

CAN THE WTO SURVIVE AND PERHAPS EVEN THRIVE DURING THE SECOND TRUMP TERM? A HOPEFUL OPINION

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I. What is the Problem, Really?

While the World Trade Organization, and its predecessor, the General Agreement on Tariffs and Trade¹/International Trade Organization (GATT/ITO), stands as one of the most impactful economic achievements of the 20th century, its longevity in the 21st century is in serious jeopardy. This is in large part due to the actions and policies of the United States over the last ten years. Indeed, the United States has shown itself not to be committed to the future of the organization at all. Its many tariff actions have violated the fundamental principles of the WTO, often intentionally and substantially. Its refusal to pay its bills to fund the WTO is equally troubling, insisting that the organization must adhere to its views before it gets any more money. Its blockage of Appellate Body appointments has substantially weakened the dispute settlement function for all. In short, the United States' governance (on a bipartisan basis) has not been driven by common-sense logic or rational decision making.

To be clear, there are legitimate concerns about the WTO's ability to meet its core functions as a negotiating body for forward-looking trade rules, as an arbiter of trade disputes, and as a resource for countries seeking to improve trade rules, receive technical assistance, and otherwise improve global economic outcomes:

- Negotiations have slowed. Since the WTO's inception, there have been more unsuccessful ministerial conferences than successful ones. With an increasing number of diverse members to bring along, and the growth of domestic concerns about the impact to trade liberalization among broad swath of the membership, multilateral agreements have slowed to a trickle. Indeed, there are serious concerns about the ability of an organization with 166 members—all of whom are sovereign—to negotiate meaningful trade commitments every two years. Not only has the WTO failed to make process on the issues identified for further work in its original 1994 documents—such as agricultural and services subsidies, and new intellectual property commitments—it has also failed to reach conclusion on issues big and small (e.g., *TRIPS*² waivers, food security, investment barriers, antitrust), multilateral and plurilateral (e.g., fishery subsidies, chemical products, environmental products, electronic commerce and digital taxes). How can a group that falls apart over bicycle tariffs and internal transparency

1. *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187.

2. GATT, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, LT/UR/A-1C/IP/1 (1994), art 73, online: <docsonline.wto.org> [perma.cc/5AW4-TEL3] [*TRIPS*].

obligations be expected to reach conclusion on existential global issues like efforts to address climate change, global labor practice, non-market economies, and industrial policy planning?

- The dispute settlement mechanism is broken. Once touted as the “crown jewel” of the WTO, the dispute settlement function of the institution has ground to a halt as the United States has used its legitimate concerns about Appellate Body overreach and procedural irregularities to paralyze the appeal process for all Members and block finalization of decisions that it does not like. These were the very problems that led the United States to insist on negative consensus and an Appellate Body in the first place, yet now it is seeking to return to those days when a single country can limit the impact of the WTO on a whim. In fact, the United States has taken the concept of “member-driven” to the extreme by insisting that it must be the sole Member in the driver’s seat.
- The notion of international trade being a “win-win” proposition is being challenged. Many countries, led by the examples of the United States (and sometimes being bad examples that the United States has criticized but then sought to emulate), have actively sought to avoid the WTO rules in bad faith, intentionally misinterpreting the various narrow exceptions, and weaponizing the “essential security” justification such that the exception swallows the whole. There is now little value placed on “doing good” through capacity building and technical assistance. Transparency is openly mocked and challenged, and stability and predictability are no longer valued. In short, the notion of international trade as a zero-sum proposition rules the day.

To be clear, the United States is not the only—nor the first—culprit here, although it does have the largest impact. Numerous other countries have sought to intentionally slow down WTO negotiations with the goal of killing ministerial conferences and preventing further development of international trade rules. Others have quietly created domestic policies intended to avoid the WTO rules. These countries continue to play the role of spoiler on progress and fail to play by the rules while seeking to remain within the system to receive the benefits that the WTO affords.

As these problems have festered, the United States, a member at the economic core of the WTO system, began to openly question the value of WTO, its achievements to date, and its ability to combat new international trade issues as they arise. Once a leader of the global trading community, the United States appears to now be leading this community in a downward spiral.

Can the global trading community escape the gravitational pull of the United States while it proceeds without a care about the adverse impacts to others and to itself?

The answer, in our opinion, is yes, the WTO can—and must—survive. It has no choice but to do so to avoid a global recession. And optimistically, albeit cautiously so, we believe that the WTO can thrive in the current environment. The WTO membership knows what the problems are, and that should be viewed positively. It must, however, be willing to throw out the old and usher in the new: new leadership among the membership is needed, new ideas are needed. Creativity and a willingness to embrace change will be key. Not every Member will want to move forward, but those that do must be willing to make difficult decisions, leave the laggards behind, and seek incremental progress that can, over time, build a sturdier foundation for the WTO.

II. Is the WTO Flexible Enough to Move Forward and Make Progress?

Assuming that there continues to be a recognition that the coordinating, convening, and dispute settlement functions of the WTO are valuable, Members looking to move forward should consider options both within and not yet considered in the WTO framework to maintain and grow this international trade regime so as to improve global trading outcomes in the 21st century.

The first thing to do is to recognize what the current WTO is—and what it is not. It is, first and foremost, a set of textual agreements that were drawn together by a small group of diplomats, mostly from a small group of countries, in a particular time period dealing with a particular set of issues, sending cables (What are they? Some of you might ask), gathering in smoke-filled rooms, and concluding “rounds” in exotic locales—conveniently distant from more risk-averse officials in capitals and the populations they represent. What they achieved was a consensus core set of “floor” rules intended to govern the fundamentals of—and importantly not every aspect of—international trade on a non-discriminatory basis. They also achieved a two-tier system of review to arbitrate disputes as to the meaning of these consensus rules that were (at best) compromises between sovereign nations. This was a system that was right for that time. Giving credit where its credit is due, the system led to clear economic acceleration through the freeing up of international trade that—let us be honest—benefitted most countries, both small and large, in the last thirty years or so.

And—let us again be honest—the system continues to work, albeit not as effectively as before. Many initiatives under the WTO continue to make incremental progress, and trade differences among many countries continue to be resolved. As much as diplomats and government officials would like to talk about the need to always be “ambitious,” trade has always been a game of inches, and indeed the efforts in the last few years have pushed the ball forward in small, but meaningful, ways.

For instance, progress has been made through non-binding but broadly accepted agreements, such as the *Agreement on Trade Facilitation*,³ a “non-sexy” and rather mundane agreement that helps to make customs procedures more efficient and customs rules and fees more objective and easy to understand. Concluded at the Ninth Ministerial Conference of the WTO, it established shared norms around transparency, notice and comment, fees upon import, customs processes and other import and export issues. While subject to a lengthy negotiation, the agreement did ultimately deliver real trade improvements.

Other less “ambitious” agreements have also reached preliminary conclusions—such as the WTO Fish Subsidies Agreement. This is an environmentally friendly but (for many countries) economically impactful agreement that demonstrated an ability to move forward in the WTO despite tough negotiations. Indeed, negotiations continue as efforts are made to reach agreement on additional provisions that could be included in the final *Fish Subsidies Agreement*.⁴

Admittedly, neither of these relatively new agreements disciplines countries set on ignoring their requirements, as insisting on enforcement obligations right now would have stopped these negotiations in their tracks. Nonetheless, their conclusions are examples of meaningful steps forward towards governing important aspects of trade that were previously not within the purview of the original WTO agreements. As international trade evolves, such new disciplines are needed to ensure further predictability and stability, as well as the importance of the rule of law and due process, in the global trading system. Consider for instance the movement of international trade from traditional goods crossing borders to services, investments, as well as innovation crossing borders. Consider also the need for more transparency for new domestic laws and regulations as they come online, as well as better and fairer access to domestic legal and administrative proceedings. As these and other new concerns are raised—such as new non-tariff barriers, new security threats,

3. WTO, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, WTO Doc WT/L/940 (2014), Annex 1A.

4. WTO, *Agreement on Fisheries Subsidies*, WTO Doc WT/MIN (22)/33–WT/L/1144 (17 June 2022).

new environmental hazards, and even new excuses—the WTO membership must consider procedures for all to address these previously unforeseen issues.

As such, the structure of the WTO needs to evolve as well.

With respect to the WTO's negotiation function, there is now discussion that the broad, original goal of the WTO to negotiate new disciplines and new market access, should be set aside for less “ambitious,” longer-term initiatives. Indeed, often when a country tries to slow down a negotiation, they would claim that that particular negotiation is “not ambitious enough.” Instead of always “swinging for the fences,” to use a baseball analogy, perhaps Members should consider all forward movement as good and welcomed progress. Smallish deals such as the *Trade Facilitation Agreement* and half deals such as the *Fish Subsidies Agreement* should be celebrated, for instance.

Furthermore, recently some members have begun to negotiate intentionally narrow agreements on the margins of the WTO, discussing targeted areas of concern, such as a potential investment facilitation agreement, an antitrust agreement, e-commerce, lowering duties for chemical products and environmental goods, critical minerals, climate change, forced labor, plastic pollution, transparency, etc. There is precedent for such “joint initiatives,” including the *Agreement on Government Procurement*,⁵ which is a “plurilateral” agreement that includes only a small group of like-minded WTO members that make commitments and offer benefits only with each other. Another form of a “joint initiative” is a “sectoral” agreement such as the *Information Technology Agreement*,⁶ where commitments are made by only a select number of countries but benefits are granted to the whole of the WTO membership. The latter is only feasible when trade covered by the targeted agreement is mostly carried out by this select number of participants.

The difficulty narrow agreements like these is that some countries insist on all the benefits and none of the commitments. The fairer approach, of course, is to allow countries to conclude agreements with others who are willing to share in the commitments and the benefits. If the WTO can be restructured to allow for more plurilateral agreements and sectoral agreements, and then to allow these “joint initiatives” to have access to the WTO Secretariat for support and dispute settlement functions, this can help the global trading

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5. WTO, *Agreement on Government Procurement as Amended by the 2012 Protocol Amending the Agreement on Government Procurement*, WTO Doc GPA/113 (2012), online <docs.wto.org> [perma.cc/E94S-4UBV].
 6. WTO, *Information Technology Agreement*, WTO Doc WT/MIN(96)/16 (1996), online <docs.wto.org> [perma.cc/2H84-XCFG].

community move forward. Countries may not wish to join certain of these initiatives or may be unable to join certain initiatives for various reasons, and that should be OK. Not all sovereign nations are in the same position resource-wise or development-wise to agree to participate in every “joint initiative.” This reality should be accepted. In this regard, perhaps capacity building can be offered by members of the joint initiative or the Secretariat staff, to assist non-members as much as possible towards understanding, considering, and ultimately joining the initiatives if they so choose. Indeed, progress for these “joint initiatives” should not be hindered by one or two countries that are not in the position to take advantage of such initiatives. Some of those countries might even want to first see the value and track record of an initiative before joining, and that should be perfectly fine as well.

To better allow for “joint initiatives,” one fundamental element of the WTO must be reconsidered, and that is the requirement to provide most favored nation (MFN) treatment at all times. As mentioned, the current existing plurilateral agreements in the WTO, such as the GPA, do not require the granting of MFN by members of the GPA to non-members of the GPA. And this has allowed the GPA to thrive, while also encouraging other WTO members to join over time as they became capable of taking advantage of the benefits of that agreement. In short, MFN should not be required at all times and within all WTO agreements if the goal is to encourage forward progress among the world trading community.

Another fundamental element that must be reconsidered to allow for “joint initiatives” is the requirement to make most decisions and reach agreement through “consensus” only. A consensus system only allows recalcitrant countries to veto any new disciplines it wishes not to participate in, while at the same time not allowing others to participate. If a sovereign nation chooses the former, that is their right. But it should not be the case that a sovereign nation can prevent other sovereign nations to progress and grow. Such actions might be akin to “economic coercion,” and should be discouraged. Thus, it may be time that decision by consensus should be reconsidered for certain WTO activities, such as in joint initiative negotiations and conclusions. Other alternatives to “consensus” to reach new agreements could include weighed voting or a structure for decision-making, like the United Nations Security Council, among other options, that would help break impasses that prevent the institution from modernizing.

And even if no “joint initiative” comes to pass, the effort to negotiate one should be embraced by the WTO membership. Such forward thinking should be encouraged, as the WTO is as good of a place as any to conduct research on

emerging trade issues, engage in dialogue and creative thinking, and develop prototypical solutions. With most trading nations already part of the organization, and with established structures such as built-in committees and working groups, the WTO is an ideal place for like-minded countries to work on new concerns and dilemmas, and seek new agreements. Even detailed text may not be achievable, the development of key concepts and disciplines could percolate up to reach future fulsome negotiations.

Yet another approach is for the WTO to develop consensus agreements not subject to dispute settlement obligations, like the approach in the *Agreement on Trade Facilitation*. While legally binding and enforceable rules are the ideal path to removing trade barriers, other paths can still be effective in achieving the goal. Such agreements could serve as building blocks for binding and legally enforceable rules in the future. For example, addressing non-tariff barriers is arguably more complicated than addressing tariffs. Certain countries may not be prepared to take on binding commitments in this area yet, but they may be willing to experiment. In those circumstances, the endorsement of, and commitment to, “best practices” may be a path forward to ultimately removing trade barriers through enforceable obligations. Best practice agreements could also incorporate a combination of capacity building and technical assistance, coupled with transition periods determining when countries would return to the negotiating table.

With respect to the WTO dispute settlement mechanism, much has been said about the problems of this system, especially the Appellate Body. However, if Members were actually willing to engage in good faith to fix these problems, common-sense solutions do exist. For instance, with respect to concerns about the need for timely resolutions to disputes, it should be noted that the United States had initially sought and obtained a WTO dispute settlement system that was quick enough to be a viable alternative to the use of the United States Section 301 statute⁷, settling cases in less than a year. The mechanism can in fact be restored to a similar time frame. Among the ideas that could be considered to address this issue are the following:

- Place restrictions on the input of the litigating parties, such as page limits, exhibit limits, and time-limited opening statements at hearings. This will help prevent the system from becoming overburdened and reduce the temptation of adjudicators to address issues not critical to the resolution of the dispute.

7. *Trade Act of 1974* § 301 (1974).

- Make the “urgency” provisions in Dispute Settlement Understanding⁸ (DSU) the norm to speed up panel proceeding time frames.
- Provide a standard “reasonable period of time” (RPT) for compliance, possibly 12 months, that begins on the date the panel report becomes public. If Members appeal a panel report, the 90-day period for appeal would count against the RPT, creating an incentive against appealing unless there is a legitimate chance of changing the result.
- Require panels to issue reports within nine months unless the parties otherwise agree, consistent with the original intent of DSU.
- Consider additional measures, such as charging Members for appeals, to dis-incentivize overuse.
- Eliminate compliance proceedings or eliminate the option for an appeal in these proceedings. If a Member who is retaliated against believes that it has legitimately complied, it can challenge the retaliation in a new proceeding.
- If a compliance process is preserved, consider requiring that panel to also decide the level of retaliation at the same time, thus avoiding the need for an additional arbitration proceeding.

And if an Appellate Body or other appeal process is maintained, based on the complaints to date, rules can be adjusted to:

- Clarify that the body is only authorized to review matters of law and that municipal (domestic) law is a matter of fact, not law;
- Restrict the body’s ability to examine legal issues not appealed by either party and to issue advisory opinions;
- Require the body to issue interim reports on which the disputing parties can comment, and allow parties to agree to partial adoption of panel and Appellate Body reports.
- Require the body to issue its final report no later than 90 days from initiation of the appeal unless the parties agree otherwise, consistent with the original intent of *DSU*.
- Improve the vetting process for appointment to the body, allow for performance reviews of first term body members prior to appointment to a

8. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, 1869 UNTS 401.

second term, and develop criteria for the overall composition of the body to ensure adequate practitioner backgrounds and experience levels.

Many of these ideas have been discussed for years, but no progress has been made because of the refusal by some Members to actively engage or to engage in good faith. It does take two to tango, or in this case to negotiate, and unfortunately the WTO has not had such willing participants recently. Indeed, it has lacked leadership among its Membership in recent years—not just from the United States. This is probably the most important problem for the organization right now, and one that is singlehandedly preventing the WTO from growing and thriving. Who can step forward to provide leadership in the WTO in this new era?

III. Who Can Provide New Leadership in the WTO?

It is clear that the United States is pulling back from the WTO, and even considering withdrawing altogether. This is a position supported by some in the Trump White House, including Peter Navarro, President Trump's senior counsellor for trade and manufacturing. Also, on April 11, 2025, US Representative Tom Tiffany, a Republican from Wisconsin, introduced a resolution in the United States House of Representatives that would withdraw the United States from the WTO. In the resolution, Representative Tiffany argues that the WTO is a “deeply flawed” organization that no longer serves the interests of the United States. In this context, the United States can no longer be an effective leader of the WTO.

And yet, it is our view that no country is so important that the WTO cannot survive without it. The WTO has a “critical mass” of the global trading community, even if one or two of the largest trading countries were to leave. It can and should survive regardless of which country chooses to be a Member. For instance, there are many trade agreements that do not involve the United States, including the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*⁹ (CPTPP). After the United States withdrew from that agreement, it not only survived but thrived, such that other countries have lined up to join.

Trade agreements work because members of those agreements voluntarily work together in good faith. They actively and creatively identify unique collaboration opportunities, not just based on development levels, but based

9. *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018, 3337 RTNU 1.

on alignment among their markets in a way that supports and benefits all participants. Agreements are win-win propositions. They do not work if a member does not believe in or strive towards this win-win goal. Put another way, without a win-win mentality among all members, a multilateral agreement will not work.

That said, one cannot expect all members of such an agreement to always maintain such a mentality. Political realities change. This is why a decision-making process other than “consensus” must be utilized in some circumstances, as noted above. When one member gets into a rut, other members will need to step up and push the multilateral agreement forward. In this way, a consensus mechanism, if it is the only mechanism available, can eventually be a barrier to progress capable of being wielded equally by the follower and the purported leader.

Another mechanism that may help a multilateral organization like the WTO from getting stuck in a rut is the Secretariat itself. It may be time to reconsider the rebalancing of the role of the Secretariat and the Membership. For years, many in the Membership have insisted that the WTO be solely a “member-driven” organization. However, when certain members slow down the organization, either intentionally or unintentionally, other forces can help maintain forward progress. This is not to say that the goal should be to go to the other extreme and become a “Secretariat driven” organization. Rather, consideration should be given to allow for a more Member-Secretariat balance to drive initiatives, resolve disagreements among Members, and promote better negotiation environments and habits. This may include the ability to pull together like-minded Members to drive certain negotiations or initiatives, or to strengthen certain emerging leaders so that opportunities to lead and grow are given to those who have the interest and drive. Finally, Secretariat staff could be utilized in non-WTO or tangential-WTO initiatives to help foster new ideas that can be brought back to the organization, as well as to spread the knowledge base of the WTO to other multilateral efforts, such as regional integration initiatives.

So, who should be promoted or encouraged to lead? Put simply, you. It is time for a broad and diverse group of individuals and Members to step up for the WTO. The leadership characteristics the WTO has always relied on will continue to be relevant in this era. The WTO needs “honest brokers” that are well respected by developed and developing countries, that have the reputation of looking not only to their own interests, but the interests of the system as a whole. The WTO needs Members to be creative at reaching consensus and resolving differences. The WTO needs leaders who are not afraid

of—and indeed have promoted—diversity in views and representation, that are not easily swayed or bullied, and that have a strong sense of right and wrong with a healthy dose of common sense. These leaders in the WTO should be sought out, cultivated, and empowered. In strengthening these leaders, the WTO should not be afraid of losing Members, but recognize that shedding bad actors will only make the organization stronger and resilient. Ultimately, those that leave will want to return when their fear of missing out on the benefits of the organization becomes palatable.

Such mentality among the WTO membership, especially among those who genuinely seek to promote a global trading order based on the rule of law and due process, will foster win-win opportunities and will progress the objectives upon which the WTO was founded. It will recognize the reality of globalization and the dangers of isolationism. It will recognize that the WTO is flawed, like any organization, but is necessary. With that understanding, and renewed leadership and resolve among most of the sovereign Members and the Secretariat, it is the view of the authors that the WTO can survive. And once it survives, it can and will thrive. It is time to step up.