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Reviving the WTO

Five Priorities for Liberalization

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EXECUTIVE SUMMARY

Established in 1995, the World Trade Organization (WTO) was the culmination of half a century of global trade liberalization achieved under the auspices of the General Agreement on Tariffs and Trade (GATT). Subsequent agreements to achieve further liberalization—and to establish rules for emerging forms of cross-border trade and investment—were among the expectations of WTO members from the outset. But very little in the way of agreements on new rules has been achieved in the quarter century since the WTO's founding, and today the institution is facing an existential crisis.

Discord among members over a variety of matters; mounting tensions in the U.S.-China relationship; differences over definitions, priorities, and expectations; and the general absence of a requisite sense of urgency have left the organization in a state of paralysis. The failure to reach any new multilateral or other agreements—or even to agree on next steps at the conclusion of the last Ministerial Conference in Buenos Aires in 2017—left many wondering if the end of the WTO was in sight.

Should the WTO continue to fade into irrelevance, the world will no doubt have deep regrets. The rule of law in the international trading system has fostered greater certainty, international cooperation, and recourse to adjudication—all pillars of global economic growth that will be missed if we allow the WTO to descend into obsolescence.

To help ward off that outcome, WTO members should be prepared to treat the next ministerial meeting, scheduled for June 2021 in Kazakhstan, as a make-or-break event where they must forge agreement on how to pursue further trade liberalization and what policy areas should take priority. This paper recommends five policy areas that should take priority in these discussions. If members cannot make progress in these areas before and during the ministerial meeting, the end of the WTO may indeed be upon us.

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INTRODUCTION

When the novel coronavirus outbreak occurred in Wuhan, China, near the end of 2019, the World Trade Organization (WTO) was already in existential crisis. It had been for some time. In the quarter century since its establishment in 1995, a concatenation of circumstances had left the WTO largely paralyzed, adrift amid the grumblings of growing global discord over trade and protectionism. The arrival of the pandemic only worsened preexisting conditions that had long been leading to this existential crisis.

The failure to complete any new multilateral or other agreements—or even to agree on the traditional declaration concluding the conference—at the 11th Ministerial Conference in Buenos Aires in 2017 left many wondering if the end for the WTO was in sight. Expectations were low in Buenos Aires, and the ministers fulfilled those low expectations. WTO members struggled to find a way toward further trade liberalization and international economic integration.

Amid the general disappointment, one encouraging sign in Buenos Aires was that many WTO members appeared ready to turn toward plurilateral solutions on trade that could, in time, become fully multilateral solutions. Multilateral trade agreements, with rules that apply multilaterally, must always be the ultimate goal for the WTO. But there is more than one way to get to multilateralism. Starting with plurilateral agreements among some WTO members and then gradually transforming them into fully global agreements seems to be the most promising path to multilateralism in the 21st century.

But no new WTO agreements of any kind have been concluded since the conference in Buenos Aires. Meantime, the drawn-out failure of the Doha Development Round of trade negotiations begun in 2001; the divide over "special and differential treatment" for developing countries; the proliferation of bilateral and regional agreements outside the WTO framework; the historic resurgence of China as a global economic power; the apprehensive U.S. reaction to China's rise; the U.S. retreat from rule-based multilateralism in trade under a unilateralist and protectionist President Trump; and the worldwide surge in managed and manipulated trade have all combined to call into question whether the WTO remains relevant.

To be sure, WTO dispute settlement continues to function, although in a truncated and increasingly ineffective form, because of U.S. efforts to subvert the Appellate Body. Trade monitoring continues as usual. Trade reports are still published. But the central task of the trading system—to widen and deepen rules-based trade liberalization sought by WTO members in an ever-changing global economy—remains mired in impasse.

The 12th Ministerial Conference of the WTO, which is currently expected to take place in Nur-Sultan, Kazakhstan, in June 2021, may be the last chance for the WTO to reclaim a central role for the WTO-based multilateral trading system. The failure to seize this last chance could ultimately lead to the collapse of the entire system. WTO members must prove that they still can negotiate new rules and put them into effect. To improve any prospects for success in Kazakhstan, WTO members must identify the issues most likely to generate consensus by June 2021 and pursue negotiations on those issues immediately. In the countdown to Kazakhstan, they should focus on five issues: free trade in medical goods, free trade in environmental goods, new disciplines on fisheries subsidies, investment facilitation, and digital trade. These could be the five first pieces of WTO reform.

FREE TRADE IN MEDICAL GOODS

Goal 3 of the United Nations Sustainable Development Goals for 2030 is to "ensure healthy lives and promote well-being for all at all ages," including by combating communicable diseases and by providing access to affordable essential medicines and vaccines.[1] International trade is indispensable to meeting this global goal. World imports of medical products totaled about $1.01 trillion in 2019. Of these imports, roughly $597 billion are linked to the COVID-19 pandemic. These essential products include medicines, medical supplies, medical equipment and technology, and personal protective products (PPP) such as facemasks, sanitizer, and hand soaps.[2]

Tariffs on some medical products remain high. For all medical products across all WTO members, the average "bound" tariff—the average tariff ceiling pledged by a country in its WTO concessions—is 26 percent. For almost one-third of WTO members, the average bound tariff on medical goods exceeds 50 percent. Some members apply tariffs as high as 65 percent on some of these essential products.[3] Average tariffs on the protective supplies used to combat COVID-19 are as high as 27 percent in some countries. The average applied tariff on hand soap is 17 percent.[4] Surprisingly, only nine WTO members allow a health product as basic as soap to enter their countries duty-free.[5]

With the sudden outbreak of the pandemic, trade in essential medical products was impeded by demand shocks, supply shocks, and disruptions of global transportation and supply chains. Facing domestic shortages of medical goods on account of just-in-time business practices and a dearth of emergency stockpiles, some countries responded by restricting or otherwise distorting trade in medical goods. By the spring of 2020, 75 governments had restricted exports of medicines and medical supplies.[6]

It is perfectly understandable that national leaders want to do all they can to make certain that their own citizens have the medicines, medical supplies, and medical care they need, particularly during a pandemic. Yet measures restricting trade in medicines and in medical supplies "hurt all countries, particularly the more fragile."[7] Restrictive trade measures prevent limited drugs and supplies from going where they are most needed to conduct an effective and coordinated global response to the pandemic.[8]

Poorer countries, which import most of the medical goods they need to fight COVID-19, will be hurt first, and maybe the most, from the scarcities and higher prices resulting from such trade restrictions. The consequences could be deadly.[9] Wealthier countries, often those imposing trade restrictions, will also be harmed. Prices will be higher than they need be and supplies will not be distributed efficiently or equitably.[10] Moreover, no one country—not even the wealthiest—will be able to make or ensure for itself the wide variety of essential medicines and medical supplies it needs.

In general, "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas . . . export licenses or other measures . . . on the exportation or sale for export of any product" are inconsistent with WTO obligations.[11] However, "export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting" WTO member are permitted, as long as they are made transparent through publication and applied on a nondiscriminatory basis.[12]

Moreover, any export restriction, even if it is not eligible for the carve-out for measures relating to critical shortages, can be excused from the general WTO ban on such measures. The only requirements are that the provision be necessary to protect public health or essential to address general or local short supply and that it not be applied "in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[13]

All this said, the fact that many of the export restrictions imposed on medical goods during the pandemic are probably legal under international law does not, as Martin Wolf of the *Financial Times* has observed, "make them wise."[14] As Jennifer Hillman of the Council on Foreign Relations has explained, such actions prevent medical goods from getting to where they are needed most at the least expense, lead to higher prices and pockets of scarcity by encouraging more restrictions, and lead to disruptions and delivery delays in global medical supply chains.[15] Moreover, export restrictions

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on medical goods cause "disproportionate harm to developing nations that cannot otherwise compete in bidding wars."[16]

In the new pandemic world, instead of restricting exports of medical goods, countries should be removing barriers to both exports and imports. At the top of the to-do list of new rules to be agreed upon by the WTO are those that would eliminate all existing trade restrictions on medicines and medical supplies and would require members to refrain from enacting additional restrictions.

Another essential component of getting to free trade on medical goods is the elimination of all tariffs on imports of drugs and medical equipment. These essential goods are needed everywhere to confront the COVID-19 emergency, and no one country can produce all these goods in the amounts they may eventually need. All countries—even the wealthiest countries—will need to import at least some of them, and removing tariffs will lower the costs of final goods and inputs.

New Zealand and Singapore can lead the way. In April 2020, they formally agreed to eliminate tariffs, refrain from export restrictions, and negotiate removal of non-tariff barriers on a long list of medical products, while inviting other countries to join in the agreement. Several dozen additional members have since expressed an interest in waiving tariffs on medical goods permanently. Previously, six WTO members—Canada; the European Union; Macao, China; Switzerland; Norway; and the United States—have implemented an agreement within the WTO framework in which they agreed to remove tariffs mutually on pharmaceutical products. In addition to this limited accord, four members—Macao, China; Hong Kong, China; Singapore; and Iceland—have eliminated all duties on all medical products.[17] The overwhelming majority of WTO members, however, have not taken such liberalizing actions.

In addition to eliminating tariffs and other restrictions on trade in medical goods, members should be discussing, in advance of Kazakhstan, new rules to: promote transparency in all national measures taken to fight the virus; waive "buy local" requirements for medical goods, which inflate the prices of government purchases; eliminate unnecessary regulatory and administrative barriers that hinder trade in medicines and medical equipment; adopt international standards to help ensure the safety and quality of imported medical goods; coordinate targeted subsidies for development and production of medicines urgently needed to stop COVID-19; and lift restrictions on the movement of health care workers across borders to provide health services. (In the United States, about 1.5 million immigrants are employed as doctors, nurses, and pharmacists.[18] Where would other Americans have been without them in 2020?)

All these new rules relating to trade in medicines and medical products should be combined into a WTO medical goods agreement. Ideally, such an agreement would be fully multilateral and include all 164 WTO members. If that is not immediately achievable, then such an agreement could initially include some WTO members, and they could build toward making it fully multilateral over time. The key to the success of a medical goods agreement would be making it enforceable, like all other WTO agreements, through WTO dispute settlement.[19]

FREE TRADE IN ENVIRONMENTAL GOODS

Negotiations on freeing trade in environmental goods began during the Doha Development Round. It was agreed in Doha in 2001 that WTO members would negotiate multilaterally on "the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services."[20] Regrettably, these negotiations failed. In January 2014, 14 WTO members launched negotiations on a proposed agreement among some WTO members—a plurilateral agreement—to free trade in environmental goods. Eventually, 46 WTO members, representing nearly 90 percent of the more than

$1 trillion in global trade in environmental goods, participated in these negotiations.[21]

The negotiations collapsed in December 2016, when trade negotiators failed to find common ground on which goods would be covered by the proposed agreement. China, which had appeared a hesitant party to the talks all along, made new requests at the last minute that others could not accept. Everyone involved promised to conclude an agreement in 2017. But the Trump administration displayed scant interest in continuing the negotiations, which stalled in 2017 and have remained frozen ever since. After nearly two decades of negotiations on trade in environmental goods, there is no agreement.

Because these are plurilateral negotiations, a consensus of all 164 WTO members would not be needed to conclude an agreement at the next ministerial conference of the WTO. The aim of the subset of WTO members that have been engaged in the negotiations on environmental goods has been to get coverage of environmental goods sufficient to constitute a "critical mass" of all the trade in such goods. Although there is no WTO rule defining such a critical mass of trade, the general rule of thumb in past negotiations has pegged it at 90 percent—a threshold considered sufficient to minimize the free-rider effect. Usually, when WTO members reach an agreement plurilaterally, the tariff cuts are extended on a most-favored-nation basis so that all WTO members, including those who have not yet signed the agreement, can enjoy the benefits. Negotiating countries are confident at this point that they have reached that critical mass of 90 percent coverage.

The highest hurdle to a WTO environmental goods agreement is reaching a consensus on which goods are, in fact, environmental goods. This uncertainty has been the main obstacle to success from the outset. The negotiations began with a list of 54 products previously agreed on by Asia-Pacific Economic Cooperation nations.[22] This initial list has grown. Some interest groups have proffered lists that contain seemingly everything, including (literally) the kitchen sink.[23] The Chinese want the list to include bicycles—arguably, environmental goods—but the European Union and the United States, both of which have imposed anti-dumping duties on imports of Chinese-made bicycles, have resisted China's push to make these imports duty-free.[24]

Another hurdle to reaching an agreement is the expressed hope of the negotiators that it will become a "living agreement" that can expand and evolve over time.[25] One key to the success of such an open-ended agreement will be agreeing on a timely means of applying duty-free treatment to new environmental goods as they are produced. In a comparable situation, it took WTO negotiators nearly 20 years to expand the list of information technology goods eligible for duty-free treatment under the WTO Information Technology Agreement, even though rapid innovation was yielding new products continuously.[26]

Whatever the final list may be, the goods covered by an environmental goods agreement will, according to the WTO Secretariat, include "important environment-related products . . . that can help achieve environmental and climate-protective 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] Abolishing tariffs on environmental goods, which are as high as 35 percent, would lower the prices of those goods and would thereby hasten their spread worldwide.[28]

Ideally, a WTO agreement that freed trade in environmental goods should also free trade in environmental services, as originally intended in the Doha Development Agenda. Because goods and services are increasingly intertwined, and because their delivery is therefore often integrated, their trade treatment should likewise be integrated. Conclusion of a WTO environmental goods agreement should not, however, be conditioned on the simultaneous conclusion of an agreement to free trade in environmental services. Instead, a plurilateral

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environmental goods agreement concluded in Kazakhstan could become the basis for an expanded agreement that would include environmental services.

DISCIPLINES ON FISHERIES SUBSIDIES

Negotiations on fisheries subsidies also began during the Doha Development Round. Like other production subsidies, fisheries subsidies are subject to existing WTO subsidies rules, but members have concluded that additional disciplines are required. Since 2001, as part of the Doha Development Agenda, members have endeavored to "clarify and improve WTO discipline on fisheries subsidies, taking into account the importance of this sector to developing countries."[29] WTO members have now struggled through 18 rounds of negotiations without success.

These negotiations were given renewed impetus in 2015, when all members of the United Nations (including all WTO members) agreed in Target 14.6 under Goal 14 of the Sustainable Development Goals (SDGs) to "prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported, and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation."[30] Because of the seriousness of the issues, the United Nations agreed to meet this target, not (as with most other SDGs) by 2030, but by 2020.

Despite this added emphasis, WTO members failed to conclude an agreement on fisheries subsidies at the 11th Ministerial Conference in Buenos Aires in 2017. But they pledged then to conclude an agreement by the next ministerial conference, which was delayed until June 2021 on account of the pandemic. In September 2020, the talks were resumed, and, in October 2020, negotiators were still seeking a compromise consensus by the end of the year—the deadline set by the United Nations in the SDGs.[31]

The state of global fisheries is a major concern everywhere. Worldwide, three billion people depend on fish and fish products for up to 15 percent of their daily protein and nutrition. Many of them live in the poorest and least-developed countries. And at least 140 million people depend on fisheries for their livelihood.[32] The demand for fish has been increasing with a growing—and increasingly prosperous—global population. Humans now eat more fish than ever before, an average of 20 kilograms (44 pounds) per person every year.[33] We eat more fish than beef.[34]

Meanwhile, the global fish catch has been declining.[35] According to the Food and Agricultural Organization (FAO) of the United Nations, fish stocks that are within biologically sustainable levels fell from 90 percent in 1974 to 65.8 percent in 2017. Underfished stocks accounted for only 6.2 percent. In its 2020 annual report on the status of fisheries and aquaculture, the FAO said that, although there have been some improvements in sustainable fisheries practices, the statistics indicate that the United Nations target of ending overfishing of marine fisheries by 2030 will not be achieved.[36]

In this grim ecological context, almost 38 percent of all the fish caught or farmed in the world is traded, with a total export value of $164 billion.[37] This trade is driven in part by subsidies. As explained by Elizabeth Wilson of the Pew Charitable Trusts:

> Fisheries subsidies are one of the key drivers behind this decline in fish stocks. Governments pay . . . each year in damaging types of fisheries subsidies, primarily to industrial fishers, to offset costs such as fuel, gear, and vessel construction. . . . Today, in part driven by fisheries subsidies, global fishing capacity—the total capability of the world's fleets—is estimated at 250 percent of the level that would bring in the maximum sustainable catch.[38]

Most countries, regardless of their stage of development, subsidize their fisheries.[39] In 2018, fisheries subsidies totaled $35.4 billion worldwide. Of these total subsidies, 22 percent were for fuel subsidies, which permit fishing trawlers, largely from the wealthier countries, to range farther into the global commons of the high seas. China granted 21 percent of total global fisheries subsidies, the European Union 11 percent, the United States 10 percent, and South Korea 9 percent.[40] The global total of fisheries subsidies is between 30 and 40 percent of the landed value generated by wild fisheries worldwide.[41]

Fearful of lost markets, many developing countries have resisted new disciplines on fisheries subsidies, even though about two-thirds of the subsidies are provided by the United States, the European Union, South Korea, and Japan, which have recently been joined by China.[42] Reasons for opposition that are often cited are the perceived risks to small fishers in developing countries from losing subsidies, although an express target of the SDGs is to "provide access for small-scale artisanal fishers to marine resources and markets."[43]

In any case, most of the subsidies go to large fishers through fuel and other support to huge corporate fishing fleets. Moreover, 2020 case studies commissioned by the International Institute for Sustainable Development in Canada show that new WTO trade disciplines on fisheries subsidies could help local fishers while increasing global economic returns from fishing. These studies indicate that, in addition to improving fishery sustainability, "reforming harmful fisheries subsidies could lead to higher yields for local fishers, which could help provide more stable jobs, raise fishers' incomes, reduce poverty, and improve food security in local communities."[44]

INVESTMENT FACILITATION

As the Organisation for Economic Co-operation and Development has explained, "Investment is central to growth and sustainable development. Under the right conditions, international investment can enhance the host economy's productive capacity and growth potential, drive job creation and improvements in living standards, allow the transfer of technology and know-how, and spur domestic investment, including through the creation of local supplier linkages."[45] To recover from the COVID-19 pandemic, the world economy will require more foreign direct investment (FDI).

Foreign direct investment and trade are mirror images of the same face of economic growth. They are mutually reinforcing. As the WTO has explained, "Given that two-thirds of world exports are governed by . . . multinational firms, deciding where to invest is simultaneously deciding from where to trade." Increased trade creates more FDI by making a greater number of markets receptive to FDI. Also, more FDI increases trade by spreading technology, shifting relationships between importers and exporters, enhancing financial relationships, and shaping supply chains.[46]

Because of the pandemic, global FDI plunged 42 percent in 2020. Further decreases of 5 percent to 10 percent are forecast for 2021, before an expected upturn in 2022.[47] The plummet in foreign direct investment during the pandemic has had virtually nothing to do with the absence of multilateral investment rules. But more and better international investment rules could help facilitate an increase in FDI.

For decades, there have been efforts to establish multilateral rules for FDI comparable to the multilateral rules for trade. Thus far, those efforts have failed. Instead, investment rules are found in nearly 3,000 bilateral investment treaties and in hundreds of other treaties containing investment provisions.[48] The investment rules in these treaties sometimes conflict, and generally they lack the coherence that is largely characteristic of WTO trade rules, which would help ease and speed the flow of FDI.

Shortly after the establishment of the WTO, the European Union and others proposed the negotiation of comprehensive rules

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dealing with the link between trade and investment in the WTO. But their proposal for investment negotiations was rejected at the first ministerial meeting in Singapore in 1997 and, to this day, there are only limited WTO rules on investment.[49] These rules in the WTO Agreement on Trade-Related Investment Measures mandate provision of national treatment for FDI; they also prohibit quantitative restrictions on FDI.[50] They do not, however, do much more.

Although there is seemingly no political appetite at this time for negotiating more substantive investment rules in the WTO, there is an apparent desire to negotiate new procedural rules that would help facilitate foreign direct investment. In September 2020, 105 members began "structured discussions" aimed at starting multilateral negotiations on investment facilitation. These two-thirds of WTO members have encouraged the rest of the WTO to join in these structured discussions toward a "concrete outcome" by the time of the ministerial conference in Kazakhstan.[51] The United States is not yet a participant in these discussions.

The proposed WTO agreement on investment facilitation for development is widely viewed as a counterpart to the WTO Trade Facilitation Agreement, which is the only full-fledged multilateral trade agreement concluded by the WTO since its establishment in 1995.[52] The stated intent is to "improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention."[53] Because some developing countries remain apprehensive about negotiating multilateral rules on investment liberalization in the WTO, the members working on investment facilitation have specifically said that these talks will exclude sensitive substantive issues, such as easing market access and ensuring investment protection.[54]

Investment facilitation is sometimes confused with mere investment promotion. The Organisation for Economic Co-operation and Development has explained that, while investment promotion is about making a country more enticing as a potential target for FDI, investment facilitation is about making it easier for investors to establish investments, and then to operate and expand them. For this to happen, there must be a domestic framework for investment that is transparent, predictable, and efficient.[55]

Karl Sauvant of Columbia University, a leading advocate for international investment rules, has stressed the need for capacity-building; he has rightly emphasized the importance of providing technical assistance for capacity-building to enable the full engagement of developing countries in negotiating and implementing an investment facilitation agreement.[56] Moreover, like the Agreement on Trade Facilitation, an agreement on investment facilitation should include different categories of obligations that developing countries can choose, depending on their stage of development and their access to assistance in compliance.

Although these potential new WTO investment rules will be procedural in nature, they will be part of a framework agreement that, if WTO members wished, could be augmented over time to add substantive obligations. The current rules on trade-related investment measures could be relocated within the new framework, and they could be supplemented with new multilateral commitments on matters that would include ensuring market access for FDI while also preserving the sovereign space of countries to regulate on the environment and on public health and safety.

DIGITAL TRADE

The most significant new dimension of international trade in the 21st century is that so much of it is now digital. In the 20th century, trade was largely comprised of exchanges of physical goods. Today, trade links are increasingly digital and trade is now "increasingly defined by flows of data and information." The McKinsey Global Institute reports that, since 1990, the global economy is 10 percent larger than it would have been without those data and information flows, which adds up to an increased economic output equivalent to $7.8 trillion. Moreover, "data flows account for $2.8 trillion of this effect, *exerting a larger impact on growth than traditional goods flows*."[57] About 12 percent of all goods traded internationally are purchased online, and about half of global trade in services is digital.[58]

What is more, digitalization is not only changing *how* we trade but is also changing *who* trades.[59] One major effect of these digital changes is that international trade is no longer the province principally of multinational corporations. Digitalization makes it easy to connect with anyone, anywhere, with only a few clicks on a computer. In the digital economy, "artisans, entrepreneurs, app developers, freelancers, small businesses, and even individuals can participate directly on digital platforms with global reach."[60]

One aim of Goal 9 of the United Nations Sustainable Development Goals for 2030 is to "foster innovation."[61] Toward this global end, the shift to a digital economy has increased economic growth by spurring technological innovations worldwide. In many sectors, these efficiencies and innovations have increased productivity, which is the key to generating economic growth.[62] These digital "technological innovations have significantly reduced trade costs and transformed the way we communicate, consume, produce and trade."[63]

The shift to a digital economy is especially important to developing countries, which continue to suffer "within and across countries" from a "digital divide."[64] Ninety percent of the people in the world without internet access are in developing countries. If new WTO rules that lower the barriers to digital trade are applied along with new measures that expand internet access in those countries, it would be of disproportionate benefit to developing countries.[65]

Essential to framing the trade rules required to help secure more innovation by supporting and speeding the shift to a digital economy is understanding that the source of the innovations flowing from the digital economy is the free flow of data—for "underpinning digital trade is the movement of data."[66] It is also necessary to recognize, when framing rules for digital trade, that, in the digital economy, the product is often the data itself.

In the new pandemic world, trade is becoming even more digital. Before the pandemic, 41 percent of interactions with customers by North American companies were digital; now 65 percent of customer interactions are digital. The Carlyle Group, a leading global private-equity firm, notes that the pace of digitalization will continue to accelerate because "technology-enabled adaptation has opened the door to more sweeping changes in business models and strategies . . . (and) tech-enabled digital platforms tend to outperform the broader market."[67]

There are no WTO rules written specifically for digital trade. Digital trade is not even defined in WTO rules. Even so, numerous rules that apply to non-digital trade also apply by default to digital trade.[68] Moreover, the WTO rules are technologically neutral, which means that merely because trade is conducted by means other than a physical transaction should not change WTO obligations.[69] But the fact remains, WTO rules on goods trade date back to 1947, long before the information revolution, and WTO rules on services trade date back to 1994, when the internet was still an obscure novelty and "many of today's digital technologies and applications did not yet exist."[70]

Despite their technological neutrality, basic legal questions remain unanswered about the extent to which current WTO rules are relevant to digital trade. For example, is a product provided online a good or a service? The answer matters in part because the obligation to treat similar foreign products no less favorably than their domestic counterparts—the obligation of "national treatment"—applies automatically to trade in goods but not to trade in services. National treatment is required for services trade only when a WTO member has explicitly agreed to it.

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Mindful of these and other limitations in the existing rules, WTO members have been trying to modernize the trade rules to deal with digital trade since 1998. They approved a temporary moratorium that year on the application of customs duties on electronic transactions, which has been renewed repeatedly.[71] But they have not yet made this moratorium permanent, and they have accomplished little else since then toward addressing the commercial concerns of what has become an increasingly digital economy.

The rise of digital trade has created digital trade rivalry, which is most evident in the commercial relations between and among the United States, the European Union, and China. This rivalry reveals, in the new digital realm, the profound differences between those in the world who believe in open and closed societies, between those who favor free individual choices about how to live, what to do, and what to think, versus those who do not.

Despite these increasing geopolitical tensions, issues ripe for WTO resolution include: making the WTO moratorium on customs duties on digital products permanent; defining digital trade and basic terms for digital trade; authorizing electronic signatures to validate online transactions; authorizing cross-border paperless trading; facilitating additional digital trade through electronic means; providing protections for e-consumers equivalent to those for other consumers; and requiring the establishment of domestic legal and regulatory rules and frameworks for electronic commerce.

Yet, amid "widespread concerns . . . about the fracturing of the global economy into walled-off and possibly warring data realms," other digital trade issues appear far from resolution.[72] Foremost among these unresolved issues is the question of the free flow of data, which is central to the debate about digital trade among the United States, the European Union, China, and other members of the WTO. But the free flow of data, which is essential to innovation, is also vulnerable to digital protectionism.

Impediments to the free flow of data in the new digital economy increasingly take the form of data localization requirements. Some governments force companies to use domestic servers to store data and prohibit the transfer of data offshore. Other governments do not bar data transfer but do require that a copy of the data be stored domestically. These governments cite the need for personal data protection and for access to data for law enforcement as justifying these restrictions. Yet these restrictions can also function as the equivalent of domestic-content requirements to benefit national firms, while discriminating against foreign firms.

In addition, some governments require companies to disclose their software source code for review as a condition of doing business in their territory. They justify this requirement as necessary to prevent the possibility that imported digital technologies will undermine personal privacy or threaten national security. This disclosure requirement can be tantamount to a mandate to turn over proprietary technology and other trade secrets in which companies have intellectual property rights.[73]

Frustrated by their continuing inability to negotiate rules on digital trade within the WTO, the United States, the European Union, and other countries—developed and developing alike—with a stake in the digital economy have ventured outside the WTO legal framework to agree on digital trade rules in regional and other preferential trade agreements. About half of WTO members are now parties to non-WTO agreements that contain rules on digital trade.[74] The digital provisions in some of these other agreements offer templates for crafting digital trade rules within the WTO.

Notable are the rules on digital trade in what is now named the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which require participating countries to permit cross-border data flows and include a general restriction on data localization. Exceptions to these requirements are limited to those that achieve legitimate public policy goals. In addition, the

CPTPP prohibits forced transfer or disclosure of software source code.[75] The recently revised North American Free Trade Agreement, now known in the United States as the United States-Mexico-Canada Agreement (USMCA), goes beyond the CPTPP in establishing rules for digital trade. A new chapter on digital trade in the USMCA is more precise than some of the CPTPP rules in broadening the scope of the protections for digital trade.[76]

In January 2019, 76 WTO members announced the commencement of "negotiations on trade-related aspects of electronic commerce."[77] Although Trump's priority has been the protection of traditional smokestack industries, his administration helped launch these negotiations on WTO digital trade rules. The European Union is also engaged in these negotiations, although China is not. These 76 countries have said that they seek the participation of as many members as possible, but they have not yet said whether their goal is a multilateral agreement among all WTO members or only a plurilateral agreement among a subset of WTO members.

During the COVID-19 pandemic, the usual difficulties of negotiating trade agreements have been vastly magnified. Virtual negotiations are much less conducive to making trade deals than are face-to-face discussions around a negotiating table. Yet there is hope for consensus on at least some of the issues of digital trade by the time of the ministerial conference in Kazakhstan. Once there is a consensus on the easier issues, there will be a basis for building on that consensus to confront the harder ones—and perhaps to bring China, at least in part, into the ambit of new WTO rules on digital trade.

An early consensus by these 76 WTO members on some of the digital issues can be found in the provisions on digital trade in the CPTPP, the USMCA, and other regional and preferential trade agreements. By one recent count, there are 69 regional trade agreements (RTAs) with either a chapter on electronic commerce or provisions on electronic commerce.[78] In particular, an appealing model for moving forward in the WTO is the Digital Economy Partnership Agreement (DEPA), which was concluded during the midst of the pandemic in June 2020 by Chile, New Zealand, and Singapore.[79] The three parties to DEPA are small countries that know well the economic value of freeing trade and shortening long distances.[80]

DEPA builds on some of what is already contained in the CPTPP, the USMCA, and other non-WTO agreements on digital trade. For instance, DEPA is the first trade agreement to deal with digital identities, which are an important component of the digital economy.[81] DEPA includes rules on financial technology and artificial intelligence that are not in the CPTPP, and it establishes programs to foster the inclusion of women and indigenous peoples in the digital economy.[82] But what is most distinctive—and what is most conducive to emulation—about DEPA is its unique structure.

Chile, New Zealand, and Singapore have agreed to the DEPA in its entirety. The three countries have, however, structured their agreement to contain a dozen separate subject-specific categories of different matters relating to digital trade. As other countries join, they can accept different levels of commitment in each of these different categories. WTO members could use this same modular approach in negotiating rules for digital trade. This would enable individual members of the WTO to agree to commitments in one or more categories but not in others. This would also enable WTO members to make different levels of commitments within each module.

A consensus on rules for digital trade is more likely to be reached with a flexible negotiating approach that permits WTO members to make some commitments without having to make, at the outset, all of the commitments that may be asked of them. And such a consensus is more likely to be reached, as well, with a flexible approach that permits WTO members to agree to different levels of commitments within different categories of digital trade.

With the benefit of such a flexible approach, the 76 members of the WTO that

"A consensus on rules for digital trade is more likely to be reached with a flexible negotiating approach that permits WTO members to make some commitments without having to make, at the outset, all of the commitments that may be asked of them."

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have agreed to negotiate rules on trade-related electronic commerce may be able to conclude, by the time of the upcoming ministerial conference in Kazakhstan, an initial and partial WTO digital trade agreement that could ultimately become fully multilateral and fully responsive to the evolving needs of the new digital economy. Indeed, some material progress should be able to be made toward this goal even before the Kazakhstan conference.

CONCLUSION

These five pieces of WTO reform are not easy pieces to put in place. Reaching agreement on them will be hard. Among the five, agreements on free trade in environmental goods, fisheries subsidies, and investment have eluded consensus among WTO members for decades. Negotiating lines on these three WTO reforms have become cemented through long years of frustrated negotiations.

In contrast, agreements on free trade in medical goods and on digital trade present newer issues for WTO members. Some of the negotiating lines on these two issues have yet to form.

Each of these five proposed WTO reforms presents different negotiating challenges. But as hard as it will surely be to achieve consensus on them, these are nevertheless the five reforms that seem the ripest for resolution in June 2021 at the next WTO ministerial conference in Kazakhstan. Success in reaching an agreement in Nur-Sultan on all five of these pieces would do much to end the existential crisis of the WTO. Failure to reach agreement on any of them would prolong and worsen that crisis, with unforeseeable, but undoubtedly unfortunate, consequences for all WTO members. There is still time, though not much, to avoid that unwelcome fate.

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