
Research
Paper

US and the Americas
Programme

September 2020

Reforming the World Trade Organization

Prospects for transatlantic
cooperation and the global
trade system

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Summary

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- The World Trade Organization (WTO), which has been the cornerstone of the multilateral rules-based global trading system since its inception in 1995, faces a make-or-break moment. Even before the COVID-19 pandemic, all three of the organization's functions – providing a negotiation forum to liberalize trade and establish new rules, monitoring trade policies, and resolving disputes between its 164 members – faced challenges. To reinvigorate the WTO, reform needs to cover all three pillars.
 - Of particular note is the need for a permanent solution to the crisis of the WTO's Appellate Body and dispute settlement system. The Appellate Body's operations have effectively been suspended since December 2019, as the US's blocking of appointments has left the body without a quorum of adjudicators needed to hear appeals. Ending the impasse will require both the procedural and substantive concerns of the US to be addressed. For the most part, these reflect long-standing and systemic issues that not only have been voiced by previous US administrations but are shared by many other WTO members (even if they do not approve of the Trump administration's tactics).
 - The crisis with the dispute settlement function of the WTO is closely linked to the breakdown in its negotiation function. While the global trade landscape has changed significantly over the past 25 years, WTO rules have not kept pace. Modernizing the WTO will necessitate the development of a new set of rules for dealing with digital trade and e-commerce. WTO members will also have to deal more effectively with China's trade policies and practices, including how to better handle state-owned enterprises and industrial subsidies. Addressing the issue of subsidies is becoming more important due to the implications of COVID-19 for state provision of economic support in many countries. A better alignment of trade policy and environmental sustainability is also needed to keep the WTO relevant. To make progress on all these fronts, an increased focus on 'plurilateral' negotiations – which involve subsets of WTO members and often focus on a particular sector – could offer a way forward.
 - Reform will be impossible without addressing the problem that no agreed definition exists of what constitutes a developed or developing country at the WTO. Members can currently self-designate as developing countries to receive 'special and differential treatment' – a practice that is the subject of much contention. WTO members will also have to take steps to improve compliance with the organization's notification and transparency requirements.

- It is in the interests of the US and its European partners to maintain and reform the rules-based international trading system which they helped to create. The US and the EU agree that new rules for 21st-century trade are needed. They share many concerns regarding China's trade policies and practices, but transatlantic differences remain over how to tackle these problems. The largest area of disagreement concerns how to reform the Appellate Body. If the US and the EU cannot work together bilaterally, reform of the WTO is unlikely. If progress is to be made, underlying frictions between the major trading partners need to be addressed, with China – as the world's largest trading nation – included in the discussion. In short, transatlantic cooperation is a necessary, though not sufficient, condition for WTO reform.

01

Introduction

With trade tensions increasingly politicized, a key appeals process suspended and COVID-19 creating huge economic challenges, a modernized and fully functioning WTO is more essential than ever.

The need to reform the World Trade Organization (WTO), which is at the centre of the multilateral rules-based trading system, is long-standing. The COVID-19 pandemic has now rendered modernization an even more urgent task.

The global economic downturn and the collapse in world trade as a result of COVID-19, as well as continued geo-economic tensions between the world's largest economies, mean that the stakes for reforming the WTO have never been higher. Keeping trade flowing is important – not only in the fight against the pandemic, but also to support the economic recovery and to set the foundations for a more resilient, inclusive and sustainable world in the future.

The WTO currently has 164 members, and 98 per cent of international trade occurs between WTO members. The WTO was created to serve three main functions: (1) to provide a forum for negotiations to liberalize trade and establish new rules; (2) to oversee and administer multilateral trade rules; and (3) to resolve trade disputes between members. Even before COVID-19, all three functions of the WTO were under pressure.

So how fit for purpose is the multilateral trading system in terms of both addressing pre-existing challenges and responding to those that the pandemic has presented? Do the US and Europe (i.e. the European Union, its key member states and the UK) still view the system that they helped to create as being in their interest?

The current rules and architecture of that system were in large part shaped by the transatlantic partners in the period after the Second World War. The US and key European countries were among the 23 original signatories to the General Agreement on Tariffs and Trade (GATT), which entered into force in 1948. Transatlantic leadership and a grand bargain between the US and European countries were also central factors in the establishment of the WTO, which was created in 1995 as the formal organization that succeeded and encompassed the

GATT. The US spearheaded the establishment of a compulsory and binding dispute settlement system. Part of this arrangement also met a key objective of the EU: getting the US to abandon trade unilateralism.

Twenty-five years later, the US has become a vocal critic of the WTO's dispute settlement system, while the EU (as a champion of free trade, even though it is not entirely devoid of protectionist tendencies itself) is once again hoping the US will renounce trade unilateralism and protectionism.

This paper starts with an analysis of how well the WTO has responded to the trade impacts of COVID-19, and of the likely implications of the pandemic for reform of the global trade system. Many of the challenges facing the WTO pre-date COVID-19. Thus, the paper also explores the long-standing structural drivers behind the WTO's current crisis and differentiates those from more temporary issues. Three particular dimensions of the reform endeavour are explored: the primary US concerns with the WTO; existing reform efforts; and how the EU can best respond to US criticism in the context of the WTO's three functions.

This paper makes the case for transatlantic cooperation as a necessary, though insufficient, condition for WTO reform.

The paper makes the case for transatlantic cooperation as a necessary, though insufficient, condition for WTO reform. It argues that it remains in the interests of both the US and Europe to maintain and upgrade the global trading system in order to better address the trade challenges posed by COVID-19, as well as to confront many other issues – including the transition to the digital economy, climate change, and the pressures associated with China's system of state capitalism.

02 WTO reform and COVID-19

While reduced production and consumption have led to an unprecedented fall in trade, the wider issue is whether the pandemic response will stimulate or constrain a rethink of global trading rules.

The WTO Secretariat has responded to COVID-19 by emphasizing the need to maintain open trade. The secretariat – which supports the WTO member governments and is headed by the director-general – has also issued its trade forecast, estimating that global merchandise trade will fall by between 13 and 32 per cent in 2020 as a result of the pandemic.¹ Though more recent forecasts by the organization show that the most pessimistic scenario will likely be avoided, the expected plunge in trade would still exceed that recorded after the 2008–09 global financial crisis.²

The WTO has also focused on providing transparency. The secretariat has gathered information on the trade-related measures taken by individual members in response to the COVID-19 crisis. As of 21 August 2020, WTO members had submitted a total of 225 notifications related to COVID-19.^{3,4} However, because notifications rely on official submissions, and thus are often late or incomplete, the actual number of measures introduced in the context of COVID-19 is likely to be higher.⁵

¹ World Trade Organization (2020), ‘Trade set to plunge as COVID-19 pandemic upends global economy’, 8 April 2020, https://www.wto.org/english/news_e/pres20_e/pr855_e.htm (accessed 14 Jul. 2020).

² World Trade Organization (2020), ‘Trade falls steeply in first half of 2020’, 22 June 2020, https://www.wto.org/english/news_e/pres20_e/pr858_e.htm (accessed 14 Jul. 2020).

³ To improve transparency, WTO member governments are obligated to notify the relevant WTO body if any trade measures they are introducing might have an effect on other members.

⁴ World Trade Organization (2020), ‘WTO members’ notifications on COVID-19’, https://www.wto.org/english/tratop_e/covid19_e/notifications_e.htm (accessed 26 Aug. 2020).

⁵ A useful reference point for a more accurate estimate of the number of trade and trade-related measures introduced because of COVID-19 is the Global Trade Alert database (<https://www.globaltradealert.org>). Recent reports also offer useful data. See, for instance, Evenett, S. J. (2020), *Tackling COVID-19 Together – The Trade Policy Dimension*, 23 March 2020, St Gallen: Global Trade Alert, University of St Gallen, Switzerland, <https://www.globaltradealert.org/reports/download/51> (accessed 14 Jul. 2020).

Many countries – including the US and initially some EU member states – imposed temporary export restrictions on certain medical goods and foods in efforts to prevent domestic shortages. (Measures by the EU states were subsequently replaced by EU-wide steps to protect the integrity of the single market.⁶) The use of trade-restrictive measures has led to questions about their compatibility with WTO obligations. The WTO rules are, in general, flexible in allowing member countries to introduce trade measures deemed necessary to protect public health, but require that such measures fulfil certain criteria (such as not discriminating between WTO members and not unnecessarily restricting trade). A key question will be how temporary these measures turn out to be. Many – including the EU's export authorization scheme for personal protective equipment – have been phased out already.⁷ The issue of export restrictions for goods related to COVID-19 will hopefully not be a long-term structural issue for the WTO and its members.

While trade restrictions have attracted particular attention, in fact most of the measures introduced have been intended to *facilitate* trade.⁸ For instance, countries have reduced or eliminated import tariffs on COVID-19-related goods. Other steps have included expediting customs inspections for critical goods.

The WTO serves as a forum for coordinating and sharing proposals for a collective and coherent trade policy response to the pandemic – although most initiatives have taken place among groups of like-minded parties. Some countries are driving forward efforts for a plurilateral agreement on medical goods.⁹ In April, the governments of New Zealand and Singapore agreed to remove tariffs and not to impose export restrictions on goods essential to the COVID-19 response, and encouraged other countries to join their 'open plurilateral' initiative.¹⁰ It is also noteworthy that the Canada-led 'Ottawa Group'¹¹ has set out a list of priority areas for a COVID-19 trade response,¹² while also advancing WTO reform.

So where does COVID-19 leave the broader prospects for WTO reform?

On the one hand, the COVID-19 crisis could provide the impetus needed for the 164 members of the WTO to modernize the organization and agree on an ambitious reform agenda. In this optimistic scenario, a new leader at the helm of the organization – following the early departure of the director-general, Roberto Azevêdo, at the end of August 2020 – could help to navigate the

⁶ European Commission (2020), 'Commission moves to ensure supply of personal protective equipment in the European Union', 15 March 2020, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2122> (accessed 14 Jul. 2020).

⁷ European Commission (2020), 'Coronavirus: Requirement for export authorisation for personal protective equipment comes to its end', 26 May 2020, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2147&title=Coronavirus-Requirement-for-export-authorisation-for-personal-protective-equipment-comes-to-its-end> (accessed 14 Jul. 2020).

⁸ World Trade Organization (2020), 'WTO report on G20 shows moves to facilitate imports even as trade restrictions remain widespread', 29 June 2020, https://www.wto.org/english/news_e/news20_e/trdev_29jun20_e.htm (accessed 14 Jul. 2020).

⁹ In the WTO, the term 'multilateral' refers to all members while the term 'plurilateral' indicates that only some members are involved.

¹⁰ New Zealand Government (2020), 'Covid-19 response: New Zealand and Singapore launch initiative to ensure free flow of essential goods', 15 April 2020, <https://www.beehive.govt.nz/release/covid-19-response-new-zealand-and-singapore-launch-initiative-ensure-free-flow-essential> (accessed 14 Jul. 2020).

¹¹ In addition to Canada, the Ottawa Group includes Australia, Brazil, Chile, the EU, Japan, Kenya, Mexico, New Zealand, Norway, Singapore, South Korea and Switzerland.

¹² Government of Canada (2020), 'June 2020 Statement of the Ottawa Group: Focusing Action on Covid-19', 15 June 2020, https://www.international.gc.ca/world-monde/international_relations-reactions_internationales/wto-omc/2019-06-covid-19.aspx?lang=eng (accessed 14 Jul. 2020).

politically charged landscape around reform. Moreover, the COVID-19-related postponement of the biennial WTO Ministerial Conference, originally scheduled for June 2020 in Kazakhstan and now expected to take place in June 2021, could be a blessing in disguise. While the postponement is a lost opportunity in the short term to make progress on issues such as fisheries subsidies, the conference was never expected to lead to breakthroughs on the most contentious issues, including the crisis of the WTO Appellate Body. Now, with more time to consolidate progress and the prospect of a different US administration taking office following the November 2020 presidential election, the outlook for WTO reform may well be more positive by the time of the next conference.

On the other hand, COVID-19 could further hobble an already-limping WTO. With the pandemic intensifying tensions between the US and China, there are now even higher hurdles to cross in order to reinvigorate the WTO dispute settlement system and strengthen the organization as a negotiation forum. The pandemic is also accelerating pre-existing trends – such as the shift to a digital economy – that WTO members were struggling to handle even before COVID-19.

COVID-19 has also created other complications for trade policy and related areas. Three particular issues stand out. First, as efforts to develop a vaccine continue, questions arise as to whether the intellectual property regime is fit for purpose in terms of dealing with a public health crisis and ensuring that any new drug is widely available and affordable. Second, the use of domestic subsidies to address the economic dimensions of the pandemic could potentially result in a wave of WTO cases centred on trade defence instruments.^{13,14} The subsidies in question are more akin to short-term fiscal stimulus and do not constitute industrial policy – for which the policy space is partially constrained by WTO rules. But an asynchronous recovery (with governments reopening markets at different times and asymmetrically removing subsidies) could lead to a flood of disputes as countries consider any remaining subsidies to be trade-distorting. If WTO members do not collectively address the issue in the short to medium term, the additional friction could derail systemic WTO reform efforts. Finally, the pandemic has brought to the forefront the need to rethink (and potentially restructure) global value chains. At a time when many countries are considering subsidies and tax incentives to strengthen domestic production (e.g. US support for the semiconductor industry), efforts to discourage China's industrial subsidies look increasingly hypocritical.

It is too early to say whether the more optimistic or pessimistic scenario for WTO reform in light of COVID-19 will come to pass. The one thing that is certain is that the stakes for WTO reform have never been higher.

¹³ Under WTO law, members are permitted to impose trade defence measures (also known as trade remedies) to protect their domestic industries from unfair practices. The three categories of trade defence instruments are: 1) 'countervailing' duties in response to subsidies; 2) actions taken against dumping (selling at an unfairly low price); and 3) so-called 'safeguards', which are temporary emergency measures to cope with a sudden surge of imports.

¹⁴ Bown, C. (2020), 'COVID-19 Could Bring Down the Trading System', *Foreign Affairs*, 28 April 2020, <https://www.foreignaffairs.com/articles/usa/2020-04-28/covid-19-could-bring-down-trading-system> (accessed 14 Jul. 2020).

03

The US and the WTO

The irony of the Trump administration's challenge to the WTO is that the US is both an ardent critic of the system and still an active participant in it.

The US continues to express deep concerns over the functioning and usefulness of the WTO, yet at the same time the Trump administration still sees value in the organization and remains an active WTO member. This presents the EU and other champions of the multilateral trading system with an opportunity for engaging the US on maintaining and reforming the WTO.

The Trump administration's attacks on the WTO

President Donald Trump has repeatedly threatened to withdraw the US from the WTO. However, there are several legal, political and economic constraints to any such move. In particular, a resolution to pull out of the WTO would have to pass both the House and Senate in the US – which constitutes a very high hurdle. In May 2020, Senator Josh Hawley (Republican from Missouri) introduced a resolution in the Senate to withdraw the US from the WTO.¹⁵ In the House of Representatives, Peter DeFazio (Democrat from Oregon) and Frank Pallone (Democrat from New Jersey) have also introduced a resolution calling for withdrawal from the WTO.¹⁶ These recent actions have triggered a congressional debate over the value of the WTO and the US's continued membership of the body. They have also shown that

¹⁵ Hawley, J. (2020), 'Senator Hawley Introduces Joint Resolution to Withdraw from WTO', 7 May 2020, <https://www.hawley.senate.gov/senator-hawley-introduces-joint-resolution-withdraw-wto> (accessed 14 Jul. 2020).

¹⁶ DeFazio, P. (2020), 'Chairs Peter DeFazio and Frank Pallone, Jr. Introduce Legislation to Withdraw the United States from the World Trade Organization', 12 May 2020, <https://defazio.house.gov/media-center/press-releases/chairs-peter-defazio-and-frank-pallone-jr-introduce-legislation-to> (accessed 14 Jul. 2020).

President Trump is by no means alone in his criticism of the WTO, and that at least some lawmakers from both parties have an appetite for pulling the US out of the organization. Nonetheless, at present neither resolution is likely to succeed.

Pressure from the business community also makes a US withdrawal from the WTO unlikely. The economic consequences of withdrawal would be significant, as other WTO members without a free-trade agreement with the US would no longer be required to grant the US so-called ‘most favoured nation’ (MFN) status and could raise their tariffs.

The potential for a US withdrawal from the WTO is not the primary concern at present. The greater danger lies in the Trump administration continuing to undermine the WTO from within by blocking the appointment of members to the Appellate Body.

The potential for a US withdrawal from the WTO is thus not the primary concern at present. The greater danger lies in the Trump administration continuing to undermine the WTO from within by blocking the appointment of members to the Appellate Body (see Chapter 4 for an in-depth discussion of the concerns raised by the US and their merits).

While this is the most important pressure point, the Trump administration is taking other steps to challenge the WTO. For instance, in November 2019 the administration threatened to veto passage of the WTO’s annual budget.¹⁷ The US is the single largest contributor to this budget, accounting for approximately 11.6 per cent of the total in 2019.¹⁸ Giving in to US demands, WTO members agreed to limit funding to the Appellate Body.

The US is also considering withdrawal from the WTO’s Government Procurement Agreement. That would not only be another attack on the WTO itself, but would have negative implications both for the US economy and for potential supplier economies by curbing foreign access to the US’s \$837 billion public procurement market.¹⁹

Finally, the Trump administration is considering a plan to increase the tariff levels that the country had agreed not to exceed – the so-called ‘bound rates’.²⁰ As part of this effort, the Trump administration might launch a renegotiation

¹⁷ Baschuk, B. (2019), ‘U.S. Raises Prospect of Blocking Passage of WTO Budget’, Bloomberg, 12 November 2019, <https://www.bloomberg.com/news/articles/2019-11-12/u-s-is-said-to-raise-prospect-of-blocking-passage-of-wto-budget> (accessed 14 Jul. 2020).

¹⁸ World Trade Organization (2019), ‘Chapter 9: Secretariat and budget’, *Annual Report 2019*, Geneva: World Trade Organization, https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep19_chap9_e.pdf (accessed 14 Jul. 2020).

¹⁹ Baschuk, B. (2020), ‘Trump Considers Withdrawing From WTO’s \$1.7 Trillion Purchasing Pact’, Bloomberg, 4 February 2020, <https://www.bloomberg.com/news/articles/2020-02-04/trump-mulls-withdrawal-from-wto-s-1-7-trillion-purchasing-pact> (accessed 14 Jul. 2020).

²⁰ Baschuk, B. and Leonard, J. (2020), ‘U.S. Weighs Higher Tariff Ceilings in Bid for More Sway Over WTO’, Bloomberg, 12 February 2020, <https://www.bloomberg.com/news/articles/2020-02-12/u-s-weighs-higher-tariff-ceilings-in-bid-for-more-sway-over-wto> (accessed 14 Jul. 2020).

of US tariff commitments at the WTO.²¹ President Trump has long criticized the fact that other countries can charge higher tariffs on certain products compared to what the US can levy. For instance, he laments the fact that the EU imposes a 10 per cent tariff on US-built cars, while the US charges a 2.5 per cent tariff on EU-manufactured cars.

Continued US engagement in the WTO

Even though it is putting pressure on the WTO, the US is still engaging with the organization. According to the US's trade policy agenda: 'The Trump Administration wants to help build a better multilateral trading system and will remain active in the World Trade Organization (WTO).'²² Robert Lighthizer, the US Trade Representative, has described the WTO as 'a valuable institution' and has even said that 'if we did not have the WTO, we would need to invent it' while at the same time outlining the US's key points of criticism.²³ Despite its concerns about the WTO's dispute settlement system, the US is still launching new cases.²⁴ The US also remains active in the committees of the WTO, where most of the practical work is done, and is contributing to efforts to negotiate new trade rules.

For example, in 2017 the US was among the first WTO members to put forward proposals aimed at improving compliance with notification obligations and enhancing transparency.²⁵ The US was also at the forefront of an initiative on e-commerce, leading to the launch of WTO negotiations involving 76 WTO members in January 2019. Back in April 2018, the US had submitted a statement to the WTO outlining ideas for an e-commerce initiative, stressing that a successful outcome could 'demonstrate the WTO's ability to respond to transformations in the global economy'.²⁶ Moreover, the US is supporting efforts to negotiate disciplines on fisheries subsidies that the Trump administration sees as 'a potentially pivotal opportunity for the WTO to demonstrate that its negotiating arm remains strong'.²⁷

Overall, these areas where the US still sees value in the WTO present an opportunity for other members, such as the EU, to engage the US. Equally, where the US has raised criticisms and taken steps to undermine the WTO,

²¹ Baschuk, B. (2020), 'U.S. Plans a "Broader Reset" of Its WTO Tariff Commitments', Bloomberg, 17 June 2020, <https://www.bloomberg.com/news/articles/2020-06-17/u-s-plans-a-broader-reset-of-its-wto-tariff-committments> (accessed 14 Jul. 2020).

²² Office of the United States Trade Representative (2018), *The 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program*, March 2018, <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF> (accessed 14 Jul. 2020).

²³ U.S. Senate Committee on Finance (2019), 'Testimony of Robert E. Lighthizer Before the U.S. Senate Committee on Finance', 12 March 2019, <https://www.finance.senate.gov/imo/media/doc/ARL%20Finance%20Testimony%20March%202019%203.12.2019%20FINAL.pdf> (accessed 14 Jul. 2020).

²⁴ See, for example, the following cases: DS585, DS566, DS561, DS560, DS559, DS558, DS557. World Trade Organization (2020), 'Chronological list of disputes cases', https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (accessed 14 Jul. 2020).

²⁵ World Trade Organization (2017), 'Procedures to enhance transparency and strengthen notification requirements under WTO Agreements', Communication from the United States, 30 October 2017, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/148.pdf> (accessed 14 Jul. 2020).

²⁶ World Trade Organization (2018), 'Joint Statement on Electronic Commerce Initiative', Communication from the United States, 12 April 2018, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/178.pdf> (accessed 14 Jul. 2020).

²⁷ U.S. Mission to International Organizations in Geneva (2019), 'U.S. Statement at WTO Fisheries Subsidies Negotiations', 27 March 2019, <https://geneva.usmission.gov/2019/03/28/u-s-statement-at-wto-fisheries-subsidies-negotiations/> (accessed 14 Jul. 2020).

there is a chance to address valid US concerns and reform the organization. Even the former WTO director-general, Roberto Azevêdo, has acknowledged that ‘the trading system may not be perfect’ and has argued ‘to turn this current crisis of multilateralism into an opportunity to save it’.²⁸

The principal remaining chapters of this paper provide a more comprehensive analysis of US concerns and structural challenges regarding each of the WTO’s three main functions, assess the merits of US grievances and actions, and outline opportunities for engagement – in particular, areas for potential transatlantic partnership on WTO reform.

²⁸ World Trade Organization (2018), ‘DG Azevêdo: we must turn the crisis of multilateralism into an opportunity to strengthen it’, 16 November 2018, https://www.wto.org/english/news_e/spra_e/spra246_e.htm (accessed 14 Jul. 2020).

04

Dispute settlement in crisis

Ending the appointments impasse that has disabled the WTO Appellate Body will require addressing legitimate US concerns. However, a permanent solution also depends on revitalizing the WTO's rule-making function.

One of the key functions of the WTO is to help members resolve trade disputes. The current crisis at the WTO Appellate Body has highlighted this role. The highest tribunal of world trade is a standing body of seven individuals that hears appeals regarding reports issued by panels in disputes between WTO members. Each Appellate Body member serves a four-year term and may be reappointed for another four-year term.

Because the Trump administration since the summer of 2017 has blocked the (re)appointment of several Appellate Body members, gradually reducing the number of serving appointees, the Appellate Body on 11 December 2019 lost its quorum of three members required to hear new appeals.²⁹ This in effect has brought the Appellate Body's work to a standstill. It is of some irony that the US – once the strongest advocate for the creation of the Appellate Body – has now caused its (at least temporary) demise.

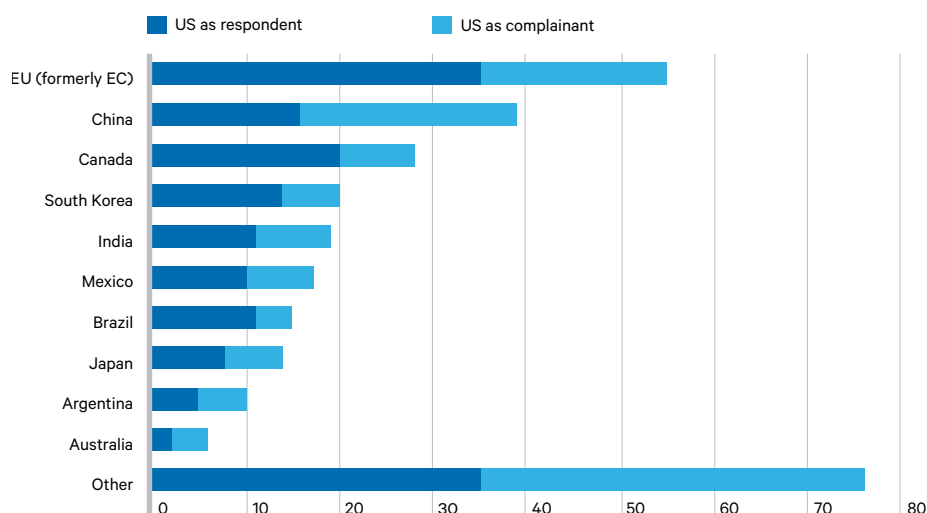
It should be noted that paralysis of the WTO Appellate Body alone does not mean the end of the WTO or the rules-based international trading system. The panel stage of WTO dispute settlement continues to function. Even though the Appellate Body is non-operational, a party to a WTO dispute can still appeal to it against the report of a panel – however, new appeals are not heard and are thus left in limbo. The situation has potentially severe implications for rules-based dispute settlement. Instead of waiting endlessly, parties that win a case at the

²⁹ World Trade Organization (undated), 'Appellate Body Members', https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (accessed 14 Jul. 2020).

panel stage will likely take matters into their own hands and retaliate unilaterally. This could lead to increased protectionism, and a return to arrangements in which power dynamics between parties play a larger role than the rules as the basis for trade relations.

A further irony in the current situation is that the US is the most active user of the WTO’s dispute settlement system. Between 1995 and 2019, the US was a complainant in 124 out of the total of 593 WTO disputes.³⁰ The EU was not far behind, initiating 104 cases. The US and the EU also had the highest number of WTO disputes filed *against them* between 1995 and 2019 – with the US being a respondent in 155 cases and the EU in 86.³¹ Both the US and the EU have targeted each other significantly (see Figures 1 and 2).

Figure 1. WTO disputes involving the US as respondent and complainant (number of cases), 1995–2019



Note: Because disputes can involve multiple complainants and/or multiple respondents, this may lead to somewhat different counts compared to a calculation based only on the number of disputes.
Source: World Trade Organization (undated), ‘Disputes by member’.

Even though President Trump has repeatedly claimed that the US loses most of its cases at the WTO, the picture is more complex. Perhaps the current administration is focused on the defensive cases, where the US has ‘lost’ approximately 86 per cent of disputes (i.e. meaning that at least one violation was found).³² But looking at the other side of the coin, in approximately 91 per cent of cases which the US has brought offensively, it has ‘won’ at least one of the claims in each case.³³

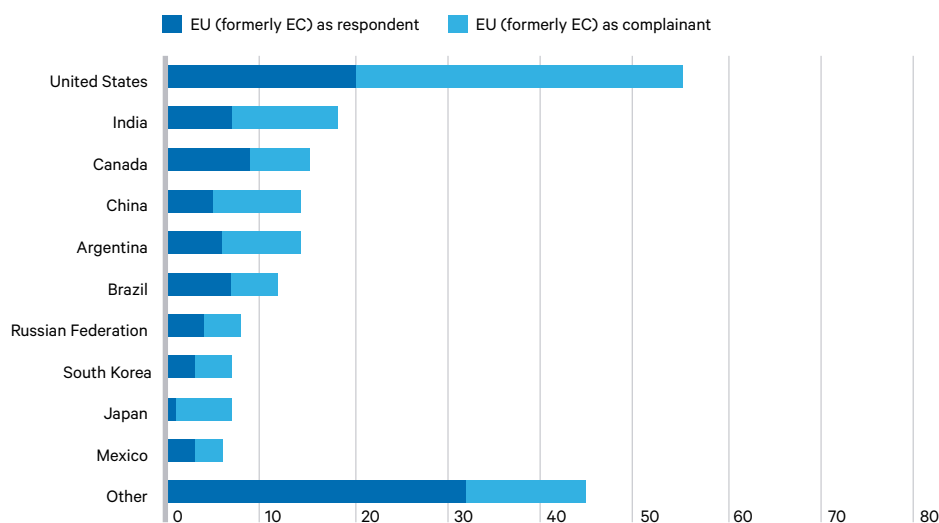
³⁰ World Trade Organization (undated), ‘Disputes by member’, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (accessed 14 Jul. 2020).

³¹ Ibid.

³² Lester, S. (2020), ‘U.S. “Wins” and “Losses” in WTO Disputes’, International Economic Law and Policy Blog, 15 March 2020, <https://ielp.worldtradelaw.net/2020/03/us-wins-and-losses-in-wto-disputes.html> (accessed 14 Jul. 2020). Note that Simon Lester refrains from using the terminology ‘winning’ and ‘losing’ WTO disputes because of methodological issues and efforts by governments to spin the rulings.

³³ Ibid.

Figure 2. WTO disputes involving the EU as respondent and complainant (number of cases), 1995–2019



Note: Because disputes can involve multiple complainants and/or multiple respondents, this may lead to somewhat different counts compared to a calculation based only on the number of disputes.
Source: World Trade Organization (undated), 'Disputes by member'.

This pattern of a strong record as a complainant and a weak record as a respondent holds for other WTO members as well. In part, it can be explained by the fact that bringing a case to the WTO is costly and time-consuming, so members do so only if they believe they have a legitimate claim. It is also noteworthy that not all the disputes initiated reach the panel stage, with consultation among WTO members often sufficient to settle the matter without requiring a ruling.³⁴

For those cases in which a WTO panel made a ruling in the original proceedings, about two-thirds have been appealed.³⁵ Thus, expectations at the time of the WTO's creation that appeals would be rare have turned out to be inaccurate.

If one assumes that the US is not systematically treated unfairly in WTO dispute settlements, why then have the cases led to so much strife in the US compared to the reaction that cases receive in other frequent users of the dispute settlement system – such as the EU?

A first notable difference arises when comparing the number of cases in which the US and the EU are complainants with the number of those in which they are respondents. As shown in Figures 1 and 2, the US has had more cases brought against it than it has brought, whereas the EU has been a complainant more often than a respondent.

³⁴ World Trade Organization (undated), 'Dispute settlement activity — some figures', https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm (accessed 14 Jul. 2020).

³⁵ Ibid.

A second factor is the nature of the cases. About two-thirds of the disputes against the US involve trade remedies (i.e. 110 cases have involved safeguard, anti-dumping and/or countervailing measures).³⁶ For the EU, fewer than half of the cases brought against it have involved trade remedies. As discussed below, trade remedy cases are key to the US's concerns regarding the Appellate Body.

US concerns regarding the Appellate Body

While a lot of political and media attention has been directed at the Trump administration's hostility to the WTO, questions about the future of the WTO Appellate Body had already surfaced during the administration of President Barack Obama. In 2011 the US blocked the reappointment of Jennifer Hillman, a widely respected US member of the Appellate Body, in a first sign of US concerns regarding the body's judicial independence. In May 2016 the US blocked the reappointment of Seung Wha Chang, an Appellate Body member from South Korea, on the basis that it objected to his 'abstract discussions' in a series of decisions that allegedly exceeded the Appellate Body's mandate.³⁷

The Trump administration's concerns can be broken down into six grievances that cover a range of issues, from the procedural to more substantive areas, as well as the WTO's interpretative approach. These are, namely:³⁸

1. A frequent failure by the Appellate Body to conclude appeals within the mandatory 90-day deadline;
2. The practice of Appellate Body members serving on appeals after their term has ended;
3. The Appellate Body's exceedance of its limited authority to review legal issues by reviewing panel findings of fact, including findings related to the meaning of a WTO member's domestic law;
4. The issuance of advisory opinions on matters not relevant to the subject under appeal;
5. The treatment of Appellate Body reports as precedent; and
6. A propensity to reach decisions that go beyond the text of the WTO agreements, thus adding to US obligations or diminishing US rights.

These complaints have led the US to conclude that the WTO Appellate Body has overreached its mandate. According to the US, 'the Appellate Body has departed from the dispute settlement system and rules agreed to by WTO Members'.³⁹

³⁶ Author's own calculations. World Trade Organization (undated), 'Follow disputes and create alerts', https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (accessed 14 Jul. 2020).

³⁷ Murril, B. J. (2019), 'The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?' , Congressional Research Service Legal Sidebar, 16 December 2019, <https://crsreports.congress.gov/product/pdf/LSB/LSB10385> (accessed 14 Jul. 2020).

³⁸ The US complaints were made in a series of statements at meetings of the WTO's Dispute Settlement Body in 2018 and 2019. A compiled list of the grievances can be found in the following report: Office of the United States Trade Representative (2020), *Report on the Appellate Body of the World Trade Organization*, February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (accessed 14 Jul. 2020).

³⁹ Ibid.

Many of these six concerns have some legitimacy and are widely shared – both within the US and around the globe. Appeals often do not get concluded within 90 days. Appellate Body members have stayed on cases after their term has ended to finish an appeal that began while they were in office. According to Hillman, Appellate Body reports often go beyond the critical issue necessary to resolve a dispute. She also claims that appeals ‘frequently re-examine facts rather than solve precise legal questions’, and that ‘too much is often made of past decisions’.⁴⁰ Similarly, Tom Graham, another former US member of the Appellate Body, has stated that other countries and also some WTO staff largely agree with the US criticisms of the Appellate Body.⁴¹ However, whether the alleged tendencies amount to judicial overreach is debatable. Agreeing with the specific concerns of the US does not necessarily equate to agreeing with the US assessment of the Appellate Body’s supposed overreach.

The US does not see itself as a ‘demandeur’, which explains why it has not tabled any proposals of its own for reforming the WTO Appellate Body or restoring it to operational status.

The end goal of the Trump administration’s attacks on the Appellate Body is also not entirely clear. Is it trying to take the WTO back to the way it was at its inception in 1995? Or is the US trying to go back to the GATT system that predated the WTO? On balance, the evidence points to the former. Some in the Trump administration – including the US ambassador to the WTO, Dennis Shea – seem to favour an approach that would restore the dispute settlement system to what the US had agreed to in 1995.⁴² The fact that many of the concerns raised by the Trump administration are not new also supports this assessment. At the same time, the suspension of the Appellate Body has the effect of the latter: it essentially returns dispute settlement to the pre-1995 system in which panel decisions were not automatically binding.⁴³

The US does not see itself as a ‘demandeur’, which explains why it has not tabled any proposals of its own for reforming the WTO Appellate Body or restoring it to operational status. The US has also not given a clear indication that it would unblock the Appellate Body even if all or most of its key complaints are resolved.

⁴⁰ Hillman, J. (2020), ‘A Reset of the World Trade Organization’s Appellate Body’, Council on Foreign Relations, 14 January 2020, <https://www.cfr.org/report/reset-world-trade-organisations-appellate-body> (accessed 14 Jul. 2020).

⁴¹ Graham, T. (2020), ‘The rise (and demise?) of the WTO Appellate Body’, John D. Greenwald Memorial Lecture, Institute of International Economic Law, Georgetown University, 5 March 2020, <https://iilaw.org/wp-content/uploads/2020/03/The-Rise-and-Demise-of-the-WTO-Appellate-Body.pdf> (accessed 14 Jul. 2020).

⁴² Office of the United States Trade Representative (2018), ‘Statement of the United States by Ambassador Dennis Shea at the 14th WTO Trade Policy Review of the United States of America’, 17 December 2018, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/december/statement-united-states-ambassador> (accessed 14 Jul. 2020).

⁴³ Under the GATT dispute settlement system, there needed to be consensus to adopt panel reports. This gave the losing party an opportunity to block the adoption of a report.

As many of the recent reform proposals (outlined below) address numerous US concerns, this raises the question of how serious the US is about getting the Appellate Body back on track.

Two things are clear, however. First, the US's concerns about the WTO – and about the Appellate Body in particular – did not start with the Trump administration and will not end with it. Second, the US's concerns reflect systemic issues that are shared by many other WTO members. Few, however, agree with the tactic of blocking the appointment or reappointment of Appellate Body members.

Existing reform efforts

To overcome the Appellate Body crisis, a number of solutions have been proposed and steps taken. These have included a broad range of approaches – some involving single countries and others groups of WTO members; some looking at temporary fixes and others searching for a more permanent solution; some using a bottom-up approach that entails finding shared solutions, and others taking a more prescriptive method by suggesting textual proposals. These different configurations and approaches indicate that the Appellate Body crisis has served as a catalyst for WTO reform efforts.

The EU has played a critical role in advancing the thinking and discussions for strengthening and safeguarding the WTO's dispute settlement function. The EU is also engaged in work on multiple reinforcing pathways to WTO reform.

In September 2018, the EU issued a concept paper that outlined suggestions for overcoming the deadlock in the WTO dispute settlement system as part of broader reform efforts.⁴⁴ Later that year, the EU and 11 other WTO members (Australia, Canada, China, Iceland, India, Mexico, New Zealand, Norway, Singapore, South Korea and Switzerland) presented proposals for a way forward on the functioning of the Appellate Body.⁴⁵

The EU also engages with other partners in the WTO. Trilateral discussions, for instance, that were launched between the EU, the US and Japan in 2017 to address trade-distortive practices by third countries (widely understood to mean China in particular, although this is not explicit) are feeding into WTO reform efforts. Between 2017 and the beginning of 2020, seven ministerial meetings took place.

In 2018, the EU and China set up a joint working group on WTO reform. Their efforts have focused on resolving the WTO Appellate Body crisis. It is noteworthy that the EU seeks to engage with China on WTO reform at the same time as working with the US and Japan to address shared concerns regarding China's trade practices and policies.

The EU is also part of the Canada-led 'Ottawa Group', which consists of a small but very diverse group of WTO members pursuing bottom-up WTO reform. Notably absent from this group are the US and China.

⁴⁴ European Commission (2018), 'European Commission presents comprehensive approach for the modernisation of the World Trade Organisation', 18 September 2018, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5786 (accessed 14 Jul. 2020).

⁴⁵ European Commission (2018), 'WTO reform: EU proposes way forward on the functioning of the Appellate Body', 26 November 2018, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1945> (accessed 14 Jul. 2020).

In general, the EU's proposals regarding the Appellate Body can be summarized as follows:

- WTO rules should provide for the possibility of parties agreeing to exceed the 90-day time frame for the Appellate Body to conclude appeals.
- The number of Appellate Body members should be increased from seven to nine, to support the body's capacity to deliver appeals.
- Transitional rules should be put in place in respect of outgoing Appellate Body members, outlining the specific circumstances in which a member can stay on to complete pending appeals that started during their term.
- A single, non-renewable longer term of six to eight years should be introduced for Appellate Body members.
- Legal issues subject to appeal by the Appellate Body should not include any review of the meaning of domestic legislation.
- The Appellate Body should address only the issues necessary for the resolution of each specific dispute.
- Annual meetings should be arranged between WTO members and the Appellate Body to address the issue of precedent by providing a forum to discuss Appellate Body approaches, systemic issues or trends in jurisprudence.

The WTO General Council launched an informal process on matters related to the functioning of the Appellate Body in December 2018. In October 2019 the facilitator of this group, Ambassador David Walker of New Zealand, presented a report outlining a number of proposals on which members of the group converged.⁴⁶ These proposals followed the list of US concerns. However, the US ambassador to the WTO, Dennis Shea, criticized some of the Walker proposals, arguing that '[it] simply will not work to "paper over" the problems that have been identified with new language'.⁴⁷

Assessment of interim solutions

As it became clearer that ongoing efforts to reform the WTO Appellate Body would not prevent the suspension of its operations from mid-December 2019, the EU took steps to set up interim appeal arbitration arrangements. In July 2019, the EU and Canada agreed the first of such arrangements.⁴⁸ This was followed in October 2019 by an agreement between the EU and Norway.⁴⁹

⁴⁶ World Trade Organization (2019), 'Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator H.E. Dr. David Walker (New Zealand)', 15 October 2019, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/222.pdf> (accessed 14 Jul. 2020).

⁴⁷ U.S. Mission to International Organizations in Geneva (2019), 'Statements Delivered to the General Council by Ambassador Dennis Shea, U.S. Permanent Representative to the World Trade Organization', 15 October 2019, <https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting> (accessed 14 Jul. 2020).

⁴⁸ European Commission (2019), 'Joint Statement by the European Union and Canada on an Interim Appeal Arbitration Arrangement', 25 July 2019, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2053> (accessed 14 Jul. 2020).

⁴⁹ European Commission (2019), 'EU and Norway agree on interim appeal system in wake of World Trade Organization Appellate Body blockage', 21 October 2019, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2074> (accessed 14 Jul. 2020).

In the wake of the suspension of the Appellate Body's activity, the EU and 18 other WTO members set up a 'multi-party interim appeal arbitration arrangement' (MPIA), which became effective on 30 April 2020.⁵⁰ This mechanism allows participating WTO members⁵¹ access to a binding, two-step dispute settlement system for handling disputes among them. Under this mechanism, the parties use the WTO's arbitration rules (Article 25 of the Dispute Settlement Understanding) to replicate the substantive and procedural aspects of the Appellate Body's functions until the body becomes operational again.

This parallel system does not include the US. However, more than 70 per cent of WTO cases involve the US (as a respondent, complainant or third party), and for many countries the majority of disputes are with the US.⁵² So a parallel system that excludes the US significantly limits the options for appeal. Moreover, it creates a situation in which the US is in effect a 'free-rider': while other WTO members follow a binding, two-step dispute settlement system, the US is able to benefit from this system without itself being subject to it.

A parallel system that excludes the US significantly limits the options for appeal. Moreover, it creates a situation in which the US is in effect a 'free-rider'.

A parallel system also risks undermining efforts to reform the Appellate Body. So long as the US continues to benefit from the interim appeals arrangement of other WTO members, it is less likely to stop blocking the nomination process for Appellate Body members. In addition, if the parallel system remains in place over the long term, it could lead to fragmentation of the rules-based international trading system.

Other interim solutions have included agreements between WTO members to accept panel decisions and forgo the right to appeal.⁵³ For instance, in March 2019 Indonesia and Vietnam agreed in respect of an ongoing dispute that they would not appeal the panel's decision, should the Appellate Body not be functioning at the time.⁵⁴

⁵⁰ European Commission (2020), 'Interim appeal arrangement for WTO disputes becomes effective', 30 April 2020, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143> (accessed 14 Jul. 2020).

⁵¹ As of 10 August 2020, Australia, Benin, Brazil, Canada, Chile, China, Colombia, Costa Rica, Ecuador, the EU, Guatemala, Hong Kong, Iceland, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay have signed the Multiparty Interim Appeal Arbitration Arrangement.

⁵² As mentioned, out of the 593 disputes brought to the WTO between 1995 and 2019, the US was a complainant in 124 cases and a respondent in 155 cases. In the same period, it was a third party in 157 cases. See World Trade Organization (undated), 'Follow disputes and create alerts'.

⁵³ For a good overview, see Payosova, T., Hufbauer, G. C. and Schott, J. J. (2018), *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, Policy Brief 18–5, Washington, DC: Peterson Institute for International Economics, March 2018, <https://www.piie.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organisation-causes-and-cures> (accessed 14 Jul. 2020).

⁵⁴ World Trade Organization (2019), 'Indonesia – Safeguard on Certain Iron or Steel Products', Understanding Between Indonesia and Vietnam Regarding Procedures under Articles 21 and 22 of the DSU, 27 March 2019, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/496-14.pdf> (accessed 14 Jul. 2020).

Some have also suggested that WTO members simply vote on appointing new Appellate Body members, though there is no agreement on whether this is legally possible.⁵⁵ Regardless of its legality, however, the proposed measure does not provide a workable interim solution because it would further alienate the US (and many other WTO members).

In short, all of the above-mentioned solutions and proposals are just short-term workarounds that do little to address the US's systemic concerns. Indeed, the measures taken or proposed by various parties could be seen by the US as further proof that the current set-up no longer serves its interests.

Towards a permanent solution and dispute settlement reform

A permanent solution to the crisis facing the WTO Appellate Body and dispute settlement system will require both the procedural and substantive concerns of the US to be addressed. The procedural concerns are more easily resolved than the substantive ones. While the former require mostly technical interventions, responding to the latter will require political solutions.

The Walker proposal is highly responsive to the US concerns. However, the US rightly questions what would guarantee that the Appellate Body will follow the principles advocated. Jennifer Hillman has argued that resetting the WTO Appellate Body could involve a three-pronged approach consisting of: (1) adopting the Walker principles; (2) establishing a new oversight committee to ensure those principles are adhered to; and (3) restricting the term limits of the WTO Secretariat's legal staff to enable new thinking to flourish, and to allow for a better balance of power between adjudicators and staff. Such an approach has also been suggested by a group of 26 US business organizations.⁵⁶

Another proposal for reforming the Appellate Body has focused on treating the most controversial types of decisions differently. Most US complaints stem from Appellate Body decisions on trade remedy actions, such as anti-dumping and countervailing actions. Some former Appellate Body members have therefore suggested creating a special Appellate Body that only hears appeals against trade remedy decisions.⁵⁷ While this could potentially move the process forward in terms of partially restoring the WTO Appellate Body to operational status, it would not address the US's fundamental complaints.

Overall, simply focusing on getting the Appellate Body functioning again misses the point. At the root of the crisis is a breakdown in the negotiation (or rule-making) function of the WTO. The distractions of the failed Doha Round not only prevented

⁵⁵ Centre for International Governance Innovation (2019), *CIGI Expert Consultation on WTO Reform*, Special Report, Spring 2019, https://www.cigionline.org/sites/default/files/documents/WTO%20Special%20Report_3.pdf (accessed 14 Jul. 2020).

⁵⁶ Americans for Prosperity (2019), 'Letter to the President', 6 December 2019, <https://americansforprosperity.org/wp-content/uploads/2019/12/WTO-AB-coalition-letter-to-president-2019-12-06.pdf> (accessed 14 Jul. 2020).

⁵⁷ Hillman, J. (2018), *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?*, Washington, DC: Institute of International Economic Law, Georgetown University, December 2018, <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf> (accessed 14 Jul. 2020).

WTO members from updating the existing trade rules, but also indirectly set back efforts to agree new ones that might better reflect changes in the global economy since the WTO's formation in 1995. In particular, the current rules are not fit for purpose in terms of addressing China's trade policies and practices, nor do they deal adequately with digital trade (both of these issues are further discussed in Chapter 8). This failure to negotiate up-to-date rules has increased the pressure on WTO panels and the Appellate Body.

Simply focusing on getting the Appellate Body functioning again misses the point. At the root of the crisis is a breakdown in the negotiation (or rule-making) function of the WTO.

A long-term solution to the Appellate Body crisis would thus involve a new balance between the rule-making and dispute settlement functions of the WTO. To address dispute settlement, WTO members need to go back to the negotiation table. Instead of pressuring the current US administration to stop blocking nominations to the Appellate Body, engagement with the US on the rule-making aspects of the WTO's mandate (discussed in the next chapter) and on some institutional issues (the topic of Chapter 6) might be more productive.

05 Revitalizing the WTO's negotiation function

Trade rules need to be updated to reflect shifts in global economic power and technological change. 'Plurilateral' agreements can help move past the negotiation gridlock.

As outlined above, the troubles affecting the WTO's dispute settlement function are closely linked to the impasse around the WTO's negotiation function. The last successful round of multilateral trade talks was the Uruguay Round (1986–94), which led to the creation of the WTO in 1995. Since then, however, WTO members have been unable to achieve a comprehensive multilateral agreement.

To truly reform the WTO, its trade rules need to be modernized to reflect shifts in global economic power and technological transformations. Moreover, new rules are needed because trade barriers are no longer primarily about tariffs but increasingly concern regulations and standards.

To update the rules-based architecture, countries have a variety of negotiation approaches – both inside and outside the WTO – available to them. These consist of multilateral negotiations, bilateral/regional negotiations and plurilateral negotiations.

Multilateral trade negotiations under pressure

The Doha Round was the ninth round of multilateral trade negotiations since 1947, and the first under the auspices of the WTO. Launched in November 2001, the Doha Development Agenda stalled over differences between developed and developing countries – particularly in respect of their positions on agricultural

subsidies. By 2008, the negotiations had collapsed. Repeated attempts to revive the negotiations failed. However, small parts of the broader Doha agenda have subsequently been addressed. At the WTO Ministerial Conference in Bali in 2013, WTO members concluded negotiations on the Trade Facilitation Agreement (TFA), which included provisions to expedite the movement, release and clearance of goods across borders. Even though narrow in scope, the TFA marked a milestone as the first multilateral agreement since the creation of the WTO. The TFA entered into force in 2017, following ratification by two-thirds of the WTO's membership. Its creation shows that achieving results, albeit limited, in a multilateral setting is still feasible.

Multilateral trade negotiations are very complex and take years to complete. This is not least because the WTO operates on the 'single undertaking' principle (whereby nothing is agreed until everything is agreed) and because decisions are taken by consensus.⁵⁸ While reaching agreements in this way can be difficult, the main advantage is that decisions are more likely to be acceptable to all members, with the single-undertaking principle potentially allowing greater scope for trade-offs between parties on different issues. Seen in this light, the failure to conclude the Doha Round could indicate that the WTO is falling victim to its own success.

The historical context is also instructive. Multilateral trade negotiations under the GATT were also lengthy. Each successive round of negotiations took longer to complete, as the conclusion of agreements on relatively straightforward areas left more contentious issues to be addressed each time, and as the increasing number of negotiating parties rendered negotiations more complex. From 23 original contracting parties in 1948, the number of GATT signatories had risen to 128 by end-1994 (with the number of WTO members standing at 164 today).

Arguments that the WTO should revisit some of its negotiating methods such as consensus decision-making and the single-undertaking principle have been raised over the past two decades.⁵⁹

Nonetheless, several issues are still the focus of multilateral negotiations, reflecting hope that agreement can be reached by the time of the next WTO Ministerial Conference. WTO members continue to negotiate over agricultural trade reforms and are also committed to negotiating disciplines for fisheries subsidies (see Chapter 8).

The move towards bilateral and regional free-trade agreements

Because of the challenges of concluding multilateral negotiations, countries have increasingly turned to bilateral or regional free-trade agreements. More than 300 bilateral and regional free-trade agreements are currently in force, compared with fewer than 60 in 1995.⁶⁰ All WTO members have a least one bilateral or regional free-trade agreement.

⁵⁸ In limited circumstances, voting is permitted; however, this has never been done.

⁵⁹ See, for example, Schott, J. J. and Watal, J. (2000), *Decision-Making in the WTO*, Policy Brief 00-2, Washington, DC: Peterson Institute for International Economics, <https://www.piie.com/publications/policy-briefs/decision-making-wto> (accessed 14 Jul. 2020).

⁶⁰ World Trade Organization (undated), 'Regional Trade Agreements Database', <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (accessed 14 Jul. 2020).

The US and the EU have been driving the proliferation of these agreements outside the WTO, even though both have historically played a key role in advancing multilateral trade liberalization.

The US currently has 14 trade agreements with 20 countries.⁶¹ Most of these agreements, which build on the WTO agreements, were concluded in the 1990s and early 2000s. One exception is the recent United States–Mexico–Canada Agreement (USMCA), which entered into force in 2020 and replaced the North American Free Trade Agreement (NAFTA) of 1994.

Compared to the US, the EU has been much more active in recent years in striking free-trade agreements.

Nonetheless, the US still trades on WTO terms with the majority of its trading partners. Approximately 65 per cent of US trade is with countries/regions with which it does not have free-trade agreements⁶² – these include some of the US’s most important trading partners, such as the EU, China and Japan (though the latter two have recently concluded limited deals with the US).

The EU currently has 41 agreements in place involving more than 70 countries, and is in the process of negotiating many more.⁶³ While most of these are what are known as ‘first generation’ agreements that were negotiated before 2006, a number of the key EU agreements (including those with Canada and Japan) have been negotiated more recently. Compared to the US, the EU has been much more active in recent years in striking free-trade agreements. Yet about 69 per cent of EU trade continues to be with partners with which the EU has no existing free-trade agreement, and thus relies on WTO terms – though the share is expected to fall to 61 per cent as pending free-trade agreements come into effect.⁶⁴

Bilateral and regional free-trade agreements are – on the face of it – incompatible with the WTO’s most-favoured-nation (MFN) principle⁶⁵ because the parties involved grant each other preferential benefits compared to the terms available to other trading partners. In fact, free-trade agreements between two or more parties are consistent with WTO rules so long as they follow certain requirements, such as covering ‘substantially all trade’⁶⁶ and being notified to the WTO.

⁶¹ Office of the United States Trade Representative (undated), ‘Free Trade Agreements’, <https://ustr.gov/trade-agreements/free-trade-agreements> (accessed 14 Jul. 2020).

⁶² Cimino-Isaacs, C. D., Fefer, R. F. and Fergusson, I. F. (2019), *World Trade Organization: Overview and Future Direction*, Congressional Research Service Report R45417, 6 December 2019, <https://fas.org/sgp/crs/row/R45417.pdf> (accessed 14 Jul. 2020).

⁶³ European Commission (2020), ‘Overview of FTA and Other Trade Negotiations’, May 2020, https://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (accessed 14 Jul. 2020).

⁶⁴ European Commission (2019), *2019 Annual Report on the Implementation of EU Trade Agreements*, October 2019, https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158388.pdf (accessed 14 Jul. 2020).

⁶⁵ The term MFN is a misnomer as it suggests preferential treatment, whereas in fact the principle requires that a country should not discriminate between its trading partners, thus giving them equally ‘most favoured nation’ status.

⁶⁶ There is no agreed definition of what constitutes ‘substantially all trade’. The EU considers this to be equal to at least 90 per cent of all existing trade between the parties.

In this context, there has been a long-standing debate as to whether bilateral and regional agreements are ‘building blocks’ or ‘stumbling blocks’ for the multilateral trading system. On the plus side, bilateral and regional agreements allow for swifter talks and greater negotiating flexibility to liberalize trade or to create new rules that build on WTO agreements. Such deals can be ‘open’ agreements, meaning that third parties that meet the new rules could join. Negotiating bilateral or regional free-trade agreements can also motivate other parties to come to the multilateral negotiation table.

On the downside, the expansion of bilateral and regional free-trade agreements into new areas not covered by multilateral rules increases the risk of regulatory inconsistency. The proliferation of bilateral and regional free-trade agreements has led to the so-called ‘spaghetti bowl effect’,⁶⁷ whereby a multiplicity of criss-crossing and/or conflicting agreements has the counterproductive effect of hampering trade. For instance, firms struggle to comply with multiple sets of trade rules, or to meet rules of origin that vary from one trade partner to another. Therefore even where free-trade agreements exist between countries, they are not always used in practice.⁶⁸ Bilateral and regional free-trade agreements can also lead to trade ‘diversion’, whereby trade between the parties involved surges while trade with third parties declines. Furthermore, bilateral or regional free-trade agreements can act as disincentives to participate in multilateral negotiations. Securing bilateral and regional free-trade agreements takes up significant negotiating resources and political will, often at the expense of multilateral negotiations. Finally, free-trade agreements often contain their own dispute settlement mechanisms, which creates the risk of competing with the WTO dispute settlement system. That said, countries have often brought their disputes to the WTO instead of using the mechanisms associated with bilateral or regional arrangements.⁶⁹

Countries have varying preferences for bilateral, regional or multilateral trade negotiations because their bargaining power can differ significantly depending on the constellation of parties involved. For smaller and medium-sized traders, the formation of coalitions can help to blunt power imbalances. Canada – despite having entered into bilateral and regional free-trade agreements – is a keen proponent of multilateral trade negotiations for this reason.

The US, under President Trump, has expressed a strong preference for bilateral negotiations where the world’s largest economy can better leverage its negotiation power.⁷⁰ The current administration withdrew the US from the Trans-Pacific

⁶⁷ Bhagwati, J. (1995), ‘US Trade Policy: The Infatuation with Free Trade Agreements’, in Bhagwati, J. and Krueger, A. (eds) (1995), *The Dangerous Drift to Preferential Trade Agreements*, Washington, DC: AEI Press.

⁶⁸ The utilization rate of the EU’s free-trade agreements is 77.4 per cent. See Nilsson, L. and Preillon, N. (2018), *EU Exports, Preferences Utilisation and Duty Savings by Member State, Sector and Partner Country*, European Commission, Directorate General for Trade, Chief Economist Note, Issue 2, June 2018, https://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156931.pdf (accessed 14 Jul. 2020).

⁶⁹ Centre for International Governance Innovation (2019), *CIGI Expert Consultation on WTO Reform*, p. 25.

⁷⁰ Wilbur Ross, the US secretary of commerce, has lamented that in multilateral and regional negotiations the US gets ‘picked apart’ country by country. See CNBC (2016), ‘CNBC Transcript: Steven Mnuchin and Wilbur Ross Speak with CNBC’s “Squawk Box” Today’, 30 November 2016, <http://www.cnbc.com/2016/11/30/cnbc-transcript-steven-mnuchin-and-wilbur-ross-speak-with-cnbc-squawk-box-today.html> (accessed 14 Jul. 2020). But even in bilateral agreements, countries often wait for what negotiating partners are offering third parties in other negotiations before concluding the agreement. This sequencing dynamic is linked to the question of bargaining power. See, for example, Castle, M. A. (2017), ‘How Do Global Trade Rules Evolve? Strategic Sequencing’, *International Economic Law*, December 2017, <http://dx.doi.org/10.2139/ssrn.3015233> (accessed 14 Jul. 2020).

Partnership (TPP), renegotiated the US's agreement with South Korea and revamped the USMCA. Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU have been suspended. Instead, the US Trade Representative has put forward negotiating objectives for an agreement with the EU and the UK post-Brexit, and has launched negotiations. The US has also recently agreed phase one of a deal with China. Although this is not a bilateral free-trade agreement *per se* because of its limited scope and the inclusion of purchasing obligations, it highlights the preference of the Trump administration for seeking a bilateral arrangement with China rather than using a multilateral approach.

The US also reached an agreement with Japan in 2019. This represents a significant break from past US approaches. Instead of pursuing a comprehensive free-trade agreement in a single package, the two sides concluded limited agreements – one on market access for certain agricultural and industrial goods, and one on digital trade. Future negotiations will address other issues – though the timeline and scope of such a process are unclear. Because the US–Japan agreement is so limited in nature, and notably does not cover the automotive sector, it is likely to be inconsistent with the above-mentioned stipulation that free-trade agreements cover ‘substantially all trade’.

So far, no other WTO member has challenged the agreement. But Japan's willingness to enter into an agreement that violates at least the spirit (if not also the letter) of WTO rules shows that even the supposed champions of global trade are taking steps that undermine the WTO in order to prioritize trade relations with the US. This arguably poses a greater risk to the rules-based international order than do the recent US attacks on the multilateral trade system.⁷¹

In short, rather than settling the debate about whether free-trade agreements are building blocks or stumbling blocks for the multilateral system, recent developments driven by the US have complicated the issue and raised additional challenges for the future of the WTO.

A number of steps could be taken to address those challenges. The first would be to strengthen the WTO's notification process for bilateral and regional free-trade agreements and improve the database in which they are recorded, for increased transparency. The second would involve using negotiations for bilateral or regional free-trade agreements to advance talks on topics not currently on the WTO agenda. Such an approach would be based on an open architecture allowing any agreement to be brought to more countries – and the rules to be applied multilaterally – later on. The third step would be to reform the WTO dispute settlement mechanism and to end the Appellate Body crisis (see Chapter 4), as this would help to maintain the pre-eminence of the WTO's dispute settlement mechanism over the plethora of other dispute settlement mechanisms that operate under free-trade agreements.

⁷¹ Schneider-Petsinger, M. (2019), ‘Stretching the rules will not save global trade’, *Financial Times*, 9 October 2019, <https://www.ft.com/content/92497c3e-e9bc-11e9-ae6b-a946d2463e4b> (accessed 14 Jul. 2020).

A plurilateral approach – the way forward

As a result of the failure to drive forward comprehensive multilateral negotiations, plurilateral negotiations – which involve subsets of WTO members and often focus on a particular sector – have become popular. But this approach is not new. Indeed, two of the plurilateral agreements currently in force go back to the early 1980s (see Box 1).

By negotiating only on specific issues with a limited number of willing participants, plurilateral negotiations can produce agreements more quickly than the multilateral process. They reduce the risk of ‘hostage-taking’ by countries seeking to press particular agendas. And like free-trade agreements, plurilateral agreements can pave the way for the expansion of rules into new areas.

Plurilateral agreements, however, are no panacea. They require forming and maintaining coalitions among like-minded countries. They still require divisions to be overcome – particularly between developed and developing countries – and trade-offs to be made.

Issues also arise from the relationship between participants and non-participants, depending on the design of a given plurilateral agreement. There are two ways to negotiate plurilateral agreements among WTO members. First, there are open plurilateral agreements that grant unconditional MFN treatment – meaning that the benefits of an agreement are extended to all other WTO members on an MFN basis. However, this can create a ‘free-riding’ problem as non-participants receive benefits even though they do not commit to the trade liberalization measures in question. To prevent free-riding, the number of participants needs to reach a critical mass, generally understood to correspond to 90 per cent of world trade in the sector or product being covered by the plurilateral agreement.⁷²

For instance, in the negotiations for a proposed Environmental Goods Agreement (EGA), 46 WTO members sought to eliminate tariffs on a number of environment-related products and would have extended the benefits of the agreement to the entire WTO membership (see Box 1). While this would have been welcome from an environmental perspective, the open nature of the agreement contributed to the demise of the negotiations. In particular, China raised concerns both over the full liberalization of trade in certain sensitive goods and over the issue of free-riding – ultimately, these factors contributed to the failure of the EGA negotiations.⁷³

In the recently launched e-commerce negotiations (Box 1), the fact that India is choosing not to participate in the talks raises questions about the legitimacy of trade agreements that do not include large emerging economies.

⁷² Hoekman, B. and Mavroidis, P. (2015), ‘WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements’, *European Journal of International Law*, 26(2): pp. 319–43, <https://doi.org/10.1093/ejil/chv025> (accessed 14 Jul. 2020).

⁷³ European Parliament (2020), ‘Legislative Train Schedule, A Balanced and Progressive Trade Policy to Harness Globalisation’, Plurilateral Environmental Goods Agreement (EGA), [http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-environmental-goods-agreement-\(ega\)](http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-environmental-goods-agreement-(ega)) (accessed 14 Jul. 2020).

Box 1. Overview of key plurilateral initiatives

Agreement on Trade in Civil Aircraft

- Aim: eliminate tariffs on civil aircraft and their components
- Type: conditional MFN
- Status: entered into force in 1980
- Parties: 51 WTO members

Government Procurement Agreement (GPA)

- Aim: mutually open government procurement markets among parties
- Type: conditional MFN
- Status: entered into force in 1981; revised GPA entered into force in 2014
- Parties: 48 WTO members, including the US and the EU; China has been in long-standing accession negotiations since 2007

Information Technology Agreement

- Aim: eliminate tariffs on IT products covered by the agreement
- Type: unconditional MFN
- Status: originally concluded in 1996; expanded in 2015
- Parties: 82 WTO members, accounting for approximately 97 per cent of global trade in IT products

Environmental Goods Agreement

- Aim: liberalize trade in environmental goods through tariff elimination
- Type: unconditional MFN
- Status: future unclear; initiated in 2014; no negotiating rounds have taken place since December 2016
- Parties: 46 WTO members (including the US, the EU and China), representing 86 per cent of global trade in covered environmental goods

Joint Initiative on E-commerce

- Aim: negotiate rules on e-commerce
- Type: unclear, but initially envisioned as unconditional MFN
- Status: negotiations formally started in March 2019
- Parties: currently 84 WTO members (coordinated by Australia, Japan and Singapore; includes the US, the EU and China); notably, India and South Africa have not joined negotiations, arguing that WTO members should be working on completing the 1998 WTO Work Programme on Electronic Commerce instead.

The second way to negotiate plurilateral agreements is via a ‘club approach’, whereby the participants extend the benefits only to other participants rather than to all WTO members. This type of agreement is known as a ‘conditional MFN’ plurilateral.⁷⁴ Conditional MFN plurilaterals create the risk of policy fragmentation, as different arrangements between signatories and non-signatories can lead to divergence in the trading rules that apply.

⁷⁴ Article X, paragraph 9 of the WTO Agreement (Marrakesh Treaty) states that the Ministerial Conference of the WTO may decide to add an agreement to the existing set of plurilateral agreements listed in Annex 4 ‘exclusively by consensus’.

To complicate matters further, some plurilateral initiatives among WTO members take place outside the WTO framework. For instance, negotiations for the Trade in Services Agreement (TiSA) were launched in 2013 between 23 WTO members, including the EU and the US. Together, these parties account for 70 per cent of global trade in services.

The TiSA talks are based on the WTO's General Agreement on Trade in Services (GATS), and in theory are open to other WTO members. But in practice, participation is more complex. While China has asked to join the negotiations, its request has not been accepted because the negotiating parties have lacked political unanimity on the issue. Brazil, India and South Africa are also notably absent from the negotiations. The TiSA had been intended to become multilateral in the future, and to be turned into a broader WTO agreement. However, negotiations have been on hold since November 2016.

The current US administration has not adopted an official position on the future of the EGA and TiSA negotiations. The fact that the US has not withdrawn from either project leaves open the prospect that the US will re-engage – though it is unlikely to do so in the current environment. A more hopeful sign is that the US is actively supporting the recently launched e-commerce negotiations.

The EU has called for 'flexible multilateralism' in the WTO – supporting full multilateral negotiations where possible, while actively supporting and pursuing negotiations for open plurilateral agreements in areas where multilateral consensus is not possible.⁷⁵ The European Commission under President Ursula von der Leyen hopes to 'give further impetus to WTO negotiations on e-commerce'.⁷⁶ Phil Hogan, the former EU trade commissioner, has also called for 'mechanisms to facilitate the integration of plurilateral approaches in the WTO framework'.⁷⁷

In sum, it seems that the way forward will be with plurilateral agreements. The current e-commerce negotiations demonstrate that the WTO increasingly provides a forum capable of covering limited sectors and – at least initially – of accommodating coalitions of countries that share similar goals and a desire to expand trading rules into new areas. Creating such rules is particularly important for areas where WTO disciplines do not exist – for instance, investment (see Chapter 8). As long as plurilateral agreements are structured in an open way that allows for expanded membership later on, they will not replace multilateral agreements, but rather can complement them and support global trade governance overall.

⁷⁵ European Commission (2018), concept paper on 'WTO modernisation', 18 September 2018, https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (accessed 14 Jul. 2020).

⁷⁶ European Commission (2019), 'Mission Letter from Ursula von der Leyen (President-elect of the European Commission) to Phil Hogan (Commissioner-designate for Trade)', 10 September 2019, https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-phil-hogan-2019_en.pdf (accessed 14 Jul. 2020).

⁷⁷ European Commission (2020), 'Statement by Commissioner Phil Hogan at Informal WTO Ministerial in Davos', 24 January 2020, https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/statement-commissioner-phil-hogan-informal-wto-ministerial-davos_en (accessed 14 Jul. 2020).

06 Institutional issues and reform

To improve its effectiveness and legitimacy, the WTO needs to raise member compliance with notification requirements – and above all rethink ‘special and differential treatment’ of developing countries.

As previously mentioned, some of the structural and long-standing challenges for WTO governance have concerned the principles of consensus and a single undertaking. The move towards bilateral, regional and plurilateral agreements has offered ways to circumvent those challenges.

More recently, the US and others have raised concerns regarding institutional issues in two other areas: (1) transparency and notification; and (2) developing-country status.

Transparency and notification

One of the principal functions of the WTO, in addition to providing a forum for trade negotiations and for the settlement of disputes, is to monitor and implement agreements. In order to do this, the various WTO agreements contain transparency and notification requirements. However, compliance has been chronically low and late.⁷⁸ In particular, the failure by many members to notify their trading partners (via the WTO) of subsidies has been a serious systemic problem for years. This lack of compliance not only undermines trust in the rules-based international trading system; it also has implications for future negotiations, as it becomes difficult to agree new rules and disciplines when there is uncertainty around compliance with existing ones.

⁷⁸ See the WTO Secretariat’s ‘Annual Report on Notifications’ provided to the Council for Trade in Goods. The most recent version is the following: World Trade Organization (2020), ‘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’, Revision 27, 11 February 2020, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/L/223R27.pdf&Open=True> (accessed 14 Jul. 2020).

To address these concerns, the Trump administration first issued a proposal on enhanced transparency in 2017.⁷⁹ In November 2018 the US, together with four other WTO members (including the EU), submitted an updated and more comprehensive proposal on enhancing transparency and strengthening notification requirements.⁸⁰

That updated proposal sets out a multi-pronged approach, including incentives for compliance and penalties for non-compliance. Among the key ideas are the following:

- WTO members experiencing difficulties in fulfilling their notification obligations are encouraged to request technical assistance and support for capacity-building.
- Measures to name and shame non-compliant WTO members should be introduced. Depending on the length of the notification delay, the suggested penalties range from the offending party being required to offer an explanation for the delay to being designated an inactive member of the WTO.
- Members are encouraged to provide counter-notifications (i.e. contesting the accuracy of another WTO member's notification).

While the proposal takes into account the challenges that developing countries face in meeting transparency and notification requirements, it has been criticized for not adequately addressing capacity constraints and for its punitive dimension.⁸¹

The current focus on addressing the historically lax compliance with transparency and notification requirements is a very welcome step, as are the joint efforts by some WTO members. The US is actively engaged in this important area, with developments to date illustrating that members have not given up on the WTO.

Developing-country status

The second – and thornier – structural issue is that of developing-country status. There is no agreed definition of what constitutes a developing country at the WTO; countries can self-declare their status.⁸² Because developing countries receive so-called ‘special and differential treatment’ – consisting of more favourable terms or extra time to fulfil their commitments – it is not surprising that approximately two-thirds of WTO members claim developing-country status.⁸³ While the status

⁷⁹ World Trade Organization (2017), ‘Procedures to enhance transparency and strengthen notification requirements under WTO Agreements’, Communication from the United States.

⁸⁰ World Trade Organization (2018), ‘Procedures to enhance transparency and strengthen notification requirements under WTO Agreements’, Communication from Argentina, Costa Rica, the European Union, Japan, and the United States, 1 November 2018, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/204.pdf&Open=True> (accessed 14 Jul. 2020). Other WTO members have since joined the efforts.

⁸¹ World Trade Organization (2018), ‘Goods Council considers revised transparency proposal to “reinvigorate” the WTO’, 12 and 13 November 2018, https://www.wto.org/english/news_e/news18_e/good_12nov18_e.htm (accessed 14 Jul. 2020).

⁸² World Trade Organization (undated), ‘Who are the developing countries in the WTO?’, https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (accessed 14 Jul. 2020). It should be noted, however, that other WTO members can challenge a member that uses the ‘special and differential treatment’ provisions available to developing countries. Also, a country can decide to forgo special and differential treatment, but still hold on to developing-country status.

⁸³ World Trade Organization (undated), ‘Understanding the WTO: Developing Countries’, https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (accessed 14 Jul. 2020).

and special treatment are warranted for some countries, it is questionable whether some of the world's largest economies legitimately qualify as developing countries. The fact that eight of the G20 countries⁸⁴ – including China and India – currently claim developing-country status at the WTO is a major point of contention. Brazil and South Korea (as well as non-G20 members Singapore and Taiwan) announced in 2019 that they would no longer seek the special and differential treatment reserved for developing countries at the WTO.⁸⁵

The effectiveness of special and differential treatment in supporting developing countries to trade and grow economically has been called into question.⁸⁶ It is not clear that simply giving WTO countries a pass on some of their obligations is in fact helping them.

Because developing countries receive so-called ‘special and differential treatment’ – consisting of more favourable terms or extra time to fulfil their commitments – it is not surprising that approximately two-thirds of WTO members claim developing-country status.

The status and treatment of developing countries at the WTO have been controversial for years – with both the US and the EU raising concerns. According to the EU, ‘the demand for blanket flexibilities for two thirds of the WTO membership dilutes the call from those countries that have evident needs for development assistance, leads to much weaker ambition in negotiations and is used as a tool to block progress in, or even at the beginning of, negotiations’.⁸⁷

Under President Obama, the US did not accept China's claim to developing-country status. But under the Trump administration, the US has for the first time taken concrete steps to address the issue more broadly. In July 2019, the administration issued a memorandum ‘toward changing the WTO approach to developing-country status such that advanced economies can no longer avail themselves of unwarranted benefits despite abundant evidence of economic strength’.⁸⁸

The Trump administration established a 90-day ultimatum for any country that improperly declares itself a developing country to drop the status or face adverse consequences. The memorandum also instructs the US Trade Representative to ‘publish on its website a list of all self-declared developing

⁸⁴ The eight countries are Argentina, China, India, Indonesia, Mexico, Saudi Arabia, South Africa and Turkey.

⁸⁵ Baschuk, B. (2019), ‘Here's What It Means to Be a WTO Developing Country’, Bloomberg, 14 November 2019, <https://www.bloomberg.com/news/articles/2019-11-14/here-s-what-it-means-to-be-a-wto-developing-country-quicktake> (accessed 14 Jul. 2020).

⁸⁶ See, for example, Ornelas, E. (2016), ‘Special and Differential Treatment for Developing Countries’, CEP Discussion Papers No 1415, Centre for Economic Performance, London School of Economics and Political Science, March 2016, <http://cep.lse.ac.uk/pubs/download/dp1415.pdf> (accessed 14 Jul. 2020).

⁸⁷ European Commission (2018), concept paper on ‘WTO modernisation’.

⁸⁸ White House (2019), ‘Memorandum on Reforming Developing-Country Status in the World Trade Organization’, 26 July 2019, <https://www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organisation/> (accessed 14 Jul. 2020).

countries that USTR believes no longer deserve such treatment for purposes of WTO rules and negotiations'.⁸⁹ It remains to be seen how this will be implemented.

The US has also proposed four categories of WTO member that should forgo special and differential treatment in current and future negotiations.⁹⁰

1. A member of (or a country that has begun the accession process to) the Organisation for Economic Co-operation and Development (OECD);
2. A member of the G20;
3. A WTO member that is classified as a 'high-income' country by the World Bank; or
4. A WTO member that accounts for no less than 0.5 per cent of global merchandise trade.

More than 30 countries would fall into at least one of these categories.⁹¹

Many countries currently claiming developing-country status reject the US proposal. Led by China and India, a group of countries has defended the self-declaration of developing-country status as 'a fundamental rule in the WTO, [that] has proven to be the most appropriate classification approach to the WTO'.⁹² They also stress that 'per capita indicators must be given the top priority when assessing the development level of a country'.⁹³

While clear and objective benchmarks would be a step in the right direction to limit WTO members' excessive use of self-declared developing-country status, the US proposal has shortcomings. The G20 – a grouping whose own legitimacy has come under criticism for its arbitrary membership – does not serve as a helpful reference point for establishing development status within the WTO. Using a country's share of global trade as a yardstick is also flawed because being a major importer or exporter can reflect the size of a country's population as much as its level of development.

Given how contentious the issue of developing-country status is, combined with the difficulty of establishing and agreeing a set of criteria, a better path forward would be to create more flexibility in the system. Among the steps that could be taken are:

⁸⁹ Ibid.

⁹⁰ World Trade Organization (2019), 'Draft General Council Decision, Procedures to Strengthen the Negotiation Function of the WTO', 15 February 2019, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W764.pdf&Open=True> (accessed 14 Jul. 2020).

⁹¹ González, A. (2019), 'Bridging the Divide between Developed and Developing Countries in WTO Negotiations', Trade and Investment Policy Watch, Peterson Institute for International Economics, 12 March 2019, <https://www.piie.com/blogs/trade-investment-policy-watch/bridging-divide-between-developed-and-developing-countries-wto> (accessed 14 Jul. 2020).

⁹² World Trade Organization (2019), '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, the Bolivarian Republic of Venezuela, Lao People's Democratic Republic, Plurinational State of Bolivia, Kenya, Cuba, Central African Republic and Pakistan, 4 March 2019, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W765R2.pdf> (accessed 14 Jul. 2020).

⁹³ Ibid.

- **Encouraging ‘graduation’.** WTO members could decide to follow the examples of Brazil, Singapore, South Korea and Taiwan in forgoing special and differential treatment. However, this approach will only be amenable to a limited number of WTO members. It is unlikely that most developing countries will give up their status, or the benefits of special and differential treatment. China, for instance, has made it very clear that it will not relinquish its developing-country status.⁹⁴
- **Determining status on a case-by-case basis.** Instead of an across-the-board approach, a slimmer version could consist of WTO members graduating to developed-country status using an agreement-by-agreement approach. The implementation of the WTO’s Trade Facilitation Agreement could serve as a useful blueprint.
- **Increasing the use of plurilateral agreements.** This could provide additional flexibility. Because the relevant commitments would only apply to countries ready to join a given plurilateral coalition, the negotiation format could accommodate differences between WTO members without relying on definitional criteria.⁹⁵
- **Individualizing commitments.** Finally, drawing inspiration from the Paris Agreement on climate change, WTO members could consider an approach based on individualized implementation schedules and practicable commitments.⁹⁶

These steps would not only improve the credibility of the WTO, but would also help to further integrate developing countries into the global trading system.

Overall, the approach to developing countries within the WTO needs to be turned on its head. Current arrangements promote the perception that the global trade rules hinder economic development, and that developing countries thus need an exemption to them. A reformed approach should instead reflect the reality that a rules-based international trade system helps development.

⁹⁴ Lee, A. (2019), ‘China refuses to give up ‘developing country’ status at WTO despite US demands’, *South China Morning Post*, 6 April 2019, <https://www.scmp.com/economy/china-economy/article/3004873/china-refuses-give-developing-country-status-wto-despite-us> (accessed 14 Jul. 2020).

⁹⁵ González (2019), ‘Bridging the Divide between Developed and Developing Countries in WTO Negotiations’.

⁹⁶ Centre for International Governance Innovation (2019), *CIGI Expert Consultation on WTO Reform*, p. 27.

07 Challenges for a transatlantic partnership

Without transatlantic cooperation, WTO modernization will be impossible. While the US and the EU are aligned on many reform issues, bilateral trade tensions risk impeding joint efforts.

In July 2018, President Trump and the then president of the European Commission, Jean-Claude Juncker, vowed to work together with like-minded partners to reform the WTO.⁹⁷ Depending on the particular aspect of WTO reform, there is a broad range of variation in how close or apart the US and the EU positions and proposals are.

The US and the EU agree that new rules for 21st-century trade are needed. The EU shares many of the US's concerns regarding China's trade policies and practices. Despite the trilateral efforts involving the US, the EU and Japan, transatlantic differences remain over the methods for tackling the problem. Where the US and the EU views differ the most is on reforming the WTO Appellate Body and dispute settlement system.

But even in the areas of WTO reform where the US and the EU are mostly aligned, current transatlantic trade tensions risk undermining joint efforts to modernize the organization.⁹⁸ Without addressing underlying bilateral frictions, reforming the WTO will be more challenging.

⁹⁷ European Commission (2018), 'Joint EU-U.S. Statement following President Juncker's visit to the White House', 25 July 2018, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4687 (accessed 14 Jul. 2020).

⁹⁸ A similar point is made by Lamprecht, P. and Abbott, R. (2019), 'Time is running out to address trade frictions. For effective WTO reform to happen the US, EU and China need to live up to their responsibilities', European Centre for International Political Economy (ECIPE), October 2019, <https://ecipe.org/blog/time-is-running-wto/> (accessed 14 Jul. 2020).

Underlying trade frictions

A dispute dating back to 2004 over alleged unfair subsidies to the aircraft manufacturers Boeing and Airbus is coming to a head, and could have implications for ongoing WTO reform efforts. Over the years, various WTO panel and Appellate Body reports have found both the US, on the one side, and the EU, France, Germany, Spain and the UK, on the other, at fault for unfairly subsidizing aircraft manufacturers. In October 2019, the WTO authorized the US to impose tariffs of up to \$7.5 billion on a wide range of EU products (including many unrelated to the aviation sector).⁹⁹ In a parallel case, the WTO is expected to rule in the EU's favour later this year, likely clearing the path for the EU to impose tariffs on imports of US products.¹⁰⁰ This would probably draw the ire of President Trump at a delicate time. It could set back the US's willingness to reform the WTO, and could also derail US and EU efforts to strike a bilateral trade deal.

Another highly sensitive area has developed around US steel and aluminium tariffs levied on alleged grounds of national security, and the EU's countermeasures to these. Following the US decision in mid-2018 to impose additional tariffs of 10 per cent on imports of aluminium products and 25 per cent on imports of certain steel products (under Section 232 of the US Trade Expansion Act of 1962), the EU launched proceedings at the WTO and in June 2018 put in place rebalancing duties.¹⁰¹ The EU disagrees with the US's national security rationale, and argues that the US tariffs are thinly disguised safeguard measures taken to protect the US steel and aluminium industries from a surge in imports. In response to the EU's countermeasures, the US launched its own WTO case.¹⁰² The WTO panels are expected to issue their findings later in 2020.

The fact that the US has turned to the WTO in this case shows that the Trump administration – despite all its criticism of the organization – still sees some use in the multilateral trade body. This is a promising sign. However, the fact that the EU did not wait for a WTO panel ruling, but instead retaliated immediately, is troublesome. Regardless of the legal merits of the EU's case, the bloc's actions undermine the WTO.¹⁰³

Digital taxes have also become a flashpoint for transatlantic trade relations. In June 2020, the US Trade Representative launched an investigation into digital services taxes that have been adopted or are being considered by a number of trade partners (including the EU and the UK) and that could result in new tariffs. While a clash between the US and France over the latter's digital taxes was effectively

⁹⁹ World Trade Organization (undated), 'DS316: European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft', https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm (accessed 14 Jul. 2020).

¹⁰⁰ Brunson, J. and Williams, A. (2020), 'Brussels warns new US tariff threat over Airbus will harm both sides', *Financial Times*, 24 June 2020, <https://www.ft.com/content/7cabefbe-5a58-4f96-96c4-e18718d17e44> (accessed 14 Jul. 2020).

¹⁰¹ European Commission (2018), 'EU adopts rebalancing measures in reaction to US steel and aluminium tariffs', 20 June 2018, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1868> (accessed 14 Jul. 2020).

¹⁰² World Trade Organization (undated), 'DS559: European Union — Additional Duties on Certain Products from the United States', https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds559_e.htm (accessed 14 Jul. 2020).

¹⁰³ For a more detailed assessment, see Schneider-Petsinger (2019), 'Stretching the rules will not save global trade'.

de-escalated in January, the matter is far from settled: in June the US paused talks to find a multilateral taxation framework at the level of the OECD.¹⁰⁴ Whether the digital services tax is consistent with WTO law has yet to be tested.

Individual EU members have a key role to play in advancing WTO reform, including in charting a common course with the US in pursuit of institutional modernization. Germany and France in particular can help unify the EU around WTO reform.

Individual EU members have a key role to play in advancing WTO reform, including in charting a common course with the US in pursuit of institutional modernization. Germany and France in particular can help unify the EU around WTO reform, even though trade policy falls under the exclusive competence of the EU. The two countries can use their roles in the G7 and G20 to advance the EU's position and build political will to reform the WTO. The 2019 G7 summit in France and the 2019 G20 summit in Japan showed that WTO reform is high on the agenda.¹⁰⁵

At the same time, action by EU member states has the potential to weaken the bloc's WTO reform efforts. For instance, Germany and France's push for a 'European industrial strategy'¹⁰⁶ seems to have complicated the EU's discussions with the US and Japan on strengthening existing WTO rules on industrial subsidies, and is a likely reason why the trilateral discussions stalled at one point. But in the end, the US, the EU and Japan made progress and finally issued a joint statement in January 2020.¹⁰⁷

What role for the UK?

The UK has a very large stake in the future of the WTO. The country has been a member in its own right since 1995. Until 31 January 2020, the UK had also been a WTO member by virtue of its membership of the EU.

The UK's withdrawal from the EU has a number of implications for the country's position in the WTO. The UK can speak more independently, but it also loses some of the EU's amplifying power to be heard. The UK will also have to defend itself on its own when challenged by other WTO members in dispute settlement cases.

¹⁰⁴ Specifically, the US paused discussions of Pillar 1 (which concerns the allocation of taxing rights), but is still seeking to conclude talks regarding Pillar 2 (on a global minimum tax) before the end of 2020.

¹⁰⁵ Government of France (2019), 'G7 Leaders' Declaration', 26 August 2019, <https://www.elysee.fr/en/g7/2019/08/26/g7-leaders-declaration> (accessed 14 Jul. 2020); Government of Japan (2019), 'G20 Osaka Leaders' Declaration', 29 June 2019, https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/en/documents/final_g20_osaka_leaders_declaration.html (accessed 14 Jul. 2020).

¹⁰⁶ Government of France (2019), 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century', 19 February 2019, <https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century> (accessed 14 Jul. 2020).

¹⁰⁷ European Commission (2020), 'EU, U.S. and Japan agree on new ways to strengthen global rules on industrial subsidies', 14 January 2020, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2101> (accessed 14 Jul. 2020).

The UK will fall back to trading with the EU on WTO terms if, by the end of the Brexit transition period on 31 December 2020, no deal for the future relationship between the UK and the EU has been struck, and no extension to the transition has been agreed. The UK may also lose continuity of trade agreements with the countries that have free-trade agreements with the EU. While the UK is in the process of rolling over many of its agreements, any failure to do so would result in trade with the relevant partner defaulting to WTO terms.

In line with its vision of a ‘Global Britain’, the UK government has stated that it will ‘support efforts to strengthen the multilateral rules-based trading system, and to modernise the WTO’.¹⁰⁸ The UK has also vowed to work towards restoring the full functioning of the WTO dispute settlement system, and to drive forward initiatives at the WTO on issues of particular relevance to the UK, such as the ongoing e-commerce negotiations.

What concrete steps can the UK take to achieve these ambitions? First, it can advance the discussions from within the WTO committees where most of the work is conducted.

Second, the UK can leverage its role in the G7, G20 and the Commonwealth. While the UK has long had these platforms, it is not necessarily maximizing their use. In particular, the UK can play a role in putting WTO reform and new trade rules on the agenda when it holds the G7 presidency in 2021.

Third, the UK can leverage the transatlantic relationship to advance WTO reform by engaging with the US constructively. However, this route is likely to be underused, as US–UK trade discussions will focus on concluding a bilateral free-trade agreement. Any efforts to work closely together on reforming the WTO will be put on the back-burner.

Fourth, in order to build on the existing efforts by like-minded countries to address the shortcomings of the current rules-based international system, it would be advantageous for the UK to join the (currently trilateral) US–EU–Japan discussion format.

Finally, the UK can work with other ‘middle powers’ to drive forward WTO reform efforts. In particular, it could be helpful for the UK to join the Canada-led ‘Ottawa Group’ (as the EU is also participating and as Canada is part of the Commonwealth).

¹⁰⁸ World Trade Organization (2020), ‘The United Kingdom’s Withdrawal from the European Union’, Communication from the United Kingdom, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/206.pdf> (accessed 14 Jul. 2020).

08

Key issues for a ‘WTO 2.0’

The WTO must balance the demands of 21st-century trade and unresolved ‘old’ trade issues. Reform must also address concerns about China’s trade policies while ensuring that China has a meaningful voice in the system.

The fact that 23 countries are currently seeking accession to the WTO shows that the organization is still seen as having a purpose.¹⁰⁹ However, a number of issues need to be addressed for the WTO to have continued relevance in the future, not least in light of COVID-19. This chapter provides an overview of the most important policy considerations and offers some recommendations, without being exhaustive.

The global trade landscape has changed significantly since the WTO was set up in 1995, but many of today’s trade issues are not adequately addressed by WTO rules. Ensuring that the WTO’s mechanisms and procedures adapt to new economic realities and pressures will require reform of rules in certain areas – such as trade involving state-owned enterprises, and the provision of subsidies to them – that have come into sharper focus as China has risen in global economic prominence. It will also require the creation of disciplines in areas that did not exist 25 years ago, such as e-commerce and digital trade. Given the pressing issues around climate change, increased efforts to align trade and environmental sustainability could help to both tackle climate change and reinvigorate the WTO. In future, WTO members will have to strike a balance between moving forward with negotiations on 21st-century issues and keeping sight of the unresolved ‘old trade issues’ such as agriculture and development. On top of these substantive issues, the WTO will have to address institutional issues (especially the above-mentioned difficulties around developing-country status) in order to stay relevant. The key aspects in this regard will be resolving the WTO Appellate Body crisis and reforming the dispute settlement system.

¹⁰⁹ World Trade Organization (2020), ‘Summary Table of Ongoing Accessions’, March 2020, https://www.wto.org/english/thewto_e/acc_e/status_e.htm (accessed 14 Jul. 2020).

China and a level playing field

China became a member of the WTO on 11 December 2001, following lengthy negotiations. But China's integration into the WTO has not been smooth. The nature of China's economic system, combined with the size and growth of its economy, has created tensions in the global trading system.

The US and the EU viewed China's WTO accession as a critical lever for promoting domestic economic reform in the country, reducing trade and investment barriers, and bringing China into the rules-based international trading system. However, by 2006, despite China having taken important steps on the road to economic reform, the signs showed important challenges remained. For instance, the first WTO Trade Policy Review of China found that 'despite China's efforts, the enforcement of intellectual property rights (IPRs) remained problematic'.¹¹⁰ In its most recent Trade Policy Review of China, the WTO remarks that '[e]xcess capacity in some energy and manufacturing sectors and implicit assistance to state-owned enterprises (SOEs) have increased over a number of years'.¹¹¹

The issue is not simply that China violates the spirit, if not the letter, of certain WTO rules. A critical part of the problem is that the rulebook of the WTO is inadequate for addressing the challenges that China presents in respect of intellectual property, state-owned enterprises and industrial subsidies.

As a result, the US has turned to unilateral measures (such as imposing tariffs under Section 301 of the US Trade Act of 1974) to tackle China's policies and practices related to technology transfer, intellectual property and innovation. The EU disagrees with this approach, even though it shares many of the US's concerns regarding China's harmful policies.

Unfortunately, efforts by the US and China to deal with their trade and technology stand-off have primarily occurred outside the WTO framework. The US–China 'phase-1' deal mentioned above contains a separate dispute settlement and enforcement mechanism. Moreover, that deal focuses on China importing an additional \$200 billion worth of US goods and services over the next two years. Even though this target was unrealistic from the start, the COVID-19 pandemic has made reaching it all but impossible. China has fallen behind on its purchasing obligations,¹¹² raising doubts about the longevity of the arrangement.

While the US–China phase-1 deal includes language on intellectual property rights and technology transfer, it remains to be seen whether these commitments will be implemented. The deal does not address some structural issues such as industrial subsidies and state-owned enterprises. This was left for a second phase of talks. But a phase-2 deal now seems very unlikely as US–China tensions rise over the origin and handling of COVID-19, as well as over China's imposition of a new national security law in Hong Kong.

¹¹⁰ World Trade Organization (2006), 'Trade Policy Review: China, Concluding remarks by the Chairperson', April 2006, https://www.wto.org/english/tratop_e/tpr_e/tp262_crc_e.htm (accessed 14 Jul. 2020).

¹¹¹ World Trade Organization (2018), 'Trade Policy Review: China, Report by the Secretariat', 6 June 2018, https://www.wto.org/english/tratop_e/tpr_e/s375_sum_e.pdf (accessed 14 Jul. 2020).

¹¹² Bown, C. (2020), 'US-China phase one tracker: China's purchases of US goods', Peterson Institute for International Economics, 2 July 2020, <https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods> (accessed 14 Jul. 2020).

Another issue is that many of China's harmful policies and practices are not directly – or are only insufficiently – disciplined by WTO rules. On competition, China's state-owned enterprises present a major challenge to the global trading system. But the WTO does not address the issue of state-owned enterprises in a comprehensive way. The key provision covering trade and the role of the state is GATT Article XVII, which concerns governmental and non-governmental enterprises that deal with goods for export and/or import.¹¹³ Countries such as the US have thus increasingly turned to bilateral and regional free-trade agreements to better deal with the issue. The TPP (now the CPTPP¹¹⁴ after the US's withdrawal from the agreement) and the USMCA each have a chapter on state-owned enterprises.¹¹⁵

As far as industrial subsidies are concerned, the WTO Agreement on Subsidies and Countervailing Measures nominally covers this aspect but has proven ineffective.¹¹⁶ In response, in 2017 the US, the EU and Japan launched trilateral efforts to identify ways to better deal with market- and trade-distorting subsidies and to strengthen WTO rules on them. The three parties outlined their proposal in January 2020.¹¹⁷ While this is a welcome step, it will be almost impossible to get China to agree. The problem of how to deal with subsidies will become increasingly important in light of COVID-19, given the renewed focus on subsidies and industrial policy in supporting beleaguered economies around the world. The best way forward lies in an open plurilateral agreement.

The problem of how to deal with subsidies will become increasingly important in light of COVID-19, given the renewed focus on subsidies and industrial policy in supporting beleaguered economies around the world.

Another contentious matter concerns whether China should be treated as a market economy.¹¹⁸ China contends that the language of its WTO protocol of accession effectively requires other members to end their treatment of China as a non-market economy for the purposes of calculating margins in anti-dumping proceedings after December 2016. But the US and the EU continue to treat China as a non-market economy for the purposes of assessing anti-dumping duties. In December 2016,

¹¹³ World Trade Organization (undated), 'State trading enterprises', https://www.wto.org/english/tratop_e/statra_e/statra_e.htm (accessed 14 Jul. 2020).

¹¹⁴ The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

¹¹⁵ While the chapter on state-owned enterprises in the USCMA is not aimed at the three parties directly, the agreement can be seen as a blueprint for future negotiations, and that chapter thus sends an important signal.

¹¹⁶ Bown, C. and Hillman, J. (2019), 'WTO'ing a Resolution to the China Subsidy Problem', Working Paper 19-17, Peterson Institute for International Economics, October 2019, <https://www.piie.com/sites/default/files/documents/wp19-17.pdf> (accessed 14 Jul. 2020).

¹¹⁷ European Commission (2020), 'Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union', 14 January 2020, https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf (accessed 14 Jul. 2020).

¹¹⁸ The key implication of non-market economy status in anti-dumping proceedings is the possibility to use other methodologies for calculating the normal value of products.

China launched WTO dispute settlement cases against the US and the EU for not granting it market-economy status. China pursued the case only against the EU, but suspended the process in June 2019.¹¹⁹

The issue of China's status as a non-market economy came up again recently. Article 32.10 of the USMCA greatly limits the ability of the three parties to enter into a free-trade agreement with a non-market economy.¹²⁰ Even though China is not named directly, the article is seen as targeting the country and has been dubbed the 'China poison pill'.¹²¹ Similar provisions will likely be replicated in future bilateral free-trade agreements that the US strikes (for instance, with the UK).

Given its weight in global trade and the world economy, China has a potentially important role to play in reforming the WTO. But precisely what role is China currently playing – and what role should it be playing?

China has engaged with the debate on WTO reform. The country's May 2019 reform proposal emphasizes 'efforts to make necessary reform to the WTO'.¹²² The proposal lists breaking the impasse over the Appellate Body, and advancing negotiations on fisheries and e-commerce, as priorities for action. On the sensitive issue of special and differential treatment, China's stance is that the rights of developing WTO members should be safeguarded. Regarding state-owned enterprises, China reiterates a vague commitment to 'fair competition' and stresses the 'imperative to respect the diversity of development models among Members'.¹²³

China is also trying to work with others on WTO reform. For instance, in 2018 it established a working group on the issue with the EU, and in November 2019 China hosted a 'mini-ministerial' meeting for approximately 30 WTO members in Shanghai.

China is therefore portraying itself as a guardian of the global trading system at a time when the US is retreating from that role. This, together with China's engagement in WTO reform, increases Beijing's ability to set and shape the reform agenda.

In light of China's global economic rise and its economic model, the key question is whether the WTO rules can be updated and enforced in a way that can accommodate two inherently different economic regimes – that of China's state capitalism and that of the major market economies. The solution cannot lie in seeking to change the nature of China's economic system. Rather, it must

¹¹⁹ Miles, T. (2019), 'China pulls WTO suit over claim to be a market economy', Reuters, 17 June 2019, <https://www.reuters.com/article/us-usa-china-wto-eu/china-pulls-wto-suit-over-claim-to-be-a-market-economy-idUSKCN1TI10A> (accessed 14 Jul. 2020).

¹²⁰ According to Article 32.10 of the USMCA, 'a Party shall inform the other Parties of its intention to commence free trade agreement negotiations with a non-market country' at least three months before commencing negotiations. The party also has to provide requested information, and provide the other parties with the full text of the agreement and annexes for review. Finally, a free-trade agreement with a non-market economy allows the other parties to terminate the USMCA with six months' notice.

¹²¹ Lawder, D. and Freifeld, K. (2018), 'Exclusive: U.S. Commerce's Ross eyes anti-China "poison pill" for new trade deals', Reuters, 5 October 2018, <https://www.reuters.com/article/us-usa-trade-ross-exclusive/exclusive-u-s-commerces-ross-eyes-anti-china-poison-pill-for-new-trade-deals-idUSKCN1MF2HJ> (accessed 14 Jul. 2020).

¹²² World Trade Organization (2019), 'China's proposal on WTO reform', Communication from China, 13 May 2019, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W773.pdf&Open=True> (accessed 14 Jul. 2020).

¹²³ Ibid.

be about designing enforceable rules that allow the two systems to interface, and about reaffirming the centrality of the WTO in the global trading framework. Even if a more integrated system can be achieved, however, there will likely be some regulatory decoupling over sensitive technology areas that affect national security.

E-commerce and digital trade

In 1998, realizing that e-commerce would play a growing role in the global economy, WTO members established a work programme ‘to examine all trade-related issues relating to global electronic commerce’.¹²⁴ According to the most recent data, the value of global e-commerce reached approximately \$26 trillion in 2018.¹²⁵ As the COVID-19 pandemic accelerates the shift to e-commerce, rules to regulate online trade will be more important than ever. But in contrast to trade in goods and services, few international rules govern cross-border e-commerce.

In 1998, members also agreed to the ‘WTO e-commerce moratorium’, which has been regularly renewed since then and has helped to facilitate digital trade by ensuring that tariffs are not applied to cross-border data flows. Recently, however, the moratorium has been called into question by developing countries because of its implications for collecting revenue.¹²⁶

As mentioned earlier, more than 75 WTO members also launched an initiative in 2019 with the aim of establishing global rules on e-commerce. While the launch of these negotiations is a positive development, and a sign that the WTO is still seen as a forum in which to advance trade rules and establish a rulebook for new trade issues, the format has a number of critical shortcomings. For instance, India did not join the negotiations despite being one of the fastest-growing e-commerce markets. In addition, the Chinese approach to the internet and proposal for facilitating e-commerce reflect a state-driven model that contrasts with the positions of the US and the EU, making a full agreement on e-commerce difficult. Even the differences between the US and the EU around issues of data flows and privacy raise questions about the possibility of reaching a meaningful consensus.

In the short term, negotiators might find it easier to focus on a general stocktaking of the e-commerce initiative, or on agreeing a roadmap for the negotiation process and future work in relation to e-commerce. In the medium to long term, efforts could shift to advancing concrete texts for negotiation and reaching partial agreements on e-commerce rules.

¹²⁴ World Trade Organization (undated), ‘Electronic commerce’, https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm (accessed 14 Jul. 2020).

¹²⁵ United Nations Conference on Trade and Development (2020), ‘Global e-Commerce hits \$25.6 trillion – latest UNCTAD estimates’, 27 April 2020, <https://unctad.org/en/Pages/PressRelease.aspx?OriginalVersionID=552> (accessed 14 Jul. 2020).

¹²⁶ World Trade Organization (2018), ‘Work Programme on Electronic commerce – Moratorium on customs duties on electronic transmissions: Need for a re-think’, Communication from India and South Africa, 13 July 2018, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W747.pdf&Open=True> (accessed 14 Jul. 2020).

To allow other WTO members to join down the road, and to potentially turn a plurilateral initiative into a multilateral one, it will be critical to keep the negotiation process open and inclusive. Otherwise, the international rules facilitating e-commerce risk becoming fragmented.

Investment

Trade and investment are closely linked, but the WTO has only dealt with the latter issue on an incomplete basis. In particular, the Agreement on Trade-Related Investment Measures ('TRIMs Agreement') and the General Agreement on Trade in Services contain limited provisions. During the 1996 WTO Ministerial Conference in Singapore, a Working Group on the Relationship between Trade and Investment was established. But in light of differences between developed and developing countries, multilateral attempts to negotiate rules on investment protection and liberalization at the WTO have not borne fruit. Ultimately, investment was dropped as a WTO negotiating issue in 2004.

In the meantime, countries have covered investment provisions through bilateral investment treaties (BITs) and in chapters of bilateral and regional free-trade agreements. New attempts to include investment in the WTO were started in 2017. More than 70 WTO members launched 'structured discussions with the aim of developing a multilateral framework on investment facilitation'.¹²⁷ By the end of 2019, 98 WTO members were moving towards negotiations on a new international framework on investment facilitation for development at the WTO.¹²⁸ By focusing on investment facilitation – and excluding the thorny issues of market access, investment protection and investor–state dispute settlement – this initiative stands a greater chance of success than past efforts.

Agriculture and development

The WTO Agreement on Agriculture, which came into force in 1995, was an important milestone, but reform efforts have not halted: policymakers continue to seek to make agricultural trade fairer and more competitive. In particular, WTO members are targeting reform of subsidies and high trade barriers, which distort agricultural trade. In 2015, WTO members committed to abolishing agricultural export subsidies. They also agreed to find solutions to the issue of public stockholding for food security purposes (an issue that demands new attention in the context of COVID-19). And they agreed to develop a special safeguard mechanism for developing countries and trade rules for cotton.¹²⁹ WTO members continue to conduct negotiations on these issues. The next WTO Ministerial

¹²⁷ World Trade Organization (2017), 'Joint Ministerial Statement on Investment Facilitation for Development', 13 December 2017, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/59.pdf&Open=True> (accessed 14 Jul. 2020).

¹²⁸ World Trade Organization (2019), 'Joint Ministerial Statement on Investment Facilitation for Development', 22 November 2019, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1072R1.pdf&Open=True> (accessed 14 Jul. 2020).

¹²⁹ World Trade Organization (undated), 'Agriculture negotiations', https://www.wto.org/english/tratop_e/agric_e/negoti_e.htm (accessed 14 Jul. 2020).

Conference needs to serve as a target for making progress. It will also be important to consider agriculture notification obligations, an area in which compliance has been notoriously low.

Development issues and the interests of developing countries have long been a focus for the work of the WTO – not least since the Doha Development Agenda was launched in 2001. But in order to move the debate forward, the problem of self-declared developing-country status must be tackled.

Environmental sustainability

Trade and the WTO have key roles to play in efforts to achieve the UN Sustainable Development Goals (SDGs) and the Paris Agreement climate goals. WTO members have discussed various trade sustainability issues, and talks have advanced to varying degrees. Three areas stand out as having the potential for progress in the short term, and could make a significant contribution to a green recovery from the COVID-19 crisis.

First, WTO members should prioritize the conclusion of an agreement on limiting subsidies to fisheries. WTO negotiations on fisheries subsidies were launched in 2001, but resulted in little progress. At the WTO Ministerial Conference in Buenos Aires in 2017, WTO members agreed to secure a deal on fisheries subsidies that delivers on SDG 14.6 by the end of 2019.¹³⁰ While the deadline has been missed, a meaningful agreement needs to be the core environmental priority for the next WTO Ministerial Conference. If WTO members do not deliver on this mandated goal, they will undermine the credibility of the WTO at a critical time. If multilateral progress remains elusive, plurilateral efforts could bear more fruit.

Second, the WTO can play a role in reforming fossil fuel subsidies. At the Buenos Aires Ministerial Conference in 2017, a coalition of 12 WTO members led by New Zealand called on the WTO ‘to achieve ambitious and effective disciplines on inefficient fossil fuel subsidies that encourage wasteful consumption’.¹³¹ The next WTO Ministerial Conference presents an opportunity to renew this statement and attract a broader group of supporters.

Third, WTO members need to focus on concluding negotiations for the Environmental Goods Agreement (EGA). As mentioned in Chapter 5, negotiations were launched in 2014 but none have taken place since 2016. Revitalizing the process by developing the EGA as an open plurilateral agreement would send a powerful signal, and would help to bolster the relevance and credibility of the WTO.¹³² By engaging on this topic with a broad range of stakeholders – from international organizations (such as the United Nations Conference on Trade

¹³⁰ Target 14.6: ‘by 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation’.

¹³¹ World Trade Organization (2017), ‘Fossil Fuel Subsidies Reform Ministerial Statement’, Communication from 12 WTO members, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/54.pdf&Open=True> (accessed 14 Jul. 2020).

¹³² Bacchus, J. (2018), *The Willing World: Shaping and Sharing a Sustainable Global Prosperity*, Cambridge: Cambridge University Press.

and Development (UNCTAD) or the United Nations Environment Programme (UNEP)) to business groups and civil society organizations – WTO members could better address the traditional divides between those groups and the habitual silos between policymakers and policy shapers in the trade and environmental sustainability space.

Linking trade and non-trade issues

The links between trade policies and issues such as environmental and labour standards have long been recognized, both in terms of the impact of trade on these areas and vice versa. But the degree to which non-trade issues should be linked to WTO negotiations and become subject to WTO rules and disciplines remains the subject of intense debate.

Past efforts to link non-trade issues to trade were pursued in order to encourage greater compliance and enforcement. By linking non-trade issues (which are traditionally hard to enforce) to the global trading system, countries could take advantage of a functioning dispute settlement mechanism under the WTO. However, this particular reason for issue linkage has become redundant as the WTO Appellate Body crisis continues.

There are limits to what the WTO can and should do regarding non-trade issues. Careful calibration is needed, particularly regarding the role of the WTO in relation to the SDG mandate.

One potential advantage of issue linkage is that it could improve alignment and policy coherence between trade and efforts to tackle climate change. Another benefit is that it could foster a broader range of compromises in the package deals of commitments on which trade agreements are typically built. For example, the addition of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to the Uruguay Round provided larger scope for agreement.¹³³

But there are limits to what the WTO can and should do regarding non-trade issues. Careful calibration is needed, particularly regarding the role of the WTO in relation to the SDG mandate. If the linkage is too weak, the WTO risks not being relevant in efforts to tackle a key global challenge. But if the linkage is too great, the WTO risks being overburdened at a time when the organization is under stress already. Perhaps the best way forward is not to focus too much on creating new rules on trade and environmental sustainability, but to focus instead on greater policy coherence and increased interaction between stakeholders.

¹³³ Centre for International Governance Innovation (2019), *CIGI Expert Consultation on WTO Reform*, p. 25.

Building domestic support

Because the WTO is a member-driven organization, reforms must be determined by member governments and other relevant authorities. Moving the debate and the reform process forward will therefore require policymakers to build domestic support. This can be challenging in some contexts. A survey by the Bertelsmann Foundation shows that only 35 per cent of respondents in the US see the WTO as an important organization, compared to 84 per cent of respondents in China.¹³⁴ In European countries, slightly more than 40 per cent of respondents have a positive perception of the WTO.

Fostering domestic support for the WTO will require greater involvement from the business community. In this regard, it is positive that 26 business organizations wrote a letter to the US president in December 2019, calling for the US to embrace plans to reform the WTO Appellate Body that build on the ‘Walker principles’.¹³⁵ The International Chamber of Commerce and the B20 (the business arm of the G20) are also working closely with the WTO, and have outlined recommendations for reforming the organization.¹³⁶ Despite these initiatives, the business community could still play a larger role and stimulate more vigorous public debate on the WTO and rules-based international trading system.

In the US, a bipartisan group of members from the House Committee on Ways and Means introduced a resolution in December 2019 encouraging the Trump administration to work with allies to reform the WTO.¹³⁷ The resolution has been presented for consideration by the full House of Representatives. This rare bipartisan move shows that there are champions of the WTO in Congress – and could hopefully open a window for constructive engagement. If some, even smaller, aspects of the WTO can be reformed, then this would strengthen the case domestically of those who back the WTO and want the US to reclaim its role as a key shaper of a reformed international rules-based trade order.

¹³⁴ Hoekman, B. (2018), *Revitalizing Multilateral Governance at the World Trade Organization*, Report of the High-Level Board of Experts on the Future of Global Trade Governance, Bertelsmann Stiftung, https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/MT_Report_Revitalizing_Multilateral_Governance_at_the_WTO.pdf (accessed 14 Jul. 2020).

¹³⁵ Americans for Prosperity (2019), ‘Letter to the President’.

¹³⁶ International Chamber of Commerce (2019), ‘ICC issues recommendations to reform global trade’, 9 October 2019, <https://iccwbo.org/media-wall/news-speeches/icc-publishes-recommendations-on-reforming-the-multilateral-rule-based-trading-system-at-wto-public-forum/> (accessed 14 Jul. 2020).

¹³⁷ Schweikert, D. (2019), ‘Bipartisan Resolution Reaffirming United States’ Commitment to the World Trade Organization Led by Reps. Schweikert and Kind Passes Committee’, 17 December 2019, <https://schweikert.house.gov/media-center/press-releases/bipartisan-resolution-reaffirming-united-states-commitment-world-trade> (accessed 14 Jul. 2020).

09 Conclusion

Reforming the WTO will require a multifaceted approach and take time. But it remains in the interests of the US and its European partners to sustain the rules-based trading system which they helped to create.

WTO reform has become a buzzword. But modernization does not come in one package. In fact, many different issues, processes and actors will have to be involved. And WTO reform will require time. The need to deal with the COVID-19 pandemic and find a new WTO director-general has stalled wider reform efforts for now, while the upcoming US election in November also means that the WTO's problems will prove intractable in the near future.

Once the dust has settled, the process of rebuilding the global economy in light of the imperatives amplified by the pandemic, combined with the presence of new leadership at the WTO, could provide much-needed impetus for bold reform. But expectations need to be managed.

The WTO Appellate Body will not return to normal immediately even if there is a change of administration in the US, and in any event its operations would need to restart under an updated format. Many of the US's concerns regarding the WTO Appellate Body are long-standing, and shared across the political aisle. But in contrast to the position taken by the Trump administration, the US approach would likely shift towards engagement with international allies if Joe Biden wins the election. To reform the WTO Appellate Body, the US stands a better chance of success if it puts forward an explicit proposal for solutions or at least spells out what changes to the Appellate Body it considers acceptable.

As essential as it is to tackle the impasse over the Appellate Body, wider WTO reform will be impossible without also improving transparency and addressing issues related to special and differential treatment for developing countries. The WTO's functions of administering and monitoring the application of trade rules and settling trade disputes depend largely on whether rules exist and are fit for purpose. Reform will therefore require updating the rulebook to address the needs of global trade in the 21st century. In this regard, the successful negotiation of rules in the areas of e-commerce and digital trade – as well as key initiatives that create

greater coherence between trade and sustainability, such as the modernization of fisheries subsidies – could help to reassert the position of the WTO at the heart of the global trading system. WTO members will also have to deal more effectively with the impact of state-owned enterprises on trade and competition – especially given China’s rise and its harmful trade policies and practices – and with industrial subsidies, an area that is becoming more important due to COVID-19.

The transatlantic relationship can be leveraged for reform.¹³⁸ The US and Europe share many of the same concerns about the WTO system – particularly as it relates to China. The ongoing trilateral discussion format involving the US, the EU and Japan also constitutes an important contribution to reform, although it could be enhanced by bringing on board other like-minded countries, such as the UK. There are also numerous historic examples of US–EU cooperation having been very strong on multilateral trade issues – especially during the early 2000s under EU Trade Commissioner Pascal Lamy and US Trade Representative Robert Zoellick. In this current moment of crisis for the WTO, the US and the EU have been discussing fundamental issues relating to the organization more closely than ever. In contrast, even during the TTIP talks between 2013 and 2016, the WTO was not a topic for debate despite concerns that the Obama administration had raised.

As mentioned, the crisis of the Appellate Body presents an opportunity to reform the WTO, while the appointment of the next director-general and the convening of the next WTO Ministerial Conference both offer chances to consider issues critical for the future of the organization and the global trading system.

This paper has focused on the need to build a positive agenda for a transatlantic partnership on WTO reform. If the US and the EU cannot work together bilaterally, progress is unlikely. To drive reform, transatlantic cooperation is necessary, but this alone is not sufficient. Two other conditions must be met. First, China – as the world’s largest trading nation – needs to be at the table. Second, underlying trade frictions between the major trading partners in the WTO need to be addressed.

The EU will stand the best chance of advancing WTO reform if it engages constructively with the US. This can be done by demonstrating to the latter why it is still in the US’s interest to maintain and reform a rules-based international trading system with the WTO at its centre. Such an effort should involve engaging with domestic US constituencies committed to the WTO and its reform, including the US business community and key players in the US Congress. By emphasizing the need to modernize WTO rules to reflect technological shifts and the challenges presented by China’s state capitalism, the EU has a strong case for why the US should work with its allies to reform the WTO.

¹³⁸ For a similar recommendation, see Garcia Bercero, I. (2020), *What Do We Need a World Trade Organization For? The Crisis of the Rule-Based Trading System and WTO Reform*, Gütersloh: Bertelsmann Stiftung, 2 June 2020, https://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/MT_WTO_Reform_2020_ENG.pdf (accessed 14 Jul. 2020).

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Acknowledgments

This paper is part of a project exploring WTO reform and the role of the transatlantic partnership. The insights from a workshop with subject matter experts, held at Chatham House in November 2019, and additional discussions with relevant stakeholders provided very helpful input for this paper.

The author and Chatham House gratefully acknowledge the financial support from the Hanns Seidel Foundation for this project. The views expressed in this paper do not necessarily reflect the positions of the foundation.

The author would like to thank two anonymous peer reviewers as well as colleagues at Chatham House for their invaluable comments, suggestions and edits. In particular, thanks go to Courtney Rice, Jake Statham and Dr Leslie Vinjamuri at Chatham House, and to Anna Brown for freelance editing support.

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ISBN 978 1 78413 419 8

This publication is printed on FSC-certified paper.
designbysoapbox.com





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