Remarks of

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International Trade Cooperation in an Era of Turbulence

Thank you for the high honor of being asked to present to Member State Trade Ministers, Secretaries, Heads of delegations, the Commissioner, the Director-General, and to European parliamentarians.

Your meetings come on the cusp of the EU-US economic summit and at a moment when global turbulence makes it even more important to enhance cooperation among close allies.

I speak to you this evening as a private individual whose views are shaped by being a citizen of the United States (US), an international lawyer, and a free trader.

The title of my talk is: International Trade Cooperation in an Era of Turbulence.

In just 11 days, the trading system will celebrate its 75th anniversary of the signing of the General Agreement on Tariffs and Trade (GATT) in 1947. What's most important to celebrate is the implantation and blossoming of the rule of law in international trade. The world trading system has been successful in maintaining and expanding international trade with concomitant positive effects on economic growth, human development, and price stability.

These days, the World Trade Organization (WTO) is under challenge on multiple fronts. Let me discuss four:

The institutional challenge is how to maintain a multilateral vision when states find bilateral and regional agreements more practical.

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The insecurity challenge is how to prevent trade rules from being swallowed up by false security claims.

The ecological challenge is how to address global environmental problems before they become trade problems.

The values challenge how to take account of the moral content of traded goods and services.

1. The Institutional Challenge

In addressing international problems, policymaking can benefit from looking back at history.

Many centuries ago, states realized that their sovereign territorial right to regulate imports and exports unilaterally was suboptimal and that states could achieve joint gains through trade cooperation using the instrument of a commercial treaty. About 900 years ago, such treaties began to incorporate legal principles such as most-favoured nation and national treatment.

In 1532, the Spanish philosopher and jurist Francisco de Vitoria pointed the way to the formation of an international community and respect for public rights to trade.

Meeting in Valencia, I am reminded that at the time Vitoria was writing, the internal laws in Spain were prohibiting Valencia from participating in lucrative trans-Atlantic trade.

The mid-19th century ushered in a new era of multilateral treaties and the construction of international organizations to solve specialized problems arising from the movement of goods, services, people, and technology across national borders.

The first international legislation for trade in goods came in 1890 with the establishment of the International Union for the Publication of Customs Tariffs.

After the first World War, governments assigned the League of Nations the responsibility for promoting "equitable treatment for the commerce of all nations." In pursuit of that goal, the League initiated two international conferences in its first decade that each adopted an important treaty to promote the rule of law.

The 1923 Brussels Convention for the Simplification of Customs Formalities contained numerous disciplines for trade facilitation and transparency. To balance out these trade rules, the Convention instituted policy exceptions to cover: an emergency affecting the safety or vital interests of a country; measures to ensure the health of humans, animals, or plants; and measures undertaken pursuant to international treaties for health, public morals, or international security.

The second multilateral trade treaty came just four years later. Back then, multilateral trade negotiations got done a lot more quickly! With startling ambition, this international convention of 1927 sought to abolish import and export prohibitions and restrictions. Although the 1927 Convention failed to go into force, many of its principles were later imported into the GATT, including the GATT Article XX exceptions. In an important Protocol, the 1927 Convention clarified that the protection of animals included measures to prevent an extinction of a species.

Given the limited time I have been allotted, I will skip over the post-World-War II design of the Havana Charter of the International Trade Organization, the provisional application of the General Agreement on Tariffs and Trade (GATT), and the creation of the WTO in 1994. But I do want to take note of the fact that the Havana Charter began with a Chapter on Employment and Economic Activity which contained a commitment that each party take whatever action may be appropriate and feasible to eliminate unfair labor conditions within its territory.

Four years ago, the criticisms of the WTO from some quarters had gotten so strident that there were fears about the WTO's survivability. But the WTO's successes last year in MC12 took the dystopian scenarios off the table. As governments and stakeholders plan for MC13 next year, I hope that the WTO can achieve value-added outcomes by consensus. Looking back to the first multilateral trade treaty in 1890, a good case can be made that the long arc of international trade law bends toward openness.

Over the past decade, however, many of the advances in international trade law have not occurred inside the WTO, but rather in regional or bilateral trade agreements (or RTAs) in the form of customs unions and free trade agreements. There have always been concerns that RTAs could dissipate negotiating energy within the WTO and that the ensuing web of RTAs would fragment international trade law. While these concerns are valid, the overall benefits of trade liberalizing

agreements should outweigh the overall costs. The EU continues to be very active in negotiating genuine RTAs with trade liberalization.

Yet, in recent years, there has been a new development, distinct from the traditional RTAs, of effectuating trade agreements without meaningful economic liberalization or other integration. This puzzling practice is centered in the US. These agreements contain a contesseration of provisions ranging from simple tautologies to shallow regulatory harmonization. Although such agreements, when voluntary, should render overall benefits to both parties, a potential exists for regulatory provisions to harm non-parties.

The most extreme example of this phenomenon is the new US scheme to negotiate what are characterized under US domestic law as new "free trade" agreements. Yet such skimpy agreements are bereft of any free trade or even any tangible trade liberalization. This US mislabeling is occurring for the purpose only[1] of qualifying certain products of particular countries as eligible inputs to satisfy a WTO-illegal US subsidy that is contingent on domestic content. For the United States, which has not negotiated a new genuine free trade agreement for over 16 years, these new Inflation Reduction Act pacts -- with all of their fanfare -- are a telling illustration of how the US has lost its way on trade!

Although the WTO executive branch now enjoys a visionary and energetic Director-General, the WTO judicial branch has lost the glue of compulsory jurisdiction combined with reverse consensus. To paraphrase the US Supreme Court decision of 1803 in *Marbury v. Madison*, it is the province and duty of the judicial department of the WTO to say what the law is. But saying what international trade law is can raise the hackles of the US Trade Representative (USTR) when the US has been held to have violated that law. The Trump Administration was eager to topple the Appellate Body in order to gratify the sore losers among US special interests.

Confoundingly, the Biden Administration has been uninterested in undoing that Trumpian triumph.

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[1]Shortly after the US law was enacted, I proposed a pathway for the Biden Administration to respect WTO anti-subsidy rules while qualifying trading partners for the federal subsidy contingent on domestic content. My plan called for negotiating an "interim agreement necessary for the formation of" a free-trade under GATT Article XXIV:5. See Steve Charnovitz, "Expanding US Free Trade Agreements in Pursuit of Clean Energy and Trade Justice," Jan. 26, 2023, https://ielp.worldtradelaw.net/2023/01/expanding-us-free-trade-agreements-in-pursuit-of-clean-energy-and-trade-justice.html.

The defenestration of the Appellate Body achieved by USTR emboldened the Trump Administration to take trade actions that were in clear violation of WTO law.

In 2018, the Trump Administration imposed tariffs on China under Section 301 of the Trade Act of 1974. In 2020, the WTO panel found violations of GATT Article II. Knowing how clear these violations were, USTR offered a defense under GATT Article XX(a) to the effect that the tariffs on China were necessary to protect public morals in the US. Using the deferential jurisprudence of Article XX(a), the panel accepted this US sophistry (even though US public morals are suppressed when responsible officials disrespect the law). But in further adjudicating Article XX(a), the panel held that the US had not shown that its tariffs were "necessary" and recommended that the US bring its measures into WTO compliance.

When it came time for the WTO Dispute Settlement Body (DSB) to adopt this panel report, the Trump Administration appealed to an empty Appellate Body.

In my view, this US stance not only undermined the trading system, but also eroded prospects for US cooperation with China that is essential for solving the most pressing problems facing the planet.

In saying that the US acts wrongfully, I am making two distinct points:

One that the US sets a bad example by disobeying international law at the same time that the US asks other countries to obey international law. The lesson of US hypocrisy is not lost on China.

And two is that the US is undermining the role of international tribunals which are vital for adjudicating international law. In having failed to join the International Criminal Court and to join the Law of the Sea Tribunal and in having reneged on much of its consent to jurisdiction by the International Court of Justice, the United States, back in 2018, was only conferring jurisdiction to one multilateral tribunal – namely the WTO. Dumping the Appellate Body furthered US legal isolationism.

While this US pullback from the international community was consistent with the Trump Administration's revanchist views at that time, the Biden Administration has in general put forward a proactive US role in world affairs. That's why it is so

troubling that when it comes to international trade justice, the Biden Administration adheres to Trump's rejectionist approach.

How should WTO dispute settlement be reformed? That's a longer conversation. But my litmus test is to oppose changes to WTO and DSU law that would give the US legal impunity. All countries, especially the US, need to be held accountable for internationally wrongful acts.

2. The Insecurity Challenge

One of the triumphs of the WTO had been its success in welcoming in a wide array of countries through accession in order to become a truly worldwide organization. Of all international organizations, only the WTO has accorded full membership rights to Taiwan. Certainly, being a WTO member does not accord any physical security guarantees. But Taiwan's WTO membership has helped its economy prosper and that has made Taiwan stronger militarily.

Of all WTO Members, China has the most legal commitments within the WTO. Yet with all of the complaining about China's trade practices, there have been only 21 cases against China at the WTO, in contrast to 74 cases against the US. While in US political discourse, China is regularly accused of being a serial WTO violator, the US has not backed up such claims in WTO tribunals.

Certainly, national security is an essential interest of any country. As I noted earlier, the first multilateral trade treaty, the 1923 Brussels Convention, contained an exception for an emergency affecting "the safety or vital interests of the country." But even that exception came with a declaration that the principle of the equitable treatment of commerce must be observed to the utmost possible extent.

Mutual interdependence and a just treatment of trading partners is a not a contradiction to national security, but rather a precondition. No doubt, there may be particular instances when trade controls at the border are needed for national security. But in general, national security is achieved by comprehensive internal measures within the homeland combined with guarantees provided in the regional or global security order.

In March 2018, on the pretext of promoting US national security, President Trump imposed tariffs and quotas on imported steel and aluminum. After a long legal proceeding, in November 2022, the WTO panel found violations of GATT Articles

II and XI. Knowing how clear these violations were, USTR offered a defense under GATT Article XXI to the effect that this new manifestation of US protectionism fulfilled an "essential security interest" for the United States.

The WTO panel, quite rightly, found that the Article XXI prerequisite of an "emergency in international relations" did not exist.

When it came time for the DSB to adopt this well-reasoned Section 232 panel report, the Biden Administration appealed to a courtroom it was blocking. This US appeal constitutes bad faith under international law because the empty Appellate Body was caused by the United States. As of today, it is true that 11 other WTO Members (including the EEC), have also appealed into the void. But these appeals are legally distinguishable from the six US appeals because the other WTO Members suffered from, but did not cause, the demise of the Appellate Body.

The iniquitous US Section 232 tariffs have given the US government economic leverage to demand trade benefits from other countries. For example, the US has pressured other countries to institute export quotas or TRQs even though such actions are a violation of WTO law by both the WTO Member taking the measure and the WTO Member directing the measure.[2] Such unjust demands from the US should be resisted.

3. The Ecological Challenge

The beginning of wisdom is to see that the WTO has made amazing progress on environmental questions. Back in 2008, I wrote an article entitled "The WTO as an Environmental Agency."[3] I suggested a new paradigm for the WTO as a multifunctional agency with environment and sustainable development understood to be one of the WTO's purposes. The WTO Fisheries Agreement of 2022 stands as most tangible proof of concept. Many proposals exist for what else the WTO can do in the years ahead on sustainable development.

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[2]WTO Agreement on Safeguards, Art. 11.

[3]Steve Charnovitz, "The WTO as an Environmental Agency," in *Institutional Interplay: Biosafety and Trade* (United Nations University Press, 2008).

Yet despite this progress, the advantages of international trade are questioned by a "Sustainist"[4] philosophy that international trade itself contradicts sustainability. Among the various complaints against trade are: the environmental costs of transport, the idea that trade interferes with a circular economy, and concern that when working as intended, trade expands economic growth at a time when (it is said) growth needs to contract.

I do not agree with this radical form of sustainism.

But supporters of trade need to better engage with anti-trade views. While recalling that Goal 17.10 of the 2015 United Nations (UN) Sustainable Development Goals (SDGs) affirms the rule-based, non-discriminatory trading system as well as the Doha Round, I urge WTO Members to work to revise that outdated SDG goal. Moreover, WTO Members should seek to upgrade the whole way that trade is addressed in the SDGs.

Trade conflicts are looming over national measures taken to address climate change.[5] The underlying conundrum is how to design climate change policies at the border. Should there be border carbon adjustments on imports and, if so, can they be done in a WTO-legal manner? For some commentators, of course, legality should not get in the way of reality. For the EU, the answer seems to be that there should be border carbon adjustments and that such measures can be accomplished in a WTO-legal manner.

When I first began writing about trade and the environment in 1991, the German-American environmentalist Konrad von Moltke taught me a valuable lesson about the trading system which is that "unmanaged environmental problems become trade problems." In applying this lesson in my writings, I termed it "Konrad's Hypothesis."[6]

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[4]See, e.g., Jeremy Caradonna, *Sustainability. A History (2014).*

[5]Gary Clyde Hufbauer, Steve Charnovitz & Jisun Kim, *Global Warming and the World Trading System* (Peterson Institute, 2009).

[6]Steve Charnovitz, "NAFTA's Social Dimension: Lessons from the Past and Framework for Future," *International Trade Journal*, Spring 1994.

For any transborder environmental problem, the first-best solution will always be to manage the environmental problem within an environment regime so that it does not fester into a trade problem. In 1992, the Rio Conference produced both the Rio Declaration as well as the UN Framework Convention on Climate Change (UNFCCC). The Rio Declaration affirmed the principle of internalizing environmental costs so that the polluter bears the cost of pollution without distorting international trade. But this fundamental cost internalization principle was not incorporated into the parallel UNFCCC or into any of its progeny including the Paris Agreement of 2015. Had the polluter pays principle been so incorporated 31 years ago, the programmatic next step for the climate regime would have been to consider how to effectuate polluter pays at the border.

In my view, the failure of the climate regime to install a rule-based, reciprocal regulatory framework has led to an angry planet and to an unmanaged environmental problem that is now a burning trade problem. The GATT permits the application of product taxes or fees to imports, and (in my view) that would include process-based fees. Seeking a border tax adjustment for a domestic regulation (rather than a tax) does not fit the GATT Article II:2(a) rule, but the environmental exception in GATT Article XX should be broad enough to cover such a border adjustment provided that the Article XX chapeau is met.

The EU's Border Carbon Adjustment Mechanism has been designed to be WTO compliant and could well be when implemented.

By contrast, over the past 25 years, I don't recall seeing any major legislative proposals for carbon adjustments from the US Congress that looked like they had been designed to be WTO-compliant.

During the US-EU Summit, there will be discussion of the negotiations for a Global Arrangement on Sustainable Steel. I haven't been involved in any of these talks. But let me provide a brief analysis based on what I've read. First, in general, a club of WTO Members is not endowed with any greater rights in how to treat steel from outside the club than the rights of single WTO Member would be for a unilateral policy. Second, other than for a customs union, the WTO does not confer any legal privilege to a common external tariff. Third, besides refraining from a violation of WTO law, the designers of a green steel pact should also refrain from violating international climate law. UNFCCC Article 3.5 declares that "Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade." Fourth, given that China has by far the largest

share of global steel production, any global steel arrangement should include China as a participant if China wants to participate.

Although the legal analysis that I just offered shows the impropriety of some of the nonmarket provisions that the US is reportedly demanding, I don't think it is legally impossible to design a constructive green steel arrangement that meets WTO law requirements. Certainly, the GATT Article XX(g) exception is available. But perhaps more importantly, the GATT Article XX(h) exception is available for intergovernmental commodity agreements that meet the conditions listed in the Havana Charter of 1948. The Article XX(h) exception extends to measures "undertaken in pursuance of obligations under any intergovernmental commodity agreement."

At the time of the Havana Charter, commodity agreements were being used (or contemplated for use) to address many different kinds of economic problems such as inadequate supply, price instability, over-expanded industries, the need to protect natural resources from exhaustion, and economic and social dislocation. A key condition was that the commodity arrangement be open to all parties on no less favorable terms. So, a commodity agreement[7] that sought to promote and regulate the market for green steel, and that was open to all WTO Members, could come within the terms of the GATT Article XX(h) exception and chapeau even if it were a limited membership agreement.[8]

The world economy is now experiencing a recrudescence of industrial policy using the instruments of subsidies and tariffs. The idea of industrial policy, of course, was anticipated in the original GATT of 1947 which stated in Article XVIII that "The contracting parties recognize that special governmental assistance may be required to promote the establishment, development or reconstruction of particular industries ... ." The GATT also provided legal space for subsidies exclusively to domestic producers.

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[7]Steel is not a primary commodity, but it is a commodity that is traded on commodity futures exchanges. I am not aware that green steel is traded.

[8]At the time that the Havana Charter was written, as far as I know, there were not, as yet, any provisions for fair labor standards in international commodity agreements. But soon the intergovernmental Sugar Agreement of 1953 did incorporate commitments on fair labor standards.

Today, WTO law does not forbid industrial policy as such, but the instruments of tariffs and subsidies are subject to legal disciplines.

When I teach the WTO Subsidies Agreement (SCM Agreement) to my law students, I pose the question of how the SCM Agreement distinguishes between specific subsidies to gratify special interests versus subsidies to address market failure. The answer is that the SCM Agreement fails to distinguish those two uses. In my view, that is a deep-seated flaw in the SCM Agreement.

Reining in subsidies to firms not legally impossible. The EU has shown that with its States Aid rules. I wish that the SCM rules could be redesigned to provide more space for public goods subsidies and less space for redistributional subsidies. But I am doubtful of the prospects for that reform. One barrier is the asymmetry among states in the supply of subsidies. This is a particularly serious problem in the US which enjoys less fiscal restraint than other countries due in part to the "exorbitant privilege of the dollar."

A key innovation of the Uruguay Round was to outlaw subsidies contingent on domestic content. Unfortunately, this anti-discriminatory provision has not had its intended effect particularly with regard to the United States that basks in the economic nationalism of "Buy America". For example, the otherwise justified climate-related subsidies in the so-called Inflation Reduction Act contain several provisions that precondition subsidies to domestic content for aviation fuels, clean hydrogen, critical minerals for batteries, and clean electricity. There is no possible excuse for these dark US protectionist actions.

4. The Values Challenge

The fourth and last challenge is the "values" content of traded goods. As noted in the brief historical review, the trading system from the beginning sought to preserve legal space for national actions to address transborder environmental and social problems. Indeed, the innovative idea of deference to other multilateral treaties was a progressive feature of the 1923 Convention that never found its way into the GATT or the WTO.

For transborder labor problems, I return to Konrad's Hypothesis. To wit, the right institution to correct international labor law violations is the International Labour Organization (the ILO). The ILO has adopted two conventions to regulate forced labour. Yet neither Convention addresses international trade in goods produced by

forced labor. But during the drafting of what became Abolition of Forced Labour Convention No. 105 in 1957, the United States offered a proposal to prohibit international trade in goods made with forced labor.

Unfortunately, that proposal was not adopted. The United States had neglected to build a coalition of support for the proposal. In retrospect, this was a missed opportunity to propound a new idea that whatever happens back at home, the channels of international trade should not be open to products whose production violates *jus cogens* obligations.

Earlier, I noted that the 1948 Havana Charter, contained a provision on fair labor standards. That provision articulated a principle that unfair labour conditions create difficulties in international trade. Over the decades, most of the commentary about worker rights in trade, including the much-maligned US 1999 proposal at MC3 in Seattle, has focused on the idea that suppressed worker rights in one country are unfair competitively to trading partners.

But a more cosmopolitan way of looking at unfair labor conditions is that they are unfair to the workers suffering under them and international trade does not have to be blind to human values of workers who produce the goods that flow in international trade.

36 years ago, when I wrote an article on "The Influence of International Labour Standards on the World Trading System"[9] I took note of the national laws at that time that banned goods produced with forced or prison labor. Back then, the US occasionally used exclusion orders, for example from Mexico, regarding prison labor. Attention to forced labor was enhanced in the late 1990s after the WTO, at MC1, spurred the ILO to enact what became the 1998 Declaration on Fundamental Principles and Rights at Work. Beginning with the US-Jordan free trade agreement, governments began incorporating provisions to implement the ILO Declaration, and these provisions have increasingly become more detailed.

[9] *International Labour Review* (Sept./Oct.1987).

In recent years, WTO members have expanded domestic law to impose import exclusions at the border on specific entities where forced labor is thought to have been used in the supply chain. For example, the EU has been working on a ban on goods made using forced labour and this initiative is commendable in many respects. One is that this regulation is not just a border measure; it applies to the internal market also. Two is that the Regulation is linked to the ILO Forced Labour Convention No. 29 which China recently ratified. Sad to say, but as with many of the ILO's fundamental labor Conventions, the US stands as an outlier in refraining from ratifying the Forced Labour Convention. I have often called on the US government to ratify fundamental ILO Conventions and to work more effectively with workers and employers in the ILO to supervise national implementation of ILO legal norms to better achieve social justice.

Closing

In summary, I have recalled the story of the origins of the trading system and discussed four contemporary challenges-- the WTO's vitality, national security, sustainability, and moral values. Let me thank the organizers for seeking input from across the Atlantic about the future path of world trade law.