND THE BEGINNING OF TROUBLES

Imagine for a moment that we are in a time warp back to the beginning of 1995, less than thirty years ago, the day of the World Trade Organization's (WTO) advent. Its advent coincided time-wise with the apex of economic liberalism. During this time Francis Fukuyama, a renown political scientist, announced the end of history with the definitive end of the Cold War, which he believed was because of the prevalence and dominance of liberal economics.¹ This is also the time when economist John Williamson coined the term "Washington consensus" to denote an increasing persuasion across governmental actors that they should be pursuing macroeconomic discipline, market economy, and openness to the world through liberalization of trade and

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¹ See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* xi (1992). According to Torbjørn Knutsen, the term "end of history" was popularized by Alexandre Kojève, a French philosopher. Torbjørn L. Knutsen, *Answered Prayers: Fukuyama, Liberalism and the End-of-History Debate*, 22 BULL. PEACE PROPOSALS 77, 77 (1991). Knutsen used the term for a different reason, namely, to refer to the time when European history realized its potential. *Id.* at 77 n.4. Kojève was a member of the French delegation that negotiated the GATT. See Robert Howse, *Kojève's Latin Empire*, HOOVER INST. (Aug. 1, 2004), <https://www.hoover.org/research/kojeves-latin-empire> [<https://perma.cc/BLS6-558K>].

foreign direct investment (FDI).² The ensuing policy changes at the national level, the agreed monumental trade liberalization during the Uruguay round—hand-in-hand with technological evolutions (especially in bringing transport costs down) opened the way to global value chains (GVCs)—and reduced distance across nations to the lowest point ever in world history. To borrow an often-heard aphorism, the world started to look increasingly flat, and maybe even lopsided as the large economic-liberalism snowball made its way towards those at the other end. Proponents of centrally-planned economies were definitely losing the battle.

Legal scholars explored the same vein a few years before when Jackson observed an irreversible trend towards rules-based (as opposed to power-driven) diplomacy.³ The liberal world order had never felt more secure, as it was predicated on third-party adjudication, where gunboat diplomacy had no place.

Trade integration had certainly contributed to all that. In fact, a multilateral trade institution called the General Agreement on Tariffs and Trade (GATT) was one of the major pillars of the world liberal order.⁴ The GATT successfully generated and administered trade liberalization in the post-WWII era, its birth defects notwithstanding. It blossomed into an important organization during the Cold War, and even attracted a few “Eastern bloc” countries that joined it, provoking a dent across what Winston Churchill had termed the countries behind the Iron Curtain.⁵ The GATT thus emerged as an important part of the equilibrium of international relations in the post WWII era.⁶ It was only natural

² See John Williamson, *Did the Washington Consensus Fail?*, PETERSON INST. INT’L ECON., <https://www.piie.com/commentary/speeches-papers/did-washington-consensus-fail> [https://perma.cc/WF69-B22V]; John Williamson, *The Strange History of the Washington Consensus*, 27 J. POST KEYNESIAN ECON. 195, 195–96 (2004). Walter Russell Mead, Professor of Foreign Affairs at Bard College, paints the wider picture when stating that this model of governance also included “[s]elf-determination, the rule of law between and within countries, liberal economics, and the protection of human rights.” Walter Russell Mead, *The End of the Wilsonian Era: Why Liberal Internationalism Failed*, FOREIGN AFFS., <https://www.foreignaffairs.com/articles/united-states/2020-12-08/end-wilsonian-era> [https://perma.cc/R2Y2-3AYZ].

³ John H. Jackson, *GATT Machinery and the Tokyo Round Agreements*, in TRADE POLICY IN THE 1980S 159, 162 (William R. Cline ed., 1983).

⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁵ Churchill was referring to all countries of Eastern Europe, and not just Eastern Germany, from Bulgaria and Romania, all the way to the Baltic states (Estonia, Latvia, and Lithuania). See Winston Churchill, U.K. Prime Minister, *The Sinews of Peace (“Iron Curtain Speech”)* (Mar. 5, 1946), in <https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/the-sinews-of-peace/> [https://perma.cc/7CSB-7DN6].

⁶ Douglas A. Irwin, *The GATT’s Contribution to Economic Recovery In Post-War Western Europe* 2 (Nat’l Bureau Econ. Rsch., Working Paper No. 4944, 1994); *The WTO Can . . . Contribute to Peace and Stability*, WTO, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi09_e.htm [https://perma.cc/4AUJ-WVTA]. There are various accounts discussing the importance of GATT in maintaining equilibrium within international relations, and two stand out: see BENN STEIL, *THE MARSHALL PLAN* 172–73 (2018) quoting press statements and newspaper articles praising the GATT’s impact on international economic relations; and see THOMAS W. ZEILER, *FREE TRADE FREE WORLD* 1–2 (1999) stating “GATT . . . proved more adaptable to the demands of wartime sustenance, recovery, economic restoration, and, above all, the Cold War.”

that nations renewed their commitment to liberal trade policies by strengthening and expanding it.

The GATT honored its mandate. Successive official publications by the WTO—the annual World Trade Reports⁷—have established that trade integration has been progressing at a steady pace since the inception of the GATT.⁸ It was born with birth defects because its umbrella organization, the International Trade Organization (ITO), never saw the light of day, as the Truman Administration never submitted the ITO Charter for ratification to U.S. Congress.⁹ An ITO without U.S. participation therein was simply unthinkable.¹⁰ The GATT thus had to invent its institutional apparatus, and transform itself from an international agreement into an international organization.¹¹ An argument during this time was if a crippled GATT could bring about a multilateral liberal order during the Cold War-era, then what could a new GATT structured as a genuine international organization buoyed by the support of the whole world and created at the end of the Cold War achieve?

The WTO's inception came at about the same time the Berlin Wall fell, the Cold War finished and liberalism peaked.¹² With the support of an ever-increasing number of states, what seemed utopian before was suddenly another typical day in the office when 123 trading nations agreed to the WTO.¹³ This was a heterogeneous group of countries comprising the Norways and Switzerlands of this world, but also developing and least-developed countries (LDCs), and some former communist countries who, following the fall of the Berlin Wall, were negotiating accession to the European Union (EU).¹⁴ The best was yet to come: China's WTO membership. China had started its accession negotiation to the WTO during the Uruguay round, and Russia did the same while the ink on the Final Act of the Uruguay round had not dried.¹⁵ The

⁷ See generally *World Trade Report*, WTO, https://www.wto.org/english/res_e/reser_e/wtr_e.htm [<https://perma.cc/QBJ8-R494>].

⁸ *1998 Press Releases: Golden Jubilee of the Multilateral Trading System*, WTO, https://www.wto.org/english/news_e/pres98_e/pr88_e.htm [<https://perma.cc/5YJ4-36Q7>]; CATHLEEN D. CIMINO-ISAACS, RACHEL F. FEFER & IAN F. FERGUSON, CONG. RSCH. SERV., R45417, *WORLD TRADE ORGANIZATION: OVERVIEW AND FUTURE DIRECTION 62* (2020) (“The broadened membership of the WTO [since GATT] has promoted greater integration of emerging markets . . . in the global economy . . .”).

⁹ 1 RAJ BHALA, *INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK 331* (5th ed. 2019).

¹⁰ See Susan Ariel Aaronson, *From GATT to WTO: The Evolution of an Obscure Agency to One Perceived as Obstructing Democracy*, *ECON. HIST. SERVS.*, <https://eh.net/encyclopedia/from-gatt-to-wto-the-evolution-of-an-obscure-agency-to-one-perceived-as-obstructing-democracy-2/> [<https://perma.cc/K9X8-G2B4>] (“The US Congress never brought membership in the ITO to a vote, and when the president announced that he would not seek ratification . . . the ITO effectively died.”).

¹¹ BHALA, *supra* note 9, at 332.

¹² *Id.* at 364.

¹³ After eight years of negotiation in the Uruguay Round, the GATT was updated by the Marrakesh Agreement to create the WTO. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

¹⁴ BHALA, *supra* note 9, at 369.

¹⁵ For further discussion, see generally PETROS C. MAVROIDIS & ANDRE SAPIR, *CHINA AND THE WTO* (2021) [hereinafter MAVROIDIS & SAPIR].

multilateral trade organization was the vindication par excellence of Francis Fukuyama, and the tangible proof that the “Washington consensus” was now relevant beyond the Beltway.

The WTO was, of course, the successor organization and new GATT, the organizational expression of a rekindled commitment to all that the GATT stood for. In retrospect though, the year 1995 marked the culmination point of “Washington consensus.” At the time, it felt as if the best was yet to come. Analysts saw a shortcut from increasing WTO membership to transformation of formally centrally-planned economies into market economies, and even an espousal of democratic values in countries like China.¹⁶ Optimism was unfettered.¹⁷

A common measure to understand trade integration is the trade openness index: it adds imports and exports in goods and services and divides this sum by the global GDP (gross domestic product).¹⁸ The larger the ratio, the more any given country is exposed to international trade. The data provided by the reputed Peterson Institute of International Economics (PIIE) suggests that between 1860-1914 (the industrialization era) trade openness was measured at 17.6; and in the interwar period between World War I and World War II at 18.¹⁹ Following the GATT’s inception, between 1947 and the end of the century, the index moved from 10.1 to 39.5. In the WTO years, it moved to 61.5, and only recently it has been in retreat, moving from 61.5 to 53.5.²⁰

Globalization and trade integration were supposed to be a one-way street, but they failed. Instead, new terms have entered the world trade lexicon, for example, “slowbalization” is meant to denote the retreat of globalization.²¹ A term unknown a few years back and unthinkable in 1995 is now omni-present in writings about international relations.²² Less than thirty years since the apex of globalization, slowbalization was not the only bad news, as far as trade integration at the WTO-level was concerned. In chronological order, the following events and circumstances cropped up and changed the idyllic picture described above:

¹⁶ *Id.*

¹⁷ It is not that everyone agreed that the world community was entering a one-way street. Writing years before it all happened, Richard Neustadt and Ernest May had warned about discontinuity being an inherent element of human thinking and history. RICHARD E. NEUSTADT & ERNEST R. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION MAKERS* 263 (1986).

¹⁸ The World Bank publishes data concerning trade openness of countries regularly. *See Trade (% of GDP)*, WORLD BANK, <https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS> [<https://perma.cc/3EUM-G8CD>].

¹⁹ Douglas A. Irwin, *Globalization is in Retreat for the First Time Since the Second World War*, PETERSON INST. INT’L ECON. (Apr. 23, 2020), <https://www.piie.com/research/piie-charts/globalization-retreat-first-time-second-world-war> [<https://perma.cc/5PL7-XTNQ>].

²⁰ *Id.*

²¹ Luca D’Urbino, *The Steam Has Gone Out of Globalisation*, THE ECONOMIST (Jan. 24, 2019), <https://www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation> [<https://perma.cc/8DEK-FT5A>].

²² *See, e.g., Globalisation Making Way for ‘Slowbalization’, Says K M Birla*, BUS. STANDARD (Jan. 14, 2020, 6:24 PM), https://www.business-standard.com/article/companies/globalisation-making-way-for-slowbalization-says-k-m-birla-120011401177_1.html [<https://perma.cc/D5R6-UJ5Z>].

- The WTO exhibited a moribund legislative function and has not managed to add much to its legislative arsenal since 1995.²³ The promise that a reinvigorated trade organization will generate the next legislative arsenal to support future trade integration proved futile.²⁴ Reduced legislative activity, over time, should have impacted its judiciary function as well. However, as described below, this did not occur. It complicated its own goal in 2001 when it opened talks for a new round at the same time as China—the biggest challenge in terms of accession of new member that it had ever faced—was acceding to the WTO.²⁵ No delegation, not even those of the biggest players could realistically simultaneously focus on two very demanding challenges;²⁶
- The financial crisis of 2008 had a major impact on international trade.²⁷ Trade flows were reduced significantly, and various measures of dubious consistency with the WTO appeared worldwide.²⁸ The WTO was certainly not prepared for this. The WTO legislative arsenal had not made any provision for similar occurrences even though financial crises do occur, and do impact trade. The Keynesian logic that the government should supply the resources in order to stimulate growth again and get out of the recession gained pace worldwide. But similar actions in the WTO vernacular are termed “subsidies,”²⁹ and subsidies can be counteracted. The WTO, its institutional deficiencies in this respect notwithstanding, managed to resist the financial crisis without major hiccups, largely thanks to the restraint that its members showed.³⁰ They did not ask questions about the legality of subsidization, and did not resort to counteracting them through countervailing duties. At least not in big numbers. It would be an exaggeration though, to claim that the WTO emerged unscathed from this experience;
- The WTO judiciary function was dealt a severe blow when the Trump Administration undermined its monopoly to adjudicate multilateral trade disputes. The Appellate Body (AB) of the WTO, the much revered second instance court of the world trading regime, became de facto non-operational for any dispute submitted to it after December 2019 when

²³ CRAIG VANGRASSTEK, *THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION* 212 (2013).

²⁴ *See id.* at 213 (detailing the WTO’s position against voting).

²⁵ *See* BHALA, *supra* note 9, at 437.

²⁶ *See id.* at 443–44 (discussing the complexity to China’s integration into the WTO and subsequent shortcomings other countries faced).

²⁷ *See generally* Andrei A. Levchenko, Logan T. Lewis & Linda L. Tesar, *The Collapse of International Trade During the 2008–09 Crisis*, 58 IMF ECON. REV. 214 (2010).

²⁸ *See* WORLD TRADE ORG., *AID FOR TRADE AT A GLANCE 2009*, at 26 (2009), https://www.wto.org/english/res_e/booksp_e/aid4trade09_e.pdf [<https://perma.cc/7C4Q-ZB9K>].

²⁹ Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

³⁰ U.N. Conf. on Trade and Dev. & Japan External Trade Org., *International Trade After the Economic Crisis*, U.N. Doc. UNCTAD/DITC/TAB/2010/2, at xi (2010).

the term for two of its last three remaining members expired.³¹ By statutory fiat, it needs three members to function.³² It dwindled down to one and became staff-less at the end of 2020.³³ Starting in 2017, the Trump administration blocked each and every request by incumbent AB members for re-appointment.³⁴ And, eventually, a long simmering tension came to boil in December 2019 when the AB was reduced to one member. The hostile attitude adopted by the Trump administration in 2017 was the proximate cause for the falling of the AB into desuetude. It was hard to imagine that there would be no ripple effects, or that the crisis of the WTO judiciary would be self-contained. More than anything else, this has been the most de-stabilizing factor of the WTO edifice. The U.S. administration has thus gone full circle from the driving force of liberalization to the player most likely pulling the rug out from under the multilateral edifice;

- China proved to be more than what the WTO membership had bargained for when the door to the Asian behemoth opened in 2001.³⁵ Complaints about its behavior, both justified as well as unjustified, have multiplied.³⁶ The trading community did not manage to always address complaints against China in a lawful manner (e.g., through litigation) before the WTO, or by adding to the existing multilateral legislative framework. The Trump administration again moved from initially trading insults to eventually adopting a pugilistic attitude by entering into tariff wars with China, ignoring the (potential) relevance of the WTO.³⁷ Unavoidably, the effects of the feud were not absorbed by the two warring parties. Third parties suffered, along with the WTO, whose role of exclusive adjudicator of trade disputes had been dealt a severe blow;³⁸

³¹ Adam Behsudi & Finbarr Bermingham, *The End of World Trade As We Know It*, POLITICO (Nov. 20, 2019, 5:21 PM), <https://www.politico.com/news/2019/11/20/world-trade-end-donald-trump-072257> [<https://perma.cc/37ER-ZZ4W>].

³² Jennifer Hillman, *A Reset of the World Trade Organization's Appellate Body*, COUNCIL FOREIGN RELS. (Jan. 14, 2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body> [<https://perma.cc/F2C6-L36K>].

³³ *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [<https://perma.cc/EA2E-QPAN>].

³⁴ See Bernard M. Hoekman & Petros C. Mavroidis, *To AB or Not to AB? Dispute Settlement in WTO Reform*, 23 J. INT'L ECON. L. 703 (2020) for a detailed account of how it happened.

³⁵ See *What Happened When China Joined the WTO*, WORLD101, <https://world101.cfr.org/global-era-issues/trade/what-happened-when-china-joined-wto> [<https://perma.cc/M5R7-F85G>].

³⁶ See *id.*

³⁷ See *Trump Attacks WTO After it Says US Tariffs on China Broke Global Trade Rules*, THE GUARDIAN (Sept. 15, 2020), <https://www.theguardian.com/world/2020/sep/16/trump-attacks-wto-after-it-says-us-tariffs-on-china-broke-global-trade-rules> [<https://perma.cc/XQ69-2JYW>].

³⁸ The fact that U.S. tariffs had been imposed unilaterally, and hence, illegally, does not make the Chinese unilateral tariffs against U.S. goods any less illegal. By acceding to the WTO, all members accept to avoid taking justice into their own hands by using trade retaliation; they may retaliate only when they had secured a multilateral finding of illegality by WTO courts. Understanding on

- COVID-19 arrived, which found the world community totally unprepared. The WTO was no exception. The pandemic is, of course, not germane to the workings of the world trading system. Trade contributed to its spreading all over the world, but it did not cause the pandemic.³⁹ The volume of trade was yet again heavily reduced.⁴⁰ Worse, established supply chains were disrupted because of the proliferation of export restrictions on medical equipment.⁴¹ The WTO is counting on instruments that it outlawed, or dissuaded at the very least (like subsidies), to see some resurgence of trade in the short run.⁴² At a more practical level, the WTO had to switch gears, slow down its already substantially slowed down rhythm, move to virtual meetings, attempt to address its portfolio and manage its day-to-day business;
- After the trading community thought it saw it all in a short timespan, in 2020 Director-General (DG) Roberto Azevedo became the first head of

Rules and Procedures Governing the Settlement of Disputes art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. See generally MAVROIDIS & SAPIR, *supra* note 15 for a discussion on the life of China in the WTO so far, as well as what should be done about it to avoid undermining further the multilateral regime. It should be added that the Trump administration's trade policy towards China is probably the only area in foreign economic policy where U.S. Democrats and Republicans see eye-to-eye. See KISHORE MAHBUBANI, HAS CHINA WON? THE CHINESE CHALLENGE TO AMERICAN PRIMACY 29–30 (2020). The consensus regarding the China policy includes the U.S. private sector as well, which backed President Trump. *Id.* at 25–26. As Mahbubani notes, the U.S. private sector opposed the linking of improvements in the protection of human rights with granting China MFN rights in the 1990s, but they are now behind the sanctions that former President Trump has been imposing, even though, for example, the allegations concerning human rights violations play second fiddle to China's policies regarding technology transfer. See *id.*

³⁹ A variety of trade scholars have concluded as much. See Richard E. Baldwin & Simon J. Evenett, *COVID-19 and Trade Policy: Why Turning Inward Won't Work*, CEPR PRESS (2020), https://voxeu.org/system/files/epublication/Covid-19_and_Trade_Policy.pdf [<https://perma.cc/CU9D-BENE>] for a collection examining the relationship between COVID-19 and international trade flows.

⁴⁰ The WTO webpage has been reporting in short intervals information on this score from March 2020 onwards. *E.g.*, *Goods Barometer Confirms Steep Drop in Trade but Hints at Nascent Recovery*, WORLD TRADE ORG., https://www.wto.org/english/news_e/news20_e/wtoi_19aug20_e.htm [<https://perma.cc/E5R4-BHWM>]. By the end of October 2020, the original forecast for reduction of trade by 12.9% had been revised downwards, and the new prediction was around 9% reduction. See *Trade Shows Signs of Rebound from COVID-19, Recovery Still Uncertain*, WORLD TRADE ORG. (Oct. 6, 2020), https://www.wto.org/english/news_e/pres20_e/pr862_e.htm [<https://perma.cc/KD9R-UUP3>]. *Global Trade Alert* contains precious information on the impact of COVID-19 to world trade, as well as world trade institutions. See generally Simon J. Evenett, *Tackling Coronavirus*, GLOB. TRADE ALERT, <https://www.globaltradealert.org/reports/download/50> [<https://perma.cc/TE3B-ERHJ>].

⁴¹ CHRISTOPHER A. CASEY & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF 11551, EXPORT RESTRICTIONS IN RESPONSE TO THE COVID-19 PANDEMIC 1 (2020).

⁴² The public health crisis as provoked should make stakeholders rethink the wisdom of the current multilateral regulation of subsidies. See Aaron Cosbey & Petros C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17 J. INT'L ECON. L. 11, 12 (2014) for arguments in favor of amending the current agreement.

the institution to quit out of the blue before the end of his mandate.⁴³ He was not a transformative DG like Eric Wyndham-White,⁴⁴ but also not a transactional DG. He left the institution in a worse place than he had found it seven years prior, and his legacy is forever tainted for his decision to leave early. The DG's departure came when the membership had lost its leader, the U.S., who sometimes alone or with the assistance of the EU or the Old Quad⁴⁵ had steered the multilateral system towards the completion of the first eight rounds.⁴⁶ Following the conclusion of the Uruguay round, the Old Quad—a relatively homogeneous group—was replaced by the New Quad: Australia, Brazil, and India replaced Canada and tested the homogeneity of the leadership.⁴⁷ The emergence of China, and the ensuing abandoning of any relevance of the New Quad signaled the passage to a multi-polar, uncoordinated world. Ian Bremners' quip that we were entering a G-Zero world a few years ago seems more and more in tune with today's reality.⁴⁸ A rudderless WTO⁴⁹ has been operating in an increasingly rudderless world.

These are not the only factors that caused the crisis at the WTO. The impact of self-inflicted errors should not be neglected. To provide an illustration, DG Azevedo stopped the practice of Green Room meetings where the leading trading nations would informally exchange views.⁵⁰ Green Room meetings had

⁴³ Emma Farge & Philip Blenkinsop, *Damaged WTO Now Leaderless as Chief Azevedo Steps Down*, REUTERS (Aug. 31, 2020), <https://www.reuters.com/article/us-trade-wto/damaged-wto-now-leaderless-as-chief-azevedo-steps-down-idUSKBN25R170> [<https://perma.cc/93M5-SNFF>].

⁴⁴ DG Wyndham-White steered the GATT into success following the ITO demise when the GATT's very existence was at stake and chaired six of the eight negotiating rounds completed during the GATT-era. See generally Rogério De Souza Farias, *Mr GATT: Eric Wyndham White and the Quest for Trade Liberalization*, 12 WORLD TRADE REV. 463 (2013) for a discussion of his accomplishments.

⁴⁵ The Old Quad members were Canada, the EU, Japan, and the U.S. *Membership, Alliances and Bureaucracy*, WORLD TRADE ORG. [hereinafter *Membership, Alliances and Bureaucracy*], https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm [<https://perma.cc/7RAR-DFWY>].

⁴⁶ VANGRASSTEK, *supra* note 23, at 83.

⁴⁷ *Membership, Alliances and Bureaucracy*, *supra* note 45. We do not insinuate identity. Homogeneity means sharing basic features, a market economy, acknowledgment of property rights, a belief in the rule of law, etc.

⁴⁸ See IAN BREMNER, EVERY NATION FOR ITSELF: WHAT HAPPENS WHEN NO ONE LEADS THE WORLD vii-viii (2013).

⁴⁹ In fact, the first call to arms from the WTO came during the interregnum period, after DG Azevedo had left Geneva, by his deputy, Alan Wolff, who in September 2020 called for planning the post-COVID-19 world. Alan Wm. Wolff, *DDG Wolff: WTO Reform Crucial to Restoring Confidence in the Trading System*, WORLD TRADE ORG. (Sept. 21, 2020), https://www.wto.org/english/news_e/news20_e/ddgaw_21sep20_e.htm [<https://perma.cc/RA2H-H86U>].

⁵⁰ DG Azevedo discontinued this practice early on in his first mandate. An official record is provided of his speech during the July 2017 Informal Trade Negotiations Committee (the body overlooking the negotiations, which customarily the DG chairs) when he stated: "So I decided that instead of doing the Green Room that we used to do before I took office, I convened Informal H[eads] O[f] D[elegation]s where everybody could be invited and could speak their minds about anything." *Minutes of the Meeting*, WORLD TRADE ORG. 111, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/M168.pdf> [<https://perma.cc/F5V3-J7NN>].

emerged as a key feature in promoting consensus within the WTO, and their importance grew as membership (and heterogeneity) grew.⁵¹ They were replaced with meetings where all participated, which increased negotiating costs exponentially and unavoidably reduced the likelihood to reach agreement. DG Azevedo might as well have issued an obituary to any hope of coordinating national trade policies at this stage.⁵²

All of the listed events were the proximate causes, and not the ultimate causes, that caused the current crisis. Academic research suggests that we landed in the current situation because of various heterogeneous factors, ranging from domestic political choices (serving the interests of the rich at the expense of workers and ordinary retirees)⁵³ to the rise of populism and demagoguery. Trade is usually the first target, or one of the priority targets, of populism.⁵⁴

All this has had a disintegrating impact on the WTO. Some of the factors mentioned above had more immediate and dramatic effect, some less so. The rise of export restrictions of medical equipment during COVID-19 and the ensuing disruption of supply chains, as reported in *Global Trade Alert*, is a recent factor.⁵⁵ But the crisis that led to the demise of the WTO AB (the recourse to subsidization during and after the financial crisis, etc.) all contributed to undermining what the world trading community had been building since 1948 with the advent of the GATT.

Furthermore, these factors are not operating in clinical isolation from each other. Disintegration has been accelerated because they appeared (almost) simultaneously. For example, COVID-19 and the disruption of supply chains came in 2019, at a rather inopportune moment, when the Appellate Body crisis was at its peak. Unavoidably, it exacerbated an existing crisis.

⁵¹ Kent Jones, *Green Room Politics and the WTO's Crisis of Representation*, 9 PROGRESS IN DEV. STUD. 349, 349 (2009).

⁵² DG Azevedo contributed to the increase of negotiating costs, by abolishing the so-called "Green Room" meetings. These meetings had become part of the GATT routine, when DG Arthur Dunkel convened them regularly during the Uruguay round. VANGRASSTEK, *supra* note 23, at 204. Only chosen delegations would participate in meetings in the DG's office (which used to be green). *Id.* at 204–05. The objective was to restrict access to a few key delegations, which were nonetheless quite representative of the whole membership, in order to facilitate agreement. *Id.* at 204. The meetings of "Heads of Dels" (i.e., Heads of Delegations) on the other hand, regrouped all heads of delegations to the WTO. *Minutes of the Meeting*, *supra* note 50, at 115.

⁵³ See MATTHEW C. KLEIN & MICHAEL PETTIS, TRADE WARS ARE CLASS WARS 5–6 (2020).

⁵⁴ The trade policy followed by the Trump Administration is the best illustration to this effect, as is the discussion in the United Kingdom that eventually led to Brexit. See, e.g., DANI RODRIK, WHY DOES GLOBALIZATION FUEL POPULISM? ECONOMICS, CULTURE, AND THE RISE OF RIGHT-WING POPULISM 23 (2020). Coglianesse offers a very perceptive analysis of populism. See Cary Coglianesse, *Pledging, Populism, and the Paris Agreement*, 34 MD. J. INT'L L. 139, 175–76 (2019). See generally Paul J.J. Welfens, *Trump's Trade Policy, BREXIT, Corona Dynamics, EU Crisis and Declining Multilateralism*, 563 INT'L ECON. & ECON. POL'Y 563 (2020) (examining how recent major trade decisions by different countries effect global trade as a whole); KEVIN H. O'ROURKE, A SHORT HISTORY OF BREXIT (2019) (discussing the events leading up to Brexit and focusing in part of the influence of trade).

⁵⁵ Simon J. Evenett, *Tackling COVID-19 Together*, GLOB. TRADE ALERT 2 (2020), <https://www.wita.org/wp-content/uploads/2020/03/TacklingCoronavirus.3.pdf> [<https://perma.cc/8BRH-A57B>].

The future of the WTO and the world's trading system are in limbo, with scholars questioning what will happen next. The WTO could be reaching the end of its life, leaving the trading community without a guide. The election of a new leader gives hope of a more stable future for the WTO, but leadership is only one facet. The WTO cannot legislate as it does not adjudicate anymore. At the moment of writing, there are fifteen appeals against panel reports, which will not be adjudicated since there is no AB to adjudicate them, leaving those considering taking action wondering if there is a point to submitting an appeal into the void.⁵⁶ The two crises are interconnected, and resolving the judiciary crisis is necessary, but not sufficient to resolving the WTO crisis. The resolution of the legislative crisis is the key to ensuring the continuous policy relevance of the WTO. There are basically two options available. The WTO membership must choose: either remain reactive, and simply pick up the low-hanging fruits from the FTA-agenda; or become proactive and attempt to legislate again. We take these issues in turn, before we conclude.

II. WHY THE LEGISLATIVE AND JUDICIARY CRISES ARE INTERCONNECTED?

In a working paper for the European University Institute, Professor Bernard Hoekman and myself argued that the legislative and judiciary crises are interconnected.⁵⁷ Here is why: if trade agreements continue to be signed in the realm of free-trade areas (FTAs) legislation (as the recent comprehensive work of the World Bank shows),⁵⁸ then all WTO courts will adjudicate, giving rise to disputes in twenty-five year old agreements. And this is the good scenario where the crisis of the judiciary has been solved. In this scenario, the writing is on the wall for the WTO. The trade agenda moved to FTAs and deep-trade agreements (DTAs) largely because of the subject-matter.⁵⁹ There is not much to be done in the realm of tariff-protection, since the average tariff-level is very low indeed, and concentrated in areas where for domestic political economy reasons additional reductions are unlikely.⁶⁰ Addressing behind-the-border protection presupposes that trading partners share the concern, and the means to achieve it.

⁵⁶ The most recent is DS543. Notification of Appeal by United States, *United States–Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/10 (Oct. 27, 2020).

⁵⁷ See Bernard Hoekman & Petros C. Mavroidis, *Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know It?* 14 (Eur. Univ. Inst., Working Paper No. RSCAS 2020/06, 2020).

⁵⁸ Claudia Hofmann, Alberto Osnago & Michele Ruta, *Horizontal Depth: A New Database on the Content of Preferential Trade Agreements 2* (World Bank Grp., Working Paper No. 7981, 2017). The World Bank uses the terms DTAs (deep-trade agreements) to denote FTAs which move beyond the current WTO agenda. See WORLD BANK GROUP, HANDBOOK OF DEEP TRADE AGREEMENTS 3–5 (Aaditya Mattoo, Nadia Rocha & Michele Ruta eds., 2020) [hereinafter DTA HANDBOOK]. These FTAs opt for deep integration, in the sense of adopting common policies or providing recognition of unilaterally-defined policies by the partner. *Deep Trade Agreements*, WORLD BANK, <https://datatopics.worldbank.org/dta/about-the-project.html> [https://perma.cc/5WDJ-689L].

⁵⁹ See DTA HANDBOOK, *supra* note 58, at 3–5.

⁶⁰ See Chad P. Bown & Douglas A. Irwin, *The GATT's Starting Point: Tariff Levels circa 1947* 3–4 (World Bank Grp., Working Paper No. 7649, 2016) (providing empirical data to this effect).

Furthermore, there are no obvious quid pro quos: it is one thing to reduce the tariff of widgets for gadgets; it is a different thing to negotiate on the optimal regulation of the precautionary principle. The negotiation would be facilitated if only like-minded players would take a seat around the table and if Tokyo round-era codes⁶¹ were re-introduced.

It would be paradoxical if the world trading community trusted the WTO membership for adjudication, but not for legislation. The WTO is not an adjudication only forum, like the International Court of Justice (ICJ).⁶² It adjudicates only disputes coming under its aegis, i.e., negotiated between the trading nations under its auspices.⁶³ When the legislative function ceases, then a very powerful warning signal has been sent to the judicial function as well.

III. THE OPTIONS FOR THE WTO

In a 1962 speech at West Point (the United States Military Academy), Dean Acheson, the great American statesman, famously quipped that “Great Britain has lost an Empire and not yet found a role.”⁶⁴ All proportions guarded, this is where the WTO is now. FTAs have taken away a substantial part of the WTO’s agenda, while the WTO is still debating how it can stay relevant.

The judicial function has to be re-established, even if we continue to observe the membership voting with its feet and moving towards FTAs. Disputes originating in the Uruguay round agreements continue to emerge and need to be addressed somewhere. But the legislative inertia of the WTO must be addressed as well. We can take it for granted that, because of its membership heterogeneity—the WTO’s 164 members are about to become 168,⁶⁵ making it look more and more like the UN—the WTO will have to be limited to “shallow integration” (basically agreements calling for non-discriminatory behavior) at the multilateral level. As it stands, the WTO contains three layers of obligations embedded in:

- Multilateral agreements, which bind all WTO members (Layer 1);
- Plurilateral agreements, which bind only their signatories (Layer 2);
- Protocols of accession, which are idiosyncratic, and bind the acceding

⁶¹ During the Tokyo round (1973-1979), a number of agreements (“codes”) were signed and participation was optional. See GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION* 16 (1986).

⁶² The ICJ is the Hague court, which is, in principle, competent for all disputes that arise in international relations. See generally GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* (1986) (recounting the court’s practices and procedures).

⁶³ DSU art. 10.

⁶⁴ Rita Deliperi, *Dean Acheson’s Observation of Great Britain in 1962*, E-INT’L RELS. (Aug. 9, 2015), <https://www.e-ir.info/2015/08/09/dean-achesons-observation-of-great-britain-in-1962/> [https://perma.cc/JJ6M-CBBB].

⁶⁵ The WTO webpage updates regularly the accession negotiations and has dedicated a special column to this effect in the official webpage. See *Summary Table of Ongoing Accessions*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/status_e.htm [https://perma.cc/JJQ3-J466].

country only (Layer 3).⁶⁶

Layers 1 and 3 do not need to change. The question is all about Layer 2. This layer overlaps to some extent with the content of FTAs and DTAs, but the DTAs contain WTO+ and WTOx obligations⁶⁷ which are known in Layers 1 and 3. Just like Layer 2 though, FTAs are selective clubs. The question for the WTO to continue its policy relevance in the future could be phrased as the following options:

- Should it allow deep integration (WTO+ and WTOx) to continue to flourish outside its confines?; or
- Should it attempt to bring it within its four doors? What does it take to divert the appetite for trade agreements within the confines of the multilateral edifice? Or, more simply, how can the WTO mimic the attractiveness of FTAs?

If the former option is taken, the WTO cannot stay idle. It will have to find ways to build bridges to the trade community, which continues to legislate away from Geneva. If not, it will be restricted to an ageing multilateral framework, as the probability to sign multilateral agreements decreases. Increasing membership and heterogeneity are the reason for pessimism in this respect. To keep its policy relevance, WTO must renew its legislative arsenal, and one low-cost way to do it is by incorporating elements already successfully negotiated in the realm of FTAs. For example, there are dozens of FTAs which include provisions regarding the relevance of the Harmonized System in the classification of goods.⁶⁸ Why can the WTO not add a provision to this effect, and avoid disputes like *EC-Chicken Cuts* in the future?⁶⁹ There must be some low-hanging fruit in this context that could be multilateralized. The dialogue between the FTAs and DTAs on one hand, and the WTO on the other, must be ongoing. This would be one way for multilateralizing some of the FTA/DTA-content.

If the latter option is taken, it will have to make its Layer 2 more attractive. But it will not be in a position to do that unless the currently prevailing formula of a single undertaking is abandoned. In this scenario, moving to variable geometry⁷⁰ is the means for the WTO to revive its currently moribund legislative

⁶⁶ See 1 PETROS C. MAVROIDIS, *THE REGULATION OF INTERNATIONAL TRADE* 53 (2015) [hereinafter MAVROIDIS VOLUME 1] for a discussion of the layers and how they intertwine.

⁶⁷ This terminology was first used by Henrik Horn, Petros C. Mavroidis and André Sapir. WTO+ refers to disciplines which are covered by the WTO contract, but where FTA partners want to commit more. Henrik Horn, Petros C. Mavroidis & André Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, *THE WORLD ECON.* 1566–67 (2010). WTOx refer to disciplines, which are not germane to the current WTO contract. *Id.*

⁶⁸ See, e.g., Comprehensive and Economic Trade Agreement, Can.–E.U., Oct. 30, 2016, O.J. (L 11) 23.

⁶⁹ See, e.g., Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts (The EC-Chicken Cuts Case)*, WTO Doc. WT/DS269/AB/R & WT/DS286/AB/R (Sept. 12, 2005) (a dispute between European Communities and Brazil and Thailand about tariff classifications of salted chicken meat).

⁷⁰ The term “variable geometry” is used in political science and international relations to denote

function. Furthermore, if we stick to the current formula of Annex 4 agreements, the latter option will never be a substitute for the former option. Annex 4 agreements are issue-specific, whereas FTAs, even when they are not all-encompassing, include wide coverage as shown by a very comprehensive study of the World Bank.⁷¹ Thus, both described options should be viewed as complements, rather than substitutes.

Finally, there is ample evidence of an appetite for trade deals, as the ever-increasing number of FTAs/DTAs shows. Irrespective whether one endorses the rent-seeking, terms-of-trade, or commitment-theory explanation for trade agreements,⁷² trade agreements are necessary for trade liberalization to occur between the members of the world trading community.

IV. IT TAKES MORE THAN TWO TO TANGO, THIS TIME

The new WTO DG will be appointed shortly and their hands will be full. They need to address the issues discussed in this article, but no matter how competent they prove to be, they cannot do it without the active support of the membership. All membership should be behind the efforts to re-start the WTO engine, but some more than others.

Up until the Uruguay round, decisions followed a similar pattern: as long as the EU and the U.S. shared a worldview, and were dancing in the same direction, the world trading community would follow. That is not the case anymore. We have now moved to a multi-polar world where voices are multiplying and diversifying. We are experiencing a cacophony when a single tune is required. The world needs to come together in the Swiss headquarters of the WTO and compose its own multilateral Alpine yodel. This is no cakewalk, but one key piece of the jigsaw puzzle seems to be abandoning its previous centrifugal tendency and move towards acting in a centripetal manner. President Joseph Biden's call to arms is in favor of working with other nations towards healing and uniting America and, also, the world.⁷³ Hopefully, the WTO favors his world agenda.

One last observation is warranted: the grievances that the U.S. has put before the WTO in recent years have not gone away, and some of them will not go away either. And it is important to distinguish between substance and process.

that some of the members of a wider organization agree to disciplines, which bind only them and not the whole membership. See Elisa Tino, *The Variable Geometry in the Experience of Regional Organizations in Developing Countries*, 18 SPANISH Y.B. INT'L L. 141, 143 (2014). The Tokyo round codes were referred to above and are an expression of variable geometry. See WINHAM, *supra* note 61. Only a few GATT members would participate, for example, in the Tokyo round Antidumping Agreement. *Id.* at 353–54.

⁷¹ See *Deep Trade Agreements*, WORLD BANK, <https://datatopics.worldbank.org/dta/table.html> [<https://perma.cc/AJB5-7FPR>].

⁷² For a non-technical explanation of the dominant theories for trade agreements see MAVROIDIS VOLUME 1, *supra* note 66, at 26–33.

⁷³ Stephen Collinson, *Biden Stakes Out His Anti-Trump Presidency*, CNN (Nov. 25, 2020), <https://edition.cnn.com/2020/11/25/politics/joe-biden-donald-trump-cabinet/index.html> [<https://perma.cc/YLQ5-6W87>].

The abrupt manner in which the Trump administration dismantled the Appellate Body, and threw the entire WTO dispute settlement system into jeopardy, should not be confused with the substantive criticism that successive U.S. administrations have voiced. Even though the U.S. was alone in disregarding the *Dispute Settlement Understanding* (DSU)⁷⁴ disciplines, it was not alone in voicing criticism.⁷⁵

Surely, the worldview of the Trump administration (its trade policy included) is an oddity when compared to the traditional U.S. approach to international relations, as Joseph S. Nye, among others, have shown.⁷⁶ In an op-ed in the *Financial Times*, Francis Fukuyama went so far as to state that: “America’s choice . . . signifies a switching of sides from the liberal internationalist camp, to the populist nationalist one.”⁷⁷

Borrowing from Haass, the view of the Trump administration was that foreign policy is an “expensive distraction.”⁷⁸ Where previous presidents invested in building coalitions and establishing international cooperation, former President Trump divested. The Trump administration was a largely transactional administration, when instead building a system and maintaining the system requires the exact opposite attitude. A transactional attitude is highly consistent with populist tendencies. Giving in to populism means giving up compulsory third-party adjudication, the foundational element of WTO adjudication. The U.S. did that. But, it bears repeating, we need to distinguish between U.S. criticism and U.S. attitude. The U.S. did raise some points worth reflecting upon regarding WTO dispute adjudication, and the manner it was evolving. The institutionally embedded mechanism to address grievances—the DSU

⁷⁴ The Dispute Settlement Understanding (DSU) is the WTO Agreement regulating dispute adjudication at the WTO. See generally DSU, *supra* note 35; *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [<https://perma.cc/S7LZ-6JBQ>].

⁷⁵ See, e.g., Matteo Fiorini, Bernard M. Hoekman, Petros C. Mavroidis, Maarja Saluste & Robert Wolfe, *WTO Dispute Settlement and the Appellate Body Crisis*, 54 J. WORLD TRADE 557.

⁷⁶ See, e.g., JOSEPH S. NYE, DO MORALS MATTER?: PRESIDENTS AND FOREIGN POLICY FROM FDR TO TRUMP 6–8 (2020).

⁷⁷ Francis Fukuyama, *US Against the World? Trump’s America and the New Global Order*, FIN. TIMES, <https://www.ft.com/content/6a43cf54-a75d-11e6-8b69-02899e8bd9d1> [<https://perma.cc/P7DA-R59M>]. On this score, Walter Mead has expressed similar views. Walter Russell Mead, *The Jacksonian Revolt: American Populism and the Liberal Order*, 96 FOREIGN AFFS. 2, 2 (2017). Bob Davis and Lingling Wei have held the view that President Trump did not want to be associated with anything that the Obama administration had contributed, and this explains its attitude in international trade relations as well. BOB DAVIS & LINGLING WEI, SUPERPOWER SHOWDOWN: HOW THE BATTLE BETWEEN TRUMP AND XI THREATENS A NEW COLD WAR 19 (2020). On the trade front, the single most dramatic (and alas, costly, as Raj Bhala first observed) change, came early on in President Trump’s term, when he withdrew U.S. participation in the Trans-Pacific Partnership (TPP), an agreement aimed to tame China’s state involvement in the private economy. Raj Bhala, *TPP, American National Security and Chinese SOEs*, 16 WORLD TRADE REV. 655, 668–69 (2017). See generally G. JOHN IKENBERRY, LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORK ORDER (2011) (explaining the U.S. attitude in the post WWII-years in more general terms).

⁷⁸ Richard Haass, *Present at the Disruption: How Trump Unmade U.S. Foreign Policy*, 99 FOREIGN AFFS. 24, 26 (2020).

Review—proved to be an inadequate forum to help dissipate U.S. concerns. All this to state, President Biden might turn a page when it comes to attitude, but will most likely take a couple of leaves from the U.S. book of expressed grievances when moving forward on the trade front. The first step for President Biden will of course, be a request to renew his Trade Promotion Authority (TPA), so that he can negotiate at the international plane.⁷⁹

V. A YEAR FROM NOW

*“I’m not crazy about reality, but it’s still the only place to get a decent meal.”*⁸⁰ – Groucho Marx

Groucho Marx’s quote probably best sums up the attitude that trading nations should adopt when they meet next in Geneva. It is not easy to replace the WTO and plunging into uncertainty by returning to less than multilateral trade institutions creates risks, which are difficult to measure. Trade policy should be analytically approached and in a self-contained manner, because it becomes almost unmanageable—analytically, that is—to view it as part and parcel of international relations. But it is part and parcel of international relations and moving one piece from the overall jigsaw puzzle might have a domino effect.

A second-best WTO is preferable to a non-WTO scenario, because of the cost of not having a WTO risks not being self-contained. It risks contaminating the wider realm of international relations. This is the time of incremental, positive steps in the right direction. It would be very appropriate indeed if the trade leaders were to take a leaf from the GATT tradition of pragmatism—that Robert E. Hudec explained in unparalleled manner—and start addressing the real problems one-by-one.⁸¹

Reality does not lend much to optimism as things stand. But the counterfactual is worrisome.

⁷⁹ The current TPA expires on July 1, 2021. See Ian F. Fergusson, CONG. RSCH. SERV., IF 10038, TRADE PROMOTION AUTHORITY (TPA) 1–2 (2020).

⁸⁰ *Groucho Marx Quotes*, SUCCESSORIES, <https://www.successories.com/quote/author/365/groucho-marx-quotes/1> [<https://perma.cc/4UBY-S4X7>].

⁸¹ See Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 89 AM. J. INT’L L. 663, 663–66 (1995).