

THE TRUMP ADMINISTRATION'S CRITIQUE OF THE WORLD TRADE ORGANIZATION AND ITS IMPLICATIONS FOR THE INTERNATIONAL TRADING SYSTEM

*Dr. Kenneth Holland**

Abstract *The crisis in which the World Trade Organization is in could be best understood as the product of the rise of China and the incredible power rivalry that it has sparked with the United States. The WTO was founded in 1995, at a time when the United States was the world's sole superpower, and expectations were high that democracy was in the ascendancy. By 2013, however, with the ascension of Xi Jinping to the leadership of the Chinese Communist Party, it was clear that China was growing increasingly authoritarian and illiberal. From Washington's point of view, the WTO, with its ability to enforce the rules regarding international trade through its Appellate Body, rendered the United States vulnerable to complaints lodged by China and its allies in the developing world. The administration of Donald Trump simply continued President Barack Obama's policy of weakening the WTO's dispute-resolution function. The Biden administration continued the calls for reform in the dispute settlement rules. Consequently, the most probable way the WTO can restore its powers was by the United States and China reaching an agreement on reforms. The success of these negotiations depends on Washington addressing the Chinese threat to its hegemony separately from updating the WTO's rules and structures. The interests of all other WTO members must take a back seat in these discussions, given the economic and military dominance of the world's two wealthiest and most powerful nations. The article concludes with a sketch of possible reforms to which the powerful rivals can agree.*

* Dr. Kenneth Holland is Professor of Law and Dean (Academics, Research and International Affairs) at O. P. Jindal Global University in Sonapat, India.

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I. THE WTO IN CRISIS

The World Trade Organization (WTO) and the multilateral trading system are in crisis because of the actions taken by the Trump administration. President Donald Trump pursued a protectionist and unilateralist approach to international trade in order to save manufacturing jobs from the effects of competition from goods made more cheaply in China and to pressurize China to purchase more agricultural products and manufactured goods from the United States, which is its largest trading partner, thereby reducing the trade deficit with China. He sought to appease his populist base, which includes many working-class men without a university education living in states in the “Rust Belt”, such as Pennsylvania and Michigan, who had lost their manufacturing jobs due to foreign competition and automation. The principal weapon that he wielded against the rules-based global trading system established under the U.S. leadership in 1947, which started with the establishment of the General Agreement on Tariffs and Trade (GATT) and extended in 1995 with its replacement by the WTO, was the refusal to allow the appointment of members to the WTO’s Appellate Body, that hears appeals from WTO panel decisions.

The effect of vetoing appointments of Appellate Body judges was to cripple the dispute resolution function of the organization, one of the pillars of the rules-based system. However, resolving trade disputes is a core activity of the WTO. Disputes arise when a member believes that another member has violated an agreement or any other commitment that it has made as a member. Since 1995, the WTO has received more than 600 disputes and issued more than 350 rulings.⁷⁰⁵ Understanding the importance of the WTO to its members, 17 of the members, including China, collectively announced in January 2020 that they would collaborate on an alternative system for resolving trade disputes that arise between them through the appointment of a panel of arbitrators to hear appeals of panel decisions. The group said that

⁷⁰⁵ World Trade Organization, “Dispute Settlement” (2020) <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> accessed 12 December 2020.

a dispute settlement process with an appeal to an impartial and independent tribunal was essential to maintain the rules-based trading system of WTO.⁷⁰⁶ By January 2021, there were six more signatories in support of the alternative mechanism, including the U.S.'s partners: Australia, New Zealand and Canada.⁷⁰⁷ The members with the most at stake in preserving the dispute settlement system are the European Union, China, Canada, and India, which, together with the U.S., are also the most active members in filing complaints. Taken together, these members, account for roughly two-thirds of the world's wealth. The role of these four members is to persuade the United States to allow the appointment of judges to the Appellate Body so that it can continue to exercise its intended function. However, what these members fear is that the United States does not want to comply with any decision of a panel or the Appellate Body with which it disagrees and believes that it possesses the diplomatic muscle, as the world's biggest economy and spender on the military, to force countries to accept its non-compliance. An example of such a dispute is the November 2019 ruling by the WTO that authorized China to levy tariffs on \$3.6 billion of U.S. goods in retaliation to the Trump administration unfairly placing anti-dumping duties on over 40 Chinese products.⁷⁰⁸ Although the Biden administration removed the objections to the appointment of a Director-General of the WTO, it did not withdraw its veto power over the appointments to the Appellate Body.⁷⁰⁹ Therefore, the WTO remains in crisis unless the United States changes its policy.

There is a solution to the WTO puzzle available to the Biden administration. Because many of the grievances expressed by President Trump with the WTO actually dealt with matters outside the scope of the WTO agreements, it is possible to separate them out and address them in bilateral negotiations with Beijing. Because the distance between China and the United States on the issues that fall within the organization's ambit is not great, it is possible for Beijing and Washington to reach a consensus on the WTO reforms that could be supported by the other major global trading nations—the members of the European Union, India, Canada, Japan and South Korea.

⁷⁰⁶ Janyce McGregor, "China, Canada Among WTO Members Backing Alternate Trade Dispute Scheme" *CBC* (24 January 2020) <<https://www.cbc.ca/news/politics/wto-dispute-alternative-friday-1.5438805>> accessed 10 November 2020.

⁷⁰⁷ Chuin-Wei Yap, "A China With More Clout Awaits Biden at the WTO" *The Wall Street Journal* (25 January 2021) <<https://www.wsj.com/articles/a-china-with-more-clout-awaits-biden-at-the-wto-11611576003?mod=e2twp>> accessed 27 January 2021.

⁷⁰⁸ Robert Delaney, "China Wins WTO Case to Sanction US\$3.6 Billion in US Products Following Anti-Dumping Methodology" *South China Morning Post* (2 November 2019) <<https://www.scmp.com/news/china/article/3036010/china-wins-wto-case-sanction-us36-billion-us-trade>> accessed 10 October 2020.

⁷⁰⁹ Robert Howse, "Appointment with Destiny: Selecting WTO Judges in the Future" (2021) 12 *Global Policy* 71.

The importance of WTO reform for the Biden administration was highlighted by the Joint Communique instituted by the Group of Seven (G7) following their summit in England in June 2021. Therein, the world's leading democracies announced, "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 modernized rulebook and a reformed World Trade Organization (WTO) at its centre [including] proper functioning of the WTO's negotiating function and dispute settlement system, requiring addressing long-standing issues".⁷¹⁰ The Communique expresses its support for the G7 Trade Ministers' efforts to modernize the WTO and looks forward to further work in the G20, of which China is a member.

II. WHAT THE UNITED STATES AND CHINA SOUGHT FROM THE WTO

Why did the United States and China join the WTO? Beijing wanted to join because that would allow China access to new trading partners and lower tariffs with the current ones, which would raise the living standards domestically while giving China a seat in an important international organization. Consequently, driven largely by tariff reductions, China's trade jumped from around \$500 billion in 2001 to more than \$4 trillion in 2017. In 1992, China's average tariff rate of 32.2 percent far surpassed the global average of 7.2 percent. By 2003, China's tariff rate averaged 4.8 percent.⁷¹¹ China's Protocol of Accession to the WTO, signed in December 2001, allowed other WTO members to consider China as a Non-Market Economy (NME) until the end of 2016.⁷¹² Since then, WTO Members may grant China Market Economy Status (MES) and use Chinese prices to determine the normal value in anti-dumping proceedings, the number of anti-dumping complaints against China was naturally expected to be low. According to the "magical deadline" view, China should have automatically received the MES after the expiration of sub paragraph 15(a)(ii) in the Protocol of Accession.⁷¹³ Under an

⁷¹⁰ The White House, Carbis Bay G7 Summit Communique (13 June 2021) <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/13/carbis-bay-g7-summit-communique/>> accessed 14 June 2021.

⁷¹¹ Center for Strategic and International Studies, "How Influential is China in the World Trade Organization?" CSIS (2020). <<https://chinapower.csis.org/china-world-trade-organization-wto/#easy-footnote-bottom-3-5150>> accessed 9 December 2020.

⁷¹² Francisco Urdinez and Gilmar Masiero, "China and the WTO: Will the Market Economy Status Make any Difference after 2016?" (2015) 48 *The Chinese Economy* 155.

⁷¹³ Christian Tietje and Karsten Nowrot, "Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016", Policy Paper No. 34 (Transnational Economic Law Research Center 2011) 7.

alternative reading of the protocol, China's status will still be left to the discretion of the importing member according to its domestic laws.⁷¹⁴ However, the WTO members are deeply divided on the question of whether China is a market economy. By November 2006, 60 countries had recognized China as an MES, but some of China's major trading partners, including the United States, European Union and India, refused to grant this recognition.⁷¹⁵ The United States expected China to reform its illiberal Marxist economic and political system in the direction of a market economy supported by a democratic political system that guaranteed individual freedom for the Chinese people. Instead, China did not act on this and became increasingly illiberal. Only some reforms in the market direction were made by China. The share of State-Owned Enterprises ("SOEs") in industrial output, for example, fell from one half in 1998 to one quarter in 2011. The success, however, of some of the most prominent SOEs led to friction between China and the United States, its largest trading partner. One of the key characteristics of non-market economies is a state sector dominated by state-controlled enterprises.⁷¹⁶ Thus, U.S. exporters and investors complained about the unfair competition in both the domestic and international market with enterprises receiving large subsidies from Beijing.⁷¹⁷ In 2017, the Trump administration filed a third-party brief with the WTO in support of the European Union's dispute with China. The brief argued that China should be treated the same way as communist Eastern European countries, including Poland, Romania, and Hungary, when they had joined the GATT. Those nations eventually earned market economy status (MES) when state subsidies and state distortions had been drastically reduced. But these reductions have not yet occurred in China.⁷¹⁸ In 2019, China halted a dispute at the WTO over its claim to be a market economy and accepted the continuation of EU and U.S.'s "anti-dumping" levies on cheap Chinese goods. In all probability, the

⁷¹⁴ Yanning Yu, "Rethinking China's Market Economy Status in Trade Remedy Disputes after 2016: Concerns and Challenges" (2013) 8 *Asian Journal of WTO and International Health Law and Policy* 77-114, 96.

⁷¹⁵ Marie-José Rinaldi-Larribe, William S. Lightfoot, and Zhongxiu Zhao, "Does China Deserve the Market Economy Status?" (2009) 2 *Journal of Chinese Economic and Foreign Trade Studies* 110 – 120, 115.

⁷¹⁶ Ru Ding, "'Public Body' or Not: Chinese State-Owned Enterprise" (2014) 48 *Journal of World Trade* 167-189, 172.

⁷¹⁷ Fan Gang and Nicholas C. Hope, "The Role of State-Owned Enterprises in the Chinese Economy" in *US-China 2022: Economic Relations in the Next 10 Years* (2021) 2 <<https://www.chinausfocus.com/2022/wp-content/uploads/Part+02-Chapter+16.pdf>> accessed 24 June 2021.

⁷¹⁸ David Lawder, "U.S. Formally Opposes China Market Economy Status at WTO" *Reuters* (1 December 2017) <<https://www.reuters.com/article/us-usa-china-trade-wto/u-s-formally-opposes-china-market-economy-status-at-wto-idUSKBN1DU2VH>> accessed 24 June 2021.

Chinese government feared the ramifications of a panel ruling that detailed all of the ways in which China was not a market economy.⁷¹⁹

Nevertheless, U.S. consumers benefited from China's entry into the WTO because they could buy goods at lower prices, and U.S.'s corporations and investors gained access to the huge Chinese market. For example, in 2017, China accounted for about one-fifth of Apple's worldwide sales, and between 2001 and 2019, U.S. agricultural exports to China increased by 1,000 percent.

At the same time, China has benefited enormously from WTO membership. The Chinese economy has grown eight-fold since accession to the WTO in 2001, and more than four hundred million Chinese have been lifted from extreme poverty. U.S.-China trade grew more than thirty times, and China emerged as America's largest trading partner, overtaking Canada, Mexico, and Japan. Thus, it can be understood that the negative effects of WTO membership are more obvious for the United States. For instance, America lost almost six million manufacturing jobs between 1999 and 2011. However, it is difficult to determine how many were lost due to competition from China and how many due to automation. On the political front, China did not change into a liberal democracy. In fact, in the years following accession in 2001, it became more authoritarian and illiberal while its economy prospered. President Xi Jinping believes that the iron rule of the Chinese Communist Party is necessary to maintain stability and dominate industries engaged in technological innovation. The control of the Communist Party over the Chinese economy has presented the WTO with novel challenges. The multi-lateral global trading system, established in 1947, was founded on the assumption that participating countries would have market economies. China, however, evolved into a socialist-market economy with the government remaining the owner of many of the largest companies. As a result, one of the most common types of complaints filed in the WTO against China by the United States is that the Chinese government is illegally subsidizing an industry, especially manufacturing and high technology, in violation of WTO rules. The allegation is that while China promotes exports to the United States it closes its own market to U.S. goods. More than half of the cases lodged against China have been by the United States. Chinese complaints against the United States typically target its anti-dumping and safeguard measures, whose purpose is to shield ageing industries such as agriculture, textiles, and steel from foreign competition. In the disputes between the two economic giants, the United States generally fares better than China. Of 23

⁷¹⁹ Tom Miles, "China Pulls WTO Suit over Claim to be a Market Economy," Reuters (17 June 2019) <<https://www.reuters.com/article/us-usa-china-wto-eu/china-pulls-wto-suit-over-claim-to-be-a-market-economy-idUSKCN1T110A>> accessed 23 June 2021.

disputes filed by Washington against Beijing between 2002 and 2018, 10 could not be settled during bilateral consultations and therefore progressed to a panel investigation. The United States won all 10 of these disputes. In contrast, China only won 4 out of the 8 complaints it had lodged against the United States that progressed to a panel investigation.⁷²⁰

Another unforeseen development was China's practices of forcing U.S. companies attempting to access the Chinese market to transfer their technology to Chinese firms and acquiring trade secrets from American companies operating in both China and at home through industrial espionage. However, the issue of technology transfer rarely arises in a WTO dispute since WTO rules do not address the issue. Moreover, direct government funding and tax breaks for industries fall into a grey area under WTO rules.

Another common U.S. complaint is that China makes its exports cheaper by manipulating its currency, but there is no WTO rule on currency manipulation. Another point of contention between the United States and China is the latter's insistence on being classified as a "developing" country. About two-thirds of WTO members designate themselves as "developing" in order to receive "special and differential treatment", such as extended time for complying with WTO decisions and assistance with managing disputes and technical matters. In 2019, Washington proposed reforms to the WTO that would establish strict criteria for the developing status, but China teamed up with India to oppose the reform. A source of the WTO's inability to address many of Washington's concerns regarding Chinese trade practices is that its rules have not been updated in nearly twenty-five years.⁷²¹ In the words of the U.S. ambassador to the WTO, "While some Chinese measures have been found by WTO panels or the Appellate Body to run afoul of China's WTO obligations, fundamental problems remain unaddressed as many of the most significant Chinese policies and practices are not directly disciplined by WTO rules or the additional commitments that China made in its Protocol of Accession".⁷²² The fact that some of the most salient complaints of the United States with China's trading behaviour fall outside WTO rules presents a solution to the current impasse over the organization's dispute resolution system, since they can be addressed, as will be shown below, through direct negotiation with Beijing and the signing of bilateral agreements. The

⁷²⁰ Council on Foreign Relations, "What Happened When China Joined the WTO?" *CFR* (2020). <<https://world101.cfr.org/global-era-issues/trade/what-happened-when-china-joined-wto#:~:text=China%20has%20incurred%20criticism%20for,manifested%20in%20official%20WTO%20disputes.>> accessed 11 December 2020.

⁷²¹ *Ibid.*

⁷²² Petros C. Mavroidis and Andre Sapir, "China and the World Trade Organization: Towards a Better Fit" Working Paper Iss 06 (Brugel, 2019) 33.

WTO by itself cannot accommodate a rivalry for hegemony between the world's two most powerful countries.

III. THE RISE OF CHINA AND THE EMERGENCE OF A BIPOLAR WORLD

For decades, the U.S. followed a policy of engagement with China on the assumption that, over time, the regime would evolve through close interaction with the West towards economic liberalism, democracy, and openness. When the WTO was established in 1995, six years after the collapse of the Soviet Union, the world was unipolar and the United States was the sole superpower. At that time, China was not a rival, nor was Russia. The Soviet Union and Communist China were not members of the GATT, the WTO's predecessor, and were outside the global trading system. As we have seen, the expectation was that following the Chinese and the Russian accessions to the WTO in 2001 and 2012, respectively, the two nations would become adherents of rules-based international trade, free markets, foreign investment, open economies, and multilateral decision making. However, it soon became clear following the accession to the presidency of Xi Jinping in 2013 that these changes would not occur. Under Xi's leadership, the regime became increasingly authoritarian and illiberal. In a series of reassessments beginning gradually in the Obama administration and accelerating during the Trump presidency, Washington shifted from a policy of engagement to one of confrontation. By 2020, the United States viewed China as a threat both to its military hegemony in the Asia-Pacific and to the international liberal rules-based order nurtured under U.S. leadership since the Second World War. China's economy and military have grown to the point where the Middle Kingdom now enjoys the status of the world's sole "emerging superpower".⁷²³ The point that China's rise is the most important strategic factor for the US was exposed in the 2018 National Defence Strategy, in which the Department of Defence declared, "Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security", concluding,

"As China continues its economic and military ascendance, asserting power through an all-of-nation long-term strategy, it will continue to pursue a military modernization program that seeks Indo-Pacific regional

⁷²³ Anthony H. Cordesman, "China and the U.S.: Cooperation, Competition and/or Conflict: An Experimental Assessment" (2019) 11 Center for Strategic and International Studies <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/191001_China_Grand_Strategy.pdf> accessed 15 December 2020.

hegemony in the near term and displacement of the United States to achieve global pre-eminence in the future”⁷²⁴

	1995 WTO is Formed		2001 China Joins the WTO		2019	
	China	USA	China	USA	China	USA
GDP, billion USD ⁷²⁵	735	7640	1339	10,580	14,340	21,430
Military Expenditure, in constant (2018) USD, billion ⁷²⁶	26	488	52	471	266	719

Between 1995 and 2001, China's wealth grew by 82%, but between its admission to the WTO in 2001 and 2019, its GDP ballooned by 971%. During the same period, Chinese military spending grew more than fourfold between 2001 and 2019. Today, the United States and China rank number one and number two in both national wealth and military expenditure respectively. At the same time, China has not hesitated to use its wealth and power to extend its influence and make territorial and maritime claims in the South and East China Seas. When asked whether China was an adversary during her confirmation hearings before the United States Senate on President-elect Joe Biden's nomination for director of national intelligence, Avril Haines replied, "they are an adversary", and vowed to counter Beijing's "illegal, unfair, aggressive actions".⁷²⁷

As presented by A.F.K. Organski in the 1950s, the power transition theory predicts that the achievement of hegemony by a great power will spark a rivalry with a great rising nation which typically results in war and a transition of power to the challenger.⁷²⁸ Power transition theory directly challenges

⁷²⁴ U.S. Department of Defense, Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge (2018) <<https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>> accessed 3 October 2020.

⁷²⁵ "GDP, by Country" World Bank (2020). <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD>> accessed 4 January 2021.

⁷²⁶ "SIPRI Military Expenditure Database" Stockholm International Peace Research Institute (2020) <<https://www.sipri.org/databases/milex>> accessed 5 November 2020.

⁷²⁷ Deirdre Shesgreen, "Joe Biden's Nominee to Lead US Intelligence Avril Haines Answers Questions on China, QAnon" *USA Today* (19 January 2021) <<https://www.usatoday.com/story/news/politics/elections/2021/01/19/bidens-spy-chief-nominee-avril-haines-faces-questions-china-qanon/4210642001/>> accessed 20 January 2021.

⁷²⁸ A.F.K. Organski, *World Politics* (Alfred A. Knopf 1958).

the dominant realist theory of international relations, the balance of power, which maintains that war could be avoided if two opposing coalitions of nations were equal in power.⁷²⁹ The inevitability of competition between the United States and China for world domination has been explained by other theorists as well, including Robert Gilpin, Paul Kennedy, Graham Allison, and Hans Morgenthau.⁷³⁰ Allison coined the term “Thucydides Trap” to describe the tendency towards war when an emerging power threatens to displace an existing great power as the international hegemon, drawing on a statement by the ancient Greek historian Thucydides that the Peloponnesian War between Athens and Sparta had been inevitable because of Spartan fear of the growth of Athenian power. Allison observed that over the past 500 years, there have been sixteen Thucydidean rivalries, with twelve ending in armed conflict, and that China and the United States are on a collision course for war.⁷³¹ This theory postulates, however, that a war between the status quo and revisionist power is not inevitable. Allison says, “Managing this relationship without war will demand sustained attention, week by week, at the highest level in both countries”.⁷³² The rules-based international order, however, could be a victim of the rivalry. Because superpowers do not fear reprisals for violating international law, the US and China are the two countries most likely to ignore the strictures of the rules-based international trading system. Therefore, the survival of this system depends on the negotiations between Washington and Beijing to an agree on reforms that are mutually beneficial.⁷³³

IV. THE APPELLATE BODY: THE FOCUS OF THE TRUMP ADMINISTRATION'S DISSATISFACTION WITH THE WTO

Any solution to U.S. hostility towards the WTO must include reforms to the Appellate Body. This is because unlike panels, which are *ad hoc*, the

⁷²⁹ Ronald L. Tammen, “The Organski Legacy: A Fifty-Year Research Program” (2008) 34 *International Interactions* 314.

⁷³⁰ Kenneth Holland, “Canada and the Indo-Pacific Strategy” (2021) 27 *Canadian Foreign Policy Journal* DOI:10.1080/11926422.2021.1880949.

⁷³¹ Graham T. Allison, *Destined for War: Can America and China Escape Thucydides's Trap?* (Houghton Mifflin Harcourt, 2017).

⁷³² Graham Allison, “The Thucydides Trap: Are the U.S. and China Headed for War?” *The Atlantic* (24 September 2015) <<https://www.theatlantic.com/international/archive/2015/09/united-states-china-war-thucydides-trap/406756/>> accessed 25 June 2021.

⁷³³ Van Der Vyver, Johan, Michael Byers, Georg Nolte, James C. Hathaway, Karin Mickelson, and Ruth Wedgwood, “The Single Superpower and the Future of International Law” (2000) 94 *Proceedings of the Annual Meeting of the American Society of International Law* 64.

Appellate Body is a permanent body of seven members entrusted with the task of reviewing the legal aspects of the panels' reports. The Appellate Body did not exist in the old dispute settlement system under GATT 1947, a system in which respondents could ignore adverse panel decisions. The addition of a second stage in the adjudication of trade disputes was one of the major innovations of the Uruguay Round of Multilateral Trade Negotiations that culminated in the establishment of the WTO. The Appellate Body, albeit operating within an international organization, is, in fact, much closer to a proper independent court of law than the panels whose decisions it reviews.⁷³⁴ WTO rules provide that when the Dispute Settlement Body (DSB) "establishes panels, when it adopts panel and Appellate Body reports and when it authorizes retaliation, the DSB must approve the decision unless there is a consensus against it [Articles 6.1, 16.4, 17.14 and 22.6 of the Dispute Settlement Understanding (DSU)]". Therefore, any WTO member that wishes to block the decision to adopt a panel report must persuade all other members to oppose it. This special decision-making procedure is commonly referred to as "reverse" consensus.⁷³⁵ The practical effect is that panel reports are automatically adopted by the WTO members.⁷³⁶ The European Union also employs reverse Majority Voting (RMV) to overcome the need for positive consensus in which one member could veto any decision. Through its review of the legal interpretations of the panels, the Appellate Body was intended to provide uniformity and predictability to the multilateral trading system. The Appellate Body may uphold, reverse, or modify the panel's legal findings. The WTO's Dispute Settlement Body (DSB), which is all the member countries meeting together, appoints the members of the Appellate Body by consensus for a four-year term and can reappoint a person once.⁷³⁷

The transformation of the U.S.' attitude towards the WTO's dispute settlement system coincided with the emergence of China as a geopolitical rival. The first U.S. administration to adopt a hostile attitude was that of President Barack Obama. China's emergence as a major power was a key challenge during Obama's presidency, and tensions rose as China enforced its territorial claims in the South China and East China Seas. The Obama administration blocked the appointment of American Jennifer Hillman for

⁷³⁴ Thomas Cottier, "Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review" (2021) 24 *Journal of International Economic Law* 1.

⁷³⁵ "WTO Bodies Involved in the Dispute Settlement Process" World Trade Organization (2020) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm> accessed 24 June 2021.

⁷³⁶ Wim Van Aken and Lionel Artige, "Reverse Majority Voting in Comparative Perspective: Implications for Fiscal Governance in the EU" in Bruno de Witte, Adrienne Heritier and Alexander H. Trechsel, *The Euro Crisis and the State of European Democracy* (European University Institute 2013) 135.

⁷³⁷ WTO *supra* note 735.

a second term to the Appellate Body in 2011, claiming that the WTO had failed to protect American interests. In the following year, Xi Jinping was named General Secretary of the Communist Party and the Chairman of the Central Military Commission. Four years later, the Obama administration blocked the reappointment of a South Korean Appellate Body judge, Seung Wha Chang. The Trump administration simply continued the practice of blocking appointments and simply went one step further by refusing to allow any vacancies on the Appellate Body to be filled.

There was hope that President Trump's successor, Joe Biden, a Democrat, would change the policy and allow filling of the vacancies on the Appellate Body. However, in the first meeting of the DSB since the change in the American administration on 25 January 2021, the United States maintained its blockage on new nominations to the Appellate body.⁷³⁸ The question that both China and America's allies have is whether or not President Biden will repudiate the hostility expressed by his predecessor towards the WTO's dispute settlement system.

V. THE UNITED STATE DECIDES TO WEAKEN THE WTO

In August 2018, President Donald Trump labelled the WTO as “the single worst trade deal ever made”. He threatened that “if they don't shape up, I would withdraw from the WTO”.⁷³⁹ Criticisms of the WTO by the United States fall into three major categories: the ability of WTO members to self-identify as “developing” countries to receive special treatment, the failure of many WTO members to properly notify the WTO and other WTO members of government subsidies in accordance with specific agreement rules, and alleged overreach by the Appellate Body. Most of this criticism is directed at the actions of China, which the United States says is skirting WTO rules in the behaviour of state-owned enterprises, dumping products, and stealing intellectual property. In his address to the United Nations General Assembly in September 2018, Trump argued that “countries were admitted to the World Trade Organization that violate every single principle on which the organization is based... We will no longer tolerate such

⁷³⁸ “U.S. Continues WTO Appellate Block in Biden Admin's First DSB Meeting” Inside U.S. Trade (25 January 2021) <<https://insidetrade.com/daily-news/us-continues-wto-appellate-block-biden-admin%E2%80%99s-first-dsb-meeting>> accessed 27 January 2021.

⁷³⁹ “Trump Threatens to Pull US Out of World Trade Organization” *BBC News* (31 August 2018) <<https://www.bbc.com/news/world-us-canada-45364150>> accessed 10 December 2020.

abuse”.⁷⁴⁰ The Trump administration was particularly troubled by a WTO panel’s finding that the organization’s dispute settlement bodies can rule on the validity of a member state’s use of “national security” as a justification for taking measures that breach WTO accords. The Trump administration, in applying tariffs for steel and aluminium, argued that these were permitted under the WTO national security exemption. This clause specifies that WTO agreements shall not prevent a government from taking steps to defend its national security. China also relied on this justification in retaliating against the tariffs levied by the United States on steel and aluminium.⁷⁴¹ As a counter to this, the Trump administration threatened to use this rationale to protect other domestic industries, such as automobiles, from cheaper imports from China and other trading partners. The United States argued that only states have the power to determine the validity of a national security motivation and that its use was non-justiciable under WTO rules.⁷⁴²

One of the most vocal critics of the WTO during the Trump administration was U.S. Trade Representative (USTR), Robert Lighthizer. He defended the administration’s crippling of the Appellate Body in response to decisions made by the body that President Trump believed imposed obligations on the United States that it never agreed to accept when it joined the WTO, including restrictions on anti-dumping and countervailing duty measures against under-priced imports, a criticism made by both Republicans and Democrats in the United States Congress.⁷⁴³ In February 2020, Ambassador Lighthizer issued a report on the Appellate Body. The report concluded that the Appellate Body failed to comply with WTO rules and interpret WTO agreements as they were written. It accused the Appellate Body of overreaching the limited role assigned to it by the United States and other WTO members. The actions of the Appellate Body said the report, “harmed the United States and its citizens, workers and businesses” and “converted the WTO from a forum for discussion and negotiation into a forum for litigation”.⁷⁴⁴

⁷⁴⁰ David A. Wemer, “What is Wrong with the WTO?” Atlantic Council (14 June 2019) <<https://www.atlanticcouncil.org/blogs/new-atlanticist/what-is-wrong-with-the-wto/>> accessed 8 December 2020.

⁷⁴¹ Dmitry Grozoubinski, “The World Trade Organization: An Optimistic Pre-Mortem in Hopes of Resurrection” (2020) Lowy Institute for International Policy Analysis 8.

⁷⁴² Wemer *supra* note 740.

⁷⁴³ Doug Palmer, “Lighthizer: No One Misses WTO Appellate Body” *Politico* (10 December 2020) <<https://www.politico.com/news/2020/12/10/lighthizer-wto-appellate-judges-444290>> accessed 15 December 2020.

⁷⁴⁴ “USTR Issues Report on the WTO Appellate Body” (Office of the United States Trade Representative, 11 February 2020) <<https://ustr.gov/index.php/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body>> accessed 23 October 2020.

The Obama and Trump administrations sought to weaken the WTO's powers even though the United States won most of its trade disputes. The United States wins eighty-seven percent of the claims it brings to the WTO, and its loss rate when a claim is brought against it is lower than that of the average WTO state.⁷⁴⁵ Trump, however, was driven by the growing rivalry with China and saw the WTO as an obstacle to force China to make concessions to reduce the growing trade deficit, which he saw as a threat to U.S. jobs and economic prosperity.⁷⁴⁶ The trigger for Trump's aggression against the WTO was its decision that tariffs imposed by the United States on Chinese exports of steel and aluminium in 2018 were illegal. Trump's unilateral actions that characterize the U.S.–China trade war reflect Washington's gradual loss of confidence in the potential of WTO remedies to deliver fairness and the lack of retrospective monetary compensation as a remedy for Chinese violations of its WTO obligations.⁷⁴⁷ Trump went further than Obama and expressed scepticism about the WTO's ambition of liberalized global trade and regarded tariffs as a weapon to wield against America's adversaries, especially China.⁷⁴⁸ A fear emerged in Washington among both Democrats and Republicans that the rules-based international trading system, established under U.S. leadership following the Second World War, now benefits China more than the United States. One of Washington's greatest concerns is that China will use international trade and investment to gain an edge in technology and become an even greater military threat.

In September 2020, Lighthizer criticized a WTO panel report⁷⁴⁹ that stated that tariffs imposed by the United States on Chinese imports “to combat China's widespread and damaging theft of American technology and intellectual property” were inconsistent with WTO rules.⁷⁵⁰ Lighthizer asserted that the panel report demonstrated that “the WTO is completely inadequate to stop China's harmful technology practices”. The WTO, he said, provides no remedy for intellectual property theft. The United States, he said, must

⁷⁴⁵ World Trade Organization, “Chronological List of Dispute Cases” (2020) <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed 6 December 2020.

⁷⁴⁶ Robert McDougall, “The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance” (2018) 52 *Journal of World Trade* 867.

⁷⁴⁷ Tolulope Anthony Adekola, “US-China Trade War and the WTO Dispute Settlement Mechanism,” (2003) 18 *Journal of International Trade Law and Policy* 125.

⁷⁴⁸ Aaron Seals, “Dismantling the WTO: The United States' Battle Against World Trade” (2019) 28 *Miami Bus. L. Rev.* 204.

⁷⁴⁹ World Trade Organization, WT/DS543/R, United States—Tariff Measures on Certain Goods from China (Panel Report, 15 September 2020) <https://www.wto.org/english/tratop_e/dispu_e/543r_e.pdf> accessed 18 October 2020

⁷⁵⁰ WTO Report on US Action Against China Shows Necessity for Reform (Office of the United States Trade Representative, 15 September 2020) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/september/wto-report-us-action-against-china-shows-necessity-reform>> accessed 10 December 2020

be free to take whatever action it deems necessary to respond to unfair trade practices. The Trump administration, he concluded, “will not let China use the WTO to take advantage of American workers, businesses, farmers, and ranchers”. In 2018, he said,

“China has implemented laws, policies, and practices and has taken actions related to intellectual property, innovation, and technology that may encourage or require the transfer of American technology and intellectual property to enterprises in China or that may otherwise negatively affect American economic interests. These laws, policies, practices, and actions may inhibit United States exports, deprive United States citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services, and innovation”⁷⁵¹

Essentially, the Trump administration rejected the enhanced dispute resolution function, including the Appellate Body, given to GATT when the WTO was formed in 1995 and worked to return to the arrangement under GATT, in which each nation could decide for itself whether to comply with panel decisions with no opportunity to appeal to a higher body with enforcement authority. Washington assumed that the United States, as the world’s sole superpower and largest economy, could best deal with what it regarded as Chinese abuses of international trade through unilateral action or bilateral negotiations. Trump’s attitude towards the WTO mirrored his administration’s rejection of multilateralism and international organizations, including the Paris Agreement on climate change, the World Health Organization, and UN Human Rights Commission, from each of which the Trump administration withdrew, decisions that the Biden administration has reversed in a renewal of Washington’s historic commitment to multilateralism. In January 2020, the efforts taken by the USTR in response to China’s trade practices resulted in the Economic and Trade Agreement between the United States of America and the People’s Republic of China (the “Phase One” Agreement) being signed in January 2020.⁷⁵² The historic agreement committed China to increase its purchase of American agricultural products and strengthen its intellectual property regime, including improving its protection of trade secrets and confidential business information. Katherine Tai, the USTR in the Biden administration, kept the Trump tariffs against China in place as

⁷⁵¹ Office of the United States Trade Representative, Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 (Executive Summary, 22 March 2018) <<https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Draft%20Exec%20Summary%203.22.ustrfinal.pdf>> accessed 30 September 2020.

⁷⁵² Office of the United States Trade Representative, “United States-China Phase One Trade Agreement” (15 January 2020) <<https://ustr.gov/phase-one>> accessed 4 October 2020.

she monitored Chinese compliance with its obligations under the Phase One agreement.

U.S. complaints about the Appellate Body focus on six concerns: (1) Appellate Body members staying on after their term has expired; (2) the Appellate Body's frequent failure to complete appeals in the required ninety days; (3) the Appellate Body exceeding its authority in reviewing and sometimes overruling factual findings by panels; (4) the Appellate Body's issuance of advisory opinions; (5) Appellate Body rulings that treat past decisions as near-binding precedent; and, (6) the Appellate Body overstepping its bounds by reaching decisions that go beyond the text of the agreements themselves.⁷⁵³ Washington views the Appellate Body as exceeding its authority in a wide array of areas and views oversight by the WTO membership (through the Dispute Settlement Body) to be vital to ensuring that the Appellate Body stays within its zone of authority.⁷⁵⁴ However, many WTO members believe that the real complaint of the United States with the Appellate Body is that at times it makes decisions with which it disagrees.⁷⁵⁵ The actions of the United States deprive all other WTO members of their right to a functioning Appellate Body. WTO countries are frustrated that Washington has not proposed reforms to address its concerns, raising suspicions that the Appellate Body's demise is part of a U.S. plan to destroy the WTO itself and, with it, the global trading system.⁷⁵⁶

VI. REFORMS TO THE WTO DEMANDED BY CHINA AND THE UNITED STATES

Both the United States and China have expressed dissatisfaction with the WTO. The future of the body depends on the ability of the two rivals to agree on a set of changes. On 13 May 2019, China's delegation to the WTO

⁷⁵³ Aditya Rathore and Ashutosh Bajpal, "The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?" *Jurist* (14 April 2020) <<https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/#:~:text=One%20of%20the%20United%20States,indulging%20in%20%E2%80%9CJudicial%20Activism%E2%80%9D.>> accessed 6 October 2020

⁷⁵⁴ Terence P. Stewart, "Proposals for WTO Dispute Settlement Reform—A First Step but not Enough" Washington International Trade Association (WITA) (29 November 2018) <<https://www.wita.org/blogs/proposals-for-wto-dispute-settlement-reform-a-first-step-but-not-enough/>> accessed 21 June 2021.

⁷⁵⁵ A Reset of the World Trade Organization's Appellate Body, Council on Foreign Relations (14 January 2020) <<https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>> accessed on 6 October 2020; Qingjiang Kong and Shuai Guo, "WTO Reform: Will there be a third Option other Than a U.S. Withdrawal and a China Expulsion" (2019) 14 *Asian Journal of WTO and International Health Law and Policy* 359-404, 390.

⁷⁵⁶ *Ibid.*

submitted a proposal on WTO reform.⁷⁵⁷ The proposal is based on four basic principles: (1) reform must be non-discriminatory and cannot target specific countries; (2) developing countries will continue to be entitled to special and preferential treatment and to be self-identified; (3) the consensus decision-making mechanism will remain; and, (4) a dispute-settlement mechanism must remain in order to preserve a rules-based international trading system. The first step, said China, is to agree on a process for selecting and appointing judges to the Appellate Body. China is willing to respond to some of the U.S.' criticisms of the Appellate Body and has joined the European Union and India in proposing a single, non-renewable longer term of six to eight years for Appellate Body members.⁷⁵⁸ China is particularly concerned about the United States' move against steel and aluminium imports in 2018, that was sought to be justified by national security concerns. The proposal suggests that such trade measures be subjected to multilateral review. China argues that the WTO rules need to be modernized in areas such as agriculture, fishery subsidies and digital trade. China joins the European Union in seeking to increase the obligations of WTO members to notify members of trade policy changes. China objects to the United States' proposal to apply different rules to state-owned enterprises. China's proposal is meant to counter the United States' tendencies towards unilateralism and protectionism. Finally, the document asks that transparency and due process of anti-dumping investigations be improved and calls for an end to discrimination based on country-of-origin and whether an enterprise is private or state-owned.

In its 2019 Trade Agenda, the United States Trade Representative also called for reform to the WTO.⁷⁵⁹ The USTR is primarily interested in the challenge that China's "non-market economy" poses to a body founded in 1995 on the assumption that members would have market economies or be working towards them. The document accused the WTO of going beyond its mandate and infringing on the sovereignty of the United States. The USTR proposal said that the WTO reform must include the following

⁷⁵⁷ "China's Proposal on WTO Reform WT/GC/W/773" World Trade Organization (13 May 2019) <<http://images.mofcom.gov.cn/sms/201905/20190514094326217.pdf>> accessed 25 October 2020.

⁷⁵⁸ "Communication from the European Union, China and India to the General Council" WT/GC/W/753 World Trade Organization (23 November 2018); <https://docsonline.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249937,249918,249919,249678,249534,249527,249457,249426,249402,249403&CurrentCatalogueIdIndex=2&FullTextHash=3718-57150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False> accessed 14 May 2021.

⁷⁵⁹ Office of the United States Trade Representative, 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program (Annual Report, March 2019) <https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf> accessed 28 October 2020

components: (1) mitigation of the disruptive impacts on international trade by non-market economies, especially China; (2) changes to the dispute settlement system, especially the Appellate Body, needed to fully respect members' sovereignty; (3) enforcement of members' notification obligations; and (4) ending the practice of allowing countries to self-identify as developing countries. The document also pointed to the need to update the agreement regarding the digital economy. The United States demands that the WTO moves away from litigation to negotiation. Adjudication has taken on a more prominent role in sustaining trade cooperation than originally envisaged. Washington says that diverting certain disputes or issues from adjudication can be accomplished through a renewed commitment to self-restraint, the improvement of alternative mechanisms such as mediation to settle disputes and even formal exclusion of certain types of disputes from the jurisdiction of adjudication.⁷⁶⁰ These reforms require the approval of all WTO members, including China.⁷⁶¹ WTO committees dealing with product regulation, for example, have demonstrated the body's capacity to discuss concerns and find solutions without recourse to the formal dispute settlement procedures.⁷⁶²

The United States, however, is not acceding to any of the proposals to reform the Appellate Body as currently submitted by China, the European Union, India and other WTO members. The United States has expressed disagreement with extending the term of Appellate Body members. It is not clear whether the United States will agree in expanding the number of Appellate Body members, making them full time, or expanding the resources of the Appellate Body Secretariat, blamed by the United States for taking on work unnecessary to the resolution of disputes. Finally, the United States will almost certainly not agree to make the launch of the selection process for Appellate Body members automatic without the correction of the substantive and procedural issues and the inclusion of checks to ensure future problems do not arise.⁷⁶³

The behaviour of China's state-owned enterprises (SOEs) and measures requiring the transfer of technology have been central to U.S. concerns. The

⁷⁶⁰ Marianne Schneider-Petsinger, "Reforming the World Trade Organization: Prospects for Transatlantic Cooperation and the Global Trade System" (September 2020) Chatham House, Research Paper, US and the Americas Programme 21.

⁷⁶¹ World Trade Organization, Strengthening and Modernizing the WTO: Discussion Paper (Discussion Paper, 21 September 2018) Communication from Canada 18-5917 JOB/GC/201.

⁷⁶² Bernard Hoekman, "Trade Wars and the World Trade Organization: Causes, Consequences, and Change" (2019) 15 Asian Economic Policy Review 1.

⁷⁶³ Terence P. Stewart, "Proposals for WTO Dispute Settlement Reform—A First Step but Not Enough" Washington International Trade Association (WITA) (29 November 2018) <<https://www.wita.org/blogs/proposals-for-wto-dispute-settlement-reform-a-first-step-but-not-enough/>> accessed 21 June 2021.

original GATT Agreement (1947) was, and the WTO Agreement is still, silent about state ownership and more broadly about state involvement in the trading regime. This silence was a reflection of the fact that GATT's main architects were the U.S. and the U.K., the front-runners of market economies, and that its original participants shared a liberal understanding of law and democracy. As a result, there was no need to discuss the issue of state-owned enterprises, since the founding members were capitalist regimes built around the protection of private property.⁷⁶⁴ Unhappiness with WTO Appellate Body rulings and a perception that the WTO agreements, and China's accession protocol are inadequate, led the Trump administration to turn to unilateral measures to address perceived competitive distortions. Unilateralism, however, has not worked as China has not changed its policies because of U.S. measures.

Regarding substantive rule changes to the WTO agreements, many of the proposals made by the United States and the European Union target China, including those dealing with industrial subsidies, SOEs, forced technology transfer, labour standards, environmental protection and security of intellectual property. China is willing to participate in new WTO reform talks but opposes any proposed reform agenda targeting a particular member.⁷⁶⁵

The Appellate Body is not the first international institution that has sparked objections from the United States on the grounds that it infringes on its sovereignty. The International Criminal Court was established in 2002 to investigate and prosecute war crimes, crimes against humanity, genocide, and the crime of aggression. There are 123 member countries that give the ICC authority to investigate and prosecute crimes committed by their nationals or anyone on their territory. The United States, however, is not a member. President George W. Bush charged that the ICC would be a politically driven institution that would pursue cases against U.S. citizens.⁷⁶⁶ The WTO, however, poses a much less malign threat to the United States' sovereignty. The principles underlying the WTO are aligned with the basic features of American democracy and foreign policy. China's state-capitalist system with heavy government ownership and control of industrial enterprises is in basic conflict with the organization's founding principles. The United States, for example, has won more cases in the WTO's dispute settlement system than

⁷⁶⁴ Petros *supra* note 722.

⁷⁶⁵ Qingjiang *supra* note 765.

⁷⁶⁶ Elise Keppler, "The United States and the International Criminal Court: The Bush Administration's Approach and a Way Forward Under the Obama Administration" Human Rights Watch (2 August 2009) <<https://www.hrw.org/news/2009/08/02/unit-ed-states-and-international-criminal-court-bush-administrations-approach-and-way#:~:text=Some%20of%20the%20Bush%20Administration's,pursue%20cases%20against%20U.S.%20citizens>> accessed 15 November 2020.

has China. Unlike the case with the ICC, where ratification of the founding treaty was never realistic, the United States was a major advocate of the Appellate Body in the design of the WTO. The fear that the body would infringe on America's sovereignty only developed after it became clear that China had become a major adversary of the United States. To sustain the two-tiered dispute resolution structure, Washington must acknowledge that a strong WTO is critical to the very allies it needs to effectively confront a rising China.

A solution exists for U.S.' concerns about the dispute settlement system. In response to U.S.' criticisms of the Appellate Body, New Zealand's ambassador to the WTO, David Walker, developed the Walker Principles, which address the six issues highlighted by the United States. If adopted, the Walker Principles would reform the Appellate Body by ensuring that appeals are completed in 90 days, prohibiting Appellate Body judges from serving beyond their terms, clarifying that precedent from past cases is not binding on future cases, prohibiting appeals based on facts and local law, proscribing advisory opinions, and restricting Appellate Body decisions so that they do not add obligations on members beyond those specified in the WTO agreements.⁷⁶⁷ China has expressed its support for the Walker Principles. In December 2018, China, together with the European Union, Canada, India, Norway, New Zealand, Switzerland, Australia, South Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro, submitted the Walker proposals on Appellate Body reform to the WTO General Council.⁷⁶⁸ Proposals to reform the Appellate Body figure prominently in China's May 2019 proposal on WTO reform, where it highlighted the need to address the United States' concerns regarding a 90-day timeframe for appellate proceedings, the status of municipal law, findings unnecessary for dispute resolution and the issue of precedent.⁷⁶⁹

A path for saving the WTO and the multilateral trading system, therefore, lies before the Biden administration. President Biden took the first step in February 2021 by removing Washington's objections to the appointment of

⁷⁶⁷ Jennifer A. Hillman, "The United States needs a Reformed WTO now. Prepared Statement before the Committee on Finance, United States Senate" Council on Foreign Relations (29 July 2020) <<https://www.finance.senate.gov/imo/media/doc/29JUL2020Hillman~CoFRSTMNT.pdf>> accessed 19 October 2020.

⁷⁶⁸ "Communication. WT/GC/W/752/Rev.2, WT/GC/W/753/Rev.1" World Trade Organization (12-13 December 2018) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=250348&CurrentCatalogueIdIndex=0&Full-TextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> (link not found) accessed 10 November 2021.

⁷⁶⁹ "China's Proposal on WTO Reform. WT/GC/W/773" World Trade Organization (13 May 2019) <<http://images.mofcom.gov.cn/sms/201905/20190514094326217.pdf>> accessed 30 October 2020.

a new WTO Director-General. Dr. Ngozi Okanjo-Iweala of Nigeria took office on 1 March 2021, the first woman and the first African to hold the position of Director-General. The next step is to accept the Walker Principles for reforming the Appellate Body and then remove objections to the appointment of seven new judges. The administration would then resume negotiations with Beijing regarding a Phase Two trade agreement that would further address the United States' concerns regarding technology transfer, industrial espionage, intellectual property rights, subsidies, including those to state-owned enterprises, investment barriers, the Made in China 2025 innovation policy, and currency manipulation. By addressing the challenges posed to the United States by China's rise as an emergent superpower through bilateral means, the United States can save the WTO and the multilateral trading system, which, by increasing the world's wealth and reducing global poverty, strengthens any alliance that Washington assembles to counter growing Chinese influence in the Indo-Pacific. India stands to benefit from both branches of the proposed policy—saving the WTO and managing China.

One approach for separating Washington's concern with China's economic and military threat from its dissatisfaction with the WTO is to work closely with allies in the Asia-Pacific to contain China's aggressive behaviour. Strengthening the Quadrilateral Security Dialogue is one promising measure. The Quadrilateral Security Dialogue, or Quad, is an informal strategic forum among the United States, Japan, Australia, and India. The participating countries engage in summit meetings, exchange information, and conduct military exercises. The erstwhile Japanese Prime Minister Shinzo Abe initiated the forum in 2007 as a response to growing Chinese military and economic power. He intended for the Quadrilateral to establish an "Asian Arc of Democracy". In exchange for their participation in Quad efforts to contain China, the United States could support the efforts to save the WTO of Australia, Japan and India, for each of whom the global trading system is vital to its economic growth. Australia, for example, joined 16 other WTO members in the Multi-Party Interim Appeal Arbitration Arrangement, an alternative to the now-defunct Appellate Body, to express its support for the necessity of having a final dispute settlement body in order to enforce the WTO's rules. The arrangement's efficacy is questionable, however, given the absence of the United States, the world's largest economy. Australia joined India in supporting the adoption of the Walker Principles to address the United States' concerns with the Appellate Body. It is not in the interest of the United States to confront China alone. As President Biden said regarding the Chinese challenge.

The most effective way to meet [it] is to build a united front of U.S. allies and partners to confront China's abusive behaviour and human rights

violations . . . When we join together with fellow democracies, our strength more than doubles.⁷⁷⁰

Biden has promised to convene a “summit of democracies” in 2021 to forge consensus on dealing with the global challenges to liberal democracy emanating from China. Biden’s Secretary of State, Antony Blinken, advocates pressuring China in conjunction with America’s allies to defeat Beijing’s efforts to build an illiberal alternative to the current liberal international order, of which the multilateral trading system is a key component.⁷⁷¹ Because the WTO is critical to the prosperity of America’s allies, including not only Australia, Japan and India but also the European Union, United Kingdom, and Canada, the United States cannot afford to alienate them by actions that weaken the organization. The survival of the WTO depends upon its capacity to accommodate the great power rivalry between the United States and China. The two adversaries must feel that the WTO is neutral in their conflict.

No amount of reform of the WTO will satisfy the United States and China. No technical solution, no matter how innovative, will emerge to sidestep the political challenges. Technical discussions in Geneva and the outstanding work of scholars and experts can only complement, not replace, political progress.⁷⁷² The salvation of the rules-based international trading system depends on the achievement of a bilateral understanding between the world’s superpower and the emerging superpower.

VII. CONCLUSION

Destroying the WTO, and with it, the multilateral, rules-based trading system, is not in the United States’ interest. American exporters and importers depend on predictability, protections for intellectual property, transparency, and lower trade barriers established by the WTO. It is the competition with China, not dissatisfaction on the part of American companies, which fuels Washington’s negative attitude toward the Appellate Body and the WTO itself. When the United States led the effort to transform the GATT into the WTO in 1994, it assumed that membership would be confined to countries

⁷⁷⁰ Joseph R. Biden, “Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump” *Foreign Affairs* (March/April 2020) <<https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again>> accessed 16 October 2020.

⁷⁷¹ Antony Blinken, “Trump is Ceding Global Leadership to China” *The New York Times* (8 November 2017) <<https://www.nytimes.com/2017/11/08/opinion/trump-china-xi-jinping.html>> accessed 6 December 2020.

⁷⁷² Dmitry *supra* note 741.

with market economies. China's application to join the WTO in 1995 led to intense negotiations with the United States that placed several conditions on China's accession that would open its economy to market forces. In 1995, the Chinese economy and military were no threat to America's position as the world's sole superpower and hegemon in the Asia-Pacific region. By the time of the administration of President Barack Obama (2009-2017), however, China had risen to be the world's second-largest economy and military power. It was clear that exposing the Chinese economy to market forces had not led to democratic reform as hoped in the West and that the Communist Party continued to hold a tight grip on the economy, especially through the large number of SOEs. The United States lost thousands of manufacturing jobs and ran a trade deficit of \$346 billion with China in 2019. Beijing was building and fortifying islands in the South China Sea and spreading its influence throughout the developing world through its Belt and Road Initiative (BRI). China had become a strategic rival to the United States. First the Obama administration and then that of President Donald Trump (2017-2021) regarded trade with China as a threat to U.S. national security. By 2017, it was clear that China had significantly benefited from WTO rules that lowered tariff- and non tariff- barriers to trade for all WTO members and that in turn prevent WTO members from engaging in trade discrimination against each other. Without the protection of WTO's rules, China's export boom might not have happened since Chinese exports would have been targeted worldwide for discriminatory protectionism.⁷⁷³

The attitude of the Trump administration changed from one of preferring to engage with China in adjusting the trade imbalance to one of confrontation, including the unilateral imposition of punitive tariffs on national security grounds. Because the rise of China was assisted powerfully by its membership in the WTO, the United States changed from the greatest advocate for the organization to its harshest critic. Fearing Chinese influence over many of the 164 member nations, the Trump administration decapitated the organization's dispute resolution mechanism so that the Appellate Body could no longer make rulings unacceptable to the United States. The United States Trade Representative demanded reform of the WTO but expressed little interest in negotiating changes with other members. The victory of Democrat Joe Biden, President Obama's Vice President, in the November 2020 presidential election, did not resolve the crisis of the WTO since Biden and his foreign policy staff share Trump's concern with what they regard as China's unfair trade practices.

⁷⁷³ Ben Baden, "China's Continuing Need for the WTO" *China Business Review* (2011) <<https://www.chinabusinessreview.com/chinas-continuing-need-for-the-wto/>> accessed 11 November 2020.

There is, however, a way forward. Given the fact that Washington has also gained from the WTO, which encourages the United States to open its markets to imports, thereby benefiting U.S. consumers and importing industries, and promotes other countries to open their markets to U.S. goods and services, thereby aiding U.S. exporting industries,⁷⁷⁴ it is in America's national interests to save the organization. The solution to the current impasse involves separating issues that are better dealt with by bilateral negotiation directly with China from the question of WTO reform. Many of the issues that Washington has with Beijing's trade practices are not clearly addressed in the WTO agreement and should be resolved outside it. A model is President Trump's Phase One trade agreement with China, signed in January 2020. In addition to promising to purchase at least \$200 billion more in U.S. goods and services over two years, China committed to make changes to its economic and trade regime in the areas of intellectual property, technology transfer, financial services, and foreign exchange.⁷⁷⁵ When these issues are removed from Ambassador Lighthizer's criticisms of the WTO, what largely remains is the need to reform the dispute settlement regime. One of the remaining criticisms of the WTO, viz., that it allows China to subsidize its industries through state ownership of enterprises, can also be addressed in a bilateral agreement with Beijing. Many of Washington's concerns about China's growing economic and military power in the Indo-Pacific, in fact, could be addressed if the United States joined the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam, signed in 2018 after President Trump withdrew from negotiations for the Trans-Pacific Partnership (TPP) supported by the Obama administration to reduce the dependence of Japan and other U.S. Pacific allies on Chinese trade and bring them closer to the United States.⁷⁷⁶ As part of its post-Brexit foreign policy in June 2021, the United Kingdom announced its intention to join the CPTPP. Thus, there are other ways for the United States to check a rising China than to destroy the international trading system from which both countries have greatly benefited. The WTO has been a boon not only to the United States and China but to the entire world through the reduction of trade barriers, which has resulted in greater global wealth, substantial reductions in poverty, a rise in

⁷⁷⁴ Daniel Griswold, "Americans Reaping Benefits of U.S. Membership in WTO" CATO Institute (5 January 2010) <<https://www.cato.org/publications/commentary/americans-reaping-benefits-us-membership-wto>> accessed 3 November 2020.

⁷⁷⁵ "Phase One Agreement" *supra* note 752.

⁷⁷⁶ Jane Perlez, "U.S. Allies See Trans-Pacific Partnership as a Check on China" *The New York Times* (6 October 2015) <<https://www.nytimes.com/2015/10/07/world/asia/trans-pacific-partnership-china-australia.html>> accessed 23 October 2020.

living standards, and peaceful resolution of disputes.⁷⁷⁷ Global merchandise exports rose from only \$54 billion in 1948 to almost \$20 trillion in 2018, a 35-fold increase.⁷⁷⁸

If the United States does not re-engage with like-minded countries having market economies, including the members of the European Union, the United Kingdom, Canada, Australia, Japan, South Korea and India, to reform the WTO, China will succeed in asserting leadership of the developing countries and in transforming the body into a very different organization whose development Washington led in the post-Cold War period. About two-thirds of the WTO's 164 members are developing countries. Largely an outsider when China joined the WTO in 2001, China is now the world's most active participant in disputes at the organization. Beijing has lodged 13 complaints since 2011, after filing eight in the previous ten-year period. It joined 54% of all cases as a third party, analogous to an *amicus curiae* role in U.S. Supreme Court cases, twice the rate of the United States.⁷⁷⁹ If the United States does not reassert its leadership in strengthening the global trading system, China will continue to grow more influential in the organization. President Xi Jinping has made the WTO central in his efforts to expand exports, saying in 2017 that the organization is critical to "promoting China's transformation from a big trading nation to a powerful one".⁷⁸⁰ Therefore, it is in the interest of the United States to reassert its leadership of the central institution in the multilateral trading system that it launched in 1947 while enlisting allies, such as India that depend on the health of that system in confronting a rising Chin.

⁷⁷⁷ World Trade Organization, "Evolution of Trade Under the WTO: Handy Statistics" <https://www.wto.org/english/res_e/statis_e/trade_evolution_e/evolution_trade_wto_e.htm#:~:text=Trade%20Growth&text=As%20of%202019%2C%20on%20average,when%20the%20WTO%20was%20established> accessed 5 January 2021.

⁷⁷⁸ Clark Packard, "WTO Appellate Body Reform Proposals Urged" *R Street* (6 December 2019) <<https://www.rstreet.org/2019/12/09/wto-appellate-body-reform-proposals-urged/#:~:text=The%20Walker%20Principles%20address%20six,subject%20to%20appeal%3B%20the%20Appellate>> accessed 15 October 2020.

⁷⁷⁹ Yap *supra* note 707.

⁷⁸⁰ *Ibid.*