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INTRODUCTION

20th Anniversary Issue

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1. Introduction

The multilateral trading order is floundering. Since the creation of the WTO in 1995, the organization has been unable to negotiate any major new agreements. The Doha Round ended in failure and no large-scale market access negotiations are planned. Even plurilateral agreements within the WTO, involving a handful of countries on specific issues, have been elusive.

Instead, the WTO is increasingly being bypassed by member countries reaching bilateral and regional trade agreements. These preferential trade agreements challenge a core principle of the multilateral system – non-discrimination through the most-favored-nation clause. That principle was a bedrock on which the predecessor of the WTO, the GATT, was based.

While its legislative function stumbled, however, the WTO for many years succeeded as an international court. The dispute settlement system was often heralded as the 'crown jewel' of the WTO. But in recent years, the dispute settlement system has become contentious, with the US and others declaring that panel and Appellate Body decisions increasingly embody judicial legislation that goes beyond the text of agreements and creates new obligations that were neither negotiated on, nor agreed to, by the membership. The Obama, Trump, and Biden administrations have all refused to approve new appointments to the Appellate Body. As a result, as of this writing, the judicial function of the WTO has largely ground to a halt.

Scholars and policy makers offer many, often conflicting accounts of what went wrong. Some ascribe the problem to voting rules. When the GATT was formed, it was a club of like-minded nations dominated by the United States and Western Europe; the voting rule adopted was one nation one vote, with many important decisions requiring 'consensus' or unanimity. Assuring an equal voice for all members is easier if the membership agrees on fundamentals. Today, however, the WTO is a universalist organization composed of nations with disparate interests. Yet the WTO retains its founding voting rule.

Others say it is not the rules themselves but that the underlying interests of members have diverged dramatically. The issues on the table in the early years were amenable to mutually advantageous agreements: tariff reductions, border rules, and harmonization of product classification, for example. Today, the issues to be decided are more contentious. As international trade shifted from manufactured goods to services and intellectual property, and tariffs became less important than border regulations and subsidies, rule setting became increasingly complex, making it difficult to reach new agreements.

Finally, still others point to a shift in the distribution of power in the international system. The GATT was built and supported by a hegemonic America. The decline of US power and the rise of China from economic isolation to become the world's second largest economy and the world's largest exporter in the 2000s and 2010s have created a difficult challenge for the organization.

But regime naysayers may have given short shrift to the core function of the organization. The WTO may have stalled in creating deeper liberalization, but it has succeeded in maintaining a

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relatively open trading regime. Trade barriers are low by historical standards and the members of the WTO have, to a great extent, abided by their treaty obligations. As the late Robert Hudec once remarked about GATT, most nations continue to adhere to most of their obligations most of the time. Members have largely refrained from re-introducing overt protectionism into domestic markets, even during economic downturns. The breakdown in formal dispute resolution has not produced a cascade of lawless behavior even though a few flagrant violations have arisen.

Likewise, the issues currently on the agenda – digital trade, e-commerce, climate change, and China's non-market economy model – are more difficult than many tackled in the past. Among other things, they require a shared view on the proper degree of government involvement in the economy. The original GATT system was founded by democratic or quasi-democratic nations who agreed that government had over-stepped and undermined economic growth in the interwar years. Today, there is no such consensus around which a successful trade regime can be built. The world's second largest economy has not only eschewed democratic principles but the liberal values of market autonomy. It should not surprise us that progress seems slower than before. In short, although it would be a mistake to describe the WTO as a failure, it unquestionably faces stiff challenges. Its long-term relevance in the face of proliferating bilateral and regional arrangements is in question.

As the WTO passes its 25th anniversary, the editors of the *World Trade Review* asked a number of scholars from the fields of law, economics, and political science to examine the most consequential issues facing the trading regime today. As an introduction to these essays, we review some basic history of the regime and then introduce the core issues facing the WTO that will determine the future of the trading system, each of which is taken up in the succeeding essays.

2. The Origins of the Trading System: GATT

The GATT/WTO is a product of its historical context: in the ending days of WWII, Western governments sought to revive the world economy by reducing some of the high tariffs and trade restrictions that had plagued the interwar period. The General Agreement on Tariffs and Trade (GATT) was created to encourage national bargains to reduce tariff levels. This effort to create international rules for commerce was led by the US, who invited 23 nations to Geneva in 1947 to swap tariff concessions. The result was a series of tariff agreements and a document that detailed both a set of exceptions to these commitments, and a thin set of general trading rules. These became effective in 1948 and the GATT was born.

Those who signed onto the original GATT thought the agreement was to be temporary, shortly to be replaced by an International Trade Organization (ITO) that was then being negotiated. The ITO's purpose, akin to the IMF and World Bank, was to forestall the disaster that had occurred in the interwar period, which was marked by protectionism and trade wars, all of which led to a collapse in world trade, intensification of the Great Depression, and ultimately war. Because of the pending ITO negotiations, those who wrote the first GATT 'contract' took up a limited agenda, essentially asking members to agree to a general code of conduct based on principles of nondiscrimination. In subsequent years, and in the wake of the failure of the ITO to gain US assent, the contract was expanded in a series of negotiating rounds.

From the start, the GATT existed in a gray area, technically no more than a treaty but increasingly functioning as an institution. The United States, Western Europe, and ultimately Japan were the key participants and the developing countries in Latin America, Africa, and South Asia were never equal partners in the process. The Communist bloc – the Soviet Union, China, and Eastern Europe – was little engaged, notwithstanding accessions by smaller countries such as Hungary and Poland. The GATT was a multilateral agreement but hardly a global agreement.

Much has been written on the US role in these initial years. In the conventional account of the regime, the US offered access to its market as an incentive to facilitate closer security and

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economic ties. But whatever its intentions, US support for deeper economic liberalization was a crucial factor in the growth of the organization. Much of the strengths and weakness of the GATT regime have been attributed to the US, including the perception that the regime began to falter as competition increased in the domestic American market. While tariffs on manufactured goods had fallen by the late 1970s, the US and others began to respond to market disruptions by creating new barriers at the border in the form of 'trade remedies'. The GATT also appeared incapable of reigning in protectionism in textiles and apparel and in agriculture. Nontariff barriers and voluntary export restraints proliferated. A few intransigent disputes resulted in trade retaliation and counterretaliation. Important commercial issues relating to services and intellectual property remained outside GATT discipline.

It also became increasingly clear by the 1980s that the norms of the GATT founders were not shared by all those who acceded to the organization. In the 1960s, the use of specific reciprocity in trade rounds, that is, tariff swaps, had been rejected by the developing world. At the request of these emerging market nations, Part IV of the GATT was added, stipulating that a set of member nations were no longer expected to give equal access to other GATT members' imports. Rather, some nations were granted special and differential treatment. A second core norm, the most-favored-nation principle, also started to erode as more nations signed preferential agreements, ostensibly pursuant to GATT Article XXIV. In fact, the rules of Article XXIV were little enforced and the proliferation of new agreements created a 'spaghetti bowl' of overlapping preferential agreements that looked a lot like the world the GATT was created to fix. Further, the national treatment principle of GATT was increasingly seen to be in tension with legitimate regulatory measures relating to environmental, labor, and other matters.

3. The WTO

The launching of the Uruguay Round in 1986 and its successful conclusion in 1994 was a stunning revival for the trading system. The GATT was supplemented by new agreements on services, agriculture, and intellectual property, updated agreements on trade remedies, and was to be overseen by a new institution, the WTO. The membership now included developing countries and would soon include the former Communist countries, all of which agreed to adhere to the new commitments. The dispute settlement system promised that those commitments would be enforced. The WTO was to be a truly global enterprise in a way that the GATT was not.

In the wake of the breakup of the USSR, those who crafted the WTO believed that a new era had begun. Capitalism had triumphed and as a result, the WTO could, and should, expand its reach. This burst of enthusiasm for free markets helped to spur support for a more centralized, and market centered, set of trade rules.

Today, it appears that this enthusiasm was premature, and in tension with the interests of the now expanded membership. The supporters of the new organization assumed that the problem with the GATT was its flexibility. To constrain its members, the WTO was a 'single undertaking' of all the rules in the treaty, many of which had previously been negotiated as plurilateral agreements among smaller groups of members. The new organization did not consider that for many members, the GATT had been valued precisely because of its flexibility – allowing leaders to placate powerful domestic groups without endangering a general commitment to the open markets. Instead of seeing certain 'extra-legal' measures, such as voluntary restraint agreements and orderly marketing arrangements, as necessary compromises between market discipline and political necessity, the WTO's supporters found fault with these exceptions and undertook to prohibit them. Forcing adherence to the rules of the single undertaking, however, may have exacerbated underlying differences among the membership. By filling in the legal holes and centralizing the adjudication of trade issues in a dispute process that issues binding rulings, the organization may have undermined its key purposes of deepening coordination and

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rationalization of trade. Thus, while the organization continued to enunciate a 'member driven' mantra, the new WTO has been far less sympathetic to the political exigencies of its membership than had been the GATT.

Unsurprisingly, therefore, the WTO faced immediate challenges. Early ministerial meetings were marred by street protests and pitted developing countries against developed countries on issues such as labor standards. The Doha Round of negotiations was launched in 2001 in the aftermath of the 9/11 terrorist attacks, which brought a wave of sympathy for the United States. Unfortunately, there was neither a well-formed consensus on the negotiating agenda nor a deep desire to push liberalization further. The Round quickly floundered and reached an impasse, eventually collapsing altogether despite the substantial curtailment of the scope of the negotiations.

China's accession to the WTO in 2001 also begat a range of problems. It was followed by rapid export growth that crowded out exports from other developing countries and caused a backlash in developed country markets. The so-called 'China shock' battered manufacturing industries in the United States and elsewhere, with empirical studies later indicating that hundreds of thousands of manufacturing jobs had been lost, affecting communities that were slow to adjust. The general consensus in favor of liberal trade suffered a heavy blow. In the United States, for example, politicians on both sides of the aisle attacked China for its myriad of alleged 'unfair' practices, and questioned the wisdom of trade agreements more broadly. An ensuing US–China 'trade war' has resulted in massive tariffs on trade in both directions, most of which flagrantly violate WTO commitments.

Concurrently, the WTO dispute process produced important decisions that prominent members – especially the US – found deeply misguided. Early decisions on the use of 'safeguard measures' created enormous legal hurdles to the lawful use of such measures to protect troubled domestic industries from import surges, a political 'escape clause' that had long provided a safety valve for protectionist pressures under GATT. Subsequent decisions on 'zeroing' in antidumping investigations invalidated a method for the computation of antidumping duties that the US had employed for many years, and that the US believed it had secured the right to retain under the WTO Antidumping Agreement. Later decisions interpreting the term 'public body' in the WTO Agreement on Subsidies and Countervailing Measures invalidated countervailing duties imposed by the United States on imports from China, which it had deemed to be subsidized by various Chinese state-owned enterprises. These and other actions by the Appellate Body led the US to blockade the appointment of new Appellate Body judges, to the point that the Appellate Body no longer functions. Any disputant can now appeal a preliminary defeat before a WTO panel 'into the void', which brings the dispute process to a halt and deprives rulings of any legal force.

4. Understanding the Multilateral Regime

Against this backdrop, we asked nine prominent trade experts from economics, law, and political science to consider the future of the trading regime. Each author will address a key aspect of the current challenges buffeting the WTO.

We begin these essays with an overview of the problems as seen by the former Chief Economist at the WTO, Patrick Low. He documents how the system has changed over time, highlighting the vast increase in the complexity of the issues that arose after the creation of the WTO. Despite the dauntingly formidable challenges facing the system, the need for the trade institution is great. 'If convergence is impossible, divergence must be managed,' he concludes, arguing that divergence without a system is a recipe for historic error.

This overview is followed by two papers focused on the dispute settlement system. Legal expert William Davey, the first Director of Legal Affairs at the WTO, provides a detailed analysis of the dispute system, looking closely at the origins and effects of the current crisis with the Appellate Body. He lays out the possible options for restoring the functioning of the system, while remaining pessimistic that any solution will achieve acceptance among all the key members. Although

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many scholars have blamed the US for the current stalemate, our next paper by political scientist Krzysztof Pelc suggests otherwise, arguing that from its inception, dispute settlement was controlled more by the WTO Secretariat than by the membership. Arguing that the role played by the Secretariat is greater at the WTO than in any comparable international tribunal, Pelc suggests that this may have unwittingly contributed to the current impasse.

The next papers address the effect of China's entry into the WTO, the effects on the trading system of its explosive growth, and the implications of its state-owned enterprises and technology transfer practices. Many of the issues here stem from China's failure to make a full transition to a market economy as the WTO membership had anticipated at the time of its accession. Legal expert Henry Gao takes a detailed look at the origins of Chinese interest in joining the WTO and offers a Chinese perspective on the developments since then. He emphasizes that China too has become frustrated with the WTO and sees many developments – such as the continued treatment of China as a non-market economy under antidumping law – as a deviation from the commitments China had secured. Legal expert Petros Mavroidis and economist André Sapir follow, directly addressing key aspects of the critique of China by its trading partners, with particular emphasis on the role of state-owned enterprises and technology transfer. They argue against 'decoupling' from China and instead favor the negotiation of new WTO rules.

Controversy over the rules governing 'trade remedies' lie at the center of the dispute settlement impasse, and motivate our next two papers. Economist Chad Bown traces the use of trade remedies in the WTO period, arguing on the positive side that trade remedies may have helped sustain greater openness in the multilateral system. On the negative side, however, the WTO's trade remedy provisions have revealed themselves as ill-suited to address the problems that countries under the western economic model have with the increasingly important Chinese economic model. Bown sees no easy solutions to the growing problem of trade remedies. Political scientist Robert Gulotty is more optimistic. Looking closely at the issue of government–market interventions, he expresses greater hope that there is the potential for a reformed subsidies agreement. While past attempts to expand GATT/WTO limits on subsidies have failed, the shift in trade shares away from wealthy states, along with the growth of global supply chains, has made this uneven treatment increasingly important to a majority of member states. The result is renewed and shared interest in new rules.

Our last two papers consider additional issues that go beyond the WTO and bear importantly on the future of the world trading system. Political scientist Stephanie Rikkard examines the effects of increased trade and investment on the interests of domestic groups and their governments transnationally. She notes that the effects of globalization have been unequal across the world, with some regions and some producers finding themselves less able to compete as markets have become more internationalized. She then takes a deeper look at how governments have responded to the disparate effects of globalization within their borders. Finally, legal expert Kathleen Claussen looks at the proliferating alternatives to the WTO regime, including the hundreds of free trade agreements now in force and an even greater number of 'skinny deals' that often fly under the radar. She argues that a primary focus of attention on the WTO may be outdated, and that much of the action has now shifted to these other fora.

These papers touch on only a few of the many challenging issues facing the WTO and the world trading system. The growing number of trade-related matters facing world leaders, as well as the complexity and interdependence of those issues, can seem overwhelming. One can easily become pessimistic at the likelihood of achieving any progress in international negotiations to provide solutions. However, as we have seen in the past, periods of pessimism and doubt can be followed by bursts of multilateral cooperation. That cooperation, even if not enough to solve problems once and for all, can ameliorate them and provide tangible benefits to the world community.

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