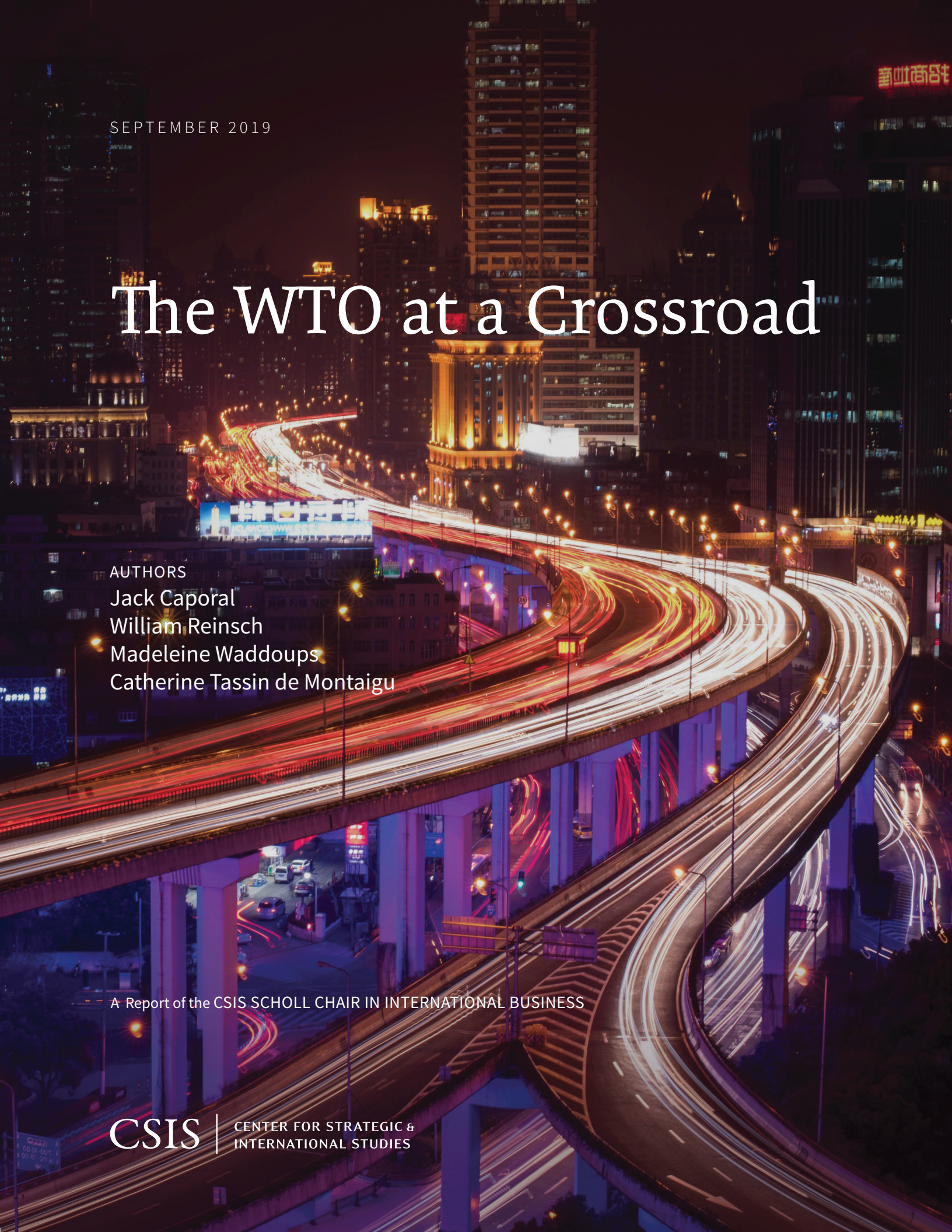

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A Report of the CSIS SCHOLL CHAIR IN INTERNATIONAL BUSINESS

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Acknowledgments

This report is made possible by the generous support of HP Inc.

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Executive Summary

Despite the invaluable role the World Trade Organization (WTO) has played in the global economy, it faces potentially fatal pressure from within and outside the organization. Within the WTO, the over 160 countries that compose its membership are mired in longstanding disagreements over a range of fundamental issues. Stuck in what have become intractable debates, the WTO is struggling to craft rules that grapple with modern trade issues, such as the digital economy. The WTO dispute settlement function will likely be kneecapped by the end of 2019. Outside of the WTO, technology is reshaping the global economy more quickly than negotiations in Geneva can keep pace. Economic nationalism is on the rise in countries that have typically supported free trade. China's state-driven economic model, which is fundamentally at odds with WTO principles, has given rise to questions over the WTO's ability to reshape the non-market activity of its members. The Trump administration's attacks on the WTO Appellate Body, elastic use of the national security exception, and imposition of tariffs outside WTO processes have added further stress to the global trade system. It is clear that the WTO is at a crossroad.

There are three general directions the United States and WTO may take considering these challenges. Each direction carries multiple sub-scenarios: a continuation of the status quo, U.S. withdrawal from the WTO, and successful reform of the WTO. Only the reform scenario yields predictability and stability in global supply chains. The status quo and withdrawal scenarios will at a minimum generate business uncertainty and stymie investment and global growth but may encourage companies to invest in the United States to avoid fallout from withdrawal or erosion of the global trading system. The upside of that investment, however, would be limited by uncertain access to 95 percent of the global population that lives outside the United States.

The status quo scenario unfolds with continued attacks on the WTO while its members fail to resolve old disagreements and fail to negotiate rules on new issues. The WTO Appellate Body becomes inoperable in mid-December and the United States' concerns over dispute settlement are unresolved, which throws dispute settlement—once the crown jewel of the WTO—into uncharted territory. As the WTO's relevance fades and its ability to enforce its rules diminishes, members may begin to test the consequences of noncompliance with their WTO obligations. Decisions in pivotal disputes over U.S. national security tariffs on steel and aluminum as well as China's non-market economy status could drive U.S. disengagement or even withdrawal from the WTO, although the latter dispute appears

to be receding in importance for the time being. The headwinds of the status quo may also inspire the United States and other WTO members to rise to the occasion, salvage, and perhaps even reimagine the WTO. History has shown that the WTO tends to lurch from crisis to crisis only to be rescued at the last moment. Such an inflection point is approaching.

The withdrawal scenario sees the United States pull out of the WTO. This scenario raises several legal and procedural questions that will influence the practical implications of withdrawal. Nonetheless, all the outcomes of the withdrawal scenario are harmful to global supply chains.

The reform scenario sees a resolution to several longstanding thorns in the side of the WTO, including issues of special and differential treatment for developing countries, notifications and transparency, and U.S. concerns over dispute settlement. The successful conclusion of negotiations for new rules on e-commerce, fisheries subsidies, state-owned enterprises, and industrial subsidies would reassert the WTO's role in the modern global trade system and unlock a new wave of trade liberalization.

The coming years will be pivotal for the WTO. The WTO faces decisions and deadlines that could shape its future, and outside pressures show no signs of easing. How the United States opts to approach the WTO will influence whether the WTO grows into a modern institution or whether it withers away. U.S. leadership will be necessary to lead the WTO membership towards modernization. However, recent U.S. actions have undermined that leadership. It is difficult to chart a positive path for the WTO with the United States continuing its blockade on the Appellate Body and maintaining national security tariffs on steel and aluminum. Threats of imposing tariffs outside of WTO processes for leverage on other policy issues further erodes U.S. credibility. To avoid the worst scenarios, the United States needs to continue its current push for reform at the WTO but abjure tactics that threaten to undermine the global trade system. In short, the United States needs to return to a strategy of leading by example.

Introduction

The World Trade Organization (WTO) is at a crossroad. Each of WTO's three main functions—monitoring and transparency, negotiation, and dispute settlement—is under stress. There is no single source for that stress. Some pressure flows from individual members, and other pressure flows from members' inability to reach consensus on long-standing irritants. Pressure has also come from the rise of China and its state-driven economy, the rapid pace of technological change and its impact on the global economy, persistent economic inequality, and a recent tilt towards nationalism in the recent decade in countries that have otherwise consistently advocated for free trade.

On a more granular level, the WTO's ability to resolve trade disputes is under question, as is its ability to wrestle with foundational issues that intersect global trade, state sovereignty, and national security. Plagued by divergent priorities, the 164 countries that make up the WTO have not been able to negotiate trade-liberalizing agreements for nearly two decades, save for the Trade Facilitation Agreement. In recent years, fragmentation at the organization has increased along multiple fault lines. The WTO now does not have consensus on what to focus the next round of trade-liberalizing negotiations on, let alone how to reach an agreement on those issues. Dissatisfaction with the WTO's dispute settlement function from successive U.S. administrations has culminated in a U.S. policy that is pushing the Appellate Body system to the brink of collapse. China's embrace of a state-led economic system that is broadly in tension with the core principles of the WTO casts a shadow over the organization. President Trump has repeatedly attacked the WTO and its rulings, and his administration has drawn up legislation that would put the United States in breach of its WTO obligations in a bid to create "fair" and "reciprocal" trade arrangements.[1] While legislation of that sort is dead on arrival on Capitol Hill (because it also transfers authority from the Congress to the president), it provides important insight into the Trump administration's view of the WTO. Amid this backdrop, world leaders have begun to realize that the status quo is no longer sustainable and have called for discussions on WTO reform. Where those discussions will lead is uncertain.

What is certain, however, is the positive impact the WTO has had on global economic growth and commercial relationships between its members. Most-favored-nation and national treatment rules are the foundation on which global commerce has grown.[2] The unique ability of the WTO to settle international disputes and award penalties has deterred would-be trade cheats and helped check those that have strayed from the

rules. Rounds of negotiations to cut tariffs across the board, establish disciplines on subsidies, and create rules to prevent regulations from being disguised as trade barriers have been a boon to businesses around the world. From October 1947, when the General Agreement on Tariffs and Trade was signed by 23 countries in Geneva, through the rounds of negotiations it took to establish the World Trade Organization in 1995, business, trade, and the global economy have grown alongside the trade rules which govern them. Between 1960 and 1994, the size of the world economy increased twentyfold, from $1.37 trillion to $27.77 trillion (current USD), and from 1995 to 2017, the global economy nearly tripled in size to a net GDP of $81 trillion.

Explosive global economic growth coincided with tariff reductions—first among the original GATT members and subsequently among the growing WTO membership. The average pre-GATT tariff rate is a subject of some debate. Some sources claim the average tariff levels for the major GATT founding members (the United States, original members of the European Economic Community, Japan, and the United Kingdom) was around 22 percent, while others claim the average tariff rate was 40 percent.[3] Regardless, the average global tariff rate stood at 2.59 percent in 2017, which is well below the 8.6 percent rate observed in 1994 before the creation of the WTO and orders of magnitude below tariffs levied during the Smoot-Hawley period.[4] Meanwhile, the membership of the rules-based global trade system has expanded from the 23 original GATT countries, to the 124 nations that signed the 1994 Marrakesh Agreement to bring the WTO alive in 1995, to the now 164-nation strong membership. Since 1995, the WTO has been a forum for resolving over 500 disputes and has issued over 350 rulings. In doing so, the WTO has served as an invaluable venue to mediate trade disputes that has steered members away from unilateral retaliation and towards predictable, measured settlements backed by international agreements. Despite the advantages of the rules-based trade system, the stress on the WTO threatens to erode it and undermine the benefits it has provided.

This report will map three possible future scenarios for the WTO: continuation of status quo gridlock, U.S. withdrawal from the WTO, and successful reform. Each scenario contains multiple sub-scenarios and possible outcomes.

Option 1: Status Quo

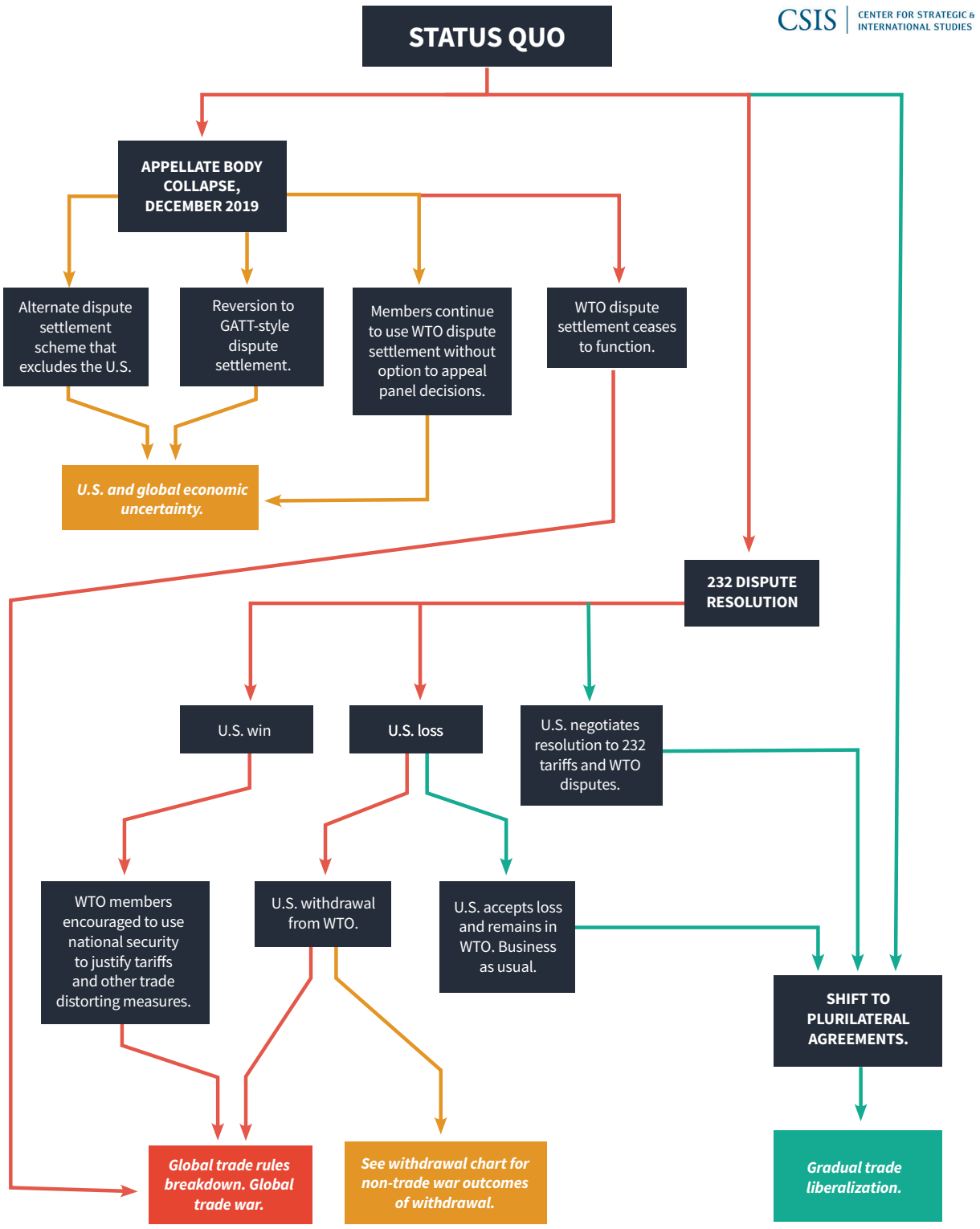
The Scenario

In this scenario, the United States continues to attack the WTO but does not act decisively to either address its criticisms or withdraw. In the absence of reform, three major events at the WTO will shape the future of the institution and global trade order: the collapse of the WTO Appellate Body in December 2019, the resolution of a WTO dispute over the legality of U.S. Section 232 national security tariffs on steel and aluminum, and the resolution of a WTO dispute regarding China's so-called "market economy status," although the latter dispute is likely to remain dormant for the time being. These events could lead to a breakdown of the rules-based global trade order or leave the WTO limping along. If the WTO survives these three challenges, slow progress toward trade liberalization is likely to take place through plurilateral agreements among like-minded nations since the challenges that plague multilateral negotiations remain insurmountable. Those challenges include divisions over special and differential treatment for developing countries, the requirement that WTO decisions be taken by consensus, disagreements over which issues the WTO should prioritize, and deep policy differences in areas of ongoing negotiation. Gridlock may result in the erosion of certain WTO norms, which is explored in multiple sub-scenarios. Finally, although unlikely, the drift towards crisis may spur WTO members to rise to the occasion, move beyond old disagreements, and forge a renewed WTO.

Issue 1: Dispute Settlement

The most pressing threat to the WTO is the collapse of the WTO Appellate Body. The United States has complained about the WTO Appellate Body ignoring rules set by WTO members and expanding its own authority over the course of multiple administrations. Due to the lack of collective action taken by WTO members to hold the Appellate Body to the rules set for it and the Appellate Body's alleged continued disregard for those rules, the Trump administration has blocked appointments to the Appellate Body. If the United States maintains its blockade, the Appellate Body will have only one serving member after December 10, 2019, and will unable to hear appeals, as three members are required to do so. As a result, the dispute settlement system will effectively become inoperative. Without a functioning appeals system, a single WTO member, likely to be a losing party in a given dispute, could block the adoption of a panel decision by filing an appeal that cannot proceed.

Figure 1: Status Quo Options



The Trump administration has brought a finer point to many longstanding U.S. concerns with the Appellate Body through statements at meetings of the Dispute Settlement Body in Geneva and risks rendering the Appellate Body inoperable in a bid to reform it. At the core of the United States criticism of the Appellate Body is the willingness of Appellate Body members to make decisions that add to or diminish the rights or obligations of WTO members under WTO agreements and the Appellate Body consistently operating outside of procedural rules set by WTO members.[5] The United States views Appellate Body decisions that interpret WTO agreements or "gap fill" ambiguity in those agreements as changing the meaning in ways that the United States and the other members had not agreed to and that often restricts the United States' ability to protect its workers and industries from WTO-inconsistent actions by other members. The United States has also taken issue with the Appellate Body consistently missing the 90-day deadline to issue decisions, the practice of reviewing panel findings on domestic law, issuing advisory opinions or rulings on issues not necessary to resolve an appeal, the treatment of Appellate Body reports as precedent, and allowing former Appellate Body members to serve on certain appeals past the expiration of their term.[6]

The collapse of the Appellate Body could lead to four separate outcomes: (1) the creation of a parallel dispute settlement system that mirrors the WTO system, includes an Appellate Body, and does not include the United States; (2) de facto reversion to a GATT-style dispute settlement system where any single party could block a decision; (3) an agreement by members to accept panel decisions and not appeal them; or (4) the total collapse of WTO dispute settlement and therefore multilateral trade dispute settlement. None of the four options hold any upside for the world trading system, and all would bring major uncertainty and unpredictability to the global economy. An inoperable dispute settlement system would also close off an avenue businesses have utilized via disputes brought by their home country to address foreign measures that harm their interests abroad.

SUB-SCENARIO 1: ALTERNATE DISPUTE SETTLEMENT SCHEME WITHOUT THE UNITED STATES

One option under discussion to address the WTO appellate body crisis is to resolve disputes via arbitration as outlined in Article 25 of the Dispute Settlement Understanding (DSU). Article 25 allows for "expeditious arbitration within the WTO as an alternative means of dispute settlement . . . of certain disputes that concern issues that are clearly defined by both parties . . . which shall agree on the procedures to be followed."[7] The vague language of Article 25 implies that members are given a broad scope in determining which aspects of a dispute they want to resolve using arbitration and which rules that process should follow.

Scholars and a former chairman of the Appellate Body have suggested that Article 25 could provide a legal basis for a parallel dispute settlement structure within the WTO framework. The European Union has begun to explore using Article 25 but has characterized it as in "interim" and "temporary" solution.[8] Canada has endorsed the EU plan in a bid to keep an appeal function alive.[9] (The EU proposal is discussed in more detail in the Reform section of this paper.) WTO members could opt for an ad hoc, one-off approach to Article 25 arbitration or negotiate an agreement that sets a framework for all disputes handled through Article 25 arbitration. Members could agree on whether to use arbitration for the entirety of the dispute settlement process or just the appeals stage, thus circumventing the Appellate Body or lack thereof. Theoretically, members to a dispute could agree to set up arbitration

procedures identical to those guiding the current Appellate Body. Unlike in the selection of judges for the Appellate Body, outside parties to the dispute would have no influence over the arbitration process unless permitted by the members involved. Disputing parties would be able to select personnel to hear appeals via Article 25 arbitration which would prevent the United States from unilaterally halting the appeals process.

Critics of an ad hoc arbitration approach have pointed out that members would have no incentive to bind themselves to arbitration if they expect an unfavorable outcome. Therefore, Article 25 as an alternative to the current dispute settlement system would have a greater chance of success if members sign a plurilateral general arbitration agreement defining the scope and procedures of the arbitration process and binding signatory respondents in a dispute to engage in the alternate Article 25 dispute settlement process.

If the United States refuses to take part in the new arbitration system, trade conflicts involving the world's largest economy would not be settled at the WTO. A WTO enforcement regime excluding the United States would have limited utility. Of the 581 disputes brought to the WTO since its inception, the United States has been a complainant or respondent on 256, or nearly half.[10] Alternatively, the United States might agree to bind itself to arbitration but not on the terms previously agreed upon by other members, thus using its economic power to coerce other countries to play by a U.S.-designed set of rules.

Whether or not the United States decides to abide by an arbitration-based dispute settlement system, a deviation from existing WTO procedures is likely to create uncertainty of how trade disputes will be resolved in the future. Without an alternative in place, U.S. businesses will no longer be able to pressure the government to file cases. Refusing to engage in dispute settlement would rob businesses of a tool to break down unfair trade barriers abroad.

Ultimately, ad hoc arbitration would allow countries to refuse to participate in the process, generating global economic uncertainty by leaving the international community without an automatic system to mediate trade disputes. To establish a general arbitration agreement—the most viable approach under Article 25—WTO members would have to agree on which rules the arbitration process should follow, establish a new body of arbitrators, and bind themselves to the arbitration process when a dispute arises. It is unclear whether a plurilateral general arbitration agreement would require approval from all WTO members to function. If the plurilateral were to be incorporated into the Marrakesh Agreement that established the WTO, a consensus from the WTO membership would be required.[11] However, if the plurilateral were negotiated outside of the WTO architecture, a consensus would likely not be needed.[12]

SUB-SCENARIO 2: REVERSION TO A GATT-STYLE DISPUTE SETTLEMENT SYSTEM

If WTO members fail to agree on an alternate dispute settlement system or to not appeal panel decisions, dispute settlement akin to the GATT era may reemerge. Members faulted in panel decisions could exercise their DSU Article 16.4 right to appeal, but without an Appellate Body to consider the appeal, the dispute would be left in limbo. This would give members facing an unsavory panel report a de facto veto over the adoption of the report or the conclusion of the dispute, similar to how the GATT dispute settlement system

functioned prior to the creation of the WTO. This veto, in practice, during that period was not unusual. Adoption of nearly half of all GATT panel reports was blocked.[13]

The reversion to a GATT-style dispute settlement system would see member state relations in the trade sphere shift from a legal regime to an environment in which diplomacy and state power play a larger role in settling disputes and justifying action that may push or break WTO rules. Indeed, a review of dispute settlement under the GATT and WTO regimes shows that the latter system results in a defendant liberalizing its contested trade measures 80 percent of the time, compared to a 60 percent rate under the GATT system.[14] Some observers have attributed the increased compliance rate to the more robust WTO dispute settlement system. For example, the DSU ensures disputes can be adjudicated in front of a dispute settlement panel if the complainant wishes to proceed, near-automatic adoption of panel reports by the WTO membership, and the right to an appeal. Perhaps most importantly, the DSU provides complainants the right to withdraw trade concessions from countries found out of compliance with their WTO obligations.[15] The multilateral buy-in to the DSU grants credibility to the WTO's findings and gives members that opt to withdraw trade concessions international legitimacy. These features were missing from a GATT-style dispute settlement system and could disappear if the Appellate Body ceases to function.

Evidence exists, however, that cuts against the claim that the DSU has been an upgrade over the GATT dispute settlement regime. Early settlement of disputes—that is a negotiated settlement prior to a ruling, which is largely considered to be the optimal outcome in international trade dispute settlement—has not improved significantly under the DSU compared to the GATT.[16] Between 1948 and 1990, 31 percent of GATT disputes were settled before any ruling. Comparatively, 43 percent of resolved WTO cases between 1995 and 2009 were settled either during consultations or before a panel ruling.[17]

Regardless of the drawbacks or advantages of either system, the lack of an international architecture with legalistic features to guide disputing parties will add uncertainty to the global business environment.

SUB-SCENARIO 3: MEMBERS AGREE NOT TO APPEAL PANEL DECISIONS

This outcome would resolve some U.S. concerns but all members are unlikely to agree to it as appeals are utilized by both complainant and respondent in most cases. Avoiding appeals would speed up the overall dispute settlement process while keeping intact much of the DSU's legal structure. This outcome could occur on a case-by-case basis, as was done in a dispute between Indonesia and Vietnam. The two countries have agreed that if the Appellate Body has less than three members when the panel report in the dispute is circulated, they will not appeal the findings of the report. In other words, if the Appellate Body cannot hear an appeal when the panel issues its findings, those findings will decide the dispute.[18]

WTO members could agree beforehand not to use the appeal process, or it could simply occur organically as countries deal with panel decisions on a case by case basis. In the recent Russia-Ukraine case involving restrictions for national security reasons, for example, both countries chose not to appeal. One advantage of not appealing is that the dispute is over sooner, and governments are spared the expense of further litigation and the longer period of uncertainty in the marketplace that comes with it.

SUB-SCENARIO 4: DISPUTE SETTLEMENT TOTALLY COLLAPSES

If the dispute settlement system completely breaks down, there would be no multilateral legal architecture to hold rule-breakers accountable. The result would be a return to law of the jungle, where economic might and resolve will determine trade relations. Countries may be tempted to test the consequences of breaching WTO rules. Lack of an international framework to constrain them will make trade miscalculation and escalation more likely.

There are currently 11 panel reports under appeal, 3 of which directly involve the United States, that would fall into limbo if the Appellate Body becomes inoperative. In addition, there are a handful of panel reports that have been adopted in which proceedings to determine compliance and an ultimate appeal of those findings may be in the interest of the United States. Those cases include two U.S.-brought disputes with China: the first over domestic support for wheat, rice, and corn producers, and the second over China's approach to fill tariff-rate quotas for those products.[19] (China has indicated its intention to comply with these panel reports, but the adequacy of their compliance would be subject to appeal.) Current disputes that already have a panel, which would likely be caught in a legal limbo if the DSU collapsed, include seven complaints about U.S. steel and aluminum tariffs, a U.S. complaint over IP protection in China stemming from the Trump administration's Section 301 investigation, U.S. complaints over retaliatory tariffs in response to the Section 232 tariffs, and a U.S. complaint over Indian export subsidies. Other decisions at the panel stage that would be caught in limbo are a complaint by Vietnam over U.S. antidumping duties on fish fillets, a complaint by Canada over U.S. countervailing duties on softwood lumber, and a complaint by Korea over U.S. antidumping methodology. If decisions in these cases are appealed after the panel reports are circulated and there are not enough Appellate Body members to hear in an appeal, that would, in effect, favor the losing party and the status quo, thus allowing the continuation of practices found to be inconsistent with WTO rules, the justification of protectionist measures by citing national security concerns, and the lack of protection for intellectual property concerns.

None of the above four possible outcomes from the erosion of the Appellate Body and dispute settlement system writ large would inspire confidence in the strength of the rules-based global trading system. Each has its own deficiencies relative to a fully operational Appellate Body, even considering the criticism of the Appellate Body. The WTO's unique enforcement system, in which the validity of trade measures by individual members is judged by an independent body as opposed to the members themselves, is a novel approach that has on balance safeguarded the interests of all WTO members large and small, rich and poor. That unique system, often referred to as the "crown jewel" of the WTO, has encouraged members to follow WTO rules, making markets more efficient, while dissuading members from unilaterally imposing trade sanctions in response to distorting trade actions from other members. Retreating to a system in which disputes are largely influenced by the size of a member's economy or in which members are left out of dispute settlement altogether would undermine those benefits and give a greenlight to members willing to test the rules-based system with aggressive trade actions. Businesses operating global supply chains would be left with less confidence that their investments would be able to remain the same, either domestically or externally. Investments would take on additional risk, particularly those in coveted assets and technologies. Further, companies and trade associations often push

governments to bring WTO cases when they believe foreign measures violate WTO rules and negatively impact their business. If WTO dispute settlement becomes unavailable or less useful, companies will likely return to their practice of seeking protection directly from their governments, which would return the trading system to the days of Smoot-Hawley. In addition, the absence of viable dispute settlement increases the risk of foreign investment, which would deter companies from expanding outside their national borders and slow down the pace of globalization and economic growth.

Issue 2: Section 232 Dispute Resolution at the WTO

A second pressing issue for the WTO are ongoing dispute settlement cases regarding the national security exception laid out in Article XXI of the GATT. The United States considers trade measures justified by national security to be beyond the ambit of WTO dispute settlement whether a measure is necessary to uphold a nation's national security inherently cannot be judged by another entity. Observers of the WTO have long seen a dispute over Article XXI as a lose-lose proposition. They are concerned that a ruling upholding the U.S. view of the national security exception could inspire other countries to impose protectionist measures in the name of national security, while a ruling that limits a country's ability to use the exception could be seen as an unacceptable breach of national sovereignty, which would discredit the WTO and perhaps lead members such as the United States to withdraw from the body.

Two WTO cases involving the national security exception are ahead of the disputes over the U.S. Section 232 tariffs in the WTO queue. One is between Russia and Ukraine, and the other is between Qatar and the United Arab Emirates (UAE). The former case is further along than the latter. On April 5, 2019, a WTO dispute settlement panel issued a landmark ruling in the Russia-Ukraine dispute, in which Russia claimed it had taken trade-restrictive measures for the purpose of protecting its national security. Central to the dispute was the so-called "national security exception" in Article XXI, which allows WTO members to breach their WTO obligations for purposes of national security. Russia invoked the exception to justify measures that blocked trade between Ukraine, Kazakhstan, and the Kyrgyz Republic that transited through Russia. Russia claimed it had adopted those measures in response to escalating events in Ukraine after political turmoil there in 2014. A panel report on a 2017 complaint brought by Qatar against the UAE over the embargo imposed on Qatar by the UAE and other neighboring countries has yet to be issued.[20] The UAE claims that the embargo was necessary to protect its national security in wake of allegations that Qatar was financing terrorism.

Meanwhile, the European Union, Turkey, Switzerland, Russia, Norway, India, and China have filed disputes against the United States and claim that there is no legitimate or plausible national security rationale for the U.S. steel and aluminum tariffs.[21] The Trump administration, however, has an unwavering view that measures taken by members for the purposes of national security cannot be reviewed by a WTO dispute settlement panel. The Trump administration sided with Russia in the complaint brought by Ukraine for the same reason, despite backing Ukraine in the conflict there. The outcome of the Russia-Ukraine dispute offers a glimpse into how future WTO panels could handle other disputes involving the Article XXI national security exception, including the U.S. steel and aluminum tariffs, even though individual panel reports are not intended to set precedents.

Below is the plain text of the Article XXI of the GATT. Its meaning and how members can operationalize the exception was the central question of the Russia-Ukraine case and will likely be the main question in disputes involving U.S. steel and aluminum tariffs.

Article XXI Security Exceptions

> *Nothing in this Agreement shall be construed*
>
> > *(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
> >
> > *(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
> >
> > > *(i) relating to fissionable materials or the materials from which they are derived;*
> > >
> > > *(ii) relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
> > >
> > > *(iii) taken in time of war or other emergency in international relations; or*
> >
> > *(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. Section (b) and subsection (b)(iii) are most relevant to the arguments made in the pending cases. Russia and the United States claim that the wording of section (b) makes the national security exception nonjusticiable by the WTO dispute settlement system. That claim stems from the phrase that the WTO agreements should not prevent any member "from taking actions which it considers necessary for the protection of its essential security interests." According to the United States and Russia, section (b) makes clear that only the member invoking the national security exception can determine whether the measure taken is in its own national security interests. The United States also argues that judgment by another body of what is in the U.S. national security interest or whether a measure is necessary to protect U.S. national security would be an inappropriate breach of national sovereignty. Therefore, the United States and Russia argue that once a member has invoked the national security exception, the measure justified by it cannot be subject to review by a WTO panel.[22]

The WTO panel in April 2019, however, rejected the Russian (and U.S.) argument that the article is nonjusticiable but ultimately found Russian actions consistent with Article XXI, making several important decisions along the way.[23] First, the panel determined that actions taken under Article XXI(b) are reviewable. The panel also found that the three subparagraphs of section (b) which lay out the circumstances in which a member can invoke the national security exception can be objectively observed.[24] Further, the panel found that measures justified by the exception can be reviewed to determine if they are necessary to protect national security and have a plausible connection to the national security interest cited by the respondent in a dispute.[25]

To sum up those conclusions, the panel found that it can review a measure a WTO member claims "it considers necessary" to protect its own security interest because it can objectively determine whether one of the three circumstances laid out in the subparagraphs of section (b) occurred at the time of the measure's imposition and because it can objectively determine whether the measure has a plausible connection to the circumstance identified. In the context of the Russia-Ukraine case, the panel decided that the state of affairs between Russia and Ukraine rose to the level of "war or other emergency in international relations," therefore meeting the requirements of section (b)(iii).[26] In making that determination, the panel, importantly, defined an "emergency in international relations" to be "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[27] By extension, the panel claimed that an emergency in international relations is an objective state that a panel can review and determine whether an action was taken "at the time of" such an emergency. The panel also found that there was a plausible relationship between the conflict between Russia and Ukraine and the trade-restrictive measure Russia had taken.[28]

The panel's findings may spell trouble for the U.S. defense of its steel and aluminum tariffs at the WTO. The United States' claim that the national security exception is nonjusticiable was clearly undercut by the panel report. In fact, the panel explicitly pushed back against that U.S. position. The panel wrote that its "interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's invocation of Article XXI(b)(iii) is 'nonjusticiable,' to the extent that this argument also relies on the alleged totally 'self-judging' nature of the provision."[29]

The United States may also be hard-pressed to meet the Russia-Ukraine panel's definition of "emergency in international relations." The panel report adds that "political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii)."[30] Many U.S. trading partners have argued that the steel and aluminum tariffs are a tool of leverage for the United States in trade negotiations. The United States has also faced push back against its argument that the tariffs are necessary to rebuild the steel and aluminum industries in the United States, both of which are necessary to maintain its defense base and national security. Questions about the purpose of the tariffs may dovetail with a question of "good faith" raised by the WTO panel in the Russia-Ukraine dispute. The panel determined that the so-called "obligation of good faith," "requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of 'reciprocal and mutually advantageous arrangements' that constitutes the multilateral trading simply by re-labelling trade interests that it had agreed to protect and promote within the system, as 'essential security interests', falling outside the reach of that system."[31]

In the Russia-Ukraine case, both countries have decided not to appeal, thereby avoiding the problem of the possible demise of the Appellate Body interrupting settlement of the dispute and in the process increasing the likelihood that the panel report will be used as guidance by future panels dealing with Article XXI, even though reports are not supposed to create precedent.

Even so, the circumstances of the U.S. case are different from the Russia-Ukraine case. A different dispute settlement panel may approach the national security issue in a different manner that may or may not be more favorable to the United States. That may be the case in the pending dispute between Qatar and the UAE, which also revolves around the national security exception. Perhaps what is most clear is that the WTO is not done deliberating on the national security question. In fact, it's likely just getting started.

SUB-SCENARIO 1: U.S. WIN IN THE 232 DISPUTES

The only outcome the United States is likely to consider a total "win" is a determination by the WTO that the steel and aluminum disputes are nonjusticiable solely due to the U.S. invocation of the national security exception. At a minimum, that ruling would give legitimacy to the justifications for the current U.S. Section 232 tariffs on steel and aluminum and deflate claims that retaliation against the United States is justified under the Safeguards Agreement. Such an outcome could also signal—rightly or not—to the United States and other countries that the WTO is unwilling to weigh in on trade measures justified by national security. Absent self-restraint by the WTO membership, a proliferation of trade-distorting measures imposed on national security grounds could quickly begin, likely led by the United States. Waves of retaliation and counterretaliation could occur, severely upsetting global supply chains and the economy. Regardless of the level of restraint shown by WTO members, a decision by the WTO to leave settlement of disputes involving national security up to the membership would make the global business environment less predictable and less stable.

A decision by a WTO panel that the issue is justiciable but that the United States tariffs on steel and aluminum are a legitimate use of the national security exception is unlikely to be welcomed by the United States because it holds the view that only sovereign nations can determine what is in their national security interest, not the WTO. Still, such a decision may similarly inspire the United States and other countries to impose trade-distorting measures in the name of national security, although the willingness of the WTO to judge the legitimacy of those measures may give countries pause.

SUB-SCENARIO 2: U.S. LOSS IN THE 232 DISPUTES

If the WTO were to rule that the U.S. 232 steel and aluminum tariffs are illegitimate and an abuse of the national security exception, the United States could be motivated to take several courses of action. The United States could opt to withdraw from the WTO in response to what it would view as the organization overstepping its bounds. The consequences of U.S. withdrawal from the WTO are discussed in another section of this paper. A less dramatic course of action would be for the United States to remain in the WTO and appeal the ruling, which would allow it to maintain the steel and aluminum tariffs since the appeal could not move forward without an Appellate Body. Retaliation against the United States has for the most part already occurred but would have added legitimacy as WTO members would have a clear ruling to point to. In this case, the United States has also brought counter-complaints against the countries that retaliated. Those countries argued that the U.S. action was not taken under Article XXI but was actually a safeguard action under Article 8 of the Safeguards Agreement which permits limited retaliation. Those cases would eventually also receive panel decisions, but the absence of an Appellate Body would allow their retaliation to remain even if the panel report went

against them. The result would be that both sides in the controversy would get away with their trade limiting behavior, further casting into doubt the WTO's ability to halt deteriorating international discipline.

The least dramatic outcome of a WTO ruling against the tariffs would be for the United States to comply and eliminate the duties. This would likely result in the elimination of retaliatory tariffs imposed on U.S. goods and lead to a ratcheting down of trade tensions. This is the most unlikely of the possible outcomes.

Irrespective of how the United States responds, the WTO showing that it is willing to rule on the legitimacy of measures member countries take for purposes of national security may discredit its position as a neutral forum for dispute settlement that respects the sovereignty of the membership, which may cause countries to turn away from it. On the other hand, a ruling against the United States could be applauded by members who view such a ruling as the WTO equally applying global trade rules to even the largest economies. In that frame, a ruling against the United States could be seen as legitimizing the WTO as a neutral arbiter of trade rules.

SUB-SCENARIO 3: NEGOTIATED SETTLEMENT/TARIFFS ARE REMOVED BEFORE RULING

A negotiated settlement between the United States and the countries that have brought complaints at the WTO over the 232 tariffs prior to a panel ruling is the most stable outcome for businesses and the trading system. Negotiated settlements would defuse the situation by preventing a WTO panel from starting down a path with no good options at the end. The Director-General of the WTO, Roberto Azevedo, has called for a negotiated solution outside of the WTO dispute settlement system.[32] Countries have had varying levels of success negotiating with the United States over the steel and aluminum tariffs. South Korea was able to negotiate the steel tariffs away in exchange for a quota scheme that has arguably little upside compared to the tariffs. Mexico and Canada fared better and negotiated away tariffs on steel and aluminum; however, they were able to do so only with the fate of the U.S.-Mexico-Canada Agreement hanging in the balance.

Issue 3: The U.S.-China Non-Market Economy Dispute

The third issue that could make or break the WTO is the latent non-market economy (NME) dispute between the United States and China. At the core of the dispute is a question of whether the United States can use a so-called "NME methodology" to calculate antidumping duties on Chinese products which generally results in higher duty rates. China believes that the legal foundation for treating it as an NME in antidumping cases expired on December 11, 2016, the 15th anniversary of its accession to the WTO.[33] The United States claims that the General Agreement on Tariffs and Trade provides sufficient authority to apply the NME methodology to countries or sectors that do not operate on market conditions irrespective of China's Protocol of Accession. It has also maintained that the relevant section in the Accession Protocol does not prevent the United States from applying the methodology but requires it make that decision on a case-by-case basis based on the specific facts of each case. The United States also argues that China does not meet the definition of a market economy laid out in U.S. law. China has brought WTO cases against the United States and the European Union over their use of NME methodology after December 11, 2016.[34] Beijing elected to move forward with its case against the European Union first. The panel reportedly

has sided with the European Union, which coordinated legal arguments with the United States, and China has dropped the case altogether reportedly to prevent the lopsided panel report from becoming public.[35] Those developments are a positive sign for the United States; however, China still has the option to proceed with its complaint against the United States and take another bite at the apple.

Both the United States and China have spoken in dramatic terms about the dispute. U.S. Trade Representative Robert Lighthizer warned at his Senate confirmation hearing that a U.S. loss would be "cataclysmic for the WTO." He described the case as "without question the most serious litigation matter we have at the WTO right now." The United States is hesitant to relinquish its ability to treat China as an NME for two reasons. First, China's NME status allows the United States to more effectively protect its domestic industries and workers from dumped Chinese goods. Second, China does not meet the definition of a market economy under U.S. law, and Congress has shown no interest in revising the law or labeling China a market economy.

China also views the dispute as significant. China's Ambassador to the WTO, Zhang Xiangchen, told the dispute settlement panel overseeing China's complaint against the European Union that the NME methodology has enabled "discriminatory antidumping duties" which have bankrupted businesses, cost "hundreds of thousands of workers their jobs," and have had a "crippling" impact. Zhang claimed that the United States position is "disingenuous" and "a set-up." He described the dispute as "especially important to China, not only legally, but also economically and politically." [36]

Resolution of China's complaint against the United States—if China pursues it—is likely years off and could never be resolved in Geneva if either side opts to appeal the panel decision to a defunct Appellate Body. An agreement between the United States and China on its NME status could be struck outside of Geneva as part of a broader trade deal; however, the chances of that are slim given the current trajectory of the relationship between the two countries. Business should continue to monitor the status of the dispute; however, the issue appears to have cooled down. Domestic industries, particularly those vulnerable to dumped Chinese products, should track the issue as well. The ability of the United States to apply high antidumping duties on Chinese products that receive state support, including those in high-tech fields identified in the Made in China 2025, is an important tool in the U.S. trade remedy arsenal.

Issue 4: Shift to Plurilateral Negotiations

Another feature of the status quo is continued gridlock in the negotiating arm of the WTO. At a procedural level, WTO members cannot agree on what issues to prioritize in negotiations, save for a deal to discipline harmful fisheries subsidies. Many developing countries insist that the WTO membership cannot move on from the Doha Development Agenda (DDA), which begun in 2001, because the agenda's work program has not been completed. Many developed countries, on the other hand, are unwilling to remain stuck on the DDA rehashing longstanding and seemingly intractable differences.

With the WTO's negotiating function at an impasse, groups of countries have turned to plurilateral negotiations. Plurilateral agreements, deals negotiated under the WTO

umbrella by a group of WTO members, can take two forms: open or closed. Open plurilateral agreements, such as the Information Technology Agreement (ITA), are nondiscriminatory in implementation. Members of an open plurilateral agreement extend the benefits of the agreement, such as tariff cuts, to all other WTO members regardless of their membership in the plurilateral agreement. Members of closed plurilateral agreements, such as the Government Procurement Agreement (GPA), only extend and receive benefits to and from other members of the agreement. Both types of agreements encourage nonparticipants to join by showing the benefits of trade liberalization. One goal for plurilateral agreements is to add new members and build enough momentum for the agreement to eventually become a multilateral deal signed by the entire WTO membership.

Separate groups of WTO members announced their intentions to initiate negotiations for separate plurilateral agreements on electronic commerce and investment facilitation for development following the December 2017 WTO Ministerial Conference in Buenos Aires which yielded no major multilateral breakthroughs. After the closing session of the Buenos Aires Ministerial, the Office of the U.S. Trade Representative stated, "the new direction of the WTO is set: improving trade through sectoral agreements by like-minded countries."[37] A plurilateral approach to negotiations allows members to mitigate the challenge of reaching consensus among the over 160 members of the WTO; however, large economies must participate in negotiations in order for plurilateral deals to cover a meaningful amount of trade. The inclusion of larger economies—the United States, European Union, China, Japan, India, and so on—will inevitably create some level of disagreement in any plurilateral negotiation, albeit most likely less than that found in a negotiation with all WTO members. Developing countries that are unwilling or unable to take on certain obligations may simply opt not to participate in a plurilateral agreement or negotiation. Flexibility in membership in agreements increases flexibility at the negotiating table. For example, developing countries have pushed back against any potential negotiations—whether plurilateral or multilateral—on new issues such as digital trade until DDA issues are resolved.[38] That dynamic has stifled multilateral negotiations at the WTO for years. In a plurilateral setting, countries opposed to such agreements lose the ability to simply veto an agreement if their demands, related or unrelated, are not met.

Regional and bilateral trade agreements are also likely to proliferate in the status quo scenario for similar reasons. Like plurilateral agreements, regional trade agreements provide an avenue for like-minded countries to negotiate amongst themselves to a desired level of ambition. Those deals, however, can come with downsides associated with trade diversion and the fragmentation, or at least increased complexity, of global trade rules.[39] Regional and bilateral trade agreements are necessarily discriminatory to those outside of them. While some argue that such deals can contribute momentum to multilateral talks and break new ground, others counter with the claim that regional trade agreements are more likely to incentivize rival trade blocs. Regardless, countries around the world are negotiating regional trade agreements at a pace faster than the United States. In 1990, 50 trade agreements were in force. Today, more than 290 are in force.[40] The United States is party to just 14 regional and bilateral agreements. If this trend continues, U.S. exporters will increasingly face worse trade terms than their competitors in markets across the globe. The entry into force of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada, and the

EU-Japan Economic Partnership Agreement brings major global economies closer together under similar rules while the United States seeks to catch up with a rulebook that in some cases does not align with those other agreements.

Issue 5: General Erosion of WTO Norms

WTO norms and the credibility of the institution are at risk of being undermined by continued criticism from world leaders (including the U.S. president), measures that breach global trade rules, and the lack of progress in negotiations. The erosion of the WTO as the arbiter of global trade can take a number of forms. Examples include countries skirting ITA requirements, lagging on WTO notification requirements, and taking advantage of provisions on special and differential treatment by self-declaring status as a developing country.

SUB-SCENARIO 1: THE ITA UNDER STRESS

Countries increasingly skirt ITA requirements to protect domestic IT industries

A perceived weakening of the WTO and increase in trade measures in breach of WTO obligations could encourage countries to test the elasticity of compliance with WTO agreements, including the ITA and its expansion, the ITA II. Already, there are questions about whether India and China are meeting their ITA I obligations to cut and maintain zero tariffs on products covered by the agreement. The European Union and Japan have initiated WTO disputes against India for alleged violations of its tariff commitments under the ITA. China's adherence to its ITA and II obligations was questioned by WTO members in 2017 and 2018 over tariffs on semiconductor products.[41] Countries such as China and India, and other ITA parties seeking to protect their own domestic IT industries, could view the erosion of the WTO's credibility as an opportunity to continue to test agreements such as the ITA.

Continued attacks on the WTO by the United States may cause countries to doubt the United States' willingness to hold them accountable for breaches of their obligations. The United States hiking tariffs on steel, aluminum, and Chinese products; other countries retaliating against the United States without prior WTO authorization; and China continuing to flout its WTO obligations provide would-be cheaters of ITA obligations examples of malfeasance to point to. Disregard for WTO rules and consistent bashing of the body, in particular by the leading founder of it, may undermine other countries' respect for the rules-based trading system.[42]

A significant benefit of WTO membership is derived from the "commitment effect," which makes it less risky to integrate along the ITA or WTO network than form a network outside where trade relations are less certain. Research suggests that imports of ITA products increase 7 to 10 percent due to membership in the agreement.[43] Instability within the ITA trade network could erode that benefit.[44] Meanwhile, as demand for information technology and communications (ITC) products continues to grow, particularly in developing countries with both massive populations and aspirations for a strong domestic IT industry like India and China, other ITA parties may be tempted to chip away at the agreement. ITA members could cut corners either by raising tariffs on products covered by the agreement or through nontariff measures not covered by the ITA that distort trade in products covered by the agreement. That would negatively impact U.S. technology

companies, disrupt global supply chains, and slow the growth of e-commerce and digital services in countries that breach their ITA obligations due to increased consumer prices for enabling hardware.

Cutting corners on ITA obligations would add costs in a sector that accounts for a share of global trade larger than that of the automobile or pharmaceutical sectors. Since 1996, exports in products covered by the ITA have roughly tripled, from $549 billion to $1.7 trillion in 2015.[45] The 81 participants in the first agreement account for over 95 percent of world trade in products covered by the agreement.

Beyond making trade in ICT products cheaper and more widespread by virtue of eliminating duties among the members of the agreement (which combine for 97 percent of trade in ICT products), the ITA has also established a predictable environment for businesses to invest and operate in. The binding agreement created the expectation that its signatories will maintain duty-free trade in the covered products and will be called out by the international community if they fail to meet their obligations. The ITA, by virtue of slashing tariffs to zero, has also reduced administrative costs and delays associated with customs activities.[46] For that reason, tariff elimination has led to a 14 to 20 percent increase in imports for intermediate ITA goods and 7 to 10 percent increase in imports of final ITA goods among the ITA signatories.[47] The combination of eliminating tariffs on key products like mobile phones and computers along with the establishment of a predictable business environment has accelerated the spread of technologies that underlie the digital economy and electronic commerce. That, in turn, has generated new opportunities for commerce and unlocked innovation around the world.[48] All the while, the prices of products covered by the ITA have declined while their computational power and utility has increased, amplifying the agreement's upside.

If additional countries are inspired to test their commitment to the ITA, the broader business benefits of the agreement could begin to unravel. Unpredictability or the loss of faith in countries abiding by the ITA commitments could lead companies to reexamine supply chains that cross through countries with a historically protectionist tilt and a burgeoning IT sector. The risk of the ITA eroding due to continued attacks on the WTO and subsequent loss of faith in the institution or credibility is particularly acute given that business certainty is generated in part by the fact that the agreement's obligations are enforceable via dispute settlement at the WTO. Unrelenting attacks on the dispute settlement system and value of the WTO could undermine not only expectations that ITA members will live up to their commitments but also that other WTO members will hold cheaters accountable via dispute settlement in Geneva.

With questions about the ITA simmering, the European Union and Japan have shown that they are willing to use the dispute settlement system to hold members accountable for allegedly violating their obligations. In early April 2019, the European Union requested consultations with India for increasing duties beyond its bound rates in its GATT schedule as modified by the ITA on several products the EU claims are covered by that agreement and therefore should have been bound to zero.[49] Japan requested consultations over the same issue in May 2019.[50] The products those countries claim India has raised tariffs on include semiconductors, equipment to manufacture semiconductors, cables, and other products used in cellular and wireless networks. India claims that those products are not

covered by the ITA I and therefore it can adjust duties on them beyond zero. The United States has requested to join both sets of consultations and claims that U.S. exports of the goods subject to increased duties listed by the European Union made up roughly $490 million in U.S. exports to India in 2018.[51]

The Impact of the ITA on the United States and Global Supply Chains

The United States' role in the global ICT industry has shifted since the ITA was negotiated in 1996. Imports of products covered by the agreement have increased, particularly from Mexico, which is not an ITA member but trades duty free with the United States under the North America Free Trade Agreement (NAFTA) and has implemented domestic legislation that in large part implements ITS obligations while U.S. exports of covered products have declined.

U.S. trade in specific ITA products has shifted as well. Imports and exports to the United States of automatic data processing machines, parts and accessories of machines, and exports of machines and mechanical appliances have all increased by at least 75 percent since the agreement came into force. An immediate spike in exports and imports of these IT products following the original ITA members signing onto the agreement in 1995 suggests the deal helped spur global trade in the covered products.[52] The ITA accelerated the global integration of ICT supply chains as production of less complex products covered by the ITA shifted to members that occupy lower rungs of the global value chain. Those countries have seen dramatic increases in the global export share of products covered by the ITA. China, which joined the agreement as part of its WTO accession in December 2011, accounted for 33 percent of global exports of products covered by the ITA in 2015 compared to just 2 percent in 1996. Vietnam did not crack the top 20 in 1996, but in 2015, it accounted for 4 percent of world exports of ITA products, showcasing impressive growth in that area. On the other hand, the United States saw its share of exports slip from 20 percent in 1996 to 9 percent in 2015. Similarly, the European Union in 1996, composed of just 15 members, led WTO members in making up 31 percent of global exports of covered products. By 2015, the EU28 accounted for 16 percent of global ITA exports. A similar, albeit less dramatic, story has played out on the import side of the picture. China's share of global imports of covered products grew from 2 percent to 23 percent between 1996 and 2015. Vietnam, not in the top 20 in 1996, was the eleventh largest importer of ITA products in 2015, accounting for 2 percent of global imports.[53]

China and, to a lesser extent, Vietnam's capture of global import and export share suggests an increase in trade in intermediate as well as final goods and highlights the global nature of ICT supply chains. Per data assembled by the WTO Secretariat, China is a top importer of integrated circuits, which made up 22.5 percent of its total industrial imports in 2015.[54] China's relatively large amount of chip imports aligns with its role as a major electronics assembler, as well as its sizeable population and rapid pace of growth and development over the past two decades. Malaysia occupies a similar position in the global ICT value chain. Japan, on the other hand, imported an amount of integrated circuits similar to the amount of intermediate inputs it exported in 2015, which suggests that it occupies a key space in the ICT global value chain as an economy that imports relatively low-tech products and exports higher-value parts to be integrated and assembled into a final product elsewhere.[55] The OECD data on value-added trade indicates as much. In 2015,

Japanese domestic value-added in the ICT sector was estimated to be 44 percent, while foreign value-added in that sector was relatively low.[56]

The United States occupies a critical space in the semiconductor and integrated circuit global value chain. It leads in semiconductor and integrated circuit design, research, development, high-end manufacturing, and supplying equipment and manufacturing.[57] The percent of foreign value-added content in U.S. ICT exports has dropped however from around 13 percent in 2005 to under 10 percent in 2015.[58] Other countries such as Singapore, Taiwan, Israel, South Africa, and Vietnam are hubs for research, manufacturing, assembling, packaging, and testing semiconductors based on their competitive advantages. Typically, semiconductor production takes place across four or more countries. Semiconductors and integrated circuits are just two examples of goods covered by the ITA that go through a global manufacturing process before being integrated into a range of final products.

The United States' reliance on imports of key ICT products covered by the ITA such as computers, integrated circuits, and semiconductors combined with the significant foundational role those products play in the U.S. economy places high stakes on the weakening of the ITA or U.S. withdrawal from it. Computer and integrated circuit imports are relatively concentrated from a few countries. In regards to U.S. computer imports, China accounts for 56 percent, Mexico accounts for 28 percent, and no other country makes up more than 5 percent. In the case of U.S. imports of integrated circuits, Malaysia accounts for 43 percent, Taiwan for 12 percent, China for 9 percent, and no other country makes up more than 7 percent.

The United States does not have free trade agreements with its top computer supplier or its top integrated circuit suppliers, which puts a significant portion of the U.S. economy in a precarious situation, particularly if the United States opts to withdraw from the WTO or raise tariffs. U.S. withdrawal from the WTO would end U.S. participation in the ITA, which was implemented via changes to the U.S. WTO tariff schedule. U.S. withdrawal from the WTO, however, would not automatically result in the ITA ceasing to operate. The 1996 Ministerial Declaration on Trade in Information Technology Products has no withdrawal clause.[59] The 1996 Declaration also does not lay out consequences if trade among ITA members in covered products drops below 90 percent. That level of trade among members was required for the agreement to come into force. The ITA Expansion includes a similar "critical mass" provision and adds that if there are "future shifts in trade in the context of critical mass . . . an appropriate opportunity shall be found to discuss the issue in the future."[60] Upon a U.S. withdrawal from the WTO, other ITA members would not be required to extend zero tariffs to the United States on covered products as members would be absolved of applying most-favored-nation tariffs to the United States. That would exacerbate the downsides posed by ITA noncompliance to an extreme degree.

Short of withdrawal, of most consequence to U.S. exports of ITA products is China's level of noncompliance. U.S. producers of computers, integrated circuits, and semiconductors could see exports to China—a top-five market for each of those products—dwindle if Beijing continues to test its ITA commitments without challenge from other WTO members. Left unchecked at the WTO, tariff hikes on products covered by the ITA risk becoming another tool for China to limit market access for U.S. firms in a bid to move up the ICT value chain and shed reliance on imports. Curtailed access to China's market

would be costly for U.S. companies. In 2018, China imported over $6 billion worth of integrated circuits from the United States, accounting for 16 percent of U.S. integrated circuit exports.

Widespread testing of the ITA would generate economic uncertainty for not only the producers and importers of covered products but also the vast majority of the economy that relies on ICT products to operate. Costs from uncertainty or outright tariff hikes on covered products would likely be passed on to consumers. Unraveling ITC supply chains would be particularly costly considering the industry's global integration, spurred in part by duty-free trade under the ITA. Analysis indicating a correlation between tariff cuts on ITA products and an increase of imports of covered products suggests that tariff hikes would lead to less trade in those products.[61] In addition to direct business costs, less trade in ITA products would slow the spread of key technologies that enable digital trade and unlock additional avenues for global commerce. Half a trillion Internet of Things devices will be in use by 2030, all underwritten by products covered by the ITA.[62] Those products will serve not only as the foundation of the modern economy but also as key enablers of innovation. Limits on U.S. firms' ability to compete abroad in the ICT sector equates to a limit on the innovative capacity of U.S. firms and their ability to maintain an edge in the economy of the future.

SUB-SCENARIO 2: COUNTRIES CONTINUE TO LAG ON NOTIFICATION REQUIREMENTS

Countries may also take the perceived weakness of the WTO as a signal that failure to meet notification and transparency obligations to the body may go unpunished. Many countries already are late in reporting subsidies and other measures to the WTO or fail to report altogether. Lack of timely, accurate information about trade measures adds another difficulty to negotiations. The United States has described up to date notifications of fisheries subsidies as a "foundation" for negotiations in that area and has argued that it will not be possible to negotiate "comprehensive and effective" disciplines without accurate subsidies information from WTO members.[63] The United States has also "counter-notified" subsidies provided by China and India previously undisclosed at the WTO in order to paint a fuller picture of whether or not those countries are meeting their WTO obligations.[64] Additionally, ducking notification obligations, some of the most basic obligations required of WTO members, can erode confidence in the WTO.

SUB-SCENARIO 3: SPECIAL AND DIFFERENTIAL TREATMENT PROLIFERATES

WTO agreements include provisions to grant developing countries flexibility in meeting their obligations, which are referred to as special and differential treatment provisions (S&D). Such rules include longer periods of time to implement agreements, rules to increase trade with developing countries, requirements that WTO members protect trade interests of developing countries, and separate rules designed specifically for the least-developed countries. The WTO, however, does not include criteria that countries must meet to qualify as developing and receive S&D treatment. That has led countries to self-define as developing or developed. Self-designations are often flawed. The practice has resulted in countries dodging full WTO obligations that they are arguably capable of taking on. For example, South Korea, Qatar, Singapore, Turkey, Israel, Hong Kong, and Mexico consider themselves as developing for the purposes of their WTO obligations but are clearly able to either take on full WTO obligations or move in that direction. Those countries all rank in roughly the top

third of GDP per capita, have dynamic economies, and are mature users of the global trade system. China represents a unique case. While China claims developing country status, the Trump administration believes it is well past time for it to assume obligations commensurate with its size and economic influence.[65] Similarly, the Trump administration's decision to terminate Turkey's membership in the Generalized System of Preferences by finding that Turkey had economically developed to the point where it no longer should be afforded preferential access to the U.S. market is one example of the Trump administration putting its views on development and trade into action.[66]

Prolific use of S&D threatens to undermine negotiations. WTO members that define themselves as developed, namely the United States, will see decreasing utility or even downsides to negotiating agreements in which major traders are unwilling to take on full obligations. This dynamic has played out in the ongoing negotiations to rein in harmful fisheries subsidies. China and Indonesia led the world in marine capture between 2014 and 2016, accounting for 19 percent and 8 percent of global capture respectively.[67] Peru, India, Vietnam, the Philippines, Malaysia, and South Korea accounted for a combined 19 percent of global marine capture over those same years.[68] For those countries to receive flexibilities or outright exemptions in an agreement to discipline harmful fisheries subsidies would significantly undercut the utility of such an agreement. Some WTO members have recognized that a new approach to S&D is needed to advance on a range of topics. New approaches to S&D and the fisheries negotiation are discussed in the Reform section of this paper.

Issue 6: Reform Spurred by Crisis

While crises are on the horizon, they may spark reform instead of destruction. Over the course of history, countries have overall trended towards trade liberalization, although the path there has often been tumultuous and certainly not straightforward. Time after time, crisis has given rise to breakthroughs that advanced free trade. From the Atlantic Charter signed by Roosevelt and Churchill in the throes of World War II, to the birth of GATT and Bretton Woods institutions in 1947, through the promise of the would-be International Trade Organization and clashing expectations that the Uruguay Round was set to collapse or succeed after a 1988 negotiating round in Montreal and then again in Brussels in 1990, the path to trade liberalization has always been full of doomsayers and eternal optimists. As the Appellate Body reaches its breaking point, the national security cases stack up, and general norms continue to erode at the WTO, the United States will have a choice between resuming its traditional role and leading the institution into the future or shrinking from leadership and watching the WTO wither away.

Of course, a bad situation can always get worse, and allowing crises to ferment at the WTO in hopes of brewing up an inspired negotiated solution to move the institution forward risks leading to a toxic reaction where no positive outcome is possible. The ingredients that led to previous negotiating success at the WTO—U.S. leadership and unrivaled economic influence, a solid foundation of trust between the United States and European Union, and the perception of U.S. respect for the rules-based trade system—are diluted. New factors, such as China's meteoric economic growth and expanding influence coupled with its unwillingness to fully meet its WTO obligations, the intransigence of developing countries, and the rapid reshaping of the foundation of the global economy,

are new variables that negotiators cannot avoid. Crisis may inspire action, but there is no guarantee that WTO members will be able to negotiate themselves out of a collapsing situation, especially if the United States continues to appear to put its international commitments on the back burner. In this scenario, a combination of the economic risks discussed above come to fruition for at least two years and potentially as long as a decade, depending on the United States political will to lead the repair and renovation of the WTO. However, digging out of the crisis could lead to trade-liberalizing reform spearheaded by the WTO, the implications of which are discussed in the reform section of this paper.

Option 2: Withdrawal

The Scenario

In this scenario, the president orders U.S. withdrawal from the WTO. The order to withdraw would give rise to a range of legal questions that could potentially limit or nullify the impact of the order. For example, a significant portion of U.S. obligations undertaken upon joining the WTO were implemented via statute which the president cannot unilaterally undo. Litigation by lawmakers or businesses serves as another check on the president's ability to fully withdraw the United States from the WTO; however, the outcome of that litigation is difficult to predict. Finally, the president could withdraw from the WTO but opt to adopt a trade policy that is in line with or exceeds WTO commitments in a bid to prevent trade conflicts but generate leverage in negotiations.

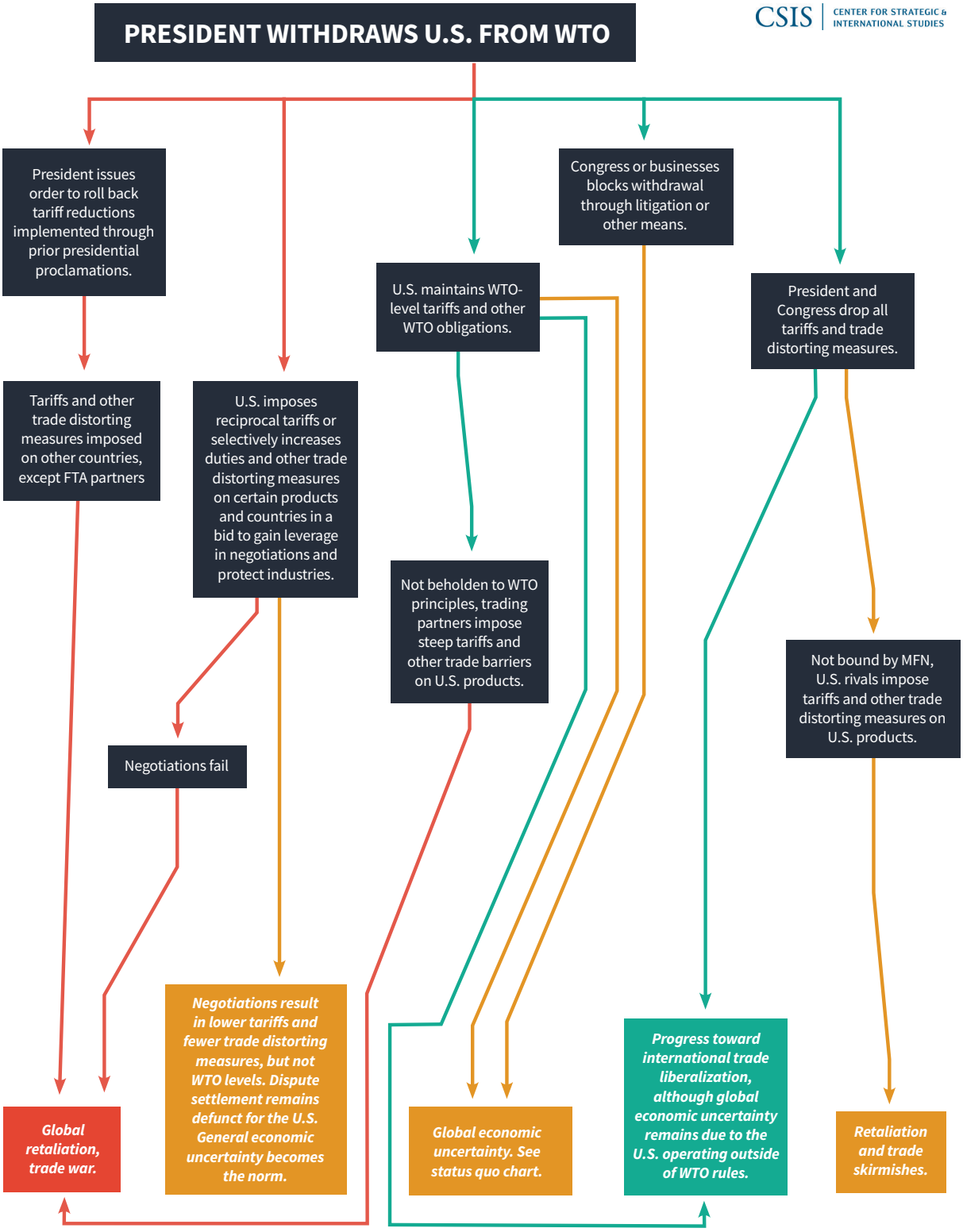
The Economic Impact of Full Withdrawal from the WTO

Withdrawal from the WTO would have severe economic impacts. With the most-favored-nation and national treatment principles gone and uncertainty abounding, businesses would have little to fall back on besides the frameworks provided by U.S. free trade agreements. With those intact, trade between the United States and Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, South Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore would remain duty-free and bound by the varying rules in those agreements. The United States would also continue to import products duty-free under the African Growth and Opportunity Act, the Generalized System of Preferences, and the Caribbean Basin Trade Partnership Act, among other trade preferences programs, until those programs expire.

Those trade agreements and programs would be no replacement for the global rules set out by the WTO. The largest issue businesses would face is the absence of trade rules with the world's major economies: China, the European Union, and Japan. The United States does not have trade agreements with 12 of its top 15 trading partners.[69] Those 12 countries make up over 40 percent of total U.S. goods trade, which amounts to roughly $1.8 trillion in imports and exports. In other words, over 40 percent of U.S. trade would no longer be governed by WTO rules and principles if the United States were to withdraw.

Of the countries that the United States does have trade agreements with, there are no cross-cutting cumulation rules for rules of origin, which would effectively prevent

Figure 2: Withdrawal Options



the United States and its partners from using the U.S. network of trade agreements as a true network to build out global supply chains. This is particularly problematic in an increasingly globalized world where goods are less frequently produced by just two countries (the United States and a bilateral trade agreement partner) or just one of them. Rules of origin govern how much of a product must originate from the given members of a trade agreement for it to receive preferential treatment. No cumulation rules exist to allow producers to add up content from multiple U.S. free trade agreement partners to qualify for preferential treatment, which reduces the upside of individual bilateral deals. At the same time, a president's order to withdraw from the WTO and rollback tariff proclamations made to meet U.S. obligations would also result in U.S. withdrawal from the ITA.

Following withdrawal and unshackled by the most-favored-nation principle and U.S. bound tariff rates, the president could fulfill his promise of "reciprocal trade" with trading partners and charge tariffs on imports at the level that the foreign trading partner charges on its own imports.[70] That would result in a dramatic increase in U.S. tariffs on most imports given the low tariff rates the United States maintains relative to the rest of the world. In 2017, the average U.S.-applied tariff, weighted across all products, was 1.7 percent. In a world of reciprocal U.S. tariffs, the average rate applied to the United States' top ten trading partners that it does not have a free trade agreement with would increase to 5.4 percent, according to one study from the Mercatus Center at George Mason University.[71] Applying reciprocal tariffs to those trading partners alone would result in tariff increases on $583 billion worth of imports and cover 45 percent of imports from those countries.[72] A separate analysis by the American Action Forum finds that imposing reciprocal tariffs on the top 16 trading partners (including free trade agreement partners), which make up 80 percent of U.S. trade, would raise prices in the United States by $60 billion annually or roughly $471 per household per year.[73] Products that the United States applies a relatively low tariff to compared to its major trading partners would be most affected. Tariffs on passenger vehicles from China and the EU, for example, would increase from 2.5 percent to 25 percent and 10 percent respectively, assuming the elimination of extra tariffs imposed on China due to the Section 301 investigation. The United States is the largest market for EU passenger vehicle exports, amounting to 29 percent of total EU vehicle exports worth roughly $40 billion in 2018.[74] U.S. tariffs on other major imports would also skyrocket. A nearly 40 percent tariff on beef from Japan would be imposed. Tariffs on coffee from Brazil, which accounts for roughly 16 percent of U.S. coffee imports, would increase from zero to 22.5 percent. Tariffs on footwear from Vietnam, which accounts for over 23 percent of U.S. footwear imports, would rise from 13 percent to 30 percent. Generally, U.S. tariffs on imports from developing countries would spike the most as those countries tend to have higher tariffs relative to more developed nations.

Reciprocal trade in ITA products with its members would keep U.S. tariffs at zero only if the members left their tariffs on those products untouched, putting the ball in their court over trade in high-tech goods with the United States. Adding uncertainty is the fact that trading partners would be able to change the tariffs they impose on U.S. goods at will, which would undermine business predictability and result in "reciprocal" tariffs that continue to change over time at governments' whim. Alternatively, the president could selectively embrace reciprocal tariffs for select products and countries and abandon the principle for other industries he seeks to protect or countries he wants to pressure

economically or diplomatically. This flexibility in principle would do little to assuage business concerns—it would be nearly impossible to know for certain whether conditions surrounding supply chains or investment decisions will remain stable—but could allow the president to establish trade networks that protect certain industries from competition from certain countries while locking in competitive and mutually beneficial trade relationships with others. This strategy has the same vulnerability as fully embracing reciprocity in every instance: with the U.S. no longer a WTO member, trading partners can change their tariffs on U.S. products at any time or opt to discriminate against U.S. products through non-tariff barriers. This conundrum highlights the core advantages of WTO membership: the most-favored-nation and national treatment principles, and the predictability brought by bound tariff rates and guardrails against arbitrary increases in duties beyond those rates.

Businesses will seek to minimize economic fallout from withdrawal by reorganizing supply chains along the lowest-tariffed path that offers suitable production capacity, but they will first have to determine whether the cost of shifting production exceeds the cost of paying new tariffs after U.S. withdrawal. Firms could also opt to invest and produce more in the United States; however, the upside to doing so would be limited by two factors: (1) the lack of most-favored-nation and national treatment guarantees abroad leaving them vulnerable to discrimination, high tariffs, and a raft of non-tariff barriers and (2) the fact that 95 percent of the world's population lives outside the United States.

Shifting production to countries that have a free trade agreement with the United States also creates new issues. There will be intense intra-industry competition to snatch up any available manufacturing facilities to avoid significant costs associated with constructing new facilities from the ground up. That competition will be replicated to control skilled labor necessary to operate those facilities. Costs from tariffs or shifting production into the U.S. free trade agreement network will be most significant for industries that involve complex supply chains that typically stretch across multiple countries, such as those for ICT products, automobiles, aircraft, and so on. Manufacturers of complex products also need to consider the location of component suppliers and whether those companies would be willing to shift operations as well. These actions—changing production locations or building new manufacturing facilities, finding skilled labor, and recentralizing component suppliers—take years to complete and require significant capital and stakeholder commitment. Withdrawal from the WTO would cost businesses a significant amount of capital that could otherwise be spent on research and development or other investments that would maintain the U.S. firms' cutting edge.

Issue 1: The Legal Debate

THE CONSTITUTIONAL QUESTION

Whether the president can unilaterally withdraw the United States from the WTO is hotly contested among trade lawyers, constitutional scholars, and other stakeholders. An order by the president to withdraw would undoubtedly result in a legal challenge from members of Congress as well as the private sector, which would raise fundamental questions about constitutional powers. Given the lack of specific case law, such a challenge would likely make its way to the Supreme Court. The constitutional arguments that would be made in front of the court are likely to be twofold. On the one hand, Article II of the Constitution

gives the president authority to operate as the "sole organ" of the United States in foreign affairs.[75] On the other hand, Article I Section 8 of the Constitution, the Commerce Clause, grants Congress the exclusive power "to regulate Commerce with foreign Nations," which includes agreements between the United States and foreign nations to increase U.S. exports. The WTO is both an instrument of commerce and an arena of diplomacy. Its composition is a collection of multilateral trade agreements implemented via congressional-executive agreement. It is not a treaty. Those agreements were negotiated by the executive branch, borne out of the GATT and decades of post-war diplomacy led by the United States. Disputes and negotiations at the WTO often bleed from purely commercial discussions into broader diplomatic issues. The dual nature of the WTO makes the president's authority to withdraw from it uncertain. Withdrawal would reshape U.S. commerce with foreign nations which clearly falls under the exclusive authority of Congress, but the president maintains inherent authority in foreign relations.

The constitution's silence on the authority to withdraw from treaties and congressional-executive agreements adds additional complexity to the legal debate. Precedent set in Supreme Court cases such as *Goldwater v. Carter* furthers the constitutional ambiguity of withdrawal authority.[76] In *Goldwater*, a group of senators and members of the House, including Senator Barry Goldwater, challenged President Carter's unilateral termination of the 1954 Taiwan Mutual Defense Treaty. The lawmakers claimed Carter's move to unilaterally terminate the treaty was unconstitutional and had no effect absent consultation with the Congress and the advice and consent of the Senate or approval of the House and Congress. In a 6-3 decision, the 4-Justice plurality opinion determined that the case should be dismissed because it raised a political, not judicial, question regarding how foreign affairs power resides between the legislative branch and executive branch. However, the decision did not settle the controversy with respect to the WTO. *Goldwater* centered on a treaty, not a congressional-executive agreement; the Justices were relatively fractured in their opinions; and the authority of Congress via the Commerce Clause was not in play as it would be in litigation over WTO withdrawal.[77] Still, the decision made clear that the Constitution is silent on the question of which branch of government has the authority to withdraw from treaties and that such cases can be dismissed in favor of the president via the political questions doctrine.

Legislative text regarding withdrawal and entry into force of trade agreements, including the WTO, adds context, albeit not necessarily clarity, to the constitutional questions regarding the president's authority to withdraw. At least the following three sections of U.S. law would be heavily featured in a court challenge brought by members of Congress over an order from the president to withdraw from the WTO: Section 125 of the Uruguay Rounds Agreement Act (URAA), Section 125 of the Trade Act of 1974, and Section 101 of the URAA. The meaning and intention of each of those sections are subject to debate among trade law experts and lawyers. Section 125 of the URAA states that the "approval of Congress" of the WTO Agreement "shall cease to be effective if, and only if, a joint resolution" of disapproval of the WTO issued by the House and Senate is enacted into law. It is the only section in the URAA which lays out a procedure to withdraw from the WTO. A vote on a joint resolution of disapproval can occur within 90 days of Congress's receipt of a report issued by the administration every five years on the costs, benefits, and value of continued U.S. participation in the WTO.[78] In essence, Section 125 of the URAA limits

a congressional vote on WTO withdrawal to once every five years. Disapproval resolutions were introduced in 2000 and 2005. The 2000 vote failed in the House 56-363, and the 2005 vote failed in the House 86-338. Neither resolution was taken up by the Senate. The "if, and only if" language appears to suggest that U.S. withdrawal from the WTO is possible only via Congressional action, although that interpretation is up for debate.

The contrary case, that Section 125 of the URAA merely specifies one procedure for U.S. withdrawal from the WTO relies on several arguments. First, Section 125 of the URAA does not explicitly limit the president's residual international affairs authority under Article II of the Constitution. Second, it does not explicitly override Section 125 of the Trade Act of 1974, which provided the authority to enter into the WTO. Section 125 of the 1974 Act states that "every trade agreement entered into under this Act shall be subject to termination," and adds that "the President may at any time terminate, in whole or in part, any proclamation made under this Act." This section's specification of proclamation is important, as presidential proclamations are distinct from implementing the legislation passed by Congress often necessary to bring trade agreements into force. Section 125 of the 1974 Act also provides the president with the authority to raise tariffs.

Third, the Statement of Administrative Action (SAA) the Clinton Administration submitted, which was endorsed by Congress alongside the URAA, suggests the White House does not view the Congress-led withdrawal mechanism in Section 125 of the URAA as the exclusive means by which the United States can withdraw from the WTO. The SAA describes that section as "an expedited procedure for Congress . . . to adopt a joint resolution revoking Congressional approval of the WTO agreement." The Clinton administration's choice to specify "Congressional approval" and describe the section as "an expedited procedure for Congress" suggests the administration viewed Section 125 of the URAA as a method for Congress to withdraw its approval of the WTO as opposed to a limit on the president's power to withdraw from the WTO via authority sourced elsewhere. U.S. Trade Representative Robert Lighthizer used language similar to that in the SAA when asked if the URAA prevents the president from withdrawing the United States from the WTO without approval from Congress.[79] Lighthizer did not state that the URAA limited the president's ability to withdraw from the WTO. A joint report of the Senate Committees on Finance, Agriculture, and Government Affairs on the URAA uses similar language to describe Section 125. The joint Senate Committee report describes it as "a mechanism through which the Congress may withdraw the approval of the U.S. participation in the WTO granted under section 101(1) of the bill." The House Ways and Means Committee took a somewhat middling interpretation of Section 125 of the URAA in its report on the legislation. The committee wrote that it did not "desire" to leave a determination over whether remaining in the WTO is in the best interest of the United States "totally in the hands of the executive branch but to be active in determining whether the WTO is an effective organization for achieving common trade goals and principles and for settling trade disputes among sovereign nations."

While authority to withdraw from the WTO is a murky question likely only to be answered by the Supreme Court, two other important powers are clearly defined between the president and Congress: the president cannot by himself repeal U.S. law, and the president does have authority to change tariff rates. The president's inability to repeal

U.S. law ties his hands in unilaterally ending U.S. compliance with WTO rules to the extent they are embedded in U.S. law, regardless of whether he has ordered the U.S. to withdraw from the WTO. The URAA, a law, implements 16 multilateral agreements and the plurilateral Agreement on Government Procurement.[80] At the time of signing, much of U.S. law already aligned with the obligations in those 16 agreements. The URAA, however, did enshrine in U.S. law some notable WTO obligations. It requires U.S. trade remedy methodologies to align with the WTO Agreement on Subsidies and Countervailing Measures and the WTO Antidumping Agreement. It ensures U.S. agricultural export programs are consistent with export subsidy commitments under the Agricultural Agreement. The URAA also amended U.S. law in line with the Agreement on Technical Barriers to Trade, the Agreement on Sanitary and Phytosanitary Measures, and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Even if the president were to withdraw the United States from the WTO, there is no clear path for him to nullify U.S. WTO-consistent obligations implemented via legislation.

The president does, however, have broad authority to adjust U.S. tariffs. Congress delegated tariff authority to the president after the disastrous experience with congressional-set tariff rates in the Smoot-Hawley Tariff Act. Using that authority, the president could flout our WTO obligations by raising U.S. tariffs without formally withdrawing the United States from the WTO. Tariff hikes would result in rapid retaliation from other WTO partners which would further erode the rules-based trading system. The president derives authority to increase tariffs from several U.S. laws. Section 125(b) of the Trade Act of 1974 provides the president the authority to revoke presidential proclamations implementing tariff reductions under trade agreements, the main method of tariff reductions since the Reciprocal Trade Agreements Act was passed in 1934. Section 125(c) of the 1974 Act provides the president the authority to increase U.S. tariffs up to 50 percent above the rate in column 2 of the U.S. Harmonized Tariff Schedule or 20 percent above the rate in effect for a given country on January 1, 1975. Column 2 rates are applied to countries that the United States does not have normal trade relations with and generally are the rates set under the Smoot-Hawley Tariff Act. Section 125(e) of the 1974 Act does curb the president's tariff raising authority by requiring that U.S. tariff levels remain in effect for one year after the termination of an agreement. The president can maneuver around that section, however, by not withdrawing from a trade agreement and simply raising tariffs.

The president has other sources of authority to raise tariffs. Section 301 of the 1974 Act allows the Office of the U.S. Trade Representative, at the direction of the president, to respond to foreign acts, policies, or practices that are "unreasonable or discriminatory and burdens or restricts United States Commerce." Section 122 of the 1974 Act allows the president to address "large and serious United States balance-of-payment deficits" by imposing import duties not exceeding 15 percent ad valorem on top of existing duties, import quotas, or a combination of duties and quotas. The duties expire after 150 days absent an extension by Congress. Section 232 of the Trade Expansion Act of 1962 provides the president with an avenue to impose tariffs to ensure national security is not impaired. The president also has largely untested authority under the International Emergency Economic Powers Act (IEEPA) to respond to an "unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States."

These statutes are not untested. The Trump administration's use of Section 301 to impose tariffs on Chinese goods has faced no legal challenge and no real threat from Congress. The Trump administration has survived, so far, a court challenge to its use of Section 232 to impose tariffs on steel and aluminum, although that case may ultimately wind up before the Supreme Court, which has upheld the constitutionality of Section 232 in past litigation.[81] President Trump flexed his authority to implement tariffs via IEEPA in June when he threatened a five percent tariff on all imports from Mexico unless Mexico took additional action to stem the flow of undocumented immigrants entering the United States from Mexico.

A president's decision to withdraw the United States from the WTO could result in at least four distinct legal scenarios, none of which have an upside for U.S. companies. In each scenario, the initial order to withdraw from the WTO would by itself cause massive economic uncertainty and shatter confidence in global markets. The lack of clarity about the practical implications of a withdrawal order and the potential for the United States to remove itself from the global trading system that has been in place for decades would send businesses around the world into an unprecedented frenzy of damage control. Speculation and uncertainty would lead investments to be put on hold, supply chain managers would immediately begin to work on scenarios to mitigate expected U.S. tariffs and retaliation, risk premiums would skyrocket, financial markets would turn into rollercoasters, and prices for goods and services would rapidly increase.

CONGRESS OR THE PRIVATE SECTOR COULD SUE THE ADMINISTRATION OVER WTO WITHDRAWAL

For a member of Congress to sue the president on behalf of the entire body, she or he must also obtain approval from a majority of either the House or Senate.[82] For a court to hear such a claim, the plaintiff must allege three things: injury-in-fact, it must be "fairly traceable" to the conduct in question, and the court must be able to fix the issue with the remedy requested.[83] Injury-in-fact necessitates that the issue is ripe and particularized enough.[84] This threshold is particularly great when the Court is asked to decide whether another branch of government's conduct is constitutional.[85] Further, where there has been no vote nullification but merely "abstract dilution of institutional power," the claim will not meet the standing requirement.[86]

While *Goldwater v. Carter* provided the standard for individual members of Congress to establish standing, *Riegle v. Federal Open Market Committee* clarified that "complete disenfranchisement" through presidential unilateral action was not the end of the test.[87] To avoid automatic dismissal, the plaintiff must show that the member cannot "obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute."[88] Given the broad grant of power from the legislative to the executive branch in the URAA, the Trade Act of 1974, and the latest fast track legislation,[89] the Court may dismiss a suit brought by lawmakers for failure to modify the president's role in those statutes via legislation rather than filing a claim in court.

Beyond those arguably insurmountable hurdles, the congressional plaintiff must also assert a remedy that the court can feasibly order. If the president unilaterally withdraws from the WTO, there are issues of whether that power was statutorily granted to him and can, therefore, be changed through bipartisan efforts.[90] If the president has yet to

withdraw but continues to threaten the institution, there are issues of ripeness and whether an injunction would adequately cure the issue.

Although tangentially related to the standing issue, the courts would also be faced with the political question doctrine—or the court's practice of avoiding determining policy decisions that are constitutionally delegated to the legislative or executive branch. Although prior practice and the rule itself counsel against judicial involvement, Chief Justice Roberts in *Zivotofsky I* argued reviewing the separation of powers "is what courts do."[91]

Sub-Scenario 1: The president orders withdrawal from the WTO and is blocked by a veto-proof majority of Congress via legislation to keep the United States in the WTO and maintain WTO bound tariff rates

This scenario would trigger short-term business downsides but prevent the worst economic damage by ensuring the United States maintains its WTO obligations, including its bound tariff rates. Veto-proof legislation would also send a strong signal to the international community that the United States by and large supports the WTO and intends to remain a part of the rules-based trade system. This scenario would also provide Congress strong legal footing in a battle over attempts by the president to increase U.S. tariffs via other means, such as Section 301, 122, or 232, if the justification for those increases is not solid.

Sub-Scenario 2: The president orders withdrawal from the WTO, is sued by Congress, and wins in court, although the URAA stays on the books

This outcome would likely cement the president's authority in the international trade arena over that of Congress, although the economic downside of withdrawal would be somewhat limited by the URAA remaining as law. The president would be free to set tariff rates as he sees fit, including in a discriminatory fashion. Likewise, foreign countries, regardless of their WTO membership, would be able to raise tariffs and impose other nontariff barriers that would otherwise be in breach of WTO agreements on U.S. goods and services if their domestic law allowed for those nontariff barriers. The six-month notice period required under the GATT would provide a window for business to prepare a mitigation strategy, but the level of disruption caused by withdrawal would be largely unmanageable in that timeframe. If litigation took longer than six months, an injunction by the courts to block withdrawal until the conclusion of the case could provide businesses more time to prepare.

Foreign governments may respond to U.S. tariffs by subsidizing their exports, further distorting international markets. Retaliation via tariff and nontariff barriers would be inevitable. Governments could target U.S. services companies by imposing customs duties on electronic transmissions with U.S. content or that pass through servers located in the United States. Consumers and companies in the United States could face foreign taxes for "liking" a picture, sending a text message or email abroad, or streaming products from abroad. Consumers in the rest of the world could be hit with penalties for streaming from U.S. companies like Netflix; using search, advertising, or mapping services provided by Google; or using Microsoft of Amazon cloud services to store files or carry out business operations. The potential barriers to trade would be limited only by a country's creativity in this scenario.

Sub-Scenario 3: The president orders withdrawal from the WTO, is sued by Congress, and loses in court

This scenario would have an economic impact similar to that of scenario one, although the period of uncertainty would be longer and there would be significant legal fallout. As in the previous scenario, whether the court issues an injunction to block withdrawal if the case takes longer than six months will be critical for businesses. Victory by Congress in the courts would cement the legislative branch as the premier arbiter of trade authority and may carry implications on a range of other issues previously discussed depending on the details of the court decision.

Sub-Scenario 4: The president orders withdrawal from the WTO, is sued by a business, and the business wins

Given the significant constitutional hurdles that Congress would need to overcome before trying a case, a more viable scenario would include a business as the plaintiff. While the political question doctrine would continue to plague any claim, notions of standing or injury would likely not hinder a case from moving forward.[92] Further, whether a judge would issue an injunction to prevent any catastrophic effects of unilaterally withdrawing from the WTO are dubious in this scenario given there is already a six-month buffer.[93] If the president opted to raise tariffs immediately, a business could conceivably calculate the immediate financial losses associated with losing the benefits of WTO bound rates and the effects it would have on investment or the feasibility of its supply chains. While an injunction could delay effects of the unilateral action, the ultimate disposition of the case would take time, thereby prolonging the costly effects of uncertainty. Ultimately, the case would center on constitutional authority to act unilaterally and perhaps even whether congressional interference after-the-fact could be retroactive.[94]

Option 3: Reform

The Scenario

In this scenario, outstanding conflicts centered on and at the WTO are resolved, and the WTO undergoes a period of reform. Outcomes could include a resolution to the Appellate Body crisis; an agreement to discipline harmful fisheries subsidies; improvements to the WTO notification and transparency regime; new rules to govern subsidies, state-owned enterprises, forced technology transfer, and digital trade; and improvements to the developing country status issue. The latter issue is of particular importance in moving multilateral negotiations forward at the WTO. Allowing countries to continue to self-identify as developing and take advantage of "special and differential treatment" in the form of longer time periods to implement WTO obligations and other flexibilities has increasingly become an irritant to the large economies.

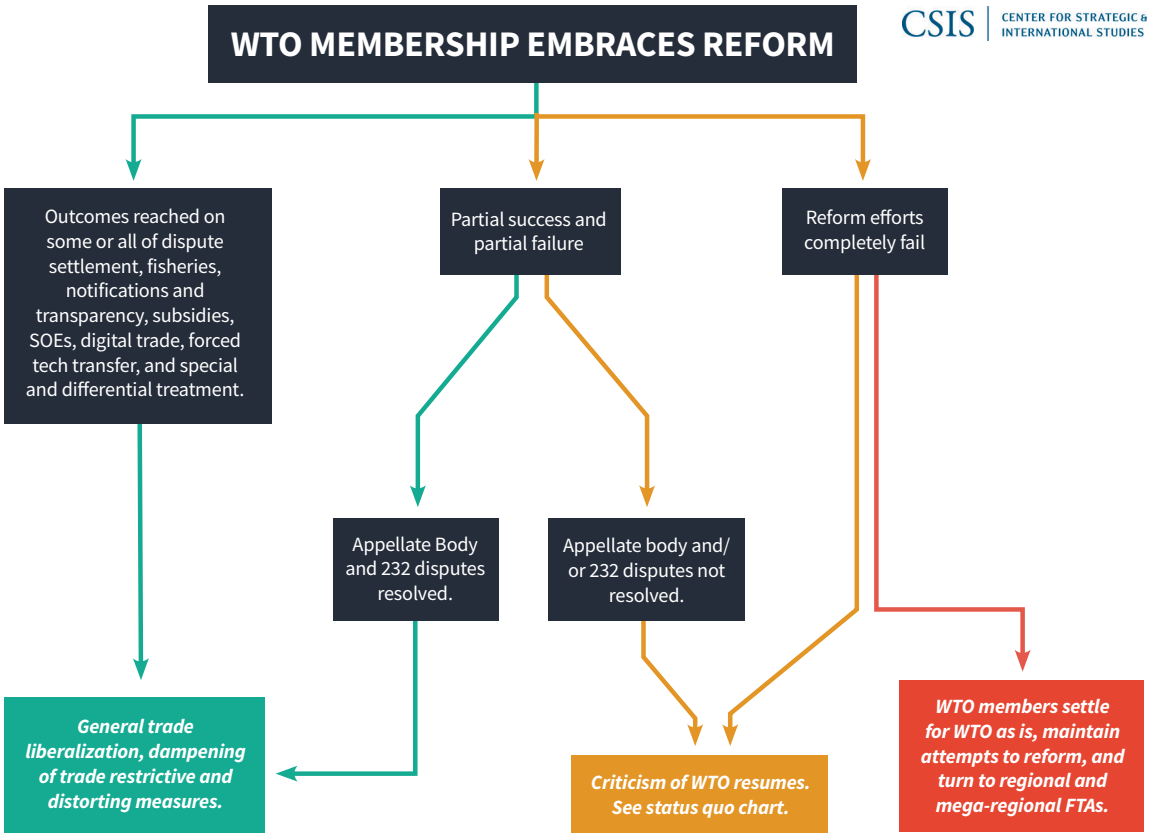
While structural reforms could be agreed to on a multilateral basis, the more likely scenario would be agreements among groups of like-minded countries in a plurilateral format due to insurmountable challenges that continue to plague multilateral negotiations at the WTO. Plurilateral agreements, however, might then lead to pressure to expand them to all members. Membership of the ITA could expand, as well as its product coverage. Discussion of non-tariff barriers among ITA members would continue, even if actionable results remain distant. Overall, WTO reform will buoy the global rules-based trading system, lead to further trade liberalization, and dampen trade-restrictive and trade-distorting measures. This outcome would allow for more flexible supply chains, expand markets overseas, and generate predictability and certainty in the global economy.

Multiple areas of the WTO need reform, and new rules are needed to bring the modern economy under stable, predictable, and equitable global trade rules. To ensure the crown jewel of the WTO, the dispute settlement system, does not fall into permanent disarray, a resolution to the Appellate Body issue is necessary. A long-term, fundamental solution to issues stemming from the national security exception also will need resolution to prevent recurring crises at the WTO. The longstanding approach to special and differential treatment will need a facelift for negotiations in new areas to move forward on a multilateral basis. Rules to incentivize compliance among the WTO membership with notification obligations are also a likely prerequisite to advancing multilateral negotiations. Without laying the groundwork for successful multilateral negotiations,

the dispute settlement system will continue to be overloaded with cases and appeals as members attempt to use litigation to achieve objectives that should otherwise be sought through negotiation.

Progress in new workstreams is also necessary for the WTO to remain relevant in a rapidly changing global economy. A deal to craft disciplines on harmful fisheries is mandated by world leaders via the United Nations Sustainable Development Goals and is seen by many is a litmus test for the WTO's ability to negotiate new rules. Progress on establishing rules for e-commerce, and perhaps digital trade more broadly, would be an important sign that the WTO is up to the task of crafting rules for the most relevant issues of the day.

Figure 3: Reform Options



Issue 1: Dispute Settlement

Absent reform or resurrection of the Appellate Body, disputes will be stuck in limbo, raising questions about the organization's viability. As explained in Part II, WTO members have the right to appeal dispute settlement panel decisions. Without a functioning Appellate Body, members could appeal panel decisions to prevent those decisions from being adopted with the result of stalling the dispute settlement process and preventing proceedings from moving to the retaliation phase, severely disadvantaging members that

opt not to retaliate or protect their industries at risk outside of the procedures laid out in the Dispute Settlement Understanding.

The most straightforward resolution to the Appellate Body crisis would be for the United States to have a change of heart and agree to a process to nominate new Appellate Body members and fully restore the roster. This option is unlikely during the Trump administration without some changes to the Appellate Body or dispute settlement process overall. Therefore, the Appellate Body as it has traditionally existed is unlikely to be revived before the next WTO Ministerial Conference in June 2020 and may be defunct through 2024, depending on President Trump's success in the 2020 elections. Irrespective of President Trump's success at the polls, successive U.S. administrations have not been fond of the Appellate Body.[95] A new administration is not a guarantee of an end to the Appellate Body blockade absent negotiations.

A negotiated solution to the Appellate Body could take different forms. WTO members could agree to rules aimed at limiting the judicial activism of the Appellate Body, such as shorter terms for Appellate Body members to provide WTO members more regular opportunities to check Appellate Body members and potentially prevent their reappointment. WTO members could also address a major source of U.S. frustration with the Appellate Body by creating a separate Appellate Body roster to hear cases involving trade remedies or ban appeals in trade remedies cases all together (most of the cases where the U.S. has been the respondent involve its application of its trade remedy laws).[96] Banning appeals of trade remedy cases would resolve U.S. accusations that the Appellate Body has eroded the United States ability to flexibly use trade remedies. A separate roster of Appellate Body members to hear trade remedy cases would allow WTO members to select trade remedy experts to hear relevant cases, which could also assuage some U.S. concerns.

Successful reform of the Appellate Body and dispute settlement function may restore some business predictability over the long term, but overuse of the dispute settlement system will persist without the removal of roadblocks the negotiating arm faces. If negotiations continue to move at a lethargic pace and in a noncompromising spirit, countries will continue to use litigation at the WTO to accomplish goals they otherwise should be seeking through negotiation.

As the United States has not yet offered concrete Appellate Body reform proposals, other WTO members have stepped up to the plate. The European Union along with China, Canada, India, Norway, New Zealand, Switzerland, Australia, South Korea, Iceland, Singapore, and Mexico offered a joint proposal in November 2018 aimed at resolving U.S. concerns by amending the Dispute Settlement Understanding.[97] The proposal clarifies that outgoing Appellate Body members may conclude appeals they are working on after their term has expired if the first hearing in the appeal has occurred. The joint proposal allows disputing members to agree to extend the 90-day deadline for an Appellate Body report if the Appellate Body is unable to finish its work in 90 days. Absent an agreement, the parties and Appellate Body could reach an agreement to limit the scope of an appeal or take other measures to ensure it is completed as soon as possible. The joint proposal also seeks to ensure the Appellate Body exercises judicial economy and makes clear that the meaning of domestic laws is not subject to appeal. On the issue of the Appellate Body treating its reports as precedent-setting, the

joint proposal would establish annual meetings between the Appellate Body and WTO members to discuss trends in jurisprudence.

A separate November 2018 joint proposal from the European Union, India, and China would have Appellate Body members serve a single term of six to eight years instead of a four-year term with the possibility of serving an additional term upon a second nomination and approval from the WTO membership.[98] The proposal would also increase the number of Appellate Body members from seven to nine. The United States has rejected those proposals, arguing that they would make the Appellate Body more independent from the WTO membership.

A proposal from Taiwan takes a somewhat different approach to Appellate Body reform but shares some prescriptions with the EU proposal.[99] Taiwan has suggested that WTO members develop guidelines for the future functioning of the Appellate Body with three core goals. First, to clarify, restate and emphasize, or describe the underlying objective of existing DSU provisions that set out how the Appellate Body may function. Second, the guidelines should clarify points of tension among some DSU provisions, such as the dueling obligations for the Appellate Body to address "each of the issues" at hand in a dispute and the need for "prompt settlement" of disputes.[100] Third, the guidelines should establish a process for WTO members to better enforce the obligations of the DSU on the Appellate Body. That process could include annual meetings between the Appellate Body and WTO members or a mechanism for external review of the Appellate Body. Finally, Taiwan suggests that members consider increasing the number of Appellate Body members or expanding its timeframe to issue reports if the Appellate Body fails to meet its 90-day deadline to issue reports after the guidelines are imposed. The United States may be open to the three core goals in principle, although it opposes increasing the number of Appellate Body members.

Honduras has suggested in its proposal that a middle ground can be found on the issue of whether panel and Appellate Body reports establish precedent.[101] One suggestion is that members could agree that a dispute settlement report forms precedent only by unanimous consent. Another suggestion relies on the "rule of reiteration." If a certain WTO rule is interpreted the same way a number of times by the Appellate Body, it could automatically be considered to have set a precedent for how that rule should be interpreted. Another iteration of this concept would allow members to adopt via unanimous consensus an interpretation of a WTO rule if it had been interpreted the same way across multiple cases. A final suggestion from Honduras that the United States would likely oppose is to allow the Appellate Body to be instructed to endorse a certain interpretation of a rule made in a previous report if Appellate Body members are unanimous on that interpretation.

The most responsive of any of the Appellate Body proposals to U.S. concerns is that from Brazil.[102] The proposal clearly establishes that Appellate Body reports must be issued within 90 days of the start of the appeal unless otherwise requested by the parties to the dispute. The proposal explicitly states that factual findings from panel reports may not be reviewed by the Appellate Body, that the Appellate Body and panels are restricted to only making findings on issues relevant to settling the given dispute, and that panel and Appellate Body reports do not set precedent. The proposal also states that if an Appellate Body member's term has expired while they are working on an appeal, only the WTO

membership may authorize that person to continue working on the appeal. This reform directly responds to a U.S. complaint that the Appellate Body has exceeded its authority by authorizing Appellate Body members whose terms have expired to continue working on appeals despite no authorization being given by WTO members.

The European Union has also circulated a proposal to use DSU Article 25 arbitration to settle appeals if the Appellate Body becomes inoperative.[103] The mechanism would operate dispute-by-dispute and not require approval from the entire WTO membership. Under the proposal, the European Union and the other party to a dispute would agree not to appeal the relevant dispute per the DSU but instead agree to replicate the standard appeals process under Article 25. Appeals would be heard by former members of the Appellate Body, who would receive support from the WTO Appellate Body Secretariat. The proposal is more of a workaround to the U.S. blockade on the Appellate Body than an attempt to reform it in a way that would satisfy the United States. The EU proposal would return some certainty to the dispute settlement process, but its utility is limited for two reasons. First, the United States would likely not participate in an appeals process that addresses none of its complaints, putting a major economy and the most frequent participant in WTO disputes outside the system. Second, countries pessimistic about their odds of success in a dispute might prefer to appeal the panel decision into a defunct Appellate Body, stalling the dispute settlement process altogether.

Article 25 aside, disagreement over the European Union's Appellate Body reform proposal sheds light on the fundamental divide between the United States and European Union on the proper function of the Appellate Body and more generally the divide over how the WTO agreements are perceived by the two governments. The United States has taken the view that the WTO agreements are a contract. Obligations are as written in the agreements—nothing less and nothing more. The Appellate Body serves only to review panel decisions in that context. In contrast to the more originalist position of the United States, the European Union appears to have taken a view that the WTO agreements are living documents and the Appellate Body is an important part of the exploration of WTO jurisprudence, similar to the European Court of Justice's function as it relates to the European Union. In that context, the gap that must be bridged to resolve the Appellate Body crisis is as wide as the philosophical gap between the United States and the European Union.

Issue 2: National Security

With the national security exception now cited by three WTO members, members will need to coalesce around an understanding of how to deal with disputes over the use of the exception in a way that does not place immense stress on the WTO itself. Continued use of the panel process to settle national security disputes risks alienating major users of the WTO dispute settlement system, including the United States. Major members could grow increasingly uncomfortable with panels of trade law experts with no domestic legal authority passing judgment on what are acceptable measures to protect national security. That discomfort could lead to disregard for panel decisions and other WTO norms, or outright withdrawal from the WTO.

WTO members could embrace a number of reforms to mitigate the fallout from challenges to the use of the national security process. Panels could be barred from reviewing national

security cases. In the place of typical dispute settlement, members could agree on a process of consultation, negotiation, and offsetting withdrawal of trade concessions from the member taking the trade-restrictive action to resolve disputes over the use of the national security exception.[104] In this case, the WTO Director-General could provide "good offices" to assist members. WTO members could also opt simply to accept the decision framework established by the panel in the Russia-Ukraine dispute, although that might leave some members still uncomfortable.

Issue 3: Fisheries

Successful negotiations creating a multilateral agreement to discipline harmful fisheries subsidies is largely viewed as a litmus test for the future of the WTO's negotiating function. Securing a deal by 2020 has become increasingly important given world leaders undertook the task as part of the United Nations Sustainable Development Goals. A fishery subsidy agreement is one of the few areas of WTO negotiations where heads of state and government have firmly tasked their trade envoys to get an agreement within a certain period. Differences over special and differential treatment and other issues will have to be worked out for a deal to be ready for trade ministers to sign at the next WTO Ministerial Conference in Kazakhstan in June 2020.

In March, the United States and Australia circulated a proposal that addresses fisheries subsidies on the basis of a country's marine capture and exports.[105] By tying obligations to a members' marine capture and exports, the U.S.-Australia proposal seeks to avoid the often inflexible debates over special and differential treatment for developing countries.[106] For example, the United States, China, the European Union, Indonesia, India, Canada, and Australia are all considered to be of the same status under the U.S. proposal due to those countries' share of global marine capture or exports despite those countries traditionally being placed in different categories for purposes of S&D.

In June, China and India offered fisheries proposals of their own. China's proposal is based on subsidies spending and specifically calls for S&D, while India's proposal is simply a template for S&D provisions to be added to a fisheries agreement.[107] China's proposal would allow members to choose to cap fisheries subsidies using one of three options: a subsidy cap equal to an unspecified percent of the average base for capping which generally covers fisheries subsidies, a subsidy cap equal to an unspecified percent of the average landed value of a member's total wild marine capture, and a subsidy cap equal to an unspecified percent of the amount of the global average base for capping per fisherman multiplied by the number of fishermen of a member. China's proposal does not include a ban on subsidies for illegal, unreported, and unregulated fishing while the U.S.-Australia proposal would ban such subsidies. China's inclusion of S&D is likely to be a nonstarter for the United States, as is India's proposal for sweeping S&D to be included in any deal. S&D is important in the context of fisheries, given the fact that China and Indonesia regularly request S&D yet are the top two countries by marine capture. Other countries that regularly request S&D, including India, are among the top 20 countries by marine capture.[108]

In the spring of 2019, trade ministers called for "text-based negotiations" to begin and warned that without an uptick in the pace of talks, a deal by the end of the year would not be possible.[109] Given the nature of the issue—the relative unimportance of developing status

distinction for the purposes of combating overfishing—and China's unwavering views on maintaining its status, negotiations have not made meaningful progress. Ultimately, failure to reach a deal by the conference date would call into question the WTO's overall use as a useful trade negotiation forum, while success would be a shot in the WTO's negotiating arm.

Issue 4: Notification and Transparency

Improvements in members' notifications and trade measure transparency at the WTO would restore some credibility to the institution and help lay the groundwork for further negotiations and trade-liberalizing efforts. Absent knowledge of what trade-distorting measures are in place, negotiators will have a difficult time focusing on the most important issues. Transparency at the WTO also provides countries opportunities to question, name, and shame members who maintain measures that are inconsistent with WTO rules. That process may pressure countries into amending trade-distorting measures and avoiding drawn-out trade disputes. In April, the United States tabled a proposal to encourage compliance with notification obligations. The proposal would penalize countries that repeatedly fail to meet notification obligations. A number of countries have cosponsored the proposal, including the European Union, Japan, Canada, New Zealand, Australia, and Taiwan.[110]

Issue 5: Special and Differential Treatment (S&D)

There are several possible reforms to the special and differential treatment system at the WTO that would relieve negotiating difficulties stemming from the status quo regime. The United States has proposed that countries would no longer be allowed S&D if they are determined to a be a "high income" country by the World Bank, are OECD members or acceding members, are a G20 nation, or account for 0.5 percent or more of world trade.[111] It is unlikely that the U.S. proposal will be formally adopted by all WTO members out of self-interest; however, it could be adopted on an ad hoc basis. For example, following a summit with President Trump, Brazil's President Jair Bolsonaro announced that Brazil would no longer define itself as a developing country in WTO negotiations. At the same meeting, the United States announced that it would support Brazil's accession to the OECD.[112]

A proposal from the European Union would shift S&D from a black and white concept—a country is either developing and receives S&D or is not developing and is subject to full obligations—to a spectrum in which countries at varying levels of development receive commensurate flexibilities. Those flexibilities would be conditioned on the developing country agreeing to receive technical assistance to fully implement the obligations in a given agreement.[113] This proposal is likely easier to deploy than the U.S. proposal because it does define development status through rigid categories. The EU proposal does not require a country to identify as developing or developed. Ignoring development status, the EU proposal simply seeks to plug gaps in capabilities to ensure that all countries are positioned to eventually fulfill their WTO obligations.

Either of those proposals would unlock greater trade liberalization over time. Greater flexibility provided by the EU proposal would allow countries closer to developed status to take on additional obligations compared to less developed countries. Technical assistance would accelerate developing countries' ability to take on full obligations in

new agreements. Under the U.S. proposal, S&D would still be a black and white issue, but far fewer WTO members would qualify. Mexico, Turkey, Israel, South Korea, Chile, Costa Rica, and Peru would no longer qualify as they are either OECD members or in the accession process. India and China would not qualify due to their share of global trade and membership in the G20. Indonesia, Saudi Arabia, and Turkey would no longer qualify due to their membership in the G20. Either proposal would bring clarity to S&D in future WTO negotiations, improving the overall negotiating environment.

Issue 6: Upgrading the Rulebook: Subsidies, SOEs, and Technology Transfer

Successful trilateral negotiation between the United States, the European Union, and Japan on subsidies (particularly those that contribute to overcapacity), the role of state-owned enterprises (SOEs) in markets, and rules to pushback on forced technology transfer requirements as a condition for market access could lead to wider adoption by the WTO membership. However, a successful conclusion of the trilateral exercise is not a given, much less adoption by other WTO members. One stumbling block the trilateral group will have to overcome to reach an agreement is a definition of subsidies that do not capture their own subsidy programs, a concern voiced by the European Union this spring according to the press.[114] Widespread adoption of upgraded disciplines in those areas could mitigate IP theft and overcapacity in new technologies that receive support from SOEs or are produced by SOEs, including semiconductors, new energy vehicles, advanced batteries, and more. Additional obligations have been discussed in the context of the U.S., EU, Japan trilateral and could include information sharing and new criteria to determine if market-oriented conditions exist within a country or sector. The three countries are interested in creating a new definition of "public body" to better cover SOEs that provide financial contributions to other firms as well as firms in which the state controls less than 50 percent equity but still exerts control over decision making. The trilateral group is also seeking rules to address market-distorting behavior of entities that are not "public bodies" under the current definition but still are controlled by the state as well as new disciplines for SOEs and public bodies.

Rules could also be developed to directly address subsidies that contribute to structural overcapacity. Structural overcapacity occurs when production capacity exceeds levels needed to meet demand for a product outside of an event that causes a sudden decrease in demand for that product.[115] Policies which lead to structural overcapacity are usually driven by political—not economic—considerations, as well as poorly managed industrial policy and the desire to dominate global markets.[116] Such policies include government financial assistance to firms at non-market terms, subsidized inputs such as energy and land to depress production costs, and discouragement or outright prevention of bankruptcies. The steel, aluminum, glass, cement, and solar industries in Western countries have already been harmed by structural overcapacity in China fueled by subsidies to SOEs or subsidies from SOEs to input providers of those products. Semiconductors, advanced batteries, aircraft, robotics, information and communications technology products, maritime equipment, advanced rail products, new energy vehicles, medical devices, and more may be the next victims of Chinese overcapacity.[117] Industries of the present and future that operate in market-based economies cannot keep pace with competitors that are provided financial benefits by the Chinese government or

SOEs on non-commercial terms. Such benefits drive global prices down, eat into profits, and deter employment in market-based economies. Overcapacity inhibits the healthy competition between firms that drives innovation. Firms that receive subsidies and drive overcapacity have few immediate reasons to wean themselves off government assistance, while government leaders—usually at the local level—that provide subsidies are driven to do so out of fear of unemployment and weakened domestic economic conditions in their regions. At the same time, overcapacity often results in low capacity utilization rates across industries, resulting in wasted resources, depressed wages, and narrow margins. In turn, less capital is available for research and development, inhibiting innovation in the market driving overcapacity, preventing firms from moving up the global value chain, and leading to further reliance on subsidies.[118]

Clearly, overcapacity and the subsidies which contribute to it distort global trade. The WTO Agreement on Subsidies and Countervailing Measures (ASCM), however, does not explicitly address such subsidies, and some may not even be subject to countermeasures authorized by the WTO.[119] Countries whose industries are harmed by overcapacity should not be left to hope that governments driving overcapacity embrace market-based reforms and remove subsidies and the broader domestic conditions that drive overcapacity. Instead, WTO members could negotiate new rules that provide for defense against subsidies that drive overcapacity. Such rules should be stringent, as proposed by the United States, the European Union, Japan, and Mexico, which in 2017 described subsidies that contribute to overcapacity and are not covered by the ASCM as having effects on trade "the same as—if not worse than—export subsidies," which are prohibited under WTO rules. Updated definitions of "public bodies" and updated rules on SOEs could be crafted with industrial overcapacity in mind, particularly as the line between public and private ownership is increasingly blurred in China.[120]

China's economic model is likely to be incompatible with new disciplines on SOEs. However, grafting those rules into regional trade agreements may effectively box China out of cutting-edge preferential arrangements unless it reforms its SOEs. The Trans-Pacific Partnership, now the Comprehensive and Progressive TPP, is one example of this approach. New rules to allow more effective countervailing duties in response to overcapacity may be of more defensive utility for businesses, particularly those that produce semiconductors, advanced batteries, aircraft, robotics, information and communications technology products, maritime equipment, advanced rail products, new energy vehicles, and medical devices, all of which could experience overcapacity at the hands of Chinese firms.[121]

Issue 7: E-Commerce

WTO rules on e-commerce could establish an important international framework in a fast-growing economic area that is devoid of global rules and provide proof that the WTO can negotiate trade rules for the twenty-first century economy. A framework open to all WTO members would generate business certainty in a realm currently governed by a smorgasbord of national and local rules as well as rules agreed to in free trade agreements. A WTO agreement would also set a floor for e-commerce rules expected to be adhered to by both developing and developed economies. A high-standard agreement (using the USMCA digital trade chapter as an example) may be difficult to negotiate due to dug-in positions on issues such as data localization, where there are a wide range of views among WTO members. Issues over privacy and personal data collection may also be difficult to resolve.

An agreement that creates rules that advance the ease of doing business online but does not address thornier issues like data localization and privacy would still be beneficial. A global approach to e-contracts and e-signatures, for example, would be welcomed by firms of all sizes. Establishing rules for digital customs procedures is also relatively low-hanging fruit that could have a positive impact on business efficiency. Rules to protect consumers from spam and online scams could also be ripe for agreement. Rules to prohibit data localization and forced disclosure of source code, encryption keys, and other similar items as a condition for market access will be more difficult to reach agreement on but would lay the groundwork for an open and level e-commerce playing field.

Permanently enshrining the ban on customs duties on electronic transmissions should be a priority in the negotiations. Doing so would lock in the ability for consumers to "import" digital goods—an e-book, movie, TV show, webpage, and so on—without paying a customs tax. Businesses and consumers take the moratorium for granted and its removal would cause massive disruption across economies. Making the moratorium permanent would remove a potential hostage in future WTO negotiations. Since its inception in 1988, the moratorium has been extended for two years at every WTO ministerial which leaves it vulnerable to use as a bargaining chip on unrelated issues. India, South Africa, and Indonesia are starting to waver in their support for the moratorium due to the loss of customs revenue for developing countries. Those countries have suggested limiting the scope of the moratorium to be more specific than the description of "electronic transmissions" agreed to in 1988.[122] Members of the e-commerce plurilateral negotiations could revisit that definition, particularly in light of the growing digitization of goods and advent of 3-D printing, the latter of which has the potential to reshape the goods trade landscape in the long-term. Indonesia has taken a step further and edited its harmonized tariff schedule to include a category for "software and other digital products transmitted electronically," thereby breaking the WTO moratorium.[123]

Many of the factors inhibiting developing countries from fully participating in e-commerce could be addressed with an e-commerce agreement, despite the hesitation or outright opposition to such a deal from many developing countries. Studies have shown that common barriers to participation in cross-border e-commerce include problems with e-signatures, data protection, online payment systems, connectivity, and infrastructure.[124] If those are addressed, rich and poor countries alike would benefit. Though negotiations have not officially commenced, many countries have issued statements on key elements of concern going into the e-commerce talks in general, these countries emphasize the need for transparent and nondiscriminatory rules in e-commerce. There is a general level of agreement among members that the agreement should set rules on paperless trading and e-signatures. A number of countries have expressed some interest in addressing cybersecurity cooperation and consumer protection as well. There is a difference in emphasis on bridging the infrastructure gap with developing countries, a topic only mentioned in discussion scoping papers by Argentina, Colombia, Costa Rica, Japan, Singapore, and Ukraine. Only the United States and Japan mentioned the prohibition of data localization laws, both calling for a full ban with very limited exceptions. Making permanent the moratorium on customs duties on electronic transmissions has been mentioned by some but not all participants in the pre-negotiations as an issue worth tackling. The 76 countries engaged in these preliminary discussions are motivated members who see the benefit of

connectivity and e-commerce. E-commerce talk participant countries average 50 percent faster connectivity growth rates and 25 percent greater internet penetration level.[125]

Summary of Initial Interests of Selected Countries in Provisions for a WTO E-Commerce Agreement

	Moratorium on Duties	***Paperless Trading and Signatures***	***Prohibition on Data Localization***	***Bridging Infrastructure Gap***	***Consumer Protection/ Security***
United States	X	X	X		X
New Zealand[126]		X			X
Argentina, Colombia, Costa Rica[127]	X			X	X
Brazil[128]		X			X
Japan[129]		X	X	X	X
Singapore[130]	X	X		X	X
Russia[131]		X			X
European Union[132]	X	X			X
Canada[133]	X				
Ukraine[134]	X	X		X	X
Australia[135]		X			

Note: "X" indicates that a member has indicated via a position, scoping, discussion, or other non-binding paper interest in including provisions on a given topic in an e-commerce agreement at the WTO. The absence of a topic in a non-binding paper does not indicate an unwillingness to negotiate on that issue.

Conclusion

The WTO is at a critical juncture. It is clear that major members of the WTO recognize that the status quo is unsustainable, and reform is needed, both in terms of the WTO's operations and its ability to grapple with the present and future economy. Opportunities for reform are ripe and a range of members have stepped up to propose paths forward on a variety of issues. Challenges remain, however. Chief among them is China's willingness to use its WTO membership for its economic gain while bending and breaching its own obligations. The Trump administration's bullying approach to trade policy and belief that it too can operate outside the system to right what it perceives as wrongs add another challenge to moving the WTO fully into the twenty-first century. Other systemic challenges to the WTO do not have a single root cause but can be attributed to some combination of a rapidly changing economy due to the pace of technological development, persistent economic inequality, slow political processes, and a renewed nationalist fervor in some countries that in the past led the charge for free trade. While the Trump administration has put forward some proposals to tackle important issues at the WTO, its actions, rhetoric, and overall approach to global trade rules undermine its leadership at the WTO at a crucial time.

If the status quo persists, several events could trigger further erosion in the global trade system—potentially to the point of collapse. Those include a decision in the Section 232 national security dispute and the aftermath of the Appellate Body ceasing to function in December 2019. WTO norms may continue to erode through chronic noncompliance with notification and transparency requirements and failure to negotiate new agreements among the membership. In sum, the status quo promises continued uncertainty for businesses; however, crisis may spur members into action to salvage and reform the WTO.

U.S. withdrawal from the WTO would disrupt global trade to an extreme degree. While this scenario carries a raft of legal questions—the answers to which carry practical implications—there is no net upside to withdrawal. Preferential trade between the United States and its free trade agreement partners would continue, but benefits would be limited for two reasons. First, the United States does not have trade agreements with major trading partners. Second, cumulative rules of origin do not exist across the free trade agreements the United States has ratified, which significantly limits the United States' ability to fully utilize its free trade agreement network. Following withdrawal, the Trump administration could make good on its promise of "reciprocal" trade by matching

U.S. tariffs with those of its trading partners. That would result in a significant increase in U.S. tariffs across the board. Last but not least, U.S. trading partners would no longer be obligated to follow the most-favored-nation and national treatment principles when trading with the United States, which would have serious ramifications for U.S. exporters and businesses operating abroad. A major reordering of supply chains and retreat inside the United States would be likely—and costly.

The reform scenario offers the most promise for businesses. In addition to being meaningful for sustainability, a deal on fisheries would be symbolically meaningful for the WTO and prove that the organization is capable of meeting twenty-first century challenges. New e-commerce rules would expand markets for digital and physical goods, lower customs costs and increase market efficiencies, and, if a high ambition agreement is reached, eliminate concerns over an emerging and costly trend towards data localization requirements. Innovative approaches to S&D would ease negotiations down the road and increase the likelihood of further trade liberalization. Added disciplines on SOEs, industrial subsidies, and forced technology transfers would bring trade-distorting tools not previously covered by the WTO under the aegis of the global trading system, providing stability and predictability for businesses and governments alike.

In the short-term, WTO members and businesses should brace for a period of uncertainty driven by the imminent collapse of the Appellate Body, further tension between the United States and China at the WTO and outside of it, and uncertainty regarding the WTO's ability to negotiate new rules. U.S. withdrawal from the WTO is unlikely at this point given its high economic cost and legal risk; however, actions that test or break WTO rules are likely to continue as President Trump appears more than willing to threaten or impose tariffs to generate leverage over other countries. Uncertainty may drive companies to invest in the United States but will also slow trade, limit the upside of that investment, and in the long run make the United States less competitive than it otherwise would be. U.S. membership at the WTO is not in question, but its leadership there is, along with the relevance of the WTO.

In the long-term, WTO members need to find a path forward on a range of issues, including China's economic model and participation in the WTO, the dispute settlement system, S&D, and digital trade. Finding a viable path will require flexibility among members and U.S. leadership that has not been exhibited in recent years. To put the WTO on track for a renewed twenty-first century, the United States will need to lead by example. Some of the risks the WTO will face in the coming years are a product of the United States' own making—overuse of the national security exception, imposing or threatening to impose tariffs beyond WTO bound rates, and kneecapping the dispute settlement system. The United States will first need to offer a viable path forward on those issues if it is to lead WTO rulemaking on new issues and reform outdated rules to grapple with the twenty-first century economy and China's rise. With deft leadership and a renewed appreciation for the potential the WTO holds, the United States can steer the WTO and global trade system along with it in a positive direction, if it so chooses.

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Endnotes

1 See the Reciprocal Trade Agreements Act of 1934.

2 The most-favored-nation principle requires WTO members to extend the favorable trade terms granted to another WTO member to all WTO members. The national treatment principle requires WTO members to treat foreign companies the same as it treats domestic companies.

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