

“The Rule of Law in an Age of Conflict”

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My special thanks to the World Trade Institute and Professor Peter Van den Bossche for the invitation to join you on this important occasion.

Months ago, when I proposed this topic, “The Rule of Law in an Age of Conflict”,² I did not anticipate fully how much the subject would be enriched by the size and scope of the trade conflicts that either exist today and appear to be imminent -- nor did I anticipate the apparent diminution of the role of law. Law in this context consists of the rules of the World Trade Organization (WTO). Only Dr. Pangloss in Voltaire’s *Candide* could explain to you why these developments are positive. But I can nevertheless see some opportunities for progress in what otherwise would see a dystopian landscape. Under the heading “A crisis is a terrible thing to waste,”³ In fact, there are now the beginnings of some positive reactions.

The daily headlines scream of trade war. The WTO is at present in the eye of the storm. On the East Coast of the United States, where I come from, hurricanes in the summer months would move up the Atlantic Coast from the Caribbean. Whirling high winds have at their center an area of eerie calm. That is where we are now, at least for the moment. The WTO continues with its daily work, administering a myriad of international agreements through committees of members, preparing reports and discussing what additional disciplines would be useful in a wide range of areas, from e-commerce to agriculture. The media, with reason, focus on the drama of likely wind damage. The institution, the WTO, largely goes on about its business, like Londoners both before and during the Blitz. How much storm damage there will be is still speculative.

The stated and unstated causes of the trade conflicts, are reasonably clear. More than a few members appear to be nursing grievances -- real enough to them. Unless one assumes cynicism on the part of some or all parties, this is what creates all conflicts: the combatants believe that they are entirely justified in their opposing points of view. This dynamic caused a large number of wars in Europe over at least half a millennium. In the United States, in the middle of the 19th century, the issue of whether the union was a soluble compact based on states’ rights or one nation indivisible cost the lives of 620,000 Americans -- a number equal to half of all Americans killed in war throughout the nation’s history. This was in essence a

¹ A caveat, I speak here in my personal capacity, not on behalf of the WTO or its members

² In response to the invitation from Professor Peter Van Den Bosch, when I chose the topic “The Rule of Law in an Age of Conflict”, I said that my remarks would not attempt to rival his erudition as a jurist and scholar. Rather they would be based on my experience as a trade negotiator for the U.S. government and for private parties as a trade law practitioner, and now as a Deputy Director General of the WTO. I said that the point of view would be policy-oriented, focusing on international commercial relations.

³ Paul Romer, Stanford economist.

rule of law question, the law at issue being the U.S. constitution. The differences could not be resolved by debate. In the trade area, we are supposed to do better. It is still uncertain that we will. What is at stake is not the effusion of blood, but the contraction of international commerce and with it the reduction of global economic well-being. There has been nothing like this since the Second World War. The last systemic threats to world trade occurred during the Great Depression in the 1930s.

While there are high risks, I do not subscribe to an apocalyptic vision of the future. And, as an impartial international civil servant, I am to make no comment on the validity of any of the causes of current trade conflicts. The reason for not making any judgments here goes beyond enforced neutrality or timidity. Some degree of humility requires study of any WTO Member's concerns in greater depth before coming to an immutable conclusion.

Where do matters stand today? The starting point is that all WTO members profess that they agree on the importance of the multilateral trading system. Once that overarching point has been articulated, significant divergences emerge. Many developing countries believe that the current system has become burdensome without delivering sufficient benefits. I would guess that each of the 164 members, without exception, believes that the disciplines on others are not as good as they should be. Some no doubt believe that certain of the obligations fall too heavily on them, especially if their commitments are nominally greater than those of others. A number of Members may hold the view that moving by complete consensus means no movement at all, that the privilege of inclusiveness, in one instance or another, is abused. Others may consider this a source of reassurance that their voices will be heard. The leader of one major country has stated that all past trade agreements disadvantage his country. Dissatisfaction is in many respects widespread.

In short, in the community of nations, all is not permanent tranquillity and good feeling. This has in fact always been the case and perhaps always will be. However, if the history of international trade relations were graphed, this would not be considered a high point of international harmony. The governance, meaning management, of international commercial relations is undergoing serious stress. The answer to smoother relations besides good will is to be found in the rule of law. Sometimes this means living up to the rules as they are, and often it refers to rules as they should be.

It is worth trying to distil some principles with respect to the rule of law and try to relate them to the trade conflicts that are currently in place and impending. In order for trade to flow there needs to be a high degree of certainty. Businesses, even those consisting of one person or just a few, require the rules to be clear and predictable in order to attempt to ship a good or provide a service across a border. For major international companies, uncertainty slows or freezes investment. The early signs of slowing cross-border investment have already appeared. For all of us, consumers, distributors and producers alike, in short for most of the world's inhabitants who engage in trade, uncertainty diminishes economic activity, and that effects all.

I cannot speak to you *ex cathedra* to deliver unquestionable universal truths. WTO Deputy Directors General do not occupy that kind of seat, so I will put to you some hypotheses, eight propositions, and you can decide for yourselves whether they are valid.

First proposition: Civilization is necessarily based on the rule of law. Sustainable trade relations require a foundation in rules and commitments that are complied with.

That civilization is necessarily based on the rule of law is demonstrated by the serried rows of Qin dynasty terra cotta warriors unearthed in Xian; the Code of Hammurabi; the Bible; the Koran; the teachings of Solon; Pax Romana; the U.S. and British Constitutions; the Code of Napoleon; the Treaty of Rome of the European Union; and for the sphere of current international commerce, the GATT and other WTO agreements. Whether autocracy or democracy, whether through the application of force or freely determined consensus, legal systems are created under which peoples live. Wherever one looks, wherever there is society, there are rules. The alternative is chaos.

Current events highlight the reason for the WTO's existence. As one of the chief critics of the current system, a trade minister, is quoted as having said "If the WTO did not exist, it would have to be created." My assumption is that what he meant was that for international commerce to thrive, the rule of law is a necessary precondition.

The presence of law does not suggest that there will be no conflicts. To the contrary, law exists because there will always will be differences that are not automatically reconcilable. This is as true for the rules needed for traffic entering a round-about as for international commerce. Interests and perceived interests clash. In the world of geopolitics as well as of trade, given that there will always be conflicts, the question is how they will be managed. At the global level, where sovereign nations interact, what needs to be achieved and maintained is governance without an overarching world government, as the latter is not only not achievable but not desired.

Conflicts have been managed successfully in the GATT and in the WTO. In 1965, the U.S. and the European Communities (EC) engaged in a "Chicken War", which at the time no doubt did feel like war, although by today's standards it seems like only a skirmish. The formation of European Common Market resulted in the curtailing of U.S. chicken exports. Under the GATT rules, the U.S. countered by imposing additional duties on brandy, dextrose, potato starch and light trucks. The idea, which will find resonance in how decisions are made today on which products to choose for the application of retaliatory duties, was to inflict pain on specific members of the EC. The 25% tariffs on light trucks, legitimate under the WTO rules, stuck, even after the chief source of imports was no longer Europe but Japan, and later it affected trade from Korea, and would affect future trade from China and other sources. Once protection is granted it can prove difficult to remove.

This last month, the EU chose to impose retaliatory tariffs on bourbon and Harley Davidson motorcycles, not coincidentally manufactured in the home areas of the Majority Leader of the U.S. Senate and the Speaker of the U.S. House of Representatives. The idea is to get the attention of the other side so that there might be re-thinking of the original action, deterrence, retribution, or all three.

By contrast to the Chicken War, and more recently, the enormous trade controversy over subsidies involving Boeing and Airbus, in its 14th year of WTO litigation, has not yet resulted in trade restrictions. Management is taking place through the dispute settlement system, without a rebalancing of trade concessions through retaliation and counter-retaliation.

Second proposition: *Self-restraint is the primary source of compliance with international trade rules.* Most countries generally comply with the letter of their obligations voluntarily without being compelled to do so. They believe that international agreements should be lived up to. *Pacta sunt servanda.*

As a practical matter, while you would not know it from recent headlines, most potential trade conflicts are extinguished within WTO member governments before a measure is adopted that could adversely affect the trade of another country.

Let me give you an illustration: When in the U.S. government, I chaired an interagency committee that formulated U.S. trade policy. A new code was going to be adopted, a plurilateral agreement for government procurement. Not all countries were joining. A question arose with respect to the treatment of 14 small countries with which the United States had obligations under pre-existing treaties. These fourteen countries were not planning to sign on to the new code. Under the procurement agreement, only signatories were required to receive the benefits. The question being debated was whether the United States would honor its bilateral treaty obligations, extending the benefits of the new code to these countries and getting nothing additional in return. All the agencies but one, the State Department in charge of foreign relations, voted to limit agreement benefits to agreement signatories. I summed up the vote as follows: the lone voice of the State Department would prevail. Why? To loud outcries I said simply that if the decision was referred to the President, then Jimmy Carter, he would without doubt decide that America would keep its word.

His personal honor and the honor of the country were congruent. It was a matter of his upbringing and belief, and the national narrative. It was not just a legal obligation, it was a moral obligation. There would be no penalty had the opposite path been taken. Honoring America's commitments was simply seen as the correct thing to do.

It is worth a separate discussion whether governments, or for that matter companies, should have moral obligations. Should governments refrain from conduct that is harmful to the environment, harmful to the economies of other countries, and harmful to the employment of other countries' citizens? The negotiations on fisheries subsidies would provide the subject for a debate on the moral issues involved. The WTO is mostly about what countries commit to do for commercial reasons and not about moral obligations. But in a number of instances the WTO agreements do support greater moral rectitude, most clearly, for example, in the government procurement agreement, which seeks to prevent corruption.

Illustrations of self-restraint also come from instances of voluntary compliance once a complaint is brought. This occurred for example when the U.S, the EU and Japan complained that a Chinese measure discriminatorily rebating VAT to domestic semiconductor producers violated the national treatment rule – that it discriminated against imported semiconductors. Once consultations were held, China chose to lift the measure without the need for a dispute settlement panel to be established.

In the various cases brought against U.S. attempts to deal with the distinction between the GATT rules' treatment of rebates of direct tax and indirect taxes, once cases were filed and decisions issued, the U.S. repealed the measures, even during the period when a panel report could be blocked from adoption by the losing party.

During the WTO era, a WTO panel found against the United States, holding a safeguard action on steel inconsistent with the rules. The George W. Bush Administration terminated the measure.

Like the Pope, the WTO and the GATT before it, has no army. As a general rule, countries comply with adverse judgments, perhaps too often incompletely, and sometimes only after repeated WTO dispute settlement panel decisions are reached against them, but they generally do comply. Ultimately noncompliance means being faced with authorized retaliation by the successful litigating party, but this has rarely been the path taken.

Just as most of us do not drive through red traffic lights, it is not just because there might be a penalty if one's conduct were observed by traffic police, or pragmatically because the chances of a collision increase. The signal is obeyed because most of us are law-abiding. This said, when crossing the street, it is still worth checking to see whether drivers consider yielding to pedestrians in crossing zones as optional. Similarly, self-restraint and voluntary compliance are not entirely reliable as dependable means of enforcement of trading rules.

Third proposition: *That self-restraint is generally exercised does not mean that it is always exercised.* Throughout history, compliance with the rule of law has been subordinated to what was at the time considered a higher imperative. Abraham Lincoln, trained as a lawyer, understood the importance of the writ of *habeas corpus*, under which a person could not be held as a prisoner unless the state showed cause why he or she was being detained. Yet Lincoln suspended that fundamental right in order to, in his view, preserve the union that was the United States. Rules -- no matter how fundamental -- are from time to time breached by governments, for causes arguably necessary and otherwise.

In international economic affairs, there have been numerous examples of claimed breaches of obligations. In 1971, the international monetary system could no longer function as it had. The dollar was backed by and convertible to gold. European central banks were cashing in their dollars for gold. The U.S. was running out of gold. The dollar was the world's reserve currency and the U.S. did not have the freedom to change the value of the dollar, despite its balance of payments problems. America's trading partners were opposed to seeing the dollar devalued, presumably comfortable with the disadvantage the *status quo* conferred on American trade. On August 15, 1971, the U.S. imposed a 10% surcharge on imports and closed the gold window. The import surcharge was technically inconsistent with U.S. obligations under the trading rules of the time -- the General Agreement on Tariffs and Trade (the GATT). As a result, the U.S. measure was condemned almost unanimously by the members of a GATT working party. The U.S. defence was that it was justified under the rules to impose more stringent measures -- quantitative restrictions. This was not a legal defence at all.

As part of its package of measures, the U.S. made demands of its three major trading partners -- the European Communities, Japan and Canada -- for unilateral unreciprocated concessions. Negotiations ensued but quickly resulted in a stalemate.

At the Smithsonian Institution in Washington on December 18, 1971, an accord was reached that allowed the U.S. dollar to be devalued. The Smithsonian Agreement led within a relatively short time to international agreement on a floating exchange rate system. The trade talks eventually led to the launch in September 1973 of the Tokyo Round of

Multilateral Trade Negotiations. The result in 1979 was the first GATT nontariff trade agreements and further trade liberalization.

I am absolutely not citing this as a precedent for any current action. I am merely observing that countries act outside the rules and sometimes there is a positive ending for all. In short, a crisis, accompanied by unilateral U.S. action inconsistent with the trade rules of the time, led in that instance to reforms. The crisis and how it was managed led to a better place for the world economy. Can that happen again? It is not to be completely excluded. As the American humorist Mark Twain said, "History does not repeat itself, but sometimes it rhymes." With good will and effort, the world trading system can be updated and improved.

At present, actions are being taken and are being threatened that the press labels, with cause, "a trade war". Some measures are accompanied by justifications under the WTO's rules. Others are not. There is no authoritative interpretation at present of which are legitimate under the rules and which are not. The role that the rules will play in resolving the ensuing conflicts is unknown. What is clear is that at some point, with measure piled upon measure, the system itself and with it world commerce and the world economy will suffer serious harm.⁴

Years ago, a French diplomat said to a representative of China that China was driving on both sides of the road, meaning that it relied on both state direction and capitalism to structure its economy. At present, there is a risk of too many major trading countries driving on both sides of the road, meaning in this case something different -- acting both within and outside of what the current WTO rules may be considered to provide. Where countries engage in this conduct, each driving on both sides of the road, collisions become unavoidable. The challenge was implicitly recognized by President Emmanuel Macron when a month ago he called on major trading countries to engage in an effort at fundamental reform of the WTO.

Fourth proposition: *A peaceful and positive global environment for world commerce can best be created through multilateral agreements.*

No set of unilateral actions can create a world trading system. The same holds true for *ad hoc* bilateral commercial deals between governments, a plethora of bilateral agreements,

⁴ The weaponization of trade: Beyond the scope of these remarks is an entire category of trade measures imposed for reasons of foreign policy or national security. In 1808, Thomas Jefferson imposed a complete embargo on U.S. foreign trade in order to coerce the British and French to make peace with each other and stop interfering with U.S. shipping. It was in effect for just over a year and was disastrous for U.S. commerce. Douglas Irwin in his book "Clashing Over Commerce" recounts that Alexander Hamilton had earlier warned against an embargo against Britain: "The consequences of so great and so sudden a disturbance of our Trade which must affect our exports as well as our Imports are not to be calculated. An excessive rise in the price of foreign commodities -- a proportional decrease of price and demand for our own commodities -- the derangement of our revenue and credit -- these circumstances united may occasion the most dangerous dissatisfaction & disorders in the community and may drive the government to a disgraceful retreat -- independent of foreign causes." -- During the Vietnam War, the U.S. Treasury's Office of Foreign Assets Control applying WWI-era authority banned financial transactions with those spending funds in Vietnam, including the Quakers who would travel to that country to film the effects of the conflict. -- In January 1980, Jimmy Carter imposed a grain export embargo in response to Russia's invasion of Afghanistan. -- In 1996, the Congress enacted the Helms-Burton Act which extended a U.S. embargo against Cuba to any non-U.S. company that dealt economically with Cuba. After blocking statutes were enacted by the EU and Canada, and a WTO case was filed, negotiations resolved the issue and the WTO case was discontinued. -- Echoes of these earlier instances of the application of trade and financial sanctions can be found in current events. (e.g. Iran sanctions effects on non-U.S. companies, ZTE, Rusal). Not all of the current issues will necessarily be subject to WTO dispute settlement. In addition, there is no settled WTO jurisprudence on the use of economic sanctions. Currently applied sanctions may soon be tested under the WTO dispute settlement system. That will be new.

or the negotiation of regional arrangements. There is no substitute for an overarching set of rules to govern world commerce.

Some regional arrangements, however, may clearly make both economic and systemic sense. Prime examples are the European Union, NAFTA, the Transpacific Partnership Agreement, and the intended Trans-Atlantic Trade and Investment Partnership. They could be potential building blocks for wider future reforms at the multilateral level. However, ad hoc deals and discriminatory trading arrangements should be closely scrutinized. They may be of commercial benefit for the participants through trade diversion but do little or nothing positive for world commerce. To gain commercial advantage through getting a better deal than other countries have was not the motivation for the creation of the carve-out for certain regional arrangements from most-favoured-nation treatment under the GATT and WTO agreements.

Most-favored nation treatment, non-discrimination, is the rock upon which the world trading system is built.

Fifth proposition. It is in the long-term national interest of all countries – developed and developing -- and collectively in the best interests of all companies and peoples -- to maintain a positive global commercial environment for the sake of global and national economic well-being. This requires investing in the system.

When I arrived in Geneva 10 months ago prepared to take up my position at the WTO, world trade was experiencing climate change – in this case I am referring to the political climate and not CO2. Rule-making was experiencing a severe drought, while storm clouds were gathering in the form of potential trade restrictions that threatened serious damage to trading relations among the largest WTO members. Despite all this, the December 2017 Buenos Aires Ministerial was in some respects a very substantial success. The ground was prepared for so-called open plurilateral initiatives – for rules for e-commerce, foreign investment, domestic regulation of services, and better conditions for micro, medium and small enterprises. Now green shoots are appearing that may portend a crop of new understandings. It is too early to tell how these discussions will turn out, but this in my view is a very positive development. Not all WTO members agree. That said, the proponents of the initiatives are investing in the system.

Could more have been accomplished? We will never know. During the lead-up to Buenos Aires, other than the President of Argentina as host of the meeting, no head of government contacted another to urge more far-reaching outcomes, nor to my knowledge did any chief executive officer of any company contact any Member at the highest level of government for this purpose.

Underinvestment in the world trading system is not new. Traditional trade negotiations can be viewed narrowly, as consisting solely of trading reciprocal concessions. If country X will allow in some of country Y's frozen chickens, Country Y may pay for that privilege by granting a reciprocal concession, for example allowing in the other's brandy at a lower tariff. The fact that it would be in the interest of each to autonomously lower its tariff is not a consideration for trade negotiators. But if narrow commercial self-interest expressed in swaps of reciprocal concessions were the sole content of trade negotiations, there would not be a world trading system, just a collection of thousands of limited deals. Some additional

element must be added for creating and maintaining institutional arrangements for the good of all. For over seventy years, there were enough parties to the WTO and the GATT to act both for narrow commercial self-interest and for self-interest more broadly defined. They made a net contribution and in doing so invested in the multilateral trading system. As a result, the world economy grew much faster than would otherwise have been the case and the overall level of worldwide poverty declined dramatically.

It is essential that nations again invest more in the trading system beyond seeking to advance narrow commercial self-interest. In addition, to succeed in a multilateral setting it is imperative that participants understand the interests and concerns of others. To do this they must have open conversations with each other. Acting on assumptions and intuition will rarely suffice. The degree of engagement today is dangerously inadequate.

Sixth proposition. Effective management of the international trading system and its continuing relevance require a set of three operational institutional capabilities: rule-making (a legislative function), dispute settlement (a consultative process with resort possible to mediation and adjudication) and executive functions. In terms relating to our topic today, this consists of making laws and assuring to the extent possible compliance with the laws.

The daily business of the WTO is very extensive. Members confer with each other regularly in the context of committee work. In some areas, there is excellent transparency – draft standards are notified and commented on by other Members, for example. Countries applying to join the WTO reform their domestic laws and regulations to qualify for membership and are peppered with numerous questions to make sure that they will contribute to the international trading system in line with their capabilities. Dispute settlement panels meet and work to settle questions of noncompliance. Not much of this is seen or known to those who are not directly involved.

Not all has been well, however.

a. Rulemaking.

In the run-up to Buenos Aires, with the possible exception of an agreement on fish subsidies (which in the end was not concluded last year), the legislative function of the WTO ceased to function. In recent years, at the prior two ministerial meetings, exceptions to this inertia could be pointed to – an agreement to ban agricultural export subsidies, a Trade Facilitation Agreement and expansion of the list of duty-free products covered by the Information Technology Agreement. But expectations were low going into the Buenos Aires ministerial meeting. Perhaps it is against that background that I regarded the ministerial meeting as very successful in that paths forward were found for exploring new areas where rules would likely be needed and could be provided.

b) Dispute settlement.

To maintain peaceful commercial relations it is essential to have an effective means to resolve disputes. Because of recent paralysis or non-existence of the legislative function, dispute settlement by default came to play a disproportionate role in the world trading system. This factor undoubtedly contributes to its current problems.

The news on the dispute settlement front is deeply troubling. Unless those WTO Members accounting for a large amount of world trade believe that dispute settlement has full legitimacy, a vital part of the institution governing world trade is likely to cease to function. Regrettably, that is a strong risk.

Comparisons with national institutions can only go so far, but there are some parallels. Any tribunal that seeks to resolve disputes and interprets the law must take care to maintain its legitimacy. The legitimacy of the U.S. Supreme Court has been tested in recent times in several instances. It famously was seen as deciding a presidential election in the year 2000 (in *Gore v. Bush*). The Court in more recent times decided not to strike down the health care law that was the signal legislative accomplishment of the Obama Administration. In another development, the United States Senate refused to begin consideration of the appointment of a Supreme Court nominee chosen by President Obama. It held the seat open for a year until after Mr. Obama left office. Despite widespread controversy over the appointment process and criticism from various parts of the political spectrum with respect to a variety of its decisions, the Court retains domestic support. But there are perils. In the era of the New Deal, many of Franklin Roosevelt's key legislative achievements were struck down by the U.S. Supreme Court. The Court came very close to being transformed.

Legitimacy is a perishable commodity. At present the appellate function of the WTO is being threatened with extinction. The way in which the WTO was constructed, a functioning appellate function is essential to the preservation of the WTO's dispute settlement capability.

The threat is not limited to parties being deprived of appellate review of panel rulings. Worse, the absence of the appellate function, in the current scheme of the WTO, can prevent a final judgment being rendered based on a panel report. There is a very dangerous scenario that follows from a loss of WTO dispute settlement. Country A, on getting a panel decision in its favour that Country B's actions are inconsistent with its obligations, requests that Country B bring its measure into conformity with the rules. Country B responds that it is appealing the panel decision, knowing that there is no possibility of an appeal being heard. Country A decides to retaliate. Country B responds with its own counter-retaliation. All of this would seem an unlikely hypothetical were there were not already at present a high risk of cycles of retaliation and counter-retaliation outside of dispute settlement -- in short, a trade war.

The U.S. is blocking appointments to the WTO Appellate Body, a right it believes it has under the consensus rules which the WTO Dispute Settlement Body uses for its proceedings. It does this, it says, because it finds fault with the way in which the Appellate Body has acted. While it is hoped that there is a breakthrough to a political level agreement, this has not occurred to date.

Part of this impasse has perhaps been due to other members' reactions to the means the U.S. has chosen to demonstrate its dissent. A number of WTO members feel that hostage taking is unacceptable in these circumstances (although not by any means rare in trade negotiations.).

When there is serious controversy, it is important to understand the nature of the disagreement. Serious differences are not unknown in United States with respect to domestic issues. In a number of cases, they are seemingly unsolvable because of irreconcilable

differences over the appropriate interpretation of the nation's founding document. In domestic U.S. politics, the right to life (anti-abortion) versus the freedom of choice (abortion) and the right to bear arms versus gun control are deeply divisive issues. The domestic legal debate to a significant extent turns on the original intent of the framers (drafters) of the U.S. constitution versus how the document should be read now.

With respect to the WTO Dispute Settlement Understanding and other WTO agreements, there appears to be an unbridgeable gulf among WTO Members as to how the Appellate Body should interpret its mandate. One view is described as follows:

*From the outset, the Appellate Body made the conscious choice to function as if it were a court, even if the finality of its decisions requires political approval by reverse consensus in the Dispute Settlement Body (DSB). Appellate Body members have chosen to assume their role as members of the international judiciary, performing the international judicial function in the same way as, but in a different context from, for example, judges of the International Court of Justice (ICJ). **This function relates to the tasks and powers of the international judge and transcends the mere mandate and context of a particular court and tribunal as established in its constitutive document and other procedural rules.** (Emphasis in bold font supplied).⁵*

Applying this approach would necessarily give little deference to national administrative decisions, or for that matter to panels upholding national decisions.

The U.S. view, as I understand it, is that with respect to antidumping decisions, for example, the key provision is to be found in Article 17.6 (ii) of the Antidumping Agreement itself:

Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.⁶

One European commentator has concluded that:

... [I]nterpretations of Article 17.6(ii) have shown that the Appellate Body has refused to apply the principle specified therein on the ground that it is irreconcilable with the task of a judge.⁷

I am a former trade law practitioner, and not a WTO scholar, but I can testify from interactions over an extended period of time with a number of officials in U.S. government and with other U.S. practitioners that they share the belief that the Appellate Body has narrowed the use of trade remedies, including antidumping, in a manner that was not anticipated at the inception of WTO dispute settlement. This is not, however, the view of many WTO Members. The current threat to the future of the Appellate Body stems from

⁵ *Treaty Interpretation by the WTO Appellate Body*. Isabelle Van Damme, *EJIL* (2010), Vol. 21 No. 3, 605–648 doi: 10.1093/ejil/chq049. Downloaded from ejil.oxfordjournals.org at New York University on November 2, 2010. 606 *EJIL* 21 (2010), 605–648.

⁶ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, At. 17.6 (ii)*.

⁷ *Ibid* n. 5 at p. 607.

these deeply divided views as to how the mandate of the Appellate Body has been and should be interpreted.

It had been my belief that a greater understanding shown of respective legal interpretations would have assisted in resolving the current impasse over the continued existence of the Appellate Body. I have recently come to the conclusion that this may not be correct. Given the prospect that the Appellate Body may soon cease to exist, other than notionally in a WTO agreement, arguing over the merits of legal positions may not contribute much at this stage. What is needed is a good faith attempt by all parties to put into place a mutually acceptable outcome, without which an important element of the management of the world trading system will likely fall away, posing serious systemic risks. This is a political decision that is highly unlikely to turn on legal merits.

I believe that the Appellate Body can still be saved with changes. But a highly creative approach would be needed together with serious engagement between the United States and other members. The outcome is unpredictable, but I feel confident that there will be an attempt at finding a resolution. Angela Merkel, Germany's Chancellor, is reported to have said with respect to EU eurozone reform, "If we stand still, we will be pulverized".⁸ That is true, I feel, with respect to resolution of the impasse over rescuing the Appellate Body. Standing still is not an acceptable option.

c. The WTO's executive functions.

Of the three branches of governance, the third – the executive branch of the WTO – is virtual, not actual. In its place, Members can propose initiatives, chair committees, bring dispute settlement cases, call for consultations, and can counter-notify measures that were not well-notified or were not notified at all by another Member. Member chairs of committees can try to prod for action. The WTO Secretariat will prepare information and other supporting documents on request.

In the United States, whether the executive or legislative branch of government takes a lead in initiating actions varies over time. During the Nixon presidency, John Jackson (with me in a supporting drafting position) had a major role in crafting landmark U.S. trade negotiating authority with the House of Representatives. Succeeding him as Special Trade Representative General Counsel in the Ford Administration, I had that role working with the U.S. Senate, and then with the two Houses of Congress for final passage. This said, we only prepared drafts. The Executive branch proposed, the Congress was the dominant branch in determining what emerged from the process. It was a partnership that worked.

The WTO does not have an independent mechanism for monitoring compliance and has systemic costs. This can, for example, disadvantage small members who may feel that it would not be useful or wise to challenge the measure of a large member. At present, no one will act on its behalf.

⁸ Financial Times, in an article by Isabelle Mateos y Lago, in the Thursday 28 June 2018 print edition. In the same article, the author, again addressing the eurozone, states that "Mr. Macron's insight that deep changes are needed to prevent implosion was correct . . ." And further "Europe [here substitute "the WTO Members"] does not have the luxury of standing still until the mood of its citizens [here substitute "the WTO Members"] improves."

The European Union, the next largest geographic unit providing order for world trade, has a very active executive, the European Commission, for actions within the EU, acting under the mandate of the its Member States with oversight by the European Parliament. The world is not a single market and will not become one. But some aspects of the European form of organization can provide a model for a more effective WTO at some point in the future. A consensus would be needed to strengthen the initiation and management functions within the WTO framework.

The WTO must function on the basis of transparency, or its deliberations, attempts at compliance, and its initiatives will clearly be impaired. Having as full information as possible on what is taking place in the world of trade is imperative. Officially, the WTO knows only what its members decide to share with it. I once asked Arthur Dunkel when he was Director General of the WTO why he did not subscribe to the Financial Times, as then he would know what was going on the world. He replied that he did subscribe but that the GATT's members would not let him read it. The Secretariat of the WTO in the future should be authorized to keep members currently informed on material facts affecting world trade, based on its independent assessment.

Seventh proposition. *Maintaining the trading system and moving it forward requires leadership.*

No doubt in reaction to the daily threats of new trade actions, and the recent decisions of various WTO Members to impose restrictions, attention is again being focussed on the adequacy of the current multilateral trading system's rules. As noted, President Macron at the time of the OECD Ministerial meeting at the end of May called for reform of the WTO and the WTO Director General supported the need for reform. (The need for reform had been cited at the Buenos Aires Ministerial by the U.S. Trade Representative in his first appearance at t WTO event. But it was not picked up by others at the time.)

A system of rules requires periodic updating to remain fully relevant. At least a quarter century has passed since most of the current rules were negotiated. The world economy has grown and evolved. Trade patterns have shifted, and trade measures have changed dramatically. This is a difficult time for suggesting liberalizing trade initiatives given the rise of populism and dissatisfaction on the part of many with what they see as the imbalance of the benefits as compared with the costs of international trade. However, the rate of change in the world economy is only going to increase. It will take strong positive leadership on the part of many to be equal to the coming challenges.

With respect to managing trade conflicts, the best answer is not retaliation and counter-retaliation. It is first to update and broaden the coverage of the rules of the international trading system so that measures taken are increasingly within the rules. If the lanes on a two-lane highway cannot handle the traffic, the answer is not to drive on both sides of the road but to increase the number of lanes. The second best but essential component of a functioning world trading system is an effective dispute settlement system.

Eighth proposition. *The future is in your hands.*

The future is not written yet. You and your generation have been given the privilege and responsibility of holding the pen.⁹

I am optimistic that the WTO can and will be maintained and improved, although there are very likely near-term challenges that need to be met and overcome. And perhaps some of you will take on these challenges. The program you are graduating from examines the interconnection of law, economics, and political science. Those are exactly the disciplines needed for attempting to manage the trading system.

When John F. Kennedy was inaugurated as the 35th President of the United States, he called Americans to public service with the words “My fellow Americans, ask not what your country can do for you, ask what you can do for your country.” My generation did respond. Many entered into public service in one form or another.

Technological change is accelerating. My father’s generation when very young watched as horses gave way to cars and gas lighting to electricity and lived to see humans go into space and a man walk on the moon. My generation spanned the time of the moon shot, giant container ships carrying massive cargoes, the beginnings of the internet and introduction and growth of electronic commerce.

Soon it may be that most cars and trucks will be autonomous. National governments need to be more responsive to the adjustment needs caused technology or international trade will pay the price for dislocations in the jobs market. At the same time, we hope to take better care of the planet’s air, water and soil. These are going to be continuing challenges and it is likely that the greatest progress will be made in your generation.

One major change that is foreseen is a time when artificial intelligence found in computers will equal and then begin to exceed human intelligence. Technologists call this event "singularity" and estimate that it will be reached in the year 2045. That is an interesting concept. Had it existed now, machines could have substituted their effort for yours, for example to write a dissertation on whether the euro is really an optimal currency solution for all of its participating countries. Of course, the paper would then be graded by employing AI as well, avoiding the need for both teaching and learning. You are fortunate as students to have preceded that revolutionary change.

There are a number of problems with AI singularity. One is illustrated by the experience of a brilliant business planning expert named Pierre Wack. Years ago, at a conference at the Harvard Business School, I listened as he described how using decision-tree analysis – meaning choosing repeatedly which of two successive options was more likely – he predicted for his employer Shell Oil Company, the two world oil crises, one in 1973 and the second in 1979. In the first, company management listened to him, deployed its assets in anticipation of the OPEC oil embargo, and it weathered that economic storm well. In the second, corporate management did not believe him, and the company suffered the consequences with the rest of the industry.

⁹ The first part of this is a quotation from the movie *Back to the Future*, from a character called “Doc.” The second part is from a message from a Geneva public service organization.

Algorithms do not have a personal sense of responsibility, nor is there a societal expectation that they are to be held accountable. AI cannot provide leadership. Winston Churchill's mobilization of the English language to give the British people hope in the opening phases of World War II would be highly unlikely to be substituted by a computer. John F. Kennedy's call to young Americans to public service would not either be well-articulated by computer nor have the desired impact.

I believe that there will be limits to the employment of AI after singularity is reached. There is a spark in humanity that is extraordinary. It is that spark of individuality that machines may emulate but can never achieve.

A very human question will be what values you bring to government, business and civil society. These may have been instilled in you by your family and in your early schooling.

Civic responsibility was never a formal part of the curriculum during my own education. It arrived in pieces, a part of my upbringing and experience. As one example, in the sixth grade in the U.S. system, attended by students who were 11 to 12 years old, we had to memorize the oath that Athenian youths took in ancient times:

*We will ever strive for the ideals and sacred things of the city, both alone and with many; We will unceasingly seek to quicken the sense of public duty; We will revere and obey the city's laws; We will transmit this city not only not less, but greater, better and more beautiful than it was transmitted to us.*¹⁰

Many of you will be in leadership positions, and some in equally important supporting roles in public service or in the private sector. Wherever you serve around the globe, your contribution to society will count. From whatever positions you accept over your careers, very often you will be in a position to help drive public policy. To do so is both challenging and exciting.

I have seen examples of a person coming into a room and completely altering the dynamic, something others were unable to do. When they were of high rank and had this effect, it was not by any means because of their position as minister. Rather they were minister because of this talent. Individuals are remarkable. They can change the course of history.

Much in the world of trade will change going forward, largely due to technology. Trade will move in different channels and consist of different products --, in terms of goods, services and products of the mind. Human ingenuity and talent, and a moral center, will determine the success of the human race.

One of the most positive aspects of my job is to oversee the WTO staff working with the trade negotiators of countries seeking entry into the WTO. Many of these countries are fragile, conflict-affected economies, ravaged by recent or current wars and by disease. They seek to join the World Trade Organization to raise the living standards of their people and put

¹⁰ To be found in the foyer of the [Maxwell School of Citizenship and Public Affairs](#), Syracuse, New York.

them in a better position to attain peace. That is what the multilateral trading system was designed to do, increase the rate of growth to lift all out of want and to give the world a better chance at peace. At this it has been remarkably successful. This was the vision of the leaders that created the multilateral trade and financial institutions after two world wars during the 20th century. I have no doubt that there are many among you who can and will carry that vision forward.

Right now, WTO reform is being contemplated, spurred by visions of a trade Armageddon. This may lead to WTO 2.0, in which a number of important but a limited number of perceived deficiencies in the current WTO rules and institutions may be rectified – for example, competition among differing national policies regarding state investment, treatment of intellectual property, curbs on harmful domestic subsidies, the bounds of retaliatory measures, changes in dispute settlement arrangements, treatment of developing countries, transparency and institutional arrangements.

In your generation's hands will be the creation of WTO 3.0. It could be revolutionary, improving the way humanity regards the role of trade and the rules which govern it, as revolutionary as was the thinking of Hugo Grotius. In 1609, in his treatise *Mare Liberum* (or *The Freedom of the Seas*), Grotius held that the "most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable" is that "every nation is free to travel to every other nation, and to trade with it."

What might be considered for inclusion in WTO 3.0: that membership in the system is universal; that the default condition of national borders and domestic economies is openness and closing a border or impeding foreign economic participation would require a strong justification; that there is a duty to provide fairness not just among nations but within them; that the disadvantaged will be raised up; that the land, air and waters of the planet will be treated as an inheritance to be passed on, in line with the Athenian oath, in a better condition than that in which it was received; and that the rule of law, by consent of the systems' members, will continually be improved, and will be adhered to.

You can consider making this a conscious lifetime effort. Chancellor Angela Merkel recently quoted Immanuel Kant as follows: *He who has no goals must endure his fate; he who has a purpose can shape it.*

Individually and collectively you have the capability to make a positive contribution.

Each of you can and should make a difference.