

THE DECLINE OF MULTILATERALISM AND THE LIMITED ELASTICITY
OF WTO RULES

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I. INTRODUCTION

The World Trade Organization (WTO) seems to be losing its grip on global trade governance amidst U.S. President Donald Trump's threats to withdraw the United States from the WTO¹ and the incessant "gridlock" that the WTO has faced since the Doha Round began in 2001.² The United States has still attempted to reform the WTO rules,³ but the so-called "trade war" between the United States and China⁴ suggests the former currently prefers unilateral actions over the multilateral approach. This annotation argues that international trade law's inability to address novel challenges, combined with the unlikelihood that WTO decision-making can accommodate two divergent views on trade, will inevitably lead to states viewing unilateral action as more attractive than multilateral, consensus-driven alternatives. Specifically, these infirmities of the WTO have led the United States to adopt a unilateral approach in challenging China.

II. THE INABILITY OF THE WTO TO ADDRESS NOVEL CHALLENGES

When China joined the WTO in 2001, the United States assumed that it would facilitate China's gradual economic liberalization, and thereby China would smoothly integrate within the global trade system.⁵ However, this assumption has proven erroneous, as China has kept its economic system under the heavy control of the "Party-state,"⁶ a situation that the U.S. government deems "harm[ful]" to both the United States and China's

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¹ *Trump Threatens To Pull US Out of World Trade Organization*, BBC NEWS (Aug. 31, 2018), <https://www.bbc.com/news/world-us-canada-45364150>.

² Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30 J. ECON. PERSP. 95, 95 (2016).

³ THOMAS J. DUESTERBERG, HUDSON INST., THE IMPORTANCE OF WTO REFORM FROM A TRANSATLANTIC PERSPECTIVE, 2 (2019), https://s3.amazonaws.com/media.hudson.org/files/publications/Duesterberg_WTOreform_Feb2019_Final.pdf.

⁴ CHAD P. BOWN & MELINA KOLB, TRUMP'S TRADE WAR TIMELINE: AN UP-TO-DATE GUIDE, PETERSON INST. FOR INT'L ECON. 1 (2019), <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf>.

⁵ *Bombed Embassies and Document Leaks—How China Got into the WTO*, TRADE TALKS (Oct. 24, 2019), <https://www.tradetalkspodcast.com/podcast/107-bombed-embassies-and-document-leaks-how-china-got-into-the-wto>.

⁶ Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 265 (2016).

other trading partners.⁷ The result is a batch of new trade disputes and conflicts. Furthermore, the WTO, which did not foresee the existence of a communist-capitalist hybrid such as China, is inadequately equipped to address many of the disputes that arise between the United States and China.⁸ Some might suggest a “dynamic” interpretation of the WTO’s legal text as a solution,⁹ but the United States is unlikely to follow this route, considering its stance against “judicial activism” in the WTO dispute settlement process¹⁰ and the accompanying risk of politicizing a judicial body that garners its “prestige” from its “image [as] a high-functioning technocratic judicial body.”¹¹ These considerations point to the need to examine the likelihood of reforming the WTO laws themselves.

III. THE (IN)FLEXIBILITY OF DECISION-MAKING IN THE GATT AND THE WTO

In order to pass new laws or reform current laws, WTO members must reach a consensus through the WTO’s decision-making process.¹² The decision-making process of both the General Agreement on Tariffs and Trade (GATT)—the WTO’s predecessor—and the WTO is flexible enough for a few major countries to take the lead to promote trade liberalization through tariff reduction.¹³ However, there is likely a point at which two countries’ respective views on trade could be so divergent that even a flexible decision-making process would result in a deadlock, preventing the formation of consensus and foreclosing reforms.

Formally, Article IX of the WTO Agreement adopts the so-called “collective decision-making” process, wherein each country receives a

⁷ Petros C. Mavroidis & André Sapir, *China and the World Trade Organisation: Towards a Better Fit* 6 (Bruegel, Working Paper Issue 6, 2019) (quoting Trade Policy Review Body, *Trade Policy Review—China: Minutes of the Meeting*, ¶ 4.105, WTO Doc. WT/TPR/M/375 (Nov. 21, 2018)), https://bruegel.org/wp-content/uploads/2019/06/WP-2019-06-110619_.pdf.

⁸ Wu, *supra* note 6, at 309, 311.

⁹ *Id.* at 311.

¹⁰ See Michael Froman, U.S. Trade Representative, Office of the U.S. Trade Representative, Remarks by Ambassador Michael Froman at the Graduate Institute in Geneva: Pragmatic Multilateralism (Oct. 17, 2016) <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2016/october/Remarks-Amb-Froman-Graduate-Institute-Geneva> (“As we have made clear, [the WTO dispute settlement process] is not an area where judicial activism or the creation of new obligations through arbitrator discretion is appropriate.”); see also Press Release, Office of the U.S. Trade Representative, USTR Robert Lighthizer Statement on the WTO Panel Report in Canada’s Challenge to U.S. Countervailing Duties on Supercalendered Paper, OFFICE U.S. TRADE REPRESENTATIVE (July 6, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/ustr-robert-lighthizer-statement-wto> (criticizing a WTO panel report that the United States perceived as “the latest example of judicial activism at the WTO seeking to undermine those laws and make it harder for Members to address unfair trade”).

¹¹ Wu, *supra* note 6, at 311.

¹² See *id.* at 312–14 (“The main mechanism for WTO members to create additional treaty rules . . . is through negotiating free trade agreements . . . and/or customs unions with other WTO members.”)

¹³ *Id.* at 285, 313.

vote, and all decisions are made through a “Joint Action,” which requires a majority of votes to pass.¹⁴ However, “in practice only the general rule on consensus is relevant.”¹⁵ The rule of consensus states:

The WTO shall continue the practice of decision-making by consensus followed under the GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.¹⁶

Consensus is met when “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision’, i.e., vetoes the decision.”¹⁷ In order to reduce the likelihood of any state vetoing, a bargaining process takes place before the main meeting, whereby decisions are made through informal consultations, “Green Room” meetings, coalition and alliance building, and individual facilitators.¹⁸

One might argue that this model “disproportionately benefit[s] the developed countries” in the WTO,¹⁹ but such compromise better incentivizes the developed states to adopt a multilateral, consensus-driven approach. This approach has worked well in the past because members with large economies, such as Japan and India, “shared (or accepted) the liberal[, or market-based,] understanding of the law and economy that was implicit in the original GATT text,” and members that were formerly non-market economies, such as Hungary, are relatively small.²⁰ However, China poses a unique challenge: It is a large economy that holds a very different view on how its economic system should work.²¹ Therefore, from the perspective of the developed states, replacing the longstanding, consensus-driven approach with the majority voting approach carries the risk of China using the system against them in the future.²² Furthermore, overturning the norm of decision-making through consensus would also substantially undermine the effectiveness and foundational legitimacy of the WTO as a whole.²³ The result is a quagmire that leads to an inevitable shift in preference towards unilateral action.

¹⁴ Mary E. Footer, *The WTO as a ‘Living Instrument’: The Contribution of Consensus Decision-Making and Informality to Institutional Norms and Practices*, in GOVERNING THE WORLD TRADE ORGANIZATION 217, 220–21, 223 (Thomas Cottier & Manfred Elsig eds., 2011).

¹⁵ *Id.* at 223.

¹⁶ *Id.* (quoting Marrakesh Agreement Establishing the World Trade Organization art. XI:1, Apr. 15, 1994, 1867 U.N.T.S. 154).

¹⁷ *Id.* at 225 (quoting Marrakesh Agreement Establishing the World Trade Organization art. XI:1 n.1, Apr. 15, 1994, 1867 U.N.T.S. 154).

¹⁸ *Id.* at 229–34.

¹⁹ Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339, 365–66 (2002).

²⁰ Mavroidis & Sapir, *supra* note 7, at 5–6.

²¹ *Id.* at 6.

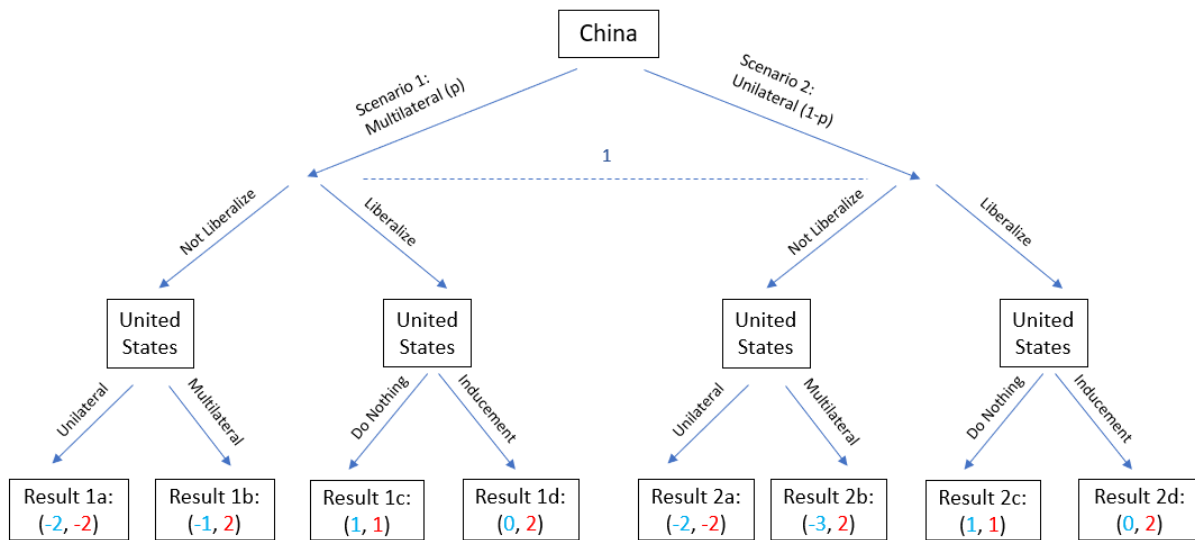
²² Henry Gao & Weihuan Zhou, *Are New Rules Needed for China at the WTO?*, IPI GLOBAL OBSERVATORY (Apr. 30, 2019), <https://theglobalobservatory.org/2019/04/are-new-rules-needed-china-wto>.

²³ Jaime Tijmes-Lhl, *Consensus and Majority Voting in the WTO*, 8 WORLD TRADE REV. 417, 422, 424–25 (2009).

IV. THE SHIFT OF U.S. PREFERENCE TOWARDS UNILATERAL ACTIONS

A country's preferred approach to trade may shift from a multilateral approach to a unilateral approach due to a change in how it perceives the relative effectiveness of the two approaches.²⁴ The game theoretic concept of the "screening game" is a useful way to capture such a shift and explain how the trade dispute has proceeded.²⁵ Figure I demonstrates such a game with the United States and China as the two players, where the goal of each country is to maximize its own profits. For each of the eight possible results (labelled 1a, 1b, 1c, and so on), the payoff for the United States is in blue and the payoff for China is in red. This payoff scheme demonstrates the simulated perception of the extent to which any given result will benefit or hurt a country relative to the other results. For example, between Results 1c and 1d, the United States will see a larger benefit in Result 1c than in Result 1d.

Figure I²⁶



²⁴ The U.S.'s shift to unilateral approaches was first evinced by its withdrawal from the Trans-Pacific Partnership. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

²⁵ See generally John G. Riley, *Silver Signals: Twenty-Five Years of Screening and Signaling*, 39 J. ECON. LITERATURE 432 (2001) (explaining the concept of "screening" in game theory). Note that the game presented in Figure I simplifies the scenario to better address this annotation's point. Additionally, for clarification, the screening game in Figure I is a two-player, two-step game with incomplete information, wherein the player with incomplete information moves first. Observers then attempt to find the perfect Bayesian equilibrium of this game.

²⁶ Figure I was created by the author.

In the game described in Figure I, China gets to move first, so it first guesses whether the two parties are in Scenario 1 (wherein probability is p) or Scenario 2 (wherein probability is $1-p$). Regardless, China next has two choices: further liberalize its economy (which is what the United States wants) or decline to liberalize its economy. If China decides to liberalize, the United States can either reward China or do nothing. If China decides not to liberalize, the U.S. can respond either in a multilateral approach or in a unilateral approach. The only difference between the two scenarios is that the United States perceives the damage it sustains from taking multilateral measures in response to China not liberalizing to be more severe under Scenario 2 (Result 2b) than under Scenario 1 (Result 1b).²⁷

The United States' track record of taking a multilateral approach before President Trump took office²⁸ implies that the United States shared an analogous perception of payoffs to the hypothetical perception in Scenario 1. This makes China believe that the probability of Scenario 1 (p) is extremely high.²⁹ Due to this belief, China will move under the assumption they are in Scenario 1. Scenario 1 will lead to Result 1b, wherein China will not liberalize its economy and the United States will address the issue in a multilateral manner. In this scenario, the United States perceives unilateral measures to be more costly than addressing the issue through multilateral measures,³⁰ possibly due to the fear that unilateral measures will lead to Chinese retaliation that would hurt the U.S. economy more than the status quo, which is simply that the United States is not able to alter China's behavior multilaterally. Therefore, even if unilateral measures hurt China more than multilateral measures would, the United States would deem unilateral measures too costly. In other words, the United States will not pursue a tit-for-tat trade war with China under this payoff model.

While the United States might be able to reward China for liberalizing its economy to the point that the payoff for China in Result 1d is higher than its payoff in Result 1b,³¹ China knows that once it liberalizes its own economy, the United States no longer has the incentive to actually pay the reward. Furthermore, liberalizing the economy might be so directly contradictory to the model of political economy preferred by Chinese leaders³² that there is no reward that the United States can offer to induce

²⁷ Note the difference in payoff for the United States after taking multilateral measures in Scenario 1 (-1, according to Result 1b) compared to Scenario 2 (-3, according to Result 2B).

²⁸ See *supra* Part I.

²⁹ For the sake of simplicity, it can be assumed here that p is 100% and $1-p$ is zero.

³⁰ The payoff for the United States in Result 1a is -2, which is lower than the payoff in Result 1b (-1).

³¹ For example, China's payoff under Result 1d might rise to 3 if the rewards that the United States grants China exceed the payoff anticipated in Figure I.

³² Mavroidis & Sapir, *supra* note 7, at 6.

China to liberalize its economy.³³ Both of these possibilities lead to the conclusion that if China liberalizes its economy, it will lead to Result 1c. Since the payoff to China in Result 1c would be lower than that of Result 1b, the most logical choice for China is to continue its refusal to liberalize its economy. Overall, Scenario 1 implies that it is rational for China not to liberalize.

Even though China anticipated *ex ante* that there is a low chance it is in Scenario 2, as mentioned above, China is actually in Scenario 2 now. The switch from Scenario 1 to Scenario 2 reflects a change in the U.S. perception of trade payoffs. There are several possible reasons for such change. Perhaps, as discussed above, the United States increasingly considers the WTO insufficiently effective in ensuring China's fulfillment of its obligations.³⁴ Or perhaps a mega-regional trade agreement such as the Trans-Pacific Partnership (TPP) would take too much time to convince China to conform to a liberal economy because China can continue to expand trade without joining the TPP.³⁵ Another possibility is that non-economic concerns, such as national security, have become more salient than before.³⁶

Due to China's *a priori* belief that the two parties are still in Scenario 1, China will take the route of not liberalizing. However, in responding to China's decision not to liberalize, the United States—now in Scenario 2—considers the multilateral approach to be more costly than a unilateral approach, and thus has pursued the latter option. This ultimately leads to Result 2a in Scenario 2, which resembles a trade war. If the payoffs assumed in Figure I are correct, and if China knows *ex ante* that the payoffs have updated to the ones in Scenario 2 (i.e., assigning a much higher probability to *1-p*), China is more likely to liberalize because, in Scenario 2, its payoff in Result 2c is higher than that of Result 2a.

Alternatively, if China really does prefer state capitalism much more strongly over liberalizing its economy, it is possible that China's payoff assigned under 2c should be lower than under 2a, and so Result 2a will actually be the ultimate result under Scenario 2. This means that even if China believes it faces Scenario 2, it will still choose not to liberalize its own economy.

³³ If this is the case, China's payoffs under Results 1c, 1d, 2c, and 2d would be lower than the respective payoff amounts for these results anticipated in Figure I.

³⁴ Chuck Grassley & Ron Wyden, *The World Trade Organization is Faltering. The US Can't Fix It Alone*, CNN (Oct. 10, 2019), <https://www.cnn.com/2019/10/10/perspectives/world-trade-organization-grassley-reform/index.html> (describing bipartisan concerns on issues that the WTO is currently not addressing effectively).

³⁵ PETER A. PETRI ET AL., *THE TRANS-PACIFIC PARTNERSHIP AND ASIA-PACIFIC INTEGRATION* 40–41 (2012), https://www.piie.com/publications/chapters_preview/6642/04iie6642.pdf (indicating the potential benefits of China signing trade agreements in Asia without joining the TPP).

³⁶ Erica Pandey, *The Chinese National Security Threat Is Bigger than Huawei*, AXIOS (Oct. 17, 2019), <https://www.axios.com/china-technology-national-security-huawei-tiktok-7cb55b31-e9e7-43c9-9e2a-3f1707c52892.html>.

V. CONCLUSION

Without more time and precise empirical studies, it is difficult to know whether the shift in the perception of the relative effectiveness of the multilateral approach versus the unilateral approach is permanent or temporary. But if China and the United States do have very divergent views on trade, it would be difficult to reach an agreement through the WTO, even if the WTO modifies its decision-making rules, due to the large influence China possesses over the organization by virtue of its huge economic size. What is worrisome is that such an impasse could lead to a further deterioration of trust in multilateral approaches, which would make other member countries more likely to take unilateral approaches to trade. Of course, the GATT and the WTO have been very successful in reducing tariffs around the world since their inception,³⁷ and the WTO's Dispute Settlement Body has been mostly effective in resolving trade disputes.³⁸ However, the recent trade dispute between the United States and China suggests that even a relatively well-functioning international organization such as the WTO will become less effective if the world becomes more multipolar, not only in terms of national strength, but also in terms of ideology.³⁹ The deadlock might only pass if the United States adjusts its perception towards unilateral and multilateral trade approaches, or if China's preference regarding economic liberalization changes. If China's statement that it "won't budge on the thorniest issues"⁴⁰ prove true, it will probably take some time for both parties to reach a comprehensive deal.

³⁷ Baldwin, *supra* note 2, at 104.

³⁸ See Press Release, World Trade Org., WTO Disputes Reach 400 Mark (Nov. 6, 2009), https://www.wto.org/english/news_e/pres09_e/pr578_e.htm (reflecting a high number of successful dispute resolutions in the Dispute Settlement Body).

³⁹ See, e.g., Baldwin, *supra* note 2, at 106 (explaining that it is easier to coordinate reduction in tariffs than it is to reduce non-tariff barriers because the former theoretically benefits both reducing countries as a whole).

⁴⁰ Shawn Donnan et al., *China Said To Doubt Long-Term Trade Deal Possible with Trump* (2), BLOOMBERG L. (Oct. 31, 2019), <https://news.bloomberglaw.com/international-trade/china-said-to-doubt-long-term-trade-deal-possible-with-trump>.