

Saving the WTO
A Roadmap to the Future of the World Trade Organization

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Introduction

My purpose today is to underline the value of the current trading system, to list some of the major challenges it faces and to chart a path forward.

I have a decidedly positive view of the WTO's future. This judgment is based largely on the undisputed belief by all of its Members that having a multilateral trading system serves their interests. It is through the WTO that sovereign nations seek to find ways to cooperate with each other for mutual economic benefit. It is a forum in which they can set the rules for international trade and raise specific trade concerns with other countries. It is where they come to settle their trade disputes. For developing countries, it is an indispensable tool for achieving development goals. For the most fragile and conflict-affected countries, membership in the system is about achieving and maintaining peace through improving the lives of their peoples.

Taking stock

By almost all measures the liberal international economic order created by the United States and its allies three-quarters of a century ago has been an enormous success. In the last half of the 1940s, visionary leaders decided to provide funding for reconstruction and development through the International Bank for Reconstruction and Development. To achieve stability among currencies, they established the International Monetary Fund. To bring about more open markets they created the multilateral trading system now encompassed within the World Trade Organization.

It would be a mistake to think that the creators of these international economic institutions were starry-eyed idealists. They were anything but. Their formative years were characterized by two world wars interrupted by the Great Depression. They were battle-hardened realists who strove to create a better world. These Americans -- and many of the prime movers of that era were Americans -- working with allies, sought to create a world without discrimination. They had experienced Imperial Preferences and wanted equal trading relationships. Through the Marshall Plan, and the predecessors of the OECD and the World Bank, they worked to restore the war-torn economies of Europe, they aided the economic recovery of their former enemies, Germany and Japan, and they sought to raise up the developing countries, often former colonies of European powers.

They believed that market forces should determine competitive outcomes and that as a result all would benefit. Perhaps they thought that David Ricardo was right, that nations trading with each other based upon what they each did best would be for the benefit of all. What they clearly did believe was that that Cordell Hull was right, that a durable peace could be built upon an open multilateral trading system.

Billions of people have had and are having better lives as a result of the creation of this liberal international economic order.

Today, the vast majority of world trade flows in compliance with the tariffs listed in schedules filed at the WTO. Countries notify their standards in draft to allow others to comment on them. Members expose their trade policies to regular review by their peers. They join together to help the poorest among them meet sanitary and phytosanitary standards (SPS) and give other kinds of technical assistance to the least developed countries, without which large segments of the population in recipient countries would risk being at below subsistence levels. The plethora of bilateral and regional trade agreements could not exist without resting on the foundation of the multilateral rules.

Testimony to the value of the WTO is the fact that 36 countries have joined the organization since it was founded in 1995, and 23 other countries are engaged in formally seeking entry. Most remarkable of all, among the countries deeply committed to their process of accession are some of the most fragile and conflict affected in the world. The last two countries to join were Liberia and Afghanistan. The current accession queue includes Ethiopia, East Timor, Iraq, Somalia, Sudan, South Sudan, Libya, Syria, Lebanon and Bosnia-Herzegovina. None are strangers to recent or even current conflicts. In addition, countries that not that long ago prided themselves on having non-market economies, such as Belarus and Uzbekistan, also seek admission.

Since its founding twenty-five years ago, the WTO has added to its canon of agreements the Information Technology Agreement and the Pharmaceutical Agreement, each providing for zero tariffs for its participants. The Trade Facilitation Agreement was negotiated to reduce the costs of moving a product from factory or farm in one country to a consumer in another. On average, the costs of crossing a border amount to an estimated 24%, dwarfing the level of most countries' current tariffs. Reducing that burden is a work in progress, but that work has begun.

Current challenges

That what we have in the trading system is of great value does not make it sufficient. This is a time of testing for the WTO.

To get to a brighter future, it is necessary to deal effectively with present challenges. While they are formidable, within each challenge is an equally great opportunity.

In addition to unfinished business, namely concluding the fisheries subsidies negotiations, a list of priority items for the attention of the WTO Members should consist of the following:

1. **Dealing with the trade aspects of fighting the pandemic.**
2. **Agreeing to trade actions to boost the economic recovery, with special attention to developing countries.**
3. **Making the recovery greener.**
4. **Assuring that carbon border adjustment measures are based on cooperation and do not become a source of conflict.**
5. **Forestalling the digital economy becoming segmented by national borders.**
6. **Putting into place binding dispute settlement that is accepted as legitimate by all litigants.**
7. **Addressing the need for the trading system to be visibly more positive for workers.**
8. **Reforming the WTO as an institution.**

To respond adequately to the challenges posed requires adoption by the Members of the WTO of an attitude exemplified in United States history by two of its Presidents.

Theodore Roosevelt facing a nation whose economy required dramatic reforms held that

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

Franklin Roosevelt, facing the need to spur economic recovery from the Depression and to provide greater equity, told the American people:

The country needs and unless I mistake its temper the country demands bold persistent experimentation. It is common sense to take a method and try it. If it fails admit it frankly and try another. But above all try something.

What the WTO needs now is action. The time for timidity, if ever it existed, is long past. WTO reform will not come through calling a new constitutional convention. There is neither time nor appetite for that. Reform will only come through solving actual problems.

None of the major challenges for 2021 and 2022 are insuperable. None can safely be ignored. The way forward for the WTO is completely clear. Facing a multiplicity of key tests, it must fail none of them.

COVID-19

- The greatest challenge by far to international trade at present is the flow of vaccines, medicines, medical supplies and medical equipment across borders to deal with the pandemic. Nothing in the field of trade is more important. Pious words are insufficient. The defeat of COVID-19 is job #1, and agreement must be reached on how the trade aspects of future pandemics are to be dealt with.

The following are some suggestions of a role for the WTO with respect to the pandemic¹:

- Transparency is what the WTO is supposed to be about. It is imperative to shine a light on the facts concerning vaccine availability and prospects for increasing supply, working with the manufacturers and the WHO. It is necessary to understand whether any restrictions contained in the licensing of intellectual property inhibit the flow of essential goods.
- The WTO Secretariat can monitor and publish with precision in real time the best information available -- regardless of member views -- of whether exports are being impeded or pre-empted.
- Members should suspend tariffs on essential goods.

¹ I made a number of more detailed suggestions at Chatham House on 30 October 2020. See: https://www.wto.org/english/news_e/news20_e/ddgaw_30oct20_e.htm.

- The Pharmaceutical Agreement which provides for zero tariffs should be expanded in coverage both of countries and products, particularly those relevant to fighting the pandemic.
- The Information Technology Agreement should be updated with medical equipment included.
- Members could create a special Essential Health Products Agreement (EHPA) providing for zero tariffs and elimination of other trade barriers, for trade facilitation measures, and contain supply commitments from countries that are in a position to export essential products. The World Customs Organization (WCO) would be a key partner.²
- Members can agree that they will do more than take into account the effect on others of export restrictions on essential products (as is now required for agricultural products) and give quantitative definition to the term “equitable share”, a current requirement when export restrictions are imposed³. They can give prior notice to the extent feasible of any planned export restriction and live up to the obligation to consult promptly about any other member’s concerns.
- An *ad hoc* working party group should discuss on a real time basis what is happening in trade in essential products, informed by a proactive secretariat.

² <http://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/natural-disaster/covid19-vaccines-distribution.aspx>.

³ An exception to the prohibition on imposing export restrictions is contained in WTO/GATT Article XX(j), where the restriction is *essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.* (Emphasis supplied).

- The Director General can offer her good offices to mediate differences, and differences there will be, where essential goods are not flowing freely across borders.
- The WTO can harness the capabilities of its developed members -- mirrored by the willing participation of developing members -- to put into place effective trade facilitation measures for essential goods and services.
- As Chad Bown has suggested, Members can coordinate subsidization of their segments of global value chains to increase supplies of essential goods, most prominently, those related to the production and distribution of vaccines.⁴
- Where dispute settlement is needed, mechanisms much more effective and timely than traditional panel processes can be put into place.
- And, yes, the WTO Members can work their way through the problem of the delicate balance of intellectual property rights, to both incentivize invention and to meet the current challenge of the pandemic. Part of the solution could be complete transparency of current licensing agreements. Technical assistance can be given to make the existing compulsory licensing provisions of the TRIPS agreement more accessible.

Given Ngozi Okonjo-Iweala's background and special knowledge with GAVI, one can expect a nontraditional role for the WTO, for example encouraging investments that will ultimately increase future production and as a result greater security of supplies in developing countries. Using the convening power of the WTO to bring together all who can contribute to a

⁴ <https://www.piie.com/blogs/trade-and-investment-policy-watch/heres-how-get-billions-covid-19-vaccine-doses-world>.

solution, the other international economic institutions, the private sector, experts, is necessary, and a first step in that direction has already been taken.⁵

Each of these steps can be a template for dealing with future pandemics far more effectively than the nations of the world have dealt with this one.

We can note in passing that major WTO reform, if the above steps are taken, will have been achieved through the actions taken. At least with respect to the pandemic, rule-making will have been restored. And for the exigencies of fighting the coronavirus, executive functions of the WTO would have been called into existence, in the form of the Secretariat engaging in monitoring, calling out measures which appear to be harmful to international trade, and providing current facts and analyses that will aid in both international coordination and national decisions.

Promoting global economic recovery through trade

Global economic recovery will be fostered primarily through national monetary and fiscal policies, assisted by international financial institutions. Trade nevertheless has a major role to play:

Rolling back and resisting adding to unneeded protection is the first necessary step,

During 2020, many political announcements were made favoring on-shoring, but global supply chains actually remain an imperative and have on the whole remained in place. It should be clear that what is most important is supply chain resilience, whether from domestic or diverse foreign sources.

⁵ https://www.wto.org/english/news_e/news21_e/dgno_09mar21_e.htm. For a report of an 14 April meeting see: https://www.wto.org/english/news_e/news21_e/dgno_14apr21_e.htm.

Without trade finance, the recovery is more likely to be K-shaped on a global basis, with many developing countries left behind, particularly the least developed. Where the WTO played an important positive role during the financial crisis over a decade ago, beyond holding the line on unnecessary protection, was using its convening power to bring together major commercial banks and international financial institutions to seek to restore trade finance. It should do so again.

A greener global economy

To make the recovery greener, re-starting and promptly concluding an Environmental Goods Agreement, not addressed since 2016, would be a positive contribution. In addition, talks for the liberalization of environmental services should be initiated.

WTO Members are increasingly recognizing their stewardship of the planet. In mid-November, two groups of WTO Members initiated two substantial environmental activities: a structured discussion on trade and the environment, and an informal dialogue on plastics pollution.

Fifty members⁶ have said they would work together on the first of these two, using structured discussions to advance work on trade and environmental sustainability. This would include promoting transparency and information sharing, identifying areas for future work within the WTO, supporting technical assistance and capacity building needs, particularly for

⁶ The proponents' Communication on Trade and Environmental Sustainability can be found at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/CTE/W249.pdf&Open=True>. The members that have sponsored this communication are Australia; Canada; Chad; Chile; Costa Rica; the European Union; Gambia; Fiji; Iceland; Japan; Korea; Liechtenstein; Maldives; Mexico; Moldova; Montenegro; New Zealand; North Macedonia; Norway; Senegal; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Switzerland; and the United Kingdom.

least-developed countries, and working on “deliverables” of environmental sustainability in the various areas of the WTO.⁷

China and Fiji, together with five other Members⁸ at the same time launched an open-ended informal dialogue on plastics pollution and environmentally sustainable plastics trade to address the rising environmental, health and economic cost of plastics pollution and the importance of trade as a solution. At the launch of this initiative, I commended to the Members consideration of a revived Environmental Goods Agreement negotiation as a means to achieve better plastics trade by reducing barriers to substitutes and waste management equipment.⁹

Climate change

- The second greatest challenge to humanity is climate-change. It is a secondary priority at present only due to the immediacy of the felt need to reduce deaths and incapacity due to infection from the coronavirus and the need to markedly reduce the economic harm from the pandemic.

In June 2021, the European Commission plans to announce its proposal for an EU carbon border adjustment mechanism. The stated intent is to apply carbon pricing to imported goods in the same way as for emission-intensive goods produced within the EU. The objective is to limit carbon leakage. Further announcements by countries can be expected in light of the upcoming COP26 in Glasgow November 1 -12, this year.¹⁰

⁷ My remarks at the launch of this initiative can be found at https://www.wto.org/english/news_e/news20_e/ddgaw_17nov20_e.htm.

⁸ *The seven Members original sponsors of the plastics initiative are Australia, Barbados, Canada, China, Fiji, Jamaica and Morocco.*

⁹ https://www.wto.org/english/news_e/news20_e/ddgaw_17nov20a_e.htm.

¹⁰ UK Prime Minister Boris Johnson assured his fellow G20 Leaders that the weather is very good for a visit to Glasgow in early November.

To avoid a counterproductive clash over climate-related trade measures, there need to be focused and constructive discussions at the WTO on how to ensure that trade-related measures adopted — and trade more broadly — contribute effectively to global ambitions on climate change. The current WTO rules are not an impediment to the adoption of environmental measures. The WTO rules require Members to be transparent and to offer the opportunity for other Members to express their views and concerns with regard to policies that might affect their trade interests. From 2009 to 2018, around 11,500 environment-related measures were notified to the WTO. The primary WTO requirement is that trade measures adopted for legitimate policy objectives must not create unjustifiable or arbitrary discrimination. The WTO's rules allow sufficient policy space for the adoption of ambitious policies even if they may have a significant impact on trade.

Among policy measures that can be considered beyond carbon border adjustment measures are:

- providing support to low-carbon technologies, including support to research and development.
- addressing industrial subsidies taking into consideration sustainability outcomes; and
- reforming fossil fuel subsidies.

Fossil fuel subsidies have been a concern of a number of WTO Members for years. At the Buenos Aires WTO Ministerial Conference in December 2017, I accepted on behalf of the WTO a proposal to limit fossil fuel subsidies.

In 2019, Norway, Iceland, Costa Rica and Fiji joined New Zealand in negotiations on the Agreement on Climate Change, Trade and Sustainability (ACCTS), which was launched at the United Nations in New York. The ACCTS agreement intends to:

- Remove tariffs on environmental goods and make new commitments on environmental services
- Establish concrete commitments to eliminate fossil fuel subsidies
- Develop voluntary guidelines for eco-labelling programmes and mechanisms.

This initiative should be broadened to gain widespread support from a coalition of willing WTO Members.

While there is no current exemption from the WTO's subsidies disciplines for well-intentioned subsidies, such as those implemented for environmental purposes, there are also no effective limits on subsidies for environmental purposes. The current rules prohibit subsidies tied to import substitution and export subsidies but beyond these two categories allow countermeasures only if the subsidies cause harm to the commercial interests of other Members. Several Members have already engaged in serious discussions to review rules on industrial subsidies. There is no reason not to take into account environmental concerns in any reform of the WTO's subsidies rules.

With the change in U.S. Administration, there may be more of a chance for like-minded Members to adopt environmentally positive policies and measures.

Climate change is more than an environmental and commercial concern. It is also a moral concern. It would be wholly inappropriate to ignore Members' current freedom to place restrictions on exports of food. Increasingly imported food will need to be transported to locations of food scarcity caused by extreme weather, places with either too little water or too much, suffering from high winds, or pests and other biological threats. A small but important down-payment would be to adopt a prohibition against the imposition of export restrictions on purchases by the World Food Program.

The issue of climate change can be ignored at the WTO only at great peril to the future of the organization.

The global digital economy

- A fifth great challenge is to establish the trading rules for the global digital economy.

Trade has increasingly been becoming digital. Digital commerce can be a major force for the well-being of all, but it risks becoming ensnared in a tangle of conflicting national regulations. It is already threatened with customs duties due to the potential expiration of a temporary waiver.

As with carbon border adjustment measures, this is a trade issue that cannot be ignored. WTO Member engagement on setting rules for the digital economy takes place in a variety of venues. There is consideration in regular committees, there is considerable debate over the moratorium on customs duties on electronic transmissions which is due to expire at the next WTO ministerial meeting and there is the joint statement initiative (JSI) on e-commerce.

The area that is most active and complex is the JSI text that is being worked on and some subjects being negotiated are far advanced toward agreement. This does not mean that highly contentious issues have been resolved, such as restrictions on location of servers and measures interfering with cross-border dataflow. A question posed in any negotiation that has advanced this far is whether low hanging fruit should be taken in an early harvest, or whether this reduces the chances of successfully tackling the most contentious issues. My instinct leans in the direction of bringing some matters to conclusion as the most difficult issues may not be resolved in the foreseeable future.

Dispute settlement

- The primary feature that distinguishes the WTO from most other international organizations is the fact that the commitments contained in its agreements are

enforceable. Putting into place binding dispute settlement accepted as legitimate by all litigants is essential to restore enforceability.

There being no Appellate Body (AB) at present, major litigants, including the U.S. and the EU, have used a procedural trick to prevent a dispute settlement panel finding from becoming final. This is informally known as “appealing into the void”. Proceedings are paused indefinitely while the losing party at the panel stage appeals to a body that does not exist except on paper.

The blocking of appointments is the sole result of one Member, the United States, being dissatisfied with what the Appellate Body was doing and not doing, mostly rendering trade remedies less effective and in some instances totally ineffective. While killing off the Appellate Body was largely a matter of one Member acting against the will of 163 others, there has been a growing recognition that only a serious negotiation is going to resolve the matter. Importantly, an increasing number of Members now concede that the former system had serious imperfections, so that change is necessary.

There is a far wider and deeper importance to the dispute settlement issue than correcting quasi-judicial overreach, or under-performance. The premise on which the United States entered into its agreements liberalizing trade was that industries and workers suffering harm from facing a more open domestic market or from unfair foreign competition would have a remedy within agreed limits. The erosion of trade remedies -- their increasing unavailability and increasing ineffectiveness when available -- caused a fundamental imbalance as compared with the deal that the United States thought that it had negotiated. In part it is due to this imbalance that a belief has grown in some quarters that the WTO serves capital rather than labor.

It is the widely held view in the United States, in the Senate, House and Executive Branch, that the Appellate Body sowed the seeds of its own destruction. Domestic

experience in the United States with its own Supreme Court is instructive. The Court itself becomes threatened if it becomes politically tone-deaf. This occurred with respect to New Deal legislation during the 1930s, and it was, observers feel, threatened again during more recent times with the attempted judicial repeal of Obamacare. In the United States, the constitutional system has checks and balances preventing a rule by judges (*gouvernance des juges* as the problem was known when it was a central cause of the French revolution). In the WTO, there has been neither a legislative nor an executive function available to review and change any outcomes that emerged from the Appellate Body. Kritarchy, rule by judges, is a form of governance that is unsustainable, and that is what occurred, at least with respect to trade remedies. This is unsupportable for an organization consisting of Members prizing sovereignty over their own trade.

The solution to the WTO dispute settlement problem lies in creating accountability to the Members. This should not take a form that interferes with the independence of its decision-making nor the binding nature of decisions. I support, as do almost all and perhaps ultimately all Members, a binding, independent, two-tier (panel and appellate stage) WTO dispute settlement system. As it may be impossible to create a relevant legislative function which would provide systemic checks and balances, much of the cure of necessity will have to lie in how a new Appellate Body (NAB) is structured.

The European Union created a multiparty interim arrangement (MPIA). Although not a complete solution in itself, it can provide some ideas for moving forward with changes in the structure of the appellate body and how it functions. The process conducted by then Dispute Settlement Body Chair Ambassador David Walker also yielded elements of a potential solution. The following suggestions could be considered:

- Expand the number of Appellate Body members. The EU suggested a roster of 10 for its MPIA (only three serving on any one case) but this number could be expanded to provide greater diversity of representation both in terms of

geography and skill sets -- including relevant trade remedy experience, as anti-dumping and subsidies are complex matters.

- Provide explicitly for a role of the WTO secretariat to seek to narrow differences and make the process more about settling a particular dispute than on seeking to make law.
- Seek to uphold the primary importance of trade agreements by directing appellate panels to look at negotiating history to discern the intent of the parties.
- Have strict time limits for appellate review to discourage a *de novo* examination of the issues at hand
- Place emphasis on streamlining written presentations as well as limits on length of decisions to focus on the essential elements needed to settle a dispute.
- The rules should provide that only issues raised by the parties can be addressed on review.
- Where the WTO agreements do not cover a specific issue, the matter should be referred to the Members to resolve through rulemaking
- Double down on the emphasis that the appellate review is not to expand obligations or limit rights and is to give due deference to domestic decision-making where trade remedies are the subject of review.
- The appellate body should not act as a collegial body on particular cases -- appellate panels should be independent of each other.

- It is necessary to try to provide a suitable oversight role for the Dispute Settlement Body (DSB) which is currently no more than a rubber stamp for appellate decisions.

Another major problem with WTO dispute settlement is that it takes far too long to get to a result, often taking several years. This is unacceptable in the eyes of ministers of WTO Member countries bringing a case and industries seeking to benefit from it. Strict time limits must be adhered to. Justice delayed can easily become justice denied.

As for process, I would suggest that the trilateral partners, the EU, the U.S, and Japan, begin working on a solution. The three are used to working with each other. The EU and the U.S. have been the furthest apart on the AB issue, with Japan somewhat in the middle. In parallel, a small working group of friends of the DSB chair or General Council chair, could be constituted to consider ways forward. The trilateral would feed suggestions into the working group, and both could report to the Membership as a whole in the DSB. At this stage a meeting of the whole membership in the name of inclusiveness, would not be productive. Inclusion in a null result is not meaningful inclusion.

A system designed to benefit people

The Biden Administration has stressed that the trading system needs to be more positive for workers. It has stated that “people are workers as well as consumers” and workers’ concerns must be taken into account to a far greater extent in trade agreements. The distributional effects of trade within economies depend most heavily on domestic measures but greater equity can be either fostered or impaired by the absence or presence of responsive global trade rules. This is also a question of bringing the benefits of the trading system more fully to women and to small businesses. To be effectively addressed, the goal of providing

greater equity must be a joint concern of finance ministers and ministers of the economy and labor, as well as trade ministers and trade negotiators.

In terms of actual and potential negative effects on employment, technological change, automation, and macroeconomic factors dramatically outweigh trade. But trade is visible and is often seen to be targeted in its effects and targeted by those adversely affected. Opposing technological change is rare and ineffective but noteworthy when it occurs. As far as I know, not since the Luddites opposed the introduction of power looms during the Industrial Revolution has labor fully taken on automation as a problem. The invention of the smart phone wiped out or diminished dozens of industries – CDs for music, cameras, alarm clocks, watches, weather forecasts and landline telephones, to name a few. The image of King Canute uselessly commanding the tide not to come in comes to mind were any to oppose the next generation of smart phones.

As a political imperative, WTO reform must address the concerns of labor to the extent feasible. One clear way is to restore the place of trade remedies in the multilateral trading system. Safeguard actions should be few and far between but should be available when and where they are needed, within clearly agreed parameters and applied only to achieve adjustment. Dumping still occurs and subsidization is rife and must be countered if the multilateral trading system is to continue being as open as it is or is to progress to further liberalization at some point. Restoring trade remedies, which provide balance for the trading system as well as essential political support, will be contentious among the WTO members, but needs to happen in order to preserve the system. Within established guidelines, trade remedies must be made fully available and the dispute settlement system's bias against them must be corrected.

At the same time, for the sake of the workforce, protectionism abroad that closes off export markets must be vigorously attacked. Injury due to closed foreign markets is every bit as real as injury from import surges or unfair trade practices, it is just less visible.

More contentious and more sensitive would be to put into place, either through new rules which would be hard to get, or interpretation of the current rules, an express acknowledgement of the freedom of Members to react to foreign government suppression of labor and wages. The WTO rules explicitly allow Members to ban imports of goods made by prisoners. They are silent with respect to child labor, slave labor and forced labor. This can be corrected. Social dumping is unacceptable. It is not the place of the WTO to establish standards for labor. The ILO exists for that purpose. Where the WTO could have a role is with respect to lack of enforcement of labor standards or lack of adoption of labor standards that have trade effects. Suppression of wages can be viewed as a subsidy against which legitimate action can be taken. In addition, suppressed wages can be an element in the calculation of dumping.

There are many examples in regional trade agreements and bilateral trade agreements of commitments with respect to labor. They need to be studied and their effectiveness evaluated.

A review of policies that suppress wages should be included in the WTO's transparency and monitoring responsibilities and in its trade policy review process. The WTO can take action to provide its Members with analysis of the impact on trade of applying current or proposed labor standards. During my tenure at the WTO, I reached out to Guy Ryder, the Director General of the ILO, to have ILO and the WTO work together on joint research projects. There will also be opportunities to work with the World Bank, the OECD, the IMF and other international organizations on improving the lot of labor under international trade agreements.

Other risks – The “great fracture”

Even before the pandemic, UN Secretary General Antonio Guterres warned us with an apocalyptic vision of an increasingly dystopian world -- what he called the “Great Fracture”. It consisted of “Surging Geopolitical Tensions, Existential Climate Crisis, Deep Mistrust, and Risky Technology”. The WTO can make a positive contribution to the solutions to each of these challenges even if reform of the trading system is far from a complete cure for any of them.

Examining each of these threats separately: the WTO will I hope address climate change, as noted above, including through making agriculture more agile in supplying food deficit countries suffering from climate-related shortages. As for risky technologies, the WTO is not likely to be a venue for addressing ethical and physical hazards of AI and biological breakthroughs, unless there are protectionist actions taken or other trade distortions occur. WTO Members are seeking to provide rules for global digital commerce which would reduce tensions that will arise with each nation setting its own policies that interfere with trade through digital means.

“Deep mistrust” can be addressed in a number of ways by the WTO. Unilateral actions are a characteristic in this era.

All too many trading nations are taking trade measures with little notice and no consultation. A case in point is that there is widespread concern that many of the jurisdictions having the capability of supplying vaccines are limiting or may limit exports, directly or implicitly.

Foreign policy is also a growing factor in commercial relations. The examples are numerous: The Financial Times earlier this month had an article stating that China had weaponized its trade with Australia. The world’s electronics industries worry about supplies of rare earths needed from China. China is worried about supplies of computer chips based on

U.S. technology. The Biden Administration is studying reliance on foreign sources of supply. Korea and Japan have experienced trade difficulties with each other manifested in part in claims that Korea was not a reliable supplier. A number of governments have chosen to bar use of 5G supplied by Huawei. Russia is feared by some as being a not-fully-reliable supplier of natural gas for export.

The U.S., which one might have thought had a monopoly on unilateralism, is far from alone. In short, there is a surfeit of causes for distrust. Trust is a perishable commodity. It can be eroded in bilateral relations overnight by a few acts in a few product sectors that interdict trade, even if the overall trade continues to flow freely. Paying attention to these deviations from the norm will help restore trust.

Part of the answer to distrust in the area of trade will be putting into place more effective and timely dispute settlement as a means for trade agreement enforcement. Agreements to give prior notice, to consult, to call upon the WTO Secretariat to mediate differences, can help to improve trust. Restoring meaningful and prompt discussions of trade challenges can help. Too long absent from the WTO is a process of deliberation of the central issues of the time.

No catalogue of “great fractures” would be complete without addressing “surging geopolitical tensions”, meaning great power rivalry. The WTO has not been the primary venue for addressing issues between the China and the United States. The casual observation is too often made that this strategic competition is a reason for the inability of the WTO in recent years to meet current challenges. I do not subscribe to that view. Most of the problems of the WTO pre-date the deterioration in U.S-China relations. Nevertheless, future frictions between the two cannot be discounted as causes of stasis or worse in the WTO. There is, for example, reason to be concerned about a competition to set international product standards that favor

one party and disadvantage the other. No area of the WTO's rulebook may prove to be wholly immune from the effects of the strategic competition.

What U.S.-China relations mean for the near future of the WTO cannot yet be discerned, because the nature of the relationship is evolving, and with a new Administration in Washington, is not yet fully defined. Despite this uncertainty, it should always be an option consider the WTO can be as a possible venue in which if the two reach bilateral solutions to trade issues which are relevant to others, they can table the solutions as proposals for adoption as part of the global trading rules. Likewise, the potential exists to use the WTO as a forum which the two can use to manage their bilateral relationship where the issues they address are of general concern.

A fundamental point at present divides the two: Is the WTO to be about convergence or can the two systems co-exist in a meaningful way in a single set of international rules? This question may not be resolved in the near term, while the two exchange restrictions, litigate and find some areas of common interest, such as measures and trade agreement provisions to deal with climate change or pollution of the oceans. I have long argued that the WTO is about convergence not coexistence. The WTO would have to be re-designed to permit co-existence if that were to be the governing principle,

Institutional reform

The WTO has three main functions: negotiations (of rules for trade and trade liberalization), enforcement of trade agreements through dispute settlement, and providing transparency. There is room for improvement in all three. In fact, the credibility of the system depends on all three functioning much better than they do today.

Like it or not, the WTO is primarily judged as a place for trade negotiations, and its output has not met expectations. No other multilateral institution is measured against a standard of producing new agreements during every ministerial conference. When the cupboard is bare, which it is much more often than not, ministerial gatherings are widely judged to be a failure despite the WTO's record of maintaining a broad array of agreements that continue to govern international trade.

Another metric for the WTO is historical. The WTO, during its 26-year existence, has not produced a package of agreements to equal the burst of energy, the Big Bang, of the Uruguay Round that gave rise to the WTO nor of the Tokyo Round that preceded it which created the first codes of conduct (known as nontariff barrier agreements). The WTO's rule-making function has not borne fruit in six years. Most of the world has forgotten that trade agreements have a long period of gestation. The fisheries subsidies negotiations are just into their third decade and it is hoped will conclude this year. In fact, they could and should conclude within a few months with political will.

A third metric by which the WTO is judged is relevance to current issues. The pandemic has been with us for over a year and besides the WTO producing transparency, there has been too little engagement with respect to providing appropriate trade responses. The same can be said about climate change given that the Paris Agreement has been in existence for over five years.

A fourth metric is the enforceability of rules. As noted, the WTO's dispute settlement system is seriously damaged, as for most Members panel decisions cannot in reality be appealed and therefore are not binding. Since the hallmark of the organization was the enforceability of commitments made in its agreements, this is an unacceptable defect in the working of the system. (A note is in order here: "Binding" does not mean that the sovereign right to impose a measure, even if WTO-inconsistent, is denied. It means that a cost is imposed

if the measure is not removed, either through the need to provide trade compensation or by suffering trade retaliation.)

A fifth metric is the fact that the WTO's executive functions are close to nonexistent. The Secretariat does not initiate proposals, point out potential noncompliance, or take steps to enforce agreements. The WTO must provide unfettered transparency, an overarching principle of the multilateral trading system, to help assure compliance with the rules, and the WTO Secretariat must be expected to propose solutions to problems. It should be remembered that there would not be a world trade organization at all had not a brave and talented GATT Director-General, a friend and colleague of that era, Arthur Dunkel, tabled solutions to the problems that otherwise would have prevented conclusion of the Uruguay Round which created the WTO. We owe the creation of the WTO to a Director-General willing to take risks.

A sixth metric is the satisfaction of Members, and many are not satisfied for disparate reasons. No set of rules should be immutable, when the world of international trade is constantly changing. Being frozen in time means that increasingly the multilateral trading system is unbalanced and out of date.

Not measuring up under any of the above six metrics holds real danger. There must be continual change and it must be positive. Global commerce requires certainty in order to thrive and deliver promised benefits. If relationships are frozen, with disparate levels of benefits and obligations as Members compare themselves to their peers, the strain on the system can become unsupportable. The system must show flexibility to remain fully viable. The WTO was founded on facts that existed in some cases in the 1980's. That world is far different than the one we inhabit today. Circumstances change, government measures that are of concern evolve, relative sizes of economies differ over time. The WTO needs to adjust.

How to move forward to save the current WTO

Continuing with business as usual will lead to further disaffection and diminishing compliance with the international trading system. Aggressive actions are needed, leaving paralysis and complacency behind. This can and should be accomplished within the framework of the WTO. I do not see, as some do, within the next two or three years, a separate coalition of the willing creating an alternative *trading system of the few* addressing a broad set of issues outside the WTO. If one looks at the list of the five or so largest WTO Members measured by trade, I do not believe that a consensus among them will emerge to form a separate trading club outside the WTO, unless this is for limited specific purposes. Nor would a Washington Trade Club be embraced in the near term by the “friends of the system”, the middle-sized market-oriented countries.

A rush to take a path that would likely result in institutionalizing WTO irrelevancy would be counterproductive. Global trade is and to the extent possible it should be governed by global rules. A strenuous effort should be made to avoid partitioning governance into separate systems of rules.

The hurdles within the WTO are formidable. It must and can face and heal the serious divisions over the Appellate Body, over the TRIPS waiver, the electronic transmissions waiver, and over whether the Joint Initiatives have a future at the WTO, to name a few. However, the most immediate existential risk for the WTO is stasis. If it stays unchanged, it will face the all too real possibility of a steady decline into irrelevance.

To make the WTO workable, Members must exercise much greater self-restraint in taking any actions that impede progress. Practices have grown up over time that need to be employed more sparingly -- if at all -- if the institution is to achieve what its founders envisioned.

- ◇ **No Member should consider that it has a veto over the activities of others.** In practice this means that no Member should be allowed to block adoption of an agenda, the nomination process for AB Members once the appellate system is reformed, the adoption of the budget, or the adoption of a plurilateral agreement (e.g., joint statement initiatives(JSIs)). Hostage-taking should become a thing of the past. A corollary: No Member can be bound by actions taken by other Members – e.g., adoption of JSI’s or budget increases -- to which it did not consent.

- ◇ **Where litigants do not make agreed appellate arrangements, panel reports should be final and binding on the parties.** No appeals into the void should be allowed. The WTO dispute settlement system was not designed to give advisory opinions.

- ◇ **The convoy system, where none can move forward unless all move forward together, is a misreading of how consensus and inclusiveness should operate, and must be abandoned. It should become acknowledged that WTO agreements will always be multi-speed,** as not all Members will be equipped to take on new obligations at the same rate. The Tokyo Round Agreements such as the Government Procurement Agreement were based on the premise that those who could achieve progress would do so. During the WTO’s history, none of agreements reached -- the Pharmaceutical Agreement, the Information Technology Agreement and the Trade Facilitation Agreement – were based on the premise that one-size fits all. Getting to the same destination must be the goal, a continuing process of maturation by WTO Members in terms achieving a common, higher level of obligations.

- ◇ **Free-riding is not acceptable. All must contribute to the extent that they are able to do so.** An example is that the very poor countries of West Africa, dependent on growing cotton, contribute in part by spelling out their needs in a pragmatic way to which donor countries can and do respond with positive contributions. Pragmatism, as opposed to demands for fulfilment of rights not universally acknowledged, is a contribution

Conclusion

To serve current and foreseeable needs, the nations of the world can no longer invest as little as they have in the WTO during recent years. The four largest Members -- the U.S., the EU, China and Japan -- together account for more of world trade than the remaining 160 combined. Their leadership is needed now.

- The current U.S. administration must do more than reject the approach of its predecessor, it must make the multilateral trading system central to its trade policy. It must go beyond pointing out flaws in existing arrangements but must table workable solutions that have a fair chance of being adopted. The conduct of the United States has to be carefully calibrated to continue to drive change, -- sometimes but not too often through behavior that is unwelcome by others (but not to the extent that it loses its ability to lead).
- Europe must assume a more assertive role of multilateral leadership, making more ambitious proposals far more expeditiously. It must be willing to open its economy leaving behind what Pascal Lamy has labeled “precautionary protectionism,” a policy that is, at its worst, simply reactionary.
- China has repeatedly pledged that it will in future negotiations contribute in accordance with its capacity. It clearly now has more than sufficient economic strength to do so. It espouses a policy of “dual circulation”, relying on internal

and external markets, but cannot be an effective full participant if the organization of its domestic economy is antithetical to the basic market-oriented principle that underlies the WTO.

- Japan and the mid-sized “friends of the system” must assume an even greater leadership role in the WTO.

Six months before the lockdown, I gave a talk at the University of Adelaide on what the WTO would be like in the year 2050. What I described may have struck participants and readers as nearly science fiction. There would be complete and instantaneous transparency. Developing countries would have become developed, benefitting fully from the global trading system and able to fulfill all of its obligations. That halcyon distant time is pleasant to contemplate, but spending time doing so is at present a luxury. For a global system to survive to 2050 in the most meaningful way, the relevant goal posts are in the present.

In 2021/22 there must be some wins posted on the WTO scoreboard to give its Members assurance that it is a vehicle for world trade worth substantially investing in. It is not possible to effect complete change in a short period of time, but it is necessary to make a good start with some early deliverables and serious engagement on achieving complete negotiated results:

- Effective steps must be taken to deal with COVID-19 and future pandemics.
- Support must be given to the economic recovery, primarily through trade finance and abjuring both protectionist measures and the dissolution of diverse international supply chains, while taking advantage of the opportunity to make the recovery greener, more sustainable.

- Practical discussions must begin with respect to dealing with climate change and the global environment, with near-term common solutions agreed with respect to carbon border adjustment measures (CBAMs) and fossil fuel subsidies disciplines
- The WTO must begin to achieve for the digital economy what it achieved for customs tariffs on goods, with agreement among those who can agree to a basic framework, and an early harvest of agreed elements.
- The 20+ years fisheries subsidies negotiation must be brought to a successful conclusion by summer of this year.
- The process must begin in earnest to restore the binding nature of WTO agreements through the negotiation of a dispute settlement system seen as legitimate by all.
- A balance struck a quarter of a century ago based on data from the 1980s and 1990s must be recalibrated to achieve a new balance through a process of leveling up.
- A broad review of regional trade agreements should be undertaken to harvest what is best in them for multilateral application and to reduce discrimination in world trade, as the founders had hoped to do, by subsuming them into the WTO.
- The process must be accelerated of achieving universal coverage of global trade through accessions of the remaining developing and least developed countries still outside the system. Substantial Secretariat assistance will be necessary to reach this goal.

Through the actions of its Members, not declarations of intent, there can be a re-commitment to a multilateral trading system that is more responsive to current needs.

Key systemic objectives are:

- Mandating as close to complete transparency as possible, calling on the Secretariat to report on a real time basis on all impediments to trade, whatever their source, nature, or WTO consistency.
- Keeping always in mind that the system is about delivering equity and well-being for people. The WTO rules should be re-examined to make the system more visibly beneficial to workers, farmers and small businesses, including through restoring the founders' intention to balance trade liberalization with effective trade remedies to deal with harms caused by trade to some while broadly benefitting the larger economy. This should include, equally, removal of barriers to expanded trade resulting loss of export markets – another harm for workers that is less visible but no less real.
- Making the Director General and the Secretariat to become a coordinate branch of world trade governance, itself initiating proposals to improve the system.
- Vastly increasing technical assistance to developing countries on the basis of need, particularly the least developed., taking full advantage of virtual tools which are dramatically transforming learning.
- Assuring that markets function with respect to commercial transactions, consistent with social goals. If this underlying assumption is not accepted, the WTO will need to find a way to accept transitional coexistence with the addition of interface mechanisms.
- Being open to plurilateral agreements within the WTO that are MFN where they can be and otherwise aspirationally MFN foresee agreements being ultimately all inclusive and applied on an MFN basis). Either the WTO will be the host of open plurilaterals, or they will proliferate outside the WTO.

- The WTO must continue its march toward universality, with all contributing to the extent that they can, and all reaching a state of equality.
- Lastly, the WTO should be adequately funded to bring these goals within reach. The WTO budget should not be a means for individual Members to control the WTO's agenda.

It is not acceptable to allow the multilateral trading system to become a relic of a vanished civilization.¹¹ That fate is entirely avoidable. The WTO provides a sound foundation for building a better institution and framework for international trade. It must be updated to meet what we now see as current and future needs. The upside potential is clearly present, but it will be attained only through strenuous efforts.

¹¹ Thanks for this phrase to Carlos Ruiz-Zafón.