

at the global level. To confront such a challenge, WTO members have to resort to unilateral or plurilateral measures. For instance, despite the expiration of paragraph fifteen of the China Accession Protocol by the end of 2016, major economies, including the United States, Japan, and the European Union (EU) refused to adopt the standard way of calculating dumping margin of exports from China; rather, new tests and methodologies have been introduced to deal with the post-expiration situation. In this way, the EU is a typical example. In 2017, the EU significantly changed its anti-dumping legislation by adopting a new way of calculating the dumping margin in anti-dumping investigations on imports from WTO members whose prices and costs are distorted because of state intervention.<sup>9</sup> In the accompanied country report on China, it was implied that the new legislation targets the “trade distortive acts” of China.<sup>10</sup> Clearly, the expiration of paragraph fifteen of the China Accession Protocol fails to expel members’ long-standing concerns over China’s non-market economy; rather, it actually ignited greater concerns. While China has initiated WTO disputes against the United States and the EU, it has recently dropped the case against the EU without giving a clear explanation.

As can be seen, if one is to agree that the WTO should pursue and defend fair trade at the global level in addition to free trade, one may also agree that the WTO is incapable of living up to this goal. To achieve this goal, not only the WTO rules and institution should be reformed, but WTO members also should implement necessary reform measures. Yet, from a practical perspective, rule-making in the WTO is difficult, as has been shown by the failure of the Doha Round. Besides, as WTO decision making remains based on consensus, any major reform of the WTO would be difficult given the diversity of WTO members. In this sense, potential transformation of the WTO from a free trade institution to a fair trade institution is a great challenge to the international community and individual countries. Thus, it is worth observing whether and how the United States will use its global influence and leadership to reform the WTO at the multilateral level and/or to push individual WTO members at the bilateral or regional level.

### **WILL CHINA AND/OR THE UNITED STATES TRANSFORM THE WTO?**

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*By Simon Lester\**

China’s 2001 entry into the World Trade Organization (WTO) and the 2016 election of Donald Trump have converged to form an existential threat to the WTO. Can the WTO manage a large economy with China’s level of state economic intervention and political authoritarianism? Will the Trump administration’s confrontational approach reform or destroy the organization?

The theme of our panel is transformation. The last transformation of the WTO occurred in 1995, after the Uruguay Round took the struggling General Agreement on Tariffs and Trade (GATT) system and turned it into the WTO. The WTO had an auspicious beginning in 1995, with so much hope and promise. There were new rules in a number of areas, including intellectual property and trade in services. There was an improved dispute system. There was a unified governing structure.

<sup>9</sup> European Commission, The EU’s New Trade Defense Rules and First Country Report, at [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_17\\_5377](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_5377).

<sup>10</sup> European Commission, Commission Staff Working Document on Significant Distortions in the Economy of the People’s Republic of China for the Purpose of Trade Defense Investigations, available at [https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc\\_156474.pdf](https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf).

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And there was now a formal institution. The conversation at that time was about how to expand the WTO further.

But soon after, the WTO began to struggle. Concerns from civil society grew, and the critics stepped up their protests on environmental, labor, and other issues. The Battle in Seattle was a wake-up call to the trade establishment. Perhaps more importantly, the growing split between wealthy and less-developed countries made the completion of negotiations extremely difficult. For this and other reasons, the next big negotiation, the Doha Round, remained stalled for many years and was eventually abandoned.

All that discord was unfortunate, but manageable. My view is that we should celebrate (most of) what was accomplished in creating the WTO, rather than fret about what has not happened since then. The Uruguay Round was a major expansion. Perhaps we should be content to let it settle in and allow people to adjust. You can go too far with international economic integration and experience a real backlash, which the EU is discovering now as an important member has left.

What may be unmanageable, however, is the growing rivalry between the two biggest players in the trading system: The United States and China. My remarks today will look at (1) China's authoritarian politics and state-led economy and (2) Trump's turn to economic nationalism, and discuss whether either one could lead to some sort of transformation of the WTO. This could mean formal abandonment, or it could mean merely disruption, or it could mean actual reform.

Starting with China, it has been said that China is "unique."<sup>1</sup> Its size, together with its political and economic structure, make it a challenge for the WTO to handle.

In my view, this claim is true but the impact is exaggerated, for two reasons. First, China's differences are a matter of degree, not of kind. There are other large economies in the WTO, and international rules are crucial for disciplining large countries. It may be challenging at times, but it is a better alternative than a power-based system. And while China is authoritarian and has an economy with heavy state involvement, so do a number of other WTO Members. We do not have to break new intellectual ground on any of this. There are GATT rules on "state-trading enterprises"<sup>2</sup> that provide us with the principles we need, and China's accession commitments already build on these for "state-owned enterprises."<sup>3</sup>

Second, China's record in WTO affairs is actually pretty good. In terms of complying with WTO disputes brought against it, China's record is respectable.<sup>4</sup> That may surprise some people, who will wonder why a country that does not have much in the way of the rule of law domestically would follow it internationally. Perhaps China simply recognized that other governments worried about China's behavior in this regard, and it wanted to send a positive signal. As to other parts of WTO governance, China has been active and mostly positive in WTO committees (with some gaps in its notifications) and in Trade Policy Reviews. China has been more of a problem in WTO negotiations, holding up important initiatives at times, but many other members share the blame here.

Are there gaps related to China's membership? Should China liberalize more, now that it is so much wealthier? Yes,<sup>5</sup> but there are ways the United States and others could close those gaps. More WTO complaints and joint pressure in negotiations from all the major trading countries would help a lot.

<sup>1</sup> Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. REV. 261 (2016).

<sup>2</sup> See, e.g., General Agreement on Tariffs and Trade, Art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994).

<sup>3</sup> See, e.g., Report of the Working Party on the Accession of China, para. 46, WT/ACC/CHN/49 (Oct. 1, 2001).

<sup>4</sup> James Bacchus, Simon Lester & Huan Zhu, *Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented*, CATO INST. (Policy Analysis No. 856, Nov. 15, 2018).

<sup>5</sup> Simon Lester & Huan Zhu, *What Trump Gets Right About China and Trade*, CNBC (Apr. 25, 2018).

Summing up, did China's entry into the WTO transform the WTO? It does not seem to have done so. It certainly livened things up and presented some challenges, but the core of the WTO is the same.

Will China transform the WTO going forward? I do not get the sense that it is looking to do so. However, a player that big does have that potential.

That brings us to the other Great Power: the United States. There has certainly been plenty of talk about transformation during the Trump administration. President Trump has mentioned U.S. withdrawal from the WTO on many occasions. A U.S. senator published an op-ed in the *New York Times* calling for the WTO to be "abolished," and subsequently tried unsuccessfully to initiate a congressional vote on withdrawal.<sup>6</sup>

These kinds of statements may seem like a fantasy, but there is a reality behind all this rhetoric. The Trump administration has put forward major challenges to the WTO in four specific areas: the issue of self-declared developing country status; the failure of some members to notify their trade measures; the role of non-market-oriented countries in the system; and the behavior of the WTO Appellate Body.

The "special and differential treatment" received by developing countries is a long-standing sensitive issue in the GATT/WTO system. When countries are poorer, they are given more flexibility in liberalizing and in complying with the various procedural obligations imposed by the WTO Agreement. However, the nature of developing country status as something that is self-declared, and possibly subject to abuse, has convinced some wealthy countries that there is a problem here. The Trump administration wants to bring objective criteria to this process and force some larger, wealthier countries to "graduate" from this status and take on greater commitments.<sup>7</sup> Should countries such as Singapore and South Korea really be able to claim developing country status? Perhaps not. Of course, China is the real issue here. It is now the second largest economy in the world, and prior to the pandemic was growing rapidly. And yet it is still poorer in terms of gross domestic product/capita than the wealthiest countries, which makes the issue a challenging one.

With regard to notifications, the Trump administration has expressed concern about the lack of transparency in trade measures, and it has proposed stricter rules that would give countries an incentive to notify.<sup>8</sup> China is a big part of this problem as well, including with its subsidies and state-owned enterprises.

The Trump administration has also made submissions that call into question the participation of non-market-oriented economies in the trading system.<sup>9</sup> Again, China is the main target here.

Finally, there is a long-standing concern from the United States about Appellate Body decisions and behavior, with allegations of "judicial overreach" that center on, but are not limited to, trade remedies. The Trump administration has blocked appointments to the Appellate Body, which is no longer functioning. The administration seems to accept the role of panels in dispute settlement, although it is uncertain whether it accepts that their decisions are binding on the parties to the dispute. It is unclear at this point what the administration's ultimate goal is with its actions here. In the meantime, there is an EU-led effort to create a temporary replacement appeals mechanism that may

<sup>6</sup> Josh Hawley, *The W.T.O. Should Be Abolished*, N.Y. TIMES (May 5, 2020); U.S. Senator Josh Hawley's Office Press Release, Senator Hawley Introduces Joint Resolution to Withdraw from WTO (May 7, 2020).

<sup>7</sup> Communication from the United States, Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO, World Trade Organization, WT/GC/W/764 (Feb. 15, 2019).

<sup>8</sup> Communication from the United States, Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements, JOB/GC/148, JOB/CTG/10 (Oct. 30, 2017).

<sup>9</sup> Communication from the United States, Draft General Council Decision: The Importance of Market-Oriented Conditions to the World Trading System, WT/GC/W/796 (Feb. 20, 2020).

actually satisfy the U.S. concerns, although the Trump administration has not shown any interest in joining.

Could these U.S. actions lead to some degree of transformation of the WTO? The Trump administration is in a strong negotiating position. It does not seem to put as much value on the WTO as others do, which gives it good negotiating leverage. But its approach makes it unlikely that there will be a consensus for change. The imposition of tariffs against major trading countries on the basis of a weak “national security” justification, as well as the confrontational actions on the appointment of Appellate Body members, have aggravated the governments that the administration needs to convince. The administration seems to believe that the existing rules are unfair to the United States, and therefore it is appropriate to take on everyone at once. But others see the situation very differently. On the other hand, with the groundwork laid, a future U.S. administration may be able to transform the WTO by using a different approach.

Transformations of established systems are rare. The Uruguay Round was one, with a brand new institution, new substantive obligations, and stronger enforcement, but we should not expect them to happen regularly. To some extent, the conditions may be ripe right now, with a possible “Great Power Rivalry” shaking up the established order. However, there are so many obstacles that could get in the way that the chances are still low. It is probably more likely that the system will continue to stumble along, with modest tweaks here and there.

#### **REMARKS BY EUNKYUNG KIM SHIN\***

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Eunkyung Kim Shin, a Senior Associate at the law firm of Baker McKenzie, addressed key industry trends in response to the U.S./China trade war from a private practitioner’s point of view, including:

- the enormous administrative burden associated with keeping up with fast-changing legal and compliance developments related the Section 301 retaliatory tariffs against certain Chinese-origin goods, leaving limited resources for more strategic reviews or long-term compliance improvements for many U.S. importers;
- the inability to move production out of China or replace a Chinese supplier with an alternative supplier in a third country, despite the heavy financial impact due to the Section 301 retaliatory tariffs, for many U.S. importers for reasons related to cost, human relationships, intellectual capital investment, and technology transfers; and
- the ever-increasing U.S. export restrictions against China under various legal tools of the U.S. government, putting the Chinese export market under scrutiny and more vulnerable to supply chain disruptions.

Ms. Shin also addressed practical challenges many U.S. importers are facing in implementing the United States-Mexico-Canada Agreement, which replaced the North American Free Trade Agreement effective July 1, 2020.

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