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Brave New World: Trends in Global Trade Governance

by Lawrence L. Herman

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POLICY PERSPECTIVE

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In its closing communiqué, June 13, 2021, following the Cornwall summit, the G7 strongly endorsed the World Trade Organization's (WTO) efforts to advance "free and fair trade" on a range of items.[1] The endorsement reflected the Biden administration's more positive approach and engagement compared to the sour attitude toward the WTO under former president Donald Trump.

This was an important boost for the WTO and for the global trading system in general, especially in the lead-up to the WTO's 12th Ministerial Conference in November of this year. With new director-general Ngozi Okonjo-Iweala now in charge, the G7 consensus renews the hope that the WTO can be put on the road to serious reform and that its negotiating agenda can be re-energized.

Taking the G7 endorsement as a starting point, the following looks at important trends in global trade governance, starting at the multilateral level, but then delving down to two other layers of activity, outside of formal treaties or intergovernmental agreements, that make up key parts of the system. These are:

- Intergovernmentally approved rules guidelines, not formally binding under trade agreements or through national laws, but developed and endorsed by governments and impacting international trade in various areas.
- Private sector standards, best practices and certifications, frequently overlooked, but which nonetheless have a major impact on global business, with some commentators calling this "private global business regulation".

There is more to the world trading order than these three tiers of activity, of course. Regional and bilateral trade agreements also occupy a major part of the global picture. But for the purposes of this discussion, starting with multilateralism and the WTO-based governance, the three levels mentioned above are considered to make up critical components of the post-pandemic global trading system.

One other preliminary point. While not mentioned by name in the trade section of the Carbis Bay communiqué, the references to modernizing the multilateral rulebook, dealing with market distorting practices of state enterprises, intellectual property theft and other concerns, were aimed squarely at China. The China factor is a weighty element in these global trends, must be borne in mind in reading the paragraphs that follow.

[1] The opening paragraph in the trade section of the communiqué says:

> We stand united in our commitment to free and fair trade as foundational principles and objectives of the rules-based multilateral system. We agree on the need for the world's leading democratic nations to unite behind a shared vision to ensure the multilateral trading system is reformed, with a modernised rulebook and a reformed World Trade Organization (WTO) at its centre, to be free and fair for all, more sustainable, resilient and responsive to the needs of global citizens. . . .

https://www.consilium.europa.eu/media/50361/carbis-bay-g7-summit-communique.pdf.

Multilateralism: Whither the WTO?

Well before the G7 Cornwall gathering, governments had recognized the need for institutional reform and restoration of the WTO's rule-making and dispute resolution functions.[2] Yet, even with a new director-general and the G7 endorsement, it remains uncertain whether the institution can regain its former vitality as we enter the post-COVID-19 era.

Back in the day – in the last part of the 20th century – international trade policy was mostly about keeping tariffs in check and eliminating unfair laws and regulations favouring local over imported goods, with multilateral rules collected in the 1947 *General Agreement on Tariffs and Trade* (GATT).

As the global economy grew, so did the multilateral order, and more detailed rules were developed and codified, resulting in the 1994 *World Trade Organization Agreement*. The agreement covered more sectors than the GATT, with new rules for intellectual property and services as examples, building on the GATT architecture to form a more effective dispute settlement system.

The WTO has served the international community well, keeping protectionism more or less under control and settling important, even if not all, trade disputes among members. However, over the last decade, supply lines became integrated, e-commerce surged, trade became digitized and climate-change policies intensified. This pace of events has revealed serious flaws in the WTO's institutional structure and in the agreement's rules.

The collapse of the Doha round 10 years ago was a major setback to the organization as a negotiating forum. It has been losing momentum since, while international business and supply-line integration moved ahead at a dizzying speed in an increasingly globalized world. New challenges have emerged as the world struggles with the distribution of COVID-19 vaccines.

In her first address to the WTO General Council, Okonjo-Iweala set out an ambitious agenda to restore the organization to its central role.[3] While the task is ambitious, reaching into numerous fields and sectors, she faces two over-arching challenges.

One is the need to change the WTO negotiating architecture to facilitate conclusion of plurilateral agreements by like-minded members on issues such as e-commerce, essential medicines and environmentally sustainable goods, where less than the full WTO membership wishes to participate. Finding a solution to the present all-or-nothing negotiating paradigm – restricting the benefits under plurilateral agreements to those who sign on – is vital if the WTO is to remain credible as a negotiating forum.

The second involves fixing the WTO's dispute resolution mechanism, which consists of a panel system (the trial level) and an appeal court known as the Appellate Body. The Trump

[2] This point was reflected in the separate G7 Trade Ministers' meeting several weeks before the heads-of-government summit, Trade Ministers' Communiqué, May 28, 2021: https://www.gov.uk/government/news/g7-trade-ministers-communique.
[3] World Trade Organization, "DG Okonjo-Iweala: WTO Can Deliver Results if Members 'Accept We Can Do Things Differently,'" March 1, 2021, https://www.wto.org/english/news_e/spno_e/spno1_e.htm.

administration's ire was directed at the latter, insisting that it had far outstepped its mandate and gone off the rails. Under Trump, the U.S. government refused to sign off on Appellate Body appointments, paralyzing the entire process. The Biden administration so far has not indicated a change in the U.S. position on this.

Without that body in operational mode, trade disputes can't reach final disposition, resulting in the dispute settlement system – once a crowning achievement of the international community – being dysfunctional. Restoring the health and well-being of the WTO's judicial arm is the second major challenge.

Despite the magnitude of these challenges and the difficulty of herding 164 member governments with disparate and often opposing interests, the situation is not totally bleak. The good news is the renewed U.S. engagement in WTO matters, presaging a return to its historic leadership role.

On improving the system generally, some important groundwork has already been laid. The European Union released a comprehensive set of thoughtful ideas earlier this year. Canada has been bringing together a number of WTO members in the Ottawa Group, offering useful and creative reform suggestions.[4]

Thus, there is cautious optimism for consensus actions to restore the organization's negotiating functions and, at some point, its dispute settlement functions as well. Even within its unreformed structure, there is the possibility of agreement on things like fishery subsidies, e-commerce and some other priority items.

Notwithstanding its present wounded state, the WTO still remains the central organizing body in global trade. Short of the mark as the current rules may be for dealing with 21st century issues, the existing rules – non-discrimination, MFN treatment, fixed tariff rates, prohibitions on import and export controls, etc. – do provide the basic framework for a continuing, if imperfect, global order.

Codes of Conduct and Business Standards

At the second level, below the umbrella of multilateral order and regional and bilateral treaties, are government-endorsed standards and guidelines, developed outside of formal treaties but with state involvement, support and imprimatur. Not enshrined in treaties or international agreements and even if not legally binding or universally applied, these standards and guidelines have proliferated and occupy a significant position in the global trading order. There are thousands of these, some more widely accepted than others but undeniably an important part of world trade.

[4] Alan Wolff, recently retired as WTO deputy director-general, now at the Peterson Institute in Washington, D.C., has provided ideas for the Ottawa Group to move the WTO forward in the post-pandemic world. "My Perspectives on the Role of the US in the WTO," Presentation to the Washington DC Ottawa Group1 Embassies, Peterson Institute for International Economics, May 19, 2019, https://www.piie.com/sites/default/files/documents/wolff2021-05-19.pdf.

Illustrating the point is the emergence of government-approved codes and standards for the conduct of international business. These find mature expression in the inter-governmental work of the Organisation for Economic Co-operation and Development (OECD), the foundation being the ground-breaking OECD *Guidelines for Multinational Enterprises,* issued in 1976.[5] Since the MNE guidelines were issued, the OECD has developed a slew of non-binding guidelines responsible business conduct that member governments have committed to promote, mostly in a non-legislated way, to influence how multinational companies behave in the global marketplace.[6]

With respect to its RBC guidelines, the OECD website says:

> Responsible business conduct (RBC) sets out an expectation that all businesses – regardless of their legal status, size, ownership or sector – avoid and address negative impacts of their operations, while contributing to sustainable development in the countries where they operate. [7]

It goes on to note how these standards can shape government policies and help businesses minimize the adverse impacts of their operations and supply chains, while providing a venue for the resolution of alleged corporate, social, environmental, labour or human rights abuses.

Beyond general guidelines, the OECD has developed sector-specific guidance for the minerals, agriculture, and garment and footwear supply chains, and good-practice papers for the extractive and financial sectors, developed in co-operation with governments, business, trade unions and civil society.

While not binding under international trade agreements or enacted into law by governments, OECD members have endorsed the guidelines and have been influential in channelling private sector behaviour in such areas as human rights, labour practices and sustainable development objectives.[8]

Many industrialized countries rely on these as baseline standards. As Global Affairs Canada's website states:

> Multilaterally, Canada promotes international standards for RBC in a number of fora including the OECD, the Group of Seven, Asia Pacific Economic Co-operation and the Organization of American States. Participation in multilateral fora provides Canada not only an opportunity to share knowledge, but also to work

[5] OECD, Annual Report, "Responsible Business Conduct OECD Guidelines for Multinational Enterprises," May 19, 2019, http://mneguidelines.oecd.org/annualreportsontheguidelines.htm.
[6] The MNE Guidelines are incorporated in a range of later OECD instruments, including: the G20/OECD Principles of Corporate Governance; the Guidelines on Corporate Governance of State-Owned Enterprises; the Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence; the Policy Framework for Investment; the Recommendation of the Council on Public Procurement; and the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.
[7] Ibid.
[8] The World Bank is another organization that has issued standards and guidelines respecting enterprises engaged in Bank projects, and there are many other examples, including by the regional development banks, https://documents1.worldbank.org/curated/en/590031510147952606/pdf/120972-REVISED-World-Bank-Sustainability-Principles-2017.pdf.

> together to promote and strengthen international RBC guidelines for the benefit of all stakeholders.

These state-endorsed business practice standards are thus part of the 21st century global order that, together with binding treaty obligations under the WTO umbrella, will play an increasingly important role, channelling international commercial and business activity in meeting ever-demanding public expectations. It is expected that these second-tier international initiatives will increase, adding a significant and growing dimension to the global trading order.

Importance of Private Sector Action

The above describes two levels of the state-regulated global trading order. Private sector standards, guidelines and product certifications issued by a variety of non-state actors occupy a third tier, sometimes described as "private global business regulation."[9] Even if not enshrined in treaties or state legislation, they influence how international business is conducted in important ways. As one commentator has observed:

> Private regulation is a large and growing field of regulatory activity. Industry associations set health and safety standards for their member companies. Companies with global supply chains establish codes of conduct for their foreign suppliers regarding treatment of workers and the environment. Companies join voluntary programs that certify and label their consumer products to indicate compliance with social and environmental criteria. Private auditors are hired to assess corporate compliance with rules and standards developed by both governments and private entities. In all these forms of private regulation, private actors engage in developing and implementing rules that serve the traditional social goals of public regulation, particularly health, safety, and environmental protection.[10]

An illustration of private sector actions is in the area of corporate social responsibility (CSR) standards, discussed above. While many have been formulated by intergovernmental bodies, many are developed privately. Whatever their origin, CSR standards have been taken on at the corporate level, not because of treaties or legislation, but because of market factors, including political, social and investor pressures.

The current impetus to move to a net-zero carbon future in compliance with Paris Agreement targets is an example affecting the conduct of international business, notably in respect of sustainability and climate change, where financial and investor pressure has forced corporate action in accepting voluntary compliance.

[9] D. Vogel, "The Private Regulation of Global Corporate Conduct," in *The Politics of Global Regulation,* Walter Mattli and Ngaire Woods, eds. (Princeton, NJ: Princeton University Press, 2009).
[10] L. K. McAllister, "Harnessing Private Regulation," *Michigan Journal of Environmental & Administrative Law* 291, 3: 2014.

Environmental, social and governance (ESG) risk assessment models, integrating ESG factors in investment decision-making and applied at the enterprise level independently of legal requirements is another major development.[11] ESG evaluations and sustainable business practices are now widely applied in the extractive (mining) sector, including those under the auspices of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF).[12]

Business practices related to employment and human rights in foreign operations are expanding in the international fashion industry, another case in point.[13] These are likewise independent of treaties or laws but reflect private sector responses to market factors.

Some of these private standards are based on, or influenced by, the work of the OECD Centre discussed above, as well by the International Chamber of Commerce, which has issued guidelines on responsible sourcing – supply chain responsibility – an example of private business responding to the market and managing relations with suppliers.[14]

One simple illustration is the acceptance by Walmart, Home Depot or Amazon that a commercial, non-legislated standard – perhaps even a standard of their own formulations – could be as commercially significant as a tariff reduction on that particular product.[15]

Product endorsements and certifications, notably in the environmental sustainability, human rights and fair-trade domain, are another factor and an added significance in shaping public and consumer attitudes and affecting international business:

- Among the earliest of these was Fairtrade International and its companion certification body, FLO-CERT, covering a wide range of products, including bananas, honey, oranges, cocoa, coffee, shortbread, cotton, dried and fresh fruits and vegetables, juices, nuts and oil seeds, quinoa, rice, spices, sugar, tea and wine.[16]

- In the same category are green endorsements, such as that of the Forest Stewardship Council (FSC), showing consumers that the products are ecologically sustainable.[17] FSC certification has become widely accepted, aided by the decision of companies

[11] An illustration of the role of non-legislated ESG and RBC standards is in the financial reports of transnational corporations. Consider Barrick Gold Corporation, a prime example where large parts of its annual report are taken up by environmental sustainability and human rights factors: https://s25.q4cdn.com/322814910/files/doc_downloads/policies/policies_and_standards/Code-of-Conduct.pdf. See: *Investment Governance and the Integration of Environmental, Social and Governance Factors*, OECD (2017).

[12] These corporate actions under the IGF and other developments in CSR are collected and reported by the International Institute of Sustainable Development (IISD): https://www.iisd.org.

[13] P. Perry and S. Wood, "Exploring the International Fashion Supply Chain and Corporate Social Responsibility: Cost, Responsiveness and Ethical Implications," in *Logistics and Retail Management: Emerging Issues and New Challenges in the Retail Supply Chain*, 5th edition, J. Fernie and L. Sparks, eds. (London/New York/New Delhi: Kogan Page, 2019).

[14] International Chamber of Commerce, *ICC Guide to Responsible Sourcing*, 2008.

[15] For example, Home Depot in its *2018 Responsibility Report* (posted on its website) states its commitment to ethical sourcing and social and environmental (SER) standards and conducts audits around the world to ensure its suppliers meet these standards, https://corporate.homedepot.com/sites/default/files/2018-responsibility-report/index.html.

[16] Fairtrade International, "Fairtrade Standards," n.d.:
"Fairtrade Standards distinguish between core requirements, which producers must meet to be certified, and development requirements that encourage producers to continuously improve and to invest in the development of their organizations and their workers.
This concept is developed for the target group of Fairtrade: disadvantaged producers and workers. It encourages sustainable, social, economic and environmental development of producers and their organizations," https://www.fairtrade.net/standard/fairtrade-standards

[17] Forest Stewardship Council, "About Us," https://ca.fsc.org/en-ca/about-us.

like Home Depot and other mass retailers to require the FSC stamp of approval from their suppliers.

- In the fashion industry, referred to above, WRAP is an independent non-profit team of global social compliance experts dedicated to promoting safe, lawful, humane and ethical manufacturing around the world through certification and education.

- In the human rights field is Better Work, a partnership between the UN's International Labour Organization and the World Bank's International Finance Corporation, bringing diverse groups together – governments, global brands, factory owners, unions and workers – to establish guidelines to improve working conditions in the garment industry with a focus on developing countries.[18]

The above are samplings of private, non-binding rules, standards and best-practice guidelines – private global business regulation – that will continue to influence international business and trade as a key part of the 21st century global order.

Returning to the point made at the outset is the increasing influence of China in many private international standard-setting bodies. Recent commentaries have expressed concern that it is aggressively engaged in attempts to set standards for 21st century technologies to its own benefit, a clear warning to western business and governments.[19]

Concluding Comments

Whether and how the WTO revives itself over the coming months and years as governments attempt to find solutions to the institutional malaise, its umbrella set of rules remain as foundation blocks of the global order: bound tariffs, non-discrimination and prohibitions on export and import controls.

While not always respected and full of built-in exceptions, WTO/GATT-based rules provide an orderly multilateral framework, even with ongoing tensions and disputes.[20] It is up to governments to find the collective will – as called for in the recent G7 summit – to further the global community's unfinished multilateral efforts in this area.

As to the subsequent tiers described above, governments have other roles to play in furthering the development of progressive and constructive business practices and codes of social responsibility on matters such as human rights and as the world advances to meet the Paris Agreement on net-zero carbon. This means supporting the work of rule-formulating intergovernmental bodies like the OECD, the World Bank and others. Because this tier is also an integral part of the global order,

[18] These and other best-practice formulating organizations in a wide range of sectors are listed on the CSR Compass website: https://www.csrcompass.com/textiles-and-clothing-industry.
[19] "China and the New Geopolitics of Technical Standardization", *Institut Francais des Relations Internationales* (I'Ifri), January 2020;"China's Participation in International Standards Setting: Benefits and Concerns for US Industry", Kemensky, J, *American National Standards Institute* newsletter, February 2020; "We cannot let China set the standards for 21st century technologies", *The Hill*, 16 April 2021.
[20] L. L. Herman, "International Law in a Turbulent World," *Canada-United States Law Journal* 1, 41: 2017.

governments must maintain a progressive sense of responsibility in furthering the rule-making activities of these bodies.

With respect to private global business regulation, governments have a different task, which is to not interfere in valuable private sector activities but, recognizing their contribution to global order, to promote their work and to help ensure their transparency, non-discrimination and technical/scientific credibility.

In each of these three levels there is the spectre of China, increasingly active in efforts to channel rules, guidelines and standards to its own benefit, a cautionary note for western governments and business enterprises to be vigilant.

To summarize this review, these three levels of activity comprise the collectivity of major trends as the world emerges from the pandemic crisis and moves forward to a net zero-carbon future. The message is that governments and private business have a common interest and responsibility in furthering actions at these three levels which collectively contribute to the progressive development of global order in international trade.

About the Author

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Canadian Global Affairs Institute

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