Policy Analysis

CATO INSTITUTE

May 8, 2018 | Number 841

Was Buenos Aires the Beginning of the End or the End of the Beginning?

The Future of the World Trade Organization

By James Bacchus

EXECUTIVE SUMMARY

In all too many minds, the relevance of the World Trade Organization (WTO) is much in doubt. The failure of the 11th Ministerial Conference of the WTO last December in Buenos Aires to complete any new multilateral or other agreements—or even to agree on the traditional declaration concluding the conference—has left many wondering if this is the beginning of the end for the WTO.

Expectations were low in Buenos Aires, and the ministers fulfilled those low expectations. Complicating matters, and further stirring doubts, are the continued assaults of the Trump administration on the WTO, both verbally and in the conduct of U.S. trade policy. Traditional U.S. leadership at the WTO is missing, as members struggle to find a way forward toward further trade liberalization and international economic integration.

Yet, despite the seemingly bleak assessments, some see not the beginning of the end for the WTO, but the end of the beginning. There were clear signs on several fronts in Buenos Aires that WTO members are ready to turn toward "plurilateral" solutions on trade that could, in time, become fully multilateral solutions. Multilateral trade agreements must always be the ultimate goal for the WTO. But there is more than one way to get to multilateralism. Starting with agreements among some, but not yet all, WTO members and then gradually transforming them into fully global agreements appears to be the most promising path to multilateralism in the 21st century.

Digital trade, services trade, fisheries subsidies, environmental goods, investment facilitation, and other issues are all ripe for negotiation and agreement. By taking a plurilateral approach toward multilateralism, the members of the WTO can ensure that this is the end of the beginning—and not the beginning of the end—for the World Trade Organization.

James Bacchus is an adjunct scholar with the Cato Institute's Herbert A. Stiefel Center for Trade Policy Studies. He was a founding judge and was twice chairman (chief judge) of the Appellate Body of the World Trade Organization in Geneva, Switzerland. He is also a former member of the U.S. Congress from Florida and a former U.S. international trade negotiator. He is Distinguished University Professor of Global Affairs and Director of the Center for Global Economic and Environmental Opportunity at the University of Central Florida.

> "In the public's mind, and in all too many political and diplomatic circles, the centrality of the WTO to global trade is much in doubt."

INTRODUCTION

Was the 11th Ministerial Conference of the World Trade Organization (WTO) last December the beginning of the end or the end of the beginning for the WTO? Trade negotiators came away from the Buenos Aires, Argentina, conference wondering about the future of the rules-based world trading system. The headlines following the conference were not encouraging. One publication proclaimed, "The WTO May Have Reached Its Breaking Point."[1] Another read, "It's the End of the WTO as We Know It—and Trump Feels Fine."[2] Perhaps the most optimistic of all the headline assessments was that of *The Economist*: "The WTO Remains Stuck in Its Rut."[3] In the public's mind, and in all too many political and diplomatic circles, the centrality of the World Trade Organization to global trade is much in doubt.

Expectations going into the conference were low, and—by and large—those low expectations were fulfilled. The conference failed to produce solutions that the world very much needs to long-festering problems. There was no multilateral outcome at all. Members could not even agree on the customary conference-concluding declaration. Many considered it a major achievement that the U.S. Trade Representative, Robert Lighthizer, deigned to attend the conference—although he left early after lecturing the other delegates largely on all that he and President Donald Trump think is wrong with the WTO. The one hoped-for multilateral outcome—a long-sought agreement limiting fisheries subsidies that support overfishing and illegal fishing—failed once again. And the proposed plurilateral agreement freeing trade in environmental goods that had come so close to closure the year before was barely mentioned in Buenos Aires.

In a world threatened by the seeming retreat of the United States and other countries from the institutions of international cooperation toward the protectionism and mercantilism of "economic nationalism," uncertainty about the future of the WTO is cause for grave concern. This concern has only been heightened by Trump's imposition of new tariffs on imported steel and aluminum and his announced intention of imposing tariffs on other products. The purported basis of some of these tariffs is national security, but underlying all these measures is the accusation that China (and others) are cheating on trade rules. By acting unilaterally on this issue, however, the United States is circumventing the WTO rules that require all members to take all their trade-related disputes falling within the scope of the treaty to WTO dispute settlement for a multilateral judgment before taking any trade action.[4]

According to Trump, the WTO is a "catastrophe" and has been a "disaster" for the United States.[5] At the very least, his tumultuous trade policy signals a turn away from the WTO as the fulcrum of world trade. Globally, a failure by the WTO to continue to provide the framework for rules-based trade would lead to a dangerous accumulation of economic disruption and confrontation as more and more countries emulate the United States and fall back into self-defeating acts of trade restriction and trade discrimination of all kinds. The ongoing stalemate over updating the global trade rules, evidenced anew in Buenos Aires, only reinforces the inclination of many WTO members to look elsewhere for the solutions they need and does nothing to counter the growing forces against trade and against globalization that are fueling commercial confrontation.

At the same time, however, despite the failure of the ministerial conference to produce any multilateral outcome, there were some encouraging signs in Buenos Aires of systemic evolution on several fronts. Subsets of like-minded members pledged to proceed with plurilateral negotiations on a variety of pressing new issues, including digital trade, investment facilitation, disciplines for fossil-fuel subsidies, trade opportunities for micro-, small-, and medium-sized enterprises, and more.[6] Even amid current U.S. hostility toward the WTO, a number of these pledges offer real promise. Indeed, in some—such as the initiative on digital trade—the United

States seems likely to participate.

Although most of the global trade liberalization accomplished under the multilateral system since the creation of the General Agreement on Tariffs and Trade (GATT) in 1947 has been the product of consensus-based multilateral negotiating rounds, the WTO agreements permit—indeed, they encourage—alternative, plurilateral approaches to liberalization in which some, but not all, WTO members agree to move ahead first with new agreements to liberalize trade. If this is to be the end of the beginning—and not the beginning of the end—of the WTO, the momentum for pursuing such plurilateral deals within the WTO framework must be encouraged and harnessed to establish and modernize world trade rules and to continue to sustain the centrality of the World Trade Organization.

THE LOGIC OF MULTILATERALISM

In considering the future of the WTO, it is necessary to understand the importance of multilateralism and nondiscrimination. Central to the success of the international trading system, which gradually evolved from the GATT in 1947 into the WTO in 1995, has been the overarching principle that international trade negotiators describe routinely—and sometimes almost reverently—as "multilateralism." The logic of multilateralism applies to all kinds of international cooperation, but in trade the enduring goal of multilateralism is to act *globally* to reduce trade barriers *globally.*

This has long been accomplished within the WTO-based trading system through the working of one fundamental rule, the rule that requires most-favored-nation (MFN) treatment, an idea that dates back nearly a thousand years to innovations by the Baltic traders of the Hanseatic League. The WTO most-favored-nation rule is widely misstated and is even more widely misunderstood. It is thought by many to mean that in lowering a tariff or another barrier to international trade, one country will give the products of another country *more favorable* treatment than it gives to those of all other countries. In fact, this basic rule of trade means precisely the opposite: products of every other country receive the *same* trade treatment as products of the *most favored* of all countries. The rule requiring MFN treatment forbids discrimination between and among the like traded products of other WTO members.

This fundamental trade principle is enshrined as a general obligation of all WTO members in the WTO agreements on goods and on services in the WTO treaty. Thus, whenever a concession on trade in a good or service is made by one WTO member to another, that same concession must be made to every other WTO member. In this way, the mutual reciprocity of trade concessions is "multilateralized," meaning that all WTO members (and the entire world trading system) benefit from each and every trade concession. Through this mechanism, the reduction of trade barriers over the course of seven decades has been achieved globally. The gains from trade have thus been maximized again and again for all the participants in the system through the successive rounds of multilateral trade negotiations conducted first by the GATT and now by the WTO. Through the working of the MFN rule, a multilateral agreement has vastly more potential to lower trade barriers and, thus, to increase trade and prosperity than will any single or series of bilateral or regional agreements.

The potential global economic payoff from continued reliance on the multilateral approach to trade liberalization could be considerable. World Bank models have suggested that a global free trade agreement "could add $5 trillion to the world's GDP by 2020, $3 trillion of which would go to developing countries. And by the close of this century, such a deal could increase GDP by more than $100 trillion, with most of the gains accruing outside developed nations."[7] Moreover, beyond these numbers, an even greater economic payoff could result from the role of freer trade as a catalyst for necessary economic change. Global free trade would be the equivalent of a global tax cut and could help jump-start much of the modernization that is

"The logic of multilateralism applies to all kinds of international cooperation, but in trade the enduring goal of multilateralism is to act *globally* to reduce trade barriers *globally*."

“Contrary to widespread perception, the multilateral agreement that established the WTO does not require that all of its trade negotiations be conducted multi-laterally.”

needed globally to meet the new challenges of the 21st century.

We are, of course, a long way from concluding a global free trade agreement. As ambitious as it was, the liberalization implicit in the Doha Round of multilateral negotiations did not begin to approach global free trade. But we are much closer than we were decades ago to global free trade because of our past adherence to the multilateral approach, which has long worked well for the trading system. Now, unfortunately, it does not. Now there are vastly more participants in the trading system and thus many more negotiators at the trading table. Now the economic and related interests of the participants vary more than ever before. And now, therefore, WTO members find it increasingly difficult to negotiate multilaterally under the procedures they have long followed.

Since 1947, multilateral trade negotiations have aimed to produce an outcome characterized as a “single undertaking”—a situation where nothing is agreed until every country taking part in the negotiations agrees on everything. Moreover, multilateral trade negotiations have long sought to achieve a consensus, meaning that nothing can be concluded if any one negotiating party formally objects.[8] Now, though, it has become exceedingly difficult for the members to reach a consensus in a single undertaking. The Doha Round, launched in 2001, achieved virtually none of its objectives after 14 years of frustration and impasse.

Despite these real obstacles, the logic of multilateralism remains. When attainable, multilateral approaches to market access and to rules for trade are still the best way to boost world trade and the prosperity that follows. On some significant issues, such as the global market distortions caused by agricultural subsidies, only multilateral solutions are available. Plurilateral solutions will not work. Politically, it would be impossible for the United States to agree to cut its agricultural subsidies if the European Union were not subject to similar terms. And how could the United States and the European Union agree to agricultural subsidies cuts in a plurilateral deal if China were not subject to similar terms? And so on.

Furthermore, changing a rule of general application in the trading system in a less than fully multilateral way would pose fundamental problems. Take, for example, the “national treatment” rule, which forbids discrimination in favor of local producers over foreign producers of like imported products. What would happen to the flow of world trade if national treatment were changed in a plurilateral agreement to mean one thing for some countries and something entirely different for others? As a result, there would be something considerably less than the desired security and predictability for the overall WTO-based world trading system.[9]

On these and on some other issues relating to market access and trade rules, the only solutions are multilateral ones. But, on other issues, including many of the new and emerging 21st-century trade issues, there is another approach, one that can produce partial trade solutions now that are potentially preludes to multilateral solutions later.

PLURILATERALISM, THE NEXT-BEST OPTION

Contrary to widespread perception, the multilateral agreement that established the WTO does not require that all WTO trade negotiations be conducted multilaterally. WTO members have *chosen* to continue to pursue new trade obligations multilaterally, but they are not required to do so. An option provided by the WTO treaty is to pursue new trade obligations plurilaterally through negotiations among a self-selected subset of WTO members seeking the perceived economic advantages of agreements within the WTO rules framework that are “WTO-plus,” which add to existing obligations and afford additional benefits to those members that choose to accept the obligations by becoming parties to the agreements.[10]

Under the WTO treaty, the WTO-plus benefits of these plurilateral trade agreements can be provided in one of two ways. The agreements can be MFN, which means their benefits can

be provided inclusively to all WTO members, including those that have not accepted the additional obligations of the multilateral agreement, as is the case with the WTO Information Technology Agreement (ITA). Or the agreements can be non-MFN, which means their benefits can be provided exclusively only to those countries that negotiate and agree to comply with the additional obligations in the new agreements, as is the case with the WTO Government Procurement Agreement (GPA).

The MFN approach to a plurilateral agreement among an ad *hoc* and like-minded coalition of willing WTO members is more appealing if the agreement is a tariff-reducing market access agreement and if a critical mass of participants in the particular market sector in question is seen as having been assembled to agree to the plurilateral agreement, thus minimizing the potential effect of free riders who benefit from the agreement without adhering to its terms. This was the case with the ITA. The non-MFN approach is more appealing where the additional obligations are not conventional market access obligations and where the parties to the agreement do not constitute such a critical mass. This was the case with the GPA.

The shared expectation of many of us in the United States and elsewhere who helped establish the WTO was that such plurilateral approaches by like-minded WTO members desirous of deeper levels of liberalization and economic integration would be commonplace. We envisaged the WTO as a forum and as a framework for ongoing innovation in providing market access and devising world trade rules to accommodate and facilitate ongoing innovations in an ever-evolving world economy. We foresaw the new international institution called the World Trade Organization as addressing emerging trade issues through agreements relating to specific sectors of global commerce and to specific trade issues that—at least at the outset—would be less than fully multilateral.[11]

It is an understatement to say that not every suggested solution to a trade problem commands immediate universal acceptance. The fact is, very few such suggestions do. In the WTO, it almost always takes time to build a critical mass of countries to move a new idea ahead. It often takes experience to discern just how that idea *should* move ahead. For some countries, there is, understandably, a natural reluctance to moving forward with new ideas without having the time and experience from which to have some notion of what will happen later.

One of the advantages of a plurilateral approach taken by some, but not all, WTO members in embracing a new idea in trade is that it provides a proving ground of trial and error within the rules-based framework of the WTO trading system. Ideas that fail can be abandoned. Ideas that work can be improved and scaled up over time to become part of fully multilateral agreements that bind all WTO members. In some ways, this approach resembles the traditional view of states in the United States as laboratories of democracy—as places where new ideas can be tried first locally and, if successful, adopted by other states and possibly at the national level.

The gradual evolution of the GATT into the WTO demonstrates the wisdom of plurilateralism. Several multilateral trade agreements in the WTO treaty—those dealing with antidumping, safeguards, subsidies, and technical regulations—began as plurilateral GATT codes that were accepted by some, but not all, GATT contracting parties. These codes only became fully multilateral with the establishment of the WTO. In the minds of those who anticipated a series of such plurilateral approaches by the WTO, the same incremental legal path would be pursued in numerous other areas of current and future global trade concern. At first this incrementalism happened: the inclusion of the GPA in the WTO treaty and the conclusion soon afterward of the ITA and the protocols on basic telecommunications services and on financial services. To many, this seemed to be the way forward for incrementally achieving the shared goal of more multilateralism.

But then came September 11, 2001. The 9th WTO Ministerial Conference in Doha, Qatar, which convened shortly after the attacks, saw the launch of the Doha Development Round.

“One of the advantages of a plurilateral approach is that it provides a proving ground of trial and error within the rules-based framework of the WTO trading system.”

> "If WTO members refuse to allow new plurilateral agreements to be concluded within the organization, plurilateral agreements will occur outside it."

Almost out of habit, the conference was a single undertaking bound by the consensus rule. The negotiations continued off and on for 14 years until they ended—not with a bang, but with a whimper—at the convening of the 10th WTO Ministerial Conference in Nairobi, Kenya, in 2015. The only notable negotiating success resulting even tangentially from the Doha Round occurred when WTO members pulled the issue of trade facilitation out of the Doha negotiations and concluded the WTO Trade Facilitation Agreement separately and multilaterally in Bali, Indonesia, in 2013.

Failure, once again, to reach a multilateral outcome in Buenos Aires in December 2017 suggests that a course correction is urgently needed for the WTO.

THE COSTS OF REJECTING PLURILATERALISM

Some WTO members have long been reluctant to support new plurilateral agreements, making it harder to conclude them as WTO agreements. For sound economic reasons, these reluctant members prefer the general—and generally bigger—payoff from multilateral deals. They are also hesitant to assume new obligations on top of those they already have. Sometimes they are unwilling even to permit other members to agree to new WTO obligations that they themselves do not wish to undertake for fear that, as has happened before, those new obligations will be negotiated without them and then eventually become fully multilateral. Not least, many developing countries are of the view that before agreeing to negotiate new agreements, they should get the benefits they feel they were promised, but have not yet received, from previous agreements.

In some respects, this reluctance is understandable. But a refusal, for whatever reason, to allow new plurilateral agreements to be concluded within the framework of the WTO only guarantees that the plurilateral undertakings of like-minded countries desirous of more ambitious trade liberalization and integration will occur outside the WTO. Developed countries, in particular, are eager to move ahead on many trade fronts. The reluctance of other WTO members to do so was a catalyst for the negotiations outside the WTO of such "megadeals" as the Trans-Pacific Partnership (TPP) among countries along the Pacific Rim and the proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union. All the participants in those negotiations are WTO members. Those negotiations could have—and should have—occurred within the WTO, but because the countries involved were unable to move ahead within the WTO, they sought to do so outside the WTO.

Negotiating these megadeals within the legal ambit of the WTO would have reduced the concern among nonparticipating WTO members that they would be locked out of these new trade arrangements. It would also have eliminated the geopolitical undertones that the new arrangements were intended for political reasons to exclude other WTO members. Plurilateral agreements within the WTO are open to all WTO members that choose to accept their obligations. With respect to the TPP, for example, the issue of whether it was intended to surround or isolate China would simply not have arisen; if the TPP were a non-MFN plurilateral agreement within the WTO, China (or any other WTO member) could join simply by agreeing to comply with the terms of the agreement.

Negotiating these megadeals and other regional arrangements within the WTO also would have helped minimize the growing concern that the proliferation of international trade arrangements outside the WTO threatens to undermine the basic nondiscrimination obligation of most-favored treatment that is at the core of the WTO. [12] Inclusive plurilaterals that are, by definition, MFN would, of course, perpetuate the MFN obligation. Exclusive plurilaterals that are non-MFN would initially be discriminatory, but they need not establish trade discrimination permanently. Rather, they could become ever closer to MFN and eventually fully MFN as more WTO members agree to their terms.

Moreover, had these negotiations been conducted within the WTO and aimed at establishing new plurilateral WTO agreements like the GPA and the ITA, disputes arising under their provisions would be subject to the WTO dispute settlement system. Thus, the parties to those new agreements would have had the benefit of both seasoned trade jurists and a body of trade jurisprudence that will otherwise have to be recreated over time under new and untried dispute settlement systems. As it is, the new mega-arrangements outside the WTO are only reinventing the existing wheel of dispute settlement in international trade.

It may be asked, why would, say, the United States and Europe want to negotiate the TTIP within the WTO? Would they not want an exclusive bilateral arrangement? In answer, why would they? If other WTO members were willing and able to incur the obligations of a TTIP, would it not be to the benefit of both the United States and the European Union to have a broader terrain for their vision of freer mutual trade and further economic integration? And would not the flow of world trade and world investment be enhanced overall if the ambit of such obligations were not merely trans-Atlantic, but transglobal?

An imposing obstacle to non-MFN plurilateral agreements is the need to receive the approval of the WTO membership to include them as plurilateral trade agreements in "Annex 4" of the WTO agreement.[13] Upon the request of the WTO members that are parties to a plurilateral agreement, the WTO Ministerial Conference "may decide exclusively by consensus to add that agreement to Annex 4."[14] Securing such a consensus will not be easy under any circumstances; it is certainly not easy in the current circumstances.

Generally, developed countries with advanced economies have been eager to negotiate new WTO obligations to meet new economic needs, even if the agreements reached are exclusive because they are non-MFN. In contrast, developing countries generally resist non-MFN agreements. In addition to their apprehension of new obligations and their focus on getting the benefits of current obligations, they have had little interest in innovations in rule making that do not address their core concerns of agricultural and manufacturing access to the developed world. A number of developing countries, "such as Brazil, China, India, and South Africa have openly expressed their rejection of a plurilateral alternative to the Doha impasse, preferring instead a multilateral approach."[15]

At this point, the developing countries that are resisting allowing new non-MFN plurilateral agreements as part of the WTO legal framework are simply outsmarting themselves. Their resistance has only encouraged developed countries ambitious for freer trade and more economic integration to turn from the WTO to the alternative of bilateral, regional, and megadeals outside the WTO. The adoption of such new obligations outside the WTO will influence global commerce in the same ways that already make developing countries apprehensive, but they will be voiceless to assert their interests, which would not be so if the new obligations were part of the WTO.

Conceivably, megadeals could be negotiated outside the WTO and later become WTO deals. For instance, the members of the TPP could request that it be added to "Annex 4" and thus become a plurilateral trade agreement within the legal framework of the WTO. As with any other non-MFN deal, this would require approval by consensus of the WTO Ministerial Conference. This WTO-centered approach would certainly be preferable to the current approach. As it is, other countries can join the TPP only with the permission of the current parties to the TPP. If the TPP were already within the WTO legal framework, other WTO members could join the TPP just by agreeing to comply with, and be bound by, TPP obligations. This said, building a consensus to bring the TPP within the WTO would be an arduous political task. Better to pursue such mega-ambitions within the WTO in the first place.

The drift away from the WTO in search of such megadeals is decidedly not in the interest of the vast majority of WTO members,

"The developing countries that are resisting allowing new non-MFN plurilateral agreements as part of the WTO legal framework are simply outsmarting themselves."

> "A continued drift outside the WTO would bolster the conclusion that now is the beginning of the end for the WTO. A return to it would advance the view that now is the end of the beginning."

including the developing countries that increasingly have their rightful say in the councils of the WTO and that benefit enormously from the centrality of the WTO trading system. A world of competing trading blocs bound by megadeals would not be a world that benefits those countries that are still on the margins of the world economy. Few of the poorer countries in the world will ever be invited to participate in a megadeal, but if such a deal is concluded within the legal structure of the WTO, they will have the right to benefit from that deal if they are willing to accept its obligations.

A continued drift outside the WTO would bolster the conclusion that now is the beginning of the end for the WTO. A return to the WTO would advance the view that now is the end of the beginning.

WILL THE UNITED STATES SUPPORT OR SUBVERT A SHIFT TO WTO PLURILATERALISM?

Alas, there is not much to suggest a turn back by the United States to the multilateralism manifested in the WTO. Under Trump, the United States is—so far—still showing up for WTO meetings and engaging in WTO dispute settlement (although mostly defensively). The United States is still making occasional WTO proposals, such as its recent and laudable proposal for more compliance with, and more transparency in, required subsidies notifications. At the same time, the United States is often uncharacteristically silent in WTO committee sessions. The U.S. delegates often cannot speak because they have no clear instructions. The traditional leadership of the United States is missing—and is missed—in the WTO.

Trump's protectionist and unilateralist trade ambassador, Robert Lighthizer, is hardly a tribune for the WTO. One reason why members failed to agree on a unified statement for the customary concluding declaration at the Buenos Aires ministerial conference, and ended up with no final declaration at all, was reportedly because Lighthizer, on behalf of the United States, insisted on excluding language from the declaration describing the WTO as the center of the multilateral trading system. Like the vast majority of other WTO members, the United States has always insisted in the past on including this statement of mutual allegiance to multilateralism. No more. Not only do Trump and Lighthizer not see the WTO as central to world trade, it is not clear that they see the need for the WTO at all. They see international trade as a win-lose proposition and a zero-sum struggle of all against all. They do not see international trade as a win-win proposition for all who participate in trade, which is the motivating philosophical underpinning of the WTO trading system.

Among the Trump administration's top trade priorities is to defend U.S. sovereignty over the making of U.S. trade policy, which is often portrayed as a necessary response to what it characterizes as WTO overreaching into the sovereign domain of domestic discretion in policymaking. Unlike past U.S. presidents and administrations of both parties, Trump and those who serve him do not seem to understand the concept of sharing sovereignty as an effective means of international cooperation toward the end of solving common global problems. As for international cooperation on trade, Trump and Lighthizer alike have, on many occasions, expressed antipathy toward the WTO and at times have hinted that withdrawing from the organization might be in the best interests of the United States.

Meanwhile, Trump has repeatedly expressed a preference for bilateral—over global and regional—trade deals, even though he has yet to secure a single negotiating partner for bilateral negotiations. The only one of 35 ongoing negotiations to which the United States is even nominally a party is the TTIP, which is in limbo because of Trump's concern that it is a regional agreement and because of his lack of attention to advancing it. It is not hard to understand why few governments want to negotiate with the Trump administration, given that the president pulled out

of the TPP, continues to threaten to pull the plug on the North American Free Trade Agreement (NAFTA), has imposed and threatened illegal unilateral trade restrictions and appears to have no coherent or consistent positions on trade policy (or, for that matter, on much else).

In the months following the Buenos Aires Conference, the president seemed to open the door to returning to the TPP, but then changed his mind again. His secretary of commerce, Wilbur Ross, is reported to have said that the TTIP negotiations are still alive. Meanwhile, juxtaposed to the administration's expressions of displeasure with the WTO is its professed interest in continuing to use the WTO dispute settlement system and its intermittent efforts to ensure that U.S. trade laws are being applied in a WTO-consistent manner. Incongruities abound.

Given the president's fickleness in overall policymaking and his predilection for saying one thing in the morning and another thing in the afternoon, who knows the extent to which he and his administration are committed over the long term to what seems a notable shift in U.S. trade strategy from more open to more constricted trade? Trump and his closest trade advisers rarely seem to think of the long term; they only seem to think of the short term. They also cause confusion with an endless stream of inconsistent statements. Having announced, for instance, in a defiant televised address that he was withdrawing the United States from the Paris climate agreement, Trump has also said that he is open to returning to that agreement. But, assuming this is so, at what price to ongoing global combat against climate change? So, too, with trade. If the Trump administration did return to the negotiating table on these megadeals, what would be the U.S. negotiating approach? If the my-way-or-the-highway tactics of the United States in the renegotiations of the NAFTA and the Korea-U.S. trade agreement are any indication, little might result from a turn by Trump back to the TPP and the TTIP.

All this said, Lighthizer, who is wrong on so much else about trade and the WTO, was right in declaring after his fly-by to Buenos Aires, "Many Members recognized that the WTO must pursue a fresh start in key areas so that like-minded WTO Members and their constituents are not held back by the few Members that are not ready to act."[16] The Office of the U.S. Trade Representative tweeted that "the new direction of the WTO is set: improving trade through sectoral agreements by like-minded countries."[17] (The Office of the U.S. Trade Representative confirmed, too, that, in the brave and unbridled new world of social media, its tweets are official statements by the United States of America.) Lighthizer also ventured boldly, "MC11 will be remembered as the moment when the impasse at the WTO was broken."[18]

Reports of the demise of the WTO are premature. Day-to-day, the WTO works smoothly. Because of the enabling global framework of WTO rules, almost all of world trade flows easily and without dispute every day. Because of the existence of the WTO dispute settlement system, almost all WTO members choose to comply with almost all WTO rules almost all the time. Most important, because of this system for resolving disputes, WTO members can resolve their inevitable trade disputes with each other peacefully and according to rules on which all members have previously agreed. This remains true despite the shameful recent attacks by the Trump administration on the WTO dispute settlement system and especially on WTO judges.

Nevertheless, Lighthizer was right in telling members in Buenos Aires that the WTO is "becoming a litigation-centered organization."[19] The WTO has proven to be proficient at upholding existing rules—an achievement not to be underestimated. But the WTO has not yet proven that it can be equally proficient in agreeing on new rules or on changes in existing rules. Unless members soon learn how to negotiate successfully on trade for the 21st century, the weight of the burden of a backlog of dispute settlement decisions will eventually intensify the dysfunction at the WTO,

"The WTO has proven to be proficient at upholding existing rules, but has not yet proven equally proficient in agreeing on new rules."

"Looking past the apocalyptic headlines, there is scope for the more optimistic view that it is not the beginning of the end, but the end of the beginning for the WTO."

while its members continue to drift elsewhere to resolve the ever more complex new issues of the global economy.

TOWARD THE END OF THE BEGINNING

If it was not clear to WTO members before the ministerial conference in Buenos Aires, it surely should be clear now that if they are going to make progress on trade liberalization any time soon, they will have to do so plurilaterally. With many countries turning inward and with many more increasingly weary of endless global trade negotiations that never seem to produce results, plurilateralism may offer the most promising path to multilateralism in the WTO. Indeed, for now, it may be the only path.

Absent progress within the WTO system, the alternatives are more bilateral, regional, and mega-agreements on trade made outside the sheltering legal framework of the WTO among the more ambitious members. Already, hundreds of trade agreements have been concluded outside the WTO—the vast majority of them since the start of the deadlock in the Doha Development Round. What began as an aberration has become a preoccupation. At present, 35 new bilateral and regional trade pacts are under consideration around the world.[20]

Looking past the apocalyptic headlines and the disappointments in Buenos Aires, there is scope for the more optimistic view that it is not the beginning of the end, but the end of the beginning for the WTO. The absence of a multilateral outcome in Buenos Aires may have triggered a psychological and tactical shift toward pursuit of plurilateral trade solutions. After years of ambivalence for fear of undermining the ongoing multilateral negotiations, like-minded members may now move forward as willing allies to modernize the rules framework of the WTO. In the absence—for now—of U.S. leadership, the European Union, Japan, China, Canada, Australia, Chile, New Zealand, and others can help fill the leadership void. On different issues, different leaders or combinations of leaders may emerge.

The list of topics that should be addressed by new trade rules is long and getting longer every day. Based on all that was said and done in Buenos Aires, several of the topics on this long list seem to be good prospects for immediate consideration, including digital trade and services.

Digital trade seems to be at the top of the list. When the WTO was established a quarter of a century ago, there was no such thing as digital trade. Thus, there were no WTO rules specifically concerning digital trade. All these years later, there are still no specific WTO rules on digital trade: WTO rules are analog, not digital. And while, overall, the growth in world trade has slowed in recent years, trade in digital goods and services has multiplied 45-fold in the past decade.[21] In ample demonstration of the death of distance, the algorithms of digital trade are everywhere a potent accelerant for globalization and have changed the conduct of international commerce profoundly. Business-to-business digital commerce is estimated to account for 90 percent of all global electronic commerce.[22] A WTO without rules on digital trade is not a "world trade" organization.

In Buenos Aires, a coalition of 71 WTO members (counting the EU member states individually) announced that they will begin exploratory work toward future negotiations on trade-related aspects of electronic commerce. They stressed that they are open to the inclusion of additional WTO members. The first session of their talks is to be held in 2018. Although these members have no negotiating mandate from the WTO, they have said they will conduct their talks within the WTO.[23] Significantly, the United States joined this coalition, with Ambassador Lighthizer saying, "Initiatives like this among like-minded countries offer a positive way forward for the WTO in the future."[24]

An issue that should also be near the top of the plurilateral list is *services trade*. For 15 years, Doha Round negotiators were unable to make any headway on services trade by expanding the scope of the General Agreement on

Trade in Services, which is part of the WTO agreement. Ultimately, a group of like-minded countries began negotiating a separate accord on services on the sidelines of the WTO—but not actually in the WTO—that they called the "Trade in Services Agreement." These negotiations halted after Trump's election and have not resumed. The willingness of the United States to negotiate on digital trade and the fact that services account for 75 percent of the U.S. economy suggest that Trump and Lighthizer, who so far have focused mainly on manufacturing trade, may be willing to take another look at this critical issue for American workers and businesses and take part in new plurilateral negotiations aimed, ultimately, at a multilateral solution.

Commitments to liberalize some services, such as occupational licensing and legal services, may be difficult to achieve multilaterally, but many others areas are amenable to plurilateral solutions. Of concern to many WTO members in Buenos Aires was finding a way to advance negotiations on domestic regulation of services. If the United States, China, or any other WTO member is unwilling to join new services negotiations, then other like-minded WTO members interested in liberalizing trade in services should simply proceed, where they can, without them.

The WTO ministers agreed in Buenos Aires to continue talking about disciplining *fisheries subsidies* with hopes of adopting a multilateral agreement by the next ministerial conference in 2019. (In trade negotiations, agreeing to continue to talk is seen as a success; trade negotiators do not understand why the rest of the world is not impressed by such an obvious accomplishment.) The looming deadline on this topic is 2020, when the members of the United Nations—including all 164 members of the WTO—have agreed to discipline subsidies for overcapacity and overfishing and to eliminate subsidies of illegal, unreported, and unregulated fishing.[25] Encouragingly, the United States has agreed to continue to participate in negotiations (after rejecting, with its withdrawal from the TPP, the restrictions there on fisheries subsidies, which are much like those being sought in the WTO).[26] If these talks reach a multilateral roadblock, then a plurilateral alternative should be pursued within the WTO that could ultimately grow into a fully multilateral solution.

Not to be forgotten are the frustrating negotiations on freeing *trade in environmental goods*, which are defined by the WTO as "products that can help achieve environmental and climate protection goals, such as generating clean and renewable energy, improving energy and resource efficiency, controlling air pollution, managing waste, treating waste water, monitoring the quality of the environment, and combatting noise pollution."[27] Annual global trade in environmental goods is currently estimated to be nearly $1 trillion and is growing rapidly along with a rising global demand.[28] However, tariffs on these products persist and, currently, some WTO members assess duties as high as 35 percent on environmental goods. Liberalizing trade in these products would do much to speed the spread of clean and more-efficient technologies throughout the world, including to the developing countries where they are much needed to promote clean energy.

Negotiations on an Environmental Goods Agreement have been in progress for several years. Having started in 2012 with a list of 54 environmental goods subject to tariffs, some 46 WTO members, accounting for most of the world's trade in these goods, continue to try to conclude an inclusive plurilateral WTO agreement to eliminate those tariffs and extend the duty-free benefits to all other WTO members on an MFN basis. These negotiations have stalled as the negotiating countries quarrel over precisely which goods are "environmental goods" that should fall within the scope of the agreement. Is a bicycle an "environmental good"? If so, are all kinds of bicycles "environmental goods"? Should we distinguish between a child's first bicycle with training wheels and a high-performance French racing bicycle? And so on. The negotiating countries have been endlessly creative in constructing arguments for defining virtually

"If any WTO member is unwilling to join new services negotiations, then other like-minded members interested in liberalizing trade in services should simply proceed without them."

> "Proceeding from work being done in the steel sector under the auspices of the G20 group, WTO members should negotiate a plurilateral steel agreement that could ultimately become a multilateral agreement."

everything as "environmental goods." These negotiations should be resumed and, once an agreement is reached to eliminate barriers to trade in environmental goods, talks should be started on making the new plurilateral agreement an Environmental Goods *and Services* Agreement by eliminating the barriers to trade in environmental services as well.

Yet another issue ripe for a plurilateral agreement is that of *excess capacity* for production—in steel especially, but also in some other basic traded products. Global oversupply in these products is depressing world prices, distorting world markets, and consequently intensifying pressures for imposing new unilateral trade restrictions worldwide. Unilateral trade restrictions—such as those imposed by Trump on steel and aluminum—not only violate WTO rules, but also could cause a spiral of global protectionism as countries impose reactive retaliatory measures. Far better to deal with the very real problem of excess capacity by negotiating rules than by a descent into unknown depths of global protectionism.

There are WTO rules to deal with situations of short supply.[29] There are, however, no WTO rules to deal with situations of oversupply. When the original 23 contracting parties of the GATT wrote the rules in 1947 in the hungry aftermath of World War II, oversupply was not a trade problem. Now it is, and now WTO rules are needed to help avoid the initiation of what could become a mutually destructive exchange of national trade restrictions and international trade disputes that would grip and, perhaps, paralyze the WTO. Proceeding from the work already being done in the steel sector under the auspices of the G20 group of leading economies, WTO members should negotiate a plurilateral sectoral agreement on steel that could ultimately become a multilateral WTO agreement.

Included in such a sectoral agreement could be guidelines on *best practices* reminiscent of those in the reference paper to the protocol on basic telecommunications services under the WTO services agreement.[30] Along with the agreement itself, those best practices could begin plurilaterally and then, with time, become multilateral. This negotiating approach of setting out best practices could be emulated in other new areas of trade concern, including two areas that drew much attention in Buenos Aires: *gender equity* and *micro-, small-,* and *medium-sized businesses*. The goal of these and other best practices efforts should not necessarily be to create new rules in these areas of concern; rather, it should be to encourage seeing trade policymaking through the lens of these concerns.

Another topic of discussion in Buenos Aires was *investment facilitation*. A large group of WTO members, comprising both developed and developing countries, endorsed a joint statement there agreeing to start "structured discussions with the aim of developing a multilateral framework on investment facilitation."[31] Examples of what an agreement on investment facilitation would contain include strengthened "electronic governance," such as a "single electronic window" that would publish investment documents and help streamline applications and admissions procedures for incoming investments; a national focal point for mediating and facilitating investor concerns with public authorities; voluntary standards of corporate social responsibility; and guarantees of transparency.[32]

Ideally, this new WTO framework on investment facilitation would accompany, and perhaps be an expansion of, the multilateral Trade Facilitation Agreement, which was concluded in Bali in 2013 and is now being phased into full implementation. It, too, could be phased in over time, and it could contain differing obligations for WTO members at different stages of development. Moreover, it could be accompanied by technical assistance. Should WTO members not be able to proceed multilaterally on this topic, then it should be the subject of a WTO plurilateral agreement that could evolve into a fully multilateral pact.

If optimism is to be justified, then these few initiatives must be only the start. The topics that now seem closest to successful plurilateral negotiations are far from the only trade topics that can and should be advanced

through this approach. There are many others. Some have been included in innovations in some of the bilateral, regional, and mega-agreements, including regulatory coherence, technical regulations, sanitary and phytosanitary measures, intellectual property protections, disciplines for state-owned enterprises, and trade remedies. Others would address more broadly the role and rules of the WTO in a new world economy facing new opportunities and confronting great challenges extending far beyond traditional trade concerns.

CONCLUSION

Plurilateral solutions are not the only solutions for the World Trade Organization. Multilateral agreements containing multilateral rules must always be the ultimate goal for the WTO. The logic of multilateralism endures. Indeed, the need to multilateralize international cooperation grows with each passing day. But there is more than one approach to achieving multilateralism. If, after more than two decades of both historic accomplishment and accumulating frustration, now is to be the end of the beginning for the WTO, and not the beginning of the end, then members can no longer afford the illusion that progress consists of merely agreeing to talk or scheduling a meeting or putting a topic on a discussion agenda in Geneva. Progress means getting things done. And that must start now.

Members must begin to negotiate in new ways that will lead to new trade agreements—and soon. If WTO members wait, if they hesitate, if they simply talk without really negotiating, and if they fail to act immediately on their shared realization that new challenges necessitate a new way of doing things, then the next ministerial conference of the WTO in 2019 may be the last one that many involved in trade policymaking will bother to attend.

NOTES

1. Alex Lawson, "The WTO May Have Reached Its Breaking Point," *Law 360,* December 14, 2017.

2. Megan Cassella, "It's the End of the WTO as We Know It—and Trump Feels Fine," *Politico,* December 14, 2017.

3. "The WTO Remains Stuck in Its Rut," *The Economist,* December 14, 2017.

4. Article 23.1, WTO Dispute Settlement Understanding.

5. David J. Lynch and Damian Paletta, "Trump Tilts Hard-Line Ahead of Trade Decisions," *Washington Post*, February 27, 2018; and Jacob M. Schlesinger, "Trump to Impose Steep Aluminum and Steel Tariffs," *Wall Street Journal*, March 2, 2018.

6. "WTO Ministerial: In Landmark Move, Country Coalitions Set to Advance on New Issues," *Bridges* Special Update, December 13, 2017, p. 2.

7. Bjorn Lomborg, "Promises to Keep: Crafting Better Development Goals," *Foreign Affairs* 93, no. 6 (November/December 2014): 133.

8. "The Marrakesh Agreement Establishing the World Trade Organization," Marrakesh, Morocco, April 15, 1994 (the "Marrakesh Agreement"), 1n.

9. Article 3.2, WTO Dispute Settlement Understanding.

10. Article X.3, Marrakesh Agreement.

11. This statement is based on my personal recollections from the time. As one of the six original cosponsors of the implementing legislation for the Uruguay Round trade agreements in 1994, when I was a member of the U.S. House of Representatives, I held this expectation, and my firm recollection is that many others—especially Americans—held it as well.

12. See Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford: Oxford University Press, 2008).

13. Article X, Marrakesh Agreement.

14. Article X.9, Marrakesh Agreement.

15. Peter Draper and Memory Dube, "Plurilaterals and the Multilateral System," International Centre for Trade and Sustainable Development and World Economic Forum, December 2013, p. 3.

16. Office of the U.S. Trade Representative, "USTR Robert Lighthizer Statement on the Conclusion of the WTO Ministerial Conference," press release, December 2017, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/ustr-robert-lighthizer-statement.

17. USTR (@USTradeRep), "Congratulations to DG @WTODGAZEVEDO and Minister @SusanaMalcorra on a successful #MC11. The new direction of the WTO is set: improving trade through sectoral agreements by like-minded countries," Twitter, December 13, 2017, 2:09 p.m., https://twitter.com/USTradeRep/status/941067574267269122.

18. Office of the U.S. Trade Representative, "USTR Robert Lighthizer Statement on the Conclusion of the WTO Ministerial Conference," press release, December 2017, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/ustr-robert-lighthizer-statement.

19. Office of the U.S. Trade Representative, "Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference," press release, December 2017, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr.

20. Ana Swanson and Jim Tankersley, "As US Trumpets 'America First,' Rest of the World Is Moving On," *New York Times*, January 25, 2018.

21. Rana Forooher, "Trump's Trade Policies Won't Help My Town," *Financial Times*, March 6, 2017.

22. United Nations Conference on Trade and Development, "Information Economy Report," 2015.

23. Luis Gil Abinader and Gus Rossi, "The WTO E-Commerce Agenda after the Buenos Aires Ministerial," *Public Knowledge* (blog), December 22, 2017, https://www.publicknowledge.org/news-blog/blogs/the-wto-e-commerce-agenda-after-the-buenos-aires-ministerial.

24. "USTR Robert Lighthizer on the Joint Statement on Electronic Commerce," U.S. Trade Representative, press release, December 12, 2017.

25. See Goal 14 and Target 14.6 in United Nations, "Transforming Our World: The 2030 Agenda for Sustainable Development," October 21, 2015, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

26. "USTR Says It Will Work with EU, Others to Advance Disciplines on Fisheries Subsidies," *World Trade Online*, December 13, 2017.

27. World Trade Organization, "Environmental Goods Agreement (EGA)," World Trade Organization, "Environmental Goods Agreement (EGA)," https://www.wto.org/english/tratop_e/envir_e/ega_e.htm.

28. Office of U.S. Trade Representative, "Environmental Goods Agreement," https://ustr.gov/trade-agreements/other-initiatives/environmental-goods-agreement.

29. Article XI:2(a), General Agreement on Tariffs and Trade.

30. Reference Paper, Protocol on Basic Telecommunications Services, General Agreement on Trade in Services.

31. "WTO Ministerial: In Landmark Move, Country Coalitions Set Plans to Advance on New Issues," p. 2.

32. "Brazil Circulates Proposal for WTO Investment Facilitation Deal," *Bridges* 22, no. 4 (February 8, 2018), https://www.ictsd.org/bridges-news/bridges/news/brazil-circulates-proposal-for-wto-investment-facilitation-deal.

RELATED PUBLICATIONS FROM THE CATO INSTITUTE

Candy-Coated Cartel: Time to Kill the U.S. Sugar Program by Colin Grabow, Cato Institute Policy Analysis no. 837, April 10, 2018

Where's the Beef? Finding a Better Way to Resolve U.S.-China Trade Conflicts by Simon Lester and Huan Zhu, Cato Institute Free Trade Bulletin No. 71, November 8, 2017

Responsible Stakeholders: Why the United States Should Welcome China's Economic Leadership by Colin Grabow, Cato Institute Policy Analysis no. 821, October 3, 2017

Doomed to Repeat It: The Long History of America's Protectionist Failures by Scott Lincicome, Cato Trade Policy Analysis no. 819, August 22, 2017

Renegotiating NAFTA in the Era of Trump: Keeping the Trade Liberalization In and the Protectionism Out by Simon Lester, Inu Manak, and Daniel Ikenson, Cato Working Paper no. 46, August 14, 2017

Cybersecurity or Protectionism? Defusing the Most Volatile Issue in the U.S.–China Relationship by Daniel Ikenson, Cato Institute Policy Analysis no. 815, July 13, 2017

It's Time to Negotiate a New Economic Relationship with China by Simon Lester and Huan Zhu, Cato Institute Free Trade Bulletin no. 70, April 4, 2017

Into the Abyss: Is a U.S.-China Trade War Inevitable? by Daniel Ikenson, Cato Institute Free Trade Bulletin no. 69, February 6, 2017

Should Free Traders Support the Trans-Pacific Partnership? An Assessment of America's Largest Preferential Trade Agreement by Daniel Ikenson, Simon Lester, Scott Lincicome, Daniel R. Pearson, and K. William Watson, Cato Institute Working Paper no. 39, September 12, 2016

Beyond the American Manufacturing Competitiveness Act: Congress Should Get More Serious About Tariff Reform by Daniel Ikenson, Cato Institute Free Trade Bulletin no. 67, April 26, 2016

Trade Promotion Authority and the Trans-Pacific Partnership: What Lies Ahead? by Daniel Ikenson, Cato Institute Free Trade Bulletin no. 61, June 8, 2015

RECENT STUDIES IN THE CATO INSTITUTE POLICY ANALYSIS SERIES

840. **Avoiding a Korean Calamity: Why Resolving the Dispute with Pyongyang Requires Keeping the Peace** by Doug Bandow (April 26, 2018)

839. **Reassessing the Facts about Inequality, Poverty, and Redistribution** by John F. Early (April 24, 2018)

838. **Extreme Vetting of Immigrants: Estimating Terrorism Vetting Failures** by David Bier (April 17, 2018)

837. **Candy-Coated Cartel: Time to Kill the U.S. Sugar Program** by Colin Grabow (April 10, 2018)

836. **Risky Business: The Role of Arms Sales in U.S. Foreign Policy** by A. Trevor Thrall and Caroline Dorminey (March 13, 2018)

835. **The Nordic Glass Ceiling** by Nima Sanandaji (March 8, 2018)

834. **Tesla Takes On Michigan** by Will Zerhouni (February 27, 2018)

833. **Your Money's No Good Here: How Restrictions on Private Securities Offerings Harm Investors** by Thaya Brook Knight (February 9, 2018)

832. **Abuse-Deterrent Opioids and the Law of Unintended Consequences** by Jeffrey A. Singer (February 6)

831. **The New National ID Systems** by Jim Harper (January 30, 2018)

830. **The Public Benefit of Private Schooling: Test Scores Rise When There Is More of It** by Corey A. DeAngelis (January 22, 2018)

829. **Staring at the Sun: An Inquiry into Compulsory Campaign Finance Donor Disclosure Laws** by Eric Wang (December 14, 2017)

828. **What to Do about the Emerging Threat of Censorship Creep on the Internet** by Danielle Keats Citron (November 28, 2017)

827. **Corruption and the Rule of Law: How Brazil Strengthened Its Legal System** by Geanluca Lorenzon (November 20, 2017)

CATO INSTITUTE