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We Have Never Been ‘Multilateral’: Consensus Discourse in International Trade Law

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Abstract

In international economic law circles, it has become common to speak of a ‘crisis of multilateralism’ and of the threatened collapse of the post-World War II international consensus on trade policy. This talk of crisis has been spurred in particular by the US’s blocking of appointments to the WTO Appellate Body, which, as a result, ceased to be quorate in December 2019. While this is a difficult time for the WTO, this chapter argues that to refer to the present moment as a ‘crisis of multilateralism’ does more than simply describe the collective political and economic forces that are buffeting the organization. It is also a discourse that actively works to shape our understanding of the world, depicting the WTO as the institutional embodiment of an imagined past in which there was broad consensus on how to manage the international economy for the good of all (i.e. a past in which ‘multilateralism’ existed), in contrast with a present in which fragmentation reigns, rogue actors flout collective norms in pursuit of their own self-interests, and the WTO is ineffective in reining in their behavior. This chapter seeks to highlight the political effects of the ‘crisis of multilateralism’ discourse, and to challenge the implied narrative that there was ever a time in which states had turned away from bilateralism, rejected ‘self-help’, or achieved consensus around a set of universal values in the world of trade policy. Instead, it argues that the ‘crisis of multilateralism’ narrative evokes a universalist rhetoric that obscures the strong disagreement that has always existed regarding the substantive content of international economic norms, and throws a cloak of legitimacy over rules designed to further particular, contestable interests.

Keywords

Multilateralism, Unilateralism, World Trade Organization, WTO, Appellate Body Crisis, Trade, International Economic Law

I. Introduction

In international economic law circles, it has become common to speak of a ‘crisis of multilateralism’ and of the threatened collapse of the post-World War II international consensus on trade policy. Amrita Narlikar, for example, recently wrote that “trade multilateralism faces a crisis of existential proportions today.”¹ Ernst-Ulrich Petersmann lamented “US President Trump’s attack on the multilateral trading system,” which precipitated “the WTO’s biggest ‘governance crisis’ since the entry into force of the 1994 Agreement establishing the WTO.”² And Michael Hahn has analyzed the EU’s counter-reaction to “the scepticism of the Trump administration towards the multilateral liberal order, including ... the WTO” which has led Europe to “engage in multiple efforts to strengthen the rules-based approach to international economic governance.”³

As is evident from the above quotes, talk of the ‘crisis of multilateralism’ has been precipitated most directly by the US’s rebellion against the WTO system, which the Trump administration saw as hostile to US interests.⁴ Perhaps the most well-known part of this insurrection is the ongoing ‘Appellate Body crisis’. Citing concerns regarding judicial overreach,⁵ the US has refused to agree to the appointment of new members to the WTO’s Appellate Body since 2017, leading to that Body’s ceasing to be quorate in December 2019, and endangering the overall system of WTO dispute settlement.⁶

As explained in Section II, however, the Appellate Body crisis is only one of the many challenges that currently threaten the multilateral system of trade governance; the latest in a long line of crises that have plagued the WTO since it came into being in 1995. Between the US’s actions, the calls for WTO ‘modernization’ collectively made by states in the global North, and the willingness of powerful economies to take unilateral action to protect their interests, this is a difficult time for the WTO, and it is easy to see why this moment could be viewed as an ‘existential crisis’ that threatens the unraveling

¹ Amrita Narlikar, ‘Trade Multilateralism in Crisis: Limitations of Current Debates on Reforming the WTO and Why a Game-Changer is Necessary’ in Teddy Soobramanien, Brendan Vickers, and Hilary Enos-Edu (eds), *WTO Reform: Reshaping Global Trade Governance for 21st Century Challenges* (Commonwealth 2019), 21.

² Ernst-Ulrich Petersmann, ‘How Should WTO Members React to Their WTO Crises?’ (2019) 18 *World Trade Review* 1, 1.

³ Michael Hahn, ‘We’ll Always Have Geneva: The Existential Crisis of the US-led Multilateral Trading System and EU Reactions’ in Inge Govaere & Sacha Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart 2019), 271.

⁴ Carol Schaeffer, ‘Donald Trump Tells Aides He Wants to Withdraw US from WTO, Reports Say’ *Independent* (London 29 June 2018) <<https://www.independent.co.uk/news/world/americas/trump-wto-latest-white-house-world-trade-organization-aides-axios-a8423396.html>>.

⁵ See United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (2020).

⁶ See, e.g., Chang-fa Lo, Junji Nakagawa, and Tsai-fang Chen, *The Appellate Body of the WTO and Its Reform* (Springer 2020).

of the multilateral system. In this sense, the integrity of the multilateral trade system in its current form is certainly under threat.

But this chapter argues that describing this moment as a ‘crisis of multilateralism’ does more than simply signify the collective political and economic forces that are currently pulling at the seams of the WTO. It also constructs a discourse that actively works to shape our understanding of the world—and a highly political and partial one at that. In effect, the ‘crisis of multilateralism’ discourse depicts the WTO as the institutional embodiment of an imagined past in which there was broad consensus on how to manage the international economy for the good of all (i.e. a past in which ‘multilateralism’ existed), in contrast with a present in which fragmentation reigns, rogue actors flout collective norms in pursuit of their own self-interests, and the WTO is ineffective in reining in their behavior. As Mazaka and Bishop write:

[A]ssertions about the end of trade multilateralism often operate as *political narratives* that, despite their specificities, rely on an artifice that depicts and romanticizes—whether explicitly or implicitly—the multilateralism of the past as having been operational, but currently under threat.⁷

Far from being an institution formerly characterized by multilateral consensus that has now come into crisis, however, the WTO has been plagued by deep disputes and continual disruptions since its earliest days.⁸ Moreover, despite the catechistic references of trade enthusiasts to Smith, Ricardo and the theory of comparative advantage, there has never been consistent agreement among policymakers, scholars, or the wider public on either the ends or means of trade policy.

This chapter seeks to highlight the political effects of the ‘crisis of multilateralism’ discourse, and to challenge the implied narrative that there was ever a time in which states had turned away from bilateralism, rejected ‘self-help’, or achieved consensus around a set of universal values in the world of trade policy. Instead, it argues that the ‘crisis of multilateralism’ narrative papers over a history filled with contestation and resistance—a whitewashing that serves the interests of those who wish to perpetuate a hegemonic vision of the global economic order. This universalist rhetoric obscures the strong disagreement that has always existed regarding the substantive content of international

⁷ Valbona Mazurka and Matthew Louis Bishop, ‘Doha Stalemate: The End of Trade Multilateralism?’ (2015) 41 *Review of International Studies* 383, 385.

⁸ See Section II.

economic norms, and throws a cloak of legitimacy over rules designed to further particular, contestable interests.⁹

Diving into the history of the modern WTO, Section II contextualizes the current ‘crisis of multilateralism’ in terms of broader institutional reform efforts and the history of crises dating back to the founding of the Organization in 1995. Section III then analyses the discourse of multilateralism as it applies to international trade governance, identifying three distinct ways in which the term is deployed: (1) multilateralism as opposed to regionalism or bilateralism; (2) multilateralism as opposed to unilateralism; and (3) multilateralism as policy consensus. Section IV tackles each of these meanings in turn, demonstrating that—contrary to implicit claims of the ‘crisis’ discourse—there was never a time when multilateralism supplanted regionalism; there was never a time when unilateralism and self-help were eliminated; and there was never a time when consensus on core substantive issues of economic policy was achieved. Section V concludes by returning to the political function of the claim that we are currently facing a ‘crisis of multilateralism’ at the WTO, emphasizing the ideological role played by this discourse and the need to reconsider our assumptions about the past and present of public international trade law.

The idea of an idyllic trade policy past characterized by consensus and mutual support is an illusion. In practice, global trade governance is, and always has been, a partial system that was designed to meet the needs and demands of its architects, and that has served some actors far better than others. As it has evolved, the WTO rulebook has been held together not by consensus on trade issues, but instead by the strategic use of loopholes, agreements to disagree, temporary workarounds, and conflicting interpretations. The ‘crisis’ the WTO faces today is not the result of ‘the end of multilateralism’, but is rather the consequence of a changing global economic and geopolitical landscape. It is no coincidence that as new alignments of states have begun to gain ground and pursue their own economic interests within the WTO (in particular larger economies like India and China), this has caused the more established powers—like the US and EU—to find the system less to their liking, and to pull away from or seek to revise a set of rules and practices that no longer seem to suit their interests. The ‘crisis of multilateralism’ discourse hides all of this, erasing the ways in which trade governance has always been a site of contestation and resistance, built by and for a particular set of actors with specific economic and political goals in mind.

⁹ See Section IV.

II. A History of Crises

The current claims of a ‘crisis of multilateralism’, as noted above, have been precipitated most immediately by the breakdown of the WTO’s Appellate Body caused by the US’s refusal to endorse the appointment of new members. However, the US’s blockage of appointments to the Appellate Body is only one of the many challenges facing the WTO.

To begin with, in parallel with its moves against the Appellate Body, the Trump administration championed the return of self-help in the trade arena. During his time in office, President Trump made heavy use of tariff policy to correct perceived trade imbalances, famously declaring that ‘[t]rade wars are good and easy to win’,¹⁰ and imposing duties on imports from China, the EU, and others as part of his ‘America first’ trade strategy. At one point, the US even went as far as threatening a total exit from the WTO, which President Trump called a ‘disaster’ that was ‘designed by the rest of the world to screw the United States’¹¹—this despite the fact that, as Gregory Shaffer, Manfred Elsig, and Mark Pollack calculate, the US has a higher ‘win rate’ as both a claimant and respondent than all other major users of the dispute settlement system.¹²

This revolt by one of the world’s biggest economies—and one of the original driving forces behind the creation of the multilateral trade regime—seriously rattled the WTO and has worried those who study it. And while there is some hope that the Biden administration will back away from the most egregious of these attacks on the system, many of the US’s complaints pre-date the Trump era,¹³ and US efforts to reform the WTO and willingness to take unilateral actions are unlikely to cease altogether.

Indeed, the US is not alone in feeling that the WTO no longer serves its interests and is thus in need of reform. Two issues in particular have risen to the fore in recent debates regarding WTO

¹⁰ Donald J. Trump, ‘Trade Wars are Good’ (Twitter, 2 March 2018) <<https://twitter.com/realdonaldtrump/status/969525362580484098?lang=en>>.

¹¹ Schaeffer (n 4).

¹² Gregory Shaffer, Manfred Elsig and Mark Pollack, ‘The Slow Killing of the World Trade Organization’, *Huffington Post* (17 November 2017) <https://www.huffpost.com/entry/the-slow-killing-of-the-world-trade-organization_b_5a0ccd1de4b03fe7403f82df>.

¹³ See, e.g., the unilateral attempt by the Obama administration to unseat Appellate Body Member Seung-wa Chang in May 2016. Sung-jin Choi, ‘US Set to Oust Korean Judge from WTO Appellate Body,’ *The Korea Times* (1 June 2016) <https://www.koreatimes.co.kr/www/tech/2020/09/693_206012.html>.

‘modernization’. First, the European Union,¹⁴ Australia,¹⁵ and other wealthy economies have joined the US¹⁶ in arguing that China, India, and other emerging markets should be stripped of their self-declared ‘developing country’ status at the WTO, as they believe that it is unfair to continue granting them special and differential treatment when their economies are among the world’s largest (notwithstanding the fact that per capita income in these states remains relatively low).¹⁷ Second, the EU, Japan, and others have also joined the US in voicing concerns regarding developing states’ use of subsidies, proposing new punitive measures for countries that fail to properly notify their subsidies to the WTO,¹⁸ and arguing that the WTO’s current rules are out of date and inadequate for reining in China and other states that make extensive use of implicitly subsidized state-owned enterprises.¹⁹ In addition to these two ‘big-picture’ criticisms, complaints are continually raised regarding the WTO’s failure to prevent developing states from violating intellectual property rights to the detriment of Western companies (China’s technology transfer practices have come under particular fire in this regard).²⁰

The US is also not the only country that has turned to unilateral action and self-help in order to protect its domestic interests. For example, following the US’s decision to impose tariffs on steel and aluminum products in 2018, the EU and Canada both retaliated immediately, without waiting for a ruling from the WTO’s dispute settlement system as to whether their retaliation was justified.²¹ And as part of the EU’s efforts to set up an alternate WTO dispute settlement mechanism that could arbitrate trade disputes among like-minded WTO Members while the Appellate Body is inoperative, the European Commission released a proposal to amend its trade Enforcement Regulation to permit the use of unilateral unauthorized countermeasures in cases where a WTO Panel ruled in the EU’s

¹⁴ European Commission, ‘Concept Paper on WTO Modernisation’ (2018) <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf>.

¹⁵ Prime Minister Scott Morrison, ‘Speech,’ Chicago Council on Global Affairs (23 September 2019) <<https://www.pm.gov.au/media/chicago-council-global-affairs>>.

¹⁶ White House, ‘Memorandum on Reforming Developing-Country Status in the World Trade Organization’ (26 July 2019).

¹⁷ European Commission, ‘Concept Paper’ (n 14), 1.

¹⁸ World Trade Organization, ‘Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements’, Communication from Argentina, Costa Rica, the European Union, Japan and the United States (1 November 2018).

¹⁹ See, e.g., European Commission, ‘Concept Paper’ (n 14), 4.

²⁰ This was a major subject of both the US and EU bilateral negotiations with China, and a subject of discussion during the trilateral talks between the US, EU, and Japan.

²¹ Specifically, they did not wait for the WTO to rule on whether or not the US’s action was a national security measure, as claimed by the US, or whether it was a safeguard measure, as the EU and Canada maintained. Marianne Schneider-Petsinger, ‘Stretching the Rules Will Not Save Global Trade,’ *Financial Times* (9 October 2019) <<https://www.ft.com/content/92497c3e-e9bc-11e9-acfb-a946d2463e4b>>.

favor but the decision could not be adopted or enforced due to the other party appealing the decision ‘into the void’.²² While these unilateral actions have been taken largely in response to US behavior, they nevertheless indicate that even the biggest champions of ‘multilateralism’ are willing to work outside of the system when they feel that their interests demand it.²³

The Appellate Body crisis, the calls for WTO reform, and the turn to unilateralism by the US and others have certainly made this a challenging moment for the WTO. But they are also only the latest in a long series of perceived existential threats to the multilateral system of trade governance in the years since the WTO was founded in 1994. The WTO is no stranger to crisis.

Even before these latest developments, the WTO had been in the midst of a ‘legislative crisis’, with entrenched disagreements on policy issues among various member governments having led to a near-total standstill in the process of negotiating further liberalization. The Doha Development Round, the first negotiating round under the WTO initiated in 2001, had barely recovered from a collapse in the mid-2000s that ‘[left] global multilateralism in a parlous state,’ according to former WTO Director General Peter Sutherland.²⁴ These failures seemed even more ominous in the aftermath of the global financial crisis of 2008, leading many to question whether the WTO was the right tool for the job of managing global market integration. Recognizing these concerns, in 2012 the WTO itself convened a prescient public forum entitled ‘Is Multilateralism in Crisis?’ in which Director General Pascal Lamy addressed the Organization’s struggles to maintain multilateralism and global cooperation.²⁵ Today, the Doha Round continues to limp along with no end in sight and few major results achieved (with the notable exception of the Trade Facilitation Agreement (TFA)).²⁶ The biennial Ministerial Conference held in Buenos Aires in 2017 failed to produce any significant outcomes, and concluded without a Ministerial Declaration for the first time in WTO history—a breakdown due in no small

²² European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union’s rights for the application and enforcement of international trade rules,’ COM(2019) 623 final (12 December 2019).

²³ See Mike Smith, ‘The EU, the US and the Crisis of Contemporary Multilateralism’ (2018) 40 *Journal of European Integration* 539; Christian Leffler, ‘Championing Multilateralism’, in Martin Westlake (ed) *The European Union’s New Foreign Policy* (Springer 2020).

²⁴ Peter Sutherland, quoted in Alan Beattie, ‘WTO Faces an Uncertain Future as its Negotiating System Seizes Up,’ *Financial Times* (London 25 July 2006).

²⁵ Pascal Lamy, ‘Multilateralism is Struggling,’ Speech at the WTO Public Forum ‘Is Multilateralism in Crisis?’, World Trade Organization, Geneva, 24 September 2012.

²⁶ The final text of the Trade Facilitation Agreement is available at <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/940.pdf&Open=True>>.

part to disagreements between the US and India over agricultural stockpiles and fishing subsidies.²⁷ Now the 2019 Nur-Sultan Conference, already postponed once to June 2020, has been pushed back again as a result of Covid-19.²⁸

The ‘legislative crisis’ was itself taking place against the background of another ‘crisis of multilateralism’ caused by WTO Members’ continued turn to bilateral, regional, and mega-regional trade agreements as the primary negotiating forums for deepening trade governance. This ‘spaghetti-bowl crisis’, which had been ongoing for the past two decades, had already spurred rafts of commentary about whether or not these individually-tailored treaties were ‘termites in the trading system’ that would fatally undermine multilateral trade governance, or whether instead they would deepen integration incrementally, ultimately leading to further multilateral trade liberalization.²⁹ For pessimists, the US’s negotiation of the mega-regional Trans-Atlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP)—which seemed *faits accomplis* in 2017 before the Trump administration surprised the world by pulling out of the deals—appeared at the time to be further nails in the multilateral coffin. Nor was the US the only ‘culprit’: other countries, too, have been pushing ahead with integration projects outside of the WTO, with major economic agreements like the African Continental Free Trade Agreement, the Eurasian Economic Union, ASEAN and the China-led Belt and Road Initiative, among others, creating new dispersed centers of economic governance outside of direct Western control.

And all of this is not to mention the ‘legitimacy crisis’, which threatened the multilateral order in the late 1990s, and came to a head following the collapse of the Seattle Ministerial in 1999.³⁰ That crisis

²⁷ ‘A Shameful Failure to Tackle Overfishing’, *The Economist* (19 December 2017), <<https://www.economist.com/leaders/2017/12/19/a-shameful-failure-to-tackle-overfishing>>.

²⁸ ‘Twelfth WTO Ministerial Conference,’ WTO.org <https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm>.

²⁹ Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (OUP 2008). See further Sungjoon Cho, ‘Defragmenting World Trade’ (2006) 27 *Northwestern Journal of International Law & Business* 39; Stephen Joseph Powell & Trisha Law, ‘Is the WTO Quietly Fading Away?: The New Regionalism and Global Trade Rules’ (2011) 9 *Georgetown Journal of Law & Public Policy* 261; Arie Reich, ‘Bilateralism versus Multilateralism in International Trade Law: Applying the Principle of Subsidiarity’ (2010) 60 *University of Toronto Law Journal* 263; Thomas Renard, ‘Partnerships for Effective Multilateralism? Assessing the Compatibility between EU Bilateralism, (Inter-)Regionalism and Multilateralism’ (2016) 29 *Cambridge Review of International Affairs* 18; Thomas Rixen & Ingo Rohlfing, ‘The Institutional Choice of Bilateralism and Multilateralism in International Trade and Taxation’ (2007) 12 *International Negotiation* 389; Tamar Megiddo, ‘Beyond Fragmentation: On International Law’s Integrationist Forces’ (2019) 44 *Yale Journal of International Law* 115.

³⁰ See, e.g., Manfred Elsig, ‘The World Trade Organization’s Legitimacy Crisis: What Does the Beast Look Like?’ (2007) 41 *Journal of World Trade* 75; Daniel C. Esty, ‘The World Trade Organization’s Legitimacy Crisis’ (2002) 1 *World Trade Review* 7; Rorden Wilkinson, ‘The WTO in Crisis: Exploring the Dimensions of Institutional Inertia’ (2001) 35 *Journal of World Trade* 397.

stemmed from the deep divide between developed and developing country preferences on issues such as the expansion of the Organization's mandate into investment, procurement, and competition policy; whether environmental and labor issues should be brought onto the WTO agenda; and the institution's insufficient focus on development—issues that to this day have not been put to rest.³¹

It is plain to see from this litany of crises that there has never been a time in which the WTO has been free of disagreement or contestation. Thus far, none of the 'crises of multilateralism' have actually resulted in the dissolution of the post-1994 system of trade governance. The WTO and its covered agreements have endured despite these challenges, and the Organization continues its work as the most important multilateral hub for trade negotiation and dispute settlement, even during the current difficulties. Given this history of persistent and endemic crisis, it may therefore be that those who speak of the 'crisis of multilateralism' continue to do so partially because they use the term 'multilateralism' to refer to much more than the bare survival of the WTO as a functioning organization, as Section III will now explore.

III. The Meaning of Multilateralism in Public International Trade Law

'Multilateralism' can mean many different things, and *does in fact* mean many different things in the context of public international trade law.

In the narrowest sense, 'multilateralism' may refer to nothing more than what Robert Keohane, in a famously descriptive definition in 1990, called 'the practice of co-ordinating national policies in groups of three or more states.'³² Trade governance generally, and the WTO specifically, are certainly 'multilateral' according to this bare-bones definition: the WTO and its covered agreements coordinate policies among a large number of states (currently 164). As described in Section II, the WTO has proven quite resilient as an organization, and its existing covered agreements continue to set the global baseline for trade policymaking. Even the (likely temporary) loss of the Appellate Body and the US's turn to self-help during the Trump era have not put the WTO in serious jeopardy as a multilateral forum for the coordination of trade policy—they have, instead, spurred talks on how to reform, augment, or shift the system in response. It would be hard to find an institution or legal framework *anywhere* that did not have to contend with disagreement and rule-breaking to one degree or another,

³¹ See Rorden Wilkinson, *Multilateralism and the World Trade Organisation: The Architecture and Extension of International Trade Regulation* (Routledge 2000).

³² Robert Keohane, 'Multilateralism: An Agenda for Research' (1990) 45 *International Journal* 731.

and even the exit of a powerful player would not necessarily mean the end of multilateral cooperation among the remaining Members. The ‘crisis of multilateralism’ must therefore mean more than simply a danger to the nominal existence of the WTO and its covered agreements as mechanisms for coordinating international economic policy.

Instead, ‘multilateralism’ in international economic law indicates a set of broader qualitative and substantive concerns regarding the political choice for peaceful, cooperative, and consultative trade relations, in contrast with economic policies characterized by conflict, self-help, and narrow self-interest. Common uses of ‘multilateralism’ can be roughly subdivided into three categories: (1) multilateralism as opposed to regionalism or bilateralism; (2) multilateralism as opposed to unilateralism; and (3) multilateralism as policy consensus.

First, the term ‘multilateralism’ is often heard in international economic policy discussions in the context of the turn to bilateralism and regionalism. Here, ‘multilateralism’ refers concretely to whether states choose to conduct economic policy negotiations at the ‘multilateral’ WTO, or instead within fragmented bilateral or regional groups. The ‘crisis’ of multilateralism in this sense refers to the fear that the WTO’s role will be undermined as states turn to other forums to accomplish their trade policy goals. This was the subject of the ‘spaghetti bowl’ ‘regionalism crisis’ discussed in Section II above. Debates over whether regional and bilateral agreements are ‘building blocks’ or ‘stumbling blocks’ to further integration in the multilateral system are at this point well known.³³

Second, ‘multilateralism’ is also used in contrast with unilateralism, as indicating a preference for institutionalism and mediated dispute settlement rather than self-help. Here, ‘multilateralism’ means a willingness to deal with trade policy and trade disputes through the diplomatic and quasi-judicial mechanisms provided by the WTO (either in addition to, or instead of, regional and bilateral trade agreements), rather than via unilateral actions; to ‘jaw jaw’ rather than ‘war war’ in Churchill’s famous phrase. The ‘crisis of multilateralism’ in this context refers to the danger of states taking matters into their own hands, and using their economic power to coerce one another into altering their trade policies. This problem is also well-known and well-explored: the tendency for states to resort to unilateral action, political arm-twisting, and economic blackmail when they feel it is in their interest to do so is neither novel nor unexpected.

³³ Jagdish Bhagwati, *The World Trading System at Risk* (Princeton UP 1991), 77; see further the works cited at n 29.

These two more functionalist definitions are complemented by (and interwoven with) a third use of the term ‘multilateralism’ in international economic law discourse—as a concept indicating not only multinational coordination or a preference for global (rather than regional) institutionalism and negotiated dispute settlement, but also as consensus on a set of normative principles. This is the most expansive sense of ‘multilateralism’ in the trade context, encompassing substantive norms as well as processes and practices. John Ruggie has called this the ‘qualitative dimension’ of multilateralism, arguing in response to Keohane’s bare-bones definition that ‘what is distinctive about multilateralism is not merely that it coordinates national policies in groups of three or more states ... but that it does so on the basis of certain principles of ordering relations among those states.’³⁴ In his words, these principles are ‘generalized principles of conduct ... which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence.’³⁵ Providing examples from the realm of international economic law, he argued that such substantive principles include ‘the norm of MFN [most favored nation] treatment, corresponding rules about reciprocal tariff reductions and the application of safeguards, and collectively sanctioned procedures for implementing the rules.’³⁶ The idea that ‘multilateralism’ has substantive semantic content is evident in international economic law discussions. For example, James Bacchus, former member of the WTO Appellate Body, has written of the need for ‘a way back to multilateralism in trade’ as both an antidote to unilateralism and as a remedy for ‘protectionism’—the idea that countries should not protect their markets through tariffs, unnecessary or discriminatory regulations, or other measures at the expense of their neighbors.³⁷ Daniel Chow similarly contrasts multilateralism with both ‘vicious nationalism’ and ‘protectionism’.³⁸

Each of these definitions of multilateralism is used at various times in discussions of international trade law. When they are used in the context of the crisis narrative, they all share a common feature: they contrast an imagined past in which multilateral cooperation existed with a present day in which regionalism, unilateralism, and dissensus are on the rise. What’s more, each of them carries within it strong normative policy preferences: for centralized trade governance, institutionalized dispute

³⁴ John Gerard Ruggie, ‘Multilateralism: The Anatomy of an Institution’ (1992) 46 *International Organization* 561, 567.

³⁵ *Ibid* 571.

³⁶ *Ibid*.

³⁷ James Bacchus, ‘We Need a Way Back to Multilateralism in Trade’, *Cato At Liberty*, 16 July 2019 <<https://www.cato.org/blog/we-need-way-back-multilateralism-trade>>.

³⁸ Daniel Chow, ‘U.S. Trade Infallibility and the Crisis of the World Trade Organization’ (2020) *Michigan State Law Review* 4.

settlement, and substantive norms such as MFN treatment, the desirability of tariff reductions, the illegitimacy of protectionism, and abolition of ‘unnecessary’ barriers to trade.

IV. The Myth of ‘Multilateralism’ in the WTO

The trouble with the ‘crisis of multilateralism’ is that the image of the past on which it relies is a false one—or is at least incomplete. In terms of the three specific meanings of multilateralism outlined above: there was never a time when multilateralism supplanted regionalism; there was never a time when unilateralism and self-help were eliminated; and there was never a time when consensus on core substantive issues of economic policy had been achieved.

Multilateralism versus Regionalism

The idea that the current trade landscape is dominated by ‘regionalism’ whereas the past was an era of ‘multilateralism’ is questionable. It is indisputable that there are *more* regional and bilateral agreements today than ever before. As of 20 September 2020, there were 306 such agreements in force and notified to the WTO.³⁹ However, regional and bilateral agreements predate and have always coexisted with the WTO. The GATT 1947 recognized and provided exceptions for regional integration, even referring to regional agreements as affirmatively *desirable*,⁴⁰ and the WTO continued this tradition.⁴¹ 39 such agreements had entered into force prior to the WTO’s birth in 1995⁴²; indeed, the Organization came onto the scene in the midst of the so-called ‘second wave’ of regional treaties that began in the early 1990s following the end of the Cold War and the opening of previously closed economies to wider international trade. Despite the attempt by the GATT and GATS to impose certain requirements for regional and bilateral agreements to benefit from the MFN exemption, no agreement has ever been found inconsistent with the multilateral regime, and WTO members seem content to continue on this path. Taking all of this into account, Alberta Fabbriotti has argued that ‘the axiom of the WTO

³⁹ WTO, ‘Regional Trade Agreements’ <https://www.wto.org/english/tratop_e/region_e/region_e.htm>.

⁴⁰ “The contracting parties recognize the *desirability* of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.” GATT Article XXIV(4) (emphasis added).

⁴¹ GATS Article V; “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” (1979) [‘Enabling Clause’].

⁴² WTO, ‘Regional Trade Agreements Database’ <<http://rtais.wto.org/UI/PublicAllRTAList.aspx>>.

universality is tenable only considering the twofold essence of this international organization, within which the two paradigms of multilateralism and regionalism coexist.⁴³

Second, viewing the WTO as a multilateral system in this sense papers over an important aspect of its governance: that though WTO commitments are multilateralized and apply on an MFN basis once they are approved, the negotiation of these commitments largely takes place bilaterally or within groups. This is true both of individual members' commitments, as well as of ongoing negotiations as part of the single undertaking. The reciprocity principle sits at the core of the WTO legal system. New candidates for WTO membership must negotiate their schedules of concessions with current members, a process that most often takes place on a state-to-state bilateral basis. In the words of the Appellate Body: "Tariff negotiations are a process of reciprocal demands and concessions, of "give and take."⁴⁴ Concessions create rights and obligations between individual members, and dispute resolution regarding breaches of those obligations thus takes place *inter partes* rather than *erga omnes*. Indeed, WTO dispute settlement does not speak of 'breach' but rather of the 'nullification or impairment of benefits' to the complaining member, and any authorization of retaliation is granted on a bilateral basis and to a degree reflecting only the bilateral damage. Moreover, renegotiations of trade concessions can take place among subsets of members with substantial trade interests in the sector concerned: no collective consultation is required.⁴⁵ Thus, as Joost Pauwelyn has argued, despite the multilateral framework of the WTO, members' commitments are essentially of an individualized and bilateral character.⁴⁶

Third, bilateral and plurilateral negotiations are the norm during liberalization discussions at the WTO, despite the multilateral framework in which they take place. It is well known that the difficulties posed by consensus decision-making are a major challenge for the WTO.⁴⁷ Because of the WTO's consensus rule, the members have made extensive use of informal processes in which smaller groups of countries conduct pre-negotiation sessions to come to agreements amongst themselves prior to multilateral talks. Before the collapse of the Seattle Ministerial, the so-called 'green room' practices had already led

⁴³ Alberta Fabbriotti, 'Universalism and Regionalism in International Trade Law: Is the WTO A Truly Universal International Organization?', in *Scritti in Memoria di Maria Rita Saulle Vol. I* (2014) 559, 573.

⁴⁴ Appellate Body Report, *European Communities-Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, adopted 22 June 1998, para. 109.

⁴⁵ GATT XXVIII; GATS XXI.

⁴⁶ Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) *European Journal of International Law* 907.

⁴⁷ This was the major result of the so-called 'Sutherland Report' in 2004: Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004).

to accusations that the WTO was essentially a ‘rich man’s club’ dominated by the Quad (Canada, EU, US, Japan), who acted as ‘deal-makers’ while the remainder of the states were relegated to being ‘deal-takers’. Despite the extension of the Quad to the G-6 and other formations in more recent years, the consensus decision-making practices at the WTO continue to favor plurilateral negotiations among the more powerful states—suggesting that ‘multilateralism’ may often be simply plurilateralism in disguise. Indeed, one of the most common explanations for the turn to bilateral and regional agreements as the primary forums for further negotiations is that the major economies can no longer get what they want at the WTO, as developing countries have refused to take on new issues within the multilateral framework until the Doha Development Round has been completed, and they have achieved some of their own trade policy goals.

All of this leads to the conclusion that the multilateral WTO has always existed alongside, through, in concert with, as well as in tension with, multiple forms of bilateralism, regionalism, and plurilateralism. There is not now, and never has been, a time in which WTO-based multilateralism or collective action supplanted these other forms of economic integration *tout court*.

Multilateralism versus Unilateralism

The idea that there has been a turn to ‘unilateralism’ that upsets a ‘multilateral’ past also needs to be reconsidered.

It is certainly true that the US and other countries have in recent years resorted to using unilateral self-help measures in pursuit of their trade policy goals without regard to the rules and procedures of the WTO. But this, too, is not a new development. Despite the availability of the WTO’s negotiation, conciliation, and dispute settlement mechanisms, countries have never ceased to employ unilateral means to try to influence the behavior of their trading partners. As a case in point, the US’s Section 301 unilateral tariff sanctions policy has been the subject of perennial complaints since the GATT days. Even at what was arguably the highwater point of international trade multilateralism—the conclusion of the Marrakesh Agreement and the birth of the WTO in 1995—the Japan-US dispute over autos saw the US mobilizing Section 301, rather than the newly formed WTO dispute settlement system, to threaten a 100% tariff on imports of Japanese luxury cars in order to pressure Japan to do

away with perceived unfair trade practices in the auto parts market.⁴⁸ Indeed, the US pursued unilateral action in this case despite the fact that the EU and Japan had consented to the WTO's more highly judicialized dispute settlement mechanisms partially in exchange for reassurances that the US would begin using the WTO dispute settlement system instead of the US's own domestic 301 process as a first port of call for dispute resolution.⁴⁹

Perhaps more novel from this perspective is the weakening of the WTO as an institution, most particularly by the US's refusal to support the appointment of new members to the Appellate Body. One of the goals of the WTO is to reduce unilateral action and avoid the possibility of trade wars by channeling conflicts through the WTO's third-party dispute settlement system.⁵⁰ This function is seriously impeded by the Appellate Body's ceasing to function, leading to real questions about the effective enforcement of the covered agreements pending Appellate Body reform.

However, the 'crisis of multilateralism' narrative hides something here, too: that the US's defection from the WTO dispute settlement system is directly related to the fact that this system has, over time, become less biased in its favor. As Gregory Shaffer explains, at the birth of the WTO in 1995 the US and EU⁵¹ were in a uniquely privileged position in terms of public and private legal resources, giving them a major institutional advantage in dispute settlement.⁵² What's more, the fact that enforcement of disputes ultimately relies on retaliation—with the winning party being authorized to suspend trade concessions granted to the losing party in an amount equivalent to the injury—means that larger economies are favored over smaller ones.⁵³ In terms of cost, access to legal resources, and ability to retaliate, then, the US and EU were for some time at a significant structural advantage in WTO dispute settlement.

Today, things have changed. Access to justice has improved through the establishment of the Advisory Centre on WTO Law, which provides legal assistance to developing countries pursuing dispute

⁴⁸ See Jay L. Eizenstat, 'The Impact of the World Trade Organization on Unilateral United States Trade Sanctions under section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute' (1997) 11 *Emory International Law Review* 137.

⁴⁹ William J. Davey, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' (2014) 27 *Journal of International Economic Law* 679, 686.

⁵⁰ WTO Agreement, Art. III:3.

⁵¹ The term EU is used throughout this contribution for the purpose of clarity, despite the fact that in some instances—here included—the term European Communities (EC) would be historically appropriate.

⁵² See Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press 2003).

⁵³ See Hakan Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: The Case for a Small Claims Tribunal?' (2008) 7 *World Trade Review* 587.

settlement claims and has become a significant player in trade disputes.⁵⁴ Emerging economies—China in particular—have become regular participants in WTO dispute settlement, holding the US and EU to account for their application of anti-dumping policies, countervailing duties, safeguards, sanitary and phytosanitary standards, and other rules in an unbiased and non-protectionist way.⁵⁵ Though the US still has a much higher ‘win rate’ than China in these disputes (with the US winning every one of its cases against China, while China’s cases see more mixed success⁵⁶), it has increasingly seen the WTO as constraining its policy freedom in a way that it had not initially anticipated.

Just as there was no past historical moment when multilateralism eliminated unilateralism and self-help from the world of international economic policy, there was also no time when the WTO dispute settlement system was a model of multilateralism based on the rule of law, free from systemic bias and institutional lopsidedness. The past was not egalitarian—it was one in which the US and other big economies had numerous structural advantages that gave them outsized power in the WTO system, and in which powerful states continued to engage in strong-arm self-help tactics in order to achieve their economic goals despite the availability of WTO dispute settlement. Now that China has joined the WTO and emerging economies have begun to use the WTO to their advantage, it is worth considering whether the US has ramped up its use of self-help measures and sabotaged the Appellate Body in order to *preserve* the unilateral power *it has always had* in trade disputes. Once again, the ‘crisis of multilateralism’ discourse encourages a manufactured nostalgia for a ‘fair and cooperative’ past that never truly existed: unilateral action was never entirely supplanted by the multilateral WTO system, and the big players always had an unfair advantage in trade disputes.

Multilateralism as Consensus

The vast majority of the world’s states are members of the WTO—164 at current count, representing 98 percent of global trade.⁵⁷ However, this widespread *participation* ought not be mistaken for *consensus* on the contours of economic law as a constitutionalist or cosmopolitan project. In the words of

⁵⁴ See <<https://www.acwl.ch/>>.

⁵⁵ See, e.g., DS252 US—Steel Products (2003); DS392 US—Poultry (2010); DS422 US—Anti-Dumping Measures on Shrimp and Diamond Sawblades (2013); DS449 US—Countervailing and Anti-Dumping Measures (2015).

⁵⁶ Jeffrey J Schott and Euijin Jung, ‘In US-China Trade Disputes, the WTO Usually Sides with the United States’ (*Peterson Institute for International Economics*, 12 March 2019) <<https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-disputes-wto-usually-sides-united-states>>.

⁵⁷ World Trade Organization, ‘WTO in Brief’ <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm>

Laurence Boisson de Chazournes: the ‘ambition to create a global public order ... has not prospered in international economic law.’⁵⁸

Despite the hegemonic rhetoric that liberalized trade policy is an unqualified good, the modern history of international economic governance has been characterized not by consensus, but rather by disagreement and partiality, both in theory and in practice. Indeed, none of the core normative principles of WTO law are or were apolitical, without distributional consequences, or universally agreed upon.

Take, for example, the central principle of non-discrimination in the application of trade rules. Post-WWII trade policy was shaped by the General Agreement on Tariffs and Trade (GATT) drafters’ common experience of protectionism during the inter-war period, leading to some concurrence on non-discrimination as the backbone of international economic policy. However, even the non-discrimination principle was more advantageous for some than others: it was adopted after a targeted campaign by the US to end the UK’s preferential arrangements with its current and former colonies, which the US saw as threatening its commercial interests.⁵⁹

Tariff reduction, too, was designed to further the interests of the original GATT drafters. The focus on lowering tariffs and eliminating protectionism was linked, as Ha-Joon Chang argues, to protecting the interests of developed economies who no longer needed to make use of interventionist industrial policies such as infant industry protection—the ‘free trade’ approach was not devised with the needs of diverse or developing states in mind, but rather in with an eye to providing markets for the competitive industries of the global North.⁶⁰ What’s more, the free trade agenda always targeted some tariffs while leaving aside others. The notable exclusion of developed country agricultural quotas from the GATT’s liberalization agenda was a case in point, as was the sheltering of developed country textile industries under the Multi-Fibre Arrangement. While developing countries were generally not required to make substantial concessions in pre-Uruguay Round trade negotiations, they were also unable to pressure the developed world to open markets in key sectors. It was in fact the ineffectiveness of the early GATT in addressing these concerns that led to the establishment of the UN Conference on Trade and Development (UNCTAD) in 1964, which was intended as a forum where the economic

⁵⁸ Laurence Boisson de Chazournes, ‘International Economic Law and the Quest for Universality’ (2019) 32 *Leiden Journal of International Law* 401, 402.

⁵⁹ Dani Rodrik, *The Globalization Paradox* (OUP 2011), 70.

⁶⁰ Ha-Joon Chang, *Kicking Away the Ladder: Development Policy in Historical Perspective* (Anthem Press 2002).

needs of the developing world would receive greater attention.⁶¹ The rhetoric of free trade coupled with the reality of selective tariff liberalization skewed the benefits of trade in favor of some countries and some industries while ignoring or undermining the needs of others, contradicting the narrative of consensus on the ‘universal good’ of across-the-board tariff reductions.

The establishment of the WTO in 1994 came at the height of the ‘Washington consensus’ era, a moment when policy concurrence around a (neo)liberal economic model was imagined to have been achieved, at least by its cheerleaders in the District of Columbia. The WTO brought new disciplines in a host of areas and deepened the existing rules on trade in goods while strengthening the dispute settlement mechanism, pushing the ‘rules-based system’ of trade governance farther than it had ever gone before. But here, too, the triumphalist assertions of the ‘end of history’⁶² belied the internal dissent and contestation that accompanied the birth of the Organization.

To give only the most obvious example, the new areas over which the WTO gained authority were selectively chosen and their benefits were far from evenly distributed. The focus on intellectual property (IP) protection and the liberalization of services trade (at least in the modes of cross-border provision and investment) strongly favored the interests of the US, EU, and other services hubs and capital exporters, with developing countries agreeing to these disciplines only as part of a bargain whereby developed states would later begin phasing out textile and agricultural controls.⁶³ This selectivity was a direct cause of the ‘legitimacy crisis’ that reached a critical peak in 1999, when developing countries who felt they had not reaped the results of the Uruguay Round refused to enter into negotiations about further liberalization of procurement, competition, investment, and other areas pushed by the developed world until they saw some movement on issues relevant to them. The opening of the Doha Development Round—which, as noted above, is essentially moribund—was the response to these demands.

The point of these few examples is simply to demonstrate what should be obvious to any critical observer: that there was no point at which the WTO or its covered agreements represented a policy consensus. At best, they represented partial and contextual agreements to work together on issues of international economic governance *despite* deep and continued divergence on fundamental issues.

⁶¹ Constantine Michalopoulos, *Developing Countries in the WTO* (Palgrave MacMillan 2001), 27.

⁶² Francis Fukuyama, ‘The End of History?’ (1989) *The National Interest* 3.

⁶³ Michalopoulos (n 61).

Robert Hudec referred to this tension as the ‘political theatre’ dimension of international economic law, and described it in the following terms:

The international agreements in this area, like international agreements generally, are frequently documents which claim to solve problems, but in fact merely paper over conflicting national positions without resolving them. The normal way of doing this is to create legal documents embroidered with elegant ambiguities, but the same result can be achieved whenever agreements simply declare divergent understandings about clear texts.⁶⁴

The WTO’s covered agreements are full of such ‘elegant ambiguities’, postponements, and divergences. They are and were contingent agreements to cooperate on certain aspects of trade policy in exchange for certain benefits in terms of market access, dispute settlement, and so on—*not* fully formed consensus-based programs with universal validity. Indeed, portraying WTO rules as representing multilateral consensus—as the crisis narrative implicitly does—elevates their status from ‘contingent agreements’ to ‘universal truths’ and thus grants them an aura of incontestability. The ‘crisis of multilateralism’ discourse, in this sense, fits Koskenniemi’s description of an international order in which ‘the winners have consolidated their victory by the institutions they rule’ and use the language of expertise, universalism, and reason to advance projects that serve their particular interests, and not some idealized conception of an agreed common good.⁶⁵

V. Conclusion: Multilateralism as Political Discourse

The challenges that the WTO faces today are serious ones: a rebellious United States that during the Trump administration sabotaged the Appellate Body and ramped up its use of punitive tariffs as tools of economic policy; a negotiating deadlock that has seen a near-total failure to achieve further liberalization of trade rules in the post-1994 era; the (related) turn to bilateralism and regionalism as alternative forums for trade policy negotiations; and the push by the ‘West’ for WTO ‘modernization’, to name just a few. These are, indeed, tough days for the Organization, and it is easy to see why

⁶⁴ Robert E. Hudec, ‘International Economic Law: The Political Theatre Dimension’ (1996) 17 *University of Pennsylvania Journal of International Economic Law* 9, 9.

⁶⁵ Martti Koskenniemi, ‘International Law and the Far Right: Reflections on Law and Cynicism’ *Fourth Annual T.M.C. Asser Lecture* (2019), 6.

commentators would speak of a ‘crisis of multilateralism’ in this context. The WTO, a multilateral organization in Keohane’s sense above, seems to be struggling to fulfil its function.

This chapter has argued, however, that the ‘crisis of multilateralism’ rhetoric should be scrutinized rather more closely. While on its face it appears to be merely a neutral descriptive phrase that sums up the challenges facing the WTO, it is in fact much more than this: it is an unacknowledged political discourse that invites us to imagine the world in accordance with its underlying presumptions. Specifically, it assumes, implies, and in some cases directly articulates an imagined past in which cooperation, community, and consensus were the order of the day, in contrast with a present characterized by regionalism, unilateralism, and disagreement.

But this imagined ‘multilateral’ past never really existed: multilateral negotiations never supplanted bilateral and regional economic cooperation (or coercion); countries have never stopped using unilateral measures to achieve their economic policy goals (including by leveraging their economic power *within* WTO dispute settlement); and there was never a time when the substantive content of trade governance was anywhere near uncontested or universally agreed upon. Instead, the history of trade governance in general and the WTO in particular has been one filled with inequality, partiality, contestation, and resistance—in addition to agreement. It is a history of ‘political theatre’ and power politics and contingency—in addition to cooperation.

The ‘crisis of multilateralism’ discourse papers over the disagreements, power struggles, and inequality that have characterized trade governance. In doing so, it promotes a hegemonic vision of a global economic order to which the only alternatives are unreasonable, short-sighted, or ‘populist’. But this consensus-based understanding of trade policy is demonstrably false, and opposition to a partial and contingent system is not, in itself, illegitimate.

Martti Koskenniemi recently cautioned that ‘international lawyers ought to re-examine their commitment to present global institutions. Like all institutions, they operate under ideas and assumptions that are contestable and revisable but that tend to be taken as natural and obvious by the people who work in them.’⁶⁶ The idea that the WTO represents a triumph of multilateralism—in any sense other than the most mundane—is one such assumption that ought to be revisited. Re-examining this ‘multilateral’ institution in light of the current crises it faces may cause us to come to some very

⁶⁶ Koskenniemi (n 65), 7.

different conclusions than those suggested by the ‘crisis of multilateralism’ discourse: that perhaps the US is going rogue in order to *preserve* an unequal status that it long held *within* the system; that perhaps the Doha Round negotiations have failed because the promise of focusing on developing countries’ needs is *incompatible* with the interests protected by the covered agreements (that is to say, the interests of the rich); that perhaps the rhetoric of ‘multilateralism’ should be recognized as a *political* discourse—not a historical fact.