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REVITALIZING THE WORLD TRADE ORGANIZATION

Clete Willems

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I. Introduction

All three pillars of the World Trade Organization (WTO) have played a key role in promoting "rules-based" international trade for the past twenty-five years.[1]

1. **Negotiations**: The negotiations creating the WTO were a major success, leading to a broad range of new rules that prohibit members from raising tariffs beyond agreed-upon levels, restrict non-tariff barriers, and ban discriminatory trade measures. Since then, a few negotiations have helped further lower barriers, including the Trade Facilitation Agreement (TFA) and Information Technology Agreement (ITA). Today, average applied tariffs are approximately half of what they were when the WTO was created, and numerous unfair trade practices have been discontinued.[2]

2. **Implementation and Monitoring**: The WTO recognizes that the implementation and monitoring of commitments are essential to maintaining the integrity of an effective rules-based system. Accordingly, the WTO includes mechanisms to track implementation and rules that require members to notify it of changes in trade policies and share information on trade-distorting practices (e.g., subsidies). Transparency and information sharing promote business predictability, while the discussion of trade-distorting policies often leads to their modification or abandonment before adoption.

3. **Dispute Settlement**: The WTO dispute-settlement system helps resolve trade disputes to minimize unilateral action and cycles of retaliation. Many countries use the dispute-settlement system to challenge adverse measures.[3] In most cases, the member losing the dispute changes the offending measure. In other cases, that member exercises its sovereignty and chooses not to change the policy, freely accepting the consequences (retaliatory tariffs). Additionally, many disputes are settled before litigation commences.

The world has changed considerably since the WTO's creation. It has experienced the rise of the Internet and other advanced technologies, China's economic expansion, greater skepticism about the benefits of trade, and greater concern about income inequality. The world has changed, and so must the WTO. At the same time, the WTO itself has not met expectations. WTO negotiations have not readily facilitated new rules or additional market-access openings, the implementation and monitoring pillar has not held countries accountable for ignoring its requirements, and the dispute-settlement system has not strictly applied the rules as negotiated. As a result, the WTO is falling far short of its promise and mandate in different ways.

WTO negotiations have failed to update international trade rules to: account for non-market economies and deal with related unfair trade practices, such as forced technology transfer and massive industrial subsidies; account for new technologies, such as the Internet; improve commitments in key areas covered in detail by free-trade agreements (FTAs), such as intellectual property and services; and fully address politically important policy issues, such as labor and the environment. WTO negotiations have also failed to substantially lower or equalize tariff treatment among major economies.

The ability of large emerging economies to self-declare "developing-country" status and avoid taking on the same commitments as competitors has compounded the challenge. Worse yet, many countries claim that trade liberalization and the WTO rules that promote it are anti-development, undermining the WTO's core mission.

Compliance with the WTO's implementation and monitoring function has not been widespread, with many members failing to follow the basic notification requirements necessary to ensure the transparency and predictability of trade.

WTO dispute settlement has drifted from its original design. It has failed to properly adjudicate certain disputes, including by inventing new rules without consensus and improperly applying the rules to non-market economies;

1 The General Agreement on Tariffs and Trade (GATT), which preceded the WTO, was in existence since 1947. However, the GATT only governed trade in goods. The WTO constitutes an improvement on the GATT to the extent that it extends protections to trade in services, as well as trade-related aspects of intellectual property rights.

2 By 2015, average applied tariffs were cut to less than 8 percent (from 15 percent in 1995), roughly 60 percent of global trade flowed free of tariffs, and another fifth was subject to tariffs of less than 5 percent. "The WTO at Twenty: Challenges and Achievements," World Trade Organization, 2015, 9, *https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf*.

3 The United States has successfully used the dispute-settlement process to challenge measures that include China's export restrictions on rare-earth metals, China's illegal anti-dumping duties on US automobiles, China's prohibited subsidies for its agricultural sector, the illegal European Union subsidies for aircraft production, India's ban on US poultry, and Argentina's broad range of illegal import restrictions, among many other measures. Other countries have had similar positive experiences with dispute settlement.

A stack of China Shipping shipping containers are pictured in the Port of Miami in Miami, Florida, U.S., May 19, 2016. *Photo Credit: Reuters. https://tinyurl.com/y2menqc5*

allowed the WTO Secretariat to wield too much power in decision-making; and taken too long, depriving workers and businesses of real-time solutions.

Accordingly, **all three pillars require reform to ensure the WTO retains a constructive and central role in resolving disputes before they spiral out of control, and in shaping international trade rules and behavior**. When the WTO is functioning properly, it provides a mechanism to enforce agreed-upon rules in a predictable manner and create new rules to protect workers and businesses. When the rules are inadequate and disputes take too long, countries are more inclined to adopt unfair practices, and may be forced to respond unilaterally to protect their interests.

WTO reform provides the quickest and most constructive path to adequately address China's unfair trade practices. The US-China Phase One trade deal made important progress on certain structural issues, but did not meaningfully address industrial subsidies or state-owned enterprises (SOEs), and it is unlikely that China will ever address these matters bilaterally given the government's central role in its economy. Therefore, concerted multilateral pressure that paints these policies as a threat to the global trading system as a whole is necessary to effectuate change. In many respects, the WTO provides the ideal forum for countries to work together to persuade China to change its most problematic behavior. The WTO already has a core set of principles, such as non-discrimination, that are critical to countering such practices, and an existing infrastructure for negotiating, monitoring, and enforcing those rules. The WTO's membership is also critical—it includes many countries impacted by these issues, as well as China itself. The broad reach of the WTO will also help ensure other countries do not adopt similar non-policies.

The United States has been calling for significant WTO reform for years, and many countries have recently joined the chorus. For example, in December 2018, all Group of Twenty (G20) members endorsed the following language in the leaders' statement:

> International trade and investment are important engines of growth, productivity, innovation, job creation and development. We recognize the contribution that the multilateral trading system has made to that end. The system is currently falling short of its objectives and there is room for improvement. We therefore support the necessary reform of the WTO to improve its functioning.[4]

Despite these high-level statements, WTO members have struggled to gain momentum toward tangible reform. Some blame the United States for refusing to offer specific proposals on dispute settlement, the European Union (EU) for an unwillingness to meaningfully address US concerns on this issue, China for refusing to engage on proposals related to its practices, and India for leading the fight to preserve preferential developing country status for large, emerging economies.

Regardless of who is to blame, **the WTO is in crisis, and momentum for ambitious reform must be generated before the system loses its relevance**. To catalyze momentum, members should quickly resolve ongoing negotiations while "thinking big" about the future and significantly raising their levels of ambition. The successful conclusion of ongoing negotiations, such as those on fisheries subsidies, will create new confidence in the WTO by demonstrating that the system is still capable of solving problems. But, negotiations will not solve the biggest problems facing the system. Therefore, even as members seek to make incremental progress, they increase their ambition with respect to the overall scope of reform needed to create a system fit for purpose in the twenty-first century and on "outside-the-box" ideas to solve some of the more intractable problems before it is too late.

Any successful WTO reform effort requires the United States and the European Union to better cooperate and coordinate. The United States and EU share common values, jointly spearheaded the creation of the original international trading system, and have both used it to promote trade-liberalizing, market-oriented policies around the globe. The economies of the United States and the EU are also equally challenged by China's policies. If they cannot reach consensus on how to fix the WTO, it is inconceivable that the rest of the world could do so.

To this end, this paper proposes an ambitious WTO reform proposal that both the United States and the European Union should be able to endorse, and ultimately work together to promote. In particular, a joint US-EU WTO reform proposal should

- address problems with all three pillars—negotiations, implementation and monitoring, and dispute settlement; these functions complement each other and reform is needed in all three to make the system work as a whole;
- address the most difficult issues, including China's unfair trade policies and how to fit a non-market economy into a system built by market economies;
  - create new rules to address issues that have emerged since the WTO was created, such as digital trade, and upgrade existing agreements, such as the intellectual property and services agreements, to the higher standards included in many FTAs;
- include more robust commitments on politically important issues, such as labor and the environment, which are critical to regaining domestic support for trade;
- eliminate the unfairly high tariff rates imposed by certain countries, and bring greater parity in tariff levels among major economic powers;
- promote liberalization by all members, not just "developed" economies, while recognizing the unique challenges faced by least-developed countries (LDCs) and allowing for differential treatment predicated on fact-based need;
- consider novel approaches to rescue the negotiating function, such as the use of plurilateral agreements that only benefit participants (non-most favored nation), or non-binding commitments for LDCs as an initial approach in certain areas;
- increase high-level political engagement from capitals to promote greater ambition in Geneva;
- hold countries accountable for failing to follow fundamental rules related to transparency;
- fully address the underlying shortcomings of the dispute settlement system by
  - ensuring that adjudicators better respect the limited mandate provided by WTO members, and do not create rules to which members never agreed;
  - making institutional reforms to improve the transparency and accountability of the process, and address the imbalance in decision-making between the WTO Secretariat and the appointed adjudicators; and

4 "G20 Buenos Aires Leaders' Declaration: Building Consensus for Fair and Sustainable Development," Group of 20, December 1, 2018, paragraph 27, *https://www.consilium.europa.eu/media/37247/buenos_aires_leaders_* declaration.pdf.

- improving the system's efficiency so it serves as a viable "real-time" alternative to unilateral action; and

- recognize that fixing the negotiating function is critical to fixing dispute settlement in a sustainable manner.

The will of all WTO members will ultimately be necessary to achieve the broad-based reforms envisioned in this paper, but improving cooperation and coordination between the United States and European Union is a necessary start. Section II of this paper further outlines some of the existing problems with the WTO system, while Section III details a joint US-EU reform agenda.

II. The WTO Needs Significant Reform

NEGOTIATIONS

The WTO has become an ineffective negotiating forum. It is failing to produce new rules to address problems that stakeholders are facing in real time. Since 1995, the WTO has produced only a few limited negotiating successes, such as the plurilateral ITA, the multilateral TFA, and an amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). By contrast, the WTO has lost consensus on continuing the comprehensive WTO Doha Development Round of negotiations, which was launched in 2001.[5] The WTO Environmental Goods Agreement negotiation, launched in 2014 to reduce tariffs on environmental goods, is nowhere near completion.[6] Negotiations on agriculture, anti-dumping and countervailing duty requirements, dispute settlement, and market access (tariffs) have stalled after years of effort. Ongoing efforts to discipline fishery subsidies and develop rules for electronic commerce ("e-commerce") face major hurdles to completion.

Existing WTO rules do not address some of China's most unfair trade behaviors. The WTO lacks rules to specifically address forced technology transfer, trade secrets and cyber theft, state-directed investment in sensitive technology, industrial subsidies, SOEs, and censorship, among other issues.

Existing WTO rules do not reflect new technology. The WTO does not have rules governing the Internet and other forms of digital trade and e-commerce, data localization, and cybersecurity.

Existing WTO rules do not cover many issues found in FTAs and, in many cases, lack the same level of ambition. WTO rules on intellectual property and services fall far short of the high standards created in modern FTAs. WTO rules governing anti-dumping and countervailing duties do not address emerging issues now commonly addressed in newer FTAs. WTO rules do not include the detailed provisions on anti-corruption included in many FTAs. WTO rules do not include the same level of ambition or detail on provisions related to labor and environment, which are included in many FTAs, and are necessary to ensure continued domestic support for the WTO.

The WTO has not reached multilateral agreement to lower tariffs since 1995, leaving many countries free to maintain high tariffs on key products. From the US perspective, many of its bound and applied tariff rates are lower than those of competitors.

- The United States' simple average final bound tariff rate is 3.4 percent, compared to 5.1 percent for the EU and 10 percent for China.[7]
- US simple average applied tariff rates are 2.3 percent, compared with almost 10 percent for China and 17 percent for India.[8]
- In 2017, eighteen WTO members had bound tariffs that exceed 500 percent, and eight of them had applied tariffs above 500 percent (Malaysia, Egypt, Switzerland, Norway, South Korea, Saudi Arabia, Japan, and Fiji).[9]

The issue of differentiation, whereby countries can self-declare developing-country status, has undermined tariff and rules negotiations. Major emerging economies and some of the wealthiest countries in the world claim that they should make less significant tariff reductions, be allowed to provide more subsidies, and get longer implementation periods than the United States, the EU, or other competitors—despite the advancement of their economies and overall international competitiveness. Among the WTO's developing countries are six of the ten wealthiest economies by purchasing-power parity (Brunei, Hong Kong, Kuwait, Macao, Qatar, and the United Arab Emirates); two of the four largest economies in the world (China and India); and at least two Organisation for Economic Co-operation and Development (OECD) members (Mexico and Turkey). LDCs —many of which deserve special treatment—are often treated the same way as large emerging economies, which does not make economic sense. The net result is often impasse in the negotiations. Many countries claim liberalization is bad for development and resist new commitments, or argue to limit market access with long implementation periods.

5 "Nairobi Ministerial Declaration," World Trade Organization, December 19, 2015, paragraph 30, *https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm*.

6 There have been no negotiating rounds since the end of 2016.

7 "World Tariff Profiles 2019," World Trade Organization, International Trade Centre, and United Nations Conference on Trade and Development, 2019, *https://www.wto.org/english/res_e/publications_e/world_tariff_profiles19_e.htm*.

8 Ibid.

9 See "World Tariff Profiles."

U.S. Trade Representative Robert Lighthizer holds up a document titled "Economic and Trade Agreement Between the United States of America and the People's Republic of China - Phase One" *Photo Credit: Reuters. https://tinyurl.com/y2n296ak*

IMPLEMENTATION AND MONITORING

Too many WTO members are not complying with existing transparency and notification requirements that are "intended to provide basic factual information regarding each Member's implementation of the relevant agreement."[10] Adherence to these obligations is critical to help businesses accurately understand the current trade landscape, identify trade-distorting behavior, and ensure members' compliance with substantive subsidy-reduction commitments. Failure to comply with these requirements "prevents other WTO Members from evaluating the trade effects and understanding the operation of notified subsidy programs."[11]

More than a dozen WTO agreements include notification provisions, yet compliance with these requirements is consistently poor.[12] Compliance with transparency obligations under the Subsidies Agreement has traditionally been less than 50 percent.[13] At least one third of regular notifications under the Agreement on Agriculture are outstanding for the period 1995–2015.[14] There was only 23-percent compliance with notification requirements under the Agreement on Import Licensing Procedures in 2016.[15] The compliance rate for notification requirements pertaining to state-trading enterprises was 26 percent in 2016.[16] Only 34 percent of members complied with the obligation to notify safeguard measures under the Agreement on Safeguards in 2016.[17]

10 "Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements," Communication from the United States to the WTO Council for Trade in Goods, October 30, 2017, *https://tinyurl.com/y3w6xgb4*.

11 "Joint Statement by the United States, European Union and Japan at MC11," Office of the US Trade Representative, press release, December 12, 2017, *https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states*.

12 The WTO Secretariat maintains and updates a listing of notification obligations and compliance. It shows that many members sporadically comply with notification obligations under some WTO agreements, and some members do not comply at all. See "Updating of the Listing of Notification Obligations and the Compliance therewith as set out in Annex III of the Report of the Working Group on Notification Obligations and Procedures," Council for Trade in Goods, March 13, 2019.

13 See "Report (2018) of the Committee on Subsidies and Countervailing Measures," World Trade Organization, October 23, 2018, *https://tinyurl.com/y3oolz77*.

14 See "Report (2018) on the Activities of the Committee on Agriculture," World Trade Organization, November 30, 2018, *https://tinyurl.com/y48jqkz9*.

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DISPUTE SETTLEMENT

The WTO's dispute-settlement function is not operating as originally intended by members, or as envisioned by the WTO's Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU). There are serious concerns about adjudicators overreaching by performing functions not assigned to them, adjudicators ignoring clear rules set by members, overreliance on WTO Secretariat staff, and the length of disputes. In certain instances, there are also concerns about the outcome, including an antipathy toward the use of trade remedy measures, which are legitimate instruments recognized by the WTO as a means of counteracting unfair trade practices.

The United States and others have made multiple complaints that adjudicators have exceeded their mandate and performed functions not assigned by the members. In the United States, these concerns are bipartisan and have spanned multiple administrations.

For example, the President's 2018 Trade Policy Agenda highlighted that "[t]he most significant area of concern has been panels and the Appellate Body adding to or diminish rights and obligations under the WTO Agreement." More specifically, "in 2002, and again in 2015, the U.S. Congress mandated that the Executive Branch consult with it on strategies to address [these] concerns." The Trade Policy Agenda also noted that "the [George W.] Bush and [Barack] Obama Administrations stated that they would pursue reforms and seek to ensure in each dispute that WTO adjudicators follow the rules and perform their functions appropriately," and that in 2005, "the United States also proposed formal guidance for Members to adopt to reaffirm that 'WTO adjudicative bodies must take care that any interpretive approach they may use results neither in supplementing nor in reducing the rights and obligations of Members under the covered agreements.'"[18]

The primary concerns expressed by the United States and others include the following.

- ***Interpreting Domestic Law.*** The Appellate Body has improperly interpreted the meaning of a member's *own* domestic law, suggesting it has more knowledge of a member's domestic legal system than that member itself.[19] This is inconsistent with DSU Article 17.6, which limits the role of the Appellate Body to legal matters. In the context of the ongoing Informal Process on Matters Related to the Functioning of the Appellate Body (the "Walker Process"), the facilitator reported convergence among members that "the 'meaning of municipal law' should be treated as a matter of fact and therefore is not subject to appeal."[20]
- ***"Gap Filling"/Creating Obligations to Which Members Never Agreed.*** Adjudicators have imposed new obligations on members and produced new rules to which members never agreed.[21] When this occurs, adjudicators overreach their mandate and act contrary to the express terms of DSU Article 3.2, which prohibits WTO adjudicators from adding to or diminishing the rights and obligations of WTO members in interpreting the WTO agreement. The

15 "Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements," Communication from the United States to the WTO Council for Trade in Goods: Communication from the United States," World Trade Organization, October 30, 2017, paragraph 4, *https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/148R1.pdf&Open=True*.

16 Ibid.

17 Ibid.

18 See "The President's 2018 Trade Policy Agenda," Office of the United States Trade Representative, 2018, 22–23, *https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf*. See also "Report on the Appellate Body of the World Trade Organization ('USTR Appellate Body Report')," United States Trade Representative, February 2020, *https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf*.

19 See, for example, "Statement by the United States at the Meeting of the WTO Dispute Settlement Body," US Mission to International Organizations in Geneva, May 23, 2016, *https://geneva.usmission.gov/wp-content/uploads/sites/290/Item7.May23.DSB_.pdf*. In the case of *US—Countervailing and Anti-Dumping Measures (China)*, "the Appellate Body Report had taken a very problematic and erroneous approach to reviewing a Member's domestic law, risking turning the WTO dispute settlement system into one that would substitute the judgement of WTO adjudicators for that of a Member's domestic legal system as to what was lawful under that Member's domestic law. It was inappropriate for a WTO adjudicator to say it would decide the 'right' result under a Member's law, in the abstract, while ignoring key constitutional principles of that Member's domestic legal system, but that was what the Appellate Body had done."

20 "Informal Process on Matters Related to the Functioning of the Appellate Body," World Trade Organization, May 7, 2019, paragraph 1.24, *hhttps://tinyurl.com/y25o985j*.

21 See "Statements by the United States at the March 25, 2011 DSB Meeting," US Mission to International Organizations in Geneva, March 25, 2011, paragraph 100, *hhttps://geneva.usmission.gov/2011/03/28/mar-25-2011-dsb-meeting*. In *US—Anti-Dumping and Countervailing Duties (China)*, the United States criticized the Appellate Body for "creat[ing] a prohibition on the imposition of a so-called 'double remedy' through the concurrent application of CVDs and NME ADs" while relying only on Article 19 of the SCM Agreement to do so."

Walker Process has also identified this as an issue that needs to be addressed.

- The Appellate Body's decision to "fill in the gaps" has had severe substantive consequences in certain disputes. In *US–Anti-Dumping and Countervailing Duties (China),* the United States and several others criticized the Appellate Body's for defining the term "public body" in a manner that significantly constrains their ability to counteract subsidies provided by Chinese SOEs. More specifically, the Appellate Body created a rule never agreed upon by the members that essentially alleges that SOEs are independent from the Chinese government for a subsidies analysis, which is divorced from reality.

- ***Advisory Opinions***. Adjudicators have provided advisory opinions on issues with the dispute at hand, essentially "making law," despite their mandate to only make findings necessary to resolve the dispute. In *Argentina–Financial Services,* the Appellate Body reversed the panel's findings on an issue, rendering all of the panel's other findings moot, but still went on to set out interpretations of various General Agreement on Trade and Services (GATS) provisions that were no longer within the scope of the appeal.[22] In other disputes, adjudicators have made recommendations for compliance where the measure being litigated has expired, and by definition, the situation is resolved.[23] The Walker Process has identified advisory opinions as a problem.

- ***Making Arguments for the Parties***. The Appellate Body has raised legal issues on appeal that neither party itself raised, or made decisions based on legal arguments that neither party made. One example of this is *India–Agricultural Products*, a dispute in which the Appellate Body engaged in a lengthy, abstract discussion of a provision of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) without ever tying that discussion to an issue on appeal, and expressed "concerns" about panel findings that neither party raised.[24]

- ***Creation of Precedent***. Adjudicators have relied on past reports as precedent, in effect making law never agreed upon by WTO members.[25] The DSU does not recognize precedent, and explicitly limits the DSB to resolving distinct matters between the members. This is a particular problem because it has led WTO members to seek to adopt binding Appellate Body interpretations to achieve outcomes that they were not able to achieve through negotiations on the same matter. This encourages more litigation, and creates a disincentive toward negotiating on the most challenging issues. The Walker Process has confirmed the lack of precedent in WTO decisions.

The Appellate Body has disregarded WTO procedural rules or created new rules without the consent of WTO members. The Appellate Body routinely disregards the rule under DSU Article 17.5 that requires it to issue reports within ninety days of any appeal, regardless of whether the disputing members have agreed to an extension of the appeal.[26] The Appellate Body has adopted a rule that gives it the authority to allow persons whose terms as Appellate Body members have expired to participate in and rule on disputes, in breach of DSU Article 17.2.[27]

The Appellate Body relies on its secretariat too much in the resolution of disputes. Appellate Body members often lack trade-remedy experience, trade-negotiation experience, and legal backgrounds. Further, Appellate Body membership is not a full-time job. This has resulted in an overreliance on the secretariat, which has contributed to a lack of independence in decision-making and an unwillingness to question past reports. It has also led to overly judicial and academic decisions that emphasize new rulemaking, while ignoring member-intended compromises and scope limitations. One mechanism utilized by the Appellate Body Secretariat to govern decision-making by Appellate Body members is the "issues paper," which often begins the process of pre-judging the dispute based on the views of the secretariat, not the Appellate Body members themselves.[28] There has been particular criticism of Appellate Body decisions in trade-remedy cases, including insufficient deference granted to domestic authorities and lack of a practitioners' understanding of anti-dumping and countervailing duty rules.

22 See "Statement by the United States at the Meeting of the WTO Dispute Settlement Body," paragraph 6.4.
23 USTR Appellate Body Report, 64.
24 "Statement by the United States at the Meeting of the WTO Dispute Settlement Body."
25 USTR Appellate Body Report, 55.
26 "The President's 2018 Trade Policy Agenda," 24–25.
27 USTR Appellate Body Report, 32.
28 Joost Pauwelyn and Krzysztof Pelc, "Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement," SSRN, September 26, 2019, *hhttps://ssrn.com/abstract=3458872*.

A SAS Airbus A330-300 plane and an Air New Zealand Boeing 787-9 Dreamliner plane taxi while a American Airlines Boeing 737 takes off at O'Hare International Airport in Chicago, Illinois, U.S. November 30, 2018. *Photo Credit:REUTERS/Kamil Krzaczynski https://tinyurl.com/y697hur8*

WTO dispute settlement takes too long. Most WTO disputes now take more than three years to get an adopted panel or Appellate Body decision.[29] The time until the winning member can retaliate to induce compliance can often be much longer due to an appealable compliance proceeding and period of time for compliance. As one example, the US and EU disputes regarding the subsidization of large civil aircraft lasted fifteen years between initiation and retaliation by the United States.

Many factors contribute to this problem, including the tendency of panels and the Appellate Body to try to "do too much," the tendency of parties to make every conceivable argument instead of those necessary to resolve the matter, the tendency of parties to appeal nearly every decision, the frequent use of compliance proceedings to delay implementation, and the lengthy periods of time for compliance. Workers and businesses cannot wait this long to resolve legitimate issues. Extremely long litigation also contributes to the incentive to use non-WTO means to retaliate against unfair trade practices.

There is no active oversight of the Appellate Body, and efforts to regularize engagement between WTO members and the Appellate Body to try addressing concerns about the Appellate Body's functioning have not been successful. In particular, for years many countries blocked US efforts to routinely meet with and review the performance of Appellate Body members. The Walker Process has noted that such engagement is appropriate.

29 James Baucus and Simon Lester, "Trade Justice Delayed is Trade Justice Denied: How to Make WTO Dispute Settlement Faster and More Effective," Cato Institute, November 20, 2019, *hhttps://www.cato.org/publications/free-trade-bulletin/trade-justice-delayed-trade-justice-denied*.

III. An Ambitious US-EU WTO Modernization Proposal

Many countries and trade experts have begun producing WTO reform proposals, including in the United States and the EU. The United States has shown tremendous ambition on new WTO rules and institutional reforms of the negotiating and implementation and monitoring pillars. It has also pushed for progress on negotiations, such as the fisheries subsidies agreement, and on a solution to the developing-country status issue, among others, to help demonstrate that the WTO reflects today's reality and can still solve problems. On the other hand, the United States has blocked the appointment of new Appellate Body members without detailing new dispute-settlement reforms. While the United States is correct to point out that a shared understanding of the problem is necessary to fully fix it, this approach has raised questions about US intentions.

For its part, the EU's approach has also exhibited strengths and weaknesses. The EU has been active on dispute-settlement reform, but it has squandered the opportunity to engage the United States by tabling largely status-quo proposals. With respect to the other pillars, the EU has focused on the right issues, but has not always been willing to forcefully advocate for the level of reform needed to address the full extent of the current system's problems.

If the WTO is to survive today's crisis, the United States and the EU must get on the same page. Both sides must table their philosophical differences, show flexibility, and together find a way to reinvigorate the system they created, and which has served them well over the years. The paragraphs that follow lay out some of the key issues that the United States and EU should seek to address together. Some proposals require further detail and debate, and it is clear that the WTO will not be able to adopt all of these ideas in the short term. However, the hope is that, by fully elaborating the range of issues that the WTO should seek to address, this paper can promote both the greater level of ambition and creative thinking that are needed to rescue the system.

NEGOTIATIONS

Significantly Expand and Modernize WTO Rules. WTO rules should be modernized to: adequately address non-market-oriented policies and related unfair trade practices; govern new technologies, such as digital trade; improve provisions on intellectual property and services, among other areas detailed in modern FTAs; and tackle politically important areas, such as labor and the environment.

1) Rules on Non-Market Issues and China's Unfair Trade Practices

WTO rules should include disciplines to address the tools that China uses to distort global markets, such as forced technology transfer, trade secrets and cyber theft, state-directed investment in sensitive technology, and industrial subsidies, among others. WTO rules must also be updated to ensure that they are correctly applied to SOEs and other elements of China's non-market economy. Some disciplines will need to be negotiated anew, but in other cases, members can import disciplines from other agreements, including those to which China has already agreed.

US-China Phase One Agreement. The US-China Phase One Agreement includes some key elements lacking in the WTO rules, including disciplines on forced technology transfer and trade-secrets protection.[30] Members should immediately bring these provisions into the WTO to jump-start reform efforts. China has already agreed to these provisions in a bilateral context, so they should also be acceptable in a multilateral one. From the US perspective, this will make these provisions easier to enforce. WTO members should also seek further detail on some of the provisions, such as forced technology transfer, and to reinsert provisions that were discussed during bilateral negotiations but not included in the final deal, including state-directed acquisition of sensitive technology and cyber theft.

30 "Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China," Office of the US Trade Representative, chapters 1 and 2, *hhttps://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf*.

US-EU-Japan Trilateral. On January 14, 2020, the United States, EU, and Japan agreed to expand the types of subsidies prohibited under WTO rules, to help deal with some of the most problematic aspects of China's industrial-subsidy regime.[31] In particular, the three economies agreed to add four new types of industrial subsidies to the Subsidies Agreement, to make it easier to prove that certain types of subsidies are harmful, and to work to modify the definition of "public body," among other enhancements. WTO members should translate these principles into text, and seek agreement on their inclusion in the WTO.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The CPTPP includes provisions that address issues like SOEs in a much more robust fashion than the WTO. In particular, CPTPP provisions address trade distortions that favor SOEs engaged in commercial activities and ensure that any activities are based on commercial considerations, including by addressing discrimination and trade-distorting subsidies.[32] WTO members should seek to include these and other China-related CPTPP provisions in the WTO.

2) Rules on New Technologies (E-Commerce/ Digital Trade)

WTO rules should be updated to include provisions governing open digital trade. Core principles that should be embedded in WTO rules include non-discrimination, a ban on data localization and forced technology transfers, the protection of cross-border data flow, a ban on tariffs and other taxes on data flow, and the protection of personal information, among other principles.[33]

WTO members should prioritize the completion of ongoing e-commerce negotiations, and expand the subject matter as necessary to cover the issues described above.

3) Rules on Intellectual Property and Services

WTO rules on intellectual property and services, among other issues, should be updated to the higher level of ambition included in FTAs negotiated since the WTO was originally created. For example, WTO rules relating to intellectual property should include much more robust provisions across a range of areas, including copyrights, trademarks, trade secrets, and enforcement, including enforcement in the digital age.[34] Likewise, the WTO GATS Agreement should be updated so that a much broader range of service sectors is covered, national treatment obligations are not optional for many sectors, and important transparency provisions are included, consistent with many FTAs.[35]

Including these modern FTA standards in the WTO will raise the level of ambition for a broader set of countries, and help prevent further fragmentation of the international trading system.

4) Rules on Labor and the Environment

The WTO should more fully address issues like labor and the environment, which have become increasingly important for continued support of the international trading system in the United States and EU, among others. On labor, WTO members should consider provisions requiring countries to adopt and maintain core worker rights under the International Labor Organization (ILO) and to prohibit forced labor, among other provisions that would help both level the playing field and protect workers internationally.[36] On the environment, WTO members should finish negotiations on fisheries subsidies and consider provisions requiring countries to follow international standards in multilateral environmental agreements, among other ideas.[37] More ambitious provisions on issues related to climate could be considered over time, but they would require all major competitors to be treated equally. In both areas, WTO members should also require the provision of technical assistance for those that need it to meet international standards.

Equalize Tariff Treatment. WTO members should begin negotiations to eliminate distinctions in the level of tariffs permitted, especially among major economic competitors, while providing some flexibility for LDCs. As an initial matter, WTO members should seek to reduce bound rates (i.e., maximum permissible rates) close to applied levels (i.e., the level actually applied in practice). This would not require any change in the existing practices of many countries, and will provide greater predictability for traders.

31 "Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union," European Commission, January 14, 2020, *hhttps://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf*.

32 "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)," chapter 17, *https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng&_ga=2.228356061.1164485776.1601487971-2046119074.1601487971*.

33 See, "United States-Mexico-Canada Agreement," Office of the US Trade Representative, chapter 19, *https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement*.

34 Ibid., chapters 15–17.

35 Ibid., chapter 20.

36 Ibid., chapter 23.

37 Ibid., chapter 24.

Consultations took place among a group of ministers representing all interests in the negotiations of the WTO's Doha Round. A series of meetings were held in Geneva from 21 to 30 July 2008. © *WTO Photo: Jay Louvion, Studio Casagrande*

Once this is established as a baseline, WTO members should then negotiate a substantial reduction in the majority of their rates, especially on products where they are internationally competitive with others that have much lower rates. Simply put, allowing some major economies to have much higher tariff levels than their competitors is unfair, and no longer politically acceptable. All major economies, whether they currently claim to be developed or developing countries, should strive for similarly low rates in as many areas as possible.

WTO members should provide additional flexibility to LDCs to maintain somewhat higher rates, but this flexibility should be predicated on the notion that overall lower tariff rates are good for development. LDCs should also commit to ultimately reduce their tariffs over time, especially as certain sectors become more internationally competitive.

Avoid the "Consensus Problem" Through Different Negotiating Formats and More Frequent Political Intervention. A critical problem in reaching new agreements on the issues described above is the need for consensus by all WTO members. Creative thinking is required to get around this problem and make progress on the important issues outlined above. Among other alternatives, ambitious WTO members should consider the following approaches.

1) Conduct Negotiations on a Non-MFN Plurilateral Basis as Necessary.

In cases where it is clear that consensus will be difficult to achieve, WTO members should engage in plurilateral negotiations, and limit participation to those willing to meet high standards. In some cases, members should consider conducting these negotiations on a non-most favored nation (MFN) basis.

To date, most plurilateral negotiations—with the notable exception of the Government Procurement Agreement—have been done on an MFN basis. However, this creates a "free-rider" problem in which even countries that do not participate benefit from the new rules.

To get around this problem, non-MFN plurilateral negotiations would only allow those countries that make substantial commitments to lower trade barriers to reap the benefits provided by others who do the same. For market-access commitments, this will provide an arrangement to facilitate progress among like-minded countries without being blocked by low-ambition members or being concerned about free riders. Maintaining such an agreement within the WTO system will enable other countries to more easily join at a later date, will allow normal WTO dispute-settlement procedures to apply, and will help retain the central position of the WTO on cutting-edge international trade issues.

A problem with this approach exists in areas like subsidies, where non-participation by some of the countries that provide the highest level of subsidies would require unilateral disarmament by participants, and will not totally solve the free-rider problem. In such areas, these commitments could be aspirational or exempt from dispute settlement until a critical mass of countries participates. Of course, those countries that agree on a subsidies agreement, for example, would also have a common basis on which they could push a multilateral solution that includes others.

2) Consider Alternative Paths to Removing Trade Barriers through Agreements Not Subject to Dispute Settlement

WTO members should consider exempting certain negotiated outcomes from dispute settlement, to enable certain countries that might otherwise block consensus to take on politically sensitive commitments as a first step toward more binding commitments. While fully enforceable rules remain preferable, insisting on them in all circumstances might prevent agreement on best practices that could serve as building blocks for enforceable rules in the future.

As one example, certain LDCs may not have the capacity to immediately undertake such binding commitments on non-tariff barriers, which are often more complicated than dealing with tariffs. These LDCs, however, may be willing to experiment. In those circumstances, the endorsement of, and commitment to, best practices may be a path forward to ultimately removing trade barriers through enforceable obligations. These best-practices agreements could incorporate a combination of capacity building and technical assistance, coupled with transition periods to determine when countries would return to the negotiating table to finalize negotiations.

3) Increase Political Intervention from Capitals

Members should increase political intervention from capitals in order to facilitate new agreements. WTO ministerial meetings are currently only held every two years, and the vast majority of the negotiations on important issues are conducted among Geneva-based staff. Although on-the-ground, lower-level engagement is necessary for final agreement, much time is wasted when Geneva-based officials merely follow their instructions from capitals without any of the real political give and take that is necessary to reach outcomes. To address this problem, more frequent capital-based negotiation is required.

There are at least two ways that members could significantly increase capital-based involvement. First, members could agree to conduct many more negotiations virtually with capital-based staff, utilizing the mechanisms developed during the current COVID-19 health crisis. Second, members should be willing to engage ministers at more frequent critical points in negotiations, especially when the framework of an agreement is emerging. Third, members should consider increasing the frequency of ministerials to an annual basis.

Address the Problem Posed by Broad Self-Designated "Developing Country" Status. WTO members should change the current system in which major emerging economies can self-designate as either "developed" or "developing" countries and use that designation to justify lower levels of commitments in ongoing negotiations. In fact, it is no longer politically acceptable or economically justifiable for the United States, the EU, or Japan, among others, to be directly disadvantaged vis-à-vis countries like China, which has the second-largest economy in the world and is a major competitor in some of the most advanced technologies. Other major economic powers, such as India, pose a similar problem. On the other hand, there may be some specific legitimate circumstances in which a certain level of deviation from the rules is necessary to account for the level of development. To address this issue, the following should happen.

- WTO members should introduce objective criteria into the WTO system that govern when a WTO member is entitled to special and differential treatment. The United States has proposed that members not be entitled to such treatment if the country is a member of the OECD or G20, has been designated as "high-income" country by the World Bank, or accounts for more than 0.5 percent of global merchandise trade.[38]
- One potential alternative could be to completely eliminate the politically sensitive development criteria for all but LDCs, which would be held harmless. Any other member would have the opportunity to request special and differential treatment in a new negotiation if they believe its circumstances warrant such treatment. This request could be based on agreed-upon criteria, such as total share of global trade or level of competitiveness in that sector. This might allow some sectors in an emerging economy to receive special and differential treatment, but not areas in which it has a major global presence.

Reaffirm that Trade Liberalization Does Not Hinder Development. The WTO should partner with think tanks and academics to fund studies that forcefully push back on the argument made by many countries in recent years that

38 "Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO," World Trade Organization, February 15, 2019, *hhttps://tinyurl.com/y4v6thgy*.

trade liberalization hinders development. This concept directly threatens the long-term viability of a system founded on the principle that trade liberalization is good for peace, stability, and shared prosperity. In particular, a WTO-led study could focus on the experience of the "Asian tigers" like South Korea and Singapore, which have relinquished special and differential treatment, and experienced substantial growth in conjunction with the lifting of trade barriers.

All Countries Must Show Flexibility on Sensitive Issues. The United States should also show flexibility on issues that are a priority for others, including some of its long-standing trade barriers. Many of the proposals included in this paper admittedly focus on long-standing US negotiating objectives at the WTO. In order to achieve these objectives, the United States must also be willing to be flexible and legitimately try to address the concerns of others about certain of its trade practices.

IMPLEMENTATION AND MONITORING

Improve Compliance with Transparency Requirements. WTO members should adopt reforms to improve compliance with basic transparency requirements.

In particular, WTO members should adopt penalties for any non-LDC member that consistently fails to follow transparency requirements. The United States and the EU, among others, have already been promoting a transparency proposal that would impose penalties on members that fail to fulfill notification requirements, including prohibiting them from chairing WTO bodies, imposing monetary penalties, treating them less favorably in certain WTO functions, and generally "naming and shaming" them.[39]

Moreover, WTO members should supplement the penalties for non-LDC members with positive incentives for LDCs. For example, WTO members could provide targeted capacity building for LDCs that may legitimately need help meeting transparency requirements, but are willing to work hard to improve compliance over time. At the same time, such LDCs could be afforded transition periods before any negative incentives set in. This is important to prevent major emerging economies from hiding behind the legitimate needs of these countries as an excuse not to meet the requirements themselves.

DISPUTE SETTLEMENT

Promote Ambitious Reform. WTO members should pursue ambitious, broad-ranging dispute-settlement reform that addresses adjudicative approach, institutional issues, and timeliness. To truly fix all of the problems with the dispute-settlement system, it will not be enough to provide guidance dictating that existing rules be followed. Institutional reforms are needed to ensure that any reiteration of the rules actually sticks, and the system is restored to its original purpose. At the same time, a quicker process is critical to ensure continued use of the mechanism, instead of unilateral alternatives that may be increasingly compelling to businesses adversely impacted by trade barriers.

Any fix to the dispute-settlement system will only be sustainable if the negotiating function is restored. In particular, if members are unable to modify the rules through negotiation, they will be tempted to use dispute settlement to try to achieve the same aim. Likewise, failing to fix dispute settlement will continue to paralyze the negotiations if members believe that they can create new rules or change hard-fought negotiated outcomes through litigation instead.

Preserve a Second Level of Legal Review. Although many changes to dispute settlement are necessary, WTO members should not abandon the concept of a targeted second level of legal review of certain panel reports. Such a system can help lend additional credibility to reports and prevent egregious legal errors by panels. As the United States has pointed out, the WTO should not have a system of precedent similar to common-law frameworks, but it is useful for countries to have some consistent notion of how a provision of an agreement is to be interpreted, so as to ensure that future behavior conforms to the rules. As discussed further below, members should also consider mechanisms to limit this second level of review considerably from current practice.

Clarify the Adjudicative Approach to Resolving Disputes. WTO members should adopt a WTO decision or amend the DSU to clarify the expected approach for the Appellate Body and panels, and ensure that it seeks to narrowly resolve disputes between parties, rather than create an independent body of law that imposes obligations on WTO members to which they never agreed. In particular, WTO members should

- clarify that the Appellate Body is only authorized to review matters of law, and that municipal (domestic) law is a matter of fact, not law;
- prohibit adjudicators from engaging in overreach and "adding to or diminishing the rights and obligations provided by the covered agreements" instead of clarifying "existing provisions in accordance with customary rules of interpretation of public international law";
- restrict the Appellate Body's ability to examine legal issues not appealed by either party, which results in advisory opinions, or from introducing its own interpretations of provisions not advanced by either party to the dispute; and
- confirm that the WTO does not follow a principle of *stare decisis,* in which previous rulings constitute binding precedent.

Adopt Institutional Reform. WTO members should adopt institutional reforms to help ensure that any guidance about the role of the system makes a sustainable difference, and that the system does not redevelop today's problems over time. To ensure that the Appellate Body remains transparent and responsive to the membership, WTO members should adopt new rules that

- require the Appellate Body to provide the parties with the opportunity to comment on draft reports before a final decision is rendered, consistent with the existing panel process;
- eliminate or curtail the Appellate Body's ability to engage in factual reviews under DSU Article 11;
- establish a mechanism for regular dialogue between Appellate Body members and WTO members, such as annual meetings;
- clarify that Appellate Body members are not guaranteed to serve a second term, and allow for a full review of their performance after their first term;
- establish a mechanism under which WTO members can seek a review of any legal findings included in past decisions that have led to unintended consequences, such as the dispute that inhibits the ability of WTO members to impose countervailing duties against subsidies provided by "public bodies"[40]; and
- allow all WTO members to view all hearings and access all submissions to improve their institutional knowledge and eliminate the need for large numbers of third parties, which can slow down the process and force members to confront issues not central to the resolution of the dispute.

To improve the balance between Appellate Body members and the WTO Secretariat, and to ensure that the process is driven by the adjudicators actually selected by the membership, WTO members should

- allow Appellate Body members to choose their own individual clerks or staff from a pool of WTO Secretariat staff;
- modify the position of Appellate Body division director so it is primarily focused on administrative tasks, and create a term limit on the role;
- restrict the use of WTO Secretariat issue papers to "frame" or pre-judge the issues for Appellate Body members;
- ensure that at least three Appellate Body members have relevant trade-remedy experience, and that at least one (and preferably two) participate in disputes appealed from the Rules Division; and
- consider requiring Appellate Body membership to be a full-time job, or alternatively, require Appellate Body members to be able to take requisite time off from their normal jobs to avoid an overreliance on staff.

Improve Timeliness. WTO members should also seek reforms to speed up the process. WTO members originally intended for dispute settlement to be able to quickly counter unfair practices harming their workers and businesses. In particular, members sought to create a system that could reach an outcome on a similar timeframe to the one-year time period included in Section 301 of the 1974 Trade Act in the United States. Both WTO adjudicators and members themselves bear some blame for the decay in the situation; therefore, WTO members should consider disciplines on both. WTO members should do the following.

- Place restrictions on the input of the litigating parties, such as page limits on submissions, numerical limits on exhibits, and time limits on opening statements at hearings. This will help prevent the system from becoming overburdened, and reduce the temptation of adjudicators to address issues not critical to resolving the dispute. As noted above, greater transparency that also reduces the need for large numbers of third parties can also reduce the burden on adjudicators and litigants.
- Require panels to issue reports no later than nine months from the date of establishment of the panel, unless the parties agree otherwise, consistent with the original intent of DSU Article 20.
- Require the Appellate Body to issue reports no later than ninety days from initiation of the appeal, unless the parties agree otherwise, consistent with the original intent of DSU Articles 17.5 and 20.
- Provide a standard reasonable period of time (RPT) for compliance of twelve months, beginning

39 "Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements," World Trade Organization, Communication from Argentina, Australia, Canada, Costa Rica, the European Union, Japan, New Zealand, Taiwan, and the United States to the General Council, April 1, 2019, *hhttps://tinyurl.com/yy5z72lz*.

40 "Statements by the United States at the March 25, 2011 DSB Meeting."

A cargo ship carrying containers is seen near the Yantian port in Shenzhen, following the novel coronavirus disease (COVID-19) outbreak, Guangdong province, China May 17, 2020 *Photo Credit: Reuters. https://tinyurl.com/yyox47y3*

when the panel report becomes public. If a member chooses to appeal, the ninety-day appeal period would count against the RPT. This will create an incentive against appealing unless the member determines there is a strong chance of changing the result. It would also reduce the Appellate Body's workload, including by allowing for the elimination of DSU Article 21.3(c) RPT arbitrations.

- Eliminate Article 21.5 compliance proceedings. If there is a disagreement about compliance, the member that lost the original dispute could challenge any imposition of retaliation in a new proceeding or, in the context of an Article 22.6 proceeding, determine the appropriate level of suspension of concessions, which would not be subject to appeal. This would reduce caseload and improve compliance with adopted reports. It would also resolve the long-debated issue of the appropriate sequencing between Article 21.5 compliance and Article 22.6 proceedings.

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