

The World Trade Organization in 2020

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The inauguration of a new international journal and the commencement of the second decade of the World Trade Organization (WTO) together provide an opportunity to reflect on the WTO's legacy and its future. Government policies are always experiments, as Jan Tumlrir explained.¹ To date, the experiment of the WTO has achieved success beyond the expectation of many observers. What lies ahead? The leading international trade law casebook admits that '[i]t is hard to tell what may happen in the future.'² Still, we should try to discern the horizon as part of our efforts to improve future conditions in international economic governance.³

This article proceeds in three parts. Part I examines the trends and tensions influencing the WTO today. Part II offers two scenarios for the WTO circa the year 2020.⁴ I start with a pessimistic scenario and then present an optimistic scenario as seen from the future. Part III concludes with a forecast and some recommendations.

I THE WTO OF 2005: KEY FEATURES AND TRENDS

The WTO today stands as a central institution of international law and international economic relations. This status might not be so surprising

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¹ Jan Tumlrir, *Economic Policy as a Constitutional Problem*, Occasional Paper 70 (London: Institute of Economic Affairs, 1984) at 18.

² John H. Jackson, William J. Davey & Alan O. Sykes, Jr., eds., *Legal Problems of International Economic Relations*, 4th ed. (St. Paul, Minn.: West Group, 2002) at 231.

³ See Harold D. Lasswell & Myres S. McDougal, *Jurisprudence for a Free Society* (The Hague: Kluwer Law International, 1992) at 973-1031. A recent example of the thoughtful use of scenarios in international governance is *Mapping the Global Future*, Report of the (US) National Intelligence Council's 2020 Project (December 2004), online: National Intelligence Council <http://www.cia.gov/nic/NIC_2020_project.html> (presenting four scenarios). See also Rubens Ricupero, 'UNCTAD Past and Present: Our Next Forty Years' (12th Raúl Prebisch Lecture, 2004), online: UNCTAD <<http://www.unctad.org/Templates/Page.asp?intItemID=3268&lang=1>>.

⁴ The year 2020 requires a fifteen-year projection, which is one and one-half times the current life of the WTO. Coincidentally, the year 2020 was the point chosen by governmental leaders of the Asia-Pacific Economic Cooperation forum for achieving 'free and open trade and investment' in the region. See Vinod K. Aggarwal, 'Economics: International Trade' in P.J. Simmons & Chantal de Jonge Oudraat, eds., *Managing Global Issues: Lessons Learned* (Washington, DC: Carnegie Endowment for International Peace, 2001) 234 at 244.

to the officials who drafted the Charter of the International Trade Organization (ITO) in 1946–8.⁵ Yet the successful transformation of the *General Agreement on Tariffs and Trade* (GATT) into the WTO was surely not the expectation of the trade mavens of the 1970s and early 1980s.⁶ The creation of an effective and respected WTO was hardly inevitable.⁷ That it happened shows a triumph of an internationalist legal vision and effective political leadership.

More so perhaps than any other international organization, the WTO is an institution of international law. Other functional international organizations, like the World Health Organization and the United Nations (UN) Security Council, have often seemed detached from a judicial system. Of the major international organizations, only the WTO regularly carries out both negotiation and adjudication.

The *Marrakesh Agreement Establishing the World Trade Organization* states that the organization ‘shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements ... [and] “a forum for further negotiations” concerning their “multilateral trade relations”’⁸ Some negotiations were ongoing when the WTO came into force in 1995 and others have occurred since then.⁹ The current Doha Round negotiation began in 2001, and has no formal deadline.

Independent adjudication in the WTO is carried out by panels, the Appellate Body, and arbitrators. The Appellate Body may be the most creative legal achievement of the Uruguay Round.¹⁰ Nowhere else

⁵ See Michael Hart, ed., *Also Present at the Creation: Dana Wilgress and the United Nations Conference on Trade and Employment at Havana* (Ottawa: Centre for Trade Policy and Law, 1995); Simon Reisman, ‘The Birth of a World Trading System: ITO and GATT’ in Orin Kirshner, ed., *The Bretton Woods—GATT System: Retrospect and Prospect After Fifty Years* (Armonk, N.Y.: M.E. Sharpe, 1996) at 82.

⁶ See e.g. Thomas R. Graham, ‘Revolution in Trade Politics’ (1979) 36 *Foreign Policy* 49 at 49 (positing that the postwar trade system is dying).

⁷ Michael Hart, *What’s Next: Canada, the Global Economy and the New Trade Policy* (Ottawa: Centre for Trade Policy and Law, 1994) at 44.

⁸ *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1125 (entered into force 1 January 1995), art. III:2 [WTO Agreement].

⁹ Several WTO provisions mandate negotiations. For example, the *General Agreement on Trade in Services* [GATS], arts. X:1, XIII:2, XIX:1; the *Agreement on Agriculture*, art. 20; the *Agreement on Rules of Origin*, art. 9; the *Agreement on Trade-Related Investment Measures* [TRIMs Agreement], art. 9.

¹⁰ See Debra P. Steger, ‘Improvements and Reforms of the WTO Appellate Body’ in Federico Ortino & Ernst-Ulrich Petersmann, eds., *The WTO Dispute Settlement System: 1995–2003* (The Hague: Kluwer Law International, 2004) 41; Claus-Dieter Ehlermann, ‘Experiences from the WTO Appellate

in the multilateral system is there a formalized second-level judicial review of state-to-state disputes.

The negotiation and enforcement of rules brings inevitable tension between WTO politics and law.¹¹ One can see this in the discourse within the trading system, particularly the cherished belief that the WTO is simultaneously ‘member-driven’ and ‘rule-based’. Yet on the whole, the WTO so far has effectively managed the changing hydraulic pressures of an international organization composed of numerous nations each animated by its own domestic political process.

The WTO’s Scope

The WTO’s remit is to govern restrictions affecting transborder trade. With trade so pervasive, the WTO has an extensive scope.¹² In addition to national trade policies, such as antidumping duties, the WTO also supervises domestic policies that affect trade in goods or services¹³—particularly, a government’s use of taxes, regulations, and standards to correct market failure. Using government subsidies as a first-best instrument to address market failure is covered by several WTO agreements.¹⁴ Using government subsidies to promote equity and social

Body’ (2003) 38 Tex. Int’l L. J. 469 at 474.

- ¹¹ The duality also brings synergies. The fact that rules are enforced may make it easier to negotiate new rules if governments think that their own commitments will be reciprocated. The opposite is also true. Enforceable rules may hinder the negotiation of illusory promises.
- ¹² Roy MacLaren, ‘The Geo-political Changes during the 1980s and their Influence on the GATT’ in Jagdish Bhagwati & Mathias Hirsch, eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel* (Ann Arbor, Mich.: University of Michigan Press, 1998) 181 at 187.
- ¹³ See e.g. GATS, art. 1.1 (stating that the GATS applies to measures ‘affecting trade in services’); *Agreement on the Application of Sanitary and Phytosanitary Measures* [SPS Agreement], art. 1.1 (stating that the SPS Agreement applies to measures that may, directly or indirectly, affect international trade); *General Agreement on Tariffs and Trade* [GATT], art. III:4 (requiring national treatment for measures affecting internal sale, offering for sale, purchase, transportation, distribution, or use). The WTO has authority to adopt disciplines for particular sectors. See e.g. World Trade Organization, Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 (17 December 1998), online: World Trade Organization <http://www.wto.org/english/tratop_e/serv_e/sl64.doc>.
- ¹⁴ See *Agreement on Agriculture*, *supra* note 9; *Agreement on Subsidies and Countervailing Measures* [SCM Agreement]. Originally, the SCM Agreement made certain subsidies non-actionable, such as assistance to disadvantaged regions (SCM Agreement, art. 8.2(b)). The non-actionable status was provided for only five years, however, and the WTO Members did not authorize renewal.

justice within a country is also covered by WTO rules.¹⁵ For example in the *United States—Byrd Amendment* case, a United States law providing a direct payment to certain companies in an import-injured industry was ruled a violation of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).¹⁶ This ruling may haunt future governmental efforts to provide adjustment assistance.

No one doubts that WTO rules and their administration can have real impact. As one keen trade policy analysis recently noted, ‘WTO decisions can so often affect domestic regulations, destroy jobs, and create new industries.’¹⁷ The deregulatory aspirations of the WTO can be seen in the names of some of its various administrative entities, such as the Working Party on Domestic Regulation and the Committee on Trade in Financial Services.

The impact of WTO rules increased during the organization’s first ten years as a result of technological developments. For example, the internet enabled more services to be reliably delivered electronically across borders.¹⁸ Biotechnology and software development have spawned new opportunities for patents and copyrights. Expedited delivery services have enabled outsourcing of services and greater trade in products.

The legislative clout of the WTO comes not only through the indirect application of its rules but also in the dynamic way in which the WTO interpenetrates other regimes. Two forms of interaction should be noted. One is the enforcement of non-trade law by the WTO and the other is the incorporation of WTO rules into other treaties. The enforcement of non-trade norms comes in the provisions of the WTO Agreement that either incorporate provisions from other treaties or require the use of current or future international standards.¹⁹ An

¹⁵ WTO rules do not generally inhibit government policies to promote equity, but there are some points of tension. See e.g. ‘The Impact of WTO Rules on the Pursuit of Gender Equality’ in Ana-Nga Tran-Nguyen & Americo Bevilgia Zampetti, eds., *Trade and Gender. Opportunities and Challenges for Developing Countries* (New York: United Nations, 2004), UN Sales No.: E.04.II.D.28, UN Doc. UNCTAD/ EDM/2004/2, c. 9.

¹⁶ *United States—Continued Dumping and Offset Subsidy Act of 2000* (2003), WT/DS217,234/AB/R (Appellate Body Report). The subsidy was also ruled a violation of the GATT and the *Agreement on Implementation of Article VI of the GATT* [Antidumping Agreement].

¹⁷ Bruce Stokes, ‘U.N., World Bank, WTO: Reform Them All’ *National Journal* (22 January 2005) 220.

¹⁸ In a recent WTO dispute decision, the United States was found to be violating the GATS because of the United States criminal laws banning remote gambling (‘US Reprimanded by WTO Ruling on Antigua’s Online Betting Industry’ *Canada Newswire* (10 November 2004)).

¹⁹ The enforcement of non-trade law occurs in the *Agreement on Trade-Related*

incorporation of WTO rules or norms into other areas of international law has sometimes occurred, and one can expect that to happen more frequently in the years ahead.²⁰

Another way in which the WTO has gained legislative clout is through the maneuver of directing governments to confer rights on foreign nationals that owing to a sense of fairness will likely also be conferred on domestic persons.²¹ That is what has happened with the *Agreement on Trade Related Aspects of Intellectual Property* (TRIPS Agreement), which addresses, *inter alia*, patents, copyrights, and trademarks. Although the obligations for intellectual property rights in the TRIPS Agreement extend solely to nationals of other WTO Members,²² governments have supplemented their obligations by

Aspects of Intellectual Property Rights [TRIPS Agreement], arts. 2.1, 9.1, 22.2, 35. The enforcement of certain international soft law occurs in the Agreement on Agriculture, *supra* note 9 art. 10.4. Mandating the use of international standards occurs in the *Agreement on Technical Barriers to Trade* [TBT Agreement], arts. 2.4, 11.2; SPS Agreement, arts. 3.1, 3.4, 3.5; GATS, art. VII:5; GATS *Annex on Telecommunications*, para. 7(a); GATT, *supra* note 13 art. XXXVIII:2(e).

²⁰ For example, see *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, 28 July 1994, 33 ILM 1309 (entered into force 28 July 1996), Annex, s. 6, para. 1(b) (referring to the GATT and superseding agreements); *Inter-American Convention for the Protection and Conservation of Sea Turtles*, 1 December 1996, S. Treaty Doc. 105-48, (entered into force 2 May 2001), art. XV. On the latter, see Takako Morita, 'Marine Sea Turtles and Shrimp Trawling: Interplay Between the U.S. Courts and the WTO Panels and Its Effect on the World Shrimp Industry' (2004) 10 Hastings W-Nw. J. Envtl. L. & Pol'y 209.

²¹ This induced impact of a treaty has interesting historical roots. After a Franco-Swiss trade treaty in 1864 that conferred certain rights on French traders who were Jews, the Swiss government conferred the same rights on Swiss Jewish traders (Jean Baneth, 'Comment on the Paper by Gary P. Sampson' in Anne O. Krueger, ed., *The WTO as an International Organization* (Chicago, Ill.: University of Chicago Press, 1998) 271 at 274). By contrast, the grant of arbitration rights to foreign investors in the *North American Free Trade Agreement* has not led to accompanying action to extend similar rights to domestic investors suffering a similar injustice. See *North American Free Trade Agreement*, 17 December 1992, 32 I.L.M. 605 (entered into force 1 January 1994), art. 1116(1) [NAFTA], for the investment arbitration provision.

²² TRIPS Agreement, art. 1.3. The point was noted by the panel in the *India—Patents* case (*India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (1998), WT/DS50/R at paras. 7.21, 7.42 (Panel Report) (adopted as modified by the Appellate Body 16 January 1998)). Commentators often make the exaggerated claim that TRIPS establishes common minimum international standards in the form of domestic rights of nationals. See e.g. Andrew G. Brown, *Reluctant Partners: A History of*

granting analogous rights to domestic citizens for patents, industrial designs, copyrights, and trademarks. The TRIPS Agreement, in effect, turned the traditional national treatment principle on its head by inducing a political dynamic in which domestic persons would inevitably gain the same rights that were being extended to foreign nationals. In doing so, the TRIPS Agreement fomented one of modern history's greatest transfers of wealth from the public domain into private hands.²³

WTO Dispute Settlement

WTO rules matter because they are enforced in a strong dispute settlement system.²⁴ Unlike the International Court of Justice (ICJ) with its contested jurisdictional phase, the WTO panels have automatic and compulsory jurisdiction.²⁵ A panel's oral hearings and then release of its report typically occur within about a year, which is a rapid timetable for international adjudication. The decision of the panel may be appealed to the Standing Appellate Body, which usually decides its cases within sixty to ninety days. After a panel issues its report or, if there is an appeal, the Appellate Body issues its report, the report is then adopted by the Dispute Settlement Body (DSB), and a losing defendant government is expected to carry out the decision, which may involve repealing or withdrawing a measure that violates WTO rules. As of early 2005, about eighty-seven per cent of adopted panel reports had found a violation.²⁶

Multilateral Trade Cooperation 1850–2000 (Ann Arbor, Mich.: University of Michigan Press, 2003) at 163.

²³ I have not seen any estimates of the amount of private sector wealth to be accumulated under the TRIPS Agreement as compared to, say, the value of privatization provided through the *US Homestead Act* of 1862. Although giving away public land does not increase the quantity of land, the grant of intellectual property rights may increase the quantity of innovation. This dynamic effect would make a comparative calculation difficult.

²⁴ Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington, DC: Brookings Institution Press, 2003) at 2-3. Not all commentators agree. For example, a recent book contends that the terms of the WTO dispute settlement system 'reveal its hapless legal status and inevitable convergence with prevalent, mercantile philosophies' (Ronald Charles Wolf, *Trade, Aid, and Arbitrate: The Globalization of Western Law* (Aldershot: Ashgate, 2004) at 196).

²⁵ See *Understanding on Rules and Procedures Governing the Settlement of Disputes* [DSU], arts. 6.1, 7.1. This advantage of avoiding arguments over jurisdiction will diminish in the future because the Appellate Body has affirmed that jurisdiction can be contested. See Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136,162/AB/R (adopted 26 September 2000), para. 54, n. 30.

²⁶ See online: Worldtradelaw.net <<http://www.worldtradelaw.net/>>

If the scofflaw government does not comply, then the complaining governments may impose trade sanctions.²⁷ For example, in *European Communities—Hormones*, Canada and the United States have imposed trade sanctions against Europe since 1999 because the Communities refused to alter their domestic standard for meat safety.²⁸ The WTO's system of rapid adjudication followed by the imposition of sanctions, when needed, does not exist anywhere else in the multilateral system.²⁹

The WTO dispute system is in tension with politics in several ways. One is that the judicial functions of the WTO are carried out more quickly and smoothly than the legislative functions. In the first ten years of the WTO, eighty-two disputes reached a final decision.³⁰ In contrast, the output from new trade negotiations over the same time period has been meagre. Furthermore, no use has been made of the 'authority to adopt interpretations' granted to the WTO Ministerial Conference and General Council.³¹ This situation has led to concerns about an imbalance between WTO politics and adjudication. Another problem is that the use or threat of trade sanctions puts pressure on governments to comply with WTO decisions even when a government has to bend normal legislative processes. For example, following a threat of sanctions by Europe and Japan, the United States Congress moved to eliminate the contested 1916 Act by inserting the repeal during a meeting of a House-Senate conference, closed to the public, even though the repeal had not been included in either the House or

dsc/database/violationcount.asp>.

²⁷ Edmund B. Fitzgerald, *Globalizing Customer Solutions* (Westport, Conn.: Praeger, 2000) at 91; George Soros, *On Globalization* (New York: Public Affairs, 2002) at 35.

²⁸ See Lori M. Wallach, 'Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards' (2002) 50 U. Kan. L. Rev. 823 at 843-5; see also Michael Trebilcock & Julie Soloway, 'International Trade Policy and Domestic Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body under the SPS Agreement' in Daniel L.M. Kennedy & James D. Southwick, eds., *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002) 537 at 557.

²⁹ James Bacchus, 'Groping Toward Grotius: The WTO and the International Rule of Law' in James Bacchus, ed., *Trade and Freedom* (London: Cameron May, 2004) 451 at 463.

³⁰ This figure was derived by counting adopted panel/Appellate Body decisions in original cases, thereby not counting separately the panels created under DSU, art. 21.5. Parallel cases are counted as one and sequential cases are separately counted.

³¹ See WTO Agreement, art. IX:2.

Senate bills that were slated to be reconciled in the conference.³²

Another tension is that the ability of the Appellate Body to interpret ambiguous provisions of WTO law has raised concerns about the legitimacy of having those decisions made by judges who are not directly accountable to elected officials.³³ Although the WTO General Council can adopt interpretations that would correct a controversial decision by the Appellate Body, in actuality, the WTO's practice of decision-making by consensus makes such corrective interpretations nearly impossible to achieve.

The Appellate Body has often used its interpretive power to adopt balancing tests for the application of rules. For example, with regard to GATT's public policy exceptions, the Appellate Body held that the 'common' interests or values pursued need to be weighed in conjunction with the effectiveness of the measure in achieving those ends and the trade restrictiveness of the contested measure.³⁴ Such triple-factor balancing arrogates a great deal of discretion to the Appellate Body. As Richard Steinberg has aptly observed, however, the Appellate Body has significant constraints in its ability to deviate from the expectations of Members.³⁵

Another point of tension is that national constitutional rules, in general,³⁶ cannot excuse a WTO violation. This was demonstrated in

³² Christopher S. Rugaber, 'Tariff Bill Delayed in Senate After Several Provisions Added in Conference' (2004) BNA International Trade Reporter 1664. The repeal of the 1916 Act is the only occasion since the advent of the WTO in which the United States has altered a federal law in a manner expected to achieve compliance with an adverse WTO decision. In my view, this repeal had to be achieved through backdoor legislation. The Congress was unlikely to act with public transparency through the normal Congressional processes via the committees of legislative jurisdiction.

³³ See Donald McRae, 'What Is the Future of WTO Dispute Settlement?' (2004) 7 J. Int'l Econ. L. 3 at 13-14.

³⁴ *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* (12 March 2001), WT/DS135/AB/R) at para. 172 (Appellate Body Report) [*Korea—Beef*].

³⁵ Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 Am. J. Int'l L. 247. Among the constraints that Steinberg points to are a 'veto' by 'powerful members' of candidates to serve on the Appellate Body, the operation of the Appellate Body 'in the shadows of threats to rewrite DSU rules that would weaken it and of possible defiance of its decisions by powerful members', and the ongoing receipt of information by the Appellate Body 'on the preferences of powerful members, helping it to avoid political pitfalls' (*ibid.* at 274).

³⁶ A few WTO rules do provide deference to national constitutions. See Antidumping Agreement, art. 4.2; SCM Agreement, art. 16.3; GATS, art. VI:2(b); TRIPS Agreement, arts. 42, 46.

Australia—Leather where the WTO directed Australia to take back a subsidy given to a domestic company that was legally granted under Australian law.³⁷ The complaining government, the United States, would not have the constitutional authority to perform the same confiscation of private property that it was asking Australia to carry out.

The WTO and Other Regimes

Tensions also exist between the WTO and the politics of other international regimes.³⁸ Because the scope of the WTO is broad and its dispute settlement system robust, the WTO has sometimes exhibited what one keen observer calls a ‘superiority complex’ in which WTO insiders consider trade law superior to the law of other treaties.³⁹ This problem might have been reduced if the WTO treaty had provided for more deference to other international regimes, yet the provisions for deference are extremely limited.⁴⁰ The problem could also have been reduced if the WTO was pursuing significant cooperation with other international organizations.⁴¹ Unfortunately, WTO efforts for positive coordination are inadequate.⁴²

The negative impact of the WTO on regimes in construction may be a more serious problem. The toolbox of instruments to promote international cooperation—such as standards, subsidies, regulations, taxes, and trade controls—can be inhibited by trade rules, thus making it harder to solve transborder and global problems.⁴³ For example, government policies that discriminate against countries that engage in

³⁷ *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather* (2000), WT/DS126/R/W (Panel Report).

³⁸ See e.g. Thomas Cottier, ‘Trade and Human Rights: A Relationship to Discover’ (2002) 5 J. Int’l Econ. L. 111; Gilbert R. Winham, ‘International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO’ (2003) 2 World Trade Review 131.

³⁹ Joost Pauwelyn, ‘WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for “Conflict Diamonds”’ (2003) 24 Mich. J. Int’l L. 1177.

⁴⁰ The main provisions for deference are: (a) to the International Monetary Fund, GATT, arts. XV:2, XV:4, GATS, art. XI:2; (b) to double taxation agreements, GATS, art. XXII:3; (c) to the export credit regime of the Organization for Economic Co-operation and Development, SCM Agreement, Annex I, para. k; and (d) to various intellectual property treaties, TRIPS Agreement, arts. 4, 5, 70.2.

⁴¹ ‘[E]ffective cooperation’ is authorized, if not mandated, in the WTO Agreement, art. V:1.

⁴² See Jeffrey L. Dunoff, ‘The WTO in Transition: Of Constituents, Competence and Coherence’ (2001) 33 Geo. Wash. Int’l L. Rev. 979 at 997-9.

⁴³ See Pierre S. Pettigrew, *The New Politics of Confidence*, trans. by Phyllis Aronoff & Howard Scott (Toronto: Stoddard, 1999) at 24-5.

bad environmental behavior may violate various rules of the WTO. That situation occurred in the *United States—Tuna (Dolphin)* and the *United States—Shrimp* disputes in which complaining governments initially refused to regulate the practices of their nationals who were needlessly killing dolphins and sea turtles.⁴⁴ The irony in those disputes was that while the GATT and WTO panels did point out the need for more environmentally-friendly fishery policies, the legal holdings were aimed at the United States—the country seeking to prevent the drowning of dolphins and turtles—rather than at the countries that were causing the environmental problems. In the *United States—Shrimp* case, the Appellate Body pontificated that sovereign nations ‘should’ adopt effective measures to protect endangered species and ‘should’ act together ‘bilaterally, plurilaterally or multilaterally... to protect the environment.’⁴⁵ Yet WTO rules do not give any authority to the Appellate Body to ask environmental scofflaw governments to do so.⁴⁶

The WTO is not formally responsible for the environment or for many other matters of international concern. Rather, the WTO is an arena where member governments can negotiate on many matters relating to trade. This limited organizational competence is a defining feature of the WTO treaty and arguably a key reason for the treaty’s overall success. On the other hand, the limited purview of the WTO has sometimes undermined public confidence in the institution and been a source of friction with other international regimes.

One characteristic of WTO rules is minimal attention to any transnational consumer interest, the public domain, or the global commons. In part, this orientation stems from the state-centricity of the WTO, which imagines that international trade occurs between an ‘exporting Member’ and an ‘importing Member’.⁴⁷ Of course, the reality

⁴⁴ *United States—Restrictions on Imports of Tuna* (1991), GATT Doc. DS21/R (September 1991, not adopted), online: Stanford <<http://gatt.stanford.edu/page/home>>; *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WT/DS58/AB/R at para. 185 (Appellate Body Report).

⁴⁵ *Ibid.* Furthermore, the Appellate Body declared that ‘the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the [United States] measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations’ (*ibid.* at para. 168).

⁴⁶ Several provisions in the WTO call on governments to carry out non-trade negotiations, but none of them pertain to the environment. See e.g. TRIPS Agreement, art. 24.1; TBT Agreement, arts. 2.6, 9.1, 10.7.

⁴⁷ See e.g. the focus on ‘exporting Member’ in SCM Agreement, art. 12.1.3; Antidumping Agreement, art. 5.5; TBT Agreement, art. 2.12; and the focus on ‘importing Member’ in SPS Agreement, art. 4.1; Agreement on Safeguards, art. 7.2; Agreement on Import Licensing Procedures, art. 1.1.

is that trade normally occurs between private economic actors, not between governments.⁴⁸ This treaty-based attention to countries as traders reflects a long tradition in thinking about trade and, in the modern era, was perhaps given its greatest boost by the economist David Ricardo who demonstrated the benefits of trade through the lens of territoriality.⁴⁹

Yet by conceiving the world economy as being composed of the trading interests possessed by governments, the WTO's rules often overlook the most basic economic unit, the individual. WTO rules can also overlook the broader interests that states share (for example, public health) rather than discretely possess. Furthermore, when WTO rules do pay attention to the interests of individual economic stakeholders, they may do so in trade-restrictive ways. For example, the Antidumping Agreement calls on governments to permit a domestic industry to apply for antidumping duties.⁵⁰

WTO rules are protective of import-competing companies that may be hurt by trade, but these rules do not give much consideration to improving the trade-readiness of a country or its government. Given that trade has an uneven effect on people and industry, no one should be surprised that trade has a variable impact on development. Even when countries gain income from trade, that gain might not translate into economic development because the derived income may be excessively concentrated and the capital may be exported. The authors of the WTO Agreement recognized this problem to some extent in the treaty's Preamble, which points out the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.⁵¹

Unfortunately, many of the efforts regarding developing

⁴⁸ Nevertheless, in its first decision, the Appellate Body described international trade as occurring 'between territorial sovereigns' (*United States—Standards for Reformulated and Conventional Gasoline* (1996), WT/DS2/AB/R at 27 (Appellate Body Report)).

⁴⁹ David Ricardo, *Principles of Political Economy and Taxation* (Amherst, NY: Prometheus Books, 1996) c. 7 (On Foreign Trade). As Alan Sykes has explained, the theory of comparative advantage predicts that 'nations will tend to specialize in the production of goods in which they have a comparative advantage, exporting them to other nations in exchange for goods in which they lack comparative advantage' (Alan O. Sykes, 'Comparative Advantage and the Normative Economics of International Trade Policy' (1998) 1 J. Int'l Econ. L. 49 at 52-3).

⁵⁰ See Antidumping Agreement, art. 5.

⁵¹ WTO Agreement, preamble.

countries in WTO rules are *negative*, not positive.⁵² Such provisions allow WTO member developing countries complete discretion to opt out of concerted market liberalization. Looking back over several decades, two leading trade economists recently reached the sober conclusion that '[t]he history of the GATT and the WTO suggest that, as a factual matter, the multilateral trading system has had very little impact in furthering trade liberalization in developing countries.'⁵³ Some observers from developing countries might view that as good news, but I do not because developing countries need to liberalize in order to gain the dynamic gains from import competition. The speed and scope of liberalization, of course, should be an open question.

The ongoing Doha Round agenda makes progress in one way by enshrining a commitment to capacity building for developing countries.⁵⁴ The period since 2001 is long enough for the WTO's work on capacity building to be evaluated, but I am not aware of any independent evaluation. My guess is that so far, such efforts have been underfunded and poorly targeted.

One pro-development opportunity the WTO has missed is to promote the achievement of the Millennium Development Goals. In September 2000, the United Nations General Assembly adopted the Millennium Declaration, which propounded several important goals and set target dates for some of them.⁵⁵ For example, by 2015, the UN proposed to halve the proportion of people who suffer from hunger. This initiative by the UN could have inspired the WTO to undertake efforts to support these global goals when feasible given the WTO's limited functional mandate. Sadly, the WTO did not take any action. The WTO Doha Declaration of November 2001 made no mention of the UN Millennium Goals. Indeed, to my knowledge, the WTO has yet to take a position on the Millennium Goals.

Perhaps some change is in the air however. In early 2005, the WTO's dynamic Director-General Supachai Panitchpakdi took the unusual step of writing a letter to WTO governments about the horrific Asian tsunami in which he said: 'As an important actor in international economic cooperation, the WTO shares part of the responsibility to assist recovery from this disaster.'⁵⁶ I applaud Supachai's idea of

⁵² For example, *ibid.*, art. XI:2; Agreement on Agriculture, art. 15.2; GATT, art. XXVIII *bis*:3(b).

⁵³ Aaditya Mattoo & Arvind Subramanian, 'The WTO and the Poorest Countries: The Stark Reality' (2004) 3 World Trade Review 385 at 393.

⁵⁴ Ministerial Declaration, WT/MIN(01)/DEC/1 (20 November 2001), paras. 2, 16, 20, 21, 26-27, 33, 36, 38-42.

⁵⁵ *United Nations Millennium Declaration*, GA Res 55/2, UN GAOR, 55th Sess., UN Doc. A/RES/55/2 (2000).

⁵⁶ 'Supachai Urges Members to Mull Trade Policies to Help Tsunami

fructifying a greater sense of a WTO responsibility to the world community.

Joining the Club

The WTO keeps its distance from the UN in many ways,⁵⁷ one of which is that there is no norm that WTO membership needs to be universal.⁵⁸ The WTO remains an exclusive club and the membership process can take many years. For example, the Russian Federation has been trying to join since 1993. Membership in the WTO is desirable for several reasons.⁵⁹ First, the treatment guaranteed in WTO rules applies only to members, and so a non-member may be discriminated against with impunity. Second, only members of the WTO can play a role in crafting new rules. Third, joining the WTO paradoxically strengthens national sovereignty by according a country membership in good standing in an important organization.⁶⁰ Fourth, being a WTO member gives a less powerful country some recourse against actions that are hurting it, especially when taken by a more powerful country.⁶¹ Fifth, the market may reward WTO membership by expanding inward foreign investment.

As a result, applicant governments will swallow a lot of indignity to gain entry into the WTO. The best exhibit is China, which accepted several WTO-plus and WTO-minus derogations.⁶² The WTO

Sufferers' *WTO News Items* (13 January 2005).

⁵⁷ Nevertheless, WTO Secretariat officials may secure a UN Laisser-Passer that may expedite trips through airports.

⁵⁸ Countries may become new WTO members through the accession process. Although the UN has many more members than the WTO, the WTO does have four members who are not member states of the UN—the European Communities, Hong Kong China, Macao China, and Taiwan (Chinese Taipei).

⁵⁹ One commentator suggests that 'WTO membership is an effective way of importing the rule of law' (Martin Wolf, *Why Globalization Works* (New Haven, NJ: Yale University Press, 2004) at 276).

⁶⁰ See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty* (Cambridge, Mass.: Harvard University Press, 1995); Jonathan Fried, 'Globalization and International Law—Some Thoughts for States and Citizens' (1997) 23 *Queen's L.J.* 259 at 270 (suggesting that a treaty freely negotiated and entered into is protection for the true exercise of state sovereignty). See also WTO Secretariat, 'Is Dispute Settlement a Threat to Democracy?', online: WTO <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction12_e.htm> (explaining that the 'surrender of sovereignty' entailed in WTO membership is voluntary).

⁶¹ Of course, this recourse only applies to actions that are found to violate WTO rules.

⁶² WTO-plus provisions are additional obligations above those in the WTO; WTO-minus provisions are reductions in the normal WTO obligations

Agreement places no limits on the terms of accession that the WTO can offer to applicant countries.⁶³

If the strong-armed accession tactics involved only China, one might not be concerned because as a large nation with considerable experience in dealing with demands for 'unequal treaties',⁶⁴ China surely can fend for itself. But the WTO has also imposed WTO-plus commitments on small and poor countries. For example, when it joined the WTO in October 2004, Cambodia agreed to achieve full implementation of the TRIPS Agreement, including for pharmaceutical products, by the end of 2006.⁶⁵ Ordinarily, as a least-developed country, Cambodia would have been entitled to a delay to the end of 2015 for pharmaceutical patents.⁶⁶

II TWO SCENARIOS FOR THE WTO IN 2020

Part II of the article presents two alternative scenarios for the WTO of 2020. The first is a pessimistic vision; the second an optimistic one. Part III of the article suggests a third, more realistic, scenario for the WTO's future.

The Pessimistic Scenario

In a 2020 dystopia, the WTO deteriorates and becomes ineffective. How could this happen? One possibility is that the Doha Round fails to reach fruition,⁶⁷ and the pro-trade countries carry out their mutual liberalization efforts in competing fora. The causation could also be reversed: The United States and the European Union might decide to place even more emphasis on the negotiation of bilateral and regional

specifically with respect to China (Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System' (2003) 37 J. World Trade 483).

⁶³ A government joins 'on terms to be agreed between it and the WTO' (WTO Agreement, art. XII:1).

⁶⁴ See L.H. Woolsey, 'China's Termination of Unequal Treaties' (1927) 21 Am. J. Int'l L. 289.

⁶⁵ WTO, *Report on the Working Party on the Accession of Cambodia*, WT/ACC/KHM/21 (15 August 2003) at para 206.

⁶⁶ TRIPS Agreement, art. 66.1, and the least developed country waiver to the year 2016 discussed in online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm>. For a good study of the coercion of Cambodia, see Oxfam International 'Cambodia's Accession to the WTO: How the Law of the Jungle is Applied to One of the World's Poorest Countries' (2003), online: Oxfam <http://www.oxfam.org/eng/pdfs/doc030902_cambodia_accession.pdf>.

⁶⁷ See Konrad von Moltke, 'The Last Round: The General Agreement on Tariffs and Trade in Light of the Earth Summit' (1993) 23 Envtl. L. 519 (predicting difficult problems for the trading system in the years ahead).

trade agreements and then to give correspondingly less attention to WTO negotiations. Such inattention could lead to WTO negotiation failure. Bilateral agreements are especially attractive to the United States because it can demand more of an individual trading partner, on issues like investment, than it can of the WTO membership. Ironically, the opposition by developing countries to negotiating investment in the multilateral WTO has decreased their leverage on that issue.

A further source of pessimism is the possibility that the WTO fails to reform any of its rules and procedures under review. Such a failure could occur as a consequence of the requirement of consensus decision-making.⁶⁸ Changes in the WTO Agreement are most likely to occur in the context of broad trade rounds, which have numerous issues in play. Nevertheless, the governments in the WTO can approve amendments to the WTO Agreement via the provisions in the treaty that provide for decisions to be taken by voting and member 'acceptance'.⁶⁹ If WTO members demonstrate an inability to write any new rules, that could lead to serious organizational instability.

Another damaging scenario would be if a major country pulls out of the WTO and this action leads to reciprocal defection by other countries. Under United States law, the Congress votes every five years on whether to disapprove United States membership in the WTO.⁷⁰ If the Congress were to move considerably to the political right (or to the left), there could be a retreat from international engagements such as the WTO. United States repulsion to the trading system might be driven by continued losses in WTO disputes.⁷¹ In 2002, for example, the Congress complained about 'the recent pattern of decisions by dispute settlement panels of the WTO and the Appellate Body to impose obligations and restrictions on the use of antidumping, countervailing, and safeguard measures'⁷² Two years ago, a leading member of the United States trade bar suggested that when a WTO panel reaches a wrong decision in

⁶⁸ Consensus is mentioned first as the mode of WTO decision-making (WTO Agreement, art. IX:1). Voting is mentioned next. The word 'consensus' was not mentioned in the GATT.

⁶⁹ See *ibid.*, art. X. Certain provisions can only be changed through 'acceptance' by all members (*ibid.*, art. X:2). Other provisions can be changed for all members without acceptance by all members (*ibid.*, arts. X:4, X:5).

⁷⁰ 19 USCS s. 3535(b). The template resolution does not purport to require the President to withdraw the United States from the WTO.

⁷¹ See Eric A. Posner, 'All Justice, Too, Is Local' *N.Y. Times* (30 December 2004) 23 ('[s]uccessful international organizations either adapt to great power politics or they wither on the vine; it is a choice that the supporters of global justice will soon face').

⁷² 19 USCS s. 3801(b)(3).

a trade remedy case, the United States should 'tell the WTO they simply got it wrong, refuse to implement the recommendation, and accept the consequences.'⁷³ This is a minority view, however, in the United States. Shortly after he was reelected as President in 2004, George W. Bush stated: 'I think it's important that all nations comply with WTO rulings.'⁷⁴

Many commentators have questioned whether WTO dispute settlement would be able to continue along its initial path. Writing in 2001, Claude Barfield, a highly respected analyst of international trade policy, wrote that the judicialized WTO dispute settlement system 'is substantively and politically unsustainable' because 'there is no real consensus among WTO members on many of the complex regulatory issues that the panels and the Appellate Body will be asked to rule upon.'⁷⁵

In my own view, the pessimistic path is unlikely to materialize. Too many centripetal forces surround the trading system for countries to easily depart from the WTO.⁷⁶ If any country could walk out it would be the United States, but that option seems almost inconceivable. In addition, although one can imagine panels and the Appellate Body being more cautious than they have been, I do not foresee any serious unravelling of WTO dispute settlement.

The Optimistic Scenario

The second scenario is rosy optimism. Looking back from the time of 2020, one sees how the WTO became a more successful and respected international organization that met four difficult challenges. These challenges were: (1) legitimacy, (2) lawmaking, (3) justice, and (4) a need for more attention to poverty alleviation and development.

1 Legitimacy

The legitimacy crisis⁷⁷ faced by the WTO in its early years was overcome through enlightened leadership and the adoption of important

⁷³ Richard O. Cunningham & Troy H. Cribb, 'Dispute Settlement through the Lens of "Free Flow of Trade"' (2003) 6 J. Int'l Econ. L. 155 at 170.

⁷⁴ 'Exchange with Reporters in Crawford, Texas' *Weekly Compilation of Presidential Documents* (29 November 2004) 2865 at 2866.

⁷⁵ Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, DC: AEI Press, 2001) at 7.

⁷⁶ Donald M. McRae, 'The Contribution of International Trade Law to the Development of International Law' (1996) 260 Rec. des Cours 103 at 231-32.

⁷⁷ See Jeffrey L. Dunoff, 'The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution' (2002) 13 Am. Rev. Int'l Arb. 197; Daniel C. Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 World Trade Review 7.

constitutional changes.⁷⁸ Although free trade remains unpopular in many countries,⁷⁹ the diatribes and street protests against the WTO stopped after the creation of the WTO Parliamentary Assembly in 2007. Even without any formal decision-making authority, the participation of parliamentarians facilitated compromises in WTO negotiations and enhanced public trust of the process and its outcomes.⁸⁰

Catalyzed by nongovernmental organizations in the early 1990s, the new WTO soon moved into the front ranks of international organizations with regard to transparency by instituting an information-rich website. Numerous areas of secrecy remained, yet year by year, the list of restricted document categories was reduced. When the Delhi Round began in 2010, the WTO agreed that all negotiating documents and Secretariat 'Notes' would be posted to the website immediately. The obsolete document formats on the WTO's website were eliminated in 2005 when the WTO outsourced the management of its website to a software consultancy in Bangalore.

The decision to open most WTO meetings to the public was a difficult one. From the beginning, the trading system had operated on the belief that secrecy enabled governments to trade off the interests of some of their import-competing industries for the benefit of their competitive export industries. As the degree of overt protection continued to fall, the diminishing utility of the traditional closed approach became obvious and was replaced by a more deliberative model in which governments sought to formulate and justify outcomes publicly. As some experts predicted,⁸¹ allowing in some sunshine did not impede the fruitfulness of trade negotiations.

The opening of the WTO to participation by civil society organizations was another important move in enhancing the WTO's

⁷⁸ See Joel P. Trachtman, 'Changing the Rules. Constitutional Moments of the WTO' (2004) 26:2 Harv. Int'l Rev. 44.

⁷⁹ In 1824, the British historian Thomas Babington Macaulay remarked that 'free trade, one of the greatest blessings which a government can confer on a people, is in almost every country unpopular' (cited in Douglas A. Irwin, *Free Trade Under Fire* (Princeton, NJ: Princeton University Press, 2002) at 1). The unpopularity of free trade persists.

⁸⁰ See Ernst-Ulrich Petersmann, 'Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO: Introduction and Summary' (2004) 7 J. Int'l Econ. L. 585. See also Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004) c. 3 (discussing legislators in the international arena).

⁸¹ See Julio A. Lacarte, 'Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective' (2004) 7 J. Int'l Econ. L. 683.

perceived legitimacy.⁸² Acknowledging its obligation under Article V:2 of the WTO Agreement, the Ministerial Conference agreed at the end of the Doha Round to make appropriate arrangements for consultation and cooperation with non-governmental organizations (NGOs). This reform ensued when developing countries recognized that many international NGOs could serve as effective advocates for the causes of poverty alleviation and sustainable economic growth.

Despite worries in some quarters that a formal NGO role would allow special interests to dominate the WTO, the new opportunities led to a more balanced, refined public debate that considerably reduced the influence of rent-seeking interests in trade policy. After all, powerful private rent-seeking interests had not needed formal access to the GATT during the negotiation of the TRIPS accord in order to influence that process.⁸³ By opening itself up to more voices, the WTO increased the likelihood that all new initiatives would be thoroughly vetted.

The acceptance of greater transparency and public participation changed the semantics of trade policy as participants increasingly recognized the rights of individual economic operators and social actors in the trading system.⁸⁴ Although the WTO treaty refers to the 'right' of Members⁸⁵ and the Appellate Body is enamored of identifying rights of Members,⁸⁶ the conclusion slowly dawned that the government-centric rights talk was obscuring the true individual rights at stake in international trade.

2 Lawmaking

The difficulties in completing the Doha Round convinced governments that the GATT/WTO practice of decision-making by consensus had to be abandoned, as was foreseen when Article IX:1 of the WTO

⁸² Pierre Marc Johnson with Karel Mayrand, 'Beyond Trade: The Case for a Broadened International Governance Agenda' (2000) 1(3) Policy Matters 28, online: IRPP <<http://www.irpp.org/pm/archive/pmvol1no3.pdf>>; Kent Jones, *Who's Afraid of the WTO?* (Oxford: Oxford University Press, 2004) at 199.

⁸³ See Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2004) at 182 (discussing the 'harmful lobbying by corporations' on intellectual property protection).

⁸⁴ See Philip Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002) at 420.

⁸⁵ See e.g. DSU, art. 3.3, SPS Agreement, art. 2.1.

⁸⁶ See e.g. *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 48 at 22; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 44 at para. 156 (pointing to 'substantive treaty rights' such as those in GATT, art. XI:1).

Agreement was written.⁸⁷ In seeking to fix the WTO's slow decision-making, the governments recognized the need for designing a mechanism that accomplished the three goals of (a) ceasing the exclusion of small countries from decision-making, (b) providing a special status for large economies, and (c) preventing paralysis. Eventually, the governments saw the wisdom of establishing a WTO Governing Body based partly on the 1919 model of the International Labour Organization in which a certain number of seats are reserved for states of chief economic importance.⁸⁸ The remainder of the seats were allocated through a system in which various geographic and income groupings select a government as a representative.⁸⁹ A resort to weighted voting was not employed because governments could not agree on how to do the weighting. Among the factors considered were population, domestic gross domestic product (GDP), and trade as a percentage of GDP.

The establishment of the Governing Body made it much easier for the WTO to build support for difficult decisions. The notorious 'green room' practices of decision-making in rump sessions was finally abandoned. To the surprise of many trade cognoscenti, the newly-created WTO Parliamentary Assembly facilitated the process of decision-making in the Governing Body and the Ministerial Conference.

⁸⁷ See John H. Jackson, 'The World Trade Organization: Watershed Innovation or Cautious Step Forward?' in John H. Jackson, ed., *The Jurisprudence of the GATT & the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000) 399 at 405-7 (discussing the new provisions to protect sovereignty included in WTO voting provisions).

⁸⁸ See *Treaty of Versailles*, 28 June 1919, 112 BFSP 1 (entered into force 10 January 1920), art. 393. The ILO model was followed in the International Trade Organization Charter, which reserved seats on the Executive Board for states of 'chief economic importance' (*Havana Charter for an International Trade Organization*, 24 March 1948, Can. T.S. 1948 No. 32 (did not enter into force), art. 78, online: WTO <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf>).

⁸⁹ A number of thoughtful proposals contributed to the reform. See e.g. Jeffrey J. Schott & Jayashree Watal, 'Decision Making in the WTO' in Schott, ed., *The WTO After Seattle* (Washington, DC: Institute for International Economics, 2000) 283; Sylvia Ostry, 'World Trade Organization: Institutional Design for Better Governance' in Roger B. Porter et al., eds., *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings, 2001) 361 at 369; Friedl Weiss, 'WTO Decision-Making: Is It Reformable?' in Kennedy & Southwick, *supra* note 28 at 68; Richard Blackhurst & David Hartridge, 'Improving the Capacity of WTO Institutions to Fulfil Their Mandate' (2004) 7 J. Int'l Econ. L. 705 at 708.

3 Justice

Although much criticized in its early years, the Appellate Body survived and received greater respect in the WTO's second decade. When the Appellate Body's name was changed to the International Court of Economic Justice (ICEJ), as had been proposed by Joseph Weiler,⁹⁰ the WTO dropped the fig leaf of gaining formal approval of panel decisions by the DSB. Over time, the contributions to trade jurisprudence by the original seven members of the Appellate Body was widely celebrated.⁹¹ After the ICEJ moved to its own building in 2010, busts of the original seven members were installed at the entrance.

In retrospect, one of the most important procedural changes that occurred was taken in the Doha Round when the DSU was amended in order to permit all WTO member governments to observe the oral hearings held by panels and the Appellate Body. This reform reflected an acknowledgement that what happens in dispute settlement is a matter of keen interest to all WTO members, not just the disputing parties. The opening of these meetings to governments fostered a greater judicialization of WTO dispute settlement and made it harder for recalcitrant WTO members to resist the logical next step of opening dispute settlement to observation by the public.

4 Poverty Alleviation and Development

Increased trade facilitates poverty alleviation,⁹² but liberalization alone is not sufficient. Governments need sufficient policy space to promote manufacturing, technology, training, education, and other prerequisites of national competitiveness. The capacity of poor countries to trade also has to be increased. Although 'capacity building' had always been a leitmotif of the Doha Round, it was not until the 2005 Hong Kong Ministerial Conference that WTO governments agreed to a substantive plan for making developing countries more trade-ready.

The centerpiece of the new plan was taking seriously the role of technical assistance.⁹³ Building on the existing provisions for technical

⁹⁰ J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement' in Porter *et al.*, *supra* note 89 at 334, 342.

⁹¹ See Robert Howse, 'The Legitimacy of the World Trade Organization' in Jean-Marc Coicaud & Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo: UN University Press, 2001) 355 at 374-94 (praising Appellate Body jurisprudence); James McCall Smith, 'WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings' (2003) 2 *World Trade Review* 65.

⁹² 'Making Poverty History' *The Economist* (18 December 2004) 13.

⁹³ See Bernard Hoekman, 'Strengthening the Global Trade Architecture for Development: The Post Doha Agenda' (2002) 1 *World Trade Review* 23 at 34 (discussing the need for the WTO to place trade issues in the context of

assistance in the WTO Agreement,⁹⁴ the Hong Kong Conference agreed that the Director-General should name an Assistance Coordinator in the WTO Secretariat for each developing country WTO member. At the same time that the country desks were established, the Conference approved a doubling of the size of the WTO Secretariat, and gave it more resources for analytical work.⁹⁵

Another important step taken was to elevate 'food security' as a WTO norm⁹⁶ while at the same time recognizing that food security can be achieved more readily through trade than through autarky. This was accomplished by the negotiation of a new Agreement to Promote Food Security.

The positive contribution of international standards as an instrument for development was also recognized at Hong Kong, and the Ministerial Conference took requisite action. The Ministerial Conference instructed the Director-General to develop new proposals for promoting international standards, including through a better use of the Standards and Trade Development Facility launched in 2004. When in 2014, the Appellate Body ruled in favor of France in *United States—Widgets* that the United States was required to fully utilize the metric system of measurement, many observers heralded that decision as a seminal triumph of the standardization movement wrought by the WTO.

In retrospect, these developments might not have occurred had not the Hong Kong Conference taken the additional, unprecedented step of inviting private sector participation in the WTO's efforts to promote the synergistic benefits of standards. Inspired by the business leadership in the World Economic Forum, the WTO recognized how valuable private sector involvement could be, especially from developing countries. When development ensues, it does not happen by muscular string-pushing but rather by the establishment of an enabling environment for capital investment and human resource development.

country assistance strategies).

⁹⁴ TBT Agreement, art. 11; SPS Agreement, art. 9; TRIPS Agreement, arts. 66.2, 67; GATS, art. XXV:2; GATS Annex on Telecommunications, para. 6; GATT, arts. XXVI:3, XXXVI, XXXVIII:2. See Aaron Cosbey, *Lessons Learned on Trade and Sustainable Development: Distilling Six Years of Knowledge from the Trade Knowledge Network* (Winnipeg: International Institute for Sustainable Development, 2004) at 41.

⁹⁵ See Jagdish Bhagwati, *Free Trade Today* (Princeton, NJ: Princeton University Press, 2002) at 73-4 (lamenting the 'starvation of the WTO' compared to the 'financial indulgence of the Bretton Woods institutions').

⁹⁶ See Agreement on Agriculture, arts. 10.4, 12.1(a); Ruosi Zhang, 'Food Security: Food Trade Regime and Food Aid Regime' (2004) 7 J. Int'l Econ. L. 565.

As Gus Speth had pointed out, unscripted, voluntary initiatives have to be part of any successful strategy to achieve good governance for sustainable development.⁹⁷

The decision by the WTO to do more on competition policy did not ensue at Hong Kong but rather at the Delhi Ministerial a few years later.⁹⁸ The breakthrough came when governments realized that a lack of adequate antitrust rules was hindering balanced economic growth.⁹⁹ To be sure, no government needed the WTO in order to establish better competition rules for its own economy. Of course, that is true for better trade policy too, as that can be achieved unilaterally. Yet as Frieder Roessler famously observed, the essential function of the multilateral trade order is to resolve conflicts of interest within nations and to help governments make better policy.¹⁰⁰ That insight justified bringing more competition rules into the WTO Agreement.

III CONCLUSION

So much for that futuristic trade fantasy. The reality is that the WTO of 2020 will probably not be much different than the WTO of 2005.¹⁰¹ It will not fall into dystopia, nor blossom into a truly progressive international organization.

Although I am pessimistic that the WTO will be able to achieve much constitutional change by 2020, I am not pessimistic as to the achievement of more trade liberalization at the national level. Back in the mid-1930s when he contemplated the future of world trade, Sir

⁹⁷ James Gustave Speth, *Red Sky at Morning: America and the Crisis of Global Environment* (New Haven, NJ: Yale University Press, 2004) at 173.

⁹⁸ In the early years of the WTO, the consideration of whether legal provisions regarding competition policy should be added to the TRIMs Agreement (see TRIMs Agreement, art. 9) had not led to any proposed amendments.

⁹⁹ Pierre Sauvé & Americo Beviglia Zampetti, 'Subsidiarity Perspectives on the New Trade Agenda' (2000) 3 J. Int'l Econ. L. 83 at 101-4; Merit E. Janow, 'Operation of the WTO Agreements in the Context of Varying Types of National Regulatory Systems: Public, Private, and Hybrid Public/Private Restraints of Trade: What Role for the WTO?' (2000) 31 Law & Pol'y Int'l Bus. 977 at 979; Marco C.E.J. Bronckers, 'The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law?' in Marco Bronckers & Reinhard Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000) at 371.

¹⁰⁰ Frieder Roessler, 'The Constitutional Function of the Multilateral Trade Order' in Frieder Roessler, ed., *The Legal Structure, Functions & Limits of the World Trade Order: A Collection of Essays* (London: Cameron May, 2000) 109.

¹⁰¹ See José Alvarez, 'The WTO as Linkage Machine' (2002) 96 Am. J. Int'l L. 146 at 151-2 (discussing path dependency).

Arthur Salter deemphasized the potential contribution of nascent ‘multilateral negotiations’, and instead pointed to the need for improvements in domestic policies. As Salter explained, world trade would advance as countries adopted reasonable national policies conceived as a whole in their own interest rather than letting policies ensue through a calculation of political pressures.¹⁰² Economic nationalism, Salter said, was not simply an enemy to slay, but also a force to encourage and educate in order to achieve ‘an evolution from within’.¹⁰³ Salter’s insight remains relevant today in a world of thicker multilateral institutions than he knew.

Citizens, interest groups, and governments should continue to promote free trade not only for its benefits to economic welfare but also for its benefits to peace. As we contemplate the WTO of the twenty-first century, we should recall the wisdom of Lester B. Pearson in his Nobel Lecture of 1957, who, looking back and ahead, said:

The higher the common man sets his economic goals in this age of mass democracy, the more essential it is to political stability and peace that we trade as freely as possible together, that we reap those great benefits from the division of labor, of each man and each region doing what he and it can do with greatest relative efficiency, which were the economic basis of nineteenth-century thought and policy.¹⁰⁴

¹⁰² Sir Arthur Salter, *World Trade and Its Future* (London: Oxford University Press, 1936) at 90-2.

¹⁰³ *Ibid.* at 101.

¹⁰⁴ Lester Bowles Pearson, ‘The Four Faces of Peace’ (Nobel Lecture, 11 December 1957), online: <<http://nobelprize.org/peace/laureates/1957/pearson-lecture.html>>.