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Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future

*By Robert Howse and Joanna Langille**

Abstract

The World Trade Organization is at an important institutional crossroads, buffeted by critique and with its once-heralded dispute system in doubt. Despite some achievements at the 2022 MC12 Ministerial Conference, the WTO appears in crisis, without a strong institutional mandate. In this Article, we offer a vision for its future, rooted in a particular interpretation of its past. The WTO's legal architecture is characterized by a resilient pluralism, which seeks to preserve diversity of governance models and regulatory approaches, both economic and political, in the domestic orders of member states. Despite strong pressures to impose a neoliberal vision of the state-market relationship on states, this pluralism has persevered; it offers a response to the WTO's critics and a mandate for the WTO's future.

Introduction

The post-neoliberal world will be one characterized by pluralism. – Rana Foroohar

Is there life for the World Trade Organization (WTO) after neoliberalism? The WTO is often assumed to exist to provide "neoliberal standards and rules for interaction in the global economy."[1] What role might the WTO have in a post-neoliberal world, where maximizing the free movement of goods, services, and capital is no longer presumed to be the desired path to development and growth?[2]

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[1] David Harvey, A Brief History of Neoliberalism 93 (2007). Neoliberalism, often identified with the Washington Consensus, involved, as Mazower articulates, "a cluster of prescriptions: avoidance of large fiscal deficits; curtailment of government subsidies; liberalization of trade and investment regimes; privatization of nationalized forms; and deregulation. If development economics had been premised on the possibility that backward economies might need a different set of prescriptions to advanced ones, the new dogma assumed that universal virtue resided in the market." Mark Mazower, Governing the World: The History of an Idea 354 (2012).

[2] This gloss overstates: (1) the extent to which neoliberalism was ever the exclusive ideology guiding global economic governance; and (2) the extent to which neoliberalism is in retreat. As we shall argue below, neoliberalism was never the only theory at play in the context of the multilateral trading system. And we of course acknowledge that neoliberal voices and players remain.

Today, the going wisdom is that the WTO is no longer fit for purpose, and even its supporters have suggested that major institutional reform is essential for its survival.[3] While the WTO was once seen by many as the standard bearer for global economic governance, in recent years, the WTO has been hit by escalating critique from virtually all corners, and has been consigned to irrelevance by many.[4] If, as a leading *Financial Times* business journalist has declared, "[t]he bottom line is that globalization as we've known it for the last half century is over" and "we need much more focus on the local,"[5] the WTO appears fated to die, as some of its critics have already predicted, albeit slowly and painfully.

On this logic, the WTO's Twelfth Ministerial Conference (MC12) in June 2022 in Geneva should have taken on the character of a funeral or wake. Instead, at the eleventh hour, after days of marathon negotiating sessions, the MC12 resulted in several significant multilateral agreements on issues such as WTO reform, e-commerce, fisheries subsidies, agriculture, and food security (the "Geneva package").[6] Still, some of these accords were merely undertakings to keep negotiating, or require additional talks to become final. So depending on your perspective, the MC12 either resurrected the WTO from the dead to live again,[7] or merely kept a mortally wounded WTO on "life support."[8]

[3] *See, e.g.*, James Bacchus, *WTO Steps Back from the Abyss of Irrelevance . . . but Crucial Issues Remain Unresolved*, CATO INST. (June 17, 2022) *at* https://www.cato.org/blog/wto-steps-back-abyss-irrelevance-crucial-issues-remain-unresolved.

[4] *See* James McBride & Anshu Siripurapu, *What's Next for the WTO?*, COUNCIL FOR. REL. (June 10, 2022), *at* https://www.cfr.org/backgrounder/whats-next-wto.

[5] RANA FOROOHAR, HOMECOMING: THE PATH TO PROSPERITY IN A POST-GLOBAL WORLD (2022).

[6] For a detailed overview, see Sean Doherty & Aditi Sara Verghese, *Understanding the WTO Ministerial Meeting: What Just Happened and What's Next?*, WORLD ECON. F. WEEKLY AGENDA (June 20, 2022), *at* https://www.weforum.org/agenda/2022/06/wto-meeting-mc12-what-just-happened. *See also* Inu Manak, *The WTO Hangs on*, COUNCIL FOR. REL. (June 22, 2022), *at* https://www.cfr.org/article/wto-hangs. The specific agreements reached at MC12 are set out in the following documents: MC12 Outcome Document, WTO Doc. WT/MIN/(22)24 – WT/L/1135; Work Programme on Small Economies – Ministerial Decision, WTO Doc. WT/MIN(22)/25 – WT/L/1136; TRIPS Non-Violation and Situation Complaints – Ministerial Decision, WTO Doc. WT/MIN(22)/26 – WT/L/1137; Sanitary and Phytosanitary Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges – Ministerial Declaration, WTO Doc. WT/MIN(22)/27 – WT/L/1138; Ministerial Declaration on the Emergency Response to Food Insecurity, WTO Doc. WT/MIN(22)/28 – WT/L/1139; Ministerial Decision on World Food Programme Food Purchases Exemption from Export Prohibitions or Restrictions, WTO Doc. WT/MIN(22)/29 – WT/L/1140; Ministerial Decision on the TRIPS Agreement, WTO Doc. WT/MIN(22)/30 – WT/L/1141; Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics, WTO Doc. WT/MIN(22)/31 – WT/L/1142; Work Programme on Electronic Commerce – Ministerial Decision, WTO Doc. WT/MIN(22)/32, WT/L/1143; Agreement on Fisheries Subsidies – Ministerial Decision, WTO Doc. WT/MIN(22)/33 – WT/L/1144. This package of documents is available at https://www.wto.org/english/thewto_e/minist_e/mc12_e/documents_e.htm.

[7] In a speech at the World Trade Institute following the conclusion of MC12, WTO Deputy Director General Ellard maintained: "[L]ast week, the WTO proved its critics wrong. By achieving results at the 12th Ministerial Conference (or MC12 as we call it), our 164 Members demonstrated that, in times of rising geopolitical tensions and even war, it is still possible to reach multilateral agreements *by consensus* for the benefit of global public goods. . . . The multilateral outcomes that our Members achieved are important not only for the future work of the WTO, but also for other institutions seeking to address issues such as climate change. . . . Members have reaffirmed their commitment to the WTO and multilateralism by committing to reform the WTO across its three functions, negotiating, monitoring, and dispute settlement." World Trade Org. Press Release, DDG Ellard Addresses the Role of Multilateralism in a World of Polycrisis (June 24, 2022), *at* https://www.wto.org/english/news_e/news22_e/ddgae_24jun22_e.htm.

[8] Alan Beattie, *The WTO Is on Life Support – but the World Still Needs It*, FIN. TIMES (June 19, 2022), *at* https://www.ft.com/content/85ac7098-4d6d-4f93-9f5f-f12e373dd753.

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In this Article, we aim to contribute, as legal scholars, to the debate about the WTO's future after the MC12, in a post-neoliberal world—a time that some have even described as "deglobalization."[9] Our objective is not to sketch a new, comprehensive model of global justice or global economic governance to suit the times. Instead, by focusing on the underlying legal architecture of the WTO, we want to suggest that the WTO's legal order is already well-suited to pivot to a post-neoliberal world. It is fundamentally compatible with an era where no single governance paradigm has emerged to replace neoliberalism, and where states are actively experimenting with a return to strong domestic economic governance, including industrial policies, as well as what former Canadian international trade and foreign affairs minister Chrystia Freeland described as "values-based" domestic and regional trade policies, which take into account fairness to workers as well as principles of human rights and democracy.[10]

In this Article, we argue that the WTO's legal architecture is fundamentally pluralist, building in acceptance and respect for different political and economic systems, and different approaches to governance and industrial policies among diverse nations. Despite some troubling departures from pluralism during its history, such as the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), taken together and understood in their best light, the WTO's legal disciplines protect the normative, economic, political, and ideological diversity of states at the domestic level. This architecture allows states to be held accountable where they impose certain collectively sanctioned economic costs or harms on other states through their trade policies. But it simultaneously seeks to ensure that these constraints do not require the adoption of a particular model or system of social or economic governance by any WTO member state.

This claim that the WTO's legal disciplines are not ideological does not mean, however, that they are "neutral" or value-free. As we shall discuss below, there is a normative logic to the WTO's legal order, rooted in consensual political agreement that states should avoid imposing certain harms or costs on one another through trade policies, while otherwise preserving domestic regulatory differences. As Dani Rodrik describes the underlying logic: "[The] purpose was never to maximize free trade. It was to achieve the maximum amount of trade compatible with different nations doing their own thing."[11]

Our analysis also does not deny there have been problematic departures from this commitment to pluralism, particularly during and after the Uruguay Round, as we shall discuss. But these have been mitigated by the WTO's Appellate Body (AB) case law, which has emphasized the need for a balance between liberalization commitments and the right to regulate. In this way, we shall argue, legal interpretation has played has an essential and constitutive role in the WTO's commitment to pluralism.

Understanding the WTO's future role as empowering diversity through pluralism is novel for trade law scholarship. We are not simply arguing that the WTO should protect or respect

[9] Markus Kornprobst & Jon Wallace, *What Is Deglobalization?*, CHATHAM HOUSE (Oct. 12, 2022), *at* https://www.chathamhouse.org/2021/10/what-deglobalization.

[10] Remarks by the Deputy Prime Minister at the Brookings Institution in Washington, D.C. (Oct. 11, 2022), *at* https://deputypm.canada.ca/en/news/speeches/2022/10/11/remarks-deputy-prime-minister-brookings-institution-washington-dc.

[11] DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 75 (2012).

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domestic policy space, that the WTO should merely return to its original legal disciplines as encapsulated in the original General Agreement on Tariffs and Trade (GATT), or that the WTO should embrace embedded liberalism, although we incorporate elements of all of these important prior claims.[12] Instead, our conception of pluralism is forward-looking, and offers suggestions for how to deepen the WTO's commitment to pluralism by empowering more diverse actors to benefit from the gains of open trade. This means tackling obstacles to such opportunities, including those that do not look like typical trade "barriers." For example, lack of availability of trade finance and of information technologies means it is much easier for large trading companies to benefit from the legal security the WTO provides than smaller or poorer economic actors, for whom the transaction costs of plugging in directly to the global economy and its opportunities may be prohibitive. Here we see existing initiatives at the WTO on inclusive trade, on trade and gender, and on micro-, small, and medium-sized enterprises as pointing the way toward a more pluralist approach, as well as inclusive implementation of the Trade Facilitation Agreement on customs practices.

We proceed in four Parts. To understand where the WTO should go from here, we need to know where it came from. Thus, in Part I, we offer an introduction to the standard history of the GATT and the WTO. We describe the Organization's origins with the GATT in 1947, and explain how its membership and mandate expanded over a series of negotiating "rounds," culminating in the creation of the WTO in 1995, with the conclusion of the Uruguay Round. We also explain how the standard view of this history is that the move from GATT to WTO fully entrenched a nascent neoliberalism in the WTO's legal disciplines.

This move from the GATT to WTO resulted in unprecedented levels of critique of the multilateral trading system. In Part II, we describe three waves of critique of the WTO as a legal order: what we will call the neoliberal critique, the Seattle critique, and the recent Washington critique. These three types of critiques, we argue, inform in various important ways contemporary debates about the WTO's future and how to interpret the results of the recent MC12.

In Part III, we offer our own conception of the WTO as an international legal project by offering a rereading of its history and its legal architecture. We argue that the core of the WTO's legal order protects the domestic pluralism of its member states by allowing them to define their own constitutional orders and industrial policies. We do this by analyzing several foundational aspects of the law of the GATT and the WTO, both procedural and substantive, which entrench pluralism. The identification of the WTO legal system with neoliberalism is therefore an error, although of course there are important deviations from pluralism in the WTO's history. This pluralist approach, we argue, also requires legal interpretation guided by the notion that the goal or telos of the trade system is not to generate as much free trade or integration as possible, but rather to preserve a healthy balance between the gains from liberalization and the need to protect the diversity of domestic political and economic systems. As such, the AB's jurisprudence has been crucial in "rebalancing" the WTO toward pluralism.

In light of this exposé of the resilient pluralism of the WTO's legal architecture, we go on to consider what kind of life the WTO could or should have going forward. In Part IV, we return

[12] Our view builds on the important contributions of those who have argued that the WTO must protect states' regulatory autonomy and policy space at the domestic level.

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to the contemporary critiques of the Organization with our pluralist understanding of the WTO in hand. We argue that the neoliberal and Washington critiques of the WTO are largely misplaced, as they misunderstand the Organization's institutional mandate and underlying norms; and that progressive, Seattle-type critics of the WTO may have to temper their expectations for reform. We also discuss the path forward for the WTO in a post-neoliberal world. We argue that there is a fit between this durable pluralist architecture and relaunching the WTO with a vision of positively facilitating pluralism, diversity, and experimentation in social and economic policy, as a guiding aspiration. This goal seems plausible, given the collapse or erosion of the neoliberal paradigm and the absence of some new emerging overall dominant ideology of globalism. But if pluralism is to become a lodestar, the formal acceptance of difference has to be supplemented by new initiatives that allow for broader inclusion in the global trading system and that redress the imbalance and inequity in the pattern of real winners and losers from the application of its rules. By restating pluralism as a guiding aspiration, we leave ample space for critique, if the WTO again finds itself coopted by the interests of powerful states or unable to move past the dominance of powerful lobbies such as Big Pharma, or where trade under its rules continues to reproduce an arguably inequitable distribution of the benefits and burdens.

I. From GATT to WTO

To understand whether the WTO has a viable future, we have to understand its past. We begin our analysis with a brief overview of the WTO's standard origin story. Today, the WTO is an international intergovernmental organization that makes and enforces legal rules on how states regulate trade in goods, services, and intellectual property among nations.[13] The WTO counts more than 164 states or parastatal entities (e.g., Hong Kong) as full members.[14]

But the WTO did not start life as a properly institutionalized international organization; it was not established as a formal international organization until 1995.[15] Instead, it evolved out of an earlier treaty called the General Agreement on Tariffs and Trade, or the GATT, which remains the most important agreement addressing trade in goods under the WTO umbrella of treaties (the so-called covered agreements).[16]

The GATT was a response to the economic crises of the interwar years, where discriminatory trade barriers and tit-for-tat tariffs, rooted in mercantilist economic theories, exacerbated

[13] "The World Trade Organization (WTO) was established in 1995 following the ratification of the Uruguay Round Agreements, and today includes 164 members. It succeeded the 1947 General Agreement on Tariffs and Trade (GATT), created as part of the post-WWII effort to build a stable, open international trading system. The WTO has three basic functions: (1) administering its agreements; (2) serving as a negotiating forum for trade liberalization and rules; and (3) providing a mechanism to settle disputes. The multiple WTO agreements cover trade in goods, agriculture and services; remove tariff and nontariff barriers; and establish rules on government practices that directly relate to trade (e.g., trade remedies, technical barriers to trade, intellectual property rights (IPR), and government procurement). The agreements are based on the principles of non-discrimination—most-favored nation treatment, national treatment, fair competition, and transparency of trade rules and regulations. WTO rules allow for exceptions, such as preferential treatment and flexibilities for developing countries and trade agreements outside the WTO." World Trade Organization, Cong. Res. Serv., at 1 (Sept. 29, 2022).

[14] *Id.*

[15] World Trade Org., *Who We Are*, *at* https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm; Bernard M. Hoekman & Michel M. Kostecki, The Political Economy of the World Trading System: The WTO and Beyond (2001).

[16] *See* Petros C. Mavroidis, Trade in Goods: The GATT and the Other WTO Agreements Regulating Trade in Goods (2012).

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the Great Depression.[17] It was the result of failed negotiations for a fulsome international organization governing trade: the proposed International Trade Organization. The GATT was signed by twenty-three countries in 1947, and was updated through a series of "rounds" of negotiations, which expanded its membership and its substantive legal disciplines.[18] Changes to the GATT were adopted through consensus of its members, with each state having a formally equal voice.[19]

The GATT dealt with trade in goods, and its legal disciplines focused on imposing reductions or limits on tariffs and related border restrictions on trade imposed by governments.[20] In addition to facilitating a graduated reduction in tariffs, the GATT's core norm was non-discrimination: that member states must not discriminate among their trading partners and against imports.[21] The GATT did not possess a compulsory dispute settlement mechanism.[22] This left significant room in the system for states to take unilateral trade remedies, an option particularly favored by the United States.[23]

The Uruguay Round of negotiations (1986–1994) expanded both the scope of issues governed by the multilateral trade regime and its institutional structure. It resulted in the General Agreement on Trade in Services (GATS)[24] and TRIPS.[25] On this basis, trade-related aspects of services and intellectual property are now governed by multilateral agreements. It also produced agreements aimed at encouraging regulatory integration and the adoption of international regulatory standards, such as the Technical Barriers to Trade Agreement (TBT Agreement)[26] and the Sanitary and Phytosanitary Measures Agreement (SPS Agreement).[27]

As such, the focus shifted from the GATT's concern with so-called "border" measures to areas of largely domestic public policy affecting trade, including subsidies, intellectual property, product standards, and food safety—what are known as "beyond the border" measures.[28] This new agenda went well beyond the GATT's commitment to detariffication and non-discrimination, to seek to harmonize or minimize state regulation. As noted, the resulting package of agreements included TRIPS, a robust commitment to protect intellectual property rights—protection which had been sought by developed countries during the

[17] Jeffrey Dunoff, *The Death of the Trade Regime*, 10 Eur. J. Int'l L. 733 (1999).

[18] *See, e.g.*, Kenneth Dam, The GATT: Law and International Economic Organization (1977); Bernard M. Hoekman & Michel M. Kostecki, The Political Economy of the World Trading System: From GATT to WTO (1995).

[19] Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 Int'l Org. 339 (2002).

[20] For historical context, see Richard N. Gardner, Sterling Dollar Diplomacy: The Origins and Prospects of our International Economic Order (1969).

[21] Hoekman & Kostecki, *supra* note 15, at 29–30.

[22] World Trade Org., *Historic Development of the WTO Dispute Settlement System*, *at* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm.

[23] For discussion of the history of U.S. use of unilateral trade remedies, see Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 J. Legal Stud. 515 (2005).

[24] General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Art. IV, Apr. 15, 1994, 1869 UNTS 187.

[25] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 UNTS 299.

[26] Agreement on Technical Barriers to Trade, Arts. 2.4–2.5, Apr. 15, 1994, 1868 UNTS 121.

[27] Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 UNTS 493.

[28] See discussion in Dani Rodrik, The Globalization Paradox: Why Global Markets, States and Democracy Can't Coexist (2011).

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negotiations.[29] These new legal disciplines have long been thought to have enshrined a neoliberal theory of global economic governance, which seeks to reduce state regulation and free the movement of capital, goods, and services, in the multilateral trading system. This approach had been emerging in the later years of the GATT, arguably beginning in the 1970s, particularly in the way the GATT was interpreted and implemented; it appeared to have been fully ensconced in the new covered agreements. And while this new set of agreements was formally decided on the basis of consensus-based decision making, it was framed as a "single undertaking"—a take-it-or-leave-it deal that meant developing countries had no choice but to agree to these new disciplines in order to continue to enjoy the benefits of the original GATT.[30]

The Uruguay Round also produced the WTO, a formal institution to regulate global trade, with legal provisions establishing a permanent Secretariat in Geneva and a formally binding dispute settlement procedure.[31] Like the GATT, the WTO's legislative body, the Ministerial Conference, adopts agreements by consensus, with each state having a formally equal vote.[32] (This does not, of course, mean that all states are or have been equally influential in practice, about which we say more below.) All WTO members also have a representative at the WTO's General Council, which manages day-to-day decision making at the Organization, supported by the Secretariat.[33] As such, the WTO is often called a "member-driven" organization; its agenda is set through the members, who work through various committees and councils, which play an important role in establishing and interpreting the WTO's legal disciplines.

The WTO's rules are enforced through compulsory dispute settlement, with the possibility of sanctions in the form of commercial retaliation when a member fails to comply with a dispute ruling.[34] A member state that believes that another member is violating its obligations under the law of the WTO can request that the WTO form a panel to review the complaint.[35] A panel's decision can be appealed to the permanent Appellate Body.[36] For some, this legalism embodied in the dispute settlement system adopted with the creation of the WTO has also been associated with the views of some neoliberal ideologues.[37] From 1995–2020, the AB developed an extensive, systematic jurisprudence on the WTO's covered agreements, issuing 148 reports on numerous aspects of the WTO's legal disciplines.[38] However, as we

[29] *See, e.g.*, Carolyn Deere Birbeck, The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries (2009).

[30] World Trade Org., *Legal Texts: The WTO Agreements*, *at* https://www.wto.org/english/docs_e/legal_e/ursum_e.htm.

[31] *See* World Trade Org., *Introduction to the WTO Dispute Settlement System*, *at* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p1_e.htm.

[32] Steinberg, *supra* note 19.

[33] World Trade Organization, *The WTO General Council*, *at* https://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm.

[34] Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 Eur. J. Int'l L. 763 (2000).

[35] Lorand Bartels, *Jurisdiction and Applicable Law in the WTO* (Society of International Economic Law (SIEL), Fifth Biennial Global Conference Working Paper No. 2016/18, 2016), *at* https://ssrn.com/abstract=2801989.

[36] *Id.*

[37] Quinn Slobodian: Globalists: The end of Empire and the Birth of Neoliberalism 256–57 (2018); see Section III.E *infra* for further discussion.

[38] Petros Mavroidis, The WTO Dispute Settlement System: How, Why and Where? 205 (2022).

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discuss below, this system is now in crisis, because the appointment of members of the Appellate Body has been blocked by the United States.[39]

After the Uruguay Round, the WTO's membership has continued to negotiate further trade agreements in the so-called "Doha Development Round" of trade negotiations.[40] But the Doha Round has produced little in the way of further multilateral accords, with the exception of the Trade Facilitation Agreement (TFA) which entered into force in 2017.[41] However, as noted above, the most recent Ministerial Conference in June 2022 ended with some measure of agreement among members on how to proceed on numerous issues, including e-commerce, fisheries subsidies, agriculture, and food security.[42]

II. Three Waves of Critique

Since its inception in 1947, the multilateral trading system has been subject to vociferous critique. During the GATT era, for example, developing country critique of the trading system was famously channeled into a demand for a New International Economic Order (NIEO).[43] But with the move from the GATT to the WTO, these critiques exploded, and the WTO became the focus of ire from both the neoliberal (center) right and the progressive left. As we will discuss below, these critiques have come in three waves, and are very much relevant to understanding where the WTO is today. Below, we outline the three waves of critiques during the WTO era, and how each of these waves has reacted to the recent MC12. In so doing, we offer an overview of why the WTO is currently perceived to be in crisis.

A. The Neoliberal Critique

Perhaps surprisingly, given that many commentators and contemporary historians have associated the WTO with the vanguard of neoliberalism, the earliest wave of critique of the WTO was by neoliberals themselves (hereafter the *neoliberal critique*). These neoliberals had expected that the institutional landmark of creating the WTO would result in rapid progress toward ever deeper integration. Yet however much energy and salience neoliberals gave to the creation of the WTO in 1995, they were almost immediately dissatisfied with the result.

Writing less than three years after the WTO was born, Fred Bergsten warned that any easing of momentum toward further liberalization would create an opportunity for a backlash against globalization to halt progress, declaring that "no significant liberalizing progress is underway at present," and calling for a new large-scale round of talks to extend economic integration further into highly regulated service industries, such as telecommunications and financial services, as well as investment.[44] Bergsten set as the goal "achieving global free trade by 2010 or 2020"—essentially the elimination of all policies and measures that

[39] *Id.* at 42.

[40] Faizel Ismail, WTO Reform and the Crisis of Multilateralism: A Developing Country Perspective 6–8 (2020).

[41] *Id.* at 78.

[42] *See* note 6 *supra* and accompanying text.

[43] Slobodian, *supra* note 37 at 214–24.

[44] C. Fred Bergsten, *Fifty Years of the GATT/WTO: Lessons from the Past for Strategies for the Future* (Peterson Institute for International Economics, Working Papers 98-3, 1998) (emphasis removed).

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impede the mobility of goods and services.[45] Likewise, Jeffrey Schott referred to the results of the Uruguay Round negotiations on services as "disappointing," and expressed frustration at the limited progress in moving beyond the all-too-modest commitments that had been made in the Round, as well as the need to expand as soon as possible the trade agenda to include liberalization of Foreign Direct Investment, global rules on anti-trust, and norms to discipline the purportedly protectionist use of trade measures linked to environment and labor.[46] In this way, the neoliberal understanding of the WTO's purpose was that it should continually produce additional legislation to cement ever-deeper liberalization.

At first, many of these neoliberal calls for more ambitious, deeper integration and new legislative output were not explicitly cast in critical terms, but instead as demands to build on the remarkable progress and promising institutional framework that was brought into being with the conclusion of the Uruguay Round. However, as successive Ministerial Conferences failed to achieve additional legislative gains to take neoliberalism further in the WTO, due in no small part to resistance by developing countries,[47] the neoliberal tone turned sharply critical. Commentators began to suggest that the WTO's consensus-based decision-making procedure was impeding further liberalization. As Arvind Subramanian argued in the *Financial Times*: "For its future effectiveness, indeed survival, the WTO needs to be de-democratized, with the large countries reasserting themselves."[48] From this neoliberal perspective, either smaller developing countries had to be pressured into swallowing further neoliberal globalization (as had occurred during the Uruguay Round), or deeper integration would have to proceed through other tracks, such as bilateral and regional approaches.[49]

These critiques and a mounting sense of disappointment in the failure to produce new large-scale gains to liberalization through additional multilateral agreements have continued throughout the WTO era. Neoliberal commentators have been particularly scathing in their assessment of the Doha Round and the only major legislative achievement of the WTO era, the TFA.[50]

[45] *Id.*

[46] Jeffrey Schott, *Challenges Facing the World Trading System*, *in* THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 3 (Jeffrey Schott ed., 1996). An effort to bypass the resistance in the Uruguay Round of developing countries in particular to investment liberalization was attempted shortly after the creation of the WTO, with the proposed Multilateral Agreement on Investment (MAI). The negotiations were held within the OECD and failed, partly due to civil society activism, the first real victory of the emerging movement against neoliberal globalization. Gordon Laxer, *The Defeat of the Multilateral Agreement on Investment: National Movements Confront Globalism*, *in* GLOBAL CIVIL SOCIETY AND ITS LIMITS 169 (Gordon Laxer & Sandra Halperin eds., 2003).

[47] For discussion, see, e.g., GREGORY SHAFFER, EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW (2021).

[48] Arvind Subramanian, *Too Much Legitimacy Can Hurt Global Trade*, FIN. TIMES (Jan. 13, 2013), *at* https://www.piie.com/commentary/op-eds/too-much-legitimacy-can-hurt-global-trade?ResearchID=2312.

[49] This was a long-standing policy of successive U.S. administrations, including the Reagan, Bush Senior, and Clinton administrations.

[50] *See* Alan Beattie, *The US and India: A Trade Truce with a Twist*, FIN. TIMES (Nov. 19, 2014), *at* https://www.ft.com/content/249a5c7a-55e1-3dab-9528-3011481290c1. Beattie asserts: "[C]laiming a significant victory for multilateralism by passing the TFA is the rough equivalent of staging an opening ceremony and some synchronised swimming and then boasting of having hosted the Olympic Games." For a more positive and far-ranging scholarly assessment, see Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization*, 14 WORLD TRADE REV. 643 (2015).

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It is not surprising, then, that proponents of the neoliberal critique did not react to the MC12 Ministerial outcome with newfound hope for the WTO.[51] While corporate interests were able to fend off both efforts to introduce a far-reaching TRIPS waiver for the pandemic[52] and a move to end a moratorium on taxation of digital trade,[53] the Geneva package did not signify an advance in any large-scale neoliberal oriented rule-making project in the WTO. For example, there were no breakthroughs on harmonizing domestic regulations affecting digital trade, an area of ongoing negotiation at the WTO. Moreover, proposals from some quarters to tighten disciplines on subsidies and create new rules to limit state capitalism (i.e., through state-owned enterprises) and to stop measures to require technology transfer are not reflected at all in the MC12 outcome; and indeed, are not even an agenda item going forward.[54]

B. The Seattle Critique

The second wave of critique, from a rather different and in some ways directly opposite perspective, became prominent with the outbreak of large-scale protests at the WTO Ministerial in Seattle in 1999 (the Seattle critique, hereafter). In the words of Quinn Slobodian, "Seattle was an existential crisis" for the WTO.[55] As Andrew Lang observes:

> Seattle helped to crystallize the basic contours and components of progressive resistance to trade liberalization at a time when the substantive critiques of the trading system were still being sharpened and made more concrete. . . . [The Seattle critique] located the trade debate within a broader common struggle against neoliberalism, understood as a kind of free market fundamentalism. Within this frame, the WTO and the global trading system were, rightly or wrongly, associated with the spread of neoliberalism, and resistance to trade negotiations was conducted on that basis.[56]

The Seattle critique focused on the way in which the move from GATT to WTO purportedly narrowed the scope for governments to regulate in the public interest, protecting workers, the environment, public health, and other critical social values, as well as losers from

[51] *See, e.g.*, Beattie, *supra* note 50. Even those who were somewhat cheered by the fact that the MC12 did not end in breakdown and failure criticized the outcome document as "empty" on WTO "reform" apart from a promise to make dispute settlement fully functional again by 2024. "More difficult than fixing the WTO machine is reframing the agenda for renovating the rules. This would start with old rules that have not kept up with massive changes in what is traded, and by who, and covers a range of issues such as services, state-owned enterprises and more." Peter Ungphakorn & Robert Wolfe, *WTO Members Achieve Breakthrough but the Tough Part Is What Happens Next*, TRADE BLOG (June 30, 2022), *at* https://tradebetablog.wordpress.com/2022/06/30/breakthrough-tough-part-happens-next.

[52] *See* Jayashree Watal, *Analysis of the 12th WTO Ministerial Conference Decision on the TRIPS Agreement*, EJIL: *TALK!* (July 8, 2022), *at* https://www.ejiltalk.org/analysis-of-the-12th-wto-ministerial-conference-decision-on-the-trips-agreement.

[53] Emma Farge, *WTO Provisionally Agree to Extend E-Commerce Tariff Moratorium-Sources*, REUTERS (June 16, 2022), *at* https://www.reuters.com/markets/commodities/wto-provisionally-agrees-extend-e-commerce-tariff-moratorium-sources-2022-06-16.

[54] *See, e.g.*, PETROS C. MAVROIDIS & ANDRÉ SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (2021). For critical discussion, Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23 J. INT'L ECON. L. 371 (2020).

[55] *See* SLOBODIAN, *supra* note 37, at 276.

[56] ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER 80–81 (2011).

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globalization, whether small farmers in developing countries or industrial workers in the North, who were given short shrift in trade negotiations. A further element of the critique was of the undemocratic and untransparent way the Uruguay Round negotiations took place, which gave powerful countries and corporate interests disproportionate and illegitimate influence over what was negotiated and the outcomes of those negotiations.[57] In the words of one of the leading proponents of the Seattle critique, Lori Wallach of Public Citizen:

> The dirty little secret is that the World Trade Organization is not mainly about *trade*. Rather the organization has the primary task of carrying out what the Harvard economist Dani Rodrik calls hyperglobalization—the worldwide imposition of one-size-fits-all rules, favored by global financial markets, which constrain democratic governments' ability to address their societies' needs. The W.T.O. asserts expansive power to set binding rules over a wide range of non-trade issues; countries are required to "ensure the conformity of its laws, regulations and administrative procedures" with W.T.O. rules—and, in turn, corporate financial interests. This includes limits on energy policy, financial regulation and food and product safety, as well as new monopoly protections for pharmaceutical firms to charge consumers more.[58]

The concerns of the activists marching in the streets overlapped considerably with those of developing country governments, some of whom already were feeling buyer's remorse about accepting the neoliberal elements of the Uruguay Round grand bargain (particularly regarding intellectual property rights, technical barriers to trade, food safety, and subsidies) with little to show in return.[59] Post-Uruguay Round, pressure tactics were again used to attempt to push developing countries to accept an even more deeply integrating agenda on matters such as investment and antitrust.[60]

In time, the Seattle critics divided into different factions or groupings with different emphases. Some, like Public Citizen, remained implacably opposed to the WTO, and framed their stance largely as one of resistance,[61] with others going further and actively calling for dismantling the World Trade Organization in the name of creating a new paradigm of

[57] *See* Fatoumata Jawara & Aileen Kwa, Behind the Scenes at the WTO: The Real World of International Trade Negotiations (2003).

[58] Lori Wallach, *The World Trade Organization is Dying. What Should Replace It?*, N.Y. Times (Nov. 28, 2019), *at* https://www.nytimes.com/2019/11/28/opinion/seattle-world-trade-organization.html.

[59] As Sylvia Ostry, a prominent Uruguay Round negotiator for Canada, explains: "The essence of the South side of the deal—the inclusion of the new issues and the creation of the new institution—was to transform the multilateral trading system. . . . The most significant feature . . . was the shift in policy focus from the border barriers of the GATT to domestic regulatory and legal systems—the institutional infrastructure of the economy. The barriers to access for service providers stem from laws, regulations, administrative actions which impede cross-border trade and factor flows. . . . In the case of intellectual property the move to positive regulation is more dramatic since the negotiations covered not only standards for domestic laws but also detailed provisions for enforcement procedures to enforce individual (corporation) property rights. . . . And, lest we forget, all this in return for minimal liberalization in agriculture and textiles and clothing." Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Trade Negotiations* (2000), *at* http://sites.utoronto.ca/cis/ostry/docs_pdf/Minnesota.pdf.

[60] *See, e.g.*, Amrita Narlikar, *The Ministerial Process and Power Dynamics in the World Trade Organization: Understanding Failure from Seattle to Cancún*, 9 New Pol. Econ. 413 (2004).

[61] Public Citizen, *More Information on the World Trade Organization (WTO)*, *at* https://www.citizen.org/article/more-information-on-the-world-trade-organization-wto ("Global civil society movements have demanded a WTO turnaround agenda to roll back WTO rules and democratize the process, while firmly rejecting any attempts to expand the mandate of the WTO into new areas, such as digital or investment issues.").

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globalism and localism in opposition to neocolonial capitalism.[62] But other Seattle critics decided to work to try to wean the WTO from neoliberalism and make it responsive to the Seattle critique, whether in dispute settlement or rulemaking. These critics assumed there were resources within the WTO system itself to push back on the neoliberal agenda to use trade rules to impose or further entrench a neoliberal model of social and economic governance.[63] Indeed, some even sought to embed an alternative, progressive model of governance in the WTO's legal order, through demands to formally "link" the WTO's disciplines to efforts to secure international labor rights, environmental protection, etc. These activists found homes in NGOs, such as the International Institute for Sustainable Development (IISD) and the International Centre for Trade and Sustainable Development (ICTSD), which had significant advocacy operations in Geneva, weighing in on how WTO law should be interpreted and evolved in light of the Seattle critique.[64] During the WTO era, developing country governments continued, by and large, to work constructively within the WTO, and managed to use their formal veto power to continue to effectively resist the neoliberal agenda they had rejected at Seattle.[65]

These kinds of divisions among the Seattle critics were evident in their reactions to the MC12 outcome. Those resistant or opposed to the WTO altogether pointed to the extremely limited TRIPS waiver for COVID-19 vaccines as evidence that the WTO had not and could change its undemocratic, neoliberal stripes, or achieve new legislative output on important matters of global concern.[66] On the other hand, activists and analysts associated with the IISD, for example, took a more nuanced gradualist view of the results of MC12, noting the importance of the conclusion of reaching a deal to curb fishing subsidies.[67]

C. The Washington Critique

A third wave of critique is more recent and more U.S.-centered, and has ushered in an acute sense of institutional crisis for the WTO (the Washington critique, hereafter). This critique centers on the apparent failure to manage China's behavior as a WTO member, as well as supposedly unfair trade practices of some other WTO members.[68] This critique was stated most loudly by the Trump administration, and was accompanied by measures such as blocking new Appellate Body appointments (eventually paralyzing the AB)[69] and imposing tariffs

[62] La Via Campesina, for example. *See* La Via Campesina, *La Via Campesina Issues Call to Mobilise Against the WTO and Free Trade Agreements* (Sept. 2, 2019), *at* https://viacampesina.org/en/la-via-campesina-issues-call-to-mobilise-against-wto-and-free-trade-agreements.

[63] *See, e.g.*, Ricardo Meléndez-Ortiz, Christophe Bellman & Miguel Rodriguez Mendoza, The Future and the WTO: Confronting the Challenges (2012).

[64] *See* Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 Harv. L. Rev. 1528, 1553 (2008).

[65] *See* Amrita Narlikar, Poverty Narratives and Power Paradoxes in International Trade Negotiations and Beyond (2020).

[66] *See, e.g.*, Public Citizen, *Undemocratic WTO Processes Produce Shameful Result on Intellectual Property and Covid at 12th WTO Ministerial* (June 16, 2022), *at* https://www.citizen.org/news/undemocratic-wto-processes-produce-shameful-result-on-covid-trips-waiver-at-12th-ministerial.

[67] Int'l Inst. Sustainable Dev., *IISD Congratulates WTO Members on Achieving Fisheries Subsidies Deal* (June 17, 2022), *at* https://www.iisd.org/articles/statement/iisd-wto-fisheries-subsidies-deal.

[68] Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 AJIL 622 (2021).

[69] *See* Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. Int'l Econ. L. 297 (2019).

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on grounds such as national security, which are widely viewed as spurious and illegal under WTO rules.[70]

The Washington critique has two dimensions. The first focuses on the claim that the WTO's rules are insufficiently stringent to address the internal policies of state-led/non-market economies such as China. It is not simply that China has been a WTO "cheat" (although the United States has levied this charge as well).[71] Rather, it is that the WTO's rules themselves do not do enough to mandate economic and political reform and to prevent intellectual property theft, the improper use of subsidies, and dumping.[72] In short, the WTO is overly permissive of state-led capitalism, and if it is to retain its legitimacy, it must alter its substantive rules to address non-market economies.[73] The United States has relied on this critique when embarking on its retaliatory trade wars with China, spurning the WTO's dispute settlement process and taking unilateral tariff measures.[74]

The second dimension, that pre-dates the Trump administration, and has frequently been heard from the Washington trade bar for a decade or more, is that the WTO dispute system, above all the Appellate Body, unduly constrains the United States (and other members) from exercising their legal rights to retaliate against other countries unfair trade practices in the form of anti-dumping or countervailing duties (the latter responding to "unfair" subsidization).[75] The United States, particularly under the Trump administration,[76] has accused the AB of pursuing a form of hyper-legalism: of issuing lengthy, time-intensive, overly ambitious legal rulings that rely too extensively on precedent, confront unnecessary legal issues, and fill legal "gaps" by drawing on an array of legal sources.[77] In doing so, the United States has argued, the AB has gone beyond its mandate to interpret the WTO's legal rules, as established in the Dispute Settlement Understanding (DSU). Instead, the AB has altered the obligations of member states. On this view, the WTO is burdened with an overly intrusive, burdensome legal order that does not leave sufficient space for diplomatic or political adjustment of trade conflict through unilateral trade remedies. So while the WTO's rule-based, sanction-supported legality was once what portended its success as a regime of international law,[78] its

[70] Andrew Chatzky & Anshu Siripurapu, *Backgrounder: The Truth About Tariffs*, Council For. Rel. (Oct. 8, 2021), *at* https://www.cfr.org/backgrounder/truth-about-tariffs.

[71] Chris Prentice & Alexandra Alper, *U.S. Trade Chief Says Talking with China Won't Stop Cheating*, Reuters (June 18, 2019), *at* https://www.reuters.com/article/us-usa-trade/u-s-trade-chief-says-talking-with-china-wont-stop-cheating-idUSKCN1TJ1VD.

[72] Alan Wolff, *US Trade Policy, the WTO, and Reframing Trade Priorities*, WTO Pub. F., at 3 (2022), *at* https://www.piie.com/sites/default/files/2022-09/2022-09-29wolff.pdf.

[73] *Id.*

[74] *See* James Bacchus, *Might Unmakes Right: The American Assault on the Rule of Law in World Trade* (CIGI Papers No. 173, 2018).

[75] For an overview, see Robert Howse, *Appointment with Destiny: Selecting WTO Judges in the Future*, 12 Glob. Pol'y 71 (2021).

[76] Although not exclusively. The initial U.S. policy of blocking new AB appointments took place under Obama, and the American insistence that there is need for "reform" of the dispute settlement process has continued under the Biden administration.

[77] *See* United States Trade Representative, Report on the Appellate Body of the World Trade Organization 14 (2020) ("It would be futile to agree to new rules—rules that could, themselves, be undermined by adjudicatory overreach—until there is clear understanding on why the original rules failed to constrain the Appellate Body.").

[78] *See, e.g.*, John H. Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, Brookings Trade F., at 179 (2000).

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formal legalism is now its Achilles' heel.[79] The United States has relied on this critique when blocking the appointment of new members of the AB since May 2017, which ground the AB's work to a halt in December 2019 when the AB lacked sufficient membership to hear appeals, and forced WTO members to negotiate an ad hoc appellate mechanism to deal with appeals.[80]

To the extent that this critique suggests that rules of the WTO are inadequate to restrict extensive and intensive state intervention in the economy that affects trade, the China-focused critics could have common cause with neoliberal critics. But the second dimension, the critique of the AB's readings of the limits that WTO Agreements imposed on the ability to take anti-dumping action and countervailing duties against subsidies, was arguably the one that attracted greater consensus in Washington and set the scene both for the Trump administration paralyzing the AB and for the failure so far of the Biden administration to reverse this policy.[81]

The MC12 and the Geneva package did little to respond to the Washington critique. The Geneva package completely ignored the Canada- and U.S.-led Ottawa Group agenda of negotiating rules more restrictive of subsidies, state capitalism, and technology transfer, which was very much targeted at addressing concerns of "unfair trade" by China.[82] On the other hand, despite a vague commitment in the Geneva package to discussions of dispute settlement reform, there was no agreement on any specifics,[83] and few ideas about how the dispute system could be redesigned to allow greater deference to members imposing duties in response to allegedly unfair trade practices of other members.[84] This being the case, the Biden administration is likely to continue to hold the Trump line on the AB.

III. The Pluralism of the GATT and the WTO

The WTO's leadership has tried to rejuvenate the public perception of the WTO by framing MC12 as a new beginning or a large-scale renewal of the WTO that somehow answers or responds to the major critiques of the Organization.[85] Yet although expectations have been raised, there is little evidence so far that the types of critiques just discussed have been responded to, despite the buzz. In this sense, the WTO is at an important institutional crossroads. It must articulate a mission or vision for the Organization in an era where returning to full throttle neoliberalism is inconceivable, where China's entry into the WTO is

[79] Robert E. Lighthizer, *How to Set World Trade Straight*, Wall St. J. (Aug. 20, 2020), *at* https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341.

[80] Pauwelyn, *supra* note 69; Howse, *supra* note 75.

[81] Howse, *supra* note 75, at 72–73.

[82] Allan Wolff notes: "The U.S. has listed as among its concerns: economic coercion, industrial subsidies, IP theft and forced technology transfer, the commercial activities of state-owned enterprises (SOEs), the need for all WTO Members to agree that the WTO is based on its Members allowing the market to determine commercial outcomes . . . ." *See* Wolff, *supra* note 72, at 3. None of these matters formed any part of the MC12 outcome, not even an agreement to place them on the agenda for future WTO talks. MC12 Outcome Document, *supra* note 6.

[83] MC12 Outcome Document, *supra* note 6.

[84] Wolff, *supra* note 72, at 6 (writing at the end of September 2022): "The United States does not appear to have further elaborated its interests and viewpoints on what how [sic] it sees the problems with the current dispute settlement system as put into place in 1995."

[85] *See* note 6 *supra* and accompanying text.

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irreversible, and when progressive Seattle critics of the WTO have not converged on an alternative paradigm for the global economy to replace neoliberalism.[86]

To understand what such a post-neoliberal mission or vision of the WTO might look like, and how it could be achieved, we propose to go back to the fundamental legal structures on which the multilateral trading system was built. Despite agreeing with both the neoliberal critics *and* the Seattle critics of neoliberalism that the Uruguay Round project created a strong association between neoliberalism and the WTO, this association is neither as strong as the neoliberal critics had once hoped for nor as inevitable as the Seattle critics have often feared.

In our view, the WTO's architecture is best understood as fundamentally pluralist. The WTO's legal disciplines are rooted in consent and consensus at the international level. Their primary purpose is to allow states to respond to certain harms to other states generated by certain types of trade policies, where there is political agreement among all member states that these harms exist and that all member states would be better off through mutual hand-tying than in a world where all pursue their trade policies indifferent to the negative spillovers on others.[87]

But importantly, these disciplines are not, for the most part, rooted in a particular economic or normative theory; there is no overarching *a priori* view of the set of negative spillovers that would justify mutual hands-tying as opposed to uncoordinated unilateralism in trade policy, except for a presumption against discrimination. Beginning in the GATT era, intrinsically discriminatory trade policies such as tariffs and import and export restrictions, where states explicitly choose to benefit some domestic constituencies by imposing costs on other states, and where the benefit sought depends on harming the interests of the other state, became a central focus. Based on the historical experience of trade and currency wars in the 1930s, these kinds of trade measures were seen as beggar-thy-neighbor measures that, if unconstrained, could lead to negative-sum outcomes, destabilizing the economies and economic governance of all, as a consequence of escalating tit-for-tat behavior.[88] Not all tariffs or other discriminatory measures need have such implications in all circumstances; and the level of constraint (i.e., the extent of commitments to reduce tariffs) and the scope of exceptions and limitations are variable and flexible. Despite the various critiques of the WTO, there remains a strong consensus that some amount of mutual hands-tying with respect to these kinds of measures may be beneficial to all.

At the same time, the WTO's legal disciplines do not systematically seek to prescribe the appropriate relationship between states and markets at the domestic level, except to exclude some very extreme types of economic nationalism, for which discrimination against outsiders in favor of one's own is a hallmark of desirable commercial policy. Nor do they mandate ever-deeper liberalization through a one-way ratchet toward free trade that cannot be reversed. And even the non-discrimination obligations contain flexibility.

[86] Though to be sure, progressive writing and campaigning is full of interesting experimental suggestions about what a post-capitalist, post-consumerist, climate-friendly world might look like.

[87] As Dani Rodrik explains: "When countries act independently, maximizing their own utility and disregarding their effects of their choices on other countries, we have the standard result [of inefficiency]. . . . Policies with negative spillovers would be over-supplied." Dani Rodrik, *Putting Global Governance in its Place*, 35 WORLD BANK RES. OBSERVER 1, 4 (2019).

[88] *Id.* at 8.

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Instead, by and large, the WTO's legal disciplines attempt to preserve the ability of states to organize their domestic economic and political structures as they see fit. They are rooted in a procedure that in principle is suited to preserve pluralism at the domestic level: state consent and the requirement of consensus. Substantively, they protect the right of states to regulate, even in ways that restrict trade, for reasons that they consider to be important—including economic, scientific, moral, or religious reasons. They do not require states to adopt any particular form of political structure to become WTO members. They allow states to backtrack from liberalization commitments; invoke temporary remedial escape devices; and offer a special and differentiated regime for developing countries (and thus recognize the economic diversity of member states). Previous scholarship has partially captured these commitments through the notions of "embedded liberalism," "regulatory autonomy," or "policy space." But in our view the WTO's commitment to pluralism is even more thoroughgoing that these prior notions, as certain aspects of the WTO's pluralism actively seek to promote diversity of economic and governance structures among and within member states and allow for partial de-liberalization and other forms of adjustment if needed.

However, because the WTO's legal architecture has this non-ideological character, there is also always a risk that its disciplines can be *co-opted* by ideological actors; there is no inherent guarantee that a pluralist legal architecture will be deployed in a pluralist spirit. In this way, pluralism is a double-edged sword. Precisely *because* a formally pluralistic legal architecture for cooperation is indeterminate or agnostic as to the ideological or policy projects that it can accommodate, such a framework runs the risk of being coopted or conscripted for a particular project. Likewise, the voluntarist, consent-based character of the multilateral trade regime means that the resulting pattern of commitments is contingent on political choices, and the power of the political bargaining agents in the regime, as well as the commercial and other interests they represent. Further, pluralism obviously does not place the particular pattern of commitments beyond all normative controversy; for example, the distribution of gains among states has been uneven, even if there is a robust case to be made that all can benefit in principle from such disciplines.

Pluralism's double-edged sword is most evident in the results of the Uruguay Round, where both procedural and substantive commitments to pluralism were compromised. But the Uruguay Round did not wipe out pluralism completely. As we shall argue, the Uruguay Round agreements contained important pluralist dimensions. In addition, the AB's subsequent jurisprudence has systematically rebalanced the neoliberal aspects of the WTO's legal disciplines in favor of a robust pluralism, blunting the neoliberal aspects of the Uruguay Round outcomes. For this reason, legality plays an important role in the WTO's pluralism: it is an essential feature of a regime committed to diverse domestic theories of regulation, and non-ideological legal disciplines. Thus both procedurally and substantively, the legal disciplines of the GATT/WTO are committed to protecting pluralism at the domestic level. While this pluralism is not guaranteed by the GATT/WTO's legal order, it has proven remarkably resilient.

Implicit throughout our argument below is the claim that these pluralist features of the GATT/WTO are normatively valuable and help make the WTO more legitimate. They are well-suited to a world in which there is genuine ideological disagreement about the relationship between states and markets, an era in which neoliberalism is in retreat and where there is no consensus on how economic governance should be structured, at either the domestic or

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international level. If there is foundational disagreement among states about how to organize the state/market relationship, the WTO should not stake out a position on that relationship, except to prohibit, as discussed below, the most extreme forms of economic nationalism, and to discipline states when there is political consensus that certain types of economic activity impose harms on one's trading partners.

To make these claims, we begin first by identifying the challenge of pluralism for international law at a conceptual level. We then turn to the specific ways in which the GATT and the WTO have protected pluralism in the multilateral trading system. Second, we discuss the consensus-based approach to rulemaking in the GATT and the WTO. Third, we outline the GATT's substantive disciplines that protect pluralism. Fourth, we show how these procedural and substantive pluralist features do not ensure pluralism in practice—the double-edged sword of pluralism—and discuss the WTO's neoliberal turn, which demonstrates how this double-edged sword can work. But, fifth, we go on to argue that this neoliberal turn has been overblown; even at the height of the new covered agreements' attempted imposition of a particular vision of the state/market relationship, there was a subsisting commitment to pluralism in the WTO's legal order. Finally, we discuss how the Appellate Body's reading of the covered agreements rebalanced the WTO's legal disciplines in favor of pluralism, which demonstrates the importance of a certain kind of legality to the WTO's pluralism.

A. The Challenge of Pluralism

Any regime of international law confronts a difficult issue. The rules of a particular regime of international law are meant to apply generally to states who are parties to the regime. Yet states themselves are diverse. They operate on the basis of widely divergent legal, constitutional, and economic commitments, rooted in very different normative theories. Roberto Ago observes that the political communities of which the international legal order is composed "*could not be more heterogeneous* with regard to the origin of their peoples, their way of life, their beliefs, their wealth, their political, social and economic organisation, the degree of their internal cohesion."[89] The challenge for international law, as Ago emphasizes, is to find a way to manage this normative pluralism among states.[90] Along these same lines, Prosper Weil formulated the challenge of any international legal project as facilitating "the cooperation of basically disparate entities composing a fundamentally pluralistic [international] society."[91] In conventional international law, the law of treaties, techniques such as reservations by individual states parties may be employed to address this challenge; or legal regimes may encompass only a sub-set of states that are relatively homogenous. But there are forms of

[89] Roberto Ago, *Pluralism and the Origins of the International Community*, 3 ITAL. Y.B. INT'L L. 3, 14 (1977) (emphasis added).

[90] Or as Benedict Kingsbury has characterized the problem: "The question of how to deal with difference has been a central one in the history of international law, particularly the history that is bound up with Western philosophy and values. Aspirations for a universal system have been continuously confronted by fundamental differences—in culture, religion, social patterns and political systems—which must be ignored, accommodated, managed, subsumed or suppressed." Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment*, 92 AJIL 713, 715 (1998) (internal references omitted).

[91] Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 418 (1983).

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international law that aspire in principle to encompass the entire society of nations; post-World War II multilateralism, of which the GATT is a product, is among them.

The problem of identifying a normative groundwork for international legal obligations is particularly acute in the international commercial context. International trade law, for example, seeks to regulate the extent to which states can use public law to place restrictions on the cross-border flow of goods and services through private contracts. That is, international trade law seeks to manage the relationship between public law and private transactions in the cross-border context, curtailing the ways in which states can use public law to place restrictions on cross-border private legal transfers of goods and services. But the proper legal relationship between public law and private rights to contract and property is among the most controversial issues in legal and political philosophy. States have historically adopted very different approaches to regulating this relationship, which makes it particularly difficult terrain in which to identify a normative standpoint from which to develop and apply general rules.

The problem of normative pluralism is further reinforced by sovereign equality. As a formal matter in the modern state system, states have an equal right to decide how to organize their societies internally. This means that states have an equal right to pursue their own conception of the good—including their understanding of the relationship between public and private law. The United Nations General Assembly has proclaimed that, "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State"[92]—what Weil calls the "right to differ" that is "inherent in the very notion of sovereignty."[93] But if states possess this right, how can international law identify a normative standpoint from which to posit rules that does not involve one state unilaterally imposing its particular conception of the good on another, in violation of the sovereign equality of states, and in violation of their right to "differ"?

B. Consensus-Based Decision Making and Pluralism

The primary way through which international law has grappled with the problem of pluralism is to root most types of international legal obligation in consent.[94] From this perspective, the foundation of legal obligation is not intrinsic morality, natural law, or divine right. No particular moral theory gives international law its legal force or determines its content. Instead, international law can rightfully govern states because they themselves agree to be bound by the law by manifesting their consent (or lack of opposition) to treaty; states are only obliged to follow laws that they give themselves, and thus they can be rightfully held to the terms of the bargain they enter into.[95]

The GATT is a classic example of an international obligation rooted in the consent of states. From a procedural perspective, the GATT (and then subsequently the WTO) has always relied on voluntary and consensus-based decision making to establish its legal

[92] GA Res. 25/2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

[93] Weil, *supra* note 91 at 419.

[94] There are, of course, international obligations that apply to states regardless of their consent or agreement, such as *jus cogens* norms.

[95] Sir Hersch Lauterpacht, Private Law Sources and Analogies of International Law (1927).

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obligations:[96] all states must accept through consent an obligation under the multilateral trading system to be bound by it, and multilateral agreements only come into force when there is total consensus among members. The GATT/WTO does not operate on the principle of majoritarianism, where one can be bound by a rule that one voted against if a majority of parties agrees to the rule; all states must agree or there is no obligation. Furthermore, GATT and WTO legal rules do not have the status of customary international law (much less *jus cogens* peremptory norms).[97] Consensus decision making assures that no member state is required to be bound by any international trade law obligation it did not formally agree to.[98]

This commitment to formal, consent-based voluntarism does not, of course, assure the presence of genuine or fulsome consent to the obligations of the GATT/WTO. As we shall discuss below, this principle has been compromised at important points in the WTO's history by power politics. The Uruguay Round was notoriously marked by procedural problems, methods of negotiation that allowed powerful states to pressure in particular developing countries into treaty terms they often did not view as beneficial or legitimate. But in principle at least, the GATT/WTO is characterized by a commitment to voluntarism, which is foundational to its pluralist nature. The legal disciplines of the GATT and the WTO are, in principle, rooted in areas of overlapping consensus among diverse member states, because by definition, all states must agree to make a certain action subject to legal disciplines;[99] they are not tied, again at least in principle, to a pre-determined ideological conception of domestic political economy.

C. The GATT's Substantive Disciplines and Pluralism

Beyond this important procedural mechanism, the substance of the GATT and the WTO's legal disciplines were also designed to respect a robust pluralism among member states. We begin here by outlining the project of the multilateral trading system as reflected in the original GATT, which remains the backbone or operating system of the WTO as a structure for multilateral rules-based trade, as it was incorporated in the WTO's legal architecture post-Uruguay Round.

As a Canadian delegate to the Havana Charter negotiations that would set the scene for the eventual adoption of the GATT reported to his government, the draft agreement offered "a bold compromise, flexible enough to take care of varying needs of different economic philosophies and of different stages of economic development, yet sufficiently true to the principles

[96] Nicolas Lamp, *The Club Approach to Multilateral Trade Lawmaking*, 49 VAND. J. TRANSNAT'L. L. 107 (2016).

[97] *See* PETROS C. MAVROIDIS: THE SOURCES OF WTO LAW AND THEIR INTERPRETATION: IS THE NEW OK, OK? 40–41 (2022) ("[N]one of the legal institutions of the world trading edifice . . . state practice [has] confirmed, is considered to be part and parcel of customary law.").

[98] Claerwen O'Hara, *Consensus Decision-Making and Democratic Discourse in the General Agreement on Tariffs and Trade 1947 and World Trade Organisation*, 9 LONDON REV. INT'L L. 37 (2021).

[99] With the exception of plurilateral agreements, which can be concluded among a subset of member states, but bind only those members. A way of understanding the larger point is to contrast the legal architecture of the GATT/WTO with that of the European Union, where the treaty system is built from general principles of freedom of movement of goods, services, capital, and people. The GATT/WTO by contrast does not establish such "constitutional" principles, but rather elaborates specific types of measures or policies that are agreed to be subject to particular kinds of discipline or constraint, qualified by bargained exceptions and limitations; absent such agreement on specific measures that are subject to legal discipline, member states' sovereignty remains plenary.

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of multilateral trade to give rise to the hope that the Organization, when it is set up, will prove to be one of the most successful and most enduring of all the intergovernmental organizations established during the last few years."[100] It is for this reason that the GATT was famously described by John Ruggie as capturing the notion of embedded liberalism. On this account, the GATT enshrined a type of liberalization *between* states that entirely remained consistent with states choosing to intervene in their own domestic economies as they saw fit.[101]

The GATT provided a structure for negotiating the reduction of tariffs and making those concessions legally binding, creating security for traders; and imposes a foundational commitment to non-discrimination. But the GATT rules did not attempt to determine *the extent* to which states should or must agree together to liberalize access to their domestic markets and did not seek to impose any particular vision of the relationship between states and markets. As one of the architects of what would eventually become the GATT, James Meade (a United Kingdom government official) wrote in his 1942 "A Proposal for an International Commercial Union": "the removal of trade restrictions do [sic] not, however, imply laissez-faire, and are *in no way* incompatible with a system of state trading."[102]

The GATT contains no requirement that tariffs be reduced at any given pace or any particular extent—much less eliminated; it merely establishes a framework whereby voluntarily and reciprocally bargained tariff concessions can be made legally enforceable through "bindings" that each state is required to respect in its customs policies.[103] Within these constraints, tariffs remain a legal and legitimate policy instrument available to states. As the WTO Appellate Body observed when interpreting the GATT, "Tariffs are legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue."[104]

In addition to facilitating tariff reduction, the GATT's core principle is to prohibit discriminatory trade policies such as import and export bans or restrictions, and discriminatory internal taxes, laws, and regulations. To this limited extent, the GATT might well be thought not to be simply neutral between domestic political and economic systems; a state that adopted a policy of radical or absolute economic nationalism, with a preference for domestic products and producers as a supervening value, could not very well commit to non-discrimination in the sense required by the GATT. But, with the exception of these uncompromising forms of economic nationalism, member states are permitted to regulate for all types of reasons, as we have argued at length in prior work[105]—be they scientific and technical reasons, instrumental (consequentialist) and non-instrumental (deontological) moral reasons, or secular or religious reasons. The GATT also permits states to pursue regulatory aims which are complex and multifaceted, and which entail tradeoffs between different policy positions, or which

[100] 14 Canadian External Relations Document (1948b), para. 14, *cited in* NARLIKAR, *supra* note 65, at 36–37.

[101] John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

[102] A Proposal for an International Commercial Union, Annex A-2, *in* DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, THE GENESIS OF THE GATT 214 (2008) (emphasis added).

[103] MAVROIDIS, *supra* note 38, at 87–90.

[104] India—Additional and Extra-Additional Duties on Imports from the United States, Appellate Body Report, WTO Doc. WT/DS360/AB/R, para. 159 (Oct. 30, 2008).

[105] *See* Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. 367 (2012); Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO After* Seal Products, 48 GEO. WASH. INT'L L. REV. 81 (2015).

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accommodate the demands of value pluralism *within* societies.[106] Likewise, the GATT accepts non-absolutist legislation, in which states can regulate to achieve policy outcomes on an incremental basis that allows for change over time through legislation that only partially achieves a particular normative or practical end.[107]

Even the core GATT prohibition against discrimination is not absolute, and in important ways countenances diverse domestic political and economic arrangements. Trade restrictive policies that discriminate among trading partners or in favor of domestic products can be *justifiably* discriminatory under the GATT such that no legal discipline has been violated. This is the case if the policies are undertaken for certain public policy objectives, such as protection of public morals, human life, or health, or in relation to the conservation of exhaustible natural resources (under Article XX of the GATT).[108] Likewise, the GATT has an exception that addresses perceived "essential" security interests of GATT member states. Article XXI of the GATT allows member states to take otherwise GATT-inconsistent measures that a member state "*considers* necessary" to its essential security interests, for example in time of war or "other emergency in international relations."[109] In effect, the GATT allowed its member states to impose costs on other states through discriminatory policy, where it could be linked sufficiently closely to stipulated legitimate public policy purposes.[110]

This model of legally constraining border or "external" measures while retaining deep pluralism of domestic legal systems largely dovetails with the economic theory of trade and trade agreements as it has evolved. It can be to the economic advantage of every state to liberalize trade by adopting unilateral reductions in border-based restrictions to imports and exports. However, states of a certain size may be able to make economic gains by imposing certain barriers to trade through tariffs. For this reason, it is economically rational for states to

[106] *Id.*

[107] *Id.*

[108] General Agreement on Tariffs and Trade, Art. XX, Oct. 30, 1947, 61 Stat. A-3, 55 UNTS 194, *at* https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT].

[109] Emphasis added. For the significance of this exception at the present moment, see Mona Paulsen, *Let's Agree to Disagree: A Strategy for Trade-Security*, 25 J. INT'L ECON. L. __ (forthcoming; LSE Legal Studies Working Paper forthcoming), *at* https://ssrn.com/abstract=4251781, at 3. Some GATT/WTO members, the United States most prominently, have taken the view that the security exception is non-justiciable or self-judging. The position has been rejected by WTO panels but in the absence of a functioning Appellate Body, the United States insists that its invocation of Article XXI is not subject to review in the dispute settlement system and will not yield to such rulings. Pluralism does not guarantee substantive equality among states; thus, a powerful player like the United States has more of a margin to impose unilaterally its conception of what is required to maintain what the state views at any given time as essential domestic policy interests. However, where such policies target other large powers, such as China, such unilateralism will likely come at a cost. Even self-judgment that rejects accountability through dispute procedures is nevertheless subject to the political assessment of other members as to whether the self-judgment is in good faith, for instance, which may in turn be influenced by dispute rulings that have legitimacy based on the quality of legal reasoning and factual determinations of the panel—even if the member that insists on self-judgment will not accept those rulings as "binding."

[110] But again, a mere nationalistic or patriotic preference for "our" producers over those of other countries is not among these. So pluralism in the architecture of the GATT is wide but bounded; it has a broad ambit, bounded by excluding the most aggressive and radical forms of economic nationalism. Understandably so, as the framers of the GATT associated these with the dark political forces that drove the rise of political extremism in Europe in the 1930s, eventually leading to the catastrophe of World War II. This kind of limit to pluralism would indeed matter if such radical or aggressive economic nationalism were to come to prevail in any significant number of states. The question remains whether the re-emphasis on the local and bringing supply chains home is a step on such a path or whether it represents a more calibrated retreat from extreme versions of globalism. This is a question to which we will return in the final Part of this Article.

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enter into trade agreements to ensure that all states pursue a policy of tariff reduction (and other limits on border-based trade restrictions), and to ensure that states do not defect on such a bargain.[111] As such, multilateral cooperation through binding legal constraints makes sense most clearly in the case of those beggar-thy-neighbor policies where the gains to the country imposing the measure come from the harmful effects on its competitors.[112]

In addition to including exceptions to the core norm of non-discrimination, the GATT protected pluralism in other ways. The GATT itself imposed no limits on what type of state could be a member of the treaty, from a domestic constitutional or political perspective. Accession to the GATT did not in principle require any democratic or market-oriented reform, and GATT (and now WTO) members represent virtually all forms of government. (However, during the neoliberal period of the WTO's existence, accession was used to demand neoliberal-oriented reforms of acceding states—but there is no basis for such demands in the legal architecture itself that pertains to accession.) As such, the GATT/WTO has nothing to say about the appropriate domestic political and legal structures that its member states can adopt; it is possible to be a member as a democracy or an autocracy. This approach differs from other types of international agreements, such as the International Covenant on Civil and Political Rights, and thus is a distinctive feature of the GATT's legal order that carried over into the WTO.

Crucially, the GATT also contains provisions that can be used to facilitate a negotiated partial retreat from liberalization. For example, Article XXVIII provides for renegotiation of tariff concessions.[113] A member state may rebalance its tariff reduction commitments and introduce higher tariffs on some products, if it offers compensation that is satisfactory to other states (such as lowering tariffs on different products). If a negotiated understanding for such rebalancing is not accepted, the state in question may still raise its tariffs, but other states may retaliate by raising theirs in turn.

Another provision that could allow a partial retreat from liberalization is that which provides for waivers from obligations, a provision that was extended from the GATT to all of the covered agreements in the Uruguay Round.[114] Waivers can accommodate the concerns of one single member state, several member states, or the community of states in general. Waivers are temporary, regularly reviewed, and require support of a supermajority of member

[111] Dani Rodrik, *What Do Trade Agreements Really Do*, 32 J. ECON. PERSP. 73 (2018). *See* Henrik Horn & Petros C. Mavroidis, *Non-discrimination*, RES. INST. INT'L ECON. (IFN Policy Paper 18, 2007) ("The inclusion of the non-discrimination obligations is largely the direct result of the decision to construct the GATT as a negative integration contract: policies are defined unilaterally and, to the extent that there are international spillovers, they will be internalized by virtue of the non-discrimination obligation. This means that a WTO Member can in practice adopt any regulation (rational or irrational) to the extent that it does not discriminate."). The work of leading trade theorists such as Kyle Bagwell, Chad Bown, and Robert Staiger also supports this notion. *See, e.g.*, Kyle Bagwell, Chad P. Bown & Robert W. Staiger, *Is the WTO Passé?* (NBER Working Paper Series No. 21303, 2015).

[112] *See* The US China Trade Policy Working Group Joint Statement, *US China Trade Relations: A Way Forward, at* https://rodrik.typepad.com/US-China%20Trade%20Relations%20-%20A%20Way%20Forward%20Booklet%20%28for%20print%29.pdf.

[113] UNITED STATES GOVERNMENT-EXECUTIVE BRANCH, GATT STUDY NO. 11, THE GATT PROVISIONS ON COMPENSATION AND RETALIATION 3 (1978).

[114] *See* ISABEL FEICHTNER, THE LAW AND POLITICS OF WTO WAIVERS: STABILITY AND FLEXIBILITY IN PUBLIC INTERNATIONAL LAW (2012).

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states.[115] The GATT also features a safeguards provision, Article XIX, which directly addresses situations where a sudden surge in imports creates adjustment challenges for a domestic industry, including workers.[116] Tariffs can be reimposed above the thresholds that member states have bound themselves legally to respect, to provide breathing space for the needed adjustments.

These partial retreat provisions make clear that the GATT's commitments to liberalization are not simply a one-way ratchet, which envisions ever-increasing market opening. The GATT's architecture is far more flexible and sensitive, and in this way is consistent with a robust conception of pluralism. Of course, there are good arguments that none of these features of the GATT, taken individually or collectively, would be sufficient to address the problem of losers from liberalization or to truly reverse liberalization where states feel that it is inordinately imposing domestic social costs. But they do indicate that the possibility of adjusting in a "deglobalizing" direction is built into the foundational architecture, as opposed to the neoliberal conception of a multilateral trading system premised on linear advances in liberalization with no retreat or rebalancing imaginable. Different states have different capacities at different times to address the domestic costs of trade liberalization, and so preserving pluralism also means preserving the right to move to a less liberalizing equilibrium that moderates these costs. This demonstrates that the pluralism baked into the architecture of the GATT is more than simply a matter of policy space or embedded liberalism. It envisions the possibility of a calibrated retreat from the commitments of liberalization, for example to address domestic distributive impacts of trade.

The GATT also included important remedial escape devices that further facilitate pluralism. During the negotiation of the GATT, states were able to agree that non-discrimination was a core norm. But there were other economic practices about which consensus could not be reached. These practices included dumping, when products are sold on export markets at a price which is lower than in the country from which the products originate, and subsidization, offering government support to product development which in turn lowers prices.[117] When consensus could not be reached on these issues, the GATT architects included a further construct: the permissibility of trade remedies in the form of anti-dumping and countervailing duties, unilateral increases in duties in response to perceptions of "unfair trade."[118] This meant that there would be no multilateral prohibition of these practices, but states were permitted to take unilateral action against these types of practices if they saw fit.

This approach, as with the non-discrimination norm, seeks to reconcile the twin imperatives of preserving pluralism and allowing sufficient scope to sanction perceived defectors. Banning the subsidies and dumping practices that some states perceived as defection would have threatened pluralism, as other states (particularly in the case of subsidies) viewed these measures as legitimate reflections of their domestic political and economic choices. On the other hand, giving no avenue to respond to perceptions that these practices are unfair

[115] But in practice they have been granted a significant number of times. *See* THE LEGAL FRAMEWORK FOR WAIVING WORLD TRADE ORGANIZATION (WTO) OBLIGATIONS, CONG. RES. SERV., at 2 (May 17, 2021), *at* https://crsreports.congress.gov/product/pdf/LSB/LSB10599.

[116] GATT, *supra* note 108, Art. XIX.

[117] John W. Evans, *Subsidies and Countervailing Duties in the GATT: Present Law and Future Prospects*, 3 MD. J. INT'L L. 211 (1977).

[118] *Id.*

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would also be contrary to pluralism, denying the legitimacy of the perspectives of the public and policymakers where those views are common.[119] As such, unilateral trade remedies are an important avenue for managing disagreement about the fairness of trade among countries with diverse approaches to social and economic governance, while preserving the basic bargain regarding non-discrimination.[120]

A further aspect of the GATT's pluralism is the way in which it offers differentiated obligations for states at different levels of development, offering even more flexibility in domestic policy choices for developing countries. As the Appellate Body would later recognize in the *Shrimp/Turtle* dispute, preserving diversity does not simply mean treating all the same; it may also entail treating states in different circumstances differently.[121] Thus, another important aspect of the GATT legal architecture that incorporates pluralism is what is known as Special and Differential Treatment (SDT) for developing country member states.[122] This approach has continued during the WTO era; the WTO's covered agreements have been modified to offer more room for developing countries to pursue alternative economic and industrial policies and strategies for development.[123] The exceptions introduced to facilitate these alternatives include allowing developing countries to offer protection for infant industries under what is known as import substitution industrialization (ISI);[124] allowing developing countries to establish preferential trade agreements that do not comply with the limits on such agreements that are normally imposed by the GATT;[125] and allowing these countries to

[119] As Dani Rodrik observes with respect to dumping, "[T]he global trade regime has to address issues of fairness, in addition to economic efficiency. When domestic firms must compete with, say, Chinese firms that are financially supported by a government with deep pockets, the playing field becomes tilted in ways that most people would consider unacceptable. Certain types of competitive advantage undermine the legitimacy of international trade, even when (as with this example) they may imply aggregate economic benefits for the importing country. So the antidumping regime has a political logic." Dani Rodrik, *Fairness and Free Trade*, PROJ. SYNDICATE (May 12, 2016), *at* https://www.project-syndicate.org/commentary/china-market-economy-status-debate-by-dani-rodrik-2016-05.

[120] On the importance of unilateral trade remedies along these lines, see Shaffer, *supra* note 68, arguing that anti-dumping should be extended to "social dumping," areas of disagreement about social standards where there are trade impacts. *See also* The U.S.-China Trade Policy Working Group Joint Statement, *supra* note 112.

[121] United States - Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

[122] *See* JAMES BACCHUS & INU MANAK, THE DEVELOPMENT DIMENSION: SPECIAL AND DIFFERENTIAL TREATMENT IN TRADE (2021).

[123] *See* Article XVIII – government assistance to economic development (for developing countries) (infant industry protection; balance of payment issues; interpreted in *India – QR* case); Article XVIII*bis* – non-reciprocity; Part IV of GATT – Articles XXVI, XXXVII, XXXVIII; Enabling Clause (legal exception to most-favored nation (MFN) permitting preferential market access for developing countries); GATS; Agreement on Subsidies and Countervailing Measures; Safeguards Agreement; Anti-Dumping Agreement. In essence, the GATT/WTO legal order allows developing countries to not comply with many of the trade regime's basic legal obligations, if there is a colorable case to be made that those legal obligations would inhibit developing states' abilities to pursue the type of economic and development policies that they see fit. There is, of course, also a critical literature that argues that these exceptions have not gone far enough to facilitate different forms of development, a critique that is particularly persuasive when aimed at the Uruguay Round's requirement that all of the covered agreements be adopted as part of a "single undertaking," as well as the intellectual property regime established by TRIPS. But in general, the GATT/WTO's legal disciplines have been remarkably flexible, building in formal legal avenues for non-compliance, that allow states to pursue radically different strategies for industrial and economic development.

[124] GATT, *supra* note 108, Art. XVIII.

[125] *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (Nov. 28, 1979), GATT BISD (26th Supp.) (1980).

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obtain market access that is non-reciprocal.[126] The adequacy of these flexibilities for developing countries has been strongly contested, and for good reason.[127] But this only reinforces the principle itself rather than undermining it. Likewise, the more recent controversy as to whether as competitive an economy as China's should benefit from Special and Differential Treatment has not shaken the principle, but intensified already existing controversies about the effective and appropriate means of fulfilling it.

A further pluralist aspect of the GATT is its attitude to member states' right to enter into bilateral and regional agreements among themselves, at a sub-multilateral level. Given the system's tolerance toward different theories of the relationship between public law and markets and its reliance on voluntary cooperation to ground legal obligations to liberalize, smaller grouping of states with more homogenous domestic economic systems might well agree on harmonization or restraint of internal policies to a greater extent than is possible under the conditions of deep diversity among states that characterize the multilateral order. Here, the EU would be the leading example. The GATT (and then the WTO) explicitly permits the establishment of such trading blocs, whether free trade areas or customs unions.[128] Thus, pluralism reconciles the acceptance of deep differences between member states of the GATT/WTO with the logic of "values-based" trade between like-minded states, which may share among themselves certain principles of human rights and democracy, for example.[129]

Finally, the GATT contains a withdrawal clause that allows any member state to exit from the Agreement on six months' notice.[130] This provision has been carried over from the GATT to the WTO, where the same notice period applies to withdrawal from all of the covered agreements under the WTO umbrella.[131] Ultimately, this provision is a protection against the risk that, despite the formal principle of consensus decision making, interstate power relations, and/or ideological or interest group capture of real world WTO processes, push the Organization in a direction that threatens domestic regulatory autonomy. This in turn reduces the risk of such an outcome, by imposing the hypothetical price of some states' exit on such behavior. While exit may not have been a credible threat in the past, except perhaps for the most powerful states who can risk falling back on anarchic trade relations, that risk seems less catastrophic today, with so many regional and bilateral arrangements in place.

D. The Double-Edged Sword of Pluralism

Despite these procedural and substantive aspects of pluralism built into the GATT (and thus the WTO), there is no guarantee that a largely pluralist legal framework will be deployed

[126] Sonia E. Rolland, Development at the WTO 69–72 (2012); Ismail, *supra* note 40, 14–23.

[127] Ismail, *supra* note 40, at 24–36.

[128] Robert Howse & Joanna Langille, *Spheres of Commerce: The WTO Legal System and Regional Trading Blocs - A Reconsideration*, 46 Ga. J. Int'l & Comp. L. 649 (2018); Joanna Langille, Note, *Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out Through Regional Trade Agreements*, 86 N.Y.U. L. REV. 1482 (2011)

[129] *See* Remarks by the Deputy Prime Minister, *supra* note 10.

[130] GATT, *supra* note 108, Art. XXXI.

[131] Marrakesh Agreement Establishing the World Trade Organization, Art. XV:1, Apr. 15, 1994, 1867 UNTS 154.

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in a pluralist spirit. Pluralism is a double-edged sword. Precisely *because* a formally pluralistic legal architecture for cooperation is indeterminate or agnostic as to the ideological or policy projects that it can accommodate, such a framework runs the risk of being coopted or conscripted for a particular project, where its proponents have political, epistemic, or economic power.[132]

An obvious example is the justificatory force of the general exceptions in Article XX of the GATT, which is critical to preserving the right of WTO members to regulate in diverse ways. Legitimate objectives stated in Article XX, like protection of public morals, might be read in a broad or a narrow sense. An interpreter operating from a neoliberal skepticism that much regulation is simply irrational or a product of interest group capture, might require a highly scientific or technocratic justification, placing a heavy burden on the regulating state. Similarly, a neoliberal ideologue might approach the Article XIX safeguards provision in the GATT with a strong presumption that adjustment pressures are due to predictable lack of efficiency in the domestic industry rather than hard-to-anticipate competition from imports. Such a neoliberal might look long and hard to find alternative explanations, such as technological change, for why workers have been displaced, that focuses on developments other than increased import competition, effectively making Article XIX inapplicable.

In a very real sense then, the fate of pluralism is very much in the hands of the actors who interpret, apply, and/or deploy the legal rules and their particular interests and ideologies. As Anne Orford observes: "international economic law works as a means of embedding neoliberalism not because it locks in the designs of [a handful of influential ideologues]" but because "particular contested interpretations of what WTO agreements mean *appear* necessary and inevitable."[133] While one can easily understand why pluralist rules might be *susceptible* to non-pluralist uses and projects, their pluralist character does not make cooptation by any *particular* ideology or set of interests in fact *inevitable*.

This doubled-edge sword of pluralism is visible in the history of the GATT and the WTO. The original neutrality of the GATT's legal architecture toward domestic social and economic governance, and agnosticism as to the degree of trade liberalization that is desirable based on multilateral rules, did not prevent powerful commercial interests, American power, and free trade as ideology from shaping the GATT's real-world impact, including who won and lost in rounds of tariff negotiations. While the GATT benefited developing countries in certain ways, it was the Global North that benefited most from the multilateral trading system.[134] The predominating powers and technocratic elites in the postwar period, increasingly from the 1970s, pushed for more and more reduction of border measures in subsequent rounds of negotiations, gradually putting on the agenda domestic policies such as subsidies and product standards for scrutiny, which go beyond the basically pluralist norm of non-discrimination. Developing countries pushed back through the project of a New International Economic

[132] As Ian Hurd observes, "because it has political effects [for example, creating winners and losers] international law is a powerful tool for governments and others and it has come to occupy an important place in their strategic behavior. States and activists invoke international law strategically with an eye on its potential to help them achieve their goals." Ian Hurd, *Liberal Versus Political Models of Global Governance* 12 (Sciences Po LIEPP Working Paper No. 97, 2019).

[133] Anne Orford, International Law and the Politics of History 281–82 (2021) (emphasis added).

[134] *See, e.g.*, Ibrahim Halmi, Abdel Rahman & Helmut Hesse, *Industrialization, Trade, and the International Division of Labour*, *in* Reshaping The International Order: A Report to the Club of Rome 235 (Antony J. Dolman ed., 1976).

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Order. In response, the GATT community developed the Generalized System of Preferences, the program of voluntary non-reciprocal trade concessions for developing countries discussed above.[135] However, this was far less than the aspired transformation of the multilateral trading system to reverse its overall orientation away from a pro-North pattern of trade liberalization that had been negotiated under the legal architecture, a pattern that protected Northern industries in areas like agriculture and textiles while reducing significantly tariffs on finished products that were primarily imported in the Global South. As well, accession negotiations would come to be used, particularly in the post-Uruguay Round WTO era, to tilt the domestic policies of new members in the direction of economic liberalism, even though as noted above the membership criteria for the GATT/WTO do not require any particular system of political or economic governance.[136] Still, the basic legal architecture did not dictate such a result. It simply did not prevent it.

The double-edged sword of pluralism became painfully apparent in the Uruguay Round itself, where the GATT's procedural and substantive pluralist approach appeared to yield to hegemonic and ideological reality in practice. Let us start on the procedural side. As Claerwen O'Hara explains,

> [T]he democratic discourse surrounding consensus decision-making in the GATT/WTO has helped to conceal the way in which this procedure can replicate underlying power relations through the murkiness of the goal to which it aspires; that of an absence of formal objection. For most of the history of the multilateral trade regime, this has seen the consensus procedure favour the interests of the US and its corporations—first, as an informal method of weighted decision-making, then as a way to "lock in" the Uruguay Agreements, and, later, as a tool of institutional destruction [including the United States blocking Appellate Body appointments].[137]

For example, one of the most problematic practices that commentators have pointed to is the so called "Green Room" practice that was used extensively to achieve "agreement" in the Uruguay Round negotiations. As Amrita Narlikar describes it:

> To facilitate consensus decision-making it was commonplace for the Director-General to convene "Green Room Meetings" among the key players. The most important of these players were the Quad—the European Union, the United States, Canada and Japan. Smaller countries were rarely invited to Green Room consultations. . . . Consensus forged behind closed doors in such a manner would then be presented at a meeting of all the contracting parties. The bias toward agreement was high at this stage, especially as developing countries were reluctant to risk the potential costs of breaking consensus.[138]

[135] *See, e.g.*, ROBERT L. ROTHSTEIN, GLOBAL BARGAINING: UNCTAD & THE QUEST FOR A NEW INTERNATIONAL ECONOMIC ORDER 40 (1979).

[136] Serbia for example has been blocked from acceding to the WTO due to its refusal to lift its ban on Genetically Modified Organisms in agriculture. Holding up an accession to force a state to adopt a particular policy on such a controversial and complex governance issues as GMOs is an egregious departure from pluralism. *See "GMO Only Causes Problems": Serbia Maintains Import Ban Despite WTO Demands*, SPUTNIK INT'L (Feb. 20, 2017), *at* https://sputniknews.com/20170220/serbia-agriculture-gmo-wto-1050870931.html.

[137] *See* O'Hara, *supra* note 98, at 3–4.

[138] NARLIKAR, *supra* note 65, at 62.

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The Green Room process became synonymous with the way in which powerful Western countries could present legislative outcomes as a *fait accompli* to smaller countries and members of the Global South.[139] For this reason, the GATT/WTO's consensus-based approach has long been subject to valid critique on the grounds that it does not actually guarantee the sovereign equality or equal voice of all states, and thus its obligations cannot be said to be rooted in pluralism-preserving consent.

The Uruguay Round's substantive results are also famous for having incorporated a neoliberal approach into the multilateral trading system, as discussed above in Parts I and II. As many have commented, the end of communism in the 1990s was the height of the neoliberal moment, where all alternatives to Anglo-American capitalism seemed defunct.[140] The transition from GATT to WTO marked a significant change in the multilateral trading system, and appeared to incorporate this neoliberal ideology. While the WTO's core legal disciplines remained encapsulated by the GATT, with its essential commitment to pluralism, several of these new treaties, such as the TRIPS, went beyond non-discrimination to harmonize domestic policies in the direction of a neoliberal model of economic governance. These new treaties, the conventional wisdom goes, brought with them a commitment to neoliberalism.

E. The WTO's Apparent Neoliberal Turn and Its In-Built Limits

Despite the common (and understandable) narrative that the Uruguay Round successfully imposed an ideological approach to multilateral trade, from both a procedural and substantive perspective, our view is that the results of the Uruguay Round and subsequent negotiations are slightly more complex, revealing an ongoing and resilient pluralism in the WTO's legal order.

Let us again start on the procedural side. Despite important evidence that Green Room procedures choked out developing country input during the Uruguay Round, the political science and international relations literature on small state participation in outcomes at the WTO actually presents a somewhat more mixed picture. As Narlikar has illustrated, post-Uruguay Round, developing countries have sometimes been able to be quite successful in resisting the pressure of powerful developed countries and avoiding new rules that serve exclusively rich developed countries' political and economic systems and perceived interests.[141] This has been achieved through coalition-building among WTO members from the Global South, and also through strategic alliances between developing countries and global civil society.[142]

In another important recent work on power in the WTO system, Greg Shaffer analyzes the significance of the rise of major non-Western powers—the BRICS—for the WTO.[143] In various ways, as Shaffer shows, countries such as Brazil, India, and China have become powerful

[139] JAWARA & KWA, *supra* note 57.

[140] As Gary Gerstle puts it: "[A]fter [the end of communism,] pressure on capitalist elites and their supporters to compromise with the working class vanished. . . . This was the moment when neoliberalism transitioned from a political movement to a political order. The fall of communism, in short, forms a central part of the story of neoliberalism's triumph." GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICAN AND THE WORLD IN THE FREE MARKET ERA 11 (2022).

[141] NARLIKAR, *supra* note 65.

[142] *Id.*

[143] The BRICS countries are Brazil, Russia, India, China, and South Africa.

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participants in the WTO, including its legal institutions, through the development of legal expertise, strategic alliances between domestic constituencies and the state, and leveraging of the size of their markets and their increasing economic power in the WTO.[144] So while there is no doubt that power politics played a role during the Uruguay Round, challenging the consent-based approach that is so fundamental to pluralism, there is also some evidence that the WTO's consent-based legislative process continues to empower smaller and developing states, so that they are able to resist legal disciplines that are not in conformity with their domestic economic and political normative commitments.

The resilience of pluralism in the WTO post-Uruguay Round is also apparent in the substance of the WTO's legal disciplines. Despite what has appeared to many as a dramatic hard-wiring of neoliberalism into the WTO's legal architecture post-Uruguay Round, we argue that when one strips away how neoliberal ideology and powerful interests backing it attempted to frame and use these new norms during neoliberalism's heyday, the new agreements themselves contain many pluralist features that adapt and reinforce some of the ways in which the original GATT architecture embraced diversity: exceptions and limitations provisions, reservations, and carve-outs of various kinds. As such, despite the impression of the hardwiring of neoliberalism into the WTO with the Uruguay Round, a careful look at the legal agreements that resulted from the Round tells a more nuanced story. Sometimes the abuses of the Green Room succeeded; in other instances, voluntarism and consent allowed developing countries to push back, resulting in limited moves to deep integration, with many qualifications, that, in fact, left the neoliberals unsatiated at the end of the Round.

As discussed above, the neoliberal critique of the WTO reflects the sense of many neoliberals that while an important step toward full globalization or liberalization of markets, the Uruguay Round agreements ultimately fell short. Even the TRIPS agreement contains many exceptions, limitations, and flexibilities, for example for compulsory licensing.[145] Big Pharma, supported almost without exception by the United States and the EU, responded on the one hand by espousing very narrow readings of these flexibilities and finding ways of intimidating smaller countries (and especially developing countries) from using them to the fullest extent, and on the other hand, by pressing for "TRIPS-plus" provisions in regional trade agreements.[146]

The Agreement on Sanitary and Phytosanitary Measures required WTO members to justify their regulation of risks with respect to food and agricultural products, measures based on

[144] Gregory Shaffer, Emerging Powers and the World Trading System: The Past and Future of International Economic Law (2021). Ignacio Bercero has argued (somewhat along the lines of the analysis herein) that the neoliberal departure from the GATT in the Uruguay Round is more qualified or limited than is often asserted. Ignacio Bercero, What Do We Need a WTO for? The Crisis of the Rules-Based Trading Regime and WTO Reform (2020).

[145] As Amy Kapczynski notes: "TRIPS offers developing countries substantially more formal flexibility in the domain of pharmaceuticals than has commonly been recognized." Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 Ca. L. Rev. 1571, 1574 (2009).

[146] As Kapczynski observes: "While TRIPS as a formal matter cannot produce deep harmonization, it nonetheless channels a strong harmonizing force, because it inserts countries into a transnational circuit that fills in the gaps in the Agreement and that works against the use of TRIPS flexibilities. Limits on administrative resources, the influence of transnational legal networks, and the threat of unilateral retaliation from high-protection jurisdictions all make it difficult for countries like India to implement an autonomous vision of patent law." *Id.* at 1574.

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scientific principles and risk assessments.[147] At the same time, the SPS Agreement contained a clause that allowed for provisional measures based on a notion of precaution, where scientific evidence was insufficient.[148] The Technical Barriers to Trade Agreement required that WTO members use international standards as a basis for their technical regulations-standards that would usually be created by standardization bodies dominated by technocrats and industry associations.[149] At the same time, the use of international standards was only required where relevant, effective, and appropriate, given a particular WTO member's regulatory goals.[150]

The Subsidies and Countervailing Measures Agreement constrained the use of subsidies, including for legitimate domestic economic development purposes, going significantly beyond the GATT, but it also contained a provision that effectively removed matters from discipline subsidies, "[w]here the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, the subsidy . . . and such criteria and conditions . . . are strictly adhered to."[151] Moreover, to challenge a subsidy successfully in WTO law required proving with economic evidence that the subsidy was producing certain adverse effects in global markets, such as price undercutting, that fall within the meaning of "serious prejudice," as defined in Article 6 of the SCM Agreement. This in effect limits the use of the SCM Agreement to attack subsidies as a legitimate tool of public policy, to cases where trade impacts are manifest.[152]

In the case of trade in services, the neoliberal agenda was clearly aimed at the dismantling of state monopolies and other forms of competition-restricting public policies that existed in most developed countries in sectors such as telecommunications until the Reagan-Thatcher revolution.[153] However, the architecture of the GATS reflected considerable push-back from developing states against legal rules entrenching the neoliberal paradigm of deregulation and privatization. The GATS architecture allowed each individual WTO member to decide which sectors it wanted to open up through commitments to National Treatment and Market Access, and even to qualify commitments to preserve certain specific policies or carve out particularly sensitive subsectors.[154] Despite pressure from powerful developed countries, above all the United States, as well as industry groups like the

[147] *See* Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329 (2000); Agreement on Sanitary and Phytosanitary Measures, *supra* note 6, Arts. 2.2, 5.1–5.2.

[148] Agreement on Sanitary and Phytosanitary Measures, *supra* note 6, Art. 5.7.

[149] Agreement on Technical Barriers to Trade, *supra* note 26, Art. 2.4.

[150] *Id.* However, the extent of the flexibilities afforded, for example, to protect public health among other regulatory goals, even under TBT and SPS, was muted or suppressed by legal interpretations of Secretariat officials taking a narrow view of the policy space in such agreements; often these interpretations got transmitted to developing and newly acceding countries through training or technical assistance exercises conducted by the Secretariat. *See* Robert Howse, *The WHO/WTO Study on Trade and Public Health: A Critical Assessment* 24 RISK ANALYSIS 501–07 (2004).

[151] Agreement on Subsidies and Countervailing Measures, *supra* note 123, Art. 2(1)(b) (internal reference omitted).

[152] *Id.* Arts. 5–6. Admittedly, though, in some specific situations the form of the subsidy creates a rebuttable presumption that "serious prejudice" is occurring.

[153] MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES: THE LEGAL IMPACT OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) ON NATIONAL REGULATORY AUTONOMY (2003).

[154] *Id.*

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Coalition of Service Industries,[155] few commitments were made that went beyond existing regulatory approaches of the countries in question. Hence the particular disappointment of neoliberal critics of the WTO with services liberalization, noted above.[156] Although opening up trade in services through demonopolization, privatization, and deregulation was the key impetus behind the GATS, the resulting framework—with its à la carte approach—allowed for enormous differentiation of commitments depending on the perspectives and needs of individual states, and thus is a remarkable example of pluralist legal architecture.

For these reasons, we are of the view that the anti-pluralist nature of the Uruguay Round agreements has been overstated. The "single undertaking" structure of the Uruguay Round, where individual countries could not continue to adhere to the GATT while rejecting for example the TRIPS and SPS Agreements, was arguably a successful coup against pluralism by dominant Western interests at the peak of neoliberalism. Yet, at the same time, not all areas where neoliberals wanted to impose their vision of economic governance were included within the single undertaking, and the resulting agreements contain important flexibility and exceptions that built in a nascent commitment to pluralism, even at the high watermark of the WTO's flirtation with an ideological neoliberal approach to trade policy.

F. The Appellate Body's Pluralist Rebalancing

The Appellate Body's jurisprudence has also been crucial to preserving the pluralism of the GATT/WTO, rebalancing the covered agreements post-Uruguay Round in favor of a fulsome commitment to pluralism by blunting their more neoliberal aspects. In articulating this position, our approach differs from other commentators. For example, Quinn Slobodian has argued that the new dispute settlement system introduced in the Uruguay Round, with compulsory jurisdiction, panel reports becoming automatically binding subject to appellate review, and enforceability through sanctions authorized by an arbitrator, reflects the legalist aspect of neoliberal ideology.[157]

We take a quite different view of the relationship of legalism in dispute settlement to pluralism and, on the other hand, neoliberalism. Before legalist dispute settlement was introduced into the multilateral trading system, legal interpretation was dominated by the Secretariat of the GATT, which was animated (as Slobodian himself illustrates) by free trade absolutist or "ordoliberal" attitudes.[158] The Secretariat to a large extent was able to impose this vision on the interpretive choices of panelists, ad hoc appointees mostly from the Geneva trade diplomatic community.[159] While the shift to legalism did not really reform the relationship of the Secretariat to panels, as Pauwelyn and Pelc have recently shown,[160] the introduction of the Appellate Body is another matter. As Joseph Weiler explains: "Underlying the pre-WTO ethos of panels was, consciously and subconsciously . . . crafting an opinion consistent with the legal advice given by the Secretariat but, at the same time, an opinion

[155] Surendra J. Patel, *The South and GATT Negotiations on Service Sector*, 26 ECON. & POL. WEEKLY 2732 (1991).

[156] *See* Section II.A *supra*.

[157] SLOBODIAN, *supra* note 37, at 256–57.

[158] *Id.* at 244–48.

[159] MAVROIDIS, *supra* note 38, at 417–19.

[160] Joost Pauwelyn & Krzysztof Pelc, *Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement*, 116 AJIL 534 (2022).

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that would settle the dispute by being adopted by both parties."[161] But right from the beginning, as Weiler notes, the Appellate Body sent a different message to panels in frequently overturning Secretariat-inspired or derived legal reasoning. The message was clear: "this is a legal process: here the law rules."[162]

With its rulings, the AB systematically developed the law of the WTO in a way that permitted pluralism and ensured that states retained the right to regulate domestically as they saw fit. The AB continually affirmed that states have the "right to regulate"—a right not protected in the text of any covered agreement.[163] As we have argued elsewhere, this makes clear that "the WTO is not a constitutional regime or a normative authority at the bar of which States must justify themselves before regulating. Regulations are presumed to be legitimate unless they have specific features that engage the precise treaty obligations of the WTO system. Merely because, actually or hypothetically, a measure has some effect on trade does not make it suspect or subject to scrutiny; it must actively be shown to violate particular disciplines."[164]

The AB has also continually emphasized that states have the ability to set their own level of regulatory protection.[165] When defending trade restrictive measures through Article XX, member states have the right to set the degree of risk protection in their regulation at whatever level they choose. This is an important affirmation of the ability of states to respect collective preferences and regulate for reasons that they take to be important, particularly for expressive normative reasons which may not be about "risk" prevention at all.[166]

In a line of cases on the "public morals" exception in Article XX, the AB also expanded the type of reasons for which states can regulate.[167] In the important *European Communities (EC) – Seal Products* case, the Appellate Body took a deferential approach to the meaning of "public morals" in Article XX(a), broadening the substantive scope of Article XX justifications. The EU had imposed trade-restrictive measures on imported products made from seals, on the grounds that the way in which seals were hunted, with problematic consequences for animal welfare, violated the EU's public morals. Canada and Norway, which have two of the largest sealing industries worldwide, brought a claim against the EU's measures at the WTO. The claimants urged the AB to undertake a searching review of what constitutes a state's "public morals" and to ensure that the state was not inconsistent or morally hypocritical. The AB did not adopt this approach. Following two prior cases on

[161] Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement*, *in* Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium 334, 340 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian & Americo Beviglia Zampetti eds., 2001).

[162] *Id.* at 340.

[163] Robert Howse, *The World Trade Organization 20 Years on: Global Governance by Judiciary*, 27 Eur. J. Int'l L. 9, 13 (2016).

[164] Joanna Langille, *The Trade/Labour Relationship in the Light of the WTO Appellate Body's Embrace of Pluralism*, 159 Int'l Lab. Rev. 569, 580 (2020).

[165] European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001); United States – Continued Suspension of Obligations in the EC – Hormones Dispute, Appellate Body Report, WTO Doc. WT/DS320/AB/R (Oct. 16, 2008).

[166] As we have argued elsewhere. *See* Howse & Langille, *supra* note 105; Howse, Langille & Sykes, *supra* note 105; Brazil – Measures Affecting Imports of Retreaded Tyres, Appellate Body Report, WTO Doc. WT/DS332/AB/R (Dec. 17, 2007).

[167] Robert Howse, *Public Morals*, *in* Elgar Encyclopedia of International Economic Law 239 (Thomas Cottier & Krista Nadakavukaren Schefer eds., 2017).

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the public morals exception,[168] the AB deferred to the state's own conception of public morality, insisting that public morals are a matter of the "systems and scales of values" relevant to each society. It rejected the idea that public values must be fully consistent to be sufficient reason for legislation; as such, it rejected a philosophical consistency argument that would have made the WTO the arbiter of the reasonableness and coherence of the moral beliefs of its members. It rejected the notion that legislation must make a material contribution to some end, when the end in question is non-instrumental. And it did not see the fact that the regulation had multiple objectives, moral and otherwise, as a problem. In all of these ways, the AB acted to preserve normative pluralism among its member states.[169]

In addition to preserving this fulsome conception of the right to regulate under WTO law, the AB has also blunted many of the more neoliberal aspects of the Uruguay Round Agreements, such as the TBT and the SPS Agreements. These Agreements contained norms imposing constraints on domestic regulation that go beyond the non-discrimination norm in the GATT, and/or lack the general public policy exceptions in the GATT, such as Article XX.

In the case of the TBT Agreement, the AB announced that the TBT should be interpreted as reflecting the *same* equilibrium between the "right to regulate" and trade liberalization as the (pluralist) GATT—despite all the evidence that this Agreement had as its very rationale shifting that balance in favor of liberalization.[170] In addition, the AB built in a GATT-style exceptions clause to the TBT that was absent on the face of the text. The TBT Agreement imposes a non-discrimination obligation on member states that echoes that of the GATT. But unlike the GATT, it does not include any general exceptions provision on its face. In the *Clove Cigarettes* case, Indonesia challenged an American ban on the sale of clove cigarettes at the WTO, on the grounds that the U.S. ban violated the TBT Agreement's prohibition on discrimination, since the United States still permitted the sale of menthol cigarettes. When analyzing whether there was discrimination in this case, the AB read in an Article XX-like exceptions provision to the TBT Agreement, so that a discriminatory measure could be justified on the basis of "a legitimate regulatory distinction."[171]

Likewise, the AB read down the TBT Agreement's requirement that members harmonize technical regulations through international standards (Article 2.4). In *Tuna/Dolphin II*, Mexico brought a claim against the United States at the WTO. The United States had adopted a labeling scheme for tuna caught in a "dolphin safe" fashion, which distinguished between tuna caught in the Eastern Tropical Pacific (ETP) and those outside that area and imposed higher standards on tuna caught in the ETP. Mexico argued that this scheme

[168] China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, Appellate Body Report, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009); United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Appellate Body Report, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005).

[169] Howse, Langille & Sykes, *supra* note 105.

[170] United States – Measures Affecting the Production and Sale of Clove Cigarettes, Appellate Body Report, WTO Doc. WT/DS406/AB/R (Apr. 24, 2012). "The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX." *Id.*, para. 96.

[171] *Id.*

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violated various aspects of the TBT Agreement, including Article 2.4. When applying this provision, the AB significantly qualified the requirement that states harmonize technical regulations through international standards by limiting the obligation to cases where international standards have been created through inclusive, consensual processes open in real terms to participation by and to the needs of developing countries.[172]

The AB has taken a similar approach to the SPS Agreement, softening and in some cases coming close to neutralizing those aspects of the Agreement that are more intrusive to regulatory autonomy than the GATT. Take the *EC-Hormones* case in which the United States brought a claim against the European Communities on the grounds that their legal regime restricting beef that had been treated with certain growth hormones violated WTO disciplines, including the SPS Agreement. When applying the SPS Agreement, the AB held that the requirement in the SPS Agreement that risk regulation of food and agricultural products be based on science was limited to an obligation that regulations bear a rational, objective relationship to *some* qualified scientific opinion, which could be a "non-mainstream" opinion.[173] This significantly broadened the capacity of states to regulate for reasons that they considered to be legitimate.

The AB has also been active in finding policy space in the interstices and silences of the TRIPS Agreement. In the *U.S.-Havana Club* case, the EC brought a claim against the United States on the grounds that an American trademark policy violated the TRIPS Agreement. The AB applied in a broad way the public policy exceptions pre-dating the TRIPS Agreement in the relevant World Intellectual Property Organization (WIPO) conventions, noting that states imposing conditions on who can be the owner of intellectual property are compatible with TRIPS.[174] Allowing states to impose conditions on *who* is entitled to own intellectual property, a flexibility only implicit in TRIPS and brought to life by the AB, arguably could have significant value for states attempting to steer intellectual property law to further industrial policy or social goals. As such, it is an important pluralist flexibility built into the TRIPS Agreement through judicial interpretation.

The AB has also been active in building pluralist flexibility into the Subsidies and Countervailing Measures Agreement. In the *Canada-Renewable Energy* case, Japan brought a claim against Canada under the SCM Agreement, on the grounds that Canada's domestic content requirements in its "Feed-in Tariffs" scheme violated the SCM's rules on subsidies. In analyzing the Canadian regime, the AB made a subtle but at the same time implicitly radical interpretive move. The AB held that, where the government creates a market, for example through establishing prices and quantities to be supplied, such a scheme should not be considered as a trade distorting subsidy benefit, even if the prices supported by the government in its policy goal of shifting to clean energy might be higher than in a market where consumer-driven supply and demand determines the price of electricity, indifferent to the

[172] United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Appellate Body Report, WTO Doc. WT/DS381/AB/R (May 16, 2012).

[173] EC Measures Concerning Meat and Meat Products (Hormones), Appellate Body Report, WTO Docs. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

[174] United States – Section 211 Omnibus Appropriations Act of 1998, Appellate Body Report, WTO Doc. WT/DS176/AB/R, at 589 (Jan. 2, 2002).

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objective of climate mitigation.[175] In other words, governments can create market structures driven by policy objectives that are protected from challenges under the SCM Agreement. This, again, secures space for states to pursue diverse economic measures and industrial policies, in line with pluralism.

In all these respects, and in many other instances, the Appellate Body has built pluralism into the aspects of the WTO that, inspired by the neoliberalism of the 1980s and 1990s, most deviate from pluralism. Just as pluralist norms in the GATT had been subject to cooptation by free trade ideologues at certain periods, neoliberal norms could be adjusted to the spirit of pluralism by the AB. The difference is that protecting pluralism is intrinsic to the role of a genuine adjudicator, for independence and impartiality imply the duty to decide in a manner that is not, and does not appear to be, preferential to any particular state and its political and economic system. In this respect, a legalist view of dispute settlement was in inherent tension with entrenching norms that privileged and indeed sought to globalize a particular ideology of economic governance, even though both were elements of the Uruguay Round project that created the WTO. Awareness that voluntarism and consensus were themselves strained to produce the latter result in the Uruguay Round may well have underpinned to some extent the openness of the AB to judicial creativity in the service of a resilient pluralist spirit in the multilateral trading system. Ultimately this reinforces the close relationship of pluralism to legitimacy in the WTO, despite the inroads of neoliberalism and efforts to shape the trading order in a non-pluralist direction. For this reason, we see the dispute settlement process as an essential plank in a pluralist legal system.

IV. The Future of the WTO

With our pluralist interpretation of the WTO's legal disciplines and its history in hand, we can now return to the critiques of the Organization and to questions about its future. In this Part, we make two claims. First, we argue that pluralism articulates a standpoint from which we can respond to long-standing critics of the WTO: it means that the neoliberal and Washington critiques of the Organization are ultimately misplaced, while progressive hope for the Organization may need to be tempered. Second, we argue that pluralism offers the seeds of a vision for the WTO's future, one that is particularly well-suited to an era of increasing diversity in theories of economic governance, both domestically and globally. Here, we offer five non-exhaustive suggestions as to how the WTO can more robustly pursue a pluralist approach to its institutional mandate going forward, and in so doing, begin to articulate a possible vision of the WTO's future.

A. Responding to the Critics

1. The Neoliberal Critique

To understand what direction the WTO should take going forward, we need to understand whether it should be responding to its long-standing critics and their claims about the future of the WTO. We can begin with the neoliberal critique of the Organization.

Recall that the neoliberal critique of the WTO is that it has not done enough post-Uruguay Round to achieve further legislative outcomes that internalize a neoliberal vision of global

[175] Canada — Certain Measures Affecting the Renewable Energy Generation Sector, Appellate Body Report, WTO Docs. WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013).

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trade. This led to a particularly framing of the MC12: that the WTO was moribund or at risk of becoming a zombie at the time that ministers arrived in Geneva for the MC12, if they could not produce major legislative agreements. This narrative internalizes what has been called the "bicycle" theory of trade liberalization. As Dani Rodrik has described the theory:

> I think it was Fred Bergsten of the Peterson Institute who first formulated the theory that trade liberalization is like riding a bicycle: you can never stop doing it, because if you do you will fall off, and that will be the end of it. The theory has been used to justify why there had to be a succession of trade negotiation rounds at the GATT/WTO. And now it is used to fend off the argument that further trade liberalization may not be an important priority for the world economy given how open it already is: you need to keep liberalizing, otherwise you risk giving up all the gains. . . . I don't know whether the Bergsten rule was ever valid, but I am pretty sure it does not apply currently. The notion that if you start putting a few chinks on the existing trade policy architecture, you end up back in the 1930s is quite implausible—and totally unsupported by any empirical evidence that I know of.[176]

This passage reveals that there are two related elements of the bicycle theory. The first is the notion that there can be no retreat or rebalancing of the system in a more protectionist or less liberalizing direction, without the system falling apart. In other words, no pedaling backward. The second is that the bicycle collapses even if one simply holds the line at the existing level of liberalization—without achieving further gains to liberalization through legislative output. Thus, while pedaling backward is unthinkable, so is maintaining any equilibrium or balance by standing still. As such, the system's survival into the future is to be judged by the ability to conclude more and more liberalization agreements.

Our examination of the pluralist legal architecture of the GATT and WTO in the previous Part shows that the bicycle theory was never part of the GATT or WTO as a legal system. The existence of waivers and the possibility of rebalancing tariff concessions (Article XXVIII of the GATT); the variety of exceptions that relate to public policy including national security, which have been read capaciously by the Appellate Body; and the permissibility of anti-dumping and countervailing duties make crystal clear that the system was designed to allow a range of unilateral and collective avenues in response to a need to rebalance in the direction of less or more qualified liberalization. The use of these various flexibilities has, in general, maintained the system through various economic and financial crises over the last decades, despite the constant anxiety introduced by the bicycle theory's neoliberal viewpoint that when protectionist pressures re-emerge and there is some rebalancing or adjustment, even temporary, the bicycle is doomed to fall over.[177]

The COVID-19 pandemic is the most recent example of successfully managing through existing flexibilities the understandable pressures to close borders. At the outset of the pandemic, many WTO members imposed export restrictions on medical equipment and treatment, the kind of beggar-thy-neighbor behavior that the original GATT architecture

[176] Dani Rodrik, *Trade Policy as Riding Bicycles*, DANI RODRIK'S WEBLOG (July 20, 2007), *at* https://rodrik.typepad.com/dani_rodriks_weblog/2007/07/trade-policy-as.html.

[177] *See* Andrew Lang, *Protectionism's Many Faces*, 44 YALE J. INT'L L. ONLINE 54 (2018), *at* https://www.yjil.yale.edu/features-symposium-international-trade-in-the-trump-era.

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was intended to constrain.[178] Members did so largely by invoking the flexibilities in Article XI of the GATT, which prohibits export and import bans and restrictions, but allows such measures as temporary responses to critical shortages.[179] Or alternatively, members invoked the flexibilities in GATT Article XX.[180]

But crucially, as these members were able to manage the pandemic in ways less harmful to other members, restrictions were removed or eased.[181] The "pedaling backward" did not make the bicycle fall down. Instead, it was limited in duration and magnitude, and did not bring down the system. This casts further doubt on the bicycle theory and suggests that its approach to liberalization misunderstands the flexible pluralism that inheres in the WTO's legal order, as both an empirical and a legal matter.

Let us now consider the second element of the bicycle theory: the constant need to negotiate significant new liberalizing agreements lest the bicycle fall down. Given our discussion of the WTO's institutional purpose and remit discussed above, our response to these concerns is to suggest that they are misplaced. Indeed, we reject the idea that continually achieving new liberalization agreements is a hallmark of a functioning WTO. The WTO's legislative ambit is limited to situations in which there is a genuine overlapping consensus between member states—and this is, by logical necessity, an area where there is declining marginal scope for agreement among diverse states. As such, our view is that there are many areas of international economic governance where moving to a rules-based approach, rather than political accommodation and adjustment, is likely to be incompatible with pluralism. For this reason, and while this may be a disappointing or even negative conclusion for some, further liberalization and integration at the multilateral level is unlikely.

Likewise, the idea that the WTO's legal disciplines should be challenging non-market economies and requiring domestic transformation on the basis of some vision of the state/market relationship is inconsistent with its pluralist founding. Those who wish for trade liberalization at the multilateral level that deeply alters the domestic political economy of member states ignore the WTO's institutional history, the purpose of many of its legal disciplines (particularly as interpreted by the AB), and its foundational commitment to pluralism.

For example, take e-commerce, an ongoing subject of negotiation at the WTO.[182] At the MC12, member states were able to agree to extend the current moratorium on customs duties on digital trade, while negotiations continue.[183] Despite this, we do not think it likely that member states will actually reach agreement on new comprehensive rules for the digital trade sector. Given the variances in their domestic political and economic systems, the United States, the EU, China, and India, for example, are not likely to agree to any comprehensive new rules for the digital trade sector. Their interests in digital trade and their stages of

[178] WTO, Summary of Export Restrictions and Trade Easing Measures Relating to the COVID-19 Pandemic, Report by the Secretariat, WTO Doc. G/MA/W/168/Rev.2 (Mar. 29, 2022).
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *See* WTO, General Council, Work Programme on Electronic Commerce, WTO Doc. WT/L/274 (Sept. 25, 1998).
[183] Work Programme on Electronic Commerce – Ministerial Decision, WTO Docs. WT/MIN(22)/32, WT/L/1143 (June 22, 2022).

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development are simply too disparate, as others have argued.[184] While plurilateral negotiations (i.e., among a subset of WTO member states) may be successful, it is hard to imagine an ambitious multilateral result.

This likely failure follows many other failed attempts at agreement on domestic policies during the WTO era. Yet these failures have not meant the end of the WTO. Indeed, in the almost two decades from Seattle to MC12, much of the WTO's entire life, the repeated failure to achieve such new liberalizing agreements, pushing farther into states' domestic regulatory autonomy would, one could have thought, provided ample opportunity for the bicycle to fall down—especially given shocks such as the 2007–2011 financial crisis. Even the Trump administration's apparent willingness to impose trade restrictions without regard for the WTO legal framework, and blocking of the Appellate Body, did not make the bicycle fall down. Some states that were targeted with Trump tariffs engaged in limited, calibrated retaliation outside the WTO dispute settlement framework,[185] which had been wounded by the demise of the Appellate Body. On the other hand, even the Trump disruption, and China-U.S. trade tensions generally, have not led to the kind of protectionist free-for-all, a general descent into anarchic beggar-thy-neighbor behavior, that the GATT's founders most feared. The Swedish Board of Trade found only a modest increase in tariffs in the 2007–2019 period, and in 2020 some modest reduction.[186] The WTO's most recent report on G20 trade measures shows that during the Trump era and peaking near its end in 2020 there was a noticeable increase in import-restrictive measures by G20 countries and also an increase in the use of trade remedy flexibilities, anti-dumping, and countervailing duties. But these have eased off and in fact are now even lower than immediate pre-Trump levels.[187] Indeed, perhaps an even more radical defect of the bicycle theory is that it has no way of coping with the current political and economic situation, which may require not just standing still but some amount of backpedaling in order to preserve the basic framework of liberalization, given global events.

2. *The Washington Critique*

One strand of the Washington critique of the WTO is that its substantive rules do not sufficiently discipline state-led capitalist economies. As noted above, the WTO's broadly pluralist approach to domestic economic and political structures means that it is unlikely to be designed to root out any (but the most dogmatically nationalistic) structures of domestic political economy. Again, the idea that the WTO's legal disciplines should be disciplining non-market economies and requiring domestic transformation for its own sake, or on the basis of some vision of the state/market relationship, is inconsistent with a commitment to

[184] Gautami Govindrajan & Ayushi Singh, *Curb Your Enthusiasm: The WTO E-commerce Negotiations and the Developing World*, 13 TRADE L. & DEV. 1 (2021); He Bo, *The Development and Outlook of International Digital Trade Rules Within the WTO Framework*, 10 J. WTO & CHINA 38 (2020); Mira Burri, *Digital Transformation: Heralding in a New Era for International Trade Law*, 13 TRADE, L. & DEV. 38 (2021); Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21 J. INT'L ECON. L. 297 (2018).

[185] Thiemo Fetzer & Carlo Schwarz, *Tariffs and Politics: Evidence from Trump's Trade Wars*, 131 ECON. J. 1717 (2021).

[186] Per Altenberg, *Rising Protectionism Signals Valuable Lessons Have Been Forgotten*, INT'L INST. SUSTAINABLE DEV. (July 28, 2021), *at* https://www.iisd.org/articles/rising-protectionism-signals-valuable-lessons-forgotten.

[187] WTO, Report on G20 Trade Measures (July 7, 2022), *at* https://www.wto.org/english/news_e/news22_e/report_trdev_jul22_e.pdf.

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pluralism. To put it mildly, it is not likely that the WTO's member states will reach agreement on this issue. And from the normative perspective we identify here, nor should they. The WTO is right to facilitate a diversity of approaches to political economy at the domestic level.

In addition, the Trump administration's attempt to change China's behavior by breaking out of the WTO's constraints on tariffs could be viewed as a kind of real-world experiment that proves the WTO's approach to be correct. While the administration was able to negotiate a so-called Phase I trade agreement with China, the agreement lacked any effective dispute settlement mechanism, China's commitments on its domestic policies were vague, and it was widely accepted that China had not fulfilled other commitments in the agreement, such as minimum purchases of American commodities. Breaking out of the multilateral framework, in other words, was ineffective in changing China's policies that derive from its basic choices of ideology and governance. This gives lie to the notion that the WTO somehow failed in not achieving this kind of change.

Let us return to the second dimension of the Washington critique: the attack on the dispute settlement system. In focusing almost exclusively on the cases that apply constraints on the use of remedies for unfair trade practices, the Washington critique distorts the record of the Appellate Body. As we have set out extensively above, the AB has typically interpreted WTO norms deferentially, preserving pluralism, including the right to agree to disagree about the fairness of domestic policies impacting upon trade, but also the product of basic governance choices of diverse WTO members.

There may well be substance to the view that the AB has not shown the same pluralist sensibility in trade remedy cases that it has exemplified in other areas of legal interpretation. However, the Washington critique has focused on the wrong target. Instead of attacking legalism in dispute settlement, it would be much more appropriate to single out the many questionable interpretative choices the AB made in the cases on anti-dumping and countervailing duties that represent smoking guns for proponents of the Washington critique. So far, paralyzing the appellate process has not produced any evolution in the direction of deference in cases concerning trade remedies, even if there is a reasonable case that such deference is desirable.

The U.S. approach has also not achieved change on the ground. While the United States has brought the dispute settlement system close to the brink by paralyzing the Appellate Body, WTO members have pushed back. The blockage of the Appellate Body has not dissuaded them from bringing disputes to panels. The demise of the AB has also not meant the demise of appellate review at the WTO. Member states have developed an ad hoc appellate arbitration mechanism following the collapse of the AB, in order to preserve appellate review.[188] As such, much of the AB's function of impartial and disinterested legal interpretation can continue to be fulfilled, albeit on the basis of ad hoc arbitration rather than through a permanent appellate mechanism and without the enforcement mechanism associated with the formal dispute settlement process.

Ultimately, the demise of the AB cannot snuff out the culture of pluralism and the rule of law that it created within the WTO membership. The Appellate Body controversy revealed

[188] World Trade Org. Press Release, Colombia Initiates Appeal Arbitration in Frozen Fries Dispute, Discloses Panel Report (Oct. 10, 2022), *at* https://www.wto.org/english/news_e/news22_e/disp_10oct22_e.htm.

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that the United States alone among WTO members was deeply dissatisfied with that culture. The capacity of the United States to use its veto to block the Appellate Body is one thing, but a legal culture supported by almost the entire membership need not atrophy. The leadership of the WTO, its legal officials, the panelists they appoint, WTO practitioners and scholars, and WTO member states can all constructively contribute to preserving that culture as new disputes arise and as global conditions change, posing new challenges for pluralism.

There is also no evidence so far that panels, the Secretariat, or WTO members in general are expecting or hoping that adjudication after the blockage of the Appellate Body would significantly deviate from, or not routinely follow, the jurisprudential *acquis* of the Appellate Body. For example, a recent panel report in a complex SPS dispute, *Costa Rica – Avocados*, summarized and applied the rather deferential approach to scientific justification that, as noted above, the AB had developed in the *Hormones* dispute.[189] Likewise, the decision of the bilateral appellate arbitrators in *EU – Pharmaceuticals* affirms this approach.[190] In this case, the EU had challenged Turkish localization requirements, designed to get foreign pharmaceutical companies to produce more drugs within Turkey. The arbitrators found that this regime was discriminatory and that it could not be justified on the grounds of GATT Article XX(b) (protection of health) because there was no evidence that this was the reason for Turkey's imposition of localization requirements. But they were careful to leave open the possibility that if such a localization scheme were actually designed to protect the health of persons by ensuring local supply of pharmaceuticals, it could be justified. As such, the arbitral award retained much of the pluralist flavor of AB judgments: the idea that states have the right to set their own regulatory goals and their own levels of protection.

3. *The Seattle Critique*

Our pluralist reading of the law and history of the GATT/WTO may offer solace to some Seattle critics, as we have attempted to show systematically that the association of the WTO with an aggressively neoliberal approach to global economic governance is overblown. We have also sought to show (here and elsewhere) that the WTO's legal order leaves ample room for diverse domestic political economy structures, including allowing states to take trade-restrictive action on the basis of other norms of international law, such as human rights law and international labor law.[191]

But in other ways, our analysis here may be disappointing to progressive critics who wish to see the WTO directly take on a major global role in tackling the crucial issues of our time, such as climate change. Our argument here is that the WTO is best suited to incremental legislative gains, not grand bargains. As such, social and environmental activist critics of the

[189] Costa Rica - Measures Concerning the Importation of Fresh Avocados from Mexico, Panel Report, WTO Doc. WT/DS524/R (Apr. 13, 2022). While as noted, U.S. blockage of AB appointments has not led to any movement of the WTO membership to affirm a proper standard of deference in trade remedy cases, the appeal arbitration in *Colombia-Frozen Fries*, decided while this Article was in copy editing, did indeed make an important advance in fulfilling the proper deference to domestic agencies in anti-dumping disputes. A new appellate jurisprudence is more plausible as a solution to the underlining issues in trade remedy cases posed by the Washington critique than obstructing appellate review.

[190] Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products - Arbitration Under Article 25 of the DSU, Award of the Arbitrators, WTO Doc. WT/DS583/ARB25 (July 25, 2022).

[191] *See* Howse & Langille, *supra* note 105; Howse, Langille & Sykes, *supra* note 105; Langille, *supra* note 164.

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WTO may need to revise their expectations for future grand bargains and major legislative output. Because of the diversity of social and economic systems that must be respected in a pluralist legal order, grand projects to deploy the WTO for such ends are at odds with its legal character.

But this does not mean that such progressive critics should go silent or abandon the WTO as a site for multilateral cooperation on issues of global importance. Pluralism does not preclude the WTO being used as a site for member state cooperation on global commons issues. There is no intrinsic reason why, along the lines of the accord on fisheries subsidies, the initiative to curb plastics pollution should not move forward at the WTO, or, much more ambitiously, a negotiation to put legal curbs on fossil fuel subsidies could not take place under the WTO's auspices. There are genuine global goods that can be pursued here, about which cooperation and discussion is essential, but whether cooperation is *possible* depends on managing the transitional costs and how they fall on different states, and indeed different social actors within and across states. As discussed above, this latter concern falls within our conception of pluralism as not merely defensive of policy space but as attentive to diversity in policy capacity and resources.

4. The WTO's Future Mandate: Toward a More Fulsome Embrace of Pluralism

Unlike most of its critics and many of its (worried) well-wishers, we see the starting point for considering the WTO's post-MC12 future as a resilient if constantly challenged pluralist legal system that has already survived many crises and shocks. The system has rightly allowed for periods of greater liberalization and has shown that it can preserve the basic legal certainty of commitments in periods of retreat or readjustment, albeit while having to live with a certain amount of great power unilateralism or self-judging in areas perceived to touch closely matters of national security (all legal systems, both domestic and international, have to cope with *some* level of defection or non-compliance, often accompanied by cynicism about the meaning of legal restraints or a sense of entitlement to take the law into ones own hands when it comes to visceral "survival" concerns). Its partial cooptation by neoliberalism strained and stressed the pluralist fabric of the system. But even when neoliberalism was at its height, various features of the multilateral trading order allowed for pushback or resistance against the hegemony of neoliberalism, and the powers and interests behind it. Conversely, in times where basic liberalization commitments have been challenged by crisis, the system's many flexibilities having been used with relative restraint, or at least without egregious abuse, avoiding a severe protectionist spiral that would destroy trust in the norms themselves.

But to dispel the narrative of failure and dysfunction and inject energy into the range of constructive pluralist-oriented initiatives that have begun with MC12, an alternative unifying vision or narrative is arguably needed. Here we propose, building on our starting point of the relative resilience and success of the basic pluralist legal forms of the WTO, the idea of embracing pluralism in practice and fact, and above all as the animating spirit of the WTO. In this respect, the WTO's legal architecture provides a solid foundation for a vision of trade in our era as accommodating and even enabling or celebrating diversity and experimentation in social economic governance. Echoing Roberto Unger, we view this pluralism not just as a necessary limit to trade liberalization, but as an aspirational goal, to be sought in a time when one economic governance paradigm

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(neoliberalism) is collapsing but no other has clearly emerged, a time for a wealth of experiments and dialogues between different countries with different approaches.[192]

This vision of realizing the spirit of pluralism entails several shifts in thinking about the WTO's role in supporting international trade. Here, we offer five suggestions as to how to do so: first, by supporting inclusive trade; second, by building capacity and participatory mechanisms; third, by embracing policy divergence and the WTO's potential to operate as a forum for deliberation, if not consensus; fourth, by rejecting omnibus, single-undertaking style agreements; and fifth, by adopting a facilitative approach to other international regimes.

Our first suggestion is for the WTO is support an agenda that is sometimes denoted as "Inclusive Trade,"[193] which would require a rethinking of the notion of barriers and restrictions to trade. The traditional way of looking at barriers or restrictions to trade is in terms of market access for multinational corporations, large economic actors backed by powers such as the United States and the EU. From an inclusive trade perspective, the focus should shift to enabling or empowering a much more diverse group of actors to gain benefits from trade, where the barriers may include lack of access to information technology, scarcity of trade financing, and the high costs of customs formalities, which may be prohibitive for small traders. Critics of neoliberal globalization who advocate for "going local" often do not seek the closing of borders. Instead, they are focused on the way in which free trade empowers for example Big Food, which has the capacity to control supply chains globally. Empowering direct trade between communities and small economic actors enables local takeback of control over supply chains while preserving openness.[194]

The one major agreement negotiated in the WTO since the Uruguay Round, the Trade Facilitation Agreement, is an example of the kind of innovation in the WTO architecture that can address these kinds of concerns. The TFA is not about curbing domestic regulation for the sake of market access; instead, it is a blueprint for cooperation among states to make the machinery of goods crossing borders more efficient and more accessible.

The WTO should continue to develop mechanisms that expand the actors who have meaningful access to the global trading system. Along these lines, the Organization has already developed initiatives on trade and gender, and in support of enhancing the capacities of small- and medium-sized enterprises. Some might view these cynically as window dressing to make the WTO seem to have more of a human face. But going forward they exemplify what needs to be central to the WTO's vision of its future. This goes to our conception of pluralism as not simply a return to "embedded liberalism," which contains the crucial idea of

[192] Unger asks, pointedly, "What would an economic theory look like that treated the deepening of diversity, including diversity of the institutional arrangements defining a market economy, as an intermediate goal equal in importance to the achievement of efficient resource allocation on the basis of established institutional arrangements?" Roberto Mangabeira Unger, Free Trade Reimagined: The World Division of Labor and the Method of Economics 49 (2007). Unger further suggests that "[t]he formative goal of the trading system should . . . be the reconciliation of alternative development strategies and alternative versions of economic, political and social pluralism rather than the maximization of free trade." *Id.* at 181.

[193] Annabel Gonzalez, *Making Trade More Inclusive*, World Bank Blogs (Sept. 30, 2015), *at* https://blogs.worldbank.org/trade/making-trade-more-inclusive. *See also* Greg Shaffer, *Retooling Trade Agreements for Social Inclusion*, 1 U. Ill. L. Rev. 1 (2019).

[194] *See* Kathryn Judge, Direct: The Rise of the Middleman Economy and the Power of Going to the Source (2022), especially ch. 9, "Connections, Local and Global." On the theme of empowerment, see Robert Howse & Kalypso Nicolaïdis, *Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large,* 79 L. & Contemp. Prob. 259, 278–80 (2016).

acceptance of diversity of political and economic systems, but assumes that all member states will have the capacity to capture the gains, and redistribute according to their domestic values the costs and benefits of gains from more liberal trade. But this assumption does not correspond at all to the actual diversity of states' experience today, or the experience of different social groups.

Second, and related, making pluralism live up to its commitment to diversity in the fullest sense requires attention to the actual capacity of individual WTO members to implement and benefit from any future WTO Agreements. Here the TFA points the way, in linking the level of obligation of different WTO members to their capacities, and the need for capacity building in some WTO members, to the obligation to provide technical assistance.[195] The Fisheries Subsidies Agreement as it emerged out of MC12 reflects this vision to some extent, though some developing country critics have argued that it needs to move farther in that direction. The Agreement envisages a fund to assist developing countries to adjust to and implement their obligations.[196]

Third, as experimentation with new industrial policies and forms of economic governance more generally continues and intensifies in the post-neoliberal era, instead of viewing policy divergences as threatening to trade or the WTO system or pushing for restricting or harmonizing new domestic policy experiments through restraints on state enterprises and new limits on subsidies, the WTO should provide a forum for deliberation among states concerning their different experiments, aimed not at convergence but mutual learning, even if the result is ultimately agreeing to disagree. Fortunately, while the United States, the EU, Canada, and Japan have declared that this is an essential pillar of WTO reform,[197] the outcome of MC12 makes no reference whatever, not even at the level of aspiration or general principle, to the anti-pluralist demand to reform WTO rules to reign in activist industrial policy. Canada, the United States, and the EU are all now straying in important ways from the neoliberal aversion to industrial policy, and China has proven understandably resistant to the idea that it should change its domestic governance model, especially with neoliberalism collapsing. Mona Paulsen, elaborating on the concept of agreeing to disagree, rightly emphasizes the deliberative function of the WTO: as providing a "transparent, deliberative processes [for] [t]alking and information sharing."[198] In a pluralist international legal regime, persistence of disagreement and differences, even over significant periods of time without full resolution, is not a sign of failure or impasse. As Monica Hakimi suggests: "Even as international law enables global actors to work past their differences and toward their shared ends, it also enables them to hone in on those differences and disagree—at times fiercely and without resolution. It does so because the two kinds of interactions are interdependent. Rather than foster cooperation at the expense of conflict, international law fosters both simultaneously."[199]

[195] *See* Eliason, *supra* note 50.

[196] *Agreement on Fisheries Subsidies*, *supra* note 6.

[197] *See* Joint Communiqué of the Ottawa Group on WTO Reform, WTO Doc. WT/L/1057 (Jan. 25, 2019); Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, Washington, D.C. (Jan. 14, 2020), *at* https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf.

[198] Paulsen, *supra* note 109.

[199] Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L. L.J. 1 5 (2017).

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Already the use of WTO committees, such as the TBT Committee, reflects aspects of this approach: instead of going to dispute settlement to challenge each other's domestic regulations, WTO members share information and engage in dialogue about their approaches to certain regulatory challenges.[200] Where members adapt their policies in response to information from others, this is entirely in the spirit of pluralism. Mutual learning is not threatening to basic choices about social and economic governance, rather it can result in states' being better able to fulfill their own values and policy visions.[201]

Fourth, to fulfill the spirit of pluralism, future WTO negotiations need to shed the single undertaking model, where members are pressured to agree to new rules that are odds with their conception of domestic economic governance or even of national interest in return for concessions on other matters. As we have argued, this was one of the main ways in which pluralism was undermined during the Uruguay Round negotiations. Crucially, MC12 saw a shift away from the single undertaking model. In an interview with *Financial Times* journalist Alan Beattie, WTO Director General Ngozi Okonjo-Iweala revealed that she had instructed WTO members not to engage in linkage between different agreements and instruments being negotiated on different topics.[202] From the perspective of fulfilling pluralism, this may indeed be the one truly transformative moment of the MC12.

Fifth, fulfilling the spirit of pluralism demands attending to the relationship of the WTO to other legal regimes, including potential club-type arrangements to address climate change. But the spirit of pluralism here requires a facilitative approach, which does not attempt to shut down such initiatives as threats to open MFN-based trade, but rather to broaden any emerging climate clubs so that their entry price is affordable for more and more countries. There are many other examples. As the Financial Action Taskforce itself acknowledges, its anti-money laundering rules have unintended consequences that can threaten inclusive trade, by creating standards for financial institutions that make it too expensive to provide trade finance to small traders.[203] More generally, keeping open access to trade finance, especially for developing countries, in the face of challenges like sovereign debt and global financial instability requires concerted efforts between the WTO, the International Monetary Fund, the World Bank, and regional development banks.

Conclusion

The WTO is at an important institutional crossroads. The Organization has been buffeted by critique from neoliberals and Seattle-type progressives alike since its inception in 1995, and its dispute system was recently brought near the brink of collapse by U.S. paralysis of the WTO's Appellate Body, upon which the system had come to depend. While the recent

[200] Lucian Cernat & David Boucher, *Multilateral Cooperation Behind the Trade War Headlines: How Much Trade Is Freed Up* (CEPS Policy Insights No PI2021-03, 2021).

[201] *See* Robert Wolfe, *Informal Learning and WTO Renewal: Using Thematic Sessions to Create More Opportunities for Dialogue*, 12 Glob. Pol'y 30 (2021).

[202] Robert Wolfe, *Have We Just Seen the Funeral of the WTO "Single Undertaking"?*, Trade Beta Blog (June 21, 2022), *at* https://tradebetablog.wordpress.com/2022/06/21/have-we-just-seen-the-funeral-of-the-wto-single-undertaking.

[203] *See* Financial Action Task Force, *Mitigating the Unintended Consequences of the FATF Standards* (2021), *at* https://www.fatf-gafi.org/publications/financialinclusionandnpoissues/documents/unintended-consequences-project.html.

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MC12 resulted in last-minute agreement among WTO member states on a range of issues, both neoliberal and progressive critics argued that the WTO has not made sufficient substantive progress on rulemaking. And the MC12 did little to respond to trenchant American critiques of the Organization, including of its dispute settlement process. The WTO is also grappling with changing ideological tides as to how the global economy should be managed, with neoliberalism largely in retreat, and with states experimenting with new forms of economic intervention, "values-based" trade, and "friend-shoring."

In this context, the WTO appears to be an organization in crisis. It appears to lack an institutional mandate and a strong vision for the future. In this Article, we have sought to offer such a vision for the WTO's future, rooted in a particular interpretation of its past. We have argued that the WTO's legal architecture is characterized by a resilient pluralism. This pluralism seeks to preserve diversity of governance models and regulatory approaches, both economic and political, in the domestic orders of WTO member states. Despite strong pressures to impose a neoliberal vision of the state-market relationship on member states through the WTO's legal disciplines, the WTO's legal order has largely resisted this clarion call. The WTO's legal disciplines allow states to respond to harms generated by certain types of economic policies of other states, where there is political agreement among all member states that these harms exist and are suitable to collective disciplines. And WTO non-discrimination rules impose limits on some types of extreme domestic nationalist policies. But the WTO's history is characterized by a strong commitment to preserving diversity of economic and political policy at the domestic level.

This has been achieved through several means. First, pluralism has been achieved in part by the GATT/WTO's commitment to consensus-based decision making, which attempts to ensure that states only agree to commitments on multilateral trade that are consistent with their domestic regulatory philosophies and systems. While this commitment to consent-based voluntarism was compromised at points during the WTO's history, particularly during the Uruguay Round, it remains an important vector for protecting pluralism. It also means that, by definition, there is likely to be diminishing political consensus among WTO member states on new areas of liberalization, as the area for possible agreement among states with very different economic and political commitments at the domestic level shrinks. For this reason, we are not likely to see the WTO continue to produce new agreements or ever-deepening commitments to liberalization or integration.

Second, pluralism was protected by the GATT's substantive legal disciplines. While organized around detariffication and the core norm of non-discrimination, the GATT's legal disciplines included many provisions that sought to protect states' right to regulate—their ability to structure their domestic legal and political orders as they saw fit. The GATT also offered avenues for states to deliberalize and to use unilateral measures in areas where agreement could not be reached; and offered an entirely differentiated regime for developing countries that was sensitive to their lack of capacity and different development needs. These disciplines remain the backbone or core of the WTO's legal order today.

Third, pluralism was protected even in the most dangerous moments of the WTO's flirtation with neoliberalism as a hegemonic ideology for global economic governance. The additional agreements that emerged out of the Uruguay Round were partly the result of ideological capture and problematic bargaining on the part of the developed West; in seeking to move "beyond the border" to promote deregulation and regulatory integration, and to

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protect controversial intellectual property rights favored by some participants in the negotiations, the WTO clearly tipped into an anti-pluralist approach. But even these controversial agreements contained the seeds of pluralism, with important carveouts, exceptions, and safeguards. Thus even the most non-pluralist of the WTO's legal disciplines were not as ideological as the Seattle critics feared.

Fourth, pluralism has been reinvigorated through the crucial work of the AB, which has worked systematically to rebalance the anti-pluralist elements of the Uruguay Round outcomes in favor of a more GATT-like approach that protects states' rights to regulate. During its tenure, the AB blunted the more problematic elements of the covered agreements and protected states' ability to regulate for reasons that are important to them.

Implicit in our argument is that these pluralist features of the GATT/WTO are normatively valuable and help make the WTO more legitimate. They are well-suited to a world in which there is genuine ideological disagreement about the relationship between states and markets; to a world marked with power imbalances in decision making at the global level; and to a world in which there is increasing ideological dissensus about the nature of global economic governance. The pluralist approach is modest and requires political agreement among states before the multilateral trading system can step in.

This pluralist approach offers a broader perspective on the long-standing as well as more recent critiques of the WTO. It suggests that the neoliberal critics of the organization are unlikely to be placated, because their demand for ever-greater liberalization will not be met. Nor should it. Seattle critics may be cheered by our characterization of the WTO's underlying legal disciplines, but our approach may also offer a note of caution to such critics, on the grounds that the WTO's institutional remit is inherently quite limited. Finally, our detailing of the resilient pluralism of the WTO offers a response to U.S.-centric critiques. These critics misunderstand the WTO's commitment to pluralism, if they think that the Organization should be imposing a particular model of economic development. And in handicapping the AB, these critics also misunderstand the resilience of the WTO's legal commitment to pluralism, which includes a robust commitment to the rule of law and judicial elaboration of legislative disciplines, in order to respect the WTO's pluralist character. In questioning whether the AB, in cases involving trade remedies, has been sufficiently sensitive or deferential to domestic agencies, U.S.-centric critics operate in the spirit of pluralism. But blocking the AB has not proven a path forward in adjusting the trade remedies jurisprudence in a pluralist direction. By contrast the appointment of an entire new bench of AB judges would be an opportunity for the United States to engage with the WTO membership on the appropriate judicial philosophy in trade remedies cases and indeed to shape the bench itself.

The pluralist approach offers the WTO a positive path forward: when we articulate pluralism as a goal or a new narrative for the WTO, we can offer a new vision of how to understand its mandate, in a world of diverse states and diverse economic theories. As we have argued, the WTO should support its pluralist mandate in several ways. First, it should actively support "inclusive trade," which seeks to develop and support participation in the trading system, permitting more and different types of actors to benefit from its legal order. Second, to facilitate this, it should redouble its longstanding commitment to capacity building and participatory mechanisms. Third, instead of seeing policy divergence or lack of agreement as a problem, the WTO should embrace this as a normal and expected outcome,

given the pluralist commitments of its states and increasing pluralism in theories of global economic governance. As such, the WTO should embrace is role as a forum for deliberation, even if that deliberation may not necessarily result in new forms of liberalization or agreement. Fourth, the WTO should reject omnibus, "single-undertaking"-style legislative approaches going forward. These approaches are both unlikely to succeed, given the shrinking possible areas of legislative agreement, and tend to erode actual consent to legislative commitments and thus are inconsistent with pluralism. In the future, incremental legislative gains are both politically likely and normatively desirable, from a pluralist perspective. Finally, we argued that the WTO must adopt a facilitative approach to other international regimes in a pluralist spirit.

Ultimately, we hope that this pluralist characterization of the WTO's legal order, the responses to the critics we offer, and these suggestions for a positive path forward offer the seeds of a renewed mandate for the Organization. The WTO is neither a panacea for the problems of the global economy, nor a moribund institution past its prime. It continues to have important relevance for states today, although perhaps on a more limited scale than some might wish. But when we understand the reasons for the WTO's self-consciously limited substantive purview and legislative output, and the reasons for its legal design, we can better understand what functions the institution does serve and why it remains a vital part of global governance today. Our pluralist reading is not an apology for the WTO or a defense of the status quo. Instead, pluralism offers a guiding aspiration and articulates an indefeasible requirement of legitimate trade multilateralism under conditions of diversity. In so doing, it provides a standpoint for further critique, if the WTO departs from pluralism at the behest of the powerful or of neoliberal revanchists.

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