

# Postcard from a disintegration: Inside the WTO's fraying seams

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Consensus means, in theory, that the hands of all 164 members are on the steering wheel. The reality is that some pairs of hands have a more forceful grip on the wheel than others.

The World Trade Organization is what is known as a “member-driven” organization. The 164 WTO Members – they are never referred to as Member States because Hong Kong and Macau are regions of China and governments do not agree on the status of Taiwan – make all relevant decisions on the basis of consensus.

It is an awkward way to get things done. Consensus means, in theory, that the hands of all 164 members are on the steering wheel. The reality is that some pairs of hands have a more forceful grip on the wheel than others.

To make things move in Geneva, you need the big players to take control, state what they want, and make clear what they are prepared to do to achieve it. In the past, it has been the United States which drove the agenda, first in the General Agreement on Tariffs and Trade and, since its founding in 1995, in the WTO. Nothing of consequence was achieved without US leadership.

Today, this is no longer the case. Such is the politically toxic nature of trade in the United States today, that the Office of the US Trade Representative has deemed a detached, disinterested approach the nation’s best course of action in trade policy.

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Two factors have contributed to the sharp deterioration in US leadership. The first is a bipartisan, ardent anxiety over China. Inside the Beltway, it is widely held that China has somehow rigged the multilateral trading system, shirked its responsibilities, and gamed the dispute settlement function. Such reasoning is flawed and not fully supported by the facts. But it can be attributed to the growing Cold War mentality gripping Washington these days.

Less easy to comprehend is the decades-old populist animosity – on the left and the right – towards trade. The starting points for this antipathy vary depending on where on the political spectrum the thinking originates. But the bottom line cited



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by such advocates is that trade destroys jobs, particularly manufacturing jobs, and that every trade deal into which the United States has entered has been a bad one.

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The volumes of evidence refuting both arguments are well known, but in an era of intense political polarization, logic and facts take a back seat to who is most effective at deploying social media or who can shout the loudest. Suffice to say that US Bureau of Labor Statistics data shows that, through November, the US economy has added 420,000 jobs.

Such was Donald Trump's distaste for the WTO that he threatened to pull the United States out of the organization altogether. It's debatable whether this could be done without the approval of Congress, but the subtleties of Constitutional interpretation were never Trump's forte. In the meanwhile, his associates dismantled the WTO's dispute settlement system and challenged many of the basic precepts of the organization including special treatment for developing countries and the use of national security exemptions to aggressively stymie exports from other countries.

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The election of President Biden heralded big changes in the United States' relations with its allies and trading partners. And on many levels, productive and forward looking change has indeed taken place. President Biden has put far greater emphasis on alliances, the environment, and on human rights. He has shown respect for his allies, and he seems to listen to what they say. One area where little has changed however is trade and this is particularly true with respect to the WTO.

Gone are the bombastic rhetoric and pugilistic protectionist actions. In its place is a kind of sneering indifference, a view that supporting, let alone leading the WTO, may expose US trade policymakers to attack from those on the left and right who would portray such support as anti-worker and pro-China.

It is an Office of the US Trade Representative that holds its finger in the air to gauge the prevailing progressive winds before embarking tentatively on a course of action designed principally to avoid trampling on the broader industrial policy foundation being laid in Washington. This fits-and-starts approach leaves US trade partners unsure of Washington's objectives while frustrating supporters at home who question whether USTR has the courage of its convictions.

Yes, the US is still a Member of the WTO and has made some perfunctory gestures that indicate a degree of cooperation on some issues. And yes, the United States was constructive in the run-up to and execution of the surprisingly successful 12th Ministerial Conference in June.

But the strategic vision of the US remains a mystery to many in Geneva. In a speech in September, US Trade Representative Katherine Tai, laid out the real objectives she has for the WTO.<sup>1</sup>

"We must ensure that the institutions that shape the international trading system keep pace with the changing global economy. And we need honest conversations about the role of the WTO in addressing widening inequality, worker rights, and the climate crisis," she said.

These are long held Democratic party trade policy goals and such statements play well with the political base. But it is worth asking what exactly does she expect from the WTO?

On the area of inequality, the WTO has a major role to play in addressing inequality among nations by making trade fairer for developing countries. This means cutting trade distorting agricultural subsidies in rich countries and opening markets to products of export interest to the poor.

But is this what Tai wants? Unlikely. Her aim is to tackle inequality within the United States and on this score the WTO is ill-equipped, unless she advocates a bigger role for the organization in creating a more progressive US tax system, bolstering primary education or making health care available to the 30 million Americans who have no health insurance.

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The WTO does have a role to play in workers' rights and the environment. But we should not lose track of the fact that the WTO is a trade organization and trade policy has essentially two big levers: facilitating trade and obstructing trade. This carrot-and-stick approach can help influence others in terms of environmental and labor policies. But there is not a union leader or environmental activist anywhere in the world that would like to see the WTO take the central role in either domain.

Superimposed on this longstanding canvas, is the quite recent and very profound shift in policy that has converted the United States, and many other countries, into a strong advocate of state-guided industrial policy.

Given these dynamics, marginalizing the WTO is apparently the path that has been chosen.



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As critical as Donald Trump was of the WTO, his USTR Robert Lighthizer and US Ambassador to the WTO Dennis Shea were anything but indifferent or inactive. They both ruffled feathers in Geneva and in capitals around the world. But today their positions on the Special and Differential Treatment for developing countries – especially China – and reform of the Dispute Settlement System, particularly the Appellate Body, are the perceived wisdom.

By contrast, the Biden administration employs the let's-sit-on-our-hands approach. This is particularly evident in discussions on overall WTO reform, reform of the dispute settlement system, and waiving WTO rules on the protection of intellectual property for vaccines to combat the Covid pandemic.

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The argument about whether intellectual property protection encourages innovation or is a tool for extracting vast profits is an old one and there are merits on both sides. Traditionally, developed countries – home to most pharmaceutical producers and medical products manufacturers – have supported TRIPs and they did so in the early days of the pandemic as well. Developing countries maintained that the waiver was essential.

In March 2022, the United States, the European Union, South Africa, and India agreed on a “compromise outcome” – the word agreement was studiously avoided. This “outcome” was not a wholesale scrapping of the TRIPs agreement, but extended flexibility in the implementation and authorization of the use of compulsory licenses in vaccine production. It was a much-needed breakthrough in the long-stalled negotiations. Curiously, Tai did not herald this development. Instead, USTR issued a statement from its spokesman Adam Hodge announcing a compromise had been reached.

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The agreement seemed to satisfy no one. Pharmaceutical makers derided it as the unraveling of global patent protection. Activist NGOs dismissed it as a watered-down compromise. In fact, the agreement was appreciated in South Africa where it enabled the government to more easily avail itself of the compulsory licensing and other flexibility provisions allowed under WTO rules. It also made it easier for producers to use these licenses to export to other poor countries. Both Indian Prime Minister Narendra Modi and South African President Cyril Ramaphosa welcomed the deal in a 27 June joint statement issued after the two leaders met on the sidelines of the G7 summit in Germany.<sup>2</sup>

What was not agreed however was whether the five-year TRIPs “waiver” would be extended to diagnostics like testing kits, masks, ventilators, syringes, and therapeutics such as Remdesivir made by Gilead Sciences Inc., Paxlovid from Pfizer Inc. or Molnupiravir from Merck & Co.

Ministers agreed to try for a deal by December, but it was a deadline they failed to make. The US position on the extension of the waiver to treatments and equipment is anybody's guess. The positions on the extension of the waiver very much mirror those laid out during discussions on the vaccine patent waiver with the EU, Japan, Switzerland, the United Kingdom, and a small group of developing countries lined up in opposition and India, South Africa, and the African Group lined up in support. The one country poised to help deliver a compromise, the United States, placed itself on the sidelines.

Caught between a rock and hard place on this extension, Tai and her colleagues decided to...wring their hands. In December USTR announced that it had engaged in consultations with domestic stakeholders and that the December 17 deadline should be extended.

In the end, Washington agreed to the language in the Ministerial Declaration that it would, like all other members, “commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.”

The US “effort” at reforming the Dispute Settlement System of the WTO is equally opaque. The Trump administration had deliberately crippled the dispute system by blocking the appointment of the seven jurists who serve on the Appellate Body. While the wider membership was dismayed at the US tactics, Trump administration officials quite skillfully laid out the case against the Appellate Body, convincingly arguing that the AB had been overreaching its mandate and taking up issues not under appeal. What US officials Lighthizer and Shea never explained was how this should be fixed.

Like virtually every other trade lawyer in Washington, Katherine Tai agreed with the Trump administration’s criticism of the AB. But quite soon after she was sworn into office, she found herself under pressure from WTO members and Director-General Ngozi Okonjo-Iweala to engage in a process of reforming the dispute function so that it better conforms to the mandate of WTO members and addressed US concerns.

In the runup to the June Ministerial Conference, the United States did not indicate precisely what it expected from the reform process. In the end, Washington agreed to the language in the Ministerial Declaration that it would, like all other members, “commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.” This deadline, would of course, fall during a presidential election year in the United States. It would be a courageous person indeed who would bet that in the



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hothouse atmosphere of a presidential campaign, the USTR and the White House would agree to bold reforms which fully restore the WTO's dispute settlement system.

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The December dispute settlement panel decisions against the US on its steel and aluminum tariffs will complicate reform efforts. The four cases, in which Lighthizer used a Kennedy administration statute to justify on national security grounds, applied tariffs against exports from China, Switzerland, and Norway. It was a ridiculous claim but Lighthizer, a wily policy operator, knew that a ruling which challenged the US interpretation of its national security interests would be viewed in Washington as arrogant and bureaucratic meddling. The USTR press release condemning the ruling proved him right. Still, the Biden administration cannot be singled out on this point. Previous administrations had expressed similar indignation at the possibility that WTO lawyers might weigh in on what constitutes the national security interest of a superpower.

Finally, there is the effort to reform the WTO. Ministers provide only the vaguest of instructions to WTO Members in the MC 12 Ministerial Declaration stating only that the process would be led by the General Council and that the members would "consider decisions as appropriate" to be submitted at the next conference. Everyone knows reform is needed. The trouble is that reform means different things to different delegations. The United States has pushed for greater transparency through greater adherence to notification obligations. But beyond this, the US has said precious little about what it wants from the reform process and how it intends to achieve this.

Roughly three-quarters of WTO Members participate in at least one of these five or six groups and so far, negotiations in the plurilaterals have produced agreements on domestic regulation in services and guidelines to improve the participation of smaller businesses in the global trading system.

Perhaps the one area of WTO activity that has shown real promise in recent years is the plurilateral "joint statement initiatives." Roughly three-quarters of WTO Members participate in at least one of these five or six groups and so far, negotiations in the plurilaterals have produced agreements on domestic regulation in services and guidelines to improve the participation of smaller businesses in the global trading system.

An agreement on investment facilitation on development among 114 Members (the United States is not participating) is likely soon. But the plurilateral that attracted the greatest attention among businesses is that of electronic commerce. A group of roughly 10 nuts-and-bolts issues have already been agreed upon, including rules for e-contracts, e-signatures, consumer protection, and spam. But agreement on the politically charged issues of cross-border data flows, data localization, and forced transfer of source code will be far trickier. The United States, the European Union, and China have very different ideas on how these issues should be handled.

One fear among many WTO negotiators is Washington would seek to apply any e-commerce accord in a manner that would discriminate against China. Finding a way to do so within the WTO is highly unlikely given that this would require China's assent.

On the critically important matter of continuing the roughly 25-year moratorium among WTO Members on the application of duties on e-commerce transmissions, US trade partners and businesses worry that US support for making this moratorium permanent, or even for rolling it over, may be wavering. An EU official said it seems Tai may not be prepared to spend political capital on the moratorium as it approaches the March 2024 deadline.

The ennui shown by the US has not gone unnoticed around the WTO. Many delegations, particularly from smaller countries deeply invested in the multilateral trading system, have prodded the US to come to the fore more forcefully on the key issues. To no avail.

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Another country that has taken note is China. Filling the void left by the United States has been a hallmark of Beijing's foreign and economic policy for some time. In Geneva, China has been energetic across the board in its WTO activities, supporting all Joint Statement Initiatives including leading some important groups like Investment Facilitation for Development and the 75-Member Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade. China has also worked hard to place top Chinese officials in prominent roles inside the Secretariat, deftly elbowing India aside to secure a Chinese national as Deputy Director General.

By contrast, while the US has retained a Deputy DG position, it shows little interest in the composition of the Secretariat. As a result, the US now holds only one of the 20 director positions in the house. Directors run the divisions of the WTO, providing support for Members, and are widely seen as the institutional memory of the organization. Should the sole remaining American director retire next year as planned, the WTO will be without an American director for the first time in the organization's history.

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Such is the indecision regarding the WTO in Washington these days that many trade policy experts are beginning to weigh setting up a parallel structure, without China, Russia, or other partners deemed problematic by the Americans.<sup>3</sup>

It's an astonishing concept. Its proponents, who include former WTO staff members, seem to underestimate the strength of opposition from skeptical trade partners. Would US allies and trading partners really feel comfortable abandoning the organization which has been the bedrock of global trade for 75 years? Would these allies happily follow the lead of a country that abandoned the Trans-Pacific Partnership and to a large extent shouldered much responsibility for the teetering state of the WTO?

Such is the enigmatic nature of US trade policy these days that no one knows for sure.

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### About the contributor



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## Endnotes

1. Remarks by Ambassador Katherine Tai on the Biden Administration's Commitment to Multilateral Engagement at the Washington Foreign Law Society's 2022 Annual Gala, Office of the USTR: <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2022/september/remarks-ambassador-katherine-tai-biden-administrations-commitment-multilateral-engagement-washington>
2. Meeting of Prime Minister with President of South Africa on the sidelines of G-7 Summit: <https://www.narendramodi.in/meeting-of-prime-minister-narendra-modi-with-president-of-south-africa-on-the-sidelines-of-g-7-summit-562823>
3. No Longer Business as Usual at the World Trade Organization, Asia Society: <https://asiasociety.org/policy-institute/no-longer-business-usual-world-trade-organization>

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