

## A WTO if you can keep it

Steve Charnovitz\*

### 1. *The place of the WTO in international economic law*

In September 1787, the inventor and free trader Benjamin Franklin emerged from the convention in Philadelphia that had just completed drafting the United States (US) Constitution. A lady awaiting outside the State House approached Franklin to ask whether the convention had created a republic or a monarchy. Whereupon Franklin replied, 'A republic if you can keep it.'<sup>1</sup> In 1994, when the drafting of the WTO was completed in Marrakesh, I am not aware that anyone in the crowd waiting outside asked European Trade Minister Leon Brittan what form of international trade governance had been created. Had that question been asked, one can imagine the cerebral Lord Brittan paraphrasing Franklin's optimistic, yet hedged, answer and replying: 'A World Trade Organization if you can keep it.'

To the Question of whether there is a 'meaningful place' for the World Trade Organization (WTO) in the 'Future of International Economic Law', the answer is an unabashed yes. Bringing order to international trade was always part of the *past* of international economic law (IEcL). So, there is little reason to doubt that a world trading system will be a crucial part of the future of IEcL.

This essay examines the stresses on the WTO in the broader context of the trends in IEcL and US economic policy. The essay has four parts: section 1 summarises the origin of and legalisation in the multilateral trading system. Section 2 provides an assessment of the performance of the WTO and its leading members, particularly with regard to the US–

\* Steve Charnovitz teaches on the Faculty of Law at George Washington University in Washington, DC. He is a member of the Council on Foreign Relations and the American Law Institute. This article is current as of 10 November 2019.

<sup>1</sup> See <[www.bartleby.com/73/1593.html](http://www.bartleby.com/73/1593.html)>.



China trade war. Section 3 looks at the pushback against trade and against international law. Section 4 presents a plan for strengthening the WTO.

Although the term IEcL originated in the 20<sup>th</sup> century,<sup>2</sup> the quest for a rule of law<sup>3</sup> in global trade goes back to the 19<sup>th</sup> century, if not earlier. Some key legal stepping stones during the 19<sup>th</sup> century include the Zollverein and its treaties starting in 1834,<sup>4</sup> the sugar bounty convention in 1864, and the resolutions on customs and reciprocity of the First Pan-American Conference in 1890.<sup>5</sup> The year 1890 also brought the first international organisation for trade, the International Union for the Publication of Customs Tariffs.<sup>6</sup>

The early 20<sup>th</sup> century raised the ambition for a rule-based international legal system. In 1911, the French diplomat Max Jarsousse de Sillac advocated ‘an organization legislative, judicial and administrative in character.’<sup>7</sup> The purpose of the ‘legislative international organization’ would be to promote the ‘security of states’ and ‘the welfare of nations.’<sup>8</sup> The judicial character would entail a ‘court of international justice’ with four chambers including a chamber for customs questions.<sup>9</sup> In 1916, US Congressman Cordell Hull proposed a ‘permanent international trade congress’ to consider national practices:

‘which in their effects are calculated to create destructive commercial controversies or bitter economic wars, and to formulate agreements with respect thereto, designed to eliminate and avoid the injurious results and dangerous possibilities of economic warfare, and to promote fair and friendly trade relations among all the nations of the world.’<sup>10</sup>

<sup>2</sup> S Charnovitz, ‘What is International Economic Law?’ (2011) 14 J Intl Economic L 3, 12.

<sup>3</sup> By a rule of law, I refer to public law. For private law in international trade, *lex mercatoria* harks back to antiquity.

<sup>4</sup> WO Henderson, ‘The Zollverein’ (1934) 19(73) History 1-19.

<sup>5</sup> P Reinsch, *Public International Unions* (Ginn and Company 1911) 79-82.

<sup>6</sup> As the British political theorist Leonard S Woolf pointed out, the Union originated from proposals by individuals and associations beginning in 1853. LS Woolf, *International Government* (Fabian Society 1916) 155.

<sup>7</sup> MJ de Sillac, ‘Periodical Peace Conferences’ (1911) 5 AJIL 968, 979. Sillac had served as one of the Secretaries of the First Hague Peace Conference.

<sup>8</sup> *ibid* 980.

<sup>9</sup> *ibid* 983-84.

<sup>10</sup> C Hull, *The Memoirs of Cordell Hull*, vol I (Macmillan 1948) 82.



The visions of Sillac and Hull were in part achieved by the Treaty of Versailles which established a League of Nations and called for future conventions to ‘secure and maintain ... equitable treatment for all commerce’ of League members.<sup>11</sup>

In pursuit of that goal, the League launched negotiations for the Convention for the Simplification of Customs Formalities with its stated aim that ‘commercial relations shall not be hindered by excessive, unnecessary or arbitrary Customs or other similar formalities.’<sup>12</sup> In this Convention of 1923, Governments agreed:

- to provide ‘equitable treatment’ in customs and similar regulations;
- to ‘publish promptly all regulations relating to Customs’ in such a manner ‘as to enable persons concerned to become acquainted with them’;
- to ensure that the issuance of licenses ‘should be carried out with the least possible delay’;
- to secure agreements with regard to ‘technical conditions’ of trade, such as purity, quality, and ‘sanitary condition’; and
- to regularly report national progress to the League of Nations.<sup>13</sup>

In addition, the Convention included an undertaking by countries ‘to prevent the arbitrary or unjust application of their laws and regulations with regard to Customs and other similar matters, and to ensure redress by administrative, judicial or arbitral procedure for those who may have been prejudiced by such abuses.’<sup>14</sup> For this specific undertaking, parties had a right to refer a ‘dispute’ to the Permanent Court of International Justice (PCIJ).<sup>15</sup>

The problem of import bans became the topic of the next round of international negotiations when cooperating Governments formulated the International Convention for the Abolition of Import and Export

<sup>11</sup> Treaty of Versailles (28 June 1919) 112 BFSP 1, art 23(e).

<sup>12</sup> International Convention Relating to the Simplification of Customs Formalities (3 November 1923) 30 LNTS 372, art 1.

<sup>13</sup> *ibid* arts 2, 3, 4, 9, 13, 16.

<sup>14</sup> *ibid* art 7.

<sup>15</sup> *ibid* art 22.



Prohibitions and Restrictions.<sup>16</sup> Under this Convention of 1927, Governments declared that ‘a return to the effective liberty of international commerce is one of the primary conditions of world prosperity’ and, to that end, agreed ‘to abolish’ all import and export prohibitions and restrictions.<sup>17</sup> This abolition requirement was subject to a list of exceptions to be available only if such measures ‘are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or disguised restriction on international trade.’<sup>18</sup> The Convention further provided that in imposing any ‘measure of prohibition or restriction’ against products of any foreign country, a Government would ‘frame the measure in a way as to cause the least possible injury to the trade of the other Contracting Parties.’<sup>19</sup> This least-trade-restrictiveness requirement was to be enforced through PCIJ adjudication. Although the international community, including the US, made heroic efforts to put the 1927 Prohibitions Convention into force, these efforts ultimately failed.

Notwithstanding this speed bump, the incipient trading system had by 1927 formulated numerous international trade norms that, 20 years later, served as key components of the General Agreement on Tariffs and Trade (GATT). The 1923 and 1927 conventions provided norms on: national treatment on customs, timely licensing, technical conditions of trade, import bans, domestic administrative law, domestic transparency, centralised reporting, and international<sup>20</sup> adjudication. Had economic amity not shattered in the early 1930s, the post-World War I efforts for a trading system might have succeeded.

<sup>16</sup> International Convention for the Abolition of Import and Export Prohibitions and Restrictions (8 November 1927) 97 LNTS 391 (not in force).

<sup>17</sup> *ibid* Preamble, art 2.

<sup>18</sup> *ibid* art 4. Among the exceptions were prohibitions imposed on ‘moral or humanitarian grounds’ or to protect animals and plants from degeneration or extinction (*ibid*, art 4 paras 2 and 4). There was also a carve out for ‘prison made goods’ (*ibid*, Protocol s 6). Another exception existed for measures to protect ‘the vital interests of the country’ provided they are applied so as ‘not to lead to any arbitrary discrimination against any other High Contracting Party’ (*ibid* art 5).

<sup>19</sup> *ibid* art 7.

<sup>20</sup> Here, I mean adjudication in a multilateral context. Dispute resolution in bilateral commercial treaties began centuries earlier. For example, a treaty between Bologna and Ferrara in 1193 included a rule to stabilise tariff duties and provide for a mixed commission of representatives to resolve differing interpretations. AP Sereni, *The Italian Conception of International Law* (Columbia University Press 1943) 12.



Viewed from the present, the most prominent trade norms missing in 1927 were the general<sup>21</sup> most-favoured-nation (MFN) principle, the commitment to reciprocal reduction of tariffs, the disciplining of subsidies, and the establishment of an international organisation overseeing the trading system. The need to codify MFN was recognised at the International Economic Conference of 1927 and analytical work ensued over the next several years in the League's Economic Committee.<sup>22</sup> But achieving MFN and the other goals became a task for the post World War II reconstruction of the international legal system.

In 1946, the United Nations (UN) launched a multilateral negotiation on 'trade and employment' that formulated both the provisional GATT and what was to be a permanent International Trade Organization (ITO).<sup>23</sup> A key advance in the GATT was to impose non-discrimination rules covering both MFN and national treatment. In addition, the GATT enshrined a commitment for future tariff negotiations.

The ITO Charter of 1948 included the GATT rules plus additional rules on employment policy, labour standards, economic development, investment, restrictive business practices, and many other issues.<sup>24</sup> The ITO also contained an organisational structure and elaborate dispute procedures with compulsory jurisdiction. Like the 1927 Prohibitions Convention, the ITO Charter failed to go into force. For that matter, the GATT did not go into force either. But the GATT was successfully applied provisionally from 1947 until 1995 when it was replaced by the WTO.

Although the WTO did not come into being until 1995, most of the key provisions in the WTO's constitution have roots in the gradual blossoming of the trading system beginning in the early 20<sup>th</sup> century. The key features of the WTO are: the rules on goods, services, and intellectual property;<sup>25</sup> a commitment to reciprocal trade negotiations; an institution

<sup>21</sup> For centuries, MFN had been negotiated as a bilateral trade obligation.

<sup>22</sup> Economic and Financial Committees of the League of Nations, *Commercial Policy in the Postwar World* (League of Nations 1945) 14, 68.

<sup>23</sup> DA Irwin, *Clashing Over Commerce* (U Chicago Press 2017) 471-84.

<sup>24</sup> Havana Charter for an International Trade Organization [ITO Charter], 24 March 1948 (not in force) <[www.wto.org/english/docs\\_e/legal\\_e/prewto\\_legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm)>.

<sup>25</sup> National treatment for 'intellectual property' had been required in some early 20<sup>th</sup> century bilateral trade agreements. See, for example, the Commercial Treaty between Estonia and Hungary (19 October 1922) 30 LNTS 349 art 5. What was new in the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) was the commitment to an international standard for providing intellectual property rights to foreign nationals.



to make intergovernmental decisions; dispute settlement with compulsory jurisdiction; and enforcement of dispute panel decisions via a suspension of concessions or other obligations (SCOO). The adoption of multilateral trade rules, including a juridical procedure for trade disputes, goes back to 1923. Governments agreed in 1948 to establish a functional international organisation for trade, but that effort was stymied after the US Congress repeated in 1949 the kind of isolationist blunder the US Senate had committed in 1919 when it rejected US entry into the League of Nations.<sup>26</sup> The formalisation of the GATT into a trade organisation was considered in the 1960s, but it was not until 1994 that the leading trade powers came together to constitutionalise the WTO at the Marrakesh Conference.

Thus, the WTO was the culmination of decades of stop and go efforts by Governments to concretise a world trading system based on the rule of law and led by a multilateral organisation. The WTO is well-designed as the embodiment of the world trade community's hopes for a 'more viable and durable multilateral trading system.'<sup>27</sup> Ideally, we will be able to keep it.

## 2. *The disappointing performance of the WTO and its members*

From its inception, the WTO drew controversy. Like any international organisation, its future is subject to changing political vicissitudes. The WTO suffered a low point in 1999 in the collapse of the Seattle Ministerial Conference that was caused in part by disagreements among countries about the role of worker rights in future WTO negotiations. The WTO enjoyed its high point in 2001 at the Doha Ministerial Conference when Governments, in a brief moment of global solidarity shortly after the 9/11 terrorist attacks, approved an ambitious negotiating agenda for a new trade round.

Despite years of efforts, the WTO failed to complete its first trade round. (By contrast, the GATT held seven successful trade rounds.)

<sup>26</sup> See JH Jackson, S Charnovitz, 'The Structure and Function of the World Trade Organization' in K Heydon, S Woolcock (eds), *The Ashgate Research Companion to International Trade Policy* (Ashgate 2012) 390.

<sup>27</sup> Marrakesh Agreement, Preamble.



What came to be known as the Doha Development Round is now dead.<sup>28</sup> As with the death of Caesar, an autopsy would show multiple wounds. The fatal wound to Doha was inflicted by the US Government which lacked the vision and generosity to contemplate a trade round that would bestow its benefits on developing countries. Rather than vitalising the WTO's legislative branch for seeking a global deal, the US preferred to pursue bilateral and regional trade arrangements outside of the WTO.

Even worse than how the US neglected the WTO's legislative branch, the US has also actively undermined the WTO's judicial branch. Beginning in 2016, the US began a practice of blocking appointments to the WTO's Appellate Body. As of early November 2019, the US attack on the Appellate Body continues, and in just a month, not only will the WTO lose this organ, but it will also lose the 'security and predictability'<sup>29</sup> of its Dispute Settlement Understanding (DSU).<sup>30</sup>

In providing a second-level review to litigants who request it, the Standing Appellate Body is a vital part of the DSU's judicial machinery. Before an original or compliance panel report can be adopted by the Dispute Settlement Body (DSB), the DSU provides an opportunity for appeal. By dismembering the WTO appellate court, the US Government can disable the machinery so that a panel report is no longer eligible to be adopted by the DSB. In other words, a WTO member Government who has lost a dispute as a defendant will now be able to engage in the strategic misbehaviour of blocking the adoption of a ruling against it. International legal scholar Joost Pauwelyn has called this blocking technique 'appeals into the void'<sup>31</sup> because a WTO defendant would be able to intentionally appeal knowing that such an appeal would freeze the adjudication.

As the WTO member that has historically been the most likely to be a losing WTO dispute defendant, the US has – with the narrow logic of defendant self-interest – struck back to trigger the ongoing WTO judicial

<sup>28</sup> J Bacchus, *The Willing World* (CUP 2018) 102-03.

<sup>29</sup> Art 3(2) DSU.

<sup>30</sup> M Wagner, 'The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?' in C Lo, J Nakagawa, T Chen (eds), *The Appellate Body of the WTO and its Reform* (Springer 2019) 67-90.

<sup>31</sup> J Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?' (7 July 2019) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3415964](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415964)>.



branch crisis. The Trump Administration's attack on the Appellate Body achieves two narrowminded goals at once: first, striking at the international rule of law; and second, preventing any further WTO legal decisions against the parade of US protectionist measures and other unethical trade practices that have been struck down by the Appellate Body since 1996.

In an essay about the WTO I authored in early 2005 for the inaugural issue of the *Journal of International Law & International Relations*, I conducted a futures assessment to predict what the state of the WTO would be 15 years hence. The title of my essay was 'The World Trade Organization in 2020.'<sup>32</sup> Now that 2020 is almost here, let me note briefly one of the scenarios I discussed in 2005. In what I labelled the 'pessimistic scenario,' I painted the possibility 'that the Doha Round fails to reach fruition' and that the 'WTO deteriorates and becomes ineffective.'<sup>33</sup> I posited that '[i]f WTO members demonstrate an inability to write any new rules, that could lead to serious organizational instability.'<sup>34</sup> Looking at the US, I considered the possibility of a 'retreat from international engagements such as the WTO' and suggested that a 'United States repulsion to the trading system might be driven by continued losses in WTO disputes.'<sup>35</sup> While I noted that '[i]f any country could walk out [of the WTO] it would be the United States,' I opined that such a departure 'seems almost inconceivable.'<sup>36</sup> Furthermore, I declared that 'I do not foresee any serious unravelling of WTO dispute settlement.'<sup>37</sup> My essay also coloured in an optimistic scenario, but then concluded: 'The reality is that the WTO of 2020 will not fall into dystopia, nor blossom into a truly progressive international organization.'<sup>38</sup>

Looking back at my predictions made in 2005, I see now that my 'pessimistic' scenario was too optimistic. I did not foresee the wave of political threats to the WTO from US protectionists and sovereigntists. I did not foresee the blame the trading system would receive for trends toward inequality in income patterns. I did not foresee the degeneration

<sup>32</sup> S Charnovitz, 'The World Trade Organization in 2020' (2005) 1 *J Intl L & Intl Relations* 167-89.

<sup>33</sup> *ibid* 180.

<sup>34</sup> *ibid* 181.

<sup>35</sup> *ibid*.

<sup>36</sup> *ibid* 182.

<sup>37</sup> *ibid*.

<sup>38</sup> *ibid* 188.





of international law that was to occur over the next 15 years. But I did not let my weak vision of the future impede my observation of the present. I stayed vigilant to detecting new threats to the trading system, especially from the US Trade Representative (USTR).

In 2016, I called out the Obama Administration for shamelessly abusing the WTO consensus rule to block the reappointment of a distinguished Korean jurist to the WTO Appellate Body.<sup>39</sup> The USTR under Obama was miffed that the Korean appellant had co-authored WTO decisions against US protectionist measures. This US attack on judicial independence led me to animadvert upon USTR's scheme. I urged that 'the Obama Administration should apologize to the WTO for the damage USTR has caused and the Administration should support the enactment of a DSB normative statement to depoliticize reappointments of WTO judges.'<sup>40</sup>

Unfortunately, the Obama Administration did not back down and USTR did not depoliticise its stance toward Appellate Body. In retrospect, one can see that USTR was test driving its capacity to block Appellate Body appointments. When the Trump Administration took over in 2017, I was dismayed to see the Administration relying on some of the same anti-WTO USTR bureaucrats that had caused so much trouble during the Obama Administration.

By summer 2017, the Trump Administration's battle plans against the Appellate Body had taken shape: the US would now block all appellant appointments. Given the clear consensus requirement in the DSU (Article 2(4)) for making Appellate Body appointments, I reflected over several weeks on whether any counter-strategies were available to outfox the Trump Administration. By November 2017, I devised a solution to the looming WTO crisis.

Since the consensus requirement prevented any solution from the DSB, I realised that the only hope to save the DSU was to secure action by an entity that had the authority to engage in non-consensus rulemaking. The only such DSU entity is the Appellate Body. Sadly, the Appellate

<sup>39</sup> S Charnovitz, 'The Obama Administration's Attack on Appellate Body Independence Shows the Need for Reforms' *International Economic Law and Policy Blog* (22 September 2016) <<https://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html>>.

<sup>40</sup> *ibid.*



Body could not save itself. But I ratiocinated that the Appellate Body could act to insulate the machinery for adopting panel reports. Hoping to promote my solution while there was still time to implement it (that is, before the Appellate Body would lose its quorum no later than September 2018), I wrote an article for the *International Economic Law and Policy Blog* titled ‘How to Save WTO Dispute Settlement from the Trump Administration.’<sup>41</sup> I chose the Blog because I know that this news service is read in the WTO and in the Geneva missions. My article was dated 3 November 2017.

The solution I offered was for the Appellate Body to install a safety valve in the machinery that requires it to adjudicate appeals before a panel report can be adopted. Specifically, I urged the Appellate Body to amend its Working Procedures ‘to state that in the event of three or more expired terms in the Appellate Body membership, the Appellate Body will be unable to accept any new appeals,’ and, therefore, if any case is appealed after that point, then the ‘completion of the appeal’ under DSU Article 16(4) will ‘occur automatically on the same day that any new appeal is lodged.’<sup>42</sup> As I explained in 2017, ‘by removing itself from the dispute process for new cases, a disabled Appellate Body will step aside so that the panel decision can automatically be adopted by the WTO Dispute Settlement Body on a timely basis.’ In urging the Appellate Body ‘to erect this defense before it is too late,’ I remarked that the Appellate Body ‘could, in effect call the Trump Administration’s bluff.’ What I meant was that the existential threat to the WTO was not so much that the Appellate Body would be shut down as that the automaticity of adoption of WTO panel reports would be shut down. If the Trump Administration were put on notice in late 2017 that merely by shutting down the Appellate Body, the US would not be able to prevent WTO panel decisions against it from being adopted, I thought it possible that the Administration would back away from its threat. In calling for immediate rulemaking by the Appellate Body in November 2017, I envisioned a fail-safe that

<sup>41</sup> S Charnovitz, ‘How to Save WTO Dispute Settlement from the Trump Administration’ *International Economic Law and Policy Blog* (3 November 2017) <<https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>>.

<sup>42</sup> *ibid.*



would be triggered when the number of appellator vacancies rose from two to three.<sup>43</sup>

Unfortunately, the Appellate Body did not adopt my proposal while there was still time to do so. Why not? No sitting appellator has informed me of the reason why the Appellate Body failed to act. I can speculate on two possibilities. First, the Appellate Body may have thought my solution was *ultra vires* and that Governments would object to the Appellate Body seeking to terminate an appeal without actually deciding it. I admit that my solution is close to the edge of legality<sup>44</sup> but, in my view, desperate times sometimes demand exigent solutions. And whether or not my proposal was technically *ultra vires*, no constitutional court exists in the WTO to strike down Appellate Body rulemaking.<sup>45</sup> The second explanation for inaction is that the Appellate Body imagined itself as too important to be destroyed. The proverb ‘Pride goeth before destruction’<sup>46</sup> comes to mind.

During the past two years, I have participated in numerous insider workshops that have tossed about ideas on what to do about the Appellate Body crisis. On the few occasions when my own proposal was discussed, I suggested that the unique status of the Appellate Body gave it a common law duty to rescue the DSB. Other than my solution, no other fixes existed to maintain the DSU’s automaticity of panel adoption. Nevertheless, not a single WTO member Government supported my proposal.

Instead, the workshops discussed various *inter se* agreements among likeminded Governments. For example, a group of Governments could mutually agree not to appeal. Or a group of Governments could mutually agree to set up an extra-DSU appellate mechanism.<sup>47</sup> While such solutions may be useful as far as they go, they do not go very far. Under the

<sup>43</sup> In other words, under my plan, the loss of appealability would have begun in late 2017 rather than in late 2019.

<sup>44</sup> Art 17(12) DSU calls for the Appellate Body to ‘address each of the issues raised’, which it would be failing to do under my proposal. But such failure was already inevitable as a result of the US scheme.

<sup>45</sup> If such a court existed, there would be a need to consider whether such rulemaking by the Appellate Body is defensible under the law of necessity.

<sup>46</sup> Proverbs 16:18.

<sup>47</sup> As I have noted, the main problems with an extra-WTO appellate mechanism are: (1) lack of authoritativeness of *ad hoc* appeals, (2) potential incoherence of WTO law whose interpretation will be handed off to separate adjudicators who might issue



breakdown of the DSU that the US has engineered, the US can now render itself immune from losing in WTO dispute settlement. Of course, immunity is not the same thing as invulnerability because other countries can copy the US in rendering themselves immune from the rule of law. When law breaks down, the community suffers. To quote John Locke (1689): ‘Where-ever law ends, tyranny begins, if the law be transgressed to another’s harm ...’<sup>48</sup>

Both in the workshops and in the public fora, the key advice I constantly offer is that other WTO members should not make the situation worse by offering to appease the Trump Administration. As history has shown, the appeasement of dictators never works. Unfortunately, I continue to see many Governments shortsightedly seeking to reach compromises with the US that involve making legislative changes to the DSU to reduce the judicial independence of the Appellate Body.<sup>49</sup> Nothing could be more foolish than to rush through hastily considered DSU amendments. As I wrote recently on the *International Economic Law and Policy Blog*:

‘I would caution against a scholastic exercise that assumes the validity of any of the US government’s objections to WTO dispute settlement. The United States government operates more and more on the assumption that if they can continue to repeat false statements [then] everyone will eventually accept them as true. This style of argument should not be accepted for the WTO anymore more than it should be accepted for climate change or any of the other foreign and domestic policy issues for which repeated falsehoods are the order of the day.’<sup>50</sup>

inconsistent final judgments, and (3) non-adoptability of awards and consequently the unavailability of WTO enforcement.

<sup>48</sup> See Online Library of Liberty, <<https://oll.libertyfund.org/quotes/115>>.

<sup>49</sup> For example, the US has criticised appellate jurisprudence that scrutinises the objectivity of a panel’s assessment of the facts. To prevent such scrutiny, the US seeks to diminish authority of appellators to assure an adequate factual basis for their decisions. In my view, the right solution to the problem of an inadequacy of facts is not for governments to further narrow the WTO appellate power, but rather to *expand* that power by giving the Appellate Body remand authority.

<sup>50</sup> See my comment of 1 October 2019 to J Pauwelyn, ‘The Role of the Secretariat in WTO Dispute Settlement (and the AB Crisis)’ *International Economic Law and Policy Blog* (26 September 2019) <<https://ielp.worldtradelaw.net/2019/09/the-role-of-the-secretariat-in-wto-dispute-settlement-and-the-ab-crisis.html>>.



I have also pointed out that the only way to appease the US would be to formally render it exempt from losing any more WTO cases.<sup>51</sup> To me, such a concession is too high of a price to pay. But if WTO members are looking for a viable formula for appeasement, offering such immunity would probably be enough to get the US to agree to allow the Appellate Body to continue its operations.

Over the past century, US officials have brooded over the prospect of having international tribunals review US compliance with its international legal obligations. In 1919, the US refused to ratify the Treaty of Versailles in part because of the compliance review procedures in the International Labour Organization (ILO). Concern was expressed in the US Senate about small nations with black representatives (eg, Haiti) being able to sit on tribunals to enforce ILO conventions against the US.<sup>52</sup> During the following decade, the US failed to join the PCIJ. The country enjoyed a cycle of internationalism after Pearl Harbor, but even so, it failed to join the ITO in 1949. In 1985, the Reagan Administration withdrew general US consent to compulsory jurisdiction by the International Court of Justice (ICJ).<sup>53</sup> In that decade and thereafter, the US failed to join the Law of the Sea Convention in part over concerns about its Tribunal. In 1999 and thereafter, the US refused to join the International Criminal Court. In 2005, the Bush Administration withdrew certain specific US consent to ICJ jurisdiction.<sup>54</sup> Thus, in the period since 1995, the US consent in the DSU to compulsory DSB jurisdiction has become more divergent from the contemporary practice by the country to reject jurisdiction of international tribunals over it.

The capacity of WTO courts to expose the WTO-illegality of new US tariff-making is a significant irritant to a US Government bent on erecting new protectionism. The bite of WTO review can be better appreciated when one realises that there are no US domestic constitutional controls

<sup>51</sup> The language I have suggested is: 'Recognizing American exceptionalism, the DSB shall not adopt any report finding a violation by the United States of any WTO agreement.'

<sup>52</sup> E McKillen, 'Integrating Labor into the Narrative of Wilsonian Internationalism: A Literature Review' (2010) 34 *Diplomatic History* 643, 661.

<sup>53</sup> The Reagan Administration withdrew after the ICJ accepted jurisdiction in a case by Nicaragua against the US regarding the US secret war against Nicaragua.

<sup>54</sup> The Bush Administration withdrew after losing the ICJ case by Mexico against the US regarding US violations of consular rights.



against protecting one industry at the expense of another.<sup>55</sup> In that regard, the 19<sup>th</sup> century American Constitution of the Confederate States was superior because it prohibited the Congress from granting bounties on exports or imposing duties in order to ‘promote or foster any branch of industry.’<sup>56</sup>

The value-added from any international organisation is to inspire and empower the better angels of its member Governments. This insight arose as early as 1909, when the American political scientist Paul Reinsch explained that a State will ‘avail itself of the advantages offered by international organization’ to enable ‘the expansion of the sphere of the national government ... for the purpose of securing the greatest possible advantages for the individual citizen’.<sup>57</sup> Although an international organisation does manifest some volition of its own, in general an organization acts as an agent. Therefore, its capacity to act is shaped by the (mis)behaviour of its member Governments. An international organisation cannot act with much greater rectitude than its members do. Furthermore, one leading member of an international organisation can have a disproportionate influence in eroding the organisation from within, especially one like the WTO that reaches decisions via consensus.

### 3. *The pushback against international trade and against international law*

Since the WTO was founded in 1994, the dark clouds and winds have rolled against it. The most consequential trend is that trade is under renewed attack by those who believe economic fundamentals have changed since 1774 when Benjamin Franklin observed that ‘No nation was ever ruined by trade.’<sup>58</sup> What has supposedly changed? The assertions abound: trade impedes economic development, impedes national security, impedes domestic income equity, impedes human rights, etc. And

<sup>55</sup> S Cho, ‘Toward a New Economic Constitution: Judicial Disciplines on Trade Politics’ (2007) 42 *Wake Forest L Rev* 167-97.

<sup>56</sup> Constitution of the Confederate States (11 March 1861) <[https://avalon.law.yale.edu/19th\\_century/csa\\_csa.asp](https://avalon.law.yale.edu/19th_century/csa_csa.asp)>.

<sup>57</sup> P Reinsch, ‘International Administrative Law and National Sovereignty’ (1909) 3 *AJIL* 1, 12, 15.

<sup>58</sup> Founders’ Quotes <<https://foundersquotes.com/founding-fathers-quote/no-nation-was-ever-ruined-by-trade-even-seemingly-the-most-disadvantageous/>>.



thus, for these reasons, trade should no longer be determined by individual voluntary choices in the market, but rather should be managed by politicians and bureaucrats acting in their own interests.

To be sure, ideas of this sort have always circulated,<sup>59</sup> but such spurious claims about the flaws of trade are more salient today than they were 25 or 50 years ago. For example, US Secretaries of State have traditionally been champions of trade. But not in the Trump Administration. In May 2019, US Secretary of State Michael R Pompeo lamented that ‘We bought into trade agreements that helped hollow out our middle class.’<sup>60</sup> Today, international trade and trade agreements are more commonly maligned as a cause of social and economic ills than as a partial solution for ameliorating such ills.

Another trend is that IEcL itself is under attack.<sup>61</sup> The Trump Administration is waging war against IEcL, and in that war, the WTO is one of the main theatres of conflict. Besides the assault on WTO dispute settlement discussed above, the Trump Administration has also stepped up its defiance of WTO rules through numerous US ‘policies inconsistent with free and fair trade ....’<sup>62</sup> These include US tariffs under Sections 201, 232, and 301 of US trade law and the proliferating use of US tariffs to carry out WTO-illegal trade remedies.<sup>63</sup> Such economic aggression by the US in peacetime is unprecedented. In recent months, the US Government’s ‘behavior has become even more aggressive and destabilizing.’<sup>64</sup> Borrowing the words of President Trump, ‘[s]uch disregard for adherence to WTO rules, including the likely disregard of any future rules, cannot continue to go unchecked.’<sup>65</sup>

<sup>59</sup> DA Irwin, *Against the Tide: An Intellectual History of Free Trade* (Princeton 1996).

<sup>60</sup> MR Pompeo, ‘A Foreign Policy from the Founding’ (11 May 2019) <[www.state.gov/remarks-at-the-claremont-institute-40th-anniversary-gala-a-foreign-policy-from-the-founding/](http://www.state.gov/remarks-at-the-claremont-institute-40th-anniversary-gala-a-foreign-policy-from-the-founding/)>.

<sup>61</sup> E-U Petersmann, *International Economic Law in the 21st Century* (Hart Publishing 2012).

<sup>62</sup> See M Pence, ‘Frederic V Malek Memorial Lecture’, Wilson Center, 24 October 2019.

<sup>63</sup> For details of US trade actions, see S Charnovitz, ‘How American Rejectionism Undermines International Economic Law’ (2018) 10 *Trade L & Development* 226-69.

<sup>64</sup> See Pence (n 62).

<sup>65</sup> White House, *Memorandum on Reforming Developing-Country Status in the World Trade Organization* (26 July 2019) <[www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization](http://www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization)>. Trump used these words to describe China, but in my view, they are more applicable to US misbehaviour.





In addition to targeting the WTO, the Trump Administration is targeting China.<sup>66</sup> The China theatre demonstrates clearly how the US Government seeks to replace the rule of law with American power. Bringing China back<sup>67</sup> into the law-based trading system was one of the signal achievements of the WTO and was an essential step for the WTO to earn the ‘W’ in its moniker.

China’s WTO accession agreement of 2001 was controversial at the time and remains controversial today. In a study I prepared for one of the book projects sponsored by the WTO Appellate Body to celebrate its 10<sup>th</sup> anniversary in 2005, I criticised the China accession agreement for imposing so many applicant WTO-plus rules on China.<sup>68</sup> Most commentators in recent years have taken the opposite position, *viz*, that the nations competing with China should have piled onto China additional WTO-plus obligations. In any event, China joined the WTO with its own individualised rulebook that entails far more obligations on China than any other WTO member Government has.

China should be held liable in the WTO for any violation of its accession agreement. Since it joined the WTO in 2001, China has been a defendant in only five WTO cases involving its accession commitments, and lost four of those cases.<sup>69</sup> In my view as an observer of China’s economy, China’s WTO commitments have been under-enforced by WTO Governments. In a study I prepared this year for the *European Yearbook of International Economic Law*, I examined the top 20 economic complaints against China by the Trump Administration.<sup>70</sup> I did not seek to reach a conclusion as to the veracity of all of those claims, but assuming them to be true, I analysed how many of them stated a legal claim for

<sup>66</sup> JM Schlesinger, A Leary, ‘Trump Denounces Both China and WTO’ *Wall Street Journal* (26 July 2019) <[www.wsj.com/articles/trump-presses-wto-to-change-china-s-developing-country-status-11564166423](http://www.wsj.com/articles/trump-presses-wto-to-change-china-s-developing-country-status-11564166423)>.

<sup>67</sup> China was an original GATT contracting party in 1947, but then departed the GATT after the communist takeover.

<sup>68</sup> S Charnovitz, ‘Mapping the Law of WTO Accession’, in ME Janow, V Donaldson, A Yanovich, *WTO at Ten: Governance, Dispute Settlement & Developing Countries* (Juris 2008) 855-920.

<sup>69</sup> WTO, DS 363, 394, 431, 517. China also lost the *Auto Parts* case (DS 339), but in the accession component of the case, the violation found by the panel was reversed by the Appellate Body.

<sup>70</sup> S Charnovitz, ‘Grading Trump’s China Trade Strategy’ (2019) *Eur YB Intl Economic L* (forthcoming). A draft of this paper was posted on SSRN on 24 May 2019 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3393083](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3393083)>.





which relief could be granted by the WTO. Of the 20 claims, my study found that at least 10 involved violations of WTO law, especially the WTO law of China accession.<sup>71</sup> Yet for those 10 potential US cases against China, the Trump Administration brought only two cases.

Nothing could be more logically inconsistent than the current US policy toward China. On the one hand, Vice President Mike Pence constantly accuses China violating ‘the rule of law, and international rules of commerce.’<sup>72</sup> Yet when the opportunity arose to lodge multiple, broad legal claims against China in the one international court that has jurisdiction over China for trade violations, the Trump Administration failed to do so.<sup>73</sup> Instead of utilising WTO law and the WTO dispute system to hold China responsible for its multilateral commitments, the Administration chose to un-judicialise the dispute and use raw economic power to force China to obey US dictates.

For the other 10 US complaints against China, assuming their validity, the norms of the trading system provide an opportunity for the US to work with likeminded WTO member Governments to strengthen WTO rules to cover China’s measures that are allegedly externalising costs on other countries (eg, activities by State-owned enterprises). But the Trump Administration has not exhibited any more interest in seeking legislative solutions regarding China than in seeking judicial solutions. The preferred solution for the Trump Administration in trade disputes is the threat or imposition of unilateral US economic sanctions. The Trump Administration’s rejection of WTO legal process is double barreled: first, a failure to bring legal cases against China’s alleged misbehaviour; and second, a failure to obey the prohibitions in WTO law against discrimination, unilateral tariffs, and bypassing the WTO dispute system.

Of course, disrespect for WTO law is not just misbehaviour practiced by the US. The European Union (EU) and China are also disrespecting WTO law by imposing tariffs in retaliation against the US Section 232

<sup>71</sup> A recent study reaches the same conclusion that China’s State capitalism can be addressed under existing WTO rules. W Zhou, H Gao, X Bai, ‘Building a Market Economy through WTO-inspired Reform of State-owned Enterprises in China’ (2019) 68 ICLQ 977-1022.

<sup>72</sup> See Pence (n 62).

<sup>73</sup> S Charnovitz, ‘U.S.-China Talks Ignore Global Trade Rules’ *Wall Street Journal* (17 May 2019) <[www.wsj.com/articles/u-s-china-talks-ignore-global-trade-rules-11558123934](http://www.wsj.com/articles/u-s-china-talks-ignore-global-trade-rules-11558123934)>.



steel and aluminium tariffs.<sup>74</sup> Although the Section 232 tariffs violate the GATT, that violation does not give other countries license to violate the GATT in retaliation. Two wrongs do not make a right in trade law (or anywhere else). The retaliation by the EU and China violates GATT Articles I and II and DSU Article 23. At the time that the US wrongfully imposed the Section 232 tariffs in March 2018, there was a colourable argument that unilateral retaliation was justifiable under GATT safeguard rules. Nevertheless, that GATT Article XIX argument was foreclosed in an Appellate Body safeguard ruling in August 2018.<sup>75</sup> Following that (questionable<sup>76</sup>) ruling, the retaliators should have withdrawn their countermeasures immediately.

In addition, China violates the WTO in its ongoing retaliation against the WTO-illegal US Section 301 sanctions. Although China lodged a complaint in the WTO against these US tariffs,<sup>77</sup> China undermined its legal position by retaliating against the US in advance. No other country has ever come to WTO dispute settlement with such unclean hands.

By sidelining law in its campaign against China, the US is committing not only a tactical mistake, but also a strategic blunder. The tactical mistake is the failure to use the legal and normative tools available to convince China to behave more cooperatively. The strategic blunder comes in showing China that what the US is really trying to achieve is the disabling of China's economy in order to preserve America's economic supremacy. This purpose is consistent with Trump's 'National Security

<sup>74</sup> USTR has brought WTO cases against the EU (DS 559) and China (DS 558) for their anti-Section 232 retaliation.

<sup>75</sup> Charnovitz (n 70).

<sup>76</sup> In my view, the Appellate Body's decision on this point is not well-reasoned. Yet I would hasten to add that my view that the Appellate Body reached the wrong legal conclusion does not mean that I share the belief of many US officials and WTO insiders that it has acted illegally. Courts do sometimes issue wrong decisions which is why we have appellate courts. And the highest appellate court can also issue wrong decisions. Unlike the US Supreme Court which is not unwilling to overrule its own precedent, the Appellate Body has never admitted past error.

<sup>77</sup> The Section 301 tariffs not only violate arts I and II GATT, but the tariffs also violate art 23 DSU.



Strategy' which accuses China and Russia of 'attempting to erode American security and prosperity.'<sup>78</sup> Indeed, Trump himself has named China an 'enemy' of the US.<sup>79</sup>

What the world needs now from China is for China to improve its respect for the rule of law and for the human rights enshrined in free market systems. But those virtues cannot be taught to China by a bully who ignores and undermines the WTO judicial system and who employs unprecedented market interventions to tilt the playing field in favour of protected US industries. The cause of reform in China is not helped by, and indeed is hindered by, the everyday hypocrisy that the US shows in rejecting world trade law in favour of unilateralism and US exceptionalism. As in so many areas, the Trump Administration's weak tactics distract attention from the foreign misbehaviour that the Administration is seeking to expose. Another example of the underlying US hypocrisy is that the Trump Administration inveighs against supposed Chinese mercantilism while demanding that China buy more agricultural exports from the US.<sup>80</sup>

As the German international law theorist Walther Schücking<sup>81</sup> wisely predicted in 1912, the 'modernizing and Europeanizing' of China will lead it to 'demand full membership within the community of sovereign states in every respect.'<sup>82</sup> China became an active member of the League of Nations,<sup>83</sup> and in 1971, China gained a seat in the UN Security Council and in numerous UN bodies. Over many decades, skilful diplomacy has encouraged and nurtured a willingness in China to play an increasingly

<sup>78</sup> President DJ Trump, 'National Security Strategy of the United States of America' (December 2017) 2 <[www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf](http://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf)>.

<sup>79</sup> D Chiacu, 'Enraged Trump likens Fed chief to "Enemy" China' *Reuters* (23 August 2019) <[www.reuters.com/article/us-usa-fed-trump/enraged-trump-likens-fed-chief-to-enemy-china-idUSKCN1VD1XL](http://www.reuters.com/article/us-usa-fed-trump/enraged-trump-likens-fed-chief-to-enemy-china-idUSKCN1VD1XL)>.

<sup>80</sup> B Fredericks, 'China resists Trump's demand to double farm imports' *New York Post* (30 October 2019) <<https://nypost.com/2019/10/30/china-resists-trumps-demand-to-double-farm-imports/>>.

<sup>81</sup> See M Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (CUP 2001) 217 (discussing Schücking's work).

<sup>82</sup> W Schücking, *The International Union of the Hague Conferences* (G Fenwich tr, Clarendon Press 1918) 243.

<sup>83</sup> AA Kaufman, 'In Pursuit of Equality and Respect: China's Diplomacy and the League of Nations' (2014) 40 *Modern China* 605-38.



constructive role in international cooperation on political, economic, environmental, and social goals.

Unfortunately, the ongoing US campaign to decouple the US and Chinese economies and to punish the Chinese people with trade sanctions takes a huge step in the wrong direction. Vice President Pence recently gushed that the Trump Administration wants to build a relationship with China based on ‘candor, fairness and mutual respect,’<sup>84</sup> but the policies being pursued by Trump and Pence demonstrate the exact opposite. China is hardly being shown mutual respect and fairness when America’s WTO obligations toward China are being routinely violated. The Trump Administration is hardly exhibiting candour when Pence says that ‘We are not seeking to contain China’s development’ yet, at the same time, his boss Trump orders US firms to leave China.<sup>85</sup>

The strategic dangers of punishing China bring to mind the prophetic warning of David Jayne Hill in 1919 who criticised the Treaty of Versailles as a ‘punitive peace’ and a ‘crime against the dignity and sanctity of law itself.’<sup>86</sup> The missed opportunity, according to Hill, was to have written a treaty that would ‘strengthen whatever law-abiding spirit may exist in the noblest minds’ of the German people and ‘set them irrevocably against the military autocracy’ that induced the First World War. Specifically, Hill called for provisions of law by which the ‘legal rights’ of one State toward another could be judicially determined. A century after Hill warned of the consequences of failing to establish a rule-based order, the WTO legal order between China and the US today is being flouted by the Trump Administration in favour of naked projections of US power. Such parochial actions to demonise and punish Chinese society will have long-term counterproductive consequences. In my view, China’s policies of socialist imperialism are more dangerous to the West than its so-called State capitalism.

Besides flubbing its campaign against China, the Trump Administration’s violations of international law are intended to and are having the effect of weakening the entire system of international law and govern-

<sup>84</sup> Pence (n 62).

<sup>85</sup> *ibid*; K Bradsher, A Rappoport, ‘Trump Ordered US Companies to Leave China. Is that possible?’ *New York Times* (24 August 2019) <[www.nytimes.com/2019/08/24/business/trump-china-trade.html](http://www.nytimes.com/2019/08/24/business/trump-china-trade.html)>.

<sup>86</sup> DJ Hill, ‘The Nations and the Law’ (1919) 210 *The North American Rev* 450-51.



ance. Diminished international law will lead to a more dangerous, unstable, and anarchic world order. The continuing pushback against IECL is just one feature of a broader pushback against global governance and international adjudication.<sup>87</sup> Ironically, given the higher mondialisation of law and economics of the early 21<sup>st</sup> century as compared to the early 20<sup>th</sup> century, contemporary political discourse may manifest more worries now about retaining national sovereignty than discourse a century ago. Recall Trump's address to the UN in 2018 when he warned: 'Around the world, responsible nations must defend against threats to sovereignty not just from global governance, but also from other, new forms of coercion and domination.'<sup>88</sup>

If the revanchist attitudes about sovereignty were just a fixation of populist politicians and street protestors, that would be bad enough. But the most troubling aspect of the sovereigntist movement is the way that academics have bought into the paradigm that there is a trade-off between national sovereignty and international law. One sees this syndrome in the scholarly international relations and international law literature that purports to assess the so-called 'sovereignty costs' of treaties.<sup>89</sup> Importantly, some legal academics have criticised these accounts by explaining instead how joint rulemaking in treaties can enhance sovereignty.<sup>90</sup>

In my view, the best pronouncement on national sovereignty came in 1923, when the PCIJ declared in the *Wimbledon* case that it 'declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty.'<sup>91</sup> Instead, the Court explained: '... the right of entering into international engagements is an attribute of State sovereignty.'<sup>92</sup>

<sup>87</sup> See C McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 67 ICLQ 499-537.

<sup>88</sup> President DJ Trump, 'Remarks by President Trump to the 73rd Session of the United Nations General Assembly' (25 September 2018) <[www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/](http://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/)>.

<sup>89</sup> See KW Abbott, D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 Intl Organization 421-24 (introducing the term 'sovereignty costs').

<sup>90</sup> K Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law' (2003) 6 J Intl Economic L 841-78; O Hathaway, 'International Delegation and Domestic Sovereignty' (2008) 71 L & Contemporary Problems 115-50.

<sup>91</sup> *Case of the S.S. "Wimbledon"* (17 August 1923) PCIJ Rep Series A No 1, 25.

<sup>92</sup> *ibid.*



The rejection of the WTO and the trumpeting of sovereignty are two examples of the ongoing degeneration of the ambition of international law. Yet the most prominent example is the climate regime which has allowed itself to be hollowed out in the Paris Agreement of 2015.

Despite its infirmities, the WTO amalgamates the key elements of international lawmaking that were developed over the 19<sup>th</sup> and 20<sup>th</sup> centuries. To wit, the WTO contains substantive rules, specific commitments based on reciprocity, dispute settlement, and enforcement. By contrast, none of those crucial features are present to any significant degree in the Paris Agreement.<sup>93</sup>

Of course, no single template is optimal for all international regimes. The architecture utilised in each of them should respond to the nature of the transborder challenge and the role of cooperation in solving it. For example, in the trading system, many of the benefits of international trade are divisible and can be obtained by a Government liberalising at home. Yet in the climate regime, the opposite situation exists. The avoidance of global warming is not divisible and achieving it requires the cooperation of the largest emitting nations. So, given this fundamental difference, one might expect the climate regime to mandate a much higher degree of multilateral cooperation than the trade regime. Yet the architecture of the climate regime is not based on that logic. Unlike the WTO, the Paris Agreement omits all of the important ingredients – including rules, reciprocity, and enforcement – of the formula for treaty success. Instead, the ‘Paris Paradigm’ is centred on ‘self-determined mitigation contributions’ for which governments ‘are not legally obligated to achieve.’<sup>94</sup>

Ironically, the only procedural obligation with bite in the Paris Agreement is the rule forbidding withdrawal from the treaty for three years after ratification and then only after giving a one-year notice.<sup>95</sup> In contrast, Article XV of the WTO Agreement permits withdrawal at any time with only a half-year notice. In my view, treaties can trench on national sovereignty if they seek to prevent States (and future policymakers within States) from easily exiting the treaty. Ideally, the adhesion to a treaty

<sup>93</sup> The Paris Agreement contains some procedural and transparency rules, but no substantive rules on actions Governments need to take in parallel (eg, a carbon tax) to reduce greenhouse gas emissions.

<sup>94</sup> L Rajamani, D Bodansky, ‘The Paris Rulebook: Balancing International Prescriptiveness with National Discretion’ (2019) 68 *ICLQ* 1023-40.

<sup>95</sup> Paris Agreement (12 December 2015) art 28.



should come from the mutual benefits gained from it, not a padlock on the fire exit.

For multilateral trade negotiations, we often hear about the negotiating failure in Geneva. Yet for climate change, the prevailing narrative is of a huge negotiating *success* in Paris. That the trade regime is held to a much higher standard than the climate regime can be seen most clearly if one imagines exporting the Paris technique to Geneva. Suppose the Doha Round recommenced based on new climate-style negotiating modalities that sought to achieve outcomes that are non-binding,<sup>96</sup> non-rule based, not susceptible to dispute settlement, and that entail no reciprocal commitments. Would such a game-plan satisfy the WTO? Obviously not.

Trade ministers and import/export groups would not accept such a voluntary arrangement for trade even though environmental ministers and environmental groups accepted and continue to be enthusiastic about the non-binding Paris Agreement. This story would be just an amusing case study of institutional irrationality if the stakes in climate change were commensurate to the stakes in the Doha Round. Unfortunately, the stakes in climate change are many times higher than the stakes ever were in the Doha Round. That's why the climate regime's choice of potluck governance over legal governance is so maddening: because the pathologies of the Paris Agreement make planetary ecological failure a much more likely outcome.

#### 4. *A plan for strengthening the WTO*

The advent of the WTO's silver anniversary provides an opportunity to update the structure and function of the WTO to reflect what has been learned during the WTO's first 25 years. President Trump told the UN in 2019 that 'the World Trade Organization needs drastic change,'<sup>97</sup> but he has not communicated to the WTO a broad agenda for reform. The

<sup>96</sup> In other words, the binding and negotiated WTO schedules of goods and services commitments would be replaced by non-binding, unilateral schedules of 'nationally determined contributions' of the type relied upon in the Paris Agreement.

<sup>97</sup> President DJ Trump, 'Remarks by President Trump to the 74th Session of the United Nations General Assembly' (25 September 2019) <[www.whitehouse.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/](http://www.whitehouse.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/)>.





only US initiative that has come to my attention is Trump's directive to USTR 'to secure changes at the WTO that would prevent self-declared developing countries from availing themselves of flexibilities in WTO rules and negotiations that are not justified by appropriate economic and other indicators.'<sup>98</sup> In my view, such changes are needed in the WTO.

Some have said that the WTO needs stronger instruments to prevent trade wars, but count me as sceptical. Previous multilateral efforts to outlaw military war such as the Kellogg-Briand Pact or even the UN Charter were not as successful as their advocates hoped. For the same reasons, tightening Article 23 DSU will not be enough to stop WTO members from waging trade wars against each other if that is what such Governments want to do.

The failure of the WTO to prevent US trade sanctions against China raises an interesting question as to whether China would have a cognisable non-violation claim against the WTO. The cause of action for such a non-violation claim would be that in accepting the WTO's terms for joining the trading system, China gained legitimate expectations that its contractual rights would be honoured in the WTO, an expectation that has been dashed by the Section 301 sanctions. Certainly, China could also make a violation claim against the US that Section 301 'as such' and 'as applied' violates the WTO.<sup>99</sup> But since the Trump Administration has asserted publicly its tariffs do not violate the WTO,<sup>100</sup> then China could also bring a non-violation claim against the US and possibly other WTO members too. (I presume that the WTO itself is immune from accountability in WTO dispute settlement.)

The ITO Charter of 1948 was authored by the UN Conference on Trade and Employment. Based on that dual purpose, the Charter recognised the need for: (1) 'internal measures' for 'the maintenance in each country of useful employment opportunities for those able and willing to work' and (2) 'concerted action ... to sustain employment,' to recognise the 'rights of workers,' and to maintain 'fair labor standards.'<sup>101</sup> The idea

<sup>98</sup> White House (n 65).

<sup>99</sup> An ongoing dispute (DS 543) exists, but since China has failed to engage in best practices in WTO transparency by releasing its briefs, I do not know whether China has levied 'as such' claims against Section 301.

<sup>100</sup> The US tariffs are said to be justified as a way to counter behaviour by China that is alleged to fall outside of the WTO rulebook.

<sup>101</sup> Arts 1-9 ITO Charter.





of linking trade and employment policy was promoted by postwar planners during World War II. For example, in April 1945, the Economic and Financial Committees of the League of Nations declared that ‘international trade negotiations can be linked with measures for ensuring high and stable levels of employment’ in order to ‘better their chances of success.’<sup>102</sup>

Unfortunately, the international employment goals were lost to the trading system when the ITO failed to go into force.<sup>103</sup> As salient as they were in 1948, these goals may be even more salient today in a more globally interconnected world. Better late than never, a treatment for the scourge of unemployment could now be revaccinated into the trading system by a WTO amendment.

Thus, one way that the WTO can be substantively improved is to embed a commitment to fostering worker adjustment to the impact of trade. Doing so could respond to the trends in trade politics that have criticised open trade and trade agreements for dis-employing workers and worsening social unfairness. Of course, such criticisms are more properly blamed on the weaknesses of the international employment regime than on the WTO itself.<sup>104</sup> While I have long advocated ‘strengthening the international employment regime,’<sup>105</sup> including on the problem of technological unemployment, I see no prospect for that vision. Given this reality, I continue to advocate a second-best solution of expanding the trading system to address some trade-related employment matters.

A popular thesis about the GATT and the WTO is that these treaties reflect ‘embedded liberalism,’ a term introduced by the US political scientist John Ruggie in 1982. The idea of ‘embedded liberalism’ is that the

<sup>102</sup> Economic and Financial Committees of the League of Nations (n 22) 29.

<sup>103</sup> JM Jensen, ‘Negotiating a World Trade and Employment Charter: The United States, the ILO and the Collapse of the ITO Ideal’ in JM Jensen, N Lichtenstein (eds), *The ILO from Geneva to the Pacific Rim: West Meets East* (Palgrave 2016) 83-109.

<sup>104</sup> ‘Trade and employment’ was the original ‘trade-and’ issue, a term that became popular in the 1990s with respect to the debate on trade and environment. As with any ‘trade-and’ issue, the linkage to trade arises out of a lack of confidence that the regime with primary competence is able to address the conjunctive trade issue. For example, the effort in the mid-1940s to link trade and employment reflected a lack of confidence in the ILO.

<sup>105</sup> See S Charnovitz, ‘Strengthening the International Employment Regime’ (1995) 30 *Intereconomics* 221-33 <[www.econstor.eu/bitstream/10419/140512/1/v30-i05-a03-BF02926365.pdf](http://www.econstor.eu/bitstream/10419/140512/1/v30-i05-a03-BF02926365.pdf)>.



liberalism of international trade plus the liberalism of Government policies 'to contain and share the social adjustment costs' of open markets were jointly embedded into postwar multilateralism.<sup>106</sup> Although Ruggie's theory was appropriately nuanced, some followers of Ruggie over the past 25 years have made broader claims that the WTO itself manifests embedded liberalism.<sup>107</sup>

In my view, such errant claims about the WTO miss the point. Although the WTO was predicated on the liberalism of international trade, the WTO is not predicated on the liberalism of domestic Government intervention to contain social adjustment costs. The ITO of 1948 had such a predicate, as Ruggie himself acknowledged, but those commitments did not find their way into the GATT. Then, in the early 1990s, when an opportunity arose to rescue the ITO's lost employment goals, the GATT Governments failed to embed them into the WTO. Thus, the WTO is more accurately characterised as 'un-embedded liberalism' than as 'embedded liberalism.'

If employment issues are added to the WTO's wheelhouse, then how about environmental issues? While a case can be made to graft sustainable development onto the WTO's mission, there is a much better solution which is to strengthen the multilateral environmental regime.<sup>108</sup> Unlike the problem of worker adjustment to trade where a viable second-best role for the WTO could exist, inserting climate change or other ecological challenges into the WTO does not constitute a viable second-best approach for fixing dysfunctional global environmental governance. To paraphrase Georges Clemenceau, the environment is too important to be left to trade ministers.

<sup>106</sup> JG Ruggie, 'International regimes, transactions, and change: embedded liberalism in the postwar economic order' (1982) 36 *Intl Organization* 379, 382-83; Id, 'Taking Embedded Liberalism Global: The Corporate Connection' in D Held, M Koenig-Archibugi (eds), *Taming Globalization. Frontiers of Governance* (Polity Press 2003) 94.

<sup>107</sup> For example, see G Moon, L Toohey (eds), *The Future of International Economic Integration. The Embedded Liberalism Compromise Revisited* (CUP 2018). See also Y Yamamoto, 'The WTO in a Dynamic Equilibrium? Between Regime and Global Governance' in A Kotera, I Araki, T Kawase (eds), *The Future of the Multilateral Trading System. East Asian Perspectives* (Cameron May 2009) 31, 43-44 (calling the WTO 'doubly embedded liberalism').

<sup>108</sup> See S Charnovitz, 'A World Environment Organization' (2002) 37 *Columbia J Environmental LL* 323-62.



Besides the addition of worker adjustment policy, the mission of the WTO should also be expanded to provide better rules for nonmarket economies. Although mainstream commentary persistently argues that international trade rules are insufficient to discipline how State capitalism externalises costs on other countries, I have seen little effort by analysts preoccupied with worries about China to propose treaty language for how WTO rules could be improved.<sup>109</sup> Drafting such language is even harder than it may initially appear because any multilateral rules have to be written to apply to all countries (including the hyper-mercantilist US), not just China.<sup>110</sup>

Given how the WTO in 2004 shut down its talks on the Doha Round issues of investment and competition, the WTO may lack the capacity to prescribe new rules governing State capitalism and mercantilism. So, if new multilateral disciplines are to be designed, that reform exercise may need to occur outside of the WTO. The venues for doing so could include the Organisation for Economic Co-operation and Development (OECD) and/or private initiative.

The recently published Joint Statement ‘US–China Trade Relations – A Way Forward’<sup>111</sup> by 30 scholars, located in China, Europe, and the US, provides an example of how private initiative could constructively seek to give direction to governments. In my view, the so-called China dilemma is just a contemporary manifestation of a long-recognised IEcL problem analysed many decades ago by Professor John H Jackson. For Jackson, trade between countries with markedly different economic systems presented a political and economic challenge that he termed the ‘interface’ problem.<sup>112</sup> The China Joint Statement does not build on (or even mention) Jackson’s pioneering work by analysing the successes and failures in the ways in which the trading system has developed responses to

<sup>109</sup> Back in 1999, an academic project led by Peter Watson offered a proposal to amend the WTO to ensure internationally contestable markets. PS Watson, JE Flynn, CC Conwell, *Completing the World Trading System* (Kluwer 1999) 342-59.

<sup>110</sup> Charnovitz (n 63) 261.

<sup>111</sup> US–China Trade Policy Working Group, ‘US–China Trade Relations – A Way Forward’ (27 October 2019) <[https://cdn.shanghai.nyu.edu/sites/default/files/\\_us-china\\_trade\\_joint\\_statement\\_2019\\_0.pdf](https://cdn.shanghai.nyu.edu/sites/default/files/_us-china_trade_joint_statement_2019_0.pdf)>.

<sup>112</sup> See D Kennedy, ‘The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law’ (1995) 10 *American U Intl L Rev* 671, 675, 701, 708-12 (discussing Jackson’s thesis on interface).



the interface problem. Nor does the Statement recommend any specific revisions in WTO law.

Instead, the Statement cautions *against* ‘using global rules or bargaining pressures that are perceived as intruding on a country’s sovereign right to make its own domestic policy choices.’<sup>113</sup> This invocation of sovereignty by the Statement’s authors – including six law professors – is especially troubling as IEcL has always been premised on using sovereignty to *solve* collective problems rather than using sovereignty as an excuse to not solve such problems. The Statement admits that nations should not have ‘absolute free rein’ to ‘impose unfair extraterritorial costs onto other nations,’ and to its credit, the Statement calls for prohibiting national actions ‘likely to create significant distortions in global markets.’<sup>114</sup> But instead of offering a plan for doing so, the Statement instead puts forward ‘an alternative intellectual framework’ and a ‘conceptual vocabulary’ interspersed with platitudes about ‘policy space.’<sup>115</sup> Sadly, for such a distinguished group, this was a missed opportunity to engage in the analytical heavy lifting needed to write better global law to address the problems of State capitalism.

The challenges of regulating competition should be decomposed whenever possible and addressed one by one. Many discrete issues might be amenable to negotiations inside or alongside the WTO. Among the most pressing issues are: digital trade, investment protectionism, and commodity/overcapacity agreements.

For these and any other trade agenda issues, the WTO should not insist upon consensus decisionmaking. Rather, the WTO should be open to negotiating new Codes among likeminded Governments. By a Code, I mean a side agreement among willing countries. If a group of WTO members want to establish mutual higher obligations to do X, there is no bar in WTO law against that provided that X does not violate the WTO. Best practice for such Codes would be open plurilateralism – *viz*, a commitment to allow additional countries to join the Code on equal terms. In my view, such a Code could be enforced through an arbitration clause.

<sup>113</sup> US–China Trade Policy Working Group (n 111) 2.

<sup>114</sup> *ibid* 2, 4.

<sup>115</sup> *ibid* 2, 3, 6-7.



What a Code cannot do under WTO law is to discriminate against non-parties to the Code. Without being able to discriminate, Code writers face the classic problem of free riders who would seek to stay out of the Code while enjoying the benefits of the adherence of other countries to higher obligations.<sup>116</sup> Free rider problems of this sort can be difficult to fix because the MFN principle prevents the exclusion of non-parties to certain benefits of a Code. Recent efforts to promote a ‘club’ of Governments on climate change<sup>117</sup> founder on MFN obligations.

But the WTO also contains a pathway for potentially overriding MFN. If governmental membership in a Code is high enough, then Code parties could seek WTO Ministerial Conference approval of a long-term WTO waiver to permit justifiable MFN violations. Legislating a WTO waiver requires a three-fourths vote of WTO members.<sup>118</sup> This is a formidable obstacle, but not an insuperable one. The math works best when there is an agreement of most WTO members to move forward despite resistance by only a few countries. The math fails if a Code is supported only by a discrete group of countries. So that legal parameter sets the terms for new WTO negotiations. The mass that is critical in a critical mass agreement is not just an economic quantity like percent of world trade. The critical mass is also a political quantity, that is, enough votes to approve a WTO waiver when needed.

Besides these proposals for the reform of substantive WTO law, let me also offer a few proposals for WTO institutional reform. I wish the WTO had not been so resistant over the past 25 years to grow its roots into domestic polities in order to gain support from elected officials, the business community, and economic and social actors. By maintaining, and even worse, glorifying, the virtues of top-down State centrality, the WTO has failed to nurture a reservoir of support from civic society and

<sup>116</sup> The legal tension between MFN and ‘plurilateral’ agreements was recognised by the League’s Economic Committee as early as 1933: see Economic and Financial Committees of the League of Nations (n 22) 67, 102. The Committee saw a possible justification for violating bilateral MFN in ‘plurilateral conventions of a general character and aiming at the improvement of economic relations between peoples ...’ (ibid 103).

<sup>117</sup> The leading proposal is W Nordhaus, ‘Climate Clubs to Override Free Riding’ (2015) 31(4) *Issues in Science and Technology* <<https://issues.org/climate-clubs-to-overcome-free-riding/>>.

<sup>118</sup> J Wouters, BD Meester, *The World Trade Organization. A Legal and Institutional Analysis* (Intersentia 2007) 186.



industry. The costs of not enjoying such grass roots support may be hidden until the WTO gets into a jam. Compare the lack of public support for the WTO to the wellspring of support for the (underequipped) Paris Agreement by subnational Governments, nongovernmental organisations (NGOs), the enlightened private sector, and the media.

Although international organisations have traditionally linked to the executive branches of States, broader connections are possible. An early attention to the distinctive role of branches came in 1912 with Professor Schücking's proposal for delegations of national Parliaments to 'meet by the side of the conference of states' in 'a later stage of development of the international organization ...'<sup>119</sup> In 2003, the Interparliamentary Union and the European Parliament began co-sponsoring regular meetings of a Parliamentary Conference on the WTO alongside of WTO Ministerial Conferences.<sup>120</sup> These meetings have been interesting to observe, but the full potential of this exercise in international democratic governance remains to evolve in the future. The WTO's judicial branch should also seek connections to national Governments via a transnational judicial dialogue of domestic and WTO judges. To the extent that the prevailing narrative of a runaway Appellate Body has any validity, then having a forum whereby WTO judges receive constructive feedback from national judges might help to solve the alleged problem.

The State centrality of the WTO, typically involving only ministries of trade or commerce, leads to another political difficulty which is the narrowness of outlook available to solve collective action and global commons problems. Constructive ideas in international affairs do not usually originate in government bureaucracies, but rather emerge from business organisations, civic society, research institutes, foundations, universities, and innovative individuals. In the GATT era, the trading system hid from

<sup>119</sup> Schücking (n 82) 311-12.

<sup>120</sup> See EB Crespo, 'From Doha to Hong Kong and beyond: a parliamentarian's perspective' in G Sacerdoti, A Yanovich, J Bohanes (eds), *The WTO at Ten. The Contribution of the Dispute Settlement System* (CUP 2006) 23, 30-34. In advance of the first meeting of a WTO Parliamentary Conference in 2003, I was asked to secure US Congressional participation. I failed in that assignment because although a group of US members of Congress were happy to journey to the Cancun Ministerial Conference in September 2003, they did not bother to attend the meeting of the elected politicians from other countries.



nonbureaucratic influences. To its credit, the WTO has sponsored an annual Public Forum which serves as a best practice for any international organisation seeking to institutionalise a way for economic and social actors, particularly transnational actors, to provide input into the organisation. Still, the WTO could do much more than it has to institutionalise effective NGO participation. Unlike the debate on NGOs 20 years ago,<sup>121</sup> there could be no serious argument today that NGO participation would render the WTO less effective than it currently is.

In conclusion, the WTO is beset by major challenges. The Trump Administration has launched a vituperative public campaign against the WTO and has weaponised tariffs against China and tariff threats against numerous countries. Through capable leadership by Director-General Roberto Azevêdo, the WTO seeks to remain afloat and operate under its own power. Yet damaging failures continue to occur. Despite the requirement in Article IV(1) of the WTO Agreement to hold a Ministerial Conference at least once every two years, the WTO prorogated the legislative Conference that should have been held in 2019. In the near future, the Standing Appellate Body may no longer remain standing. The ensuing disruption of WTO dispute settlement will put even greater stress on the WTO. Moreover, Trump's animosity against the WTO is hardly depleted. Should President Trump be elected to a second term, USTR may block the appointment of a new Director-General after Azevêdo's term ends in September 2021. Worse still, there may be a US withdrawal from the WTO ('Uexit'). I hope that whatever tumult ensues, the world community will be able to keep the WTO. Yet even in the worst case, while the WTO can be dismantled, it cannot be disinvented.

<sup>121</sup> See Charnovitz, 'WTO Cosmopolitics' (2002) 34 *New York U J Intl L & Politics* 299-354.

