

# **CAN THE WORLD TRADE ORGANIZATION REORGANIZE WITHOUT THE UNITED STATES OF AMERICA?**

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## **ABSTRACT**

The World Trade Organization (WTO) is an intergovernmental organization that has helped expand modern globalization by reducing tariff barriers and by regulating international trade among countries. Since 2016, both President Barack Obama and President Donald Trump have refused to allow the appointment of new judges for the critically important Dispute Settlement Process and as of December 11, 2019, the WTO can no longer adjudicate trade conflicts. The America First philosophy of no multilateral institutional intrusion on its sovereignty could lead the WTO to proceed without the United States, as has been suggested by former WTO Managing Director Pascal Lamy.

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**Keywords:** WTO, Global Trade, Trade Barriers, Regulations

## **INTRODUCTION**

The World Trade Organization (WTO) is based in Geneva, Switzerland, and was established in 1995, replacing the General Agreement on Tariffs and Trade (GATT), which started in 1948. The WTO accounts for 96% of world trade and is responsible for overseeing the rules of international trade among its 164 member countries and 23 observer governments. The WTO monitors the implementation of trade agreements and acts as a forum to help settle trade disputes between

countries. Its basic founding principle is “a commitment to openness, meaning reducing tariffs as well as limiting quotas, import bans, distorting subsidies, and other barriers to trade” (McBride, 2018). Another principle is nondiscrimination, whereby all member countries must treat trade with other countries equally. The WTO strives for transparency and predictability in trade related regulations. James McBride writing recently for the Council on Foreign Relations said “the WTO is also committed, in principle, to giving less-developed countries flexibility and accommodations to help them adjust to new rules” (McBride, 2018). Trade decisions made by the WTO must be unanimous and are binding. The countries themselves enforce the rules and decisions including the imposition of trade sanctions on members that violate these agreements and decisions.

To better understand the tensions between the WTO and the Trump administration, it is important to know the WTO history of handling conflicts. Out of more than 500 disputes that the WTO has overseen since 1995, most were settled by consultation, with the remaining few requiring litigation. When an issue arises and a member country files a complaint against another country, they must first try to resolve the problem by negotiation. From the founding of the WTO in 1995 until December 11, 2019, if consultation did not work, a three-judge WTO panel was chosen from the seven judges of the Dispute Settlement Body. Panel judges were selected for four-year terms and were eligible for reappointment to a second term. After a WTO ruling against an offending country, unless it is overturned on appeal, it must implement the panel’s recommendation. Otherwise, the complaining country can use punitive measures such as raising tariffs or blocking imports.

## **THE WTO FACES CHALLENGES AND UNCERTAINTY**

President Donald Trump has claimed that the dispute settlement system is biased against the United States, despite the fact that U.S. has won the majority of the cases it has been involved with. Unsurprisingly, the United States has been a very active member in dispute settlements (116 filed complaints and 136 cases as a defendant), especially regarding China. Of the 25 cases the United States filed with the WTO during the Obama administration, 16 were against China. President Trump’s administration went further by instituting tariffs targeting steel and aluminum from China and other nations. These unilateral tariffs violated WTO rules. Pascal Lamy, Managing Director of the WTO from 2005 to 2013, has an interesting perspective on the trade battle between China and the United States: “the Middle Kingdom’s drive for technological modernization is symptomatic of the problems with the global trading system. To be sure, China’s trade practices, including opaque, trade-distorting subsidies of high-tech products, need to be disciplined by stronger WTO rules. But technically, Beijing argues, it abides by current WTO restrictions, because the rules on industrial subsidies are too vague. And, it will probably argue that rules about agricultural subsidies also need strengthening, which U.S. farmers may not like.” Trump’s willingness to subvert the WTO is a major concern, that some fear could lead to the end of the organization in the near future. (Lamy, 2018).

The United States has targeted the dispute settlement process. In 2016, the Obama administration blocked the reappointment of a South Korean judge to the WTO's Appellate Body, which was the first time a country blocked a second term for a judge. International Law Professor Steve Charnovitz of George Washington Law School severely criticized the Obama Administration for "shamelessly abusing the WTO consensus rule to block the reappointment of a distinguished Korean jurist to the WTO Appellate Body. The USTR (United States Trade Representative) under Obama was miffed that the Korean appellatory had co-authored WTO decisions against US protectionist measures...I urged that the Obama Administration should apologize to the WTO" (Charnovitz, 2019). President Trump continued to block new appointments, and in December, 2019, only one judge was available and since three judges are needed to make a ruling, the WTO dispute settlement system is now suspended. The American Ambassador to the WTO, Dennis Shea, argued that the Appellate Body has "consistently overstepped its authority" and to protect American interests, the U.S. would be "disruptive where necessary." (Miles, 2018)

The dispute settlement process is viewed by international law scholars as a major achievement. Professor Peter Van den Bossche of Belgium who had served as an Appellate Board Member said at the end of his term in May, 2019, "the WTO dispute settlement system...was—and currently still is—a glorious experiment with the rule of law in international relations." Ambassador Ujal Bhatia of India referred to the Appellate Body as a 'crown jewel.' (Pauwelyn, 2019). Jim Bacchus, an American member of the Appellate Body from 1995 to 2013 said, the "dispute settlement process had served as a beacon of hope for being one of the fastest and most effective international dispute settlement systems in the history of the world" (Bacchus and Lester, 2019).

Professor Steve Charnovitz described the long history of international trade law going back to the 19<sup>th</sup> century and its evolution after two world wars to the GATT in 1947 agreed by 23 countries. GATT codified many rules of trade but was forced by the United States to be a temporary organization as reflected in its official title, "General Agreement on Tariffs and Trade." Compliance was voluntary. In 1995, the major countries of the world (excluding China and Russia which did not join the WTO until the 21<sup>st</sup> century) agreed to a formal constitution creating the WTO and its dispute settlement process which provided penalties for violating WTO rules. (Charnovitz, 2019).

Robert Lighthizer, who after a long career as an International Trade lawyer became the Trade Representative for the Trump Administration, has challenged the infringement on American sovereignty of the WTO and said that the process under GATT was better. In a 2017 interview, he said: "under the GATT...you would bring panels and then you would have a negotiation. And you know, trade grew and we resolved issues eventually...it's a system that, you know, was successful for a long period of time." (Pauwelyn, 2019). The less formal process under GATT enabled the United States to utilize its economic power to shape agreements. The more formal WTO dispute settlement process involving scholarly judges using well defined procedures constrained the United States, to which Lighthizer objected when he was a lawyer defending protectionist practices for the steel industry. In advising President Trump to paralyze the dispute settlement process, he is arguing for the old GATT mechanisms which maximized American

sovereignty and the power of US government officials. *The Economist* (2019) believes that Americans prefer “clear contractual terms” and that the Europeans are “more comfortable with resolving ambiguities by going beyond what is written.” The EU believes that the WTO dispute settlement process works well, and *The Economist* reported that 117 members have signed a joint letter asking America to allow it to resume its work. As an alternative, it has been suggested that a coalition of willing WTO members could set up the equivalent of the current process to resolve trade disputes without the United States (Pauwelyn, 2019).

Another challenge facing the WTO is the Doha Development Agenda (also known as the Doha Round), which began in Doha, Qatar, in 2001. The WTO agreed to a new round of negotiations that focused on the economic growth of developing countries. The main point of the Doha Round has been to free up global agricultural trade, because many developing countries rely on exporting basic agricultural products, but it has had to deal with rich countries that protect their farmers with annual subsidies of \$300 billion. “Developing countries argue that without a reduction in developed countries’ subsidies, they must maintain tariffs and their own domestic subsidies.” The Doha Round has also been trying to reduce trade barriers in areas such as business and financial services. Originally, the agenda promised to give developing countries more time to enact changes, along with technical and financial backing. These negotiations fell apart in 2008 due to disagreement over agriculture subsidies. (McBride, 2018)

## WTO ACTIONS

In terms of making progress towards creating more favorable policies for developing countries, it took the WTO until 2013 to achieve its first multilateral agreement called the Trade Facilitation Agreement (TFA). Its purpose was to accelerate customs procedures to make trade easier and cheaper. A temporary agreement was also reached about “public stockholding” which is an “exception that allows developing countries to stockpile agricultural products to protect against food shortages”. Unfortunately, though TFA only answered a part of the Doha Round agenda, it showed that the WTO was capable of enacting new global trade solutions. The WTO had another meeting in Nairobi in 2015, where members agreed to start phasing out agriculture export subsidies and some countries agreed to end tariffs on information technology products. Sadly, due to a combination of the election of President Trump in 2016 and the lack of further progress at the WTO meeting in Buenos Aires in 2017, this is the last bit of progress the WTO would make on the Doha agenda. Many member countries considered this to be a failure for the trade organization, and U.S. Trade Representative Robert Lighthizer, called for a “fresh start,” which could mean that he believes that it is time for the world to move on from the WTO. (McBride, 2018)

Even though it took twelve years for any real, visible progress to be made in the Doha Round, the fact it was able to establish a multilateral agreement was a sign of hope for what the WTO could accomplish in the future. Unfortunately, it was a thin silver lining in what turned out to be a very disappointing attempt at successful global trade regulation. The WTO not only faces issues involving the Doha Round and the policies of President Trump, but it also has to deal with criticism

of how it operates internally. Farmers and labor groups believe the WTO focuses too much on corporate interests. American policy makers, including prominent Democrats and Republicans, assert that the organization has failed to keep China in line and allows it to abuse the system. James McBride has outlined four main concerns:

- ***Intellectual property:*** “The WTO’s intellectual property agreement, Trade-Related Aspects of Intellectual Property Rights (TRIPS), draws criticism from experts who have argued that WTO rules on drug patents have limited access to medicines in poorer countries. The WTO says that enforcing patent protections is central to expanding global trade.”
- ***Response to China:*** “Trump has been a vocal critic of Chinese state-led development policy, arguing that while the United States has adhered to global trade rules, other countries, (primarily China), have gained an advantage by ignoring them.”
- ***Sovereignty and regulation:*** “Some critics say WTO rules overrule national sovereignty, and in doing so erode environmental and labor protections. Environmental groups have criticized WTO decisions on genetically modified foods, as well as recent WTO rulings against what it considers discriminatory environmental labeling. Labor unions in the United States argue that the WTO is inadequate for protecting U.S. wages from being undercut by unfair labor practices abroad, alleging, for instance, that China violates basic workers’ rights to lower the cost of its exports. Developing countries counter that attempts to address labor standards at the WTO are a form of protectionism in disguise.”
- ***Import competition:*** “Some economists allege that by promoting imports and encouraging firms to move their operations abroad, WTO-led tariff reductions hurt U.S. jobs and wages. The Economic Policy Institute’s Robert E. Scott and Will Kimball have estimated that China’s entrance into the WTO in 2001 led to the loss of more than three million U.S. jobs, as U.S. firms were forced to compete with China’s much cheaper imports.” (McBride, 2018)

## ALTERNATIVE AGREEMENTS

The recent WTO organizational difficulties and membership dissatisfaction have countries looking for alternative systems to deal with world trade. While the Doha Round conversations have not made any progress since the 2017 meeting, the WTO is still facilitating trade through a method called plurilateral negotiations whereby an agreement is reached between a subset of WTO countries. Obviously, these agreements are easier to coordinate because they focus on narrower issues and are only binding to the subset of countries involved in the discussion.

One is the Information Technology Agreement from the 2015 meeting in Nairobi, (ITA), that was agreed by 53 WTO countries to reduce trade tariffs on IT products. The Trade in Services Agreement (TISA) has been in progress since 2013 and involves 23 member countries. Its goal is

to better liberalize global trade by updating the WTO's rules, which have not been modified since their inception in 1995. McBride reports that "in 2012, 19 members agreed to update the Government Procurement Agreement (GPA), which seeks to further open government procurement markets. And in 2014, 14 members, including the United States, China, the EU, and Japan, opened negotiations on a proposed Environmental Goods Agreement (EGA), which would liberalize trade in environmental products, such as wind turbines and solar technology" (McBride, 2018). Some countries have negotiated bilateral treaties and larger regional free trade agreements. President Trump prefers to use bilateral discussions, or even unilateral measures with countries such as China. The fact that these plurilateral and bilateral agreements were and still are being made, while the WTO is trying to find some kind of global solution through the Doha agenda, demonstrates that these methods can lead to trade progress.

Global multilateral agreements sound good in theory, but reality has proved that not all nations are ready to move in unison. Different countries have varying needs based on internal factors which is why a binding rule for all does not always work. Member countries have been forced to partake in plurilateral agreement to achieve trade agreements. The WTO may need to adopt plurilateral and bilateral negotiations on a much larger scale to achieve progress in international trade. The WTO Secretariat in Geneva, Switzerland facilitates and coordinates the various activities of the WTO, but the authority to make agreements must come from the countries themselves.

While many do not necessarily agree with how President Trump is managing trade issues, he has triggered a wakeup call that the WTO badly needed. Pascal Lamy, former WTO Managing Director, has said the WTO has "a process that has remained stalled and elusive for too many years. Those who value fostering a fair global trading system that works for all, should seize this chance." In a perfect world, the United States would continue to be a part of the WTO, but if the Trump administration continues to use its ultimatum style approach to negotiations, other member countries need to be prepared to create a new international trade organization that does not involve America. (Lamy, 2018). Lamy's view of the Trump Administration is echoed in a Reuters article entitled, "Isolate Trump at WTO, says former top trade judge Bacchus." Bacchus, a former member of the United States House of Representatives argued at a speech given at the WTO headquarters that countries belonging to the World Trade Organization should unite against the bullying of U.S. President Donald Trump. (Miles, 2018).

Lamy frames future WTO discussions by saying for there to be a fair-trading system that accurately reflexes our modern era, it must take into account the concept of "one world with three systems." Pascal Lamy describes these systems as "the U.S. system, which is hyper-capitalist, individualistic and entrepreneurial; China mixes a strong collectivist state with uneven market competition; Europe's social market system and many others stand somewhere in between" (Lamy, 2018). These different systems need to coexist and trade goods and services with each other. Lamy also argues that "it would be prudent for other members to start thinking about devising a new international trade organization minus the United States in order to avoid the 'my way or the highway' blackmail that has become the American President's signature negotiating style." (Lamy, 2018)

The *Wall Street Journal* (Alter, 2019) recently published an opinion article recommending a WTO 2.0 that said “we need a system that can deal with the reality that China isn’t a market economy, and that allows for effective retaliation when Beijing steals other nations’ technology and intellectual property.” Furthermore, other analysts believe that the current WTO primarily benefits multinational corporate interests and hinders the aspirations of developing countries. In an article entitled, “Good Riddance to the WTO,” Walden Bello, Executive Director of Focus on the Global South, argued that Europe and the United States have used the WTO to create a global hegemony that includes the Agreement on Agriculture that has facilitated the dumping of American and European food surpluses on developing countries and the Trade Related Intellectual Property Rights Agreements that has protected the technology of multinational corporations. Bello prefers the old GATT system that enabled developing countries to industrialize without the restrictions of the WTO (Bello, 2019). An example of a rich country benefiting from WTO sanctions against a developing country is the recent case won by America against India. The U.S. Trade Representative announced in November 2019 that the WTO Dispute Settlement Panel agreed that “India gives prohibited subsidies to producers of steel products, pharmaceuticals, chemicals, information technology products, textiles, and apparel, to the detriment of American workers and manufacturers.” These export subsidies had been permitted until recently because India was considered a developing country, but the WTO ruled that in these industries, India had exceeded the permissible subsidies (Fortune, 2019). Bello and his supporters could argue that under the old GATT procedures, India would be able to subsidize manufacturing and business services, because they are needed to provide manufacturing employment for the large number of young rural citizens entering the workforce.

## CONCLUSION

The United States is challenging the very existence of the WTO. Three scenarios may be possible over the next several years.

- 1) The USA continues to attack the WTO, regardless of who is elected President in 2020. It is worth noting that President Obama started the process of weakening the WTO, and that Senator Bernie Sanders and other prominent Democrats have been opposed to international trade agreements that they believe have harmed American workers.
- 2) China and America negotiate an agreement, and the WTO agrees to significant reforms.
- 3) China and America decouple their two economies and enter a trade Cold War. To counter-act America First actions, Europe, China and many other members of the WTO could develop a wide-ranging agreement that would exclude the USA and continue the dispute settlement process of the WTO. A WTO without the United States is feasible due to the growing interactions among Europe, Asia and Africa, which are increasing their infrastructure and trade connections. Moreover, 86% of the world’s population now lives on these three geographically linked continents and the

Western Hemisphere accounts for only 14% of the world’s population. In two recent books, *The Future is Asian* and *Connectography*, Parag Khanna details the growing economic and infrastructure relationships being developed between Europe and Asia whose trade now exceeds that of Asia and North America (Khanna, 2019). The possibility of a worldwide coalition without the United States could offset American isolationism and the related ideology of the United States being the indispensable nation as articulated by Madeline Albright, the Clinton Administration Secretary of State. This recent arrogance of the United States as the indispensable center of the world is in contrast to President John F. Kennedy’s statement in November, 1961 that the citizens of the world “face problems which do not lend themselves to easy or quick or permanent solutions. And we must face the fact that the United States is neither omnipotent or omniscient — that we are only 6 percent of the world’s population — that we cannot impose our will upon the other 94 percent of mankind — that we cannot right every wrong or reverse each adversity — and that therefore there cannot be an American solution to every world problem.” In the spirit of these remarks, the GATT launched the successful Kennedy Round in the 1960’s that led to major expansion of GATT activities in a 1967 agreement signed by 62 countries (Norwood, 1969). A cooperative attitude by Americans in the next decade could lead to significant improvements in the WTO.

Globalization has been controversial, especially the political dynamics among rich and developing countries, but as former United Nations Secretary General Kofi Annan said, “Arguing against globalization is like arguing against the law of gravity” (Khanna, 2016). The 2019 Nobel Laureates in Economics, Abhijit Banerjee and Esther Duflo, began a 2020 Foreign Affairs article, “How Poverty Ends,” by describing how since 1980, the income of the bottom 50% of the world has doubled and that extreme poverty has dropped from nearly two billion in 1990 to less than 700 million. Much of this improvement has been in China and India, which have benefitted enormously from international business fueled by globalization. The WTO and its Dispute Settlement Process has been the referee for trade since 1995. One of the giants of the European Enlightenment, John Locke, said in 1689, “Wherever laws ends, tyranny begins.” Let us hope that international trade does not become a Darwinian jungle where the powerful demand subservience from others. An intelligent WTO 2.0 with compassionate policies and processes to help developing nations in conjunction with the 2030 Sustainable Development Goals of the United Nations, could bring progress to every corner of the world.

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