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# World Trade Organization: Overview and Future Direction

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SUMMARY

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# World Trade Organization: Overview and Future Direction

Historically, the United States' leadership of the global trading system has ensured the United States a seat at the table to shape the international trade agenda in ways that both advance and defend U.S. interests. The evolution of U.S. leadership and the global trading system remain of interest to Congress, which holds constitutional authority over foreign commerce and establishes general and principal U.S. trade negotiating objectives through legislation. Congress has recognized the World Trade Organization (WTO) as the "foundation of the global trading system" within trade promotion authority (TPA) and plays a direct legislative and oversight role over WTO agreements. The statutory basis for U.S. WTO membership is the Uruguay Round Agreements Act (P.L. 103-465), and U.S. priorities and objectives for the General Agreement on Tariffs and Trade (GATT)/WTO have been reflected in various TPA legislation since 1974. Congress also has oversight of the U.S. Trade Representative and other agencies that participate in WTO meetings and enforce WTO commitments.

The WTO is a 164-member international organization that was created to oversee and administer multilateral trade rules, serve as a forum for trade liberalization negotiations, and resolve trade disputes. The United States was a major force behind the establishment of the WTO in 1995, and the rules and agreements resulting from multilateral trade negotiations since 1947. The WTO encompassed and succeeded the GATT, established in 1947 among the United States and 22 other countries. Through the GATT and WTO, the United States, with other countries, sought to establish a more open, rules-based trading system in the postwar era, with the goal of fostering international economic cooperation and raising economic prosperity worldwide. Today, 98% of global trade is among WTO members.

The WTO is a consensus and member-driven organization. Its core principles include nondiscrimination (most-favored nation treatment and national treatment), freer trade, fair competition, transparency, and encouraging development. These are enshrined in WTO agreements covering goods, agriculture, services, intellectual property rights, and trade facilitation, among other issues. Many countries have been motivated to join the WTO not just to expand access to foreign markets but also to spur domestic economic reforms, transition to market economies, and promote the rule of law.

The WTO dispute settlement (DS) mechanism provides an enforceable means for members to resolve disputes over WTO commitments and obligations. The WTO has processed nearly 600 disputes, and the United States has been an active user of the system. Supporters of the multilateral trading system consider the DS mechanism an important success, and an enforceable DS process was a priority negotiating objective for the United States in the Uruguay Round negotiations during 1986-1994. More recently, some members, most notably the United States, contend it has procedural shortcomings and has exceeded its mandate in deciding certain cases. Because of this, the United States has vetoed the appointment of panelists to the WTO's Appellate Body (AB; the seven-member body that reviews appeals by WTO members of a panel's findings in a dispute case). In December 2019, the terms of two of the remaining jurists expired, leaving the AB unable to function and hear new cases. This action could potentially render the DS system ineffective, as members struggle to agree to solutions that sufficiently address U.S. concerns.

More broadly, many observers are concerned that the WTO's effectiveness has diminished since the collapse of the Doha Round of multilateral trade negotiations, which began in 2001, and believe the WTO needs to negotiate new rules and adopt reforms to continue its role as the foundation of the trading system. To date, members have been unable to reach consensus for a new comprehensive agreement on trade liberalization and rules. While global supply chains and technology have transformed global trade and investment, WTO rules have not kept up with the pace of change. Many countries have turned to negotiating free trade agreements outside the WTO and plurilateral agreements involving subsets of WTO members.

In early 2020, the WTO's 12th Ministerial Conference (MC12) was rescheduled to 2021 due to the Coronavirus Disease 2019 (COVID-19) pandemic. The biennial meeting, which usually involves active U.S. participation, was widely anticipated as an action-forcing event for the WTO. At the previous ministerial in December 2017, no major deliverables were announced, leaving the stakes high for MC12. Several members committed to make progress on issues related to ongoing talks, such as fisheries subsidies and e-commerce, while other areas remain stalled amid disagreements.

In its June 2020 forecast, the WTO estimated a plunge in global trade growth for 2020, with recovery depending on the duration of the pandemic and countries' policy choices. The WTO has committed to work with other international organizations to minimize disruptions to trade and global supply chains, and encouraged WTO members to notify trade measures taken in response to COVID-19, which have surged since the beginning of 2020, causing concern for many. Some members have called on the WTO to address the trade policy challenges emerging from COVID-19 through new rules.

Meanwhile, WTO members continue to explore aspects of reform and future negotiations. Potential reforms concern the administration of the organization, its procedures and practices, and attempts to address the inability of WTO members to conclude new agreements. Proposed reforms to dispute settlement also attempt to improve the working of the DS system, particularly the AB, which U.S. trade officials to date have not supported.

Some U.S. government frustrations with the WTO are not new and many are shared by other trading partners. At the same time, the Trump Administration's overall approach has spurred questions among stakeholders and some Members of Congress regarding future U.S. leadership and priorities for improving the trading system. Some concerns have emphasized that the Administration's actions to unilaterally raise tariffs under U.S. trade laws and to impede the functioning of the DS system might undermine the WTO's credibility.

The growing debate over the role and future direction of the WTO are of interest to Congress. Some Members have expressed support for WTO reform efforts and U.S. leadership; while others introduced joint resolutions in May 2020 to withdraw congressional approval of WTO agreements. Issues Congress may address include the effects of current and future WTO agreements on the U.S. economy, the value of U.S. membership and leadership in the WTO, the possibility of establishing new U.S. negotiating objectives or oversight hearings on the prospects for future WTO reforms and rulemaking, and the relevant U.S. trade authorities and impact of potential U.S. withdrawal from the WTO on U.S. economic and foreign policy interests. The pending WTO Ministerial Conference in 2021 presents the United States and WTO members with an opportunity to address pressing concerns over reform efforts, ongoing and new negotiations, a nonfunctioning DS system, and the future of the multilateral trading system more broadly, as members grapple with economic recovery from COVID-19 and other challenges.

# Contents

Introduction ..... 1
Background ..... 3
General Agreement on Tariffs and Trade (GATT) ..... 3
World Trade Organization ..... 6
Administering Trade Rules ..... 6
Establishing New Rules and Trade Liberalization through Negotiations ..... 9
Resolving Disputes ..... 10
The United States and the WTO ..... 11
WTO Agreements ..... 12
Marrakesh Agreement Establishing the World Trade Organization ..... 12
Multilateral Agreement on Trade in Goods (Annex 1A) ..... 12
Agreement on Agriculture (AoA) ..... 13
Trade-Related Investment Measures (TRIMS) ..... 14
General Agreement on Trade in Services (GATS) (Annex 1B) ..... 15
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Annex 1C) ..... 16
Trade Remedies ..... 17
Dispute Settlement Understanding (DSU) (Annex 2) ..... 18
Trade Policy Review Mechanism (Annex 3) ..... 22
Plurilateral Agreements (Annex 4) ..... 23
Government Procurement Agreement ..... 23
Information Technology Agreement ..... 24
Trade Facilitation Agreement ..... 24
Key Exceptions under GATT/WTO ..... 25
Joining the WTO: The Accession Process ..... 26
China's Accession and Membership ..... 27
Current Status and Ongoing Negotiations ..... 31
Buenos Aires Ministerial MC11, 2017 ..... 31
Outlook for MC12, 2021 ..... 33
Selected Ongoing WTO Negotiations ..... 33
Agriculture ..... 33
Fisheries Subsidies ..... 34
Electronic Commerce/Digital Trade ..... 35
Environmental Goods Agreement (EGA) ..... 36
Policy Issues and Future Direction ..... 37
COVID-19 and WTO Reactions ..... 39
Negotiating Approaches ..... 41
Plurilateral Agreements ..... 41
Preferential Free Trade Agreements ..... 42
Future Negotiations on Selected Issues ..... 44
Services ..... 45
Competition with SOEs and Non-Market Practices ..... 45
Investment ..... 46
Labor and Environment ..... 47
Proposed Institutional Reforms ..... 48
Institutional Issues ..... 49

Dispute Settlement ..... 53
Selected Challenges and Issues for Congress ..... 59
Value of the Multilateral System and U.S. Leadership and Membership ..... 59
Respect for the Rules and Credibility of the WTO ..... 60
U.S. Sovereignty and the WTO ..... 61
Role of Emerging Markets ..... 62
Priorities for WTO Reforms and Future Negotiations ..... 63
Outlook ..... 64

## Figures

Figure 1. WTO Structure ..... 8
Figure 2. Uruguay Round Impact on Tariff Bindings ..... 8
Figure 3. Average Applied Most-Favored Nation (MFN) Tariffs ..... 9
Figure 4. Four Modes of Service Delivery and Hypothetical Examples ..... 16
Figure 5. WTO Dispute Settlement Procedure ..... 19
Figure 6. WTO Disputes Involving the United States ..... 20
Figure 7. WTO Accession Process ..... 27
Figure 8. U.S. Trade in the WTO ..... 43

## Tables

Table 1. Summary of GATT Negotiating Rounds ..... 4
Table 2. Marrakesh Protocol to the GATT 1994 ..... 13
Table 3. WTO Challenges to Tariff Measures Imposed by Trump Administration Under U.S. Trade Laws ..... 21
Table 4. WTO DG Candidates ..... 39

## Contacts

Author Information ..... 64

# Introduction

The World Trade Organization (WTO) is an international organization that administers the trade rules and agreements negotiated by its 164 members to eliminate trade barriers and create transparent and nondiscriminatory rules to govern trade. It also serves as an important forum for resolving trade disputes. The United States was a major force behind the establishment of the WTO in 1995 and the rules and agreements that resulted from the Uruguay Round of multilateral trade negotiations (1986-1994). The WTO encompassed and expanded on the commitments and institutional functions of the General Agreement on Tariffs and Trade (GATT), established in 1947 by the United States and 22 other countries. Through the GATT and the WTO, the United States and others sought to establish a more open, rules-based trading system in the postwar era, with the goal of fostering international economic cooperation, stability, and prosperity worldwide. Today, the vast majority of world trade, 98%, takes place among WTO members.

The evolution of U.S. leadership in the WTO and the institution's future agenda have been of interest to Congress. The terms set by the WTO agreements govern the majority of U.S. trading relationships. Some 65% of U.S. global trade is with countries that do not have free trade agreements (FTAs) with the United States, including China, the European Union (EU), India, and Japan, and thus, the majority of U.S. trade relies primarily on the terms of WTO agreements. Congress has recognized the WTO as the "foundation of the global trading system" within U.S. trade legislation and plays a direct legislative and oversight role over WTO agreements.[1] U.S. FTAs also build on core WTO agreements. While the U.S. Trade Representative (USTR) represents the United States at the WTO, Congress holds constitutional authority over foreign commerce and establishes U.S. trade negotiating objectives and priorities and implements major U.S. trade liberalization agreements through legislation. U.S. priorities and objectives for the GATT/WTO are reflected in trade promotion authority (TPA) legislation since 1974. Congress also has oversight of the USTR and other executive branch agencies that participate in WTO meetings and enforce WTO commitments.

The WTO's effectiveness as a negotiating body for broad-based trade liberalization has come under intensified scrutiny, as has its role in resolving trade disputes. WTO members have struggled to reach consensus over issues that can place developed country members against developing country members (such as agricultural subsidies, industrial goods tariffs, and intellectual property rights protection). The institution has also struggled to address newer trade barriers, such as digital trade restrictions and the role of state-owned enterprises in international commerce, which have become more prominent in the years since the WTO was established. Global supply chains and advances in technology have transformed global commerce, but trade rules have failed to keep up with the pace of change; since 1995, WTO members have been unable to reach consensus for a new comprehensive multilateral agreement. As a result, many have turned to negotiating FTAs with one another outside the WTO to build on core WTO agreements and advance trade liberalization and rules; in some of these bilateral and regional agreements, including those pursued by the United States and EU, certain newer rules may vary significantly. Plurilateral negotiations, involving subsets of WTO members rather than all members, are also becoming a popular forum for tackling newer issues on the trade agenda.

The most recent round of WTO negotiations, the Doha Round, began in November 2001, but concluded with no clear path forward, leaving several unresolved issues after the 10th Ministerial Conference in 2015. Efforts to build on current WTO agreements outside of the Doha agenda

[1] Section 102(b)(13) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Title I, P.L. 114-26), which reauthorized trade promotion authority (TPA).

continue. While WTO members have made some progress, no major deliverables were announced at the last Ministerial in 2017. The stakes appear high for the next meeting, which members were forced to reschedule from 2020 to 2021 due to the Coronavirus Disease 2019 (COVID-19) pandemic. COVID-19 has tested cooperation and coordination in global trade policies, disrupted global supply chains, and resulted in widespread trade protectionism. At the same time, several countries have reaffirmed the trading system, lifted restrictions, and view the WTO as playing an important role in tackling trade policy challenges that have emerged from the pandemic.

Concerns about growing protectionist trade policies predate COVID-19. Observers remain concerned that recent U.S. tariff actions and counterretaliation, and escalating trade disputes between major economies, most notably the United States and China, may further strain the trading system. The WTO is faced with resolving significant pending disputes, which involve the United States, as well as debate about the role of its Appellate Body.

In a break from the approaches of past Administrations, the Trump Administration has expressed doubt over the value of the WTO institution to the U.S. economy and questioned whether leadership in the organization benefits the United States. While USTR Robert Lighthizer maintains that the WTO is an "important institution" that does an "enormous amount of good," U.S. officials have expressed skepticism toward multilateral trade deals, including those negotiated within the WTO.[2] President Trump has at times threatened to withdraw the United States from the WTO.[3] He claims that the WTO "needs drastic change," and criticizes China as declining to adopt promised reforms following WTO accession.[4] In addition, amid concerns about "judicial overreach" in WTO dispute findings, the Administration has withheld approval for judge appointments to the WTO Appellate Body—a practice that occurred under the Obama Administration and concerns some Members of Congress.

At the same time, reform of the multilateral trading system is a stated trade policy objective of the Trump Administration, and the United States remains engaged in certain WTO initiatives and plurilateral efforts.[5] In testimony before Congress in June 2020, USTR Lighthizer emphasized primary U.S. concerns include that other WTO members resort more often to litigation, rather than negotiations to craft new rules, maintain "outdated" high tariffs, and skirt WTO obligations through flexibilities.[6] The United States seeks a "broad reset" at the WTO, with across-the-board reforms.[7] While many of U.S. fundamental concerns predate the Trump Administration and are shared by other trading partners, questions remain about U.S. priorities for improving the system.

With growing debate over the role and future direction of the WTO, Congress may maintain interest in several issues, including: the value of U.S. membership and leadership in the WTO, the possibility of establishing new U.S. negotiating objectives or holding oversight hearings to address prospects of new WTO reforms and rulemaking, and the relevant U.S. trade authorities and impact of potential WTO withdrawal on U.S. economic and foreign policy interests.

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[2] USTR, "Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference," Press Release, December 11, 2017.

[3] John Micklethwait, Margaret Talev, and Jennifer Jacobs, "Trump Threatens to Pull U.S. Out of WTO If It Doesn't 'Shape Up'," *Bloomberg News*, August 30, 2018.

[4] White House, "Remarks by President Trump to the 74th Session of the United Nations General Assembly," September 25, 2019, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/.

[5] USTR, *2018 Trade Policy Agenda*, March 2018.

[6] House Ways and Means Committee, *Hearing on the President's 2020 Trade Policy Agenda,* written testimony by Ambassador Robert E. Lighthizer, June 17, 2020.

[7] Also, see Robert E. Lighthizer, "How to Set World Trade Straight," *Wall Street Journal* op-ed, August 20, 2020.

This report provides background history of the WTO, its organization, and current status of negotiations and reform efforts. The report also explores concerns some have regarding the WTO's future direction and key policy issues for Congress.

# Background

Following World War II, countries throughout the world, led by the United States and several other developed countries, sought to establish a more transparent and nondiscriminatory trading system with the goal of raising the economic well-being of all countries. Aware of the role of tit-for-tat trade barriers resulting from the U.S. Smoot-Hawley tariffs in exacerbating the economic depression in the 1930s, including severe drops in world trade, global production, and employment, the countries that met to discuss the new trading system considered more open trade as essential for peace and economic stability.[8]

The intent of these negotiators was to establish an International Trade Organization (ITO) to address not only trade barriers but other issues indirectly related to trade, including employment, investment, restrictive business practices, and commodity agreements. Unable to secure approval for such a comprehensive agreement, however, they reached a provisional agreement on tariffs and trade rules, known as the GATT, which went into effect in 1948.[9] This provisional agreement, subject to several rounds of trade liberalization negotiations, became the principal set of rules governing international trade for the next 47 years, until the establishment of the WTO.

## General Agreement on Tariffs and Trade (GATT)

The GATT was neither a formal treaty nor an international organization, but an agreement between governments, to which they were contracting parties. The GATT parties established a secretariat based in Geneva, but it remained relatively small, especially compared to the staffs of international economic institutions created by the postwar Bretton Woods conference—the International Monetary Fund and World Bank. Based on a mission to promote trade liberalization, the GATT became the principal set of rules and disciplines governing international trade.

**GATT/WTO Principles of Nondiscrimination**

**Most-favored nation (MFN) treatment** (also called *normal trade relations* by the United States). Requires each member country to grant each other member country treatment at least as favorable as it grants to its most-favored trade partner.

**National treatment**. Obligates each country not to discriminate between domestic and foreign products; once an imported product has entered a country, the product must be treated no less favorably than a "like" product produced domestically.

The core principles and articles of the GATT (which were carried over to the WTO) committed the original 23 members, including the United States, to lower tariffs on a range of industrial goods and to apply tariffs in a nondiscriminatory manner—the so-called most-favored nation or MFN principle (see **text box**). By having to extend the same benefits and concessions to members, the economic gains from trade liberalization were magnified. Exceptions to the MFN principle were allowed, however, including for preferential trade agreements outside the GATT/WTO covering "substantially" all trade among members and for

[8] Barry Eichengreen and Douglas A. Irwin, "The Slide to Protectionism in the Great Depression: Who Succumbed and Why?" *The Journal of Economic History*, vol. 70, no. 4 (December 2010), pp. 871-897.

[9] One major reason the ITO lost momentum was the U.S. government's announcement in 1950 that it would no longer seek congressional ratification of the ITO Charter, due to opposition in the U.S. Congress. WTO, "The GATT years: from Havana to Marrakesh," https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

nonreciprocal preferences for developing countries.[10] GATT members also agreed to provide "national treatment" for imports from other members. For example, countries could not establish one set of health and safety regulations on domestic products while imposing more stringent regulations on imports.

Although the GATT mechanism for the enforcement of these rules or principles was generally viewed as largely ineffective, the agreement nonetheless brought about a substantial reduction of tariffs and other trade barriers.[11] The eight "negotiating rounds" of the GATT succeeded in reducing average tariffs on industrial products from between 20%-30% to just below 4%, and later establishing agreements to address certain non-tariff barriers, facilitating a 14-fold increase in world trade over its 47-year history (see **Table 1**).[12] When the first round concluded in 1947, 23 countries had participated, which accounted for a majority of global trade at the time. When the Uruguay Round establishing the WTO concluded in 1994, 123 countries had participated and the amount of trade affected was nearly $3.7 trillion. As of the end of 2018, there are 164 WTO members, and trade flows totaled $22.6 trillion in 2017.[13]

**Table 1. Summary of GATT Negotiating Rounds**

| Round (Year: Location) | Negotiating Countries (#) | Major Accomplishments |
|---|---|---|
| **1947: Geneva, Switzerland** | 23 | • GATT established<br>• Tariff reduction of about 20% negotiated |
| **1949: Annecy, France** | 13 | • Accession of 11 new contracting parties<br>• Tariff reduction of about 2% |
| **1950-51: Torquay, UK** | 38 | • Accession of 7 new contracting parties<br>• Tariff reduction of about 3% |
| **1955-56: Geneva** | 26 | • Tariff reduction of about 2.5% |
| **1960-61: Geneva (Dillon)** | 26 | • Tariff reduction of about 4% and negotiations involving the external tariff of the European Community |
| **1964-67: Geneva (Kennedy)** | 62 | • Tariff reduction of about 35%<br>• Negotiation of antidumping measures |
| **1973-79: Geneva (Tokyo)** | 102 | • Tariff reduction of about 33%<br>• Several nontariff barrier codes negotiated, including subsidies, customs valuation, standards, and government procurement |
| **1986-1994: Geneva (Uruguay)** | 123 | • WTO created a new dispute settlement system<br>• Liberalization of agriculture, textiles, and apparel<br>• Rules adopted in new areas such as services, trade-related investment, and intellectual property |

**Sources:** Douglas A. Irwin, *Free Trade Under Fire,* p. 225, and Stephen D. Cohen et al., *Fundamentals of U.S. Foreign Trade Policy*, p. 185.

[10] GATT Article XXIV. For more information see CRS Report R45198, *U.S. and Global Trade Agreements: Issues for Congress*, by Brock R. Williams.

[11] For more detail on perceived shortcomings of GATT dispute settlement, see "Historic development of the WTO dispute settlement system," https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm.

[12] WTO, *World Trade Report 2007*, pp. 201-209.

[13] WTO, *World Trade Statistical Review 2018*, https://www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf.

During the first trade round held in Geneva in 1947, members negotiated a 20% reciprocal tariff reduction on industrial products, and made further cuts in subsequent rounds. The Tokyo Round represented the first attempt to reform the trade rules that had existed unchanged since 1947, by including issues and policies that could distort international trade. As a result, Tokyo Round negotiators established several plurilateral codes dealing with nontariff issues such as antidumping, subsidies, standards or technical barriers to trade, import licensing, customs valuation, and government procurement.[14] Countries could choose which, if any, of these codes they wished to adopt. While the United States agreed to all of the codes, the majority of GATT signatories, including most developing countries, chose not to sign the codes.[15]

The Uruguay Round, which took eight years to negotiate (1986-1994), proved to be the most comprehensive GATT round. This round further lowered tariffs and liberalized trade in areas that had eluded previous negotiators, notably agriculture and textiles and apparel. Several codes were amended and turned into multilateral commitments accepted by all members.[16] It also extended rules to new areas such as services, trade-related investment measures, and intellectual property rights. It created a trade policy review mechanism, which periodically examines each member's trade policies and practices. Significantly, the Uruguay Round created the WTO as a legal international organization charged with administering a revised and stronger dispute settlement mechanism—a principal U.S. negotiating objective (see **text box**)—as well as many new trade agreements adopted during the long negotiation. For the most part, the Uruguay Round agreements were accepted as a *single package* or *single undertaking*, meaning that all participants and future WTO members were required to subscribe to all the multilateral agreements.

### U.S. Trade Negotiating Objectives for Uruguay Round

U.S. trade negotiating objectives for the Uruguay Round were set by Congress in the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418), including the following:

- **Market access.** Obtain more open, equitable, and reciprocal market access in other countries; reduced tariffs and nontariff barriers; and more effective system of international trade disciplines.
- **Dispute settlement.** Adopt more effective and expeditious DS mechanisms and procedures, and enable better enforcement of U.S. rights.
- **Transparency.** Ensure broader application of the principle of transparency and clarification of the costs and benefits of other countries' trade policy actions.
- **Development.** Ensure developing countries promote the "fullest possible measure of responsibility" for maintaining an open trading system by providing reciprocal benefits and assuming equal obligations.
- **Agriculture.** Obtain more open and fair conditions of trade in agriculture, and increase U.S. exports by reducing barriers to trade and production subsidies.
- **Unfair trade practices.** Discourage use of trade-distorting practices, nontariff measures, and other unfair trading practices, such as subsidies in several sectors.
- **Services.** Develop international rules in trade in services and reduce or eliminate barriers.
- **Intellectual property.** Establish GATT obligations on adequate protection and effective enforcement for IP, including copyrights, patents, and trade secrets.
- **Foreign direct investment.** Reduce trade-distorting barriers to FDI, expand principle of national treatment, and develop internationally agreed rules.
- **Worker rights.** Promote respect for worker rights.

[14] WTO, "Pre-WTO legal texts," https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm.

[15] Douglas A. Irwin, *Free Trade Under Fire*, Princeton University Press, 2009, p. 226.

[16] Four agreements remained "plurilateral," including on government procurement, bovine meat, civil aircraft and dairy products. See https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

# World Trade Organization

The WTO succeeded the GATT in 1995. In contrast to the GATT, the WTO was created as a permanent organization. But as with the GATT, the WTO Secretariat and support staff is small by international standards and lacks independent power. The power to write rules and negotiate future trade liberalization resides specifically with the member countries, and not the WTO director-general (DG) or staff. Thus, the WTO is referred to as a member-driven organization.[17] The Secretariat's primary role is to provide technical and professional support to members on WTO activities and negotiations, monitor and analyze global trade developments, and organize Ministerial Conferences.

Decisions within the WTO are made by consensus, although majority voting can be used in limited circumstances. The highest-level body in the WTO is the Ministerial Conference, which is the body of political representatives (trade ministers) from each member country (**Figure 1**). The body that oversees the day-to-day operations of the WTO is the General Council, which consists of a representative from each member country. Many other councils and committees deal with particular issues, and members of these bodies are also national representatives.

In general, the WTO has three broad functions: administering the rules and disciplines of the trading system; establishing new rules through negotiations; and resolving disputes between member states.

## Administering Trade Rules

The WTO administers the global rules and principles negotiated and signed by its members. The main purpose of the rules is "to ensure that trade flows as smoothly, predictably, and freely as possible."[18] WTO rules and agreements are essentially contracts that bind governments to keep their trade policies within agreed limits. A number of fundamental principles guide WTO rules.

In general, as with the GATT, these key principles are nondiscrimination and the notion that freer trade through the gradual reduction of trade barriers strengthens the world economy and increases prosperity for each member. The WTO agreements apply the GATT principles of nondiscrimination as discussed above: MFN treatment and national treatment. The trade barriers concerned include tariffs, quotas, and a growing range of nontariff measures, such as product standards, food safety measures, subsidies, and discriminatory domestic regulations. The fundamental principle of reciprocity is also behind members' aim of "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."[19]

Transparency is another key principle of the WTO, which aims to reduce information asymmetry in markets, ensure trust, and, therefore, foster greater stability in the global trading system. Transparency commitments are incorporated into individual WTO agreements. Active participation in various WTO committees also aims to ensure that agreements are monitored and that members are held accountable for their actions. For example, members are required to publish their trade practices and policies and notify new or amended regulations to WTO

[17] Ibid, p. 239.

[18] "The WTO," https://www.wto.org/english/thewto_e/thewto_e.htm.

[19] Preamble to the Marrakesh Agreement Establishing the World Trade Organization, https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

committees. Regular trade policy reviews of each member's trade policies and practices provide a deeper dive into an economy's implementation of its commitments—see "Trade Policy Review Mechanism (Annex 3)."[20] In addition, the WTO's annual trade monitoring report takes stock of trade-restrictive and trade-facilitating measures of the collective body of WTO members.

While opening markets can encourage competition, innovation, and growth, it can also entail adjustments for workers and firms. Trade liberalization can also be more difficult for the least-developed countries (LDCs) and countries transitioning to market economies. WTO agreements thus allow countries to lower trade barriers gradually. Developing countries and sensitive sectors in particular are usually given longer transition periods to fulfill their obligations; developing countries make up about two-thirds of the WTO membership—WTO members self-designate developing country status.[21] The WTO also supplements this so-called "special and differential" treatment (SDT) for developing countries with trade capacity-building measures to provide technical assistance and help implement WTO obligations, and with permissions for countries to extend nonreciprocal, trade preference programs.

In WTO parlance, when countries agree to open their markets further to foreign goods and services, they "bind" their commitments or agree not to raise them. For goods, these bindings amount to ceilings on tariff rates. A country can change its bindings, but only after negotiating with its trading partners, which could entail compensating them for loss of trade. As shown in **Figure 2**, one of the achievements of the Uruguay Round was to increase the amount of trade under binding commitments. Bound tariff rates are not necessarily the rates WTO members apply in practice to imports from trading partners; so-called applied MFN rates can be lower than bound rates, as reflected in tariff reductions under the GATT. **Figure 3** shows average applied MFN tariffs worldwide. In 2019, the United States simple average MFN tariff was 3.3%.

A key issue in the Doha Round for the United States was lowering major developing countries' relatively high bound tariffs to below their applied rates in practice to achieve commercially meaningful new market access.

Promising not to raise a trade barrier can have a significant economic effect because the promise provides traders and investors certainty and predictability in the commercial environment. A growing body of economic literature suggests certainty in the stability of tariff rates may be just as important for increasing global trade as reduction in trade barriers.[22] This proved particularly important during the 2009 global economic downturn. Unlike in the 1930s, when countries reacted to slumping world demand by raising tariffs and other trade barriers, the WTO reported that its 153 members (at the time), accounting for 90% of world trade, by and large did not resort to protectionist measures in response to the crisis.[23]

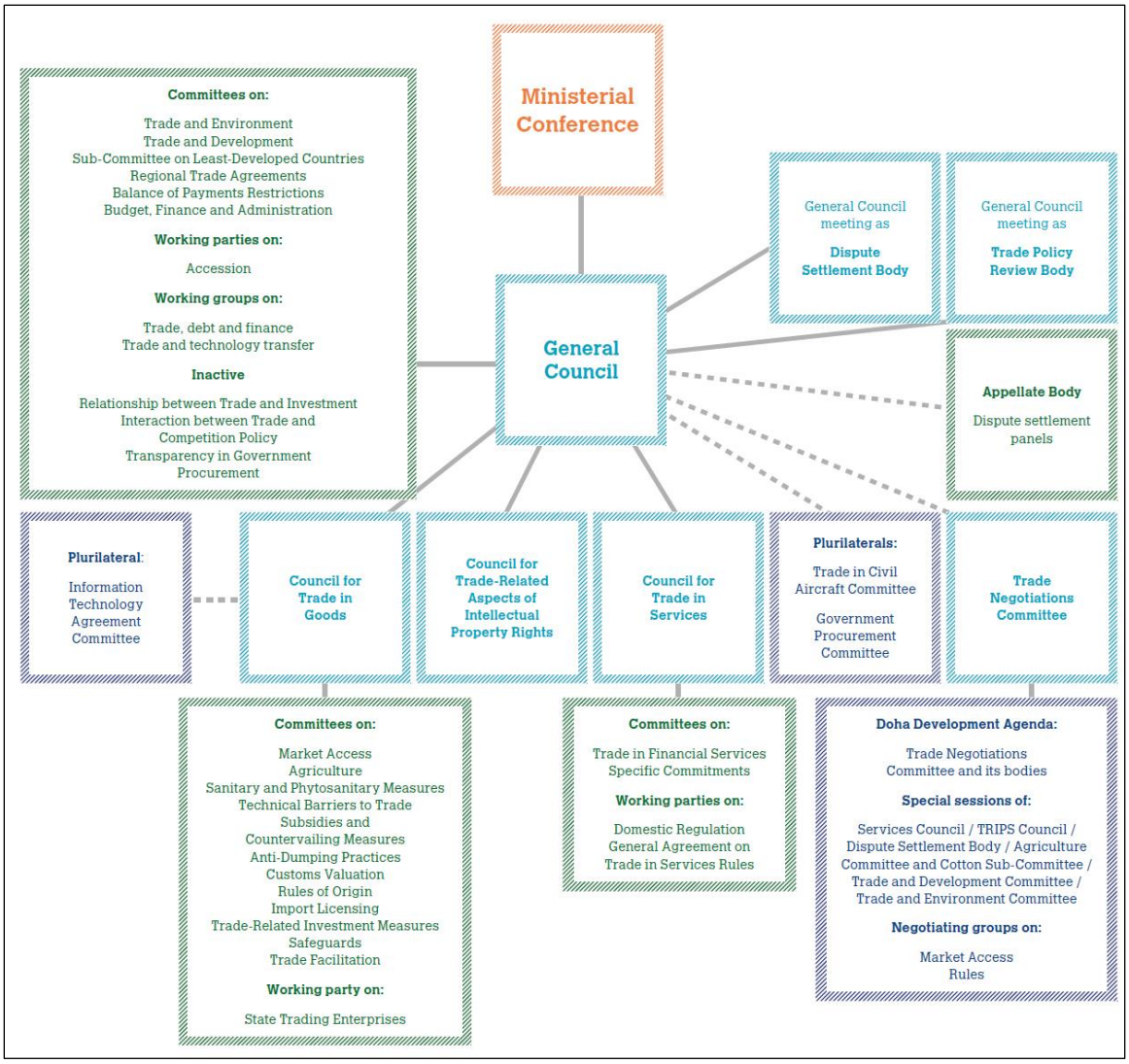
[20] For more information, see https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm.

[21] The WTO does not specify criteria for "developing" country status, though a sub-group, least-developed countries, are defined under United Nations criteria. See, "Who are the developing countries in the WTO?" https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm.

[22] See for example, Kyle Handley and Nuno Limao, "Policy Uncertainty, Trade, and Welfare: Theory and Evidence for China and the United States," *American Economic Review*, vol. 107, no. 9 (2017).

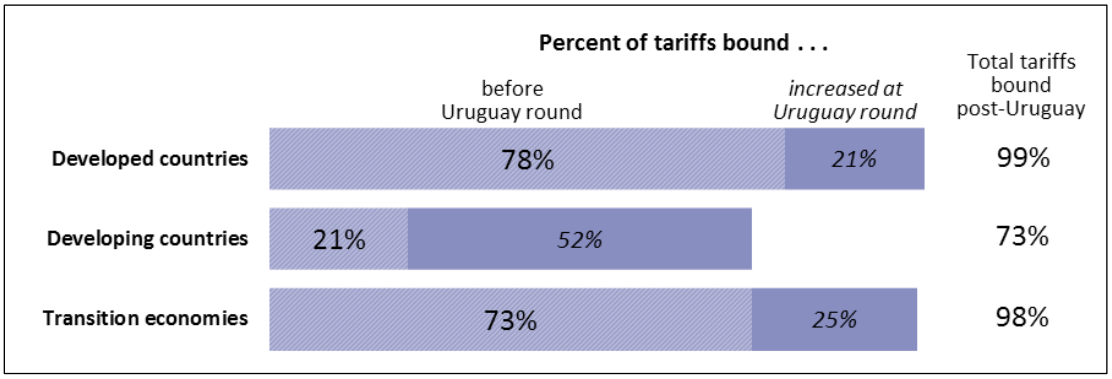
[23] WTO, "Overview of Developments in the International Trading Environment," WT/TPR/OV/12, November 18, 2009, p. 4.

**Figure 1. WTO Structure**




**Source:** WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf.

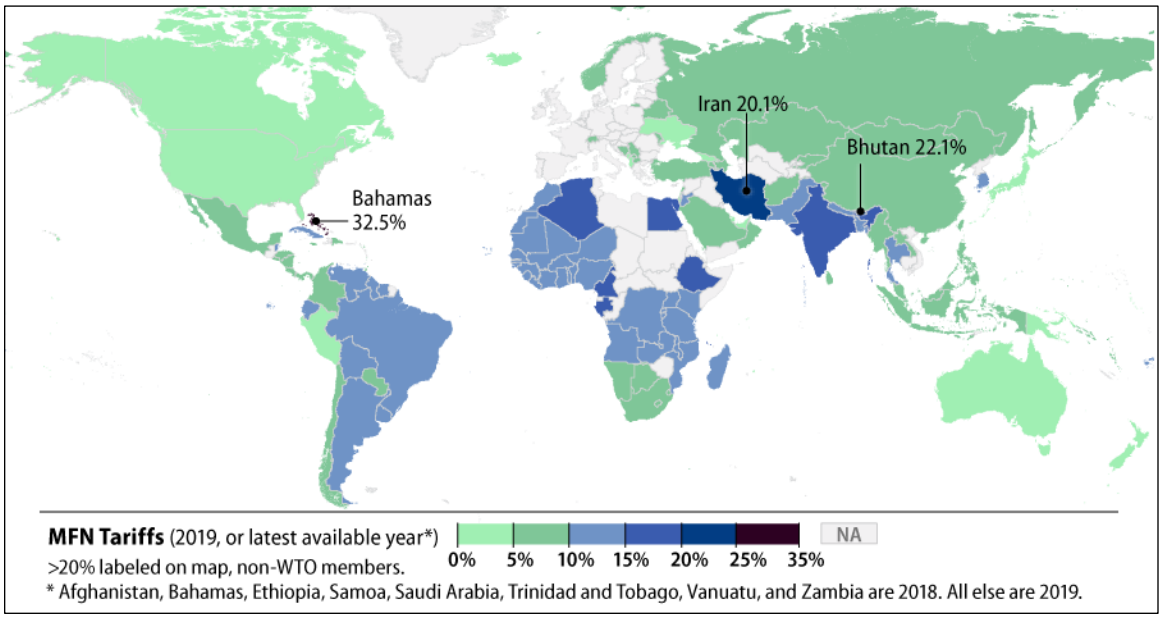
**Figure 2. Uruguay Round Impact on Tariff Bindings**




**Source:** Data from WTO, *Understanding the WTO: Basics*, http://www.wto.org. Created by CRS.

**Notes:** Percentages reflect shares of total tariff lines; not trade-weighted. The Uruguay Round was 1986-1994.

**Figure 3. Average Applied Most-Favored Nation (MFN) Tariffs**




**Source:** WTO, 2020, https://www.wto.org/english/res_e/reser_e/tariff_profiles_e.htm. Created by CRS.

The promotion of fair and undistorted competition is another important principle of the WTO. While the WTO is often described as a "free trade" organization, numerous rules are concerned with ensuring transparent and non-discriminatory competition. In addition to nondiscrimination, MFN treatment and national treatment concepts aim to promote "fair" conditions of trade. WTO rules on subsidies and antidumping in particular aim to promote fair competition in trade through recourse to trade remedies, or temporary restriction of imports, in response to alleged unfair trade practices—see "Trade Remedies."[24] For example, when a foreign company receives a prohibited subsidy for exporting as defined in WTO agreements, WTO rules allow governments to impose duties to offset any unfair advantage found to cause injury to their domestic industries.[25]

The scope of the WTO is broader than the GATT because, in addition to goods, it administers multilateral agreements on agriculture, services, intellectual property, and certain trade-related investment measures. These newer rules in particular are forcing the WTO and its DS system to deal with complex issues that go beyond tariff border measures.

## Establishing New Rules and Trade Liberalization through Negotiations

As the GATT did for 47 years, the WTO provides a negotiating forum where members reduce barriers and try to sort out their trade problems. Negotiations can involve a few countries, many countries, or all members. As part of the post-Uruguay Round agenda, negotiations covering basic telecommunications and financial services were completed in 1997 under the auspices of the WTO. Groups of WTO members also negotiated deals to eliminate tariffs on certain information technology products and improve rules and procedures for government procurement. A more

[24] WTO, "Anti-dumping, subsidies, safeguards: contingencies, etc." https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

[25] See CRS Report R46296, *Trade Remedies: Antidumping*, by Christopher A. Casey, and CRS In Focus IF10018, *Trade Remedies: Antidumping and Countervailing Duties*, by Vivian C. Jones and Christopher A. Casey.

recent significant accomplishment was the WTO Trade Facilitation Agreement in 2017, addressing customs and logistics barriers.

The latest round of multilateral negotiations, the Doha Development Agenda (DDA), or Doha Round, launched in 2001, has achieved limited progress to date, as the agenda proved difficult and contentious. Despite a lack of consensus on its future, many view the round as effectively over.[26] The negotiations stalled over issues such as reducing domestic subsidies and opening markets further in agriculture, industrial tariffs, nontariff barriers, services, intellectual property rights, and SDT for developing countries. The negotiations exposed fissures between developed countries, led by the United States and EU, and developing countries, led by China, Brazil, and India, who have come to play a more prominent role in global trade.

The inability of countries to achieve the objectives of the Doha Round prompted many to question the utility of the WTO as a negotiating forum, as well as the practicality of conducting a large-scale negotiation involving 164 participants with consensus and the single undertaking as guiding principles. At the same time, members have advanced several proposals for moving forward from Doha and making the WTO a stronger forum for negotiations in the future.[27] (See "Policy Issues and Future Direction.")

With some exceptions, such as the Trade Facilitation Agreement, the WTO arguably has been more successful in the negotiation of discrete items to which not all parties must agree or be bound (see "Plurilateral Agreements (Annex 4)"). Some view these plurilaterals as a more promising negotiating approach for the WTO moving forward given their flexibility, as they can involve subsets of more "like-minded" partners and advance parts of the global trade agenda. Some experts have raised concerns, however, that this approach could lead to "free riders"—those who benefit from the agreement but do not make commitments—as agreements on an MFN basis, or otherwise, could isolate some countries who do not participate and may face trade restrictions or disadvantages as a result. Others argue that only through the single undertaking approach with multiple issues under negotiation can there be trade-offs sufficient to bring all members on board.

## Resolving Disputes

The third overall function of the WTO is to provide a mechanism to enforce its rules and settle trade disputes. A central goal of the United States during the Uruguay Round negotiations was to strengthen the DS mechanism that existed under the GATT. While the GATT's process for settling disputes between member countries was informal, ad hoc, and voluntary, the WTO DS process is more formalized and enforceable.[28] Under the GATT, panel proceedings could take years to complete; any defending party could block an unfavorable ruling; failure to implement a ruling carried no consequence; and the process did not cover all the agreements. Under the WTO, there are strict timetables—though not always followed—for panel proceedings; the defending party cannot block rulings; there is one comprehensive DS process covering all the agreements; and the rulings are enforceable. WTO adjudicative bodies can authorize retaliation if a member fails to implement a ruling or provide compensation. Yet, under both systems, considerable emphasis is placed on having the member countries attempt to resolve disputes through

[26] For example, see "The Doha round finally dies a merciful death," *Financial Times*, December 21, 2015.

[27] See CRS Report RL32060, *World Trade Organization Negotiations: The Doha Development Agenda*, by Ian F. Fergusson; and CRS Report RS22927, *WTO Doha Round: Implications for U.S. Agriculture*, by Randy Schnepf.

[28] This stronger DS system was created, in part due to demands from Congress based on concerns that the GATT approach was ineffective in eliminating barriers to U.S. exports. In fact, it was first principal trade negotiating objective set out in the Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, §1101(b)(1), 19 U.S.C. 2901(b)(1).

consultations and negotiations, rather than relying on formal panel rulings. See "Dispute Settlement Understanding (DSU)" for more detail on WTO procedures and dispute trends.

## The United States and the WTO

The statutory basis for U.S. membership in the WTO is the Uruguay Round Agreements Act (URAA, P.L. 103-465), which approved the trade agreements resulting from the Uruguay Round. The legislation contained general provisions on:

- approval and entry into force of the Uruguay Round Agreements, and the relationship of the agreements to U.S. laws (Section 101 of the act);
- authorities to implement the results of current and future tariff negotiations (Section 111 of the act);
- oversight of activities of the WTO (Sections 121-130 of the act);
- procedures regarding implementation of DS proceedings affecting the United States (Section 123 of the act);
- objectives regarding extended Uruguay Round negotiations;
- statutory modifications to implement specific agreements, including:
    - Antidumping Agreement;
    - Agreement on Subsidies and Countervailing Measures (ASCM);
    - Safeguards Agreement;
    - Agreement on Government Procurement (GPA);
    - Technical Barriers to Trade (TBT) (product standards);
    - Agreement on Agriculture; and
    - Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

U.S. priorities and objectives for the GATT/WTO have been reflected in various trade promotion authority (TPA) legislation since 1974. For example, the Omnibus Trade and Competitiveness Act of 1988 specifically contained provisions directing U.S. negotiators to negotiate disciplines on agriculture, DS, intellectual property, trade in services, and safeguards, among others, that resulted in WTO agreements in the Uruguay Round. The Trade Act of 2002 provided U.S. objectives for the Doha Round, including seeking to expand commitments on e-commerce and clarifications to the WTO DS system. The 2015 TPA, perhaps reflecting the impasse of the Doha Round, was more muted, seeking full implementation of existing agreements, enhanced compliance by members with their WTO obligations, and new negotiations to extend commitments to new areas.[29]

Section 125(b) of the URAA sets procedures for congressional disapproval of WTO participation. It specifies that Congress's approval of the WTO agreement shall cease to be effective "if and only if" Congress enacts a privileged joint resolution calling for withdrawal. Congress may vote every five years on withdrawal; resolutions were introduced in 2000 and 2005, however neither passed.[30] The debates in 2000 and 2005 were characterized by concerns about certain dispute settlement cases, especially adverse decisions on trade remedies, and beliefs that WTO

[29] See CRS Report R43491, *Trade Promotion Authority (TPA): Frequently Asked Questions*, by Ian F. Fergusson and Christopher M. Davis.

[30] For the 2000 and 2005 resolutions, see https://www.congress.gov/bill/106th-congress/house-joint-resolution/90/actions and https://www.congress.gov/bill/109th-congress/house-joint-resolution/27/actions.

membership impinges U.S. sovereignty. WTO supporters emphasized the economic benefits and value of an open and rules-based trading system. Several factors shaped past debates. In 2000, China had yet to join the WTO. In 2005, China had acceded but was not yet playing a pivotal role, and the Doha Round, launched in 2001, was actively being negotiated. More recently, U.S. concerns with the WTO have grown in some quarters and perception of WTO's benefits have dimmed among some Members.[31] In May 2020, withdrawal resolutions were introduced during the 116th Congress by Representatives DeFazio and Pallone (H.J.Res. 89) and by Senator Hawley (S.J.Res. 71).[32] A rule change proposed by the House Rules Committee and adopted by the House, as well as by an interpretation of the statute reportedly made by the Senate Parliamentarian, are likely to prevent votes from occurring on the measures.[33]

# WTO Agreements

The WTO member-led body negotiates, administers, and settles disputes for agreements that cover goods, agriculture, services, certain trade-related investment measures, and intellectual property rights, among other issues. The WTO core principles are enshrined in a series of trade agreements that include rules and commitments specific to each agreement, subject to various exceptions. The GATT/WTO system of agreements has expanded rulemaking to several areas of international trade, but does not extensively cover some key areas, including multilateral investment rules, trade-related labor or environment issues, and emerging issues like digital trade or the commercial role of state-owned enterprises.

## Marrakesh Agreement Establishing the World Trade Organization

The Marrakesh Agreement is the umbrella agreement under which the various agreements, annexes, commitment schedules, and understandings reside. The Marrakesh Agreement itself created the WTO as a legal international organization and sets forth its functions, structure, secretariat, budget procedures, decisionmaking, accession, entry-into-force, withdrawal, and other provisions. The Agreement contains four annexes. The three major substantive areas of commitments undertaken by the members are contained in Annex 1.

## Multilateral Agreement on Trade in Goods (Annex 1A)

The Multilateral Agreement on Trade in Goods establishes the rules for trade in goods through sectoral or issue-specific agreements (see **Table 2**). Its core is the GATT 1994, which includes GATT 1947, the amendments, understanding, protocols, and decisions of the GATT from 1947 to 1994, cumulatively known as the GATT-*acquis,* as well as six Understandings on Articles of the GATT 1947 negotiated in the Uruguay Round. In addition to clarifying the core WTO principles, each agreement contains sector- or issue-specific rules and principles. The schedule of commitments identifies each member's specific binding commitments on tariffs for goods in general, and combinations of tariffs and quotas for some agricultural goods. Through a series of negotiating rounds, members agreed to the current level of trade liberalization (**Figure 2** above).

[31] For example, see Senator Josh Hawley's op-ed, "The WTO Should be Abolished," *New York Times*, May 5, 2020.

[32] CRS Insight IN11399, *The WTO Withdrawal Resolutions*, by Ian F. Fergusson and Christopher M. Davis.

[33] Doug Palmer, "New ruling quashes Hawley's hope for Senate WTO withdrawal vote," *Politico*, July 1, 2020.

**Table 2. Marrakesh Protocol to the GATT 1994**

| | | | |
|---|---|---|---|
| Agreement on Agriculture | Agreement on Implementation of Article VI (Anti-dumping) | Agreement on Import Licensing Procedures | Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) |
| Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) | Agreement on Implementation of Article VII (Customs Valuation) | Agreement on Subsidies and Countervailing Measures | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| Agreement on Technical Barriers to Trade (TBT) | Agreement on Preshipment Inspection | Agreement on Safeguards | Agreement on Trade in Civil Aircraft |
| Agreement on Trade-Related Investment Measures (TRIMS) | Agreement on Rules of Origin (ROO) | General Agreement on Trade in Services (GATS) | Agreement on Government Procurement |

**Source:** CRS based on WTO.

In the last four rounds of negotiations, WTO members aimed to expand international trade rules beyond tariff reductions to tackle barriers in other areas. For example, agreements on technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures aim to protect a country's rights to implement domestic regulations and standards, while ensuring they do not discriminate against trading partners or unnecessarily restrict trade.[34]

## Agreement on Agriculture (AoA)

The Agreement on Agriculture (AoA) includes rules and commitments on market access and disciplines on certain domestic agricultural support programs and export subsidies. Its objective was to provide a framework for WTO members to reform certain aspects of agricultural trade and domestic farm policies to facilitate more market-oriented and open trade.[35] Regarding market access, members agreed not to restrict agricultural imports by quotas or other nontariff measures, converting them to tariff-equivalent levels of protection, such as tariff-rate quotas—a process called "tariffication." Developed countries committed to cut tariffs (or out-of-quota tariffs, those tariffs applied to any imports above the agreed quota threshold) by an average of 36% in equal increments over six years; developing countries committed to 24% tariff cuts over 10 years.

[34] TBT refers to technical regulations, standards and certification and conformity assessment procedures; while SPS refers to food safety and animal and plant health measures.

[35] WTO, "Agriculture: fairer markets for farmers," https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm.

Special safeguards to temporarily restrict imports were permitted for products considered sensitive by a member in certain events, such as falling prices or surges of imports.

The AoA also categorizes and restricts agricultural domestic support programs, according to their potential to distort trade. Members agreed to limit and reduce the most distortive forms of domestic subsidies over 6 to 10 years, referred to as "amber box" subsidies and measured by the Aggregate Measure of Support (AMS) index.[36] Subsidies considered to cause minimal distortion on production and trade are not subject to spending limits and are exempted from obligations as "green box" and "blue box" subsidies or under *de minimis* (below a certain threshold) or SDT provisions. A so-called "peace" clause protected members using domestic subsidies that comply with the agreement from being challenged under other WTO agreements, such as through use of countervailing duties; the clause expired after nine years in 2003. In addition, AoA commitments required that export subsidies were to be capped and subject to incremental reductions.

Members are required to submit notifications regularly on the implementation of AoA commitments on market access, domestic subsidies, and export competition—though some countries, including the United States, have raised concerns that these requirements are not abided by in a consistent fashion.

Further agricultural trade reform was a major priority under the Doha Round, but to date, negotiations have seen limited progress on resolving major issues. Members have advanced some areas for reform, however, for example, in 2015 members reached an agreement to fully eliminate export subsidies for agriculture.

## Trade-Related Investment Measures (TRIMS)

The framework of the GATT did not address the growing linkages between trade and investment. During the Uruguay Round, the Agreement on Trade-Related Investment Measures (TRIMS) was drafted to address certain investment measures that may restrict and distort trade. The agreement did not address the regulation or protection of foreign investment, but focused on investment measures that may violate basic GATT disciplines on trade in goods, such as nondiscrimination. Specifically, members committed not to apply any TRIM that is inconsistent with provisions on national treatment or a prohibition of quantitative restrictions on imports or exports. TRIMS includes an annex with an illustrative list of prohibited measures, such as local content requirements—requirements to purchase or use products of domestic origin. The agreement also includes a safeguard measure for balance of payment difficulties, which permits developing countries to temporarily suspend TRIMS obligations.

While TRIMS and other WTO agreements, such as the GATS (see below), include some provisions pertaining to investment, the lack of comprehensive multilateral rules on investment led to several efforts under the Doha Round to consider proposals, which to date have been unfruitful (see "Future Negotiations on Selected Issues"). In December 2017, 70 WTO members announced new discussions on developing a multilateral framework on investment facilitation, in part to complement the successful negotiation of rules on trade facilitation.

[36] The United States committed to spend no more than $19.1 billion annually on amber box programs. For more detail, see CRS Report R45305, *Agriculture in the WTO: Rules and Limits on U.S. Domestic Support*, by Randy Schnepf.

## General Agreement on Trade in Services (GATS) (Annex 1B)

The GATT agreements focused solely on trade in goods. Services were eventually covered in the GATS as a result of the Uruguay Round.[37] The GATS provides the first and only multilateral framework of principles and rules for government policies and regulations affecting services trade. It has served as a foundation for bilateral and regional trade agreements covering services.

The services trade agenda is complex due to the characteristics of the sector. "Services" refers to a growing range of economic activities, such as audiovisual, construction, computer and related services, express delivery, e-commerce, financial, professional (e.g., accounting and legal services), retail and wholesaling, transportation, tourism, and telecommunications. Advances in information technology and the growth of global supply chains have reduced barriers to trade in services, expanding the services tradable across national borders. But liberalizing trade in services can be more complex than for goods, since the impediments faced by service providers occur largely within the importing country, as so-called "behind the border" barriers, some in the form of government regulations. While the right of governments to regulate service industries is widely recognized as prudent and necessary to protect consumers from harmful or unqualified providers, a main focus of WTO members is whether these regulations are applied to foreign service providers in a discriminatory and unnecessarily trade restrictive manner that limits market access.

The GATS contains multiple parts, including definition of scope (excluding government-provided services); principles and obligations, including MFN treatment and transparency; market access and national treatment obligations; annexes listing exceptions that members take to MFN treatment; as well as various technical elements. Members negotiated GATS on a positive list basis, which means that the commitments only apply to those services and modes of delivery listed in each member's schedule of commitments.[38] WTO members adopted a system of classifying four modes of delivery for services to measure trade in services and classify government measures that affect trade in services, including cross-border supply, consumption abroad, commercial presence, and temporary presence of natural persons (**Figure 4**). Under GATS, unless a member country has specifically committed to open its market to suppliers in a particular service, the national treatment and market access obligations do not apply.

In addition to the GATS, some members made specific sectoral commitments in financial services and telecommunications. Negotiations to expand these commitments were later folded into the broader services negotiations.

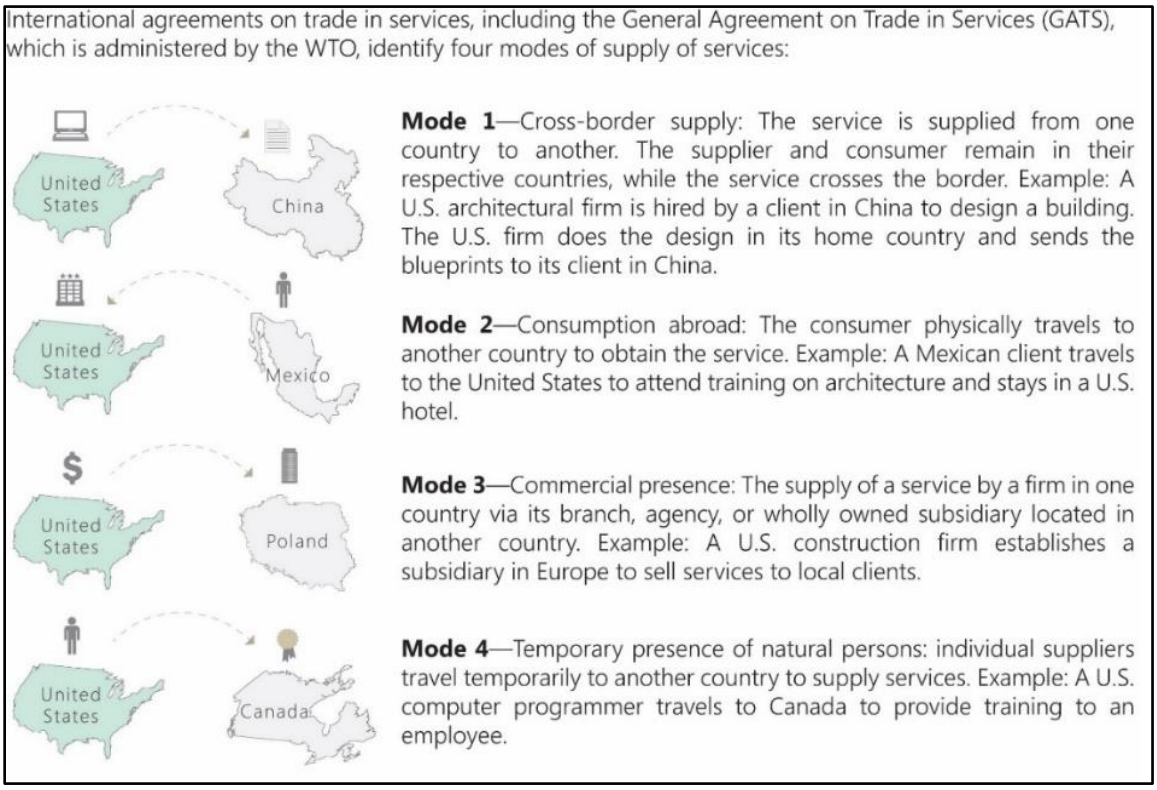
WTO members aimed to update GATS provisions and market access commitments as part of the Doha Round. Several WTO members have since submitted revised offers of services liberalization, but in the view of the United States and others the talks have not yielded adequate offers of improved market access (see "Future Negotiations"). Given the lack of progress, in 2013, 23 WTO members, including the United States, representing approximately 70% of global services trade, launched negotiations of a services-specific plurilateral agreement.[39] Although outside of the WTO structure, participants designed the Trade in Services Agreement (TiSA) negotiations in a way that would not preclude a concluded agreement from someday being brought into the WTO. TiSA talks were initially led by Australia and the United States, but have since stalled; the Trump Administration has not stated a formal position on TiSA.

[37] For more analysis, see CRS Report R43291, *U.S. Trade in Services: Trends and Policy Issues*, by Rachel F. Fefer.

[38] Within U.S. FTAs, the United States has sought a more comprehensive negative list approach, in which obligations are to apply to all types of services, unless explicitly excluded by a country in its list of nonconforming measures.

[39] See CRS In Focus IF10311, *Trade in Services Agreement (TiSA) Negotiations*, by Rachel F. Fefer.

**Figure 4. Four Modes of Service Delivery and Hypothetical Examples**




**Source:** CRS based on WTO.

## Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Annex 1C)

The TRIPS Agreement marked the first time multilateral trade rules incorporated intellectual property rights (IPR)—legal, private, enforceable rights that governments grant to inventors and artists to encourage innovation and creative output.[40] Like the GATS, TRIPS was negotiated as part of the Uruguay Round and was a major U.S. objective for the round. TRIPS sets minimum standards of protection and enforcement for IPR. Much of the agreement sets out the extent of coverage of the various types of intellectual property, including patents, copyrights, trademarks, trade secrets, and geographical indications. TRIPS includes provisions on nondiscrimination and on enforcement measures, such as civil and administrative procedures and remedies.

The TRIPS Agreement's newly placed requirements on many developing countries elevated the debate over the relationship between IPR and development. At issue is the balance of rights and obligations between protecting private right holders and securing broader public benefits, such as access to medicines and the free flow of data, especially in developing countries. TRIPS includes flexibilities for developing countries allowing longer phase-in periods for implementing obligations and, separately, for pharmaceutical patent obligations—these were subsequently extended for LDCs until January 2033 or until they no longer qualify as LDCs, whichever is

[40] For more detail, see CRS Report RL34292, *Intellectual Property Rights and International Trade*, by Shayerah Ilias Akhtar and Ian F. Fergusson.

earlier.[41] The 2001 WTO "Doha Declaration" committed members to interpret and implement TRIPS obligations in a way that supports public health and access to medicines.[42] In 2005, members agreed to amend TRIPS to allow developing and LDC members that lack production capacity to import generic medicines from third country producers under "compulsory licensing" arrangements.[43] The amendment entered into force in January 2017.[44]

## Trade Remedies

While WTO agreements uphold MFN principles, they also allow exceptions to binding tariffs in certain circumstances. The WTO Agreement on Subsidies and Countervailing Measures (ASCM), the WTO Agreement on Safeguards, and articles in the GATT, commonly known as the Antidumping Agreement, allow for trade remedies in the form of temporary measures (e.g., primarily duties or quotas) to mitigate the adverse impact of various trade practices on domestic industries and workers. These include actions taken against dumping (selling at an unfairly low price) or to counter certain government subsidies, and emergency measures to limit "fairly"-traded imports temporarily, designed to "safeguard" domestic industries.

Supporters of trade remedies view them as necessary to shield domestic industries and workers from unfair competition and to level the playing field. Other domestic constituents, including some importers and downstream consuming industries, voice concern that antidumping (AD) and countervailing duty (CVD) actions can serve as disguised protectionism and create inefficiencies in the world trading system by raising prices on imported goods. How trade remedies are applied to imports has become a major source of disputes under the WTO (see below).

The United States has enacted trade remedy laws that conform to the WTO rules:[45]

- U.S. antidumping laws (19 U.S.C. §1673 et seq.) provide relief to domestic industries that have been, or are threatened with, the adverse impact of imports sold in the U.S. market at prices that are shown to be less than fair market value. The relief provided is an additional import duty placed on the dumped imports.
- U.S. countervailing duty laws (19 U.S.C. §1671 et seq.) give similar relief to domestic industries that have been, or are threatened with, the adverse impact of imported goods that have been subsidized by a foreign government or public entity, and can therefore be sold at lower prices than U.S.-produced goods. The relief provided is a duty placed on the subsidized imports.
- U.S. safeguard laws give domestic industries relief from import surges of goods; no allegation of "unfair" practices is needed to launch a safeguard investigation. Although used less frequently than AD/CVD laws, Section 201 of the Trade Act of 1974 (19 U.S.C. §2251 et seq.), is designed to give domestic industry the

[41] WTO, "Intellectual property: protection and enforcement," https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.

[42] Declaration on the TRIPS Agreement and Public Health, (WT/MIN(01)/DEC/2), November 14, 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm. For more on TRIPS, see CRS Report RL34292, *Intellectual Property Rights and International Trade*, by Shayerah Ilias Akhtar and Ian F. Fergusson.

[43] WTO, "WTO IP rules amended to ease poor countries' access to affordable medicines," January 23, 2017, https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm.

[44] Notably, this marked the first time that a WTO agreement was amended since the WTO's inception (WTO 2017).

[45] For more detail, see CRS Report R46296, *Trade Remedies: Antidumping*, by Christopher A. Casey, CRS In Focus IF10018, *Trade Remedies: Antidumping and Countervailing Duties*, by Vivian C. Jones and Christopher A. Casey, and CRS In Focus IF10786, *Safeguards: Section 201 of the Trade Act of 1974*, by Vivian C. Jones.

opportunity to adjust to import competition and remain competitive. The relief provided is generally a temporary import duty and/or quota. Unlike AD/CVD, safeguard laws require presidential action for relief to be put into effect.

## Dispute Settlement Understanding (DSU) (Annex 2)

The DS system, often called the "crown jewel" of the WTO, has been considered by some observers to be one of the most important successes of the multilateral trading system.[46] WTO agreements contain provisions that are either binding or nonbinding. The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes—Dispute Settlement Understanding or DSU—provides an enforceable means for WTO members to resolve disputes arising under the binding provisions.[47] The DSU commits members not to determine violations of WTO obligations or impose penalties unilaterally, but to settle complaints about alleged violations under DSU rules and procedures. In recent years, there have been some calls by members for reform of the DS system to deal with procedural delays and new strains on the system, including the growing volume and complexity of cases and disagreement over the role of the Appellate Body (AB).

The Dispute Settlement Body (DSB) is a plenary committee of the WTO, which oversees the panels and adopts the recommendation of a DS panel or AB panel (see below). Panels are composed of three (or five in complex cases) panelists—not citizens of the members involved—chosen through a roster of "well qualified governmental and/or non-governmental individuals" maintained by the Secretariat. WTO members must first attempt to settle a dispute through consultations, but if these fail, a member seeking to initiate a dispute may request that a panel examine and report on its complaint. A respondent party is able to block the establishment of a panel at the DSB once, but if the complainant requests its establishment again at a subsequent meeting of the DSB, a panel is established. At its conclusion, the panel recommends a decision to the DSB that it will adopt unless all parties agree to block the recommendation. The DSU sets out a timeline of approximately one year for the initial resolution of disputes (see **Figure 5**); however, cases are rarely resolved in this timeframe.

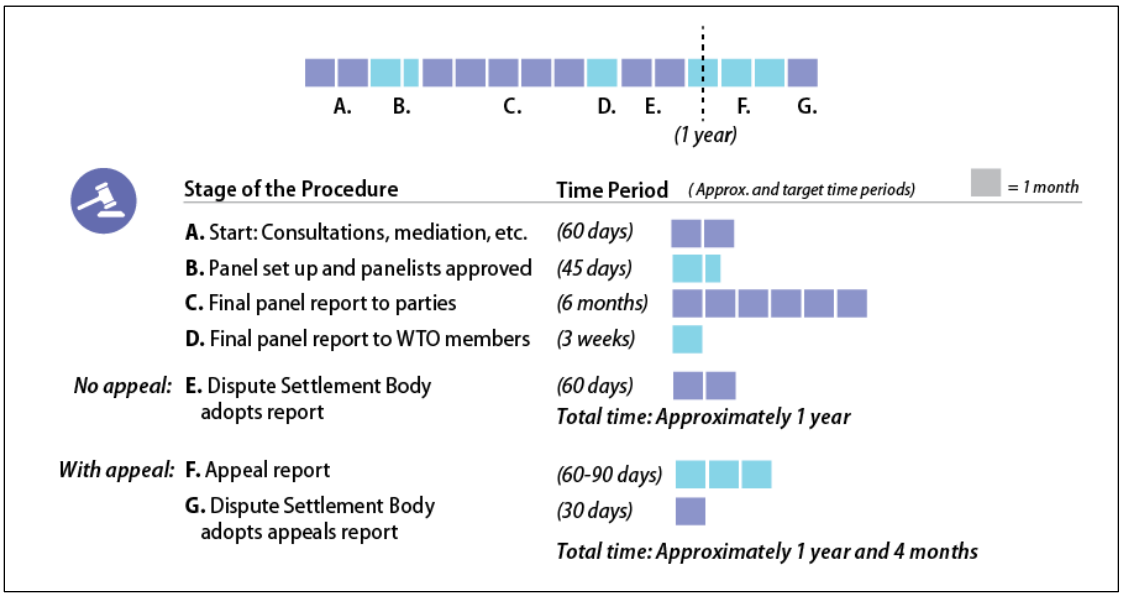
The DSU also provides for AB review of panel reports in the event a decision is appealed. The AB is composed of seven rotating panelists, appointed by the DSB, that serve four-year terms, with the possibility of a one-term reappointment. According to the DSU, appeals are to be limited to questions of law or legal interpretation developed by the panel in the case (Article 17.6). The AB is to make a recommendation, and the DSB is to ratify that recommendation within 120 days of the ratification of the initial panel report, but again, such timely resolution rarely occurs. The United States has raised several issues regarding the practices of the AB and has blocked the appointments of several judges—for more on the debate, see "Proposed Institutional Reforms."

[46] WTO, "The Place of the WTO in the International Legal Order," Speeches—DG Pascal Lamy, June 15, 2008, https://www.wto.org/english/news_e/sppl_e/sppl94_e.htm.

[47] For more information, see CRS In Focus IF10436, *Dispute Settlement in the World Trade Organization: Key Legal Concepts*, by Brandon J. Murrill.

**Figure 5. WTO Dispute Settlement Procedure**

Stages and Time Periods




**Source:** Created by CRS. Based on information from Madhur Jha, Samantha Amerasinghe, and Philippe Dauba-Pantanacce, *Global trade: Trade first! (Avoiding an own goal)*, Standard Chartered, 2017, p. 17.

**Notes:** Alternating colors indicate a different stage of the procedure. Time periods displayed are approximate. The WTO establishes timelines for each stage with one year total for the initial resolution of disputes; however, in practice, cases are rarely resolved within this timeframe.

Following the adoption of a panel or appellate report, the DSB oversees the implementation of the findings. The losing party is then to propose how it is to bring itself into compliance "within a reasonable period of time" with the DSB-adopted findings. A reasonable period of time is determined by mutual agreement with the DSB, among the parties, or through arbitration. If a dispute arises over the manner of implementation, the DSB may form a panel to judge compliance. If a party declines to comply, the parties negotiate over compensation pending full implementation. If there is still no agreement, the DSB may authorize retaliation in the amount of the determined cost of the offending party's measure to the aggrieved party's economy.

Filing a DS case provides a way for countries to resolve disputes through a legal process and to do so publicly, signaling to domestic and international constituents the need to address outstanding issues. DS procedures can serve as a deterrent for countries considering not abiding by WTO agreements, and rulings can help build a body of case law to inform countries when they implement new regulatory regimes or interpret WTO agreements.

That said, WTO agreements and decisions of panels are not self-executing and cannot directly modify U.S. law. If a case is brought against the United States and the panel renders an adverse decision, the United States would be expected to remove the offending measure within a reasonable period of time or face the possibility of either paying compensation to the complainant or be subject to sanctions, often in the form of higher tariffs on imports of certain U.S. products.

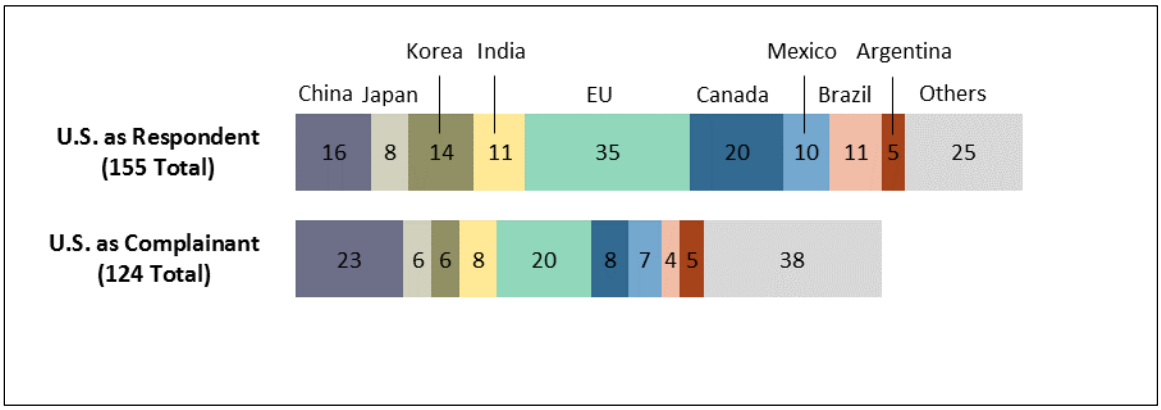
As of mid-2020, the WTO has initiated nearly 600 disputes on behalf of its members and issued more than 350 rulings, with DS activity peaking in 2018.[48] Nearly two-thirds of WTO members have participated in the DS system. Not all complaints result in formal panel proceedings; about

[48] WTO, "Dispute settlement activity—some figures," https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

half were resolved during consultations. Complainants have usually won their cases, in large part because they tend to only initiate disputes that they have a higher chance of winning. In the words of WTO DG Roberto Azevêdo, the widespread use of the DS system is evidence it "enjoys tremendous confidence among the membership, who value it as a fair, effective, efficient mechanism to solve trade problems."[49]

The United States is an active user of the DS system. Among WTO members, the United States has been a complainant in the most dispute cases since the system was established in 1995, initiating 124 disputes.[50] The two largest targets of complaints initiated by the United States are China and the EU, which, combined, account for more than one-third (**Figure 6**).

**Figure 6. WTO Disputes Involving the United States**




**Source:** WTO, https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm. Created by CRS.

**Notes:** Does not include cases with U.S. participation as a third party. Dispute count as of August 1, 2020.

As a respondent in 155 dispute cases since 1995, the United States has also had the most disputes filed against it by other WTO members, followed by the EU (87 disputes) and China (44 disputes). The EU has filed the most cases against the United States, followed by Canada, China, South Korea, Brazil, and India. A large number of complaints concern trade remedies, in particular methodologies used for calculating and imposing antidumping duties on U.S. imports.

Several pending WTO disputes are of significance to the United States. These include challenges to the tariff measures imposed by the Trump Administration under U.S. trade laws, including Section 201 (safeguards), Section 232 (national security), and Section 301 ("unfair" trading practices) (**Table 3**). Nine WTO members, including China, the EU, Canada, and Mexico, initiated separate complaints at the WTO, based on allegations that U.S. Section 232 tariffs on steel and aluminum imports are inconsistent with WTO rules. In May 2019, the cases involving Canada and Mexico were withdrawn, due to a negotiated settlement with the United States.[51] Consultations were unsuccessful in resolving the remaining disputes and panel decisions are expected in late 2020. Most countries notified their complaints pursuant to the Agreement on Safeguards, though some also allege that U.S. tariff measures and related exemptions are contrary

[49] WTO, "WTO disputes reach 500 mark," November 10, 2015, https://www.wto.org/english/news_e/news15_e/ds500rfc_10nov15_e.htm.

[50] Dispute count as of early August 2020. WTO, https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.

[51] The three countries announced a joint monitoring and consultation system to replace the tariffs. See https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/united-states-announces-deal-canada-and.

to U.S. obligations under several provisions of the GATT. Several other WTO members have requested to join the disputes as third parties.

In 2018, the United States filed its own WTO complaints over retaliatory tariffs imposed by six countries (Canada, China, EU, Mexico, Russia, and Turkey) in response to U.S. actions.[52] Most recently, in July 2019 the United States filed a similar case against India. The cases are in the panel stage (except for resolved cases with Canada and Mexico). The United States has invoked the national security exception (GATT Article XXI) in defense of its tariffs (see "Key Exceptions under GATT/WTO"), and states that the tariffs are not safeguards as claimed by other countries.

**Table 3. WTO Challenges to Tariff Measures Imposed by Trump Administration Under U.S. Trade Laws**

| Issue | Complainant country | Dispute number | Date Filed / Latest Status |
|---|---|---|---|
| **SECTION 201** | | | |
| **U.S. safeguard measure on crystalline silicon photovoltaic products** | South Korea | DS545 | 5/14/18 consultations requested; 9/26/18 panel established but not yet composed |
| | China | DS562 | 8/14/18 consultations requested 10/24/19 panel composed |
| **U.S. safeguard measure on large residential washers imports** | South Korea | DS546 | 5/14/18 consultations requested; 7/01/19 panel composed |
| **SECTION 232** | | | |
| **U.S. tariffs on steel and aluminum imports** | China | DS544 | 4/05/18 consultations requested; 01/25/19 panel composed |
| | India | DS547 | 5/18/18 consultations requested; 01/25/19 panel composed |
| | EU | DS548 | 6/01/18 consultations requested; 01/25/19 panel composed |
| | Canada | DS550 | 6/01/18 consultations requested; 05/23/19 settled or terminated (withdrawn, mutually agreed solution) |
| | Mexico | DS551 | 6/05/18 consultations requested; 05/28/19 settled or terminated (withdrawn, mutually agreed solution) |
| | Norway | DS552 | 6/12/18 consultations requested; 01/25/19 panel composed |
| | Russia | DS554 | 6/29/18 consultations requested; 01/25/19 panel composed |
| | Switzerland | DS556 | 7/09/18 consultations requested; 01/25/19 panel composed |
| | Turkey | DS564 | 8/15/18 consultations requested; 01/25/19 panel composed |
| **SECTION 301** | | | |

[52] USTR, "United States Challenges Five WTO Members Imposing Illegal Tariffs Against U.S. Products," press release, July 2018, https://go.usa.gov/xPftA.

| Issue | Complainant country | Dispute number | Date Filed / Latest Status |
|---|---|---|---|
| **U.S. tariffs on certain Chinese imports** | China | DS543 | 4/04/18 consultations requested; 06/03/19 panel composed |
| | China | DS565 | 8/23/18 consultations requested |
| | China | DS587 | 09/02/19 consultations requested |

**Source:** WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

**Note:** Status as of August 1, 2020. Panel established is when the DSB has agreed to create a panel but the panelists have not yet been chosen (i.e., panel composed).

## Trade Policy Review Mechanism (Annex 3)

Annex 3 sets the procedures for regular trade policy reviews that are conducted by the Secretariat to report on the trade policies of members. These reviews are carried out by the Trade Policy Review Body (TPRB) and are conducted periodically with the largest economies (United States, EU, Japan, and China) evaluated every three years, the next 16 largest economies every five years, and remaining economies every seven years. These reviews are meant to increase transparency of a country's trade policy and enable a multilateral assessment of the effect of policies on the trading system. The reviews also allow each member country to question specific practices of other members, and may serve as a forum to flag, and possibly avoid, future disputes.

The most recent trade policy review of China occurred in July 2018.[53] During the review members noted and commended some recent initiatives of China to open market access and liberalize its foreign investment regime. Several concerns were also raised, including "the preponderant role of the State in general, and of state-owned enterprises in particular," and "China's support and subsidy policies and local content requirements, including those that may be part of the 2025 [Made in China] plan."[54]

### 2018 Trade Policy Review of the United States

The most recent trade policy review of the United States culminated in December 2018.[55] The Secretariat's report issued in November is a factual description of a country's policy and of significant developments since the last review. It does not pass judgement on the consistency of a country's policies with WTO agreements. Subsequently, the TPRB met on December 17-19 to assess the report, pose questions, and allow other members to opine on specific aspects of U.S. policy. In his statement, U.S. Ambassador to the WTO Dennis Shea contended that U.S. trade policy is "steadfastly focused on the national interest including retaining and using US sovereign power to act in defense of that interest." He described U.S. trade policy as resting on five major pillars: "supporting U.S. national security, strengthening the U.S. economy, negotiating better trade deals, aggressive enforcement of U.S. trade laws, and reforming the multilateral trading system."[56]

While WTO members generally lauded the United States on a free and open trade policy, and recognized its traditional role as a pillar of the multilateral trading system, some countries voiced their displeasure at recent U.S. trade actions. Members took issue with the imposition of tariffs on steel and aluminum as a result of the Section 232 national security determinations; the imposition of Section 301 tariffs on China; increased use of trade remedies; and rising levels of trade-distorting farm subsidies, including the aid package for agricultural producers

[53] For the text of the report, see https://www.wto.org/english/tratop_e/tpr_e/tp475_e.htm.

[54] WTO, "Trade Policy Review: China: Concluding remarks by the Chairperson," July 11 and 13, 2018, https://www.wto.org/english/tratop_e/tpr_e/tp475_crc_e.htm.

[55] See https://www.wto.org/english/tratop_e/tpr_e/tp482_e.htm.

[56] "U.S. Statement by Ambassador Shea at the 14th Trade Policy Review of the United States," December 17, 2018, https://geneva.usmission.gov/2018/12/17/u-s-statement-by-ambassador-shea-at-the-14th-wto-tpr-of-the-united-states-of-america/.

hit by retaliatory tariffs; as well as perennial irritants, such as Buy American policies and Jones Act maritime and cabotage restrictions.[57] According to the EU Ambassador to the WTO Marc Vanheukelen, "the multilateral trading system is in a deep crisis and the United States is in the epicenter for a number of reasons."[58]

## Plurilateral Agreements (Annex 4)

Most WTO agreements in force have been negotiated on a multilateral basis, meaning the entire body of WTO members subscribes to them. By contrast, plurilateral agreements are negotiated by a subset of WTO members and often focus on a specific sector. A handful of such agreements supplement the main WTO agreements discussed previously.[59]

Within the WTO, members have two ways to negotiate on a plurilateral basis, also known as "variable geometry."[60] A group of countries can negotiate with one another provided that the group extends the benefits to all other WTO members on an MFN basis—the foundational nondiscrimination principle of the GATT/WTO. Because the benefits of the agreement are to be shared among all WTO members and not just the participants, the negotiating group likely would include those members forming a critical mass of world trade in the product or sector covered by the negotiation in order to avoid the problem of free riders—those countries that receive trade benefits without committing to liberalization. An example of this type of plurilateral agreement granting unconditional MFN is the Information Technology Agreement (ITA), in which tariffs on selected information technology goods were lowered to zero, as negotiated by WTO members comprising more than 90% of world trade in these goods (see below).

A second type of plurilateral is the non-MFN agreement, often referred to as "conditional-MFN." In this type, participants undertake obligations among themselves, but do not extend the benefits to other WTO members, unless they directly participate in the agreement. Also known as the "club" approach, non-MFN plurilaterals allow for willing members to address policy issues not covered by WTO disciplines. However, these agreements require a waiver from the entire WTO membership to commence negotiations. Some countries are reluctant to allow other countries to negotiate for fear of being left out, even while not being ready to commit themselves to new disciplines. Yet, according to one commentator, these members are "simply outsmarting themselves" by encouraging more ambitious members to take negotiations out of the WTO.

### Government Procurement Agreement

The Government Procurement Agreement (GPA) is an early example of a plurilateral agreement with limited WTO membership—first developed as a code in the 1979 Tokyo Round. As of the end of 2019, 48 WTO members (including the 28 EU member countries and United States) participate in the GPA; non-GPA signatories do not enjoy rights under the GPA.[61] The GPA

[57] "Concluding Remarks of the Chairperson, Ambassador Sunanta Kangvalkulkij" Trade Policy Review Body, December 19, 2018. https://www.wto.org/english/tratop_e/tpr_e/tp482_crc_e.htm.

[58] "U.S. Criticized at WTO," *Washington Trade Daily*, December 18, 2018.

[59] One example is the Agreement on Trade in Civil Aircraft, which entered into force in 1980 between 32 WTO members, including the United States. The agreement eliminates import duties on all aircraft, other than military aircraft, and other specified products. See https://www.wto.org/english/tratop_e/civair_e/civair_e.htm.

[60] Peter Sutherland et al., "The Future of the WTO: Addressing institutional challenges in the new millennium," World Trade Organization, 2004, p. 64.

[61] In November 2018, WTO members approved in principle the UK's market access offer to continue GPA membership as a separate member, following its pending withdrawal from the EU. See WTO, https://www.wto.org/

provides market access for various nondefense government projects to contractors of its signatories.[62] Each member specifies government entities and goods and services (with thresholds and limitations) that are open to procurement bids by foreign firms of the other GPA members. For example, the U.S. GPA market access schedules of commitments cover 85 federal-level entities and voluntary commitments by 37 states.[63]

Negotiations to expand the GPA were concluded in March 2012, and a revised GPA entered into force on April 6, 2014. Several countries, including China—which committed to pursuing GPA participation in its 2001 WTO accession process—are in long-pending negotiations to accede to the GPA. Australia was the latest WTO member to join the revised GPA in May 2019. According to estimates by the U.S. Government Accountability Office (GAO), from 2008 to 2012, 8% of total global government expenditures, and approximately one-third of U.S. federal government procurement, was covered by the GPA or similar commitments in U.S. FTAs.[64]

### Information Technology Agreement

Unlike the GPA, the Information Technology Agreement (ITA) is a plurilateral agreement that is applied on an unconditional MFN basis. In other words, all WTO members benefit from the tariff reductions enacted by parties to the ITA regardless of their own participation.[65] Originally concluded in 1996 by a subset of WTO members, the ITA provides tariff-free treatment for covered IT products; however, the agreement does not cover services or digital products like software. In December 2015, a group of 51 WTO members, including the United States, negotiated an expanded agreement to cover an additional 201 products and technologies, valued at over $1 trillion in annual global exports.[66] Members committed to reduce the majority of tariffs by 2019. In June 2016, the United States initiated the ITA tariff cuts. China began its cuts in mid-September 2016, with plans to reduce tariffs over five to seven years.

## Trade Facilitation Agreement

The Trade Facilitation Agreement (TFA) is the newest WTO multilateral trade agreement, entering into force on February 22, 2017, and perhaps the lasting legacy of the Doha Round, since it is the only major concluded component of the negotiations.[67] The TFA aims to address multiple trade barriers confronted by exporters and importers and reduce trade costs by streamlining, modernizing, and speeding up the customs processes for cross-border trade, as well as making it more transparent. Some analysts view the TFA as evidence that achieving new multilateral agreements is possible and that the design, including special and differential treatment provisions, could serve as a template for future agreements.

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english/news_e/news18_e/gpro_28nov18_e.htm.

[62] For more information on the GPA, see https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

[63] For the U.S. GPA schedule, see https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=United States&AnnexNo=1&ContentCulture=en.

[64] U.S. GAO, United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed, GAO-17-168, February 9, 2017, p. 10. Also, see CRS In Focus IF11580, *U.S. Government Procurement and International Trade*, by Andres B. Schwarzenberg.

[65] For more information on the ITA, see https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm and https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm.

[66] USTR, "U.S. and WTO Partners Announce Final Agreement on Landmark Expansion of Information Technology Agreement," December 2015, https://go.usa.gov/xPftt.

[67] See CRS Report R44777, *WTO Trade Facilitation Agreement*, by Rachel F. Fefer and Vivian C. Jones.

The TFA has three sections. The first is the heart of the agreement, containing the main provisions, of which many, but not all, are binding and enforceable. Mandatory articles include requiring members to publish information, including publishing certain items online; issue advance rulings in a reasonable amount of time; and provide for appeals or reviews, if requested. The second section provides for SDT for developing country and LDC members, allowing them more time and assistance to implement the agreement. The TFA is the first WTO agreement in which members determine their own implementation schedules and in which progress in implementation is explicitly linked to technical and financial capacity. The TFA requires that "donor members," including the United States, provide the needed capacity building and support. Finally, the third section sets institutional arrangements for administering the TFA. As of the TFA's third anniversary in February 2020, 91% of the membership have ratified the agreement. Members have been actively notifying their commitments and progress, and capacity-building activities are ongoing to support full implementation

**Impact of the WTO Trade Facilitation Agreement**

According to WTO estimates, global export gains from full implementation of the TFA could range from $750 billion to more than $3.6 trillion dollars per year and, for the 2015-2030 time period, could increase world export growth by 2.7% a year and world GDP growth by over 0.5% a year.

The Organisation for Economic Co-operation and Development (OECD) estimates that TFA implementation could lower the costs of doing trade as much as 12.5%-17.5% globally.

## Key Exceptions under GATT/WTO

Under WTO agreements, members generally cannot discriminate among trading partners, though specific market access commitments can vary significantly by agreement and by member. WTO rules permit some broad exceptions, which allow members to adopt trade policies and practices that may be inconsistent with WTO disciplines and principles such as MFN treatment, granting special preferences to certain countries, and restricting trade in certain sectors, provided certain conditions are met. Some of the key exceptions follow.

**General exceptions.** GATT Article XX grants WTO members the right to take certain measures necessary to protect human, animal, or plant life or health, or to conserve exhaustible natural resources, among other aims. The measures, however, must not entail "arbitrary" or "unjustifiable" discrimination between countries, or serve as "disguised restriction on international trade." GATS Article XIV provides for similar exceptions for trade in services.

**National security exception.** GATT Article XXI protects the right of members to take any action considered "necessary for the protection of essential national security interests," as related to (i) fissionable materials; (ii) traffic in arms, ammunition, and implements of war, and such traffic in other goods and materials carried out to supply a military establishment; and (iii) taken in time of war or other emergency in international relations. Similar exceptions relate to trade in services (GATS Article XIV bis) and intellectual property rights (TRIPS Article 73).

**More favorable treatment to developing countries.** The so-called "enabling clause" of the GATT—called the "Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries" of 1979—enables developed country members to grant differential and more favorable treatment to developing countries that is not extended to other members. For example, this permits granting unilateral and nonreciprocal trade preferences to developing countries under special programs, such as the U.S. Generalized System of Preferences (GSP), and also relates to regional trade agreements outside the WTO (see below).

**Exceptions for regional trade agreements (RTAs).** WTO countries are permitted to depart from the MFN principle and grant each other more favorable treatment in trade agreements outside the WTO, provided certain conditions are met. Three sets of rules generally apply. GATT Article XXIV applies to goods trade, and allows the formation of free trade areas and customs unions (areas with common external tariffs). These provisions require that RTAs be notified to the other WTO members, cover "substantially all trade," and do not effectively raise barriers on imports from third parties. GATS Article V allows for economic integration agreements related to services trade, provided they entail "substantial sectoral coverage," eliminate "substantially all discrimination," and do not "raise the overall level of barriers to trade in services" on members outside the agreement. Paragraph 2(c) of the "enabling clause," which deals with special and differential treatment, allows for RTAs among developing countries in goods trade, based on the "mutual reduction or elimination of tariffs." RTA provisions in the GATS also allow greater flexibility in sectoral coverage within services agreements that include developing countries.

# Joining the WTO: The Accession Process

There are currently 164 members of the WTO. Another 22 countries are seeking to become members.[68] Joining the WTO means taking on the commitments and obligations of all the multilateral agreements. Governments are motivated to join not just to expand access to foreign markets but also to spur domestic economic reforms, help transition to market economies, and promote the rule of law.[69] While any state or customs territory fully in control of its trade policy may become a WTO member, a lengthy process of accession involves a series of documentation of a country's trade regime and market access negotiation requirements (see **Figure 7**).[70]

For example, Kazakhstan joined the WTO on November 30, 2015, after a 20-year process. Afghanistan became the 164th WTO member on July 29, 2016, after nearly 12 years of negotiating its accession terms. Other countries have initiated the process but face delays. Iran first applied for membership in 1996 and, while it submitted its Memorandum on the Foreign Trade Regime in 2009 (a prerequisite for negotiating an accession package), Iran has not begun the bilateral negotiation process, and the United States is unlikely to support its accession.[71]

As the WTO generally operates by member consensus, any single member could block the accession of a prospective new member. As part of the process, a prospective member must satisfy specific market access conditions of other WTO members by negotiating on a bilateral basis. The United States has been a central arbiter of the accession process for countries like China (joined in 2001, see below), Vietnam (2007), and Russia (2012), with which permanent normal trade relations had to be established concurrently under U.S. law for the United States to receive the full benefits of their membership.

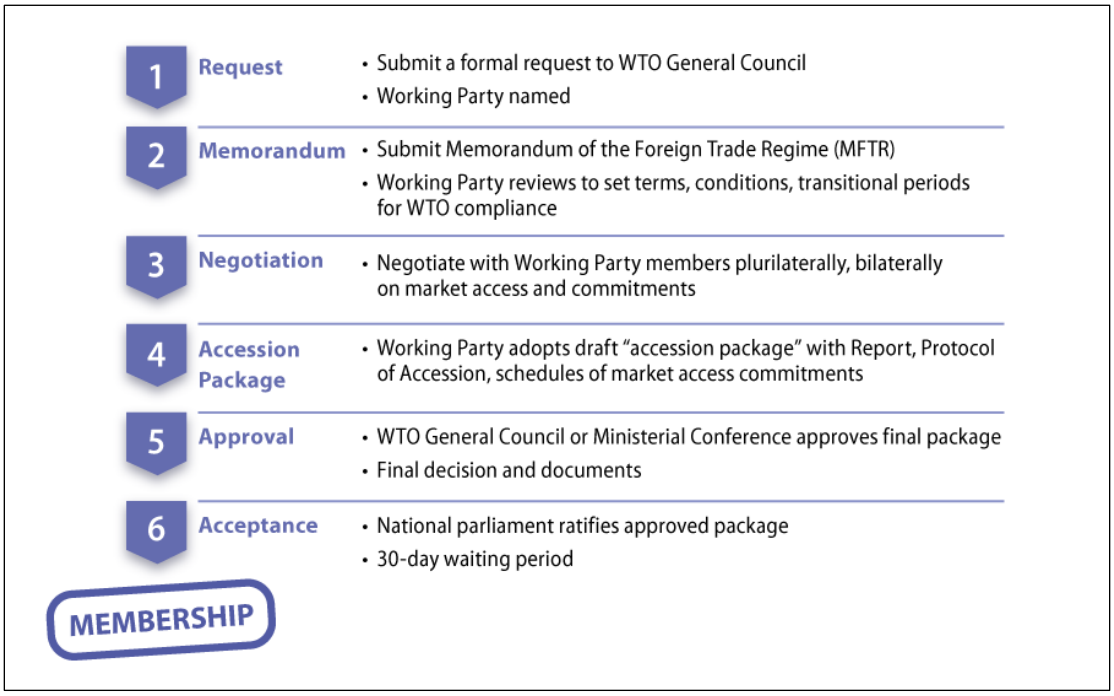
[68] For the current status of accessions, see https://www.wto.org/english/thewto_e/acc_e/status_e.htm.

[69] Uri Dadush and Chiedu Osakwe, ed., *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty,* Cambridge University Press and the World Trade Organization, 2015.

[70] For more information on WTO accessions, see https://www.wto.org/english/thewto_e/acc_e/acces_e.htm and https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s1p1_e.htm.

[71] Iran's prospective membership is complicated by U.S. economic sanctions, which restrict trade and investment. Iran's accession to the WTO would require the United States and other members to extend MFN treatment to Iran.

**Figure 7. WTO Accession Process**




**Source:** WTO. Created by CRS.

**Note:** The Working Party is a group of members negotiating multilaterally with a country applying to join.

## China's Accession and Membership

China formally joined the WTO in December 2001.[72] China has emerged as a major player in the global economy, as the fastest-growing economy, largest merchandise exporter, and second-largest merchandise importer worldwide. China's accession into the WTO on commercially meaningful terms was a major U.S. trade objective during the late 1990s.Entry into the WTO was viewed by many as an important catalyst for spurring additional economic and trade reforms and the opening of China's economy in a market, rules-based direction.[73] These reforms have made China an increasingly significant market for U.S. exporters, a central factor in global supply chains, and a major source of low-cost goods for U.S. consumers. At the same time, China has yet to fully transition to a market economy and the government continues to intervene in many parts of the economy, which has created a growing debate over the role of the WTO in both respects.

Negotiations for China's accession to the GATT and then the WTO began in 1986 and took more than 15 years to complete. China sought to enter the WTO as a developing country, while U.S. trade officials insisted that China's entry had to be based on "commercially meaningful terms" that would require China to significantly reduce trade and investment barriers within a relatively short time. In the end, a compromise was reached that required China to make immediate and extensive reductions in various trade and investment barriers, while allowing it to maintain some protection (or a transitional period of protection) for certain sensitive sectors (see **text box**).[74]

[72] For more information, see CRS Report RL33536, *China-U.S. Trade Issues*, by Wayne M. Morrison.

[73] Written testimony by Nicholas R. Lardy, "Issues in China's WTO Accession," May 9, 2001, Brookings Institution, https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/.

[74] For more detail on the terms, see CRS Report RL33536, *China-U.S. Trade Issues*, by Wayne M. Morrison.

**Selected Terms of China's 2001 WTO Accession**

- **Reduce the average tariff** for industrial goods from 17% to 8.9%, and average tariffs on U.S. priority agricultural products from 31% to 14%.
- **Limit subsidies for agricultural production** to 8.5% of the value of farm output, eliminate export subsidies on agricultural exports, and regularly notify WTO of all state subsidies.
- **Grant full trade and distribution rights to foreign enterprises** within three years (with some exceptions, such as for certain agricultural products, minerals, and fuels).
- **Provide nondiscriminatory treatment to all WTO members**, such as treating foreign firms no less favorably than Chinese firms for trade purposes.
- **End discriminatory trade policies against foreign invested firms**, such as domestic content rules and technology transfer requirements.
- **Implement the TRIPS Agreement** (which sets basic standards on IPR protection and rules for enforcement) upon accession.
- **Fully open the banking system** to foreign financial institutions within five years.
- **Allow joint ventures in insurance and telecommunications** sectors (with various degrees of foreign ownership allowed).

After joining the WTO, China began to implement economic reforms that facilitated its transition toward a market economy and increased its openness to trade and foreign direct investment (FDI). China also generally implemented its tariff cuts on schedule. However, by 2006, U.S. officials and companies noted evidence of some trends toward a more restrictive trade regime and more state intervention in the economy.[75] In particular, observers have voiced concern about various Chinese industrial policies, such as those that foster indigenous innovation based on forced technology transfer, domestic subsidies, and IP theft. Some stakeholders have expressed concerns over China's mixed record of implementing certain WTO obligations and asserted that, in some cases, China appeared to be abiding by the letter but not the "spirit" of the WTO.[76]

The United States and other WTO members have used dispute settlement (DS) procedures on a number of occasions to address China's alleged noncompliance with certain WTO commitments. As a respondent, China accounts for about 12% of total WTO disputes since 2001. The United States has brought 23 dispute cases against China at the WTO on issues, including IPR protection, subsidies, and discriminatory industrial policies, and has largely prevailed in most cases. Though some issues remain contested, China has largely complied with most WTO rulings.[77] China has also increasingly used DS to confront what it views as discriminatory measures; to date, it has brought 16 cases against the United States (as of August 2020).

More broadly, the Trump Administration has questioned whether WTO rules are sufficient to address the challenges that China's economy presents. USTR Lighthizer expressed this view in remarks in September 2017: "The sheer scale of their coordinated efforts to develop their economy, to subsidize, to create national champions, to force technology transfer, and to distort

[75] See USTR, *2016 Report to Congress on China's WTO Compliance,* January 2017, and the annual USTR *National Trade Estimate Reports* for specific examples.

[76] For example, see Written testimony by the U.S.-China Business Council, "China's Implementation of its World Trade Organization Commitments," Submitted in response to the Office of the U.S. Trade Representative's Request for Comments and Notice of Public Hearing Concerning China's Compliance with WTO Commitments, September 21, 2016; and Atkinson et al., *Stopping China's Mercantilism: A Doctrine of Constructive, Alliance-Backed Confrontation,* Information Technology and Innovation Foundation, March 16, 2017.

[77] James Bacchus, Simon Lester, and Huan Zhu, "Disciplining China at the WTO," CATO Institute, *Policy Analysis* No. 856, November 15, 2018.

markets in China and throughout the world is a threat to the world trading system that is unprecedented. Unfortunately, the World Trade Organization is not equipped to deal with this problem."[78] USTR views efforts to resolve concerns over Chinese trade practices to date as limited in effectiveness, including through WTO DS, as well as recent proposals by WTO members to craft new rules and WTO reforms.[79] In its latest annual report to Congress on China's WTO compliance for 2019, USTR stated:

> [The WTO DS] mechanism is not designed to address a trade regime that broadly conflicts with the fundamental underpinnings of the WTO system. No amount of WTO DS by other WTO members would be sufficient to remedy this systemic problem. Indeed, many of the most harmful policies and practices being pursued by China are not even directly disciplined by WTO rules.[80]

Another related U.S. concern is China's claim that it is a "developing country" under the WTO, and, in particular, implications for concessions under ongoing and future WTO negotiations.[81] Through developing country status, which countries self-designate, countries are entitled to certain rights under special and differential treatment (SDT), among other provisions in WTO agreements (for more discussion, see "Treatment of Developing Countries" and **text box**). While it is unclear the extent of SDT provisions China has sought in current ongoing negotiations, China is a part of the coalition group of Asian developing members at the WTO and has claimed to be a developing country in various fora.[82] In the view of the Trump Administration, "the United States has never accepted China's claim to developing-country status," and the WTO should change its approach to affording flexibilities based on developing country status.[83] (See "Treatment of Developing Countries".) Some Members of Congress also view this issue as a priority for WTO reform in order to address what they perceive as China's "predatory trade practices and abuse."[84] Chinese officials assert that despite being the world's second-largest economy, China remains a developing country, due to its relatively low GDP per capita and other economic challenges.[85]

Concerns over China's trade actions despite its WTO commitments have led the Trump Administration to increase the use of unilateral mechanisms outside the WTO that in its view more effectively address Chinese "unfair trade practices;" the recent Section 301 investigation of Chinese IPR and technology transfer practices and resulting imposition of tariffs is evidence of

[78] "U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative," September 18, 2017, CSIS, https://www.csis.org/events/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative.

[79] See USTR, *2019 Report to Congress on China's WTO Compliance*, March 2020.

[80] Ibid, pp. 14-15.

[81] See "U.S. Statement at the Trade Policy Review of the People's Republic of China," Statement as delivered by Ambassador Dennis C. Shea on Behalf of the United States of America, July 11, 2018, Geneva.

[82] In its June 2018 white paper "China and the World Trade Organization," which reflects on its compliance with WTO obligations and support for the multilateral trading system, China called itself the "largest developing country in the world." See http://www.xinhuanet.com/english/2018-06/28/c_137286993.htm.

[83] The White House, "Memorandum on Reforming Developing-Country Status in the World Trade Organization," July 26, 2019.

[84] Rep. Darin LaHood and Rep. Anthony Gonzalez, "Reforming China's unfair practices at the WTO will level the global playing field," Op-ed, *Washington Examiner*, August 4, 2020.

[85] "China remains largest developing country: economist," *Xinhua*, April 15, 2018. As per the World Bank, China is considered a developed country, though it is often distinguished as an "emerging market." However, based on World Bank classifications of countries by income groupings, using gross national income (GNI) per capita, China is considered an upper-middle income economy. See World Bank, https://www.worldbank.org/en/country/china/overview and https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups.

this strategy.[86] Prior to the establishment of the WTO, the United States resorted to Section 301 relatively frequently, in particular due to concerns that the GATT lacked an effective DS system.[87] When the United States joined the WTO in 1995, it agreed to use the DS mechanism rather than act unilaterally; many analysts contend that the United States has violated its WTO obligations by imposing tariffs against China under Section 301. Following its investigation, the United States also initiated a WTO DS case against China's "discriminatory technology licensing" in 2018. Subsequently, China filed its own complaints at the WTO over U.S. tariff actions (see above).

The United States has pursued cooperation to some extent with other countries with similar concerns over Chinese non-market policies and practices, and the need to clarify and improve WTO rules on industrial subsidies and state-owned enterprises (SOEs) in particular.[88] In December 2017, the United States, EU, and Japan announced new trilateral efforts to cooperate on issues related to government-supported excess capacity, unfair competition caused by market-distorting subsidies and SOEs, forced technology transfer, and local content requirements.[89] The three officials have made advances toward a draft text on stronger rules on industrial subsidies; however, talks appear to have make limited progress since mid-2019.[90] (See "Competition with SOEs and Non-Market Practices".)

"Non-market oriented" policies and practices of China are a central driver of recent efforts. A related WTO dispute involving China was poised to have significant implications for the treatment of China's economy under WTO rules, in particular the terms of China's "nonmarket economy" (NME) status under its WTO accession protocol.[91] USTR Lighthizer described the case as "the most serious litigation matter we have at the WTO" and that a decision in favor of China would be "cataclysmic" for the WTO.[92] Both the United States and EU continue to treat China as a nonmarket economy in antidumping and countervailing duty proceedings, a point of contention for China. Under its accession, China agreed to allow WTO members to use alternative methodologies, such as surrogate countries, for assessing prices and costs on products subject to AD measures, amid their concerns that distortions in the Chinese economy caused by government intervention result in Chinese prices that do not reflect market forces. China contends that its WTO accession protocol requires all members to terminate use of the alternative methodology by December 11, 2016. The NME distinction is important to China as it has often resulted in higher AD margins on Chinese exports; moreover, a significant share of Chinese

[86] CRS In Focus IF11346, *Section 301 of the Trade Act of 1974*, by Andres B. Schwarzenberg.

[87] Chad P. Bown, "Rogue 301: Trump to Dust Off Another Outdated US Trade Laws," Peterson Institute for International Economics, August 3, 2017, https://piie.com/blogs/trade-investment-policy-watch/rogue-301-trump-dust-another-outdated-us-trade-law.

[88] Some experts suggest that the United States should pursue a comprehensive, multilateral case at the WTO with a broad coalition of countries sharing concerns about certain Chinese practices that either violate one or more specific WTO commitments or that "nullify or impair" a benefit provided to WTO members (known as a non-violation claim under Article XXIII of the GATT). See U.S.-China Economic and Security Review Commission, *Hearing on U.S. Tools to Address Chinese Market Distortions*, written testimony of Jennifer Hillman, June 8, 2018.

[89] USTR, "Joint Statement by the United States, European Union and Japan at MC11," December 11, 2017.

[90] USTR, "Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union," press release, May 31, 2018; and "Joint Statement of the Trilateral Meeting of the Trade Ministers," press release, January 9, 2019 and May 23, 2019.

[91] Section 301 through 310 of the Trade Act of 1974, commonly called "Section 301," is one of the principal statutory means by which the United States addresses "unfair" foreign trade barriers to U.S. exports and enforces U.S. rights under trade agreements. Section 301 applies to foreign acts, policies, and practices that USTR determines either violates, or is inconsistent with, a trade agreement; or is "unjustifiable" and burdens or restricts U.S. trade.

[92] David Lawder, "U.S. formally opposes China market economy status at the WTO," Reuters, November 30, 2017.

exports is subject to trade remedies.[93] The United States and the EU have argued that the WTO language is vague and did not automatically obligate them to extend market economy status (MES) to China because it is still not a market economy.[94]

In December 2016, China requested consultations under WTO DS with the United States and EU over the failure to grant China MES. In April 2017, a panel was established in the EU case. In November 2017, the United States formally submitted arguments as a third party in support of the EU; China's case involving the United States did not progress. The EU-China panel said it expected to issue its final report during the second quarter of 2019.[95] In May 2019, however, China requested to suspend its dispute with the EU before the findings were issued.[96]

# Current Status and Ongoing Negotiations

## Buenos Aires Ministerial MC11, 2017

The last WTO Ministerial Conference (MC11) took place in December 2017, in Buenos Aires, Argentina. After countries were unable to complete the Doha Round (see **text box** below), many questioned what could effectively be achieved at MC11. WTO Director-General Azevêdo had tempered expectations for major negotiated outcomes, acknowledging that "members' positions continue to diverge significantly on the substantial issues."[97] These differences were perhaps most apparent by the inability of WTO members to reach consensus over a Ministerial Declaration, largely due to staunch disagreements over including references to the mandate of the Doha Round (see **text box**).[98] Instead the Ministerial became primarily an opportunity for members to take stock of ongoing talks and further define priority work areas.

Although WTO members worked intensively to build consensus over proposals in several areas, MC11 did not result in major breakthroughs. WTO members committed to intensify negotiations to reduce fisheries subsidies, "with a view to adopting" an agreement by the next Ministerial; the United States has supported these efforts. A joint statement was issued by 60 members in support of advancing multilateral negotiations on domestic regulations in services. Subsets of WTO members also issued statements committing to new work programs or open-ended talks for interested parties to potentially conclude plurilateral agreements in areas, including:[99]

- **E-commerce**: among 84 WTO members, including the United States;
- **Investment facilitation**: among 98 WTO members; and

[93] Chad P. Bown, "Should the United States Recognize China as a Market Economy?" Peterson Institute for International Economics, December 2016.

[94] The expectation back in 2001 was that China would transition to a market economy within 15 years.

[95] WTO, "DS516: European Union – Measures Related to Price Comparison Methodologies," https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm.

[96] Some speculate that this action was in anticipation of some findings that were not favorable to China. Tom Miles, "China pulls WTO suit over claim to be a market economy," Reuters, June 17, 2019.

[97] WTO, "DG Azevêdo details process for MC11 as preparations enter final stages," November 28, 2017, https://www.wto.org/english/news_e/spra_e/spra201_e.htm.

[98] "MC11 expected to end without Ministerial declaration as U.S., India clash over language on development," *Inside U.S. Trade*, December 13, 2017.

[99] Number of countries in the talks reflects current participants, which expanded since the original announcements. WTO, "New initiatives on electronic commerce, investment facilitation and MSMEs," December 13, 2017, https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm.

- **Micro, small and medium-sized enterprises**: among 90 WTO members.

The lack of concrete multilateral outcomes at MC11 was a reminder of the continued resistance of some countries to a new agenda outside of the original 2001 Doha mandate. In the view of EU Trade Commissioner Cecilia Malmström, the Ministerial "laid bare the deficiencies of the negotiating function at the WTO" and that "members are systematically being blocked from addressing the pressing realities of global trade." Malmström blamed the lack of progress on "procedural excuses and vetoes" and "cynical hostage taking."[100] Some developing country members, including India, attempted to block multilateral progress in a range of areas absent more progress on Doha issues, such as agricultural stockholding for food security. Such "hostage-taking" tactics, widely acknowledged to have hindered progress in the Doha Round, further highlight the difficulty of achieving future consensus among all 164 members.

In contrast, the United States generally viewed the Ministerial outcome positively—that it signaled "the impasse at the WTO was broken," paving the way for like-minded countries to pursue new work in other areas.[101] USTR expressed U.S. support in particular for forthcoming work on e-commerce, scientific standards for agriculture, and disciplines on fisheries subsidies.

### What Happened to the Doha Round

The Doha Round launched in November 2001, but after nearly two decades of negotiations, members did not achieve its agenda. In the 2015 Ministerial Declaration, WTO members acknowledged their divisions over the future of Doha and over reaffirming its continuation:

> *We recognize that many Members reaffirm the Doha Development Agenda (DDA), and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations.*

Put simply, the large and diverse membership of the WTO made consensus on the broad Doha mandate difficult. At the root of the stalemate were persistent differences among the United States, EU, and developing countries on major issues including agricultural market access, subsidies, industrial tariffs and nontariff barriers, services, and trade remedies. Developing countries, including large emerging markets like China, Brazil, and India, sought reduction of agricultural tariffs and subsidies by developed countries, nonreciprocal market access for manufacturing sectors, and continued protection for services sectors. In contrast, developed country members sought reciprocal trade liberalization, especially commercially meaningful market access in advanced developing countries, while retaining protection for agriculture.

Procedural rigidities inherent in the WTO negotiating approach also complicated negotiations. In particular, the "single undertaking" approach, which means "nothing is agreed until everything is agreed," prevented progress in select areas where consensus might be easier to achieve. However, some experts view a big package as the best approach to securing major new trade liberalization where every member has to give and take.

Countries have disagreed about how to learn best from the perceived failure of Doha, leaving the path forward unclear. In the view of former USTR Michael Froman, the "route forward is a new form of pragmatic multilateralism. Moving beyond Doha does not mean leaving its unfinished business behind. Rather, it means bringing new approaches to the table. Doha issues are too important to leave to the Doha architecture that has failed for so long." Recently, the EU, Canada, and others have put forward proposals to "modernize" the WTO.

[100] European Commission, "EU Statement at the Heads of Delegations meeting," Buenos Aires, Argentina, December 13, 2017, http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156464.pdf.

[101] USTR, "USTR Robert Lighthizer Statement on the Conclusion of the WTO Ministerial Conference," press release, December 2017.

## Outlook for MC12, 2021

The Ministerial generally convenes every two years to make decisions and announce progress on multilateral trade agreements. With Kazakhstan as the host for MC12, members scheduled the Ministerial for June 2020 in the expectation of more accommodating weather. Following the mixed results of MC11, the United States and other WTO members had hoped MC12 would be an action-forcing event to conclude key negotiations and make progress on multiple initiatives, demonstrating the value of the WTO. MC12 was also to serve as a critical forum for taking stock of various WTO reform proposals and the crisis in the DS system.

Due to the COVID-19 pandemic, MC12 was postponed to 2021.[102] During COVID-19, some WTO activities have continued virtually, including General Council meetings, and some in person as well, as limited staff returned to offices in May. But several negotiations stalled as members reevaluate whether it is viable and appropriate for talks to be conducted virtually. The strategic direction for MC12 will be shaped by new leadership of the WTO Secretariat, following DG Azevêdo's announcement that he will resign at the end of August 2020, a year before his term's end. Azevêdo resigned early to prevent the DG selection from coinciding with MC12, potentially diverting political attention from achieving critical outcomes (see **text box** under "Policy Issues and Future Direction").

## Selected Ongoing WTO Negotiations

Despite the postponement of the 2020 Ministerial, several countries continue to make progress on some ongoing talks, including fisheries subsidies and e-commerce. In other areas, such as agriculture and environmental goods, talks remain largely stalled with no clear path forward. The various states of talks raise the stakes for making progress at the rescheduled Ministerial in 2021.

### Agriculture

For some issues, multilateral solutions arguably remain ideal, for example, disciplines on agricultural subsidies, which are widely used by developed and advanced developing countries alike. While the Doha Round largely did not achieve its comprehensive negotiating mandate to lower agricultural tariffs and subsidies, negotiations more limited in scope have continued.[103] The 2015 Nairobi Ministerial agreed to eliminate export subsidies for agriculture, but the issue of public stockholding remains seemingly intractable. Public stockholding—otherwise known as price support or supply control programs—is used by governments, especially in developing countries to purchase and stockpile food to bolster domestic farm prices by removing surplus stocks from the market. Some governments may release portions of these government-owned stocks to the public during periods of market volatility or shortage, but a major concern is that some of these stocks may be exported at below their purchase price, thus acting as indirect export subsidies. These programs can also become problematic when governments purchase food at a price and quantity that effectively become trade-distorting domestic support.

Since the last Ministerial, working groups have met to seek convergence in the areas of domestic support, market access, export competition, export prohibition/restrictions, public stockholding, and cotton trade issues. With the postponement of MC12, members have exchanged views in

[102] WTO, "DG Azevêdo provides urgent information to WTO members on MC12 date and venue," Press release, March 12, 2020.

[103] For more detailed analysis, see CRS Report R46456, *Reforming the WTO Agreement on Agriculture*, by Anita Regmi, Nina M. Hart, and Randy Schnepf.

writing on issues, including public stockholding and special safeguard mechanisms for developing countries. Recognizing the potential social and economic impact of the COVID-19 pandemic, the chair of the Agriculture Committee plans to seek member feedback on the ongoing negotiations in an effort to revitalize reform efforts in September 2020.[104]

As part of WTO reform efforts, the United States has also flagged the broader issue of notifications and transparency, which has implications for agricultural trade reform. WTO agreements require members to notify subsidies and trade-distorting support to ensure transparency and consistency with a member's obligation. Compliance with notifications has been notoriously lax, with some countries years behind on their reporting. According to U.S. Department of Agriculture trade counsel, Jason Hafemeister, these practices have consequences:

> In the absence of transparency, how are we to determine whether Members are complying with existing obligations? Moreover, only with comprehensive and current information can negotiators understand, discuss, and address the problems that face farmers today: high tariffs, trade distorting support, and non-tariff barriers.[105]

Some experts see a transparency agreement as a feasible outcome for an eventual MC12. The United States and other countries are also raising issues of special and differential treatment in the agriculture negotiations (see below).

## Fisheries Subsidies

As noted above, WTO members committed to negotiate disciplines related to fisheries subsidies that contribute to overcapacity and overfishing with a view toward reaching an agreement by 2020. The proposals aim to meet the goals outlined in the UN Sustainable Development Goal 14 targeting illegal, unregulated, and unreported (IUU) fishing. Members have tabled proposals to:

- combat IUU fishing, overfishing, and overcapacity by prohibiting harmful fishery subsidies,
- cap the total amount of fisheries subsidies,
- identify alleged maintenance of a prohibited subsidy by another member through a consultation mechanism, and
- require greater transparency over fishing subsidies.[106]

Members had committed to finish negotiations on fisheries subsidies at MC12, an achievement many view as critical to upholding the WTO's legitimacy. With the cancellation of in-person meetings during the pandemic, the chair initially attempted to continue talks, but halted them after some parties voiced concerns about the virtual participation. The chair released a consolidated text in June, which forms the basis for negotiations with four rounds planned for September through the end of 2020, with the goal to conclude the agreement by year-end or by MC12.

The United States has emphasized notification requirements and the need for subsidy caps that "can combine transparent and accountable policy space with serious constraints on major

[104] WTO, "WTO members appoint new chair for agriculture talks," July 21, 2020, https://www.wto.org/english/news_e/news20_e/agng_21jul20_e.htm.

[105] U.S. Department of Agriculture, Foreign Agriculture Service, "What's Next for Agriculture in the WTO?" January 5, 2018, https://www.fas.usda.gov/newsroom/what-s-next-agriculture-wto.

[106] "New fisheries subsidies proposals considered ahead of December target for agreement," WTO Press Release, September 13, 2019, https://www.wto.org/english/news_e/news19_e/fish_13sep19_e.htm.

subsidizers."[107] The United States has sought application of the commitments to all countries, while some developing country members have sought flexibilities in implementing commitments.[108] A recent U.S. executive order aims to increase enforcement and resources to combat IUU fishing and promote domestic seafood production.[109]

## Electronic Commerce/Digital Trade

Digital trade has emerged as a major force in world trade since the Uruguay Round, creating end products (e.g., email or social media), enabling trade in services (e.g., consulting), and facilitating goods trade through services, such as logistics and supply chain management that depend on digital data flows. While the GATS contains explicit commitments for telecommunications and financial services that underlie e-commerce, trade barriers related to digital trade, information flows, and other related issues are not specifically included. The WTO Work Program on Electronic Commerce was established in 1998 to examine trade-related issues for e-commerce under existing agreements.[110] Under the work program, members agreed to continue a temporary moratorium on e-commerce customs duties, and have renewed the moratorium at each ministerial meeting. Members had extended the moratorium on customs duties on electronic transmissions until MC12, but it is unclear if the extension will be sustained after the delayed Ministerial, given the opposition of some developing countries and lack of agreement on what would constitute the scope of electronic transmissions.

Separate from the work program, at the 11th Ministerial, over 75 countries agreed to "initiate exploratory work on negotiations on electronic commerce issues in the WTO."[111] After initial talks, information exchanges and education, especially targeting developing country members, the United States and other parties formally launched the e-commerce initiative in January 2019,[112] and negotiations commenced in March 2019. Known as the Joint Statement Initiative on E-commerce (JSI) and coordinated by Australia, Japan, and Singapore, the now 84 participants are a mix of developed and developing countries and include the United States, EU, and China, among others. As with the work program, some developing countries have opted not to participate in the negotiations. For example, India and South Africa stated they do not want to accept international constraints on efforts to protect their domestic industry or raise potential tariff revenue on digital products, actions could be prohibited or curtailed under a new agreement.

Multiple negotiating parties submitted proposals outlining their positions and desired scope for the negotiations.[113] The United States was one of the first parties to submit a discussion paper. The U.S. proposal includes "trade provisions that represent the highest standard in safeguarding and promoting digital trade" and reflects the U.S. support for a market-driven, open, interoperable internet under a multi-stakeholder system.[114] The paper echoes many of the commitments

[107] Hannah Monicken, "WTO to start fisheries text negotiations in fall; U.S. sees 'missing pieces'," *Inside U.S. Trade,* July 21, 2020.

[108] "WTO Polarized over Fisheries Subsidies," *Washington Trade Daily,* July 2020.

[109] White House, "Executive Order on Promoting American Seafood Competitiveness and Economic Growth," May 7, 2020.

[110] WTO, "Electronic Commerce," https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

[111] Joint Statement on Electronic Commerce, WTO WT/MIN(17).60, December 13, 2017.

[112] Joint Statement on Electronic Commerce, WTO WT/L/1056, January 25, 2019.

[113] All proposals can be found on the WTO online documents portal: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.

[114] United States, *Joint Statement on Electronic Commerce*, WTO INF/ECOM/23, April 26, 2019.

contained in the U.S.-Mexico-Canada Agreement (USMCA), which entered into force in July 2020. On the other hand, a proposal by China focuses on facilitating narrowly on e-commerce and global value chains as a means to assist WTO members, especially developing countries, in benefiting from digital trade.[115] Some proposals included digital trade facilitation measures (e.g., electronic single windows and interoperability, technology for customs risk management), but it is unclear if these issues should be considered under the WTO Committee on Trade Facilitation and implementation of the TFA.[116]

The plurilateral negotiations are happening within the WTO context as the parties aim to set a new international standard that could eventually become a multilateral agreement. With MC12's postponement, the parties are negotiating virtually, as well as through hybrid in-person/virtual formats, allowing trade negotiators and subject matter experts to participate.

The parties recognize that there are some significant hurdles, including issues related to data flows and privacy, but aim to have a consolidated text this year. A June 2020 statement by the members of the so-called Ottawa Group[117] called for "officials to prioritize and accelerate work on the Joint Statement Initiative on E-commerce, including through informal and virtual discussions, ahead of the rescheduled Twelfth Ministerial Conference (MC12) in 2021, including by the development of a consolidated negotiating text by the end of 2020 at the latest."[118] While not a member of the group, the United States is reportedly in agreement with the goal of completion of a streamlined text by the end of the year.[119]

## Environmental Goods Agreement (EGA)

The EGA negotiations were initiated in mid-2014 to liberalize trade in environmental goods through tariff liberalization. The original 14 participants, including the United States, the EU, and China, represented nearly 90% of global trade in covered environmental goods;[120] talks have since expanded to include 18 WTO members. Like the ITA, the EGA would be an open plurilateral agreement so that the benefits achieved through negotiations would be extended on an MFN basis to all WTO members. Despite 18 rounds of negotiations, members were unable to conclude the agreement by the meeting of the General Council in December 2016, and no negotiations have taken place since. Several stakeholders blamed China for the lack of progress, as it rejected the list of products to be included and requested lengthy tariff phaseout periods which other countries refused to accept.[121] The EGA's future remains uncertain; while several countries have expressed support for resuming talks, the Trump Administration has not put forward a public position on the agreement.[122]

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[115] China, *Joint Statement on Electronic Commerce*, WTO INF/ECOM/19, April 23, 2019.

[116] The Trade Facilitation Committee was created on 22 February 2017 when the Trade Facilitation Agreement (TFA) entered into force. For more information, see https://www.wto.org/english/tratop_e/tradfa_e/comm_tradfa_e.htm.

[117] Ottawa Group members include Canada, Australia, Brazil, Chile, the European Union, Japan, Kenya, Mexico, New Zealand, Norway, Singapore, South Korea, and Switzerland.

[118] Government of Canada, "June 2020 Statement of the Ottawa Group: Focusing Action on Covid-19," June 15, 2020, https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/2019-06-covid-19.aspx?lang=eng.

[119] "U.S. Urges Speed in E-Commerce Talks," *Washington Trade Daily*, June 15, 2020.

[120] WTO, "Azevêdo welcomes launch of plurilateral environmental goods negotiations," July 8, 2014.

[121] "EU blames China for WTO environmental trade talks collapse," Reuters, December 4, 2016; "Key Lawmaker, EU and industry all blame China for torpedoing EGA deal," *Inside U.S. Trade*, December 7, 2016.

[122] "U.S. remains silent as WTO members look for ways to resume EGA talks," *Inside U.S. Trade*, June 22, 2017.

# Policy Issues and Future Direction

The inability of WTO members to conclude a comprehensive agreement during the Doha Round raised new questions about the WTO's future direction. Many intractable issues from Doha remain unresolved, and members have yet to reach consensus on a way forward. Persistent differences about the extent and balance of trade liberalization continue to limit progress, as indicated by the outcomes of recent ministerial meetings. Further, members remain divided over adopting new issues on the agenda, amid concerns that the WTO could lose relevance if its rules are not updated to reflect the modern global economy. Some WTO members seek to incorporate new issues that pose challenges to the trading system, such as digital trade, competition with SOEs, global supply chains, and the relationship between trade and environment issues.

These divisions have called into question the viability of the "single undertaking," or one-package approach in future multilateral negotiations and suggest broader need for institutional reform if the WTO is to remain a relevant negotiating body. Moreover, the consistent practice of some countries like India to block discussion of new issues serves as a reminder of the power of a single member to halt progress in the WTO's consensus-based system.

As a result of slow progress at the WTO, countries have increasingly turned to other venues to advance trade liberalization and rules, namely plurilateral agreements and preferential FTAs outside the WTO. Plurilaterals have been seen as having the potential to resurrect the WTO's relevance as a negotiating body, but have also been seen as possibly undermining multilateralism, if the agreements are not extended to all WTO members on an MFN basis. Regional trade agreements have also been seen as potential laboratories for new rules. How these negotiations and agreements will ultimately affect the WTO's status as the preeminent global trade institution is widely debated.

The fundamental longstanding challenges facing the WTO are compounded by recent developments that have further strained the trading system. In the near-term, COVID-19 has highlighted serious economic and trade policy challenges, in addition to the health crisis, and has spurred protectionist trade and investment policies and disruptions to supply chains that may have lasting effects.[123] Many observers have called for better global coordination in policy responses, with some advocating for a new WTO plurilateral agreement on medical goods. Whether the WTO is equipped to play a meaningful role in the crisis is also tied to broader questions about the need for systemic reform of the institution. As Deputy DG Alan Wolff posited in May 2020:[124]

> In the current upsurge in criticism of the inadequacies of the collective responses to the pandemic, the WTO is receiving heightened scrutiny. Were the WTO Members to join together to meet the trade challenges of the coronavirus and the desperately needed economic recovery, most public criticisms of the WTO would likely disappear. But the problems preceded the pandemic and will, absent reforms, persist after the pandemic is over and its after-effects have been addressed. It is necessary to understand what values the multilateral trading system is designed to promote before it can be reformed.

Prior to the crisis, concerns were already mounting about the growing use of trade protectionist policies by both developed and developing countries, recent U.S. unilateral tariff actions and

[123] See for example, OECD, *COVID-19 and International Trade: Issues and Actions*, June 12, 2020, http://www.oecd.org/coronavirus/policy-responses/covid-19-and-international-trade-issues-and-actions-494da2fa/; Chad P. Bown, "COVID-19 Could Bring Down the Trading System: How to Stop Protectionism From Running Amok," *Foreign Affairs*, April 28, 2020, https://www.foreignaffairs.com/articles/united-states/2020-04-28/covid-19-could-bring-down-trading-system.

[124] WTO, "DDG Wolff: This is the time to consider the future of the multilateral trading system," May 27, 2020.

counterretaliation by other countries, and escalating trade disputes between major economies. Many countries are questioning whether the WTO is equipped to effectively handle the challenges of emerging markets like China, where the state may play a central role in international trade, as well as the deepening trade tensions between major economic players. Some experts view the multilateral trading system as facing a potential crisis, while others remain optimistic that the current state of affairs could spur renewed focus on reforms of the system. WTO members, including the EU, Canada, Japan, and the United States, are exploring areas for reform and have submitted various proposals.

New WTO leadership will face ushering the trading system through these challenges. WTO members are currently in the process of selecting a new DG among eight candidates (see **text box**). The process requires all 164 members to agree by consensus on the appointment. WTO members and observers view the outcome of the DG race and fresh leadership as important to inject new momentum into the institution, amid efforts to increase its relevance and chart a path forward. The WTO has expedited the intensive selection process, usually lasting nine months, to conclude possibly by early November, after Azevêdo steps down and following the U.S. presidential election.[125]

### Selection of WTO Director-General

Notwithstanding the lack of formal power of the WTO Secretariat, the DG is an advocate for the global trading system and often wields "soft power," relying on diplomatic and political heft in helping members build consensus or break stalemates—an increasingly difficult task in recent years.[126] As a result, some have argued that the Secretariat should be granted more authority to table proposals and advance new rules.[127]

In the current DG race, analysts have variously called for an "honest broker" and dealmaker, politician over technocrat, or a "peacekeeper." DG qualifications broadly include "extensive experience in international relations, encompassing economic, trade and/or political experience; a firm commitment to the work and objectives of the WTO; proven leadership and managerial ability; and demonstrated communication skills."[128] The eight candidates in 2020 have a breadth of experience (**Table 4**). A recent survey suggests management and political experience, economics training, and WTO negotiating experience are preferred characteristics.[129] Experts speculated at the onset that Nigeria's Ngozi Okonjo-Iweala and Kenya's Amina Mohamed lead the field.[130]

WTO DG appointments generally have alternated between developing and developed countries, and have hailed from all regions except Africa, the Middle East, and North America—regions home to five current candidates. With Azevêdo from Brazil, some developed countries view it as their moment, while African countries strongly argue it is their turn. No female has ever served as DG, and some are calling for a change to the status quo. Candidates have emphasized that regardless of these factors, the person most qualified for the position should be chosen. Some have highlighted their political neutrality for managing differences between the United States and China as advantages to their candidacy.

[125] Members were unable to agree on which deputy DG would serve as acting DG at the end of August until the selection process concludes, attributed to disagreements between the U.S. and China. "U.S. official: China blocked acting DG compromise at WTO," *Inside U.S. Trade*, July 30, 2020.

[126] David Tinline and Tatiana Lacerda Prazeres, "5 reasons why the role of WTO Director-General matters," World Economic Forum, June 5, 2020, https://www.weforum.org/agenda/2020/06/5-reasons-why-the-world-trade-organization-wto-director-general-position-matters-roberto-azevedo-step-down/.

[127] Doug Palmer, "U.S. dismisses 'invalid' WTO Appellate Body ruling," *Politico Pro Trade*, April 23, 2020.

[128] WTO, *Procedures for the Appointment of Director-Generals*, WT/L/509, January 20, 2003.

[129] Fiorinia et al., "Selecting the next WTO Director-General: What the trade community thinks," VoxEU, July 8, 2020, https://voxeu.org/article/selecting-next-wto-director-general-what-trade-community-thinks.

[130] Jim Brunsden and Alan Bettie, "Kenyan and Nigerian candidates lead field for WTO chief," *Financial Times*, July 8, 2020.

**Table 4. WTO DG Candidates**

| Candidate (by order of announcement) | Country | Background and Key Positions |
|---|---|---|
| Jesús Seade Kuri | Mexico | • Foreign Affairs Under Secretary for North America<br>• Former Deputy DG of the WTO<br>• Former Deputy DG of the GATT |
| Ngozi Okonjo-Iweala | Nigeria | • Former Finance Minister<br>• Former Managing Director World Bank |
| Abdel-Hamid Mamdouh | Egypt | • Senior Counsel, King & Spalding LLP<br>• Former WTO official |
| Tudor Ulianovschi | Moldova | • Former Foreign Minister<br>• Former Ambassador to WTO |
| Yoo Myung-hee | South Korea | • Trade Minister |
| Amina C. Mohamed | Kenya | • Secretary for Sports, Culture and Heritage<br>• Former Foreign Affairs and Trade Minister; Chair of 2015 WTO Ministerial Conference<br>• Former Deputy Secretary-General United Nations |
| Mohammad Maziad Al-Tuwaijri | Saudi Arabia | • Royal Court Adviser<br>• Former Economy and Planning Minister<br>• Former Banking Executive |
| Liam Fox | United Kingdom | • Former Trade Secretary |

**Source:** WTO, "Candidates for DG selection process 2020," https://www.wto.org/english/thewto _e/dg_e/dgsel20 _e/dgsel20_e.htm

DG candidates met (primarily virtually) with WTO members from July 15-17 to present views and answer questions.[131] This campaign phase, expected to last through September 7, is followed by consultations among members over two months to narrow the field and build consensus around a candidate (two candidates are to be eliminated in the first round and three candidates in the second round, leaving two for the final selection). A selection committee, headed by the GC Chair, leads this process. The committee then issues its recommendation on the candidate most likely to gain consensus, and members make their final decision.[132]

Regarding ideal qualities for a DG, in testimony to Congress USTR Lighthizer called for leadership that supports fundamental, across the-board reform and understands the nature of problems facing market economies in dealing with China and current rules that fail to discipline large state-run economies.[133] He noted that any "whiff of anti-Americanism" would be grounds for a U.S. veto.

## COVID-19 and WTO Reactions

As countries across the world grapple with COVID-19, many WTO activities have been disrupted and trade policy challenges have emerged. Experts have emphasized trade policies as playing a major role in two respects. First in helping respond to COVID-19 and second, in assisting in the recovery. The WTO committed to work with other international organizations to minimize disruptions to cross-border trade and global supply chains—in particular those central to combatting the virus. The WTO has also sought to inform members of the impact of the pandemic, and called on members to abide by notification obligations on trade-related measures

[131] For candidates statements, see https://www.wto.org/english/thewto_e/dg_e/dgsel20_e/dgsel20_e.htm.

[132] In the (rare) absence of consensus, procedures specify that as a last resort there can be recourse to other voting procedures.

[133] House Ways and Means Committee, *Hearing on the President's 2020 Trade Policy Agenda,* written testimony by Ambassador Robert E. Lighthizer, June 17, 2020.

taken in response. Many countries, including the United States, have imposed temporary restrictions on exports of certain medical goods and some foodstuffs to mitigate potential shortages.[134] At the same time, some countries have since lifted restrictions or implemented measures to liberalize trade.[135] A WTO report in April 2020 warned of the policies' long-term costs, in terms of lower supply and higher prices.[136] WTO leadership urged careful consideration of ripple effects of export curbs, as most major countries are both exporters and importers of medical supplies, and emphasized use of WTO-consistent tools to address critical shortages, such as unilaterally eliminating tariffs or other taxes, expediting customs procedures, and using subsidies to generate production. In April, the WTO estimated a plunge in global trade in 2020, with a potential recovery in 2021 dependent on the duration of the pandemic and countries' policy choices.[137] For the latter, transparency is viewed as critically important; however, members have been slow to formally notify new measures.[138]

WTO agreements are flexible in permitting emergency measures related to national security or health that may contravene WTO obligations. They broadly require, however, that such restrictions be targeted, temporary, and transparent, and do not unnecessarily restrict trade. GATT Article XI prohibits export bans and restrictions, other than duties, taxes or other charges, but allows members to apply restrictions temporarily "to prevent or relieve critical shortages of foodstuffs or other products essential" to the exporting country, among other circumstances. In the case of foodstuffs, members must give "due consideration to the effects on food security" of importers. As previously discussed, general exceptions providing policy flexibility require that restrictions are not "a means of arbitrary or unjustifiable discrimination," or "disguised restriction on international trade," among other conditions.

Several WTO agreements have relevance to health-related policy, such as TBT, SPS, GATS and TRIPS. Others guide implementation of policies, including the WTO's core principle of nondiscrimination and rules on subsidies. Specific commitments have contributed to liberalized trade in medical products: (1) tariff negotiations during the Uruguay Round; (2) a plurilateral Agreement on Pharmaceutical Products, updated in 2011; and (3) the expanded ITA in 2015. These have improved market access for medical products, but barriers remain. An April 2020 WTO report estimates nearly $600 billion in annual trade in critical medical products with limited availability during COVID-19.[139] For these products, the average applied MFN tariff is 4.8%, but certain products, such as hand soap and face masks, have relatively high tariffs in some countries.

As measures to restrict trade spread in early 2020, some countries including the G-20 recommitted to WTO guidance that measures be targeted, temporary, and transparent. A group of seven countries led by New Zealand and Singapore issued stronger statements to maintain open and connected supply chains.[140] Forty-two WTO members pledged to lift emergency measures as soon as possible; the United States, EU, and China did not join the pledge. Experts have

[134] CRS In Focus IF11551, *Export Restrictions in Response to the COVID-19 Pandemic*, by Christopher A. Casey and Cathleen D. Cimino-Isaacs.

[135] WTO, "WTO report on G20 shows moves to facilitate imports even as trade restrictions remain widespread," June 29, 2020, https://www.wto.org/english/news_e/news20_e/trdev_29jun20_e.htm.

[136] WTO, *Export Prohibitions and Restrictions*, Information Note, April 23, 2020.

[137] WTO, "Trade falls steeply in first half of 2020," Press Release, June 22, 2020, https://www.wto.org/english/news_e/pres20_e/pr858_e.htm.

[138] WTO, "COVID-19 and world trade," https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm.

[139] WTO, *Trade in Medical Goods in the Context of Tackling COVID-19*, Information Note, April 3, 2020.

[140] See https://www.international.gc.ca/gac-amc/news-nouvelles/2020-03-25-joint-ministerial-statement-declaration-ministerielle-commune.aspx?lang=eng.

advocated for more coordinated trade policies worldwide or concrete action in the WTO.[141] In June, the Ottawa Group recommended a range of actions, with a central role for the WTO:[142]

> In response to these challenges, thinking has begun on trade policy actions that would support an inclusive, sustainable, and resilient recovery as well as what trade rules should be adapted or developed to guide collaborative policy responses to future global crises. In this context, the WTO must play an important role in helping ensure coordination and coherence between actions its members take. This will require initiative and engagement by WTO members in order to be successful.

Some WTO members advocate for a plurilateral agreement on medical goods, modeled after the ITA. Other members acknowledge that there is neither time nor political will to conclude a round of tariff negotiations in the near term, but advocate for unilateral reductions. New Zealand and Singapore recently agreed to an "open plurilateral" agreement to remove tariffs, not to impose export restrictions, and to remove nontariff barriers on COVID-19 related products.[143] The two countries have encouraged others to join. U.S. trade officials have said they prioritize dealing with the crisis before discussing the WTO role.[144] Per USTR Lighthizer remarks in May to G20 trade ministers: "while we are in the midst of the crisis, we caution against embarking upon new plurilateral tariff cutting negotiations, or trying to dictate what the future role of the WTO may be in terms of addressing longer-term actions. Indeed, we find it inappropriate to use this crisis, which has been tragic for the global community, to push other agendas."

## Negotiating Approaches

### Plurilateral Agreements

In contrast to the consensus-based agreements of the WTO, some members, including the United States, point to the progress made in sectoral or plurilateral settings as the way forward for the institution. By assembling coalitions of interested parties, negotiators may more easily and quickly achieve trade liberalizing objectives, as shown by the ITA. Sectoral agreements are viewed as one way to pursue new agreements and extend WTO disciplines and commitments in new areas, including, for example, U.S. trade priorities in digital trade and SOEs. The commitments by some WTO members to pursue talks in e-commerce, investment facilitation, SMEs and other areas, could plant the seeds for future plurilaterals.

Plurilateral negotiations, however, still involve resolving divisions among developed and advanced developing countries. Members were able ultimately to overcome their differences in the ITA negotiation, but thus far have been unable to reach consensus in the EGA. At the same time, the participation of developing and emerging market economies, such as China and India, is

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[141] For example, see Richard E. Baldwin and Simon J. Evenett ed., *COVID-19 and Trade Policy: Why Turning Inward Won't Work*, Centre for Economic Policy Research, April 2020; Wendy Cutler, "Coronavirus: The Need to Adjust and Reshape Our Trade Agenda," March 17, 2020, https://asiasociety.org/policy-institute/coronavirus-need-adjust-and-reshape-our-trade-agenda; Jennifer Hillman, "Six Proactive Steps in a Smart Trade Approach to Fighting COVID-19," *Think Global Health, March* 20, 2020, https://www.thinkglobalhealth.org/article/six-proactive-steps-smart-trade-approach-fighting-covid-19; and Anabel Gonzalez, "A memo to trade ministers on how trade policy can help fight COVID-19," Trade and Investment Policy Watch blog, https://www.piie.com/blogs/trade-and-investment-policy-watch/memo-trade-ministers-how-trade-policy-can-help-fight-covid.

[142] Government of Canada, "June 2020 Statement of the Ottawa Group: Focusing Action on Covid-19," June 15, 2020, https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/2019-06-covid-19.aspx?lang=eng.

[143] See https://www.mfat.govt.nz/en/trade/covid-19-and-trade/.

[144] "U.S.: Wait until crisis subsides to address WTO's role," *Inside U.S. Trade*, May 15, 2020.

critical to achieving agreements that cover a meaningful share of global trade. There is also a concern that plurilateral agreements not applied on an MFN basis could lead nonparticipating countries to become marginalized from the trading system and face new trade restrictions. To attract a critical mass of participants and lower barriers for developing countries and LDCs who may be hesitant to agree to ambitious commitments, agreements could allow flexibility in implementation timeframes and provide additional assistance, as in the TFA.

Some experts question whether potential waning U.S. leadership in plurilateral and multilateral trade negotiations might slow momentum toward concluding new agreements (see "Value of the Multilateral System and U.S. Leadership and Membership"). The Trump Administration has yet to clarify its position on plurilaterals pursued under the Obama Administration, such as EGA and TiSA, which have stalled, but is supporting new efforts on e-commerce/digital trade.

## Preferential Free Trade Agreements

Given that the WTO allows its members to establish preferential FTAs outside the WTO that are consistent with WTO rules, many countries have formed bilateral or regional FTAs and customs areas; since 1990, the number of RTAs in force has increased seven-fold, with around 300 agreements notified to the WTO and in force.[145] FTAs have often provided more negotiating flexibility for countries to advance new trade liberalization and rulemaking that builds on WTO agreements; however, the agreements vary widely in terms of scope and depth. Like plurilaterals, many view comprehensive FTAs as having potential for advancing the global trade agenda. However, like plurilaterals, FTAs can also have downsides compared to multilateral deals.

The United States currently has 14 FTAs in force with 20 countries, with some new partial agreements completed or in progress. The Trump Administration has stated a preference for negotiating bilateral FTAs, rather than multiparty agreements. In October 2019, the United States and Japan signed the "first stage" of trade agreements covering certain agricultural and industrial goods market access, as well as rules on digital trade—the agreements did not require congressional approval.[146] In January 2020, Congress approved the USMCA between the United States, Mexico, and Canada, which replaces the North American Free Trade Agreement (NAFTA).[147] In addition, USTR notified Congress of trade negotiations with the EU, the UK, and most recently, Kenya.

In general, U.S. FTAs are considered to be "WTO-plus" in that they reaffirm the WTO agreements, but also eliminate most tariff and nontariff barriers and contain rules and obligations in areas not covered by the WTO. For example, most U.S. FTAs include access to services markets beyond what is contained in the GATS or, more recently, digital trade obligations and disciplines to address distortions from state-led trade practices. The recent U.S. limited agreements with Japan, however, represent a significant shift in approach from recent U.S. FTAs, which typically involve one comprehensive negotiation and agenda. Several analysts question the extent to which the stage-one agreement adheres to GATT Article XXIV, requiring that FTAs

[145] As of the end of 2019. WTO RTA database, https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

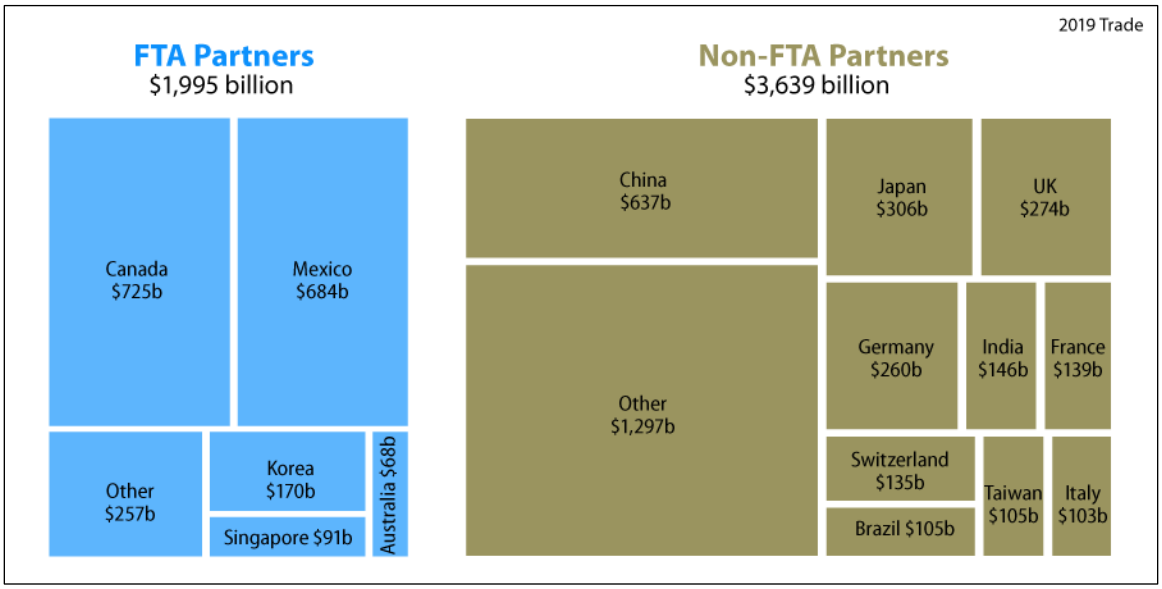
[146] White House, "Joint Statement of the United States and Japan," September 25, 2019. https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-japan-2/; USTR, "FACT SHEET: U.S.-Japan Trade Agreement," September 2019, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/september/fact-sheet-us-japan-trade-agreement.

[147] CRS In Focus IF10997, *U.S.-Mexico-Canada (USMCA) Trade Agreement*, by M. Angeles Villarreal and Ian F. Fergusson.

cover "substantially all trade," in particular given the exclusion of U.S.-Japan auto trade.[148] Whether or not the agreement violates the letter or spirit of this provision likely depends on the timeline and scope of the next stage of U.S.-Japan talks, which both sides indicated aim to be comprehensive in scope, and whether another WTO member would challenge it via WTO dispute settlement.[149] In practice, however, WTO members have rarely challenged other trading partners' agreements for consistency with these requirements at DS proceedings.[150]

While U.S. FTAs cover some major trading partners, the majority of U.S. trade, including with significant trade partners such as China and the EU, continues to rely solely on the terms of market access and rulemaking in WTO agreements. In 2019, the United States traded $3.6 trillion with non-FTA partners, compared to $2 trillion with its FTA partners (**Figure 8**).

**Figure 8. U.S. Trade in the WTO**




**Sources:** Data from the Census Bureau and Bureau of Economic Analysis. Figure created by CRS.

**Notes:** Includes exports and imports of goods and services. U.S. trade with non-FTA partners is covered under WTO rules. Since the U.S.-Japan trade agreement, which entered into effect in January 2020 covers a portion (5%), but not all bilateral goods trade and second-stage talks remain incomplete, Japan is not included as a full FTA partner for illustrative purposes.

More recently, groups of countries have also been pursuing so-called "mega-regional" trade agreements that have broad membership and cover significant shares of global trade. These include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed in March 2018 between 11 countries in the Asia-Pacific region to replace the proposed TPP, near complete negotiations over the Regional Comprehensive Economic Partnership (RCEP) between the Association of Southeast Asian Nations (ASEAN) and five of its FTA

[148] "Analysts question WTO compliance of U.S.-Japan deal," *Inside U.S. Trade*, September 17, 2019. In addition, the GATS includes a similar provision.

[149] U.S. negotiating objectives, released at the outset of the talks in December 2018, suggested a broad range of issues beyond tariffs and digital trade would be covered. See https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations.

[150] Petros C. Mavroidis, "If I Don't Do It, Somebody Else Will (or Won't)," *Journal of World Trade*, vol. 40, no. 1 (February 2006): 187-214.

partners including China,[151] and the Pacific Alliance signed in June 2012 among Chile, Colombia, Mexico, and Peru. Such agreements could potentially help to consolidate trade rules across regions, and to a varying extent, address new issues not covered by the WTO. With U.S. withdrawal from the TPP and Trump Administration's preference for bilateral negotiations, the United States is likely to play a more limited role in shaping rules in such fora under the current Administration.

There has been wide debate regarding the relationship of preferential FTAs to the WTO and multilateral trading system.[152] Some argue that crafting new rules through mega-regionals could undermine the trading system, create competing regional trade blocs and rules, lead to trade diversion, and marginalize countries not participating in the initiatives.[153] In remarks in July 2020, USTR Lighhizer claimed "we should have a multilateral system or a bunch of bilateral systems," noting that otherwise the two systems fundamentally conflict with one another.[154] On the other hand, some view such agreements as potentially spurring new momentum at the global level. WTO DG Azevêdo has supported the latter sentiment, expressing that "RTAs [regional trade agreements] are blocks which can help build the edifice of global rules and liberalization."[155] Many analysts have viewed the CPTPP specifically through this lens.[156] Some experts view plurilateral agreements in particular as potential vehicles for bringing new rulemaking from RTAs into the multilateral trading system, as NAFTA did for the groundbreaking Uruguay Round in 1994.[157] While RTAs may propagate precisely what the multilateral system—with MFN and national treatment at its underpinnings—was designed to prevent, namely trade diversion and fragmented trading blocs, some observers believe it may be the only way trade may be liberalized in the future as additional interested parties could join the over time.

## Future Negotiations on Selected Issues

Since the founding of the WTO, the landscape of global trade has changed dramatically. The commercial internet, the growth of supply chains, and increasing trade in services have all contributed to the tremendous expansion of trade. However, WTO disciplines have not been significantly modernized or expanded since 1995, aside from the TFA and renegotiation of the ITA and GPA. In addition to ongoing WTO efforts to negotiate new trade liberalization and rules in areas like e-commerce and digital trade, the following selected areas of trade policy could be subjects for future negotiations multilaterally within the WTO, or as plurilaterals. Meaningful progress in areas such as services, competition with SOEs, investment, and labor and environment issues could help increase the relevance of the WTO as a negotiating body. More

[151] India, an original member, dropped out of RCEP in December 2019, when RCEP members announced the agreement's preliminary conclusion. CRS Insight IN11200, *The Regional Comprehensive Economic Partnership: Status and Recent Developments*, by Cathleen D. Cimino-Isaacs and Michael D. Sutherland.

[152] For example, see World Economic Forum, *Regional Trade Agreements: Game Changers or Costly Distractions for the World Trading System*, July 2014.

[153] For more on the debate, see CRS Report R45198, *U.S. and Global Trade Agreements: Issues for Congress*, by Brock R. Williams.

[154] David Lawder and Andrea Shalal, "Lighthizer says bilateral trade pacts conflict with multilateral trading system," Reuters, July 9, 2020.

[155] WTO, "Regional trade agreements 'cannot substitute' the multilateral trading system," September 25, 2014, https://www.wto.org/english/news_e/spra_e/spra33_e.htm.

[156] See CRS Report R44489, *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress*, coordinated by Ian F. Fergusson and Brock R. Williams.

[157] For example, see Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO*, Council on Foreign Relations, Part of Discussion Paper Series on Global and Regional Governance, September 2016.

recently, the COVID-19 pandemic, and subsequent disruption to supply chains and spread of new trade restrictions have also led to some calls for a dedicated plurilateral agreement on medical goods trade.

### Services

Since the GATS, the scope of global trade in services has increased tremendously, spurred by advances in IT and the growth of global supply chains. Yet, these advances are largely not reflected in the GATS. WTO members committed to further services negotiations, which began in 2000 and were incorporated into the Doha Round. Further talks were spurred by recognition among many observers that GATS, while extending the principles of nondiscrimination and transparency to services trade, did not provide much actual liberalization, as many countries simply bound existing practices.[158] However, services talks during Doha also succumbed to developing countries' resistance to open their markets in response to developed country demands, as well as dissatisfaction with other aspects of the single undertaking. Whether the stalled plurilateral TiSA talks will ultimately lead to services reform in the WTO is an open question.

Aside from increased market access, several issues are ripe for future negotiations at the WTO, such as transition from the current positive list schedule of commitments to a negative list.[159] Instead of a member declaring which services are open for competition, it would need to declare which sectors are exempted. This exercise in itself could force members to reexamine their approximately 25-year-old commitments and decide whether current market access barriers will be maintained. Before the pandemic, WTO members had been discussing proposals on market access for tourism and related services and environmental services. The issue of "servicification" of traditional goods industries—for example, services that are sold with a good, such as insurance or maintenance services, or enabling services, such as distribution, transportation, marketing, or retail—has also attracted attention as the subject of possible WTO negotiations.[160] Other issues of interest to members include services facilitation (transparency, streamlining administrative procedures, simplifying domestic regulations),[161] and emergency safeguards, envisioned in GATS (Article X) as an issue for future negotiation. Recently members have focused on the economic impact of COVID-19 on sectors such as tourism, transport and distribution services as well as the challenges and opportunities presented for digital services delivery and digital inclusion.

### Competition with SOEs and Non-Market Practices

The United States and other members of the WTO see an increased need to discipline state-owned or state-dominated enterprises engaged in international commerce, and designated monopolies, whether through the WTO or through regional or bilateral FTAs. However, WTO rules on competition with state-owned or state-dominated enterprises are limited to state trading enterprises (STE)—enterprises, such as agricultural marketing boards, that influence the import

[158] Gary Clyde Hufbauer, "Liberalization of Services Trade," in *Trans-Pacific Partnership: An Assessment*, ed. Cathleen Cimino-Isaacs and Jeffrey J. Schott, (Washington, DC: Peterson Institute of International Economics, 2016).

[159] U.S. FTAs use a negative list approach, and the proposed TiSA negotiations use a hybrid approach to apply a negative list to national treatment commitments and a positive list for market access.

[160] International Centre for Trade and Sustainable Development (ICTSD), "Negotiating Disciplines on Domestic Regulations in Services," June 2018, https://www.ictsd.org/themes/services-and-digital-economy/research/negotiating-disciplines-on-domestic-regulations-in.

[161] Marta Soprana, "Services facilitation in regional trade agreements and opportunities for convergence," The E15 Initiative, October 2018, http://e15initiative.org/blogs/services-facilitation-in-regional-trade-agreements-and-opportunities-for-convergence/.

or export of a good. GATT Article XVII requires them to act consistently with GATT commitments on nondiscrimination, to operate in accordance with commercial considerations, and to abide by other GATT disciplines, such as disciplines on import and export restrictions. The transparency obligations consist of reporting requirements describing the reason and purpose of the STE, products covered, a description of its functions, and pertinent statistical information.[162]

Meanwhile, countries desiring disciplines on SOEs have turned to FTAs. The CPTPP and the USMCA have dedicated chapters on SOEs. The USMCA includes commitments that SOEs of a party act in accordance with commercial considerations; requires parties to provide nondiscriminatory treatment to like goods or services to those provided by SOEs; and prohibits most noncommercial assistance to SOEs, among other issues. The USMCA SOE chapter could also be aimed at countries other than the three USMCA parties, such as China, to signal their negotiating intentions going forward. While there could be a desire to multilateralize these disciplines, they likely would face objections from those members engaged in such practices.

State support provided to SOEs, including subsidies, is a closely related issue, as it can play a major role in market-distorting behavior under current rules. The WTO Agreement on Subsidies and Countervailing Measures (ASCM) covers the provision of specified subsidies granted to SOEs, including by the government or any "public body." Some members, including the United States and EU, have contested past interpretations by the Appellate Body of what qualifies as a public body as too narrow, and remain concerned that a large share of Chinese and other SOEs in effect have avoided being subject to disciplines.[163] As discussed, the United States, EU, and Japan are engaged in ongoing discussions to strengthen WTO rules. A January 2020 joint statement by the trilateral proposed areas for changes to the existing WTO ASCM rules on industrial subsidies.[164] Recommended changes include expanding the types of prohibited subsidies, reversing the burden of proof to the subsidizing country, and incentives for subsidy notifications, among others. China opposes the proposal and stated it will not negotiate new rules on industrial subsidies.[165] It is unclear if the trilateral members or others will pursue a plurilateral agreement on subsidy disciplines; moreover, analysts emphasize that such efforts must ultimately achieve buy-in from China and others to have a lasting impact.[166] Regardless, members may seek to revisit multilateral competition rules if market distortions emerge in the post-pandemic economic recovery, given many governments have provided subsidies and other forms of support to domestic industries during the economic downturn.

## Investment

With limited provisions under TRIMS and GATS, rules and disciplines covering international investment are not part of the WTO. More extensive protection for investors was one of the "Singapore issues" proposed at the 1996 WTO Ministerial as a topic for future negotiations, but

[162] WTO, "Technical Information on State Trading Enterprises," https://www.wto.org/english/tratop_e/statra_e/statra_info_e.htm.

[163] European Commission, *WTO Modernization*, Concept Paper, September 2018, pp. 4-5; and USTR, Statement by the U.S. to the Dispute Settlement Body, March 2011, https://ustr.gov/sites/default/files/uploads/Mar25%20Stmt%20US%20AD-CVD%20fin.pdf.

[164] "Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union," January 14, 2020, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union.

[165] Doug Palmer, "Envoy: China can't support WTO talks on industrial subsidies," *Politico Pro*, May 12, 2020.

[166] Wendy Cutler and Andrew Chatzky, *Curbing State-Driven Trade Policies: How to Craft New & Effective Approaches to Counter Distortive Practices*, Asia Society Policy Institute, July 2020.

then dropped under opposition from developing countries at the 2003 Cancun Ministerial. The OECD also attempted to liberalize investment practices and provide investor protections through a Multilateral Agreement on Investment, however, that effort was abandoned in 1998 in the face of widespread campaigns by nongovernment organizations in developed countries.

While multilateral attempts to negotiate investment disciplines have not borne fruit, countries have agreed to investment protections within bilateral investment treaties (BITs) and chapters in bilateral and regional FTAs. The U.S. "model BIT" serves as the basis for most recent U.S. FTAs.[167] These provisions are often negotiated between developed countries and developing countries—often viewed as having less robust legal systems—that want to provide assurance that incoming FDI will be protected in the country. Developed countries themselves have begun to diverge on the use and inclusion of provisions on investor-state dispute settlement (ISDS).[168]

Incorporating investment issues more fully in the WTO would recognize that trade and investment issues are increasingly interlinked. Moreover, bringing coherence to the nearly 3,000 BITs or trade agreements with investment provisions could be a role for the WTO. In addition, agreement on investment disciplines could help to resolve the thorny issue of investment adjudication between the competing models of ISDS and an investment court, as proposed by the EU in its recent FTAs, given that disputes likely would remit to WTO DS. While it remains unclear whether developing countries would be more amenable to negotiating investment disciplines multilaterally than they were in 2003, this area could be ripe for plurilateral activity.

In the meantime, since MC11 some WTO members have been pursuing the development of a multilateral framework on investment facilitation. The group is comprised of a mix of developed and developing economies, including the EU, Canada, China, Japan, Mexico, Singapore, and Russia, but not the United States.[169]

## Labor and Environment

Labor and environmental provisions were not included in the Uruguay Round agreements, largely at the insistence of developing countries.[170] Some observers maintain that this has created major gaps in global trade rules and call for the WTO to address these issues.[171] Related provisions have developed and evolved within U.S. FTAs outside the WTO. Recent U.S. FTAs require partner countries to adhere to internationally recognized labor principles of the International Labor Organization (ILO) and applicable multilateral environmental agreements, and to enforce their labor or environmental laws and not to derogate from these laws to attract trade and investment. Recent agreements like the CPTPP and USMCA also contain provisions, though not identical,

[167] CRS In Focus IF10052, *U.S. International Investment Agreements (IIAs)*, by Martin A. Weiss and Shayerah Ilias Akhtar, and CRS Report R43052, *U.S. International Investment Agreements: Issues for Congress*, by Shayerah Ilias Akhtar and Martin A. Weiss.

[168] The United States has pursued ISDS in most of its FTAs. In the proposed USMCA, the Trump Administration restricted recourse to ISDS in the case of Mexico and ended the application of ISDS with Canada. Recent EU agreements contain an investment court model with a standing body replacing ad hoc tribunals common to ISDS.

[169] "Joint Ministerial Statement on Investment Facilitation for Development," WT/MIN(17)/59, December 13, 2017.

[170] One labor-related provision, GATT Article XX(e) provides an exception to trade obligations for measures "relating to products of prison labor."

[171] For example, in the view of Thea Lee of the Economic Policy Institute, WTO rules are currently "lopsided" and do not adequately protect the interests of workers, consumers, and the environment; in particular, the WTO should recognize that "violation of internationally recognized workers' rights is as much an unfair trade policy as the violation of patents or copyrights." Senate Foreign Relations Committee, *Hearing on Multilateral Economic Institutions and U.S. Foreign Policy*, written testimony by Thea M. Lee, November 27, 2018.

prohibiting the most harmful fisheries subsidies, and relating to illegal trafficking, marine species, air quality, marine litter, and sustainable forestry. More broadly, while inclusion of labor and environmental provisions in FTAs has expanded in the past decade, in general the commitments can vary widely in their scope and depth, with only some subject to DS mechanisms.[172]

While general provisions on labor and environment may be a heavy lift at this time given these differences, the WTO has undertaken an effort to discipline fisheries subsidies, which could have a beneficial environmental effect (see above). However, fisheries subsidies may be a special case, as it directly pertains to an existing trade-related agreement, the ASCM.

## Proposed Institutional Reforms

Many observers, including some Members of Congress, believe the WTO needs to adopt reforms to continue its role as the foundation of the world trading system. In particular, its negotiating function has atrophied following the collapse of the Doha Round. Its DS mechanism, while functioning, is viewed by some WTO members as cumbersome and time consuming. And some observers, including U.S. officials, contend it has exceeded its mandate when deciding cases.

Potential changes described below address institutional and negotiation reform, as well as reforms to the DS system. Reforms concern the administration of the organization, including its procedures and practices, and attempts to address the inability of WTO members to conclude new agreements. DS reforms attempt to improve the working of the DS system, particularly the Appellate Body (AB), which fell below its three-member quorum in December, challenging the WTO's ability to effectively enforce DS decisions.

Certain WTO members have been exploring some aspects of reform.[173] In September 2018, the European Commission published a revised paper on its comprehensive approach "to modernise the WTO and to make international trade rules fit for the challenges of the global economy."[174] As noted, the United States, EU, and Japan have issued scoping papers on strengthening WTO disciplines on industrial subsidies and SOEs.

In addition, in late 2018 Canada organized a ministerial among a small group of "like-minded" countries interested in WTO reform, including Australia, Brazil, Chile, the EU, Japan, Kenya, Mexico, New Zealand, Norway, Singapore, South Korea, and Switzerland. Canadian trade officials said that "starting small has allowed us to address problems head-on and quickly develop proposals," while acknowledging that a larger effort must include the United States and China.[175] In a joint communiqué, the group of 13 countries emphasized that "the current situation at the WTO is no longer sustainable," and identified three areas in particular requiring "urgent consideration": safeguarding and strengthening the DS system; reinvigorating the WTO's negotiating function; including how the development dimension can be best pursued in rulemaking; and strengthening the monitoring and transparency of WTO members' trade

[172] The ILO reports that less than a third of trade agreements have labor-related provisions (as of 2016). Of those, nearly half are U.S., EU or Canadian agreements, while about a quarter are between South-South trading partners. See ILO, *Labour-related provisions in trade agreements*, GB.328/POL/3, September 2016.

[173] For a database listing of some of the ongoing reform efforts by country, see CSIS, "WTO Reform Tracker," https://tradeguys.csis.org/trade-explained/wto-tracker/.

[174] European Commission, "EU proposals on WTO modernization," WK8329/2018 INIT, July 5, 2018; and "European Commission presents comprehensive approach for the modernization of the World Trade Organization," press release, September 18, 2018, http://europa.eu/rapid/press-release_IP-18-5786_en.htm.

[175] Janyce McGregor, "Global trade reform must include China, U.S., Jim Carr says after hosting WTO meeting," *CBC News*, October 25, 2018.

policies.[176] The group held its third meeting in May 2019, and confirmed that "work continues apace on developing concrete proposals to be brought forward for consideration by the wider membership."[177] Some Members of Congress have expressed support for these new efforts to address longstanding concerns of the United States.[178]

China held its own mini-ministerial among 34 WTO members in November 2019 to discuss reform efforts, and called on all parties "to firmly support the multilateral trading system, resolutely oppose unilateralism and protectionism, actively participate in the necessary reform of the WTO….and enhance the WTO's confidence"[179]

## Institutional Issues

### *Consensus in Decisionmaking*

While consensus in decisionmaking is a long-standing core practice at the GATT/WTO, voting on a nonconsensus basis is authorized for certain activities on a one member-one vote basis. For example, interpretations of the WTO agreements and country waivers from certain provisions require a three-fourths affirmative vote for some matters, while a two-thirds affirmative vote is required for an amendment to an agreement. However, even when voting is possible, the practice of consensus decisionmaking remains the norm.

As an organization of sovereign entities, some observers believe the practice of consensus decisionmaking gives legitimacy to WTO actions. Consensus assures that actions taken are in the self-interest of all its members. Consensus also reassures small countries that their concerns must be addressed. However, the practice of consensus has often led to deadlock, especially in the Doha Round negotiations. The ability to block consensus also has perpetuated so-called "hostage taking," in which a country can block consensus over an unrelated matter.

In order to attempt to expedite institutional decisionmaking, some expert observers have proposed alternatives to the current system, such as:

- Use the voting procedures currently prescribed in the WTO agreements.
- Adopt a weighted voting system based on a formula that includes criteria relating to a member's GDP, trade flows, population, or a combination thereof.
- Establish an executive committee composed of a combination of permanent and rotating members, or composed based on a formula as above or representatives of differing groups of countries.

[176] "Joint Communiqué of the Ottawa Ministerial on WTO Reform," October 15, 2018, https://www.canada.ca/en/global-affairs/news/2018/10/joint-communique-of-the-ottawa-ministerial-on-wto-reform.html.

[177] Government of Canada, "Summary of Ottawa Group Meeting in Paris, May 2019," May 23, 2019, https://www.canada.ca/en/global-affairs/news/2019/05/summary-of-ottawa-group-meeting-in-paris-may-2019.html.

[178] House Ways and Means Chairman Kevin Brady noted, "I am pleased that some of the key trading partners appear to be engaged in serious discussion of the concerns the United States has raised for many years about the need for reform ... the WTO urgently needs to reform to keep the organization well-functioning and viable, including with respect to negotiations towards new agreements as well as improving dispute resolution." See "Brady Calls for Serious WTO Reform," October 25, 2018, https://waysandmeans.house.gov/brady-calls-for-serious-wto-reform/.

[179] "At mini-ministerial, WTO members call for resuming Appellate Body nominations," *Inside U.S. Trade*, November 5, 2019.

- Maintain current consensus voting but require a member stating an objection to explain why it is doing so, or why it is a matter of vital national interest.[180]

### *The Single Undertaking Approach*

The "single undertaking" method by which WTO members negotiate agreements means that during a negotiating round, all issues are up for negotiation until everything is agreed. On one hand, this method, in which nothing is agreed until everything is agreed, is suited for large, complex rounds in which rules and disciplines in many areas of trade (goods, services, agriculture, IPR, etc.) are discussed. It permits negotiation on a cross-sectoral basis, so countries can make a concession in one area of negotiation and receive a concession elsewhere. The method is intended to prevent smaller countries from being "steamrolled" by the demands of larger economies, and helps ensure that each country sees a net benefit in the resulting agreement.

On the other hand, arguably, the single undertaking has contributed to the breakdown of the negotiating function under the WTO, exemplified by the never-completed Doha Round, as issues of importance to one country or another served to block consensus at numerous points during the round. Some members, including the EU, have called for "flexible multilateralism," based on continued support for full multilateral negotiations where possible, but pursuit of plurilateral agreements on an MFN basis where multilateral consensus is not possible.[181]

### *Transparency/Notification*

An important task of the WTO is to monitor each member's compliance with various agreements. A WTO member is required to notify the Secretariat of certain relevant domestic laws or practices so that other members can assess the consistency of WTO members' domestic laws, regulations, and actions with WTO agreements. Required notifications include measures concerning subsidies, agricultural support, quantitative restrictions, TBT, and SPS standards.

Compliance with the WTO agreement's notification requirements, especially regarding government subsidy programs, has become a serious concern among certain members, including the United States. Many WTO members are late in submitting their required notifications or do not submit them at all. This effectively prevents other members from fully examining the policies of their trading partners. In response, some members—notably the United States and the EU—have proposed incentives for compliance or sanctions for noncompliance with notification reporting requirements. These include:

- A U.S. proposal to impose a series of sanctions including steps to "name and shame" an offending member, limiting the member from using certain WTO resources, and designating a member "inactive."[182]
- An EU proposal to create a rebuttable presumption that a non-notified subsidy measure is an actionable subsidy or a subsidy causing serious prejudice, thereby allowing a member to challenge the subsidy under WTO DS.

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[180] Peter Sutherland et al., *The Future of the WTO: Addressing institutional challenges in the new millennium*, World Trade Organization, 2004, p. 64.

[181] European Commission, "WTO modernization," Concept Paper, September 2018.

[182] "Procedures to enhance transparency and strengthen notification requirements under WTO agreements," Communications from the United States, JOB/GC/148, October 30, 2017; under this proposal, inactive members would have access to most training and technical assistance, and would be referred to as such in General Council meetings.

- An EU proposal to encourage counternotifications—a challenge to the accuracy or existence of another member's notification—against members that do not voluntarily notify on their own.[183] In May and November 2018, for example, the United States launched counternotifications of India's farm subsidy notifications regarding wheat, rice, and cotton.

In November 2018, the United States, EU, Japan, Argentina, and Costa Rica put forward a joint proposal that reflects several of these elements, including penalties for noncompliance.[184] It also specifies exemptions for developing countries that lack capacity and have requested assistance to help fulfill notification obligations.

### *Treatment of Developing Countries*

A country's development status can affect the pace at which a country undertakes its WTO obligations. Given that WTO members self-designate their status, some members hold on to developing-country status even after their economies begin more to resemble their developed-country peers.[185] In addition, some of the world's largest economies, including China, India, and Brazil, may justify developing country status because their per capita incomes more closely resemble those of a developing country than those of developed countries. Developing country status enables a country to claim special and differential treatment (SDT) both in the context of existing obligations and in negotiations for new disciplines (see **text box**).[186] The WTO specifies, however, that while the designated status is based on self-selection, it is "not necessarily automatically accepted in all WTO bodies."[187]

Several developed countries, including the EU and United States, have expressed frustration at this state of affairs. In January 2019, the United States circulated a paper warning that the WTO is at risk of becoming irrelevant due to the practice of allowing members to self-designate their development status to obtain special and differential treatment.[188] On July 26, 2019, President Trump issued a "Memorandum on Reforming Developing-Country Status in the World Trade Organization."[189] The President stated that the WTO dichotomy between developed and developing countries is outdated and "has allowed some WTO Members to gain unfair advantages in the international trade arena." He specifically mentioned China, stating that "the United States has never accepted China's claim to developing-country status, and virtually every current economic indicator belies China's claim." The President instructed USTR to work to reform the WTO self-declaration practice and, if no substantial progress is made within 90 days, to take certain unilateral actions, such as no longer treating a country as developing if the USTR

[183] European Commission, "EU proposals on WTO modernization," WK8329/2018 INIT, July 5, 2018.

[184] "Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements," JOB/GC/204, November 1, 2018.

[185] The WTO does not specify criteria for "developing" or "developed" country status, but least-developed countries are defined under U.N. criteria.

[186] For examples of types of the SDT provisions in WTO agreements, see https://www.wto.org/english/tratop_e/devel_e/teccop_e/s_and_d_eg_e.htm.

[187] "Understanding the WTO: The Organization," https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

[188] "An undifferentiated WTO: Self-declared development status risk institutional irrelevance," Communications from the United States, WT/GC/W/757, January 16, 2019.

[189] The White House, "Memorandum on Reforming Developing-Country Status in the World Trade Organization," July 26, 2019.

believes that designation to be improper, and to publish a list of all economies USTR believes to be "inappropriately" claiming developing-economy status.

The U.S. memorandum received a mixed response from other WTO members. Defending its developing country status and the availability of SDT, a Chinese Foreign Ministry spokesperson insisted that the principle of SDT "reflects the core values and basic principles of the WTO" and "must be safeguarded no matter how the WTO is reformed." At the same time, she stated that in claiming the status, "China does not intend to shy away from its due international responsibilities," while the U.S. position shows the United States to be "capricious, arrogant and selfish."[190] China, India, South Africa, and others defend the relevance of development status, claiming that, "the persistence of the enormous development divide between the developing and developed Members of the WTO is reflected on a wide range of indicators."[191] Developed countries, such as Norway and others, also have emphasized the importance of SDT as a "tool for enabling development and greater participation in the multilateral trading system."[192] Further, in their view, "negotiating criteria for designating Members' access to S&D is unlikely to be productive. What matters is responding adequately to the specific development needs of Members." On the other hand, some countries, like South Korea, Brazil, and Singapore, recently agreed not to seek SDT,[193] and Taiwan previously changed its status to "developed" in 2018.[194]

Several other suggestions have been made to address the situation, including encouraging countries to graduate from developing country status; setting quantifiable criteria for development status; targeting SDT in future agreements on a needs-driven, differential basis; and requiring full eventual implementation of all new agreements.[195] Some of these steps were implemented in the WTO Trade Facilitation Agreement.

**The Meaning of "Developing Country" Status**

The WTO does not apply established definitions of "developed" and "developing" countries to its members; in practice, most WTO members select their designation as "developing." In general, this status means countries are entitled to certain rights under so-called "special and differential treatment" (SDT). Broadly, these provisions include the following:[196]

- Measures that aim to increase trading opportunities for developing countries.
- Requirements that WTO members safeguard the interests of developing countries.

[190] Ministry of Foreign Affairs of the PRC, "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference," July 29, 2019, https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1684227.shtml.

[191] "The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness," Communication from China, India, South Africa and the Bolivarian Republic of Venezuela, WT/GC/W/765, February 18, 2019.

[192] "Pursuing the Development Dimension in WTO Rule-making Efforts," Communication from Norway, Iceland, New Zealand, Singapore and Switzerland, WT/GC/W/770/Rev.2, May 6, 2019.

[193] "S. Korea Has 'Little to Gain' in Maintaining Developing-Nation Status," *KBSWorld*, September 5, 2019; "Singapore does not take advantage of WTO special provisions for developing nations in negotiating agreements: MTI," *can*, July 27, 2019; and Iana Dreyer, "Beyond Brussels: Brazil accepts to forego WTO developing country status," *Borderlex*, March 20, 2019.

[194] Joseph Yeh, "Taiwan will benefit from 'developed' country status in WTO: Deng," *Focus Taiwan*, October 14, 2018.

[195] For example, see European Commission, "EU proposals on WTO modernization," July 5, 2018.

[196] See WTO, "Special and differential treatment provisions," https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, and "Examples of provisions for differential and more favourable treatment of developing countries," https://www.wto.org/english/tratop_e/devel_e/teccop_e/s_and_d_eg_e.htm.

- Transitional time periods for implementing WTO agreements and commitments.
- Flexibility of commitments, action, and use of certain policy instruments.
- Technical assistance to build capacity to carry out WTO work, handle disputes, and implement technical standards.
- Specific provisions for least-developed countries.

These provisions are generally nonreciprocal, meaning that developed country members agree to unilaterally grant additional preferences or flexibilities to developing countries. According to the WTO, there are 145 SDT provisions across core WTO agreements including on goods, agriculture, services, intellectual property, government procurement, and DS.[197] Most recently, SDT provisions were also included in the Trade Facilitation Agreement. Certain ministerial declarations and General Council decisions allow for SDT as well. The Bali Ministerial in December 2013 established a monitoring mechanism to review implementation of SDT provisions.

## Dispute Settlement

Supporters of the multilateral trading system consider the dispute settlement mechanism (DSM) not only a success of the system, but essential to maintain the relevance of the institution, especially while the WTO has struggled as a negotiating body. However, the DSM is facing increased pressure for reform, in part due to long-standing U.S. objections over certain rules and procedures. USTR Lighthizer contends that the WTO has become a "litigation-centered organization," which has lost its focus on negotiations.[198] While WTO members have actively used the DSM since its creation, some have also voiced concerns about various aspects, including procedural delays and compliance, and believe the current system could be reformed to be fairer and more efficient.

The Doha Round included negotiations to reform the DS system through "improvements and clarifications" to DSU rules.[199] A framework of 50 proposals was circulated in 2003 but countries were unable to reach consensus.[200] Discussions have continued beyond Doha with a primary focus on 12 issues, including third-party rights, panel composition, and remand authority of the Appellate Body. Under prior Administrations, the United States proposed greater control for WTO members over the process, guidelines for the adjudicative bodies, and greater transparency, such as public access to proceedings. However, these negotiations have yet to achieve results.

Some experts suggest that enhancing the capabilities and legitimacy of the DS system will likely require several changes, including improving mechanisms for oversight, narrowing the scope of and diverting sensitive issues from adjudication, improving institutional support, and providing WTO members more input over certain procedures.[201] Other analysts point to major challenges facing the DS system that could have the potential to either dismantle the current system or further catalyze change. These include most notably, the Appellate Body ceasing to operate in

[197] WTO Committee on Trade and Development, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Note by the Secretariat, WT/COMTD/W/219, September 22, 2016.

[198] USTR Robert Lighthizer, "Opening Plenary Statement," December 11, 2017.

[199] "Doha WTO Ministerial 2001: Ministerial Declaration," WT/MIN(01)/DEC/1, November 20, 2001, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

[200] There have been some cases of past DSU procedural reforms, such as the decisions to accept outside counsel and *amicus curiae* briefs in panel deliberations. See Craig VanGrasstek, *The History and Future of the World Trade Organization*, World Trade Organization, 2013.

[201] Robert McDougall, "Crisis in the WTO: Restoring the WTO Dispute Settlement Function," Centre for International Governance Innovation, CIGI Papers No. 194, October 2018.

December 2019 and forthcoming rulings on WTO disputes over U.S. Section 232 tariffs, or resolution of the long-standing, though currently dormant, dispute regarding China's treatment as a nonmarket economy.[202] Many analysts point to the impasse over reform of the DS system as also reflecting deeper systemic issues concerning the inability of the WTO to keep up with structural changes in the global economy. One report concludes, the WTO's "dispute settlement function cannot be safeguarded unless, at the same time, the WTO's rule-making function is also strengthened and the substantive trade rules are modernized."[203]

### *Appellate Body (AB) Vacancies*

The immediate flashpoint to the system is the refusal of the United States to consent to the appointment of new AB jurists. The United States has long-standing objections to decisions involving the AB's interpretation of certain U.S. trade remedy laws in particular—the subject of the majority of complaints brought by other WTO members against the United States.[204] The AB's seven jurists are appointed to four-year terms on a rolling basis, with the possibility of a one-term reappointment. The Trump Administration, as well as the Obama Administration in one instance, blocked the process to appoint new jurists as their term's expired, leaving the AB with one member in December 2019.[205] Deputy DG of the WTO Alan Wolff summarized the stakes of the Appellate Body ceasing to function: with member countries unable to appeal an adverse panel decision against one of their policies, "there is a risk of every trade dispute devolving into small and not so small trade wars, consisting of retaliation and counter-retaliation."[206]

WTO members and other stakeholders are exploring a number of options, in the absence of a functioning AB, that may support the current system (see below), to forestall collapse of dispute settlement altogether. Interim or permanent solutions debated include the possible creation of a parallel DS system that mirrors the WTO but does not include the United States; fall back to a GATT-like system where a disputing party can block decisions; or tacit agreement by members to accept panel decisions without appeal.[207] Most notably, on April 30, 2020, a group of members led by the EU put into effect an ad hoc Multi-Party Interim Appeal Arbitration Arrangement (MPIA), pursuant to Article 25 of the DSU, as a temporary measure to arbitrate disputes, which mirrors the main functions of the WTO appeals system.[208] On July 31, the MPIA took a final step toward becoming operational when members formally decided on the pool of 10 standing arbitrators to hear appeals. To date, 22 WTO members, including China, are part of the MPIA; it does not apply to cases involving members who have not joined, including the United States.

The United States, has criticized these efforts as "endorsing and legitimizing" the Appellate Body practices that "breached the rules set by WTO members," that have been central to U.S. concerns.[209] One study considers the merits of interim solutions, suggesting that "no-appeal and appeal-arbitration agreements can preserve rights for some members, but solutions that attempt to

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[202] Jack Caporal et al., *The WTO at a Crossroad*, Center for Strategic and International Studies, September 2019.

[203] *CIGI Expert Consultation on WTO Reform*, Special Report: Spring 2019, Centre for International Governance Innovation (CIGI), September 12, 2019.

[204] Adam Behsudi, "The man getting ready to take on the WTO," *Politico*, February 15, 2017.

[205] The Obama Administration blocked the reappointment of a Korean AB jurist in May 2016.

[206] Megan Cassella, "WTO's Wolff: More trade wars coming if Appellate Body dies," *Politico*, October 16, 2018.

[207] Jack Caporal et al., *The WTO at a Crossroad*, Center for Strategic and International Studies, September 2019.

[208] See European Commission, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143.

[209] "U.S.: EU-Canada interim plan would 'legitimize' bad Appellate Body practices," *Inside U.S. Trade*, September 30, 2019.

exclude the United States are not in the interests of most members."[210] In the view of Japan, one major economy that has not joined the MPIA, "attempts to adopt measures of provisional nature must serve the ultimate purpose of achieving a long-lasting reform" of the DS system.[211] Some analysts argue that the experience of the MPIA will likely lead to new approaches to handling appeals, but without engagement the United States will have no ability to shape its direction.[212] More broadly, some are also concerned that the perceived U.S. disinterest or lack of leadership in resolving the impasse over the AB may undermine other U.S. efforts to advance WTO reforms and new rules beset by a lack of trust among members. Other experts have cautioned against a quick agreement to restart the AB without deeper engagement from members on U.S. critiques, arguing that the U.S. risks losing its leverage, and that DS and WTO reforms should be done together.[213]

### *Proposed DS Reforms*

The United States expounded on some of the perceived shortcomings of the DS system in its most recent trade policy agenda and lengthy report on the AB issued in February 2020.[214] Arguably, the main U.S. complaint is that the system, particularly the AB has "overreached on substantive issues, engaged in impermissible gap-filling, and read into the WTO agreements rules that are simply not there… adding to or diminishing the rights and obligations of WTO Members."[215] This is particularly so in the areas of subsidies, AD and CVDs, standards, and safeguards. At its crux, the current controversy is over the autonomy of the AB, its deference to the DSB, and its obligations to implement the provisions of the DSU. The United States has been the most vocal in its criticisms, yet other WTO members have expressed similar concerns. While the United States has not tabled specific reforms for these complaints to the WTO membership, it has criticized aspects of the DS system in various General Council meetings and reports. Meanwhile, several members, singly or in groups, have tabled proposals or suggestions on how to reform AB procedures and practices. The General Council launched an informal process on the functioning of the AB at its December 2018 meeting. This group's facilitator, Ambassador David Walker of New Zealand, proposed in October 2019 a list of items of convergence among its participants as a draft decision of the General Council—the United States ultimately declined to back the draft decision. Under each of the following issues, U.S. concerns are raised along with Ambassador Walker's proposals to address them.[216]

*Disregard for the 90-day, DSU-mandated deadline for AB appeals.* USTR claims that the AB does not have the authority to fail to meet the deadline without consulting the DSB, maintaining

[210] *CIGI Expert Consultation on WTO Reform*, Special Report: Spring 2019, Centre for International Governance Innovation (CIGI), September 12, 2019, p. 18.

[211] Permanent Mission of Japan to the International Organizations in Geneva, "Trade Policy Review: Japan," Statement, July 8, 2020, https://www.geneve-mission.emb-japan.go.jp/itpr_en/statement_trade_20200708.html.

[212] Senate Finance Committee, *Hearing on WTO Reform: Making Global Rules Work For Global Challenges,* written testimony by Jennifer Hillman, July 29, 2020.

[213] Senate Finance Committee, *Hearing on WTO Reform: Making Global Rules Work For Global Challenges,* written testimony by Thomas R. Graham, July 29, 2020.

[214] USTR called the report the "the first comprehensive study of the Appellate Body's failure to comply with WTO rules and interpret WTO agreements as written," and published it "to examine and explain the problem, not dictate solutions." See *Report on the Appellate Body of the World Trade Organization*, February 2020.

[215] Ibid, pp. 8-9.

[216] WTO General Council, "Informal Process Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. David Walker (New Zealand), (Job /GC/222), Tuesday October 15, 2019.

that the deadline "helps ensure that the AB focuses its report on the issue on appeal." The facilitator found convergence on the following issues:

- The AB is obligated to issue its report no later than 90 days from the date a party to the dispute notifies its intention to appeal.
- The parties may agree with the Appellate Body to extend the timeframe for issuance of the Appellate Body report beyond 90 days in cases of unusual complexity or periods of numerous appeals. The parties will notify such agreement to the DSB and the Chair of the AB.
    - *Extension of service by former AB jurists on cases continuing after their four-year terms have expired.* The United States maintains that the AB does not have the authority unilaterally to extend the terms of jurists, rather that authority lies with the DSB and that it is a matter of adherence to the DSU.[217] In actual practice, however, it may be the case that having former jurists stay on to finish an appeal may be more efficient than having a new jurist join the case. The DSB has the authority and responsibility to determine the membership of the AB and must fill vacancies as they arise.
    - The DSB shall launch the selection process for a new member 180 days before the expiration of the term of an outgoing AB member. If a vacancy arises before the expiration of an AB jurist's mandate, the DSB shall launch an immediate selection process.
    - AB members may be assigned a new appeal until 60 days prior to the expiration of their term.
    - An AB panel may complete an appeal after expiration of the member's term if the oral hearing is held prior to the expiration.

During the Obama Administration, the United States blocked the reappointment of a South Korean jurist to the AB in May 2016. The United States cited what it considered "abstract discussions" in prior decisions by the jurist that went beyond the legal scope of the WTO.[218] This action has led to the concern that the prospect of non-reappointment could affect the independence of the AB system.[219] However, one former AB jurist opines that, "reappointment is an option, not a right," and calls for the WTO members to determine if a more formal process similar to initial appointment of AB jurists is needed for reappointment.[220]

[217] USTR indicates this plank requires immediate attention, noting "the United States is resolute in its view that Members need to resolve this issue before moving on to the issue of replacing Appellate Body Members." See USTR *2018 Annual Report*, March 2018, p. 26.

[218] Shawn Donnan, "US accused of undermining WTO," *Financial Times*, May 30, 2016.

[219] European Commission, "EU proposals on WTO modernization," (WK8329/2018 INIT), July 5, 2018, p. 16.

[220] WTO, "Farewell Speech of Appellate Body Member Ricardo Ramirez-Hernandez, May 28, 2018, https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm.

**Dispute Settlement Understanding, Article 3.2**

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The members recognize that it serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Other criticisms of the AB involve the extent to which it can interpret WTO agreements. The United States, in arguing for a more restrictive view of the power of the DSB, points to Article 3.2 that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" (see **text box** above). However, those supporting a more expansive view of the DSU's role can point to the same article, which highlights the role "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The scope and reach of the AB's activities is an enduring controversy for the organization, not limited to the Trump Administration. USTR has flagged several specific practices relating to these issues, such as the following:

*Issuing advisory opinions on issues not relevant to the issue on appeal.* This point relates to the U.S. concern that the AB is engaged in "judicial overreach" by going beyond deciding the case at hand. USTR contends that the ability to issue advisory opinions or interpretations of text rests with the Ministerial Conference or General Council. The facilitator found convergence on the following issues:

- The AB should not rule on issues not raised by either party.
- The AB shall address issues raised by parties only to the extent necessary to assist the DSB in making a decision.

The following two suggestions, while not part of the Walker recommendations, have also been raised in this context:

- Rather than issue advisory opinions, the AB also could "remand" issues of uncertainty to the standing committees of the WTO for further negotiation. Canada has suggested this could allow for more interaction between the panel and appeal level.[221]
- Members could also use a provision of the WTO Agreement (Article IX.2) to seek an "authoritative interpretation" of a WTO text at the General Council or Ministerial Conference, which could be adopted by a three-fourths vote.

*De novo review of facts or domestic law in cases on appeal.* The United States alleges that the AB is not giving the initial panel due deference on matters of fact, including regarding the panel's interpretation of domestic law. This point derives from USTR's view that a country's domestic or municipal law should be considered as fact, and that the panel's interpretation of the domestic law is thus not reviewable by the AB. The facilitator found convergence on the following issues:

- The meaning of a party's municipal (domestic) laws is a matter of fact, and not reviewable by the AB.
- The DSU does not permit *de novo* review or 'to complete the analysis' of facts in a dispute.

[221] See, for example, Joost Pauwelyn, *Appeal without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix It*, International Centre for Trade and Sustainable Development, June 2007; Canada submission, JOB/GC/201, p. 3.

*Treatment of AB decisions as precedent.* Like the previous two concerns, this complaint speaks to the alleged overreach of the AB. USTR asserts that while AB reports can provide "valuable clarification" of covered agreements, they cannot be considered or substituted for the WTO agreements and obligations negotiated by members. However, according to one former DG of the WTO, "the precedent concept used in the WTO jurisprudence is ... centrally important to the effectiveness of the WTO dispute settlement procedure goals of security and predictability."[222] A related concern some WTO members have is "gap-filling" by the DS system, where the legal precedent is unclear or ambiguous or there are no or incomplete WTO rules regarding a contested issue. Here there are diametrically opposite beliefs: a U.S. trade practitioner asks, "Is filling gaps and construing silences really not the creation of rights and obligations through disputes vs. leaving such function to negotiations by the members?"[223] The former DG, however, contends that "every juridical institution has at least some measure of gap-filling responsibility as part of its efforts to resolve ambiguity."[224] The issue of the legitimacy of precedence or gap-filling may be one of the thorniest issues of all with few solutions proposed that would potentially satisfy differences among members. The facilitator found convergence on the following issues:

- DS proceedings do not create precedent.
- Members find value in the consistency and predictability of the interpretation of rights and obligations under the covered agreements.
- Panels and the AB should take previous panel/Appellate Body reports into account to the extent they find them relevant to a dispute they are considering.
- Reaffirms that findings and recommendations of panels and the AB and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.
- Reaffirms Article 17.6 of the Antidumping Agreement, which states that "where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the [domestic administrative] authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

The Walker process also found consensus to establish a mechanism for regular dialogue between WTO members and the AB in an informal setting to discuss issues related to the functioning of the AB, but unrelated to particular cases.

It is likely that many of the issues that could arise from proposed reforms to the WTO system would require clarification of or amendment to the language of the Marrakesh Agreement or the DSU. Clarification could take the form of interpretation of the agreements. As noted above, interpretation can be undertaken by the Ministerial Conference (held every two years), General Council, or DSB, with a three-fourths vote of the WTO membership. Amending the decisionmaking provisions of the Marrakesh Agreement (Article IX) or the DSU would require consensus of the membership at the Ministerial Conference (Marrakesh Agreement, Article X.8). Amendments to the Marrakesh Agreement would require a two-thirds vote of the membership. As noted above, negotiations related to reforms of the DSM occurred during the Doha Round, and

[222] Peter Sutherland et al., *The Future of the WTO: Addressing institutional challenges in the new millennium*, World Trade Organization, 2004, p. 55.

[223] Terence Stewart, "The Broken Multilateral Trade Dispute System," Asia Society Policy Institute, February 7, 2018.

[224] Sutherland, 2004, p. 52.

despite the criticism of the DSM by the United States and others, the General Council or the DSB has not undertaken serious consideration of these reforms.

The United States criticized some of the Walker proposals as seeking to change WTO DS rules to fit the practices objectionable to the United States, rather than adhering to the rules as originally negotiated. Instead of seeking to accommodate current practices, U.S. Ambassador to the WTO Dennis Shea proposed that WTO members "engage in a deeper discussion" of why the Appellate Body has "felt free to depart from what WTO Members agreed to," and that "without this understanding, there is no reason to believe that simply adopting new or additional language, in whatever form, will be effective in addressing the concerns shared by several Members."[225] In testimony before Congress in June 2020, USTR Lighthizer commented that it would be a welcome outcome if the AB were never to go back into effect.[226]

## Selected Challenges and Issues for Congress

### Value of the Multilateral System and U.S. Leadership and Membership

The United States has served as a leader in the WTO and the GATT since their creation. The United States played a major role in shaping GATT/WTO negotiations and rulemaking, many of which reflect U.S. laws and norms. It was a leading advocate in the Uruguay Round for expanding negotiations to include services and IPR, key sources of U.S. competitiveness, as well as binding DS to ensure new rules were enforceable. Today, many stakeholders across the United States rely on WTO rules to open markets for importing and exporting goods and services, and to defend and advance U.S. economic interests.

As discussed, the Trump Administration has variously expressed doubt over the value of the WTO and multilateral trade negotiations to the U.S. economy. While President Trump's initial talk of WTO withdrawal has abated, the Administration continues to express skepticism toward the value of multilateralism, often preferring bilateral negotiations to address "unfair trading practices." While many view U.S. concerns as justified, the U.S. practice of blocking of the AB and reticence to debate specific reforms could cede U.S. leadership to others. At the same time, reform of the multilateral trading system is a stated U.S. trade policy objective, and the United States has remained engaged in certain initiatives and plurilateral efforts at the WTO, and has put forward several reform proposals in other areas. While some U.S. frustrations with the WTO are not new and are shared by other trading partners, the Administration's overall approach has spurred questions regarding the future of U.S. leadership of and participation in the WTO.

Most observers maintain that the possibility of U.S. withdrawal from the WTO remains unlikely for procedural and substantive reasons. Procedurally, a withdrawal resolution would have to pass the House and Senate; it has also been debated what legal effect the resolution would have if adopted.[227] While resolutions were introduced in May 2020 during the 116th Congress, a rule change proposed by the House Rules Committee and adopted by the House, as well as by an interpretation of the statute reportedly made by the Senate Parliamentarian, are likely to prevent votes from occurring on the measures.[228] Moreover, if the United States were to consider such a

[225] Ambassador Dennis Shea, "Statements delivered by Ambassador Shea at the Meeting of the WTO General Council, July 23, 2019, https://geneva.usmission.gov/2019/07/23/statements-delivered-by-ambassador-dennis-shea-wto-general-council-meeting-july-23-2019/.

[226] "USTR: If WTO Appellate Body never comes back, 'that would be fine,'" *Inside U.S. Trade*, June 17, 2020.

[227] For a discussion of the debate, see Jack Caporal et al., *The WTO at a Crossroad*, Center for Strategic and International Studies, September 2019.

[228] Doug Palmer, "New ruling quashes Hawley's hope for Senate WTO withdrawal vote," *Politico*, July 1, 2020.

step, withdrawal would have a number of practical consequences. The United States would face economic costs, since absent WTO membership, remaining members would no longer be obligated to grant the United States MFN status under WTO agreements, or uphold WTO rules on IPR and restrictions on the use of regulations, trade-related investment measures, or subsidies. Consequently, U.S. goods and services could face significant disadvantages in other markets, as members without FTAs with the United States could raise tariffs or other trade barriers on U.S. exports at will. More broadly, the United States would stand to lose influence over the writing of future global trade rules.

A broader question is whether the WTO would flounder without U.S. leadership, or whether other members like the EU and China would expand their roles. As some in the United States question the value of WTO participation and leadership, other countries have asserted themselves as advocates for the global trading system. As noted, cooperation on WTO reform has been elevated as a major topic at recent high-level meetings including among the EU, China, and Canada.[229]

Ongoing congressional oversight could examine the value, both economic and political, of U.S. WTO membership and leadership. Congress could consider, or could ask the U.S. International Trade Commission to investigate the value of the WTO or potential impact of WTO withdrawal on U.S. businesses, consumers, federal agencies, laws and regulations, and foreign policy. Through resolutions some Members have expressed support for ongoing WTO reform efforts (H.Res. 746, introduced December 2019) and advocated for specific reforms and U.S. leadership (S.Res. 651, introduced July 2020). S.Res. 651, for example, cautioned that the United States "achieved its trade policy objectives through active leadership at the WTO, and that an absence of that leadership would be filled by nonmarket economies that are hostile to a host of United States interests." Congress could also hold broader debate over WTO participation in considering a disapproval resolution of U.S. membership under the URAA.

H.Res. 746

Expressing the sense of the House of Representatives that the United States should reaffirm its commitment as a member of the WTO and work with other WTO members to achieve reforms at the WTO that improve the speed and predictability of dispute settlement, address longstanding concerns with the WTO's Appellate Body, increase transparency at the WTO, ensure that WTO members invoke special and differential treatment reserved for developing countries only in fair and appropriate circumstances, and update the WTO rules to address the needs of the United States and other free and open economies in the 21st century.

**S.Res. 651**

Expressing the sense of the Senate that, while the United States finds value and usefulness in the WTO in fulfilling the needs of the United States and other free and open economies in the 21st century, significant reforms at the WTO are needed and the United States must therefore continue to demonstrate leadership to achieve those reforms.

## Respect for the Rules and Credibility of the WTO

The founding of the GATT and WTO were premised on the notion that an open, transparent and rules-based multilateral trading system was necessary to avoid a return to the nationalistic interwar trade policies of the 1930s. There arguably are substantial reasons for the United States and other countries to uphold the rules and enforce their commitments. A liberalized, rules-based

[229] For example, see Delegation of the European Union to China, "Joint statement of the 21st EU-China summit," April 10, 2019, https://eeas.europa.eu/delegations/china_en/60836/Joint%20statement%20of%20the%2021st%20EU-China%20summit; and Government of Canada, "Ottawa Group and WTO reform," https://www.canada.ca/en/global-affairs/news/2019/05/ottawa-group-and-wto-reform.html.

global trading system increases competition for companies domestically, but also helps to ensure that companies and their workers have access and opportunity to compete in foreign markets with the certainty of a stable, rules-based system. A system for enforcing the rules and resolving disputes that inevitably arise from repeated commercial interactions also helps ensure such trade frictions do not spill over into broader international relations.

However, certain actions by the Trump Administration and other countries have raised questions about respect for the trading system, and could weaken the credibility of the WTO. In particular, recent U.S. actions to raise tariffs against major trading partners and obstruct the functioning of the DS system have prompted concerns from some that the United States may undermine the effectiveness and credibility of the institution that it helped to create.[230] Moreover, the outcomes of controversial dispute cases over U.S. tariffs could set important related precedents (see below). Some are concerned that U.S. actions may embolden other countries to protect their own industries under claims of protecting national security interests. At the same time, other countries' retaliatory tariff actions may violate WTO commitments and are pending DS resolution. If the DS process cannot satisfactorily resolve the conflicts, further unilateral actions and tit-for-tat retaliation could escalate. More broadly, many observers view the future of the trading system as deeply intertwined with how the United States and China manage their ongoing trade frictions.

In recent years, countries have also been accused of imposing new trade restrictions and taking actions that are not in line with either the spirit or letter of WTO agreements—in particular, China's state-led industrial policies, including subsidies, IPR violations, and forced technology transfer practices.[231] In part, the WTO's perceived inability to address Chinese policies and gaps in rules led to the United States resorting to Section 301 actions. Many increasingly view WTO relevance as waning, absent more concerted efforts to tackle systemic non-market practices, which have driven recent U.S. and other's efforts to explore new rules in and outside the WTO—efforts largely resisted by China. More broadly, countries' pursuit of such measures in the name of national or economic security appears to further call into question the viability of the rules-based system. While WTO agreements offer ample flexibility for temporary measures justified by national security or health crises, the spread of export restrictions following COVID-19 have further amplified such concerns.

## U.S. Sovereignty and the WTO

Under the Trump Administration, USTR has put new emphasis on "preserving national sovereignty" within the U.S. trade policy agenda, emphasizing that any multinational system to resolve trade disputes "must not force Americans to live under new obligations to which the United States and its elected officials never agreed."[232] The question of sovereignty is not a new one. The Uruguay Round Agreements Act provided that U.S. law would prevail against an inconsistent provision or an application of a provision in a WTO agreement. Further, it specified that no U.S. law could be modified or amended by the agreements, including in areas of public health, environment, worker safety, or U.S. trade laws, unless specified in the implementing

[230] CRS Report R45529, *Trump Administration Tariff Actions (Sections 201, 232, and 301): Frequently Asked Questions*, coordinated by Brock R. Williams.

[231] In 2018, trade-restrictive measures imposed by G20 economies "hit a new high" between mid- and late 2018, compared to the previous reporting period, and was the largest recorded since 2012. "WTO report shows sharp rise in trade-restrictive measures from G20 economies," November 27, 2018, https://www.wto.org/english/news_e/news18_e/trdev_22nov18_e.htm.

[232] USTR, *2018 Trade Policy Agenda*, March 2018, p. 3.

legislation.[233] In other words, an adverse DS decision against the United States would not change U.S. law; Congress would need to make the change to come into compliance with a DS decision or decline to do so, as Congress has done in the past. In that case, however, the other disputing party may impose retaliatory tariffs on the United States in compensation. In addition, the withdrawal procedures in the URAA responded to the same sovereignty concerns expressed in the language above.[234]

While U.S. concerns regarding alleged "judicial overreach" in WTO dispute findings are long-standing, the Trump Administration has also emphasized unilateral action outside the WTO as a means of defending U.S. interests, including national security. Some observers fear that disagreements at the WTO on issues related to national security (e.g., Section 232 tariffs) may be difficult to resolve through the existing DS procedures, given current disagreements related to the WTO AB and concerns over national sovereignty.[235] WTO members and parties to the GATT have invoked Article XXI allowing measures to protect "essential security interests," in a handful of other trade disputes. These parties, including the United States, have often argued that each country is the sole judge of questions relating to its own security interests.

The outcome of a recent case could have implications for the adjudication of disputes involving U.S. steel and aluminum tariffs. In April 2019, a panel ruling in a Russia-Ukraine dispute clarified the WTO's role in evaluating the use of the national security exception, finding that DS panels are competent to review member actions justified under Article XXI.[236] The panel determined that it had jurisdiction to review whether a WTO member's actions were justified under Article XXI's national security exception and that Russia satisfied the requirements for invoking the exception.[237] The United States voiced concerns with the panel report, finding it "insufficient," and maintaining that Article XXI is "self-judging" and not subject to panel review.

## Role of Emerging Markets

The broadened membership of the WTO over the past two decades has promoted greater integration of emerging markets such as Brazil, China, India, and Russia in the global economy, and helped ensure that developing country interests are represented on the global trade agenda. At the same time, many observers have attributed the inability of WTO members to collectively reach compromise over new rules and trade liberalization to differing priorities for reforms and market opening among developed countries and emerging markets.

One question is to what extent economies like China, with significant economic clout, will take on greater leadership to play a more constructive role, advance the global trade agenda, and

[233] P.L. 103-465, Sec. 102.

[234] During congressional debate over URAA, some Members proposed to create extra review mechanisms of WTO DS, and many Members stressed that only Congress can change U.S. laws as a result of dispute findings.

[235] For more information, see CRS Report R45249, *Section 232 Investigations: Overview and Issues for Congress*, coordinated by Rachel F. Fefer.

[236] WTO, "Members adopt national security ruling on Russian Federation's transit restrictions," April 26, 2019. Ukraine argued that Russia's restrictions and bans on the traffic of certain goods crossing its territory from Ukraine violated the GATT and Russia's Accession Protocol. Russia invoked the national security exception in GATT Article XXI(b)(iii) in its defense, arguing that the panel lacked jurisdiction to evaluate the merits of Ukraine's claims, and that deterioration in relations and conflict between Russia and Ukraine was a threat to its security interests.

[237] The panel determined requirements were met because: (1) Russia's relations with Ukraine had deteriorated to the point that they constituted an "emergency in international relations"; (2) Russia's trade restrictions qualified as measures "taken in time of this emergency"; and (3) Russia met all other requirements for invoking the exception. Ibid, Para. 8.1(d)(i)-(iv).

facilitate compromise among competing interests. China has voiced support for globalization and the multilateral trading system under which it has thrived.[238] The Chinese government's 2018 white paper on the WTO stated that: "The multilateral trading system, with the WTO at its core, is the cornerstone of international trade and underpins the sound and orderly development of global trade. China firmly observes and upholds the WTO rules, and supports the multilateral trading system that is open, transparent, inclusive and nondiscriminatory."[239] At the same time, China has blocked progress in certain initiatives, including the WTO's stalled plurilateral on environmental goods, is seeking to limit the scope of ongoing e-commerce negotiations, and has not put forward a sufficiently robust offer on procurement to join the GPA, a longstanding promise. More broadly, growing scrutiny of Chinese industrial policies and non-market practices are challenging China's role in the system, raising questions about the country's willingness in practice to take on meaningful leadership responsibility in the WTO context.

Another related concern voiced by the United States, including some Members of Congress, and other WTO members is the role of large emerging markets and use of developing country status by those and other countries to ensure flexibility in implementing commitments. The United States is seeking to work with other members to set qualifications for such status, but the issue remains controversial. Members could be given incentives to graduate from developing country status; moreover, different WTO agreements could offer different incentives or other flexibilities.

## Priorities for WTO Reforms and Future Negotiations

Reform of the multilateral trading system remains among the Administration's trade policy objectives.[240] Congress can take a number of steps to direct, influence, and signal support for U.S. priorities for ongoing and future WTO negotiations and reform. The primary legislative vehicle for establishing negotiating objectives is TPA. Congress could consider establishing specific or enhanced negotiating objectives for multilateral or plurilateral trade negotiations, possibly through legislation to amend TPA during its potential reauthorization after July 2021. Congress could also consider specific reporting requirements in TPA, related to providing updates to Congress on progress toward meeting WTO objectives or on WTO reform efforts.

As discussed, some Members have expressed congressional views on reforms through "sense of Congress" resolutions and directed the executive branch to increase U.S. engagement in specific areas. Congress could hold oversight hearings or submit letters to ask USTR about specific actions, plans, or objectives regarding WTO reforms for the institution, dispute settlement procedures, or in regards to updating existing agreements to address trade barriers and economic practices not sufficiently covered by current rules. In July 2020, the Senate Finance Committee held a hearing on WTO reform, expressing bipartisan agreement on the importance of improving the institution.[241] Congress could request that USTR provide an update of ongoing plurilateral talks at the WTO, such as on e-commerce and digital trade—specified by Congress as a principal trade negotiating objective in TPA. Congress could also consider appropriating additional funds dedicated to WTO reform efforts. More broadly, Congress may consider the long-term implications of recent U.S. and other countries' restrictive and/or unilateral trade actions on current and future trade negotiations. Some experts argue that U.S. unilateral tariffs and blocking

[238] See, for example, President Xi Jinping's remarks at the World Economic Forum in 2017, http://www.china.org.cn/node_7247529/content_40569136.htm.

[239] China's State Council Information Office, "China and the World Trade Organization," white paper, June 2018, http://english.gov.cn/archive/white_paper/2018/06/28/content_281476201898696.htm.

[240] USTR, *2018 Trade Policy Agenda,* March 2018; and *2020 Trade Policy Agenda,* February 2020.

[241] Senate Finance Committee, *Hearing on WTO Reform: Making Global Rules Work For Global Challenges,* July 29, 2020.

of AB appointments may limit other countries' interest in engaging in negotiations to reduce trade barriers and craft new rules. Such concerns are amplified with the proliferation of preferential FTAs outside the WTO, which may have potential discriminatory effects on non-participating countries, including the United States.

## Outlook

The future outlook of the multilateral trading system is the subject of growing debate, as it faces serious challenges, some longstanding and some emerging more recently. Some experts view the system as long stagnant and facing a crisis; others remain optimistic that the current state of affairs could spur new momentum toward reforms and alternative negotiating approaches moving forward. Despite differing views, there is a growing consensus that the status quo is no longer sustainable, and that there is urgent need to improve the system and find ground for new compromises if the WTO is to remain the cornerstone of the trading system.

Debate about the path forward continues. Recent proposals for WTO reforms and for new rules are under development and have provided the seeds for new ideas, though concrete solutions and next steps have yet to be agreed among countries involved in discussions and broader WTO membership. In the near term, several events on the horizon could provide added impetus for resolving differences and assessing progress. The challenges of COVID-19 have tested the resilience of global cooperation, disrupted global supply chains, and resulted in widespread trade protectionism. At the same time, several countries have reaffirmed the trading system, lifted restrictions and liberalized trade in response to the crisis, and view the WTO as playing an important role in tackling the trade policy challenges. While some reform efforts are stalled and the WTO DS system ceased to fully function in December 2019, the alternate arbitration mechanism among the EU, China and some other WTO members began operations in 2020 and will test a key function of the WTO. In addition, several U.S. WTO disputes, including ones involving China, are awaiting consequential decisions in 2020. More broadly, many observers view the future of the global trading system as deeply intertwined with how the United States and China manage their trade relationship and ongoing frictions.

WTO members also are to face their rescheduled Ministerial in 2021, which many view as a critical action-forcing event. MC12 could provide an opportunity for countries to announce completion of negotiations and concrete progress in other priority areas, including plurilateral efforts. MC12 and more broadly, the WTO as an institution will be shaped by the vision of a new Director-General seeking to inject new momentum into ongoing efforts.

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