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Steve Charnovitz

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Steve Charnovitz*

World trade faces fundamental challenges. This essay examines six threats to the intellectual case for open trade: to wit, worries about ecology, fairness, morality, equity, security, and geopolitics. Together, these threats implicate a huge swath of international trade. One of the biggest indicators of diminishing support for trade is the moribund status of the leading institution of the trading system, the World Trade Organization (WTO). There are three branches of WTO governance and all three are in trouble: the judicial branch and its vacant Appellate Body, the executive branch and its vacant post of WTO Director-General, and the legislative branch where the WTO Ministerial Conference has failed to meet since 2017. Solving global problems often requires focused international policies and sometimes specialized international agencies to administer such policies. Unfortunately, during the 21st century, the growth in international problems has not been matched by a growth in international solutions. The faltering of the trading system is one example of that mismatch, but the same pathology exists in many areas of global governance. The biggest problem may be the shallow Paris Agreement on Climate Change that lacks any mutually agreed commitments, such as a carbon tax, for harmonized actions to combat global warming. Yet even without any international commitment to impose a carbon tax on domestic commerce, there are political demands to impose carbon taxes on imported products for ecological and fairness reasons. This essay introduces the term “tradeclimate” questions as nomenclature for the set of environmental issues relating to transborder trade that should be resolved in the climate regime, not in the WTO. In discussing China, the essay notes that the trade war between China and the United States spills into the WTO, and explains why the WTO should not arrogate to itself the task of re-educating China. Gaining China’s cooperation is critical to achieving better policies in the WTO, the Paris Agreement, and the World Health Organization.

World trade faces fundamental challenges. While the social and economic benefits gained through exchange have been apparent to humans since antiquity, the litany of political complaints about cross-border commerce may be more extensive and louder than ever before. As always, the market recognizes the importance of international trade to prosperity. Yet many politicians express doubt as to when participation in international trade enhances the national interest.

One of the biggest indicators of diminishing support for trade is the moribund status of the leading institution of the trading system, the World Trade Organization (WTO) in Geneva. There are three branches of WTO governance and all three are in trouble: The Trump Administration has discombobulated the judicial branch by refusing to agree to new judges for the Appellate Body. The post of the WTO Director-General, who heads the executive branch, has been vacant since August 2020. The topmost body of the WTO's legislative branch, the Ministerial Conference, has failed to meet since 2017. Overall, the WTO's decrepitude demonstrates "constitutional failure."

Globalization and the governance of globalization will survive. The transborder movement of goods, services, capital, technology, and people will survive because most countries are not attracted to the deprivation that would be entailed by an alternative strategy of national (or subnational) self-sufficiency. The WTO will (probably) also survive now that the Trump Administration will soon pack its bags. The WTO survives because lawmakers and influential economic and social actors on the world stage know that international law and international rules are needed to restrain beggar-thy-neighbor trade politics. Around the world, many countries continue to be interested in enhancing mutual commitments to deepen trade ties as reflected most recently in the November 2020 signing of the Regional Comprehensive Economic Partnership (RCEP)

The underperformance of the WTO, of course, is hardly the biggest policy dysfunction on Earth. Our biggest problems include an unchecked viral pandemic, worsening global warming, widespread poverty, and a proliferation of nuclear ballistics in states with malign intentions. As governments address such conditions, a basic question arises as to whether international trade is part of the solution or part of the problem.

Seventy-five years ago, the conventional wisdom was that trade was part of the solution for peace¹, economic growth, and social development. In my view, that conventional wisdom remains convincing today. Yet the dialectics of the cosmopolitan conversation have led to reassessments of many economic, social, and political practices within each society and between countries. Are existing trade patterns supportive of solutions to the most pressing problems facing the planet? Under what conditions does trade undermine optimal solutions, especially to the challenges of global warming and underemployment?

Although trade per se is conceptually distinct from the international supervision of trade policies, these two phenomena are difficult to disentangle. Voluntary international trade makes traders better off and so too does global commerce enhance the wealth of nations. The freedom to engage in transnational commerce promotes social progress and enables bottom-up prosperity. Nevertheless, from Aristotle onward, some trade theorists have argued for economic autarky and other top-down controls over individual liberty and transborder exchange. Acting on the evidence that international trade enriches societies, leading publicists have championed intellectual justifications for free trade — in the 16th century Hugo Grotius, in the 17th century Dudley North, in the 18th century Adam Smith, and in the 19th century David Ricardo.

Nevertheless, those liberal philosophies were often ignored by political arguments that states have a right to and should control trade in order to promote mercantilist, diplomatic, industrial or security objectives. Yet the domestic political debate on trade, however edifying,

*Of the Law Faculty, George Washington University Law School, Washington, DC, USA. This essay is current as of 22 November 2020. ©Steve Charnovitz. Email contact is scharnovitz@law.gwu.edu.

¹The WTO is to be commended for its “Trade for Peace” program begun in 2017, see https://www.wto.org/english/thewto_e/acc_e/tradeforpeace_e.htm.

was necessarily imperfect and incomplete because other countries (the other side of the transaction) were not equal participants in that debate. To gain the greatest benefits from mutual market access, the political debate on trade has to occur on two levels, the international and the domestic.

Recognizing the enduring benefits of allowing trade to cross political boundaries, states have, for many centuries, utilized commercial treaties as a tactic for overcoming anti-competitive tendencies in domestic politics. After World War I, leading governments took the first steps to construct a multilateral trading system based on law. The post-World War II trade negotiations created the General Agreement on Tariffs and Trade (GATT) in 1947 which established presumptions in favor of reducing tariffs and non-tariff barriers and eliminating trade discrimination.

In 1994, the GATT was transformed into the WTO legal system by the major trading nations. The WTO strengthened the institutional support for “open, market-oriented policies”², non-discrimination, limits on government subsidies, and respect for intellectual property. But even so, the leading governments in the WTO (especially the United States) never renounced or abandoned state-led protectionism, mercantilism, industrial policy, and discrimination against unfavored nations. Since an international organization cannot be more virtuous than its Member States, there were always limits to how much the WTO could accomplish in tearing down the walls separating national economies.

²The WTO’s orientation toward “open, market-oriented policies” is noted in the Preamble to the GATT’s Marrakesh Declaration of 1994.

The Six Threats to World Trade

Although international trade tends to make participating countries better off than they would be without international trade, not everyone in each country is better off. The need for a social net underlying international trade was appreciated by the founders of the Bretton Woods institutions. Unfortunately, the skeletal legal provisions on employment and development in the 1948 Charter for the International Trade Organization (ITO) were never planted into the GATT or into the WTO. In my view, that omission was a “breach of social contract” by the world trading system. And that breach has led, in part, to the crumbling of the system’s intellectual foundations that we see in the current political debate about the WTO.

Yet it is not just the multilateral trade institutions that are under assault. World trade itself is being challenged on six grounds: (1) ecological, (2) competitive fairness, (3) morality, (4) equity, (5) national security, and (6) geopolitical imbalance. This essay briefly discusses each of the six threats and then turns to a more detailed look at ecological challenges.

The first threat is to question the *ecological* impact of trade with a country that pursues less ambitious environmental policies. This debate on the environmental integrity of international trade is relatively recent, commencing only to the early 1970s. The initial focus was on local environmental problems of pollution control. Around the time the GATT’s Uruguay Round went into high gear, a greater consciousness about the quintessentially global problem of climate change rendered the potential negative cross-border effects of trade more salient than ever before. Given the need to reduce global greenhouse gas emissions, an expansion of production and trade in any country not reducing emissions could worsen global warming. In contrast to local environmental problems, where the trade connection is third order, global environmental problems can elevate trade to a second or first order concern.

Trade becomes impossible to ignore if carbon-neutral domestic production is displaced by imported products whose production and/or exportation generates a lot more CO₂. Moreover, if production relocates from a country with strict climate regulations to a country with lax climate regulations, this movement of production (and investment) is said to spur a “leakage” of emissions. Other global environmental goals, especially biodiversity, can be directly affected by international trade. From the beginnings of international environmental policy in the late 19th century (e.g., mammal trophies and bird feathers), international trade has been recognized as a driver of harm. As a consequence, some of the earliest environmental treaties employed trade controls as an instrument of environmental regulation.

The bedrock principle in the trading system has been that otherwise identical goods that differ only by the “process or production method” (PPM) used to obtain them are still “like” products and therefore qualify for the treatment required for like products. For example, “green steel” made using clean energy is a like product to “brown” steel made using energy from fossil fuels. And that likeness generates a presumption in trade law that an importing government should not treat the green and brown steel differently.³

Yet this “like product” principle is in tension with longtime trends in environmental policy which look more dynamically at goods to take into account the production and consumption footprint. Whenever the “like product” principle gets challenged by unilateral

³My pre-WTO scholarship questioned the legality validity of that presumption. See, for example, Steve Charnovitz, “Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures,” *Tulane Environmental Law Journal* (1994); “Free Trade, Fair Trade, Green Trade: Defogging the Debate,” *Cornell International Law Journal* (1994). But the GATT and WTO caselaw since then has not abandoned the “like product” presumption with regard to GATT Articles I and III. My early scholarship also noted that the GATT has important general exceptions that could be used to overturn that presumption for national environmental laws based on PPM distinctions. For example, see Steve Charnovitz, “Exploring the Environmental Exceptions in GATT Article XX,” *Journal of World Trade* (1991). WTO caselaw has borne out my hopeful prediction.

governmental actions, in the name of the environment, to impose “border tax adjustments,” “carbon tariffs” or “border carbon adjustments,” then the basic expectations of “governments and traders”⁴ in market relations get destabilized. Improvements in technology worsen the tension because the traditional understanding that a product as such is mute about its provenance and life cycle is now conceptually under reconstruction. Using specialized verification and tracing mechanisms⁵, PPM labeling of traded goods is becoming feasible.

The second threat is to question the *competitive fairness* of trade transactions between countries with differing economic and regulatory policies. Such “level playing field” arguments for protectionism go back centuries with different packaging. In recent years, the most popular packaging is that market-friendly countries cannot successfully compete with market-unfriendly countries that make use of nationalistic policies of state ownership, state control, state subsidies, and state planning. Or, in other words, the narrative is that non-market economies have a self-constructed competitive advantage over market economies. Such narratives are put forward without any apparent embarrassment in viewing “market economy status” as an albatross.

Even between countries that enjoy market economies, there will still be asymmetries in how capitalism is bridled. That is, governments will always differ in how they regulate, tax, and subsidize market participants — either to address market failure, promote public goods, redistribute income, or pay for government. Such differences are often pointed to as rendering “unfair” the proverbial trade “playing field.” Any divergence in the way that one country intervenes in its market compared to how another country intervenes can elicit “unfairness”

⁴GATT Article X:1.

⁵See Amy K. Lehr, “New Approaches to Supply Chain Traceability,” CSIS (2020).

claims “on the export or the import side.” Unfairness claims can also arise from individual private actor decisions (e.g., inter-country price discrimination) with effects in foreign markets.

The third threat is to question the *morality* of trade between countries whose legal systems manifest different attitudes about human dignity. When governments refuse democracy, abridge basic political rights, outlaw labor unions, or engage in corruption, then the citizens of other countries can adopt the view that trade and economic cooperation exploits foreign workers and citizens. Such outwardly-directed moral consumerism has existed for centuries, but with global communication (and affluence) the voices are amplified now. This unhappiness with what’s going on inside foreign countries triggers sympathetic domestic unhappiness which gets mediated through domestic policymakers who seek to regulate trade for moral reasons.

The sense of domestic responsibility for affairs in foreign countries gets more focused when identifiable traded goods are produced in an “odious” way, such as a commodity produced with forced labor. Seen in this way, moral values get integrated into the value chain. Multilateral controls on “odious trade” go back to the early 20th century in the episode of the regulation of phosphorus matches.

Moral repercussions in trade play out in complex ways. For example, the Opium Trade of the 1830s between the British East India Company and China (opium for tea) led to many harmful effects in China that still reverberate today. The moral and economic aspects of trade being incommensurate means that they cannot be predictably weighed against each other. Once the morality of trade is superimposed onto the economy of trade, then the disutility of both imports and exports can be recalculated to outweigh their utility. Traded goods become traded bads.

Beginning around the time of the establishment of the United Nations (UN) Global Compact two decades ago, global corporations have sought to internalize environmental and social factors into corporate supply chains. Such private standard setting shapes international trade as standards have always done. But government action to influence such standard-setting transforms private action into government measures that can become a legal issue within the trading system.

The fourth threat is to question the *equity* of international trade both inside a domestic economy and/or between national economies. As noted above, trade makes participants better off, but may make some bystanders worse off. Such distributional consequences on individuals can cumulate into negative impact on particular groups like business sectors, local communities, workers grouped by education, and workers grouped by race or sex. When those effects are characterized as an “injustice” caused by trade, then the social costs of trade may seem high relative to the social benefits.

In theory, the most tangible of the private costs of trade are susceptible to compensation via focused government policies paid for by some of the value added from trade.⁶ Among the oldest of such compensation programs is the idea of trade adjustment assistance for workers. Unfortunately, a lot of the efforts at delivering worker adjustment assistance have been carried out poorly over the past half-century. Moreover, when market effects on individuals are falsely attributed to trade (e.g., misattributing to trade the social costs of technological change), then even the gains from trade may not be high enough to compensate for those misattributed technology costs. Without a “social contract” to assure that the market does not get the last word

⁶Steve Charnovitz, “Worker Adjustment: The Missing Ingredient in Trade Policy,” *California Management Review*, 1986.

on allocating the benefits of commerce, both open trade and trade agreements will suffer headwinds.

The fifth threat is to question the *national security* implications of trade. As with many of the arguments against trade, this patriotic argument goes back decades and in some ways centuries. Transborder commercial intercourse by definition involves *interdependence* between countries and that interdependence itself may be said to cause national *insecurity*. In reality, security is hardly fructified by a tactic of economic isolation or import substitution. Mutual dependence between countries in general does not undermine national security.

Yet even within a frame of open trade, a valid concern exists about the composition of exports — that is, one can worry that the exports of certain goods or technology from one country to another will strengthen foreign adversaries by providing access to those goods or technology. So, export controls can be justified. Yet this policy can have unintended consequences. Any program of export controls can boomerang by incentivizing homegrown innovation in the targeted country -- necessity being one mother of invention.

The obverse claim that an open flow of imports weakens the security of an *importing* nation (rather than promoting resilience) is far less plausible. If the imported good or service or technology is itself harmful, such as imported armaments or imported blueprints for biological weapons, then, of course, border controls would be justified. But if the import restraint is promoted merely to maintain the competitiveness of a particular domestic industry, then any such restraint is simply protectionism disguised as a “national security strategy.”

Nowadays, disguise has become unnecessary. One of the trade policy triumphs of the Trump Administration has been to revive the idea of controlling imports for ostensibly “national

security” reasons through the notorious Section 232 program.⁷ This is a dangerous doctrine in a world trading system because if any import can be subject to a new layer of tariffs in the furtherance of any industrial policy, then the “security and predictability” benefit from signing on to the trading system will be lost. The Trump Administration has also re-energized the US Defense Production Act (DPA) which authorizes the President to intervene in US markets so as to commandeer private sector production for expansively defined “defense” purposes. Recourse to the DPA will not cease after the Trump Administration.

Once the concept of “national security” is made so elastic as to include “economic security” or “human security,” then national industrial policies can be pursued willy-nilly for any “security-sensitive” sector (e.g., steel, automobiles, computer chips, artificial intelligence, etc.). Such policies can include the traditional instruments of protectionism, as well as instruments of subsidy, regulation, and government procurement. Favored domestic companies or sectors can be succored and their foreign competitors hobbled. To recover from the ravages of Covid-19, leading governments can be expected to erect massive “rescue programs” that may fail to be trade neutral. Demands for “just in case” supply chain indigenization and maintenance of “critical” domestic infrastructure are being voiced under a banner of economic/health security.

Although WTO rules contain disciplines on subsidies and discriminatory regulation, governments retain considerable autonomy to use policy to shape competition in “future technologies,” “key industries” and “national champions.” A proponent of world public order can imagine international negotiations to effectuate codes governing industrial policy that would maintain control over and stay ahead of government programs to “pick winners.” The reality

⁷My colleagues and I tried but failed to get US courts to declare Section 232 unconstitutional. Naomi Jagoda, “Supreme Court declines to hear case challenging Trump’s steel tariffs,” *The Hill* (22 June 2020).

though is that no intergovernmental efforts to manage that sort of competition between leading governments is likely to be successful or even attempted.

While the WTO contains rules that may intersect with national security concerns, WTO rules are silent about any obligation of a WTO Member government to refrain from seeking to topple the security or autonomy of another WTO Member. Consider various national policies in place against WTO Members Ukraine, Russia, Hong Kong, Taiwan, Cuba, and Venezuela. The WTO may encourage good trade relations between Members, but the WTO does not require it.

The sixth threat is the *geopolitical imbalance* caused by trade. This claim differs from the security threat in not being premised on the particular goods, services, or technology involved. Instead, the claim is broader: that *because* trade strengthens nations, countries that are the most successful participants in the world economy may get disproportionately powerful in relation to other countries. Just as particular companies can get too big and powerful within a domestic economy, particular *countries* can get so big that they wield too much power over the world economy. Moreover, when a great power can be said to exhibit predatory intent, then arguments can arise to “decouple” from or erect a “silicon curtain” against that state. Without any legal mechanisms to “break up” large national economies enjoying overweening power, we are left with only the classic architecture seeking mutual security through a multipolar “balance of power.”⁸

In contemporary politics, there is a loud chorus against China centered on the fact that China is politically authoritarian (indeed communist). Yet if China were fully democratic and pursued the exact same policies of state capitalism (or state mercantilism) and hegemony, then the alleged geostrategic dangers would seem to be just as great. Although China may be the

⁸I have benefited from the thoughtful essay “Geopolitics and trade” by Marko Papic (Hinrich Foundation, Nov. 2020).

most demonized of the superpowers, the United States sets a bad example in swinging its disproportionate economic power to “make America great” and to prescribe outcomes in other countries. The centrality of the dollar in the world economy is an enabler of aggressive US extraterritorial regulation.

These *six threats* impale the open trade paradigm. The intellectual foundation for the world economy is the idea that trade between two countries makes *both* countries better off. This *positive-sum* paradigm is challenged with the six concerns/threats discussed above. With the fairness, national security, and geopolitical threats, the paradigm can degrade to viewing trade as *zero-sum* with some countries benefiting at the expense of others. Yet with some of the other threats, such as moral or ecological concerns, the paradigm can invert to seeing trade as *negative-sum* for participating countries.

In their private lives, consumers see and enjoy the myriad benefits of international trade. Yet in their public lives, consumers as citizens are sometimes swayed by politicians and interest groups to oppose international trade for any of the six reasons discussed above. Particular individuals may find some of these reasons compelling while rejecting the others. Yet with six varieties of anti-trade dogma to choose from, there will be multiple ways for open trade ideals to be undermined in public opinion.

Trade actions by governments can be classified as *defensive* or *proactive*. The typical defensive trade action pursues “fairness” or “industrial policy” objectives. Tariffs are the central instrument to *level* the playing field in the name of fairness and to *unlevel* the playing field in the name of industrial policy. Proactive trade actions occur when trade instruments are used as leverage in foreign policy or when trade negotiations are sought to promote market openness in other countries. Import or export restrictions (or other origin-based measures) are a longtime

tool of foreign policy, especially in a large, meddlesome polity like the United States. The foreign policy purpose can be for any reason: human rights, sustainable development, safeguarding investment, etc. When the U.S. government uses an import restriction to protect the environment in a foreign country (such as an import ban on elephant ivory or on shrimp to protect turtles), such action should be labeled as “environmental policy” rather than “trade policy.” Yet however labeled, measures applying to trade used in an outwardly-directed way to induce outcomes for a foreign country are governed by WTO rules.

Today’s crippled WTO is especially vulnerable to these six threats. To be sure, the epistemic community of international trade has always been aware of these six threats. They are hardly novel. Leading trade scholars have analyzed these claims for decades. For example in 1981, Richard Blackhurst called attention to trends in overlapping of domestic and international economic policies.⁹ Also in 1981, C. Fred Bergsten founded what is now called the Peterson Institute for International Economics (PIIE) to carry out comprehensive research on the multiple dimensions of international economic policy. All six of these threats have been explored in PIIE research projects over the years.¹⁰ In 1989, John H. Jackson called attention to the trade “interface” features of the GATT that allowed countries with different economic systems to enjoy the mutual benefits of the trading system.¹¹ Jackson appreciated that an economy does not have to be capitalist to seek to benefit from international trade. In 1996, Jagdish Bhagwati and Robert E. Hudec led an interdisciplinary scholarly project to dissect several “fairness” claims in

⁹Richard Blackhurst, “The Twilight of Domestic Economic Policies”, *The World Economy* (1981).

¹⁰The PIIE is now led ably by Adam Posen who continues the Institute’s leading role in thinking through complex trade issues.

¹¹John H. Jackson, *THE WORLD TRADING SYSTEM* (1989).

the international trade debate.¹² By the early 21st century, most new contributions to trade law scholarship addressed at least one of these six claims.

All six claims have been part of the discourse in and around the WTO and several of them have been addressed in WTO Doha Round negotiations and in WTO dispute settlement. WTO rules contain various exceptions and carveouts than can be said to provide “policy space” for these six concerns. On the environment, both GATT and the General Agreement on Trade in Service (GATS) contain health exceptions; the GATT contains a natural resources exception. On certain fairness claims, the trading system provides countervailing duties, antidumping duties, subsidy disciplines, intellectual property disciplines, nondiscrimination rules, and carveouts for some commodity agreements. On moral claims, the GATT, the GATS, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contain a moral exception. On domestic equity, no WTO norm exists, although back in the early years of the WTO, there was a carve-out for domestic subsidies to “disadvantaged regions.” On inter-country equity or “global inequality”, there are many WTO rules meant to favor developing and least developed countries. On national security, the GATT, the GATS, and the TRIPS Agreement contain security exceptions. On geopolitical imbalance, WTO rules are silent reflecting the state centrality of the WTO and international law generally. Yet the unique WTO accession negotiations do provide opportunities for incumbent members to impose WTO-plus obligations on particular WTO-applicant countries. Looking back to 1947, one can see that trade rules have been written, modified, and elastically interpreted in ways that provide flexibility for addressing all six concerns/threats.

¹²Jagdish N. Bhagwati & Robert E. Hudec (eds.), *FAIR TRADE AND HARMONIZATION* (1996).

But now, one wonders whether these six fundamental concerns about trade have grown so large that they can no longer be finessed or assimilated into the WTO legal system. Some limit surely exists for how many exceptions can be loaded onto the camel's back and how many holes a piece of Swiss cheese can accommodate. Even worse, when the United States accuses China of "unfair" investment and regulatory practices, but rather than use neutral WTO tribunals instead acts unilaterally to impose trade sanctions on China, such misbehavior by the United States cannot possibly be squared with WTO norms. At a certain point, the game of WTO rules is rendered unworth the candle.

The six threats/concerns laid out in this essay implicate a huge swath of international trade. If one were to add up all international trade that could be said to infringe upon the environment, fairness to competitors, public morals, social justice, a nation's security, *or* big power relations, what percent of global international trade would remain innocent? I have not seen any data, but my guess is not much.

Starting in the late 19th century, the trends in globalization and technological change have transformed more economic activity into international issues and international problems. Leading governments have responded by seeking to construct needed international rules. Two world wars interrupted progress and then afterwards enabled progress. This transnational normative process received significant intellectual aid from future-thinking nongovernmental organizations. The metaphors "spaceship Earth" and "our global neighborhood" captured the imagination of generations of internationalists.¹³

Solving global problems often requires focused international policies and sometimes specialized international agencies to administer such policies. During the 21st century, the

¹³Barbara Ward, *SPACESHIP EARTH* (1966); The Commission on Global Governance, *OUR GLOBAL NEIGHBORHOOD* (1995).

growth in international problems has not been matched by a growth in international solutions. The faltering of the trading system is one example of that mismatch, but the same pathology exists in many areas of global governance.

International rules are used to correct market failure, but such rules are also employed to correct “government failure.”¹⁴ Although there is, to some extent, an “invisible hand” in the market that can render self-interested individual behavior socially beneficial, there is no invisible hand in the global polity that can render selfish national governmental action beneficial for the world, especially with problems that overlap borders. This is not to deny the self-evident truth that nations should pursue their own national interest. But the national interest needs to be calculated in an enlightened way that respects the legal obligations of a state in treaty and customary international law. Attentiveness to science is also vital especially on issues where international legal obligations do not exist.

Environmental Policy and the Trading System

Over the years, I have participated in numerous academic and policy projects wherein I wrote about how to promote the mutual compatibility of environmental protection and the trading system. Those various exercises took place under the auspices of the Organisation for Economic Cooperation and Development (OECD) (1993), the United Nations Conference on Trade and Development (1995), the Aspen Global Change Institute (1995), the International Agricultural Trade Research Consortium (1996); the Yale Center for Environmental Law &

¹⁴See Steve Charnovitz, “Addressing Government Failure Through International Financial Law,” *Journal of International Economic Law* (2010).

Policy (1997)¹⁵, the Norwegian Institute for International Affairs (1998), Columbia University (1999), the Pew Center on Global Climate Change (2003), the United Nations University (2008), the Peterson Institute for International Economics (2009), the University of British Columbia Faculty of Law (2013), the World Bank (2014), and the Yale Center for Environmental Law & Policy (2019). Not every study was centered on combatting climate change, but most where.

Looking back at those projects, all of them adhered to a similar assumption of accepting the precepts of the international trading system and analyzing how adjustments could be made within the system to achieve the duals goals of trade liberalization and environmental protection. In other words, the international trading system was viewed as an *exogenous* legal constraint for which the environment and climate regimes should seek mutual harmony. Today, the time may be ripe for a deeper dive.

Do Earth's serious environmental problems call for a clean-green slate, that is, a zero-based approach to international trade and trade rules? If it is true that the planet's economy needs to be reorganized and revitalized at a fundamental level to address the existential challenges of climate change, what types of international trade practices are consistent with those environmental imperatives? Through such an analysis, the role of international trade and international trade institutions would be viewed as *endogenous* to constructing a new model for how the inhabitants on Planet Earth should organize clean production, consumption, and exchange.

In the early 20th century, John Muir taught that "When we try to pick out anything by itself, we find it hitched to everything else in the Universe." Several decades ago, Barry

¹⁵In several instances, I co-authored studies. For example in 1997, UNEP Executive Director Elizabeth Dowdeswell and I co-authored the essay "Globalization, Trade, and Interdependence" in Marian R. Chertow & Daniel C. Esty (eds), THINKING ECOLOGICALLY: BUILDING THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Yale University Press, 1997).

Commoner reminded us that “Everything is connected to everything else.” Nevertheless, even while recognizing the complex linkages within the ecolonomy, analysts can still usefully distinguish baskets of issues.

Our global environmental challenges can be divided into two main baskets — nature and industry. The first basket comprises the policy improvements needed to sustain and regenerate living resources in the skies, on land, and in the seas. The second basket comprises the policy improvements needed to reduce pollution and waste from production and consumption in order to achieve clean air, clean water, a safe human habitat, and atmospheric stability.

The challenges with *nature* are caused by insensate human activity. In the Hebrew Bible, mankind is told “to keep” the garden and to have “dominion over the fish of the sea and over the birds of the heavens.” But mankind has not exercised this stewardship in a responsible way. Appropriate environmental policies are needed for sustainable agriculture, management of regenerative resources such as forests, and conservation of biodiversity including the biosphere within the “sovereignty” of particular countries. When a failure in conservation occurs, then remedial and restorative policies should be actuated to the extent that they are technically feasible.

The challenges with *industrial* pollution can degrade the life, health, and satisfaction of humans. (Pollution also affects animals and plants.) Unlike nature, much of which exists outside the market, industrial activities exist in the market, and yet a market failure allows the costs of pollution to be externalized. In theory, government regulatory (and tax) policy can correct such ongoing market failures (e.g., with a “polluter pays” principle). Yet a transnational

market is not well suited to correction via inconsistent national policies. Past market failures can be cleaned up within technical limits, but doing so will typically require public spending (or public investment). In the real world, governments sometimes have a hard time finding public resources to fix long-festered problems.

Once the optimal remedial policies for nature and industry are identified, there should be an inquiry as to the ways that international trade contributes to supporting those policies and the ways that international trade hinders achieving those policies. Such an inquiry is amenable to both theoretical and empirical analysis. One can start by considering what impact *domestic* commerce has on achieving environmental solutions. With that answer as a baseline, one can then consider what differences ensue when traders are distant from each other or when traders operate in different countries with asymmetric political and economic systems.

The commonplace that climate change is an “existential” crisis implies that rapid and strong remedial actions are needed to reduce greenhouse gas emissions and to re-engineer the atmosphere if feasible so as to limit global warming to 1.5 degrees Celsius above pre-industrial levels. Emission reduction is needed in all sectors — especially energy and food production. Transitioning out of fossil fuels, stepping up of reforestation, and deploying carbon capture technologies can each play important roles. If all countries implemented all of these programs with equal dedication, the dangers of climate change could possibly be averted. Yet on Earth, governments sometimes fail to act cooperatively to rapidly address global problems. The achievements of environmental governance over the past century demonstrate that effective environmental regimes are essential for managing ecological problems and that such regimes are not always in place.

Although the UN Framework Convention on Climate Change (UNFCCC) of 1992 provided a good start for the climate regime, the international efforts since then have been disappointing. The minimalist design of the Paris Agreement neglects many of the lessons learned from successful regimes that are based on reciprocal commitments on the domestic policy instruments to be used (or not used) and means for enforcing those commitments. The champions of the non-binding, rules-free Paris Agreement seem to believe that its pot luck style will prove effective. But I dissent from the proposition that we should bet the planet on it.¹⁶

As countries carry out bottom-up climate actions, the question of trade has and will arise in climate debates.¹⁷ Should a climate-ambitious government accept business-as-usual trade relations with less ambitious governments? Can a country that imposes climate taxes and regulations on its own producers compete fairly with producers in countries that do not? If a country is controlling emissions in domestic production, then how can it stay open to imported goods that are not produced under conditions of equivalent emission control? Should international trade itself be subject to an atmosphere use tax?

I call these the “tradeclimate” questions.¹⁸ To the extent that domestic debates on tradeclimate questions make intellectual contributions, so much the better. But when those

¹⁶I have been making this point for years but in late 2020 am encouraged by the sad fact that Covid-19 may have granted humanity an extra inning to undertake needed collective action.

¹⁷For an examination of the issues, see Steve Charnovitz, “Trade and Climate: Potential Conflicts and Synergies,” in Joseph E. Aldy et al., *BEYOND KYOTO. ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE* (2003); Gary Clyde Hufbauer, Steve Charnovitz & Jisun Kim, *GLOBAL WARMING AND THE WORLD TRADING SYSTEM* (2009).

¹⁸I have noted the “Climatetrade” enterprise, the blockchain based trading platform.

domestic debates lead to self-help trade measures based on the “carbon content” of imports, then such unilateral actions will profoundly impact trade relations.

In contemporary debates about reforming the WTO and trade law, a mantra has arisen that the WTO should expand its wheelhouse to take on climate policy as a way of making the WTO more politically sustainable and making international trade more environmentally sustainable. But changing the contours of the WTO in this way is a bad idea for several reasons: First, the trade bureaucrats serving in and around the WTO are ill-suited to make climate policy. Second, climate policy should be designed in a regime where science reigns, and trade policy is hardly based on science. Third, the specialized mission of the trading system to promote non-discriminatory and open markets is itself vital to economic progress; giving the WTO a diverging mission will impede the WTO. Fourth, the WTO is too state-centric and untransparent to the key social and economic actors needed to formulate climate change solutions, particularly the business community, environmental NGOs, and subnational governments.

But how can it be that the WTO should not try to solve the tradeclimate problems? The answer is that the solution to those problems is inherent in achieving an effective climate regime. Several decades ago, the respected 20th century environmentalist Konrad von Moltke taught us that “unmanaged environmental problems become trade problems.”¹⁹ But the locus for managing environmental problems should remain the designated environmental regime.

If the climate regime is not addressing the tradeclimate problems, then it should get its act together to do so. Go back to the drawing board in Paris (or Glasgow), not in Geneva.

¹⁹See Steve Charnovitz, “The World Trade Organization and Social Issues,” *Journal of World Trade*, 1994.

Seeking to delegate the tradeclimate issues to the WTO is illogical because they are fundamentally environmental issues, not trade issues.

Once the climate regime figures out the best way to handle tradeclimate issues, then the WTO can adapt its rules to confer recognition to that “multilaterally determined” outcome. Some might worry that the WTO might not be able to grant recognition to environmental law because WTO decisionmaking is consensus-based. Yet the practice of making progress by consensus is widely used in treaty-making (including climate treaty-making) and this approach to legitimacy is a feature not a bug. Moreover, while the WTO typically relies on consensus, the WTO constitution does contain some mechanisms for making decisions without a consensus.²⁰ These mechanisms will not work if a major economy objects, but they would work if a club of all major economies agreed to solutions in the climate regime and then sought to export those decisions into WTO law.

In calling for this approach, I do not suggest that environmental policy or trade policy should be formulated without regard for each other. Certainly, complementarity is needed on all issues of governance. For example, I have always supported the WTO initiatives to address fishery subsidies that are harmful both to fisheries and to trade. But for the difficult tradeclimate issues, it would be wrong for the trading system to get in over its head. Of course, it will not be easy for the major governmental players in climate policymaking to nail down a workable solution to the tricky tradeclimate choices. But that is right road for nations to take.

²⁰See John H. Jackson & Steve Charnovitz, “The Structure and Function of the World Trade Organization,” in Kenneth Heydon (ed), *THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL TRADE POLICY* (2012).

The danger we face is that powerful governments are attracted to a darker road, that is, prescribing “nationally-determined” regulations or taxes that can be imposed on the import trade. Indeed, applying a US carbon tax to US imports is much more politically popular than applying a carbon tax within the US domestic economy. Indeed, as I have noted for many years in lectures I give on climate change, while I cannot predict what regulatory approach the US Congress will eventually settle on to reduce greenhouse gas emissions, I can confidently predict that the US Congress will include border measures.

As an aside, this essay notes that the same principle of functional specialization should be applied to the worker right issues that some have sought add to the WTO’s remit.²¹ No doubt it is true that governments should “endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their industrial and commercial relations extend...”²², but this Wilsonian era concept is best pursued by the functional international organization that Wilson himself championed and helped to create over a century ago — the International Labour Organization (ILO).²³ If better international rules are needed to bring social justice to international trade, then ask the ILO to write those rules; don’t ask the WTO. Unlike the WTO’s decisionmaking bodies which comprise only trade ministry officials, the ILO’s decisionmaking bodies comprise not just governmental officials, but also private sector employer and worker representatives.

²¹I admit to once or twice taking a different position in the pre-WTO era. I try to learn from my mistakes.

²²Treaty of Versailles, Art. 23, 1919, Part. XIII Preamble.

²³See Steve Charnovitz, “The International Labour Organization in its Second Century,” *Max Planck Yearbook of United Nations Law* (2000).

Although the ILO is also competent on all employment policy issues, I would nevertheless favor a WTO role in responding to the social deficits from international trade. As I noted above regarding the creation of the post-war trading system in 1948, the original concept did seek to embed a social commitment on job creation and economic development. In 2020, we enjoy a great deal of soft law and financing on employment issues that did not exist in 1948. Nevertheless, as I have written on multiple occasions over many decades²⁴, the trading system should circle back to these first principles and consider ways that international rules can be helpful to domestic governments in assuring that dislocated workers injured by international trade receive the help they need to recover.

Finally, a brief word about the WTO 's agenda for 2021. The trade war between China and the United States spills into the WTO,²⁵ but the WTO should not pull itself into the march of folly. Just as the WTO should not take on a new task of combatting global warming or strengthening worker rights, the WTO should not take on a new task of re-educating China. Actually, the WTO got a shot at inculcating better practices in China in the early 2000s when the WTO negotiated China's accession into the WTO and imposed on China numerous obligations more stringent than baseline WTO law.²⁶ Looking back to 2001, with a healthy serving of

²⁴For example, see Steve Charnovitz, "Strengthening the International Employment Regime," *Intereconomics. Review of European Economic Policy* (1995); "The (Neglected) Employment Dimension of the World Trade Organization," in Virginia A. Leary & Daniel Warner (eds), *SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS* (2005).

²⁵For an evaluation of the Trump Administration's efforts to adversarialize China, see Steve Charnovitz, "Grading Trump's China Trade Strategy," 2019 *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW*.

²⁶See Steve Charnovitz, "Mapping the Law of WTO Accession," in Merit E. Janow et al. (eds), *The WTO: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES* (2008).

revisionism, one might conclude that the WTO proved to be a poor trade negotiator vis-à-vis China. But now that China is a longtime Member of the WTO, with all the rights and privileges of membership, the WTO should not disfavor (or favor) China. Indeed, gaining cooperation by China will be critical to making needed progress in all international agencies including the WTO, the Paris Agreement, and the World Health Organization (WHO).

In my view, China is perfectly entitled to challenge U.S. influence in a peaceful way. Rather than emulating some of China's worst nonmarket behavior, the United States and its democratic allies should seek to lead the world through initiatives for broadly shared prosperity. A generous plan for global distribution of Covid-19 vaccines to developing countries would be a good place to start.²⁷

The doomed Doha Development Round launched by the WTO in 2001 has failed, but all²⁸ of the issues in that Round would resurface in any new multilateral negotiation. From my perspective, the top priorities²⁹ in a new WTO negotiation should include: (1) reducing agricultural subsidies by high-income countries, (2) reducing barriers to trade in environmental goods and services, (3) reducing barriers to trade in medical supplies, medical equipment, and medicines, (4) writing needed rules for e-commerce (digital trade), and (5) fixing the flaws that

²⁷See Steve Charnovitz, "International Trade Law Norms and the Ethics of Covid-19 Vaccine Distribution," *International Economic Law and Policy Blog* (21 Sept. 2020); Samantha Power, "The Can-Do Power," *Foreign Affairs* (Jan.-Feb. 2021).

²⁸The WTO succeeded in fulfilling two Doha Round era issues by enacting the TRIPS Amendment for public health and the Trade Facilitation Agreement (TFA). The negotiations for the TFA began before the Doha Ministerial Conference.

²⁹Ungrounding the WTO appellate tribunal is also a high priority, but that should not require any negotiations. All that is needed is for the US government to begin playing by the rules that require appellant vacancies to be "filled as they arise". Steve Charnovitz, "How WTO Dispute Settlement Succumbed to the Trump Administration," GW Legal Studies Research Paper No. 2019-73.

have arisen in the administration of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). The caselaw of the WTO shows numerous challenges against WTO-illegal government subsidies including two very large arbitral awards against the United States (each over \$3.9 billion annually). Since China became a member of the WTO almost 20 years ago, *not a single case against China has been lodged* alleging a Chinese government subsidy that violates SCM rules.

In recent days, an initiative has arisen in the WTO to waive patent protection for Covid-19 vaccines.³⁰ Such an initiative is a terrible idea. To be sure, our longtime method for incentivizing pharmaceutical innovation and pricing the fruits of research is fundamentally flawed. Radical reform is required, but not by waiving patent protection.

The market for pharmaceuticals is wacky. If a medicine works, then it should be available to everyone who could benefit from it. This can only be achieved by having a well-endowed global mechanism that can step in to purchase pharmaceutical patents at a reasonable price. That price has to be *high* enough to reward success by providing incentives to innovate in research processes that often end in failure. Such a social price cannot be a “market” price because a true market does not exist independent of governmental health programs. Once the innovating pharmaceutical companies are properly compensated,³¹ then they can produce the drug for distribution to the world. This method would obviate the enabling of generic drug production as a legitimate form of competition with all of the ensuing trade and health distortions. The costs of proper compensation to pharmaceutical companies would be fiscally expensive.

³⁰“A Global Covid Vaccine Heist,” *Wall Street Journal*, 20 November 2020.

³¹Another mechanism is the use of prizes for a specified medical achievement.

Certainly, the pathologies of the current pharmaceutical pricing model are not caused by the WTO's TRIPS Agreement. So, one not should look to the WTO to take the lead in fixing our flawed arrangements. Yet the TRIPS Agreement does present a stumbling block toward rational reform because TRIPS Article 31(h) recognizes compulsory licensing of patents with very weak protections for innovators.³² In particular, the TRIPS Agreement sets the standard of "adequate remuneration in the circumstances of each case." No WTO caselaw exists on how high the remuneration has to be to be "adequate." From the negotiating history and national practice one can infer the *absence* of any common understanding that, as a minimum, the remuneration ought to be set in the same ballpark as the profits that are normally derived from blockbuster drugs.

A Roadmap for Progress

International trade faces significant political challenges. This essay lays out the six-part narrative that is undermining intellectual support for open trade – namely, ecology, level playing field fairness, morality, equity, security, and geopolitics. As I finish this essay, I have taken note of the G20 Riyadh Summit Leaders' Declaration pledging to "continue to work to ensure a level playing field to foster an enabling business environment."³³

The WTO has been rocked by these developments and cannot just pick itself up and dust itself off in our Covid-shell-shocked world economy. The Trump Administration is blameworthy for the WTO's ongoing constitutional failures, but the problems go deeper than Trump.

³²For background on this topic, see Antony Taubman, "Rethinking TRIPS: *Adequate remuneration* for Non-Voluntary Patent Licensing," *Journal of International Economic Law* (2008); Jerome H. Reichman, "Compulsory licensing of patented pharmaceutical inventions: evaluating the options," *Journal of Law, Medicine and Ethics* (2009).

³³https://g20.org/en/media/Documents/G20%20Riyadh%20Summit%20Leaders%20Declaration_EN.pdf (22 November 2020).

Unfortunately, the isolationist impulse in American politics that I have termed “American Rejectionism”³⁴ will not be cleansed away by the 2020 US elections.

Yet alongside the WTO’s failures (and perhaps because of the WTO’s failures), regional trade negotiations continue to blossom. Everyone agrees on a need for “WTO reform,” but no consensus exists on the details of reform. In my view, the biggest flaw in the WTO is not that it is too brutal on national volition, but rather that it is too gentle. WTO law needs stronger disciplines for both market and nonmarket economies. In thinking about what country can lead reform, I note that the government (the United States) that has been the most critical of the WTO for being feckless is the government that has been the biggest WTO rule-breaker as measured by losses within WTO tribunals.

The first step toward solving these six challenges to world trade is to recognize them as independent intellectual challenges. None of them have easy fixes and none of them are fully addressable through current WTO rules. More inclusive dialogue within the WTO (and the OECD) can be helpful in thinking through each of these threats all of which permeate into domestic policy space. For some of these threats, other international regimes need to raise their games. The biggest underperformer is the Paris Agreement which is routinely glorified as a landmark accomplishment.

The climate change challenges facing the world economy should be quickly and effectively addressed. The proper place to center action is in the climate regime and its timid Paris Agreement. Seeking to use the WTO as a substitute for an improved Paris Agreement is barking up the wrong rain forest. Still, many opportunities exist for the WTO to make a useful

³⁴Steve Charnovitz, "How American Rejectionism Undermines International Economic Law," *Trade, Law and Development* (2018).

contribution to combating climate change. To help address the first of the six threats, the WTO should provide more policy space for subsidies to promote decarbonization.³⁵

Because I have written extensively on the governance dilemmas within the trading system,³⁶ I will not address those issues except to note that the current plight of the WTO has punctured the myth of “WTO exceptionalism.” By WTO exceptionalism, I mean the self-image within the WTO “House” that it operates in a separate sphere from other international regimes because WTO rules are “enforceable” rather than being merely aspirational or voluntary.³⁷ The WTO is clearly different in a lot of ways from the WHO or the Conference of the Parties (COP) to the UNFCCC. Yet all specialized international governing mechanisms share the same common purpose and challenge. The common purpose is to promote better outcomes for a world of cooperating and competing nation states. The common challenge is to do so using rules and monitoring more than carrots and sticks.

³⁵Steve Charnovitz, “Green Subsidies and the WTO,” World Bank Policy Research Working Paper (2014).

³⁶For example, see Steve Charnovitz, “Rethinking WTO Trade Sanctions,” *American Journal of International Law* (2001); “The World Trade Organization in 2020,” *Journal of International Law & International Relations* (2005); “A Post-Montesquieu Analysis of the WTO,” in Thomas Cottier & Manfred Elsig (eds.), *GOVERNING THE WORLD TRADE ORGANIZATION* (2011); “A WTO if you can keep it,” *Questions of International Law* (2019).

³⁷For a declamation of WTO exceptionalism, see the remarks by WTO Deputy Director-General Alan Wolff on 6 November 2020 to the UN Chief Executives Board wherein he discusses the “values that are inherent” in the WTO system including: “Rule of law — The enforceability of obligations is a key distinguishing feature of the WTO as compared with most other international endeavours,” https://www.wto.org/english/news_e/news20_e/igo_06nov20_e.htm.