THE WORLD TRADE ORGANIZATION AFTER TRUMP

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ABSTRACT

The Trump Administration's imposition of steep and discriminatory tariffs on much of the world with which the United States trades is often seen as a fundamental attack on the World Trade Organization (WTO), which may not survive unless extreme measures are taken, such as the removal (or voluntary withdrawal) of the United States from the WTO. This article questions this narrative, arguing that there are strong reasons to believe that the WTO has the resilience to survive and evolve despite the tension between the transactional power politics of trade and the values of legalism and non-discrimination that are emblematic of the multilateral trading system embedded in the WTO. A historical perspective reveals that the multilateral trading system has always been confronted with gaps between the ideology and ideals surrounding trade multilateralism and, on the other hand, the reality of the system, where rules and their enforcement are shaped by power and where non-discrimination is often honored in the breach. The system has adapted and accommodated to power politics. Proposals to remove the United States from the WTO would themselves constitute violations of international law, as the WTO constitution or charter does not contain any provision for expulsion of a WTO Member, much less any objective criteria for so doing. In recent years, the WTO has pivoted to new roles and agendas—generally under the rubric of inclusive trade—that deviate from the rule creation and enforcement through dispute settlement focus that many observers still see as the entire basis for the WTO's existence. It is more equipped to withstand the current trade winds and to ride the waves than is appreciated by those with nostalgia for days when the WTO was widely seen as the poster child for neoliberal globalism in a neoliberal era, as well as for the post-Cold War liberal narrative of the global rule of law.

I. INTRODUCTION

Can the WTO withstand the Trump tariff shock, or is some kind of radical action needed if there is still to be a meaningful multilateral trading system? Even before the tariff shock of the last months, the WTO was frequently criticized as moribund or paralyzed.[1] But the Trump approach to tariffs seems a complete

[1] Kristen Hopewell, *The World Is Abandoning the WTO*, FOREIGN AFFS. (Oct. 7, 2024), https://www.foreignaffairs.com/united-states/world-abandoning-wto-china-leading-way-kristen-hopewell#; Benn Steill & Elizabeth Harding, *How Washington Killed the WTO*, BARRON'S (Dec. 12, 2024, at 10:14 EST), https://www.barrons.com/articles/how-washington-killed-the-world-trade-organization-biden-trump-f2505304.

antithesis to the values and ideals underlying the WTO rule of law, non-discrimination, predictability, certainty, and transparency in the regulation of trade. Paulsen and Ciuriak state the stark opposition between "rules-based governance" and Trump's "exercising coercive power and weaponizing the networked global economy for geopolitical and domestic economic objectives."[2] Baldwin warns: "The global implications are stark. By violating key World Trade Organization principles like non-discrimination and tariff bindings, Trump's tariffs risk cascading protectionism worldwide."[3]

Multilateral economic governance has, however, taken significant shocks in the past and lived to see another day. In the 1950s, the United States threatened to leave the General Agreement on Tariffs and Trade treaty (GATT) (the multilateral trade institution that morphed into the WTO in 1995) unless its member states found a way of accepting domestic U.S. agricultural policies despite their clash with GATT rules. In 1971, Richard Nixon unilaterally destroyed the gold standard as the anchor for international monetary relations—creating a revolution in global finance, and at the same time imposing an extra ten percent across-the-board tariff on imports.[4] The IMF and the GATT survived. Based on past crises, one should not underestimate the potential resilience of the WTO.

This paper is intended to provide a nuanced assessment of the possible consequences or outcomes for the WTO of the Trump tariff shock. Part I presents an inventory of the conflicts that exist between the Trump tariffs and the legal norms of the WTO. Part II seeks to move beyond the simple power against rules story to unpack the legalist ideology or narrative(s) surrounding the WTO—particularly the "rules enforcement" notion as well as the Most-Favored Nation (MFN) ideal of non-discrimination in trade. This paper illustrates how, throughout the GATT era but also ever since the WTO came into existence, there has been a gap between the ideology and ideals surrounding trade multilateralism and, on the other hand, how the WTO is a messy place where accommodations to power happen all the time, where rules and their enforcement are shaped by power, and where non-discrimination is often honored in the breach and equality is elusive. In Part III, this paper assesses proposals that have emerged in response to the Trump tariff shock, ranging from expelling the United States from the WTO to the creation of a new multilateral trade institution that would replace the WTO (but might exclude both the United States and China from its membership). In Part IV, this paper shows how the WTO has been, for some time, evolving and adapting in light of geopolitics and crises, pivoting to new or changed roles and priorities that reflect the waning of neoliberalism, the new geopolitics, and the challenges of emergency trade governance in situations like the pandemic. This has been a story that has been ignored by those who see the WTO as an institution that lives or dies by its ability

[2] Mona Paulsen & Dan Ciuriak, *The Case for WTO Collective Action* 5 (LSE Law Soc'y & Econ., Working Paper, Paper No. 19/2025, 2025), https://ssrn.com/abstract=5284221.
[3] Richard Baldwin, THE GREAT TRADE HACK: HOW TRUMP'S TRADE WAR FAILS AND THE WORLD MOVES VIII (CEPR Press 2025).
[4] *See* Jeffrey Garten, *When America Remade the World*, PRO. SYN. (Aug. 13, 2021), https://www.project-syndicate.org/onpoint/nixon-dollar-gold-standard-end-of-bretton-woods-by-jeffrey-e-garten-2021-08.

to create large new trade-liberalizing agreements and to enforce rules through legalized dispute settlement.

II. THE CHALLENGE OF TRUMP II TARIFFS TO THE WTO LEGAL SYSTEM

In assessing the gravity and significance of the second Trump Administration's (Trump II) tariffs to the WTO legal system, it is useful to disaggregate several different tensions between the tariffs as they have unfolded so far and the normal operation of the system.

1) First, and perhaps most obviously, at the center of the WTO system is a framework where ceilings on tariffs are negotiated and then bound, product by product, such that there is an obligation not to raise the tariffs beyond the ceiling that has been bargained for.[5] Whatever the logic driving the Trump Administration's (Administration) determination of the amount and scope of these tariffs, respect for these bound ceilings appears to play no part in its decision-making.[6]
2) Second, in enacting or threatening radically different rates of tariff for different countries (with radically different stated reasons), the Administration is ignoring what many considered the foundational norm of the multilateral trading system, the MFN principle.[7]
3) Third, the political and economic crises that these tariffs have created—in those WTO Members that are the targets of them—has led to retaliatory measures against the United States that break out of WTO rules.[8] Under WTO law, retaliation against breaches by other WTO Members is only legal after a binding determination in the dispute system and, after that, a reasonable period of time to comply, which can be up to 18 months.[9]
4) Fourth, and risking spillover in illegality to trade between WTO Members other than the United States, the prospect of a flux of imports due to a diversion from the now high-tariff U.S. market may lead WTO Members to restrict imports from *other* trading partners to prevent trade diversion; Canadian Prime Minister Mark Carney has already announced that Canada

[5] *See* GATT art. II, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
[6] There are quite a few cases where a WTO Member's actual tariffs (called applied rates) may be below the bound rate (the ceiling). In such instances, raising tariffs is not necessarily in tension with WTO law, provided the result is that in no case they exceed the bound rate. Appellate Body Report, *Chile Price Band-Report of the Appellate Body*, WTO Doc. WT/DS207/AB/R (Sep. 23, 2002).
[7] *See* GATT art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
[8] Christopher Shim & Will Merrow, *Here's How Countries Are Retaliating Against Trump's Tariffs*, WITA (Mar. 21, 2025), https://www.wita.org/atp-research/how-countries-retaliating-tariffs/.
[9] P. C. Mavroidis, *Remedies in the WTO legal system: between a rock and a hard place*, 11 EUR. J. OF INT'L L. 763, 813 (2000).

will enact more restrictive tariff quotas on imports of steel from non-U.S. sources as well as a surtax.[10]

5) Fifth, while it is too early to conclude their shape definitively, the trade agreements that the Administration has been negotiating with other WTO Members seem to have elements (such as preserving or even increasing tariffs in some cases, and only applying to certain economic sectors) that are inconsistent with the WTO rules for permissible preferential trade agreements (PTAs). To qualify under Article XXIV, a free trade area must include the general removal of trade barriers, including tariffs, across all, or almost all, products.[11]

As will be elaborated below, the Trump II tariffs are far from the first challenge to the multilateral trading system from a large Member avoiding or explicitly violating its obligations. So far, the confrontation has been limited in this case to trade in goods.[12] U.S. goods imports account for only around ten percent of world trade.[13] Services, untouched so far by Trump tariffs, constitute roughly twenty percent of all U.S. imports.[14] The current WTO legal system includes treaties on services, intellectual property, domestic regulatory measures, and trade remedies such as anti-dumping duties.[15]

As for contagion effects, such as retaliation outside WTO rules by other WTO Members or protectionism in the face of trade, points (3) and (4) above, these

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[10] Prime Minister's Office, Gov't of Can., *Prime Minister Carney Announces New Measures to Protect and Strengthen Canada's Steel Industry* (July 16, 2025), https://www.pm.gc.ca/en/news/news-releases/2025/07/16/prime-minister-carney-announces-new-measures-protect-and-strength.

[11] According to GATT, *supra* note 5, art. XXIV:8(b), "A free-trade area shall be understood to mean a group of two or more customs territories in which the *duties and other restrictive regulations of commerce* (except, where necessary, those permitted under [other exceptions in the GATT such as for health, environment, balance of payments concerns] are *eliminated on substantially all the trade* between the constituent territories in products originating in such territories." For a detailed examination of these and other criteria and conditions in Article XXIV, *see generally* Robert Howse & Joanna Langille, *Spheres of Commerce: The WTO Legal System and Regional Trading Blocs — A Reconsideration*, 46 GA. J. INT'L & COMPAR. L. 649 (2018).

[12] At one point, Trump hinted at imposing tariffs on foreign-made films, which would have spilled over to the services area. To my knowledge, this is not being pursued so far. *See* Alex Alexanian, *To Penalize Foreign-Made Films Is to Punish Americans Too*, L.A. TIMES (July 15, 2025), https://www.latimes.com/opinion/story/2025-07-15/foreign-film-tariffs-trump.

[13] Einar H. Dyvik, *Imports in the U.S. – Statistics & Facts*, STATISTA (Dec. 17, 2025) https://www.statista.com/topics/3840/us-imports/?srsltid=AfmBOoq1OKjpjY6lq0UqMn0563VjrWvRX7BWBkx6bi4Fbg_iNxR3akVC.

[14] *Id.*

[15] Robert Howse & Joanna Langille, *Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future* 117 AM. J. INT'L L. 1, 7–9 (2023).

so far have been overall quite modest[16] despite the concerning announcement by Canada's Prime Minister, cited above. In the case of (4) particularly, if anything, the WTO's relevance is *heightened* by the risk of trade diversion-driven protectionism, as the WTO is the forum in which the states affected can work through monitoring and peer review and pressure to avoid a race to the bottom of protectionist measures as they seek the address the need to rely more on each other's markets for imports given the reduction of market access to the United States. In the case of developing countries, the dramatic rise in South-South trade (and South-South free trade agreements) is a factor that is likely to make the race to find substitute markets less cutthroat, and less likely to provoke a protectionist spiral.[17]

III. Legalism and Non-Discrimination at the WTO: Ideology and Reality

The puzzle of compliance is endemic to the international legal order, and a pervasive theme in international legal scholarship. Like many domestic legal orders, international regimes can co-exist with sometimes high levels of non-compliance with their rules. As Ruti Teitel and I have explained, rule-compliance far from exhausts the normative impact of international legal orders—law can shift the discourse of international politics, create new meanings, engender new actors, and alter foreign policy agendas even where compliance is infrequent, or at least difficult to observe.[18] As will be explored in Sections III and V of this paper, the WTO is not just a rulebook to be followed, but a forum for policy dialogue and cooperation, information exchange, training and technical assistance in trade matters, as well as providing a hub for consideration of trade issues and policies that engage a wide range of other international organizations including the Organization for Economic Cooperation and Development (OECD) to the World Customs Organization, the World Health Organization, International Organization for Standardization, the International Monetary Fund and the World Bank.

Part of the extreme reaction to the tariff challenge to the WTO is unquestionably due to the dramatically disruptive Trumpian style. President Donald Trump projects indifference to, and sometimes defiance of, international law. In the WTO universe, this style clashes forcefully with a certain narrative, or mythology, of the WTO as a model or exceptional international legal regime where the rules are accompanied by enforcement mechanisms that can stand up to power.

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[16] *See* Peter Foster et al., *Trump Tariffs Swell US Coffers by $50Bn After World Relents*, FIN. TIMES, July 17, 2025, at 1 (noting "the timidity of the global response to Trump has forestalled a retaliatory spiral of the kind that decimate global trade between the first and second world wars.").

[17] *See The Reshaping of Global Trade: How Developing Countries Can Strategize*, UNITED NATIONS TRADE & DEV. (Oct. 29, 2024), https://unctad.org/news/reshaping-global-trade-how-developing-countries-can-strategize (noting that South-South trade has doubled between 2007 and 2023).

[18] Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOB. POL'Y, May 2010, at 127.

In her classic work *Legalism,* Judith Shklar articulated the gap she saw between the reality of how international law functions on the ground and what is considered an ideology of legalism that was promulgated by the international law professional community.[19] This ideology presents international law as something autonomous from, or an alternative to politics, or at least effectively resistant to power politics. For Shklar, the gap with reality is stark because "the principles of international law are not supported by effective institutions."[20]

Many observers, especially those supportive of multilateral trade liberalization, concluded that with the creation of the WTO, the international trade regime had finally closed this gap, thereby establishing itself as exceptional and superior in legalism to other international legal orders.[21] Under its prior incarnation as the GATT, the settlement of disputes remained subject to political control, and indeed veto.[22] A dispute panel could only be established by the consensus of the membership; an adoption of its finding was also subject to consensus.[23] By contrast, as I have set out elsewhere:

> [t]he Uruguay Round produced a dispute settlement of a judicial sort. The 'legalizing' or 'judicializing' features of the new system—compulsory jurisdiction and automatically binding dispute settlement reports (through the replacement of the positive consensus with the negative consensus rule), with the ultimate control of dispute settlement outcomes shifting from the membership (political/diplomatic control) to the new Appellate

[19] JUDITH N. SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 129 (Harvard Univ. Press, 1964).
[20] *Id.*
[21] Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflection on WTO Dispute Settlement*, *in* EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 344 (R. Porter et al. eds., 2001). I cite Weiler here for his articulation of the attitude; I am not suggesting he himself endorses it.
[22] *Adoption of GATT Dispute Reports,* WTO, *https://gatt-disputes.wto.org/disputes/overview/adoption-reports* (last visited Apr. 15, 2026, at 15:14 MST).
[23] *See Historical Development of the WTO Dispute Settlement System,* WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm ("Some key principles, however, remained unchanged up to the Uruguay Round, the most important being the rule of positive consensus that existed under GATT 1947. For example, there needed to be a positive consensus in the GATT Council in order to refer a dispute to a panel. Positive consensus meant that there had to be no objection from any contracting party to the decision. Importantly, the parties to the dispute were not excluded from participation in this decision-making process. In other words, the respondent could block the establishment of a panel. Moreover, the adoption of the panel report also required a positive consensus, and so did the authorization of countermeasures against a non-implementing respondent. Such actions could also be blocked by the respondent.") (last visited Apr. 15, 2026, at 15:14 MST).

> Body—have been repetitively invoked, as . . . to indicate a rule-of-law revolution or even a constitutional one.[24]

The resulting *ideology* of legalism in the WTO has had a range of "beyond compliance" normative effects, regardless of whether it has had the result of greater actual compliance with the rules than in the GATT era, which is doubtful.[25] First of all, legalism contributed to a WTO superiority complex in relation to other international legal regimes. These include regimes where normative perspectives might differ from the WTO on so-called "trade and" issues, such as environment, biodiversity, human and labor rights. If states have decided to provide these truly legalistic enforcement mechanisms to underpin trade norms, even extending to authorized countermeasures where a state fails to comply, it must mean that they take the liberalization of trade more seriously than the objectives of other international regimes. The latter may lack legalized enforcement mechanisms altogether, or, for example, permit individual state parties to opt out of accepting compulsory dispute settlement by an impartial independent tribunal. Some, like the libertarian WTO scholar and practitioner Ernst-Ulrich Petersmann, elevated WTO legalism to the notion of a global economic constitution.[26]

Other effects of WTO legalism cut in an opposite direction. The Appellate Body, a panel of judges, proved more open to pluralism values in deciding sensitive WTO disputes, such as the *Shrimp/Turtle* dispute, than did the liberal/neoliberal economist-dominated epistemic community in the GATT or WTO, which tended to skepticism as to whether trade restrictions could ever be efficient public policy instruments.[27] Until the Appellate Body asserted itself as an independent tribunal, dispute panel outcomes were often dominated by the Secretariat, where even the lawyers seemed to be influenced by this liberal/neoliberal attitude of putting free trade first, and minimizing the scope and meaning of exceptions and balancing provisions that protect non-trade values.

Yet another dimension of the WTO legalist ideology is the notion that equality before the law helps mitigate the power imbalance between states, that it is an important hedge against a pure power politics of trade, and a response to the complaints of developing countries, particularly in the GATT era, that powerful developed countries had been able to break out of the GATT legal framework or abuse its exceptions with impunity, especially in the case of agricultural trade.

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[24] Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L., 9, 19 (2016).

[25] *See* Adam S. Chilton & Rachel Brewster*, Supplying Compliance: Why and When the United States Complies with WTO Rulings,* 39 YALE J. INT'L L. 201, 210–11. Most of the compliance studies cited by Chilton and Brewster do not find that the legalism of the WTO has increased actual rule compliance relative to the more diplomatic, traditional international law regime of the GATT.

[26] *See* QUINN SLOBODIAN, THE GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 7–8 (Harv. Univ. Press 2018). For a prescriptive and descriptive critique of the constitutionalist account of WTO legalism, *see* Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?,* 16 GOVERNANCE 73 (2003).

[27] *See* Howse, *supra* note 21 (accounting comprehensibly this aspect of WTO legalism).

The ideology of legalism has also become the basis for a *critique* of the WTO, often with nostalgia for the prior GATT era. This critique, which Langille and I call the "Washington Critique," suggested that the assertiveness of the judicial branch of the WTO had gone too far and was a threat to American sovereignty. The United States had supported an Appellate Body, but not an overweening global supreme court for trade.[28] This Washington Critique, led by figures such as Robert Lighthizer and Claude Barfield, had deep roots in U.S. attitudes toward global economic governance. It was U.S. opposition that prevented the creation of the International Trade Organization (ITO), the original proposed Bretton-Woods institution to address; it presented as too much like a real supranational governing authority, and disputes could be referred under the ITO to the International Court of Justice, another institution that the United States would have a troubled relationship with.[29] When the results of the Uruguay Round negotiations came before Congress, and it was faced with the task of deciding whether to approve U.S. membership in the WTO, it was thought necessary to add a rider referred to as the Dole Amendment, which would have created a mechanism for domestic U.S. judges to review Appellate Body decisions where the United States had lost, with a possible ultimate outcome of withdrawal from the WTO. [30]The Dole Amendment, in the end, was not adopted. But its very consideration reflected the tenuousness of global trade legalism in the United States even before the ink on the WTO treaties was dry.[31]

A. The Limits of "Enforcement"

But did, in fact, the WTO, in its heyday, close the gap between legalism and reality asserted by Shklar? Most of the legalist narratives about the WTO assume this is largely the case, even the critical ones.[32] I see a rather more complicated picture.

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[28] Howse & Langille, *supra* note 15.

[29] Daniel Drache, *The Short but Significant Life of the International Trade Organization* (CSGR, Working Paper No. 62/00, 2000), https://wrap.warwick.ac.uk/id/eprint/2063/1/WRAP_Drache_wp6200.pdf.

[30] Gary Horlick, *WTO Dispute Settlement and the Dole Commission*, 29 J. WORLD TRADE 45 (1995), https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD1995040.pdf.

[31] Brewster and Chilton summarize the Dole mechanism as follows: "Senate Minority Leader Robert Dole offered legislation that would offer an 'escape' from adverse WTO rulings. The legislation called for the creation of a commission of federal judges who would evaluate whether the WTO system had exceeded its interpretative authority in any case the United States lost. If the panel found that the WTO system had overstepped its bounds, any legislator could propose a resolution that the United States withdraw from the WTO Agreements." Chilton & Brewster, *supra* note 25, n.13.

[32] *See, e.g.*, Kristen Hopewell, *Unravelling of the Trade Legal Order: Enforcement, Defection and the Crisis of the WTO Dispute Settlement System,* 101 INT'L AFFS. 1103 (2025), https://doi.org/10.1093/ia/iiaf055; Richard G. Shell, *Trade Legalism and*

The model of the WTO as a system for effective rule enforcement relied heavily not only on compulsory jurisdiction in dispute settlement, and the automatically binding nature of dispute rulings (subject only to appellate review), but above all on the notion that if a Member failed to comply with binding rulings, there was a mechanism for authorized sanctions.[33] Sanctions would enhance compliance significantly.

It became apparent early on, however, that this was not always the actual effect of sanctions. In two very significant early cases, *EC-Bananas* and *EC-Hormones*, the European Union decided to endure sanctions while remaining in non-compliance with the rulings in question for many years. The EU did not challenge the interpretive authority or legitimacy in general of the dispute panels or the Appellate Body; it simply viewed the possibility of subjecting itself to sanctions as akin to efficient breach.[34] In other words, if a WTO Member had compelling internal political interests in not complying, it could simply pay the price in the form of authorized retaliation. Not surprisingly, larger, richer Members found themselves much more able to pay this price, and smaller developing countries came to realize that they might well not be able to exact it without shooting themselves in the foot (since retaliation might consist in restricting imports that a small country needs either for consumers, such as medications, or as inputs for its economy). The case of Antigua's effort to enforce a ruling in its favor against the United States on internet gambling is a classic example.[35]

The rigorousness of the legal proceedings in the WTO could be seen as reinforcing positive narratives of legalism—formal consultations, a panel of first instance with two hearings and two exchanges of written pleadings, appellate review, the possibility of further arbitration and further appellate review of that additional arbitration concerning whether the Member had done what was necessary to comply with the original rulings, then if needed, arbitration over the reasonable period of time to comply, and ultimately over the quantum of sanctions (the equivalence or proportionality requirement).

On the other hand, in terms of the rule's *enforcement* focus of the main legalism narrative or ideology, this process created an uncomfortable reality. Dispute proceedings could easily take three years if all the steps were used. This meant that a WTO Member had a significant grace period for violating WTO law

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International Relations Theory: An Analysis of the World Trade Organization, 44 DUKE L. J. 829 (2016), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3278&context=dlj.

[33] *Disputes - Dispute Settlement CBT - The Process - Stages in a Typical WTO Dispute Settlement Case - Countermeasures by the Prevailing Member (Suspension of Obligations) - Page 1*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm (last visited Apr 5, 2026).

[34] D. A. Collins, *Efficient Breach, Reliance and Contract Remedies at the WTO*, 43 J. WORLD TRADE 255 (2009), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1552903_code516664.pdf?abstractid=1552903&mirid=1&type=2.

[35] *See* ANDREW F. COOPER, "REMOTE" IN THE EASTERN CARIBBEAN: THE ANTIGUA-US WTO INTERNET GAMBLING CASE (2008), https://www.files.ethz.ch/isn/56005/CP_4.pdf.

with impunity because the special regime of state responsibility in the WTO excluded the possibility of reparations, or any relief for past harm, limiting the remedy to future compliance on pain of sanctions. Rule compliance after several years would more and more seem like a pyrrhic victory in a fast-moving global economy where supply chains are created and adapted or broken at breakneck speed and where competitive advantage could easily be lost or badly damaged by several years of WTO-inconsistent protectionism.

This was further exacerbated by the lack of possibility of provisional measures under the WTO Dispute Settlement Understanding (DSU).[36] And, as a general matter, taking any countermeasures in response to flagrantly illegal behavior by another WTO Member was strictly prohibited prior to the dispute process running its course. One can see here the complexity of legalism narratives—prohibition of self-help and the requirement of a rigorous independent judicial process prior to imposition of sanctions are strongly associated with legalism—but given the lack of injunctive or emergency relief, these very features compromise the rules *enforcement* narrative of legalism.

B. Legalism Breeds Anti-Legalism

There are other respects in which WTO legalism became the victim of its own success or proved self-undermining. The WTO codes on so-called trade remedies, anti-dumping, countervailing duties, and safeguards, were intended to subject the use of these unilateral remedies to strict legal discipline at the international plane, responding to a perception that the criteria for "unfairness" of the trade practice were loosely applied, such that these remedies provided, de facto, a possibility of imposing unilateral trade restrictions in open-ended response to domestic political and social pressures. While, at the behest of the United States in particular, some deference to domestic agencies was built into these codes, especially the Anti-Dumping Agreement, the WTO Appellate Body applied them in a constitutionalist manner, like a high court enforcing domestic public law, allowing little flexibility to domestic agencies to respond to political pressures; this fed powerfully into the negative Washington Critique narrative about legalism.[37]

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[36] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

[37] Former US WTO Appellate Body Member Jennifer Hillman observes: "there was always a risk that, to the extent that the dispute settlement system is seen as overly-limiting of countries' ability to take discreet WTO legal measures to address either political opposition or to address particular economic stress, and here I would say particularly through the use of trade remedies (anti-dumping, countervailing duties, or safeguards), the system can harm the overall support for the WTO and the rules-based system." Jennifer Hillman, *Ensuring that Dispute Settlement Contributes to the Security and Predictability of the Multilateral Trading System*, *in* PROCEEDINGS OF THE CONFERENCE ORGANIZED BY THE WORLD TRADE INSTITUTE ON 4 FEBRUARY 2019 AT THE WORLD TRADE ORGANIZATION, GENEVA, 34, 43 (World Trade Inst. 2019).

It was this negative narrative that led, ultimately, to the U.S. destruction of the WTO Appellate Body itself, through blocking appointments to replace retiring Members to the point that the Appellate Body did not have enough Members even to function.[38] This practice began in Trump's first administration (Trump I) but was continued consistently throughout the Biden Administration, exhibiting the bipartisan bite of the Biden critique.[39] The demise of the Appellate Body resulted in the non-operability of other features of WTO legalism; the binding nature of dispute panel reports depends on the lack of an appeal, and in turn, the right to sanctions depends on a WTO Member having not complied with a *binding* report. To avoid a report becoming binding and the eventual possibility for sanctions for non-compliance, a WTO Member may simply file a notice of appeal, which, of course, goes nowhere because there is no Appellate Body left; this is known as "appealing into the void."[40]

C. The National Security Exception: Legalism's Aversion to Political Escape Clauses

WTO legalism also undermined itself in the treatment of the GATT national security exception, Article XXI. In the GATT era, national security was almost never invoked as a justification for non-performance of WTO obligations.[41] In 1975, the possible sweep of the national security exception, which extends to what a state party *considers* to be necessary for its essential security interests, was indicated by a communication of Sweden to the GATT, invoking Article XXI to justify otherwise GATT-inconsistent restrictions on imports of shoes and boots.[42] In language that is eerily similar to that from Trump Administration officials in the last months, Sweden asserted: "decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defense as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such capacity is indispensable in order to secure the provision of essential products

[38] *See* Cong. Rsch. Serv., *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?* (Dec. 12, 2019), https://www.congress.gov/crs_external_products/LSB/PDF/LSB10385/LSB10385.1.pdf.
[39] James Bacchus, *Echoing Trump, Biden Embraces International Trade Lawlessness*, CATO AT LIBERTY BLOG (Dec. 12, 2022), https://www.cato.org/blog/echoing-trump-biden-embraces-international-trade-lawlessness.
[40] *Id.*; *see also* Stratos Pahis, *Appeals After the Appellate Body,* WORLD TRADE REV., Sep. 2024, at 296, 296–297.
[41] There is recent path-breaking scholarship on Article XXI, including the negotiating history and practice throughout the GATT and WTO eras. *See* Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109 (2020); J. Ben Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L. J. 1020 (2020).
[42] Sweden – Import Restrictions on Certain Footwear (Nov. 17, 1975), L/4250, at 3 (1975).

necessary to meet basic needs in case of war or other emergency in international relations."[43]

In the GATT era, Sweden could have simply vetoed the establishment of a dispute panel to test this interpretation of Article XXI, but instead it indicated its willingness to be sued; whatever the disagreements of other GATT states parties (then known as Contracting Parties) with Sweden's reasoning, none chose to test the meaning of Article XXI in dispute settlement and the measures were eventually withdrawn voluntarily by Sweden.[44] In 1982, there was an effort to craft some kind of interpretive understanding for Article XXI, which failed but did result in a procedural agreement on notice requirements for Article XXI measures.[45]

In 1985, Nicaragua sought to challenge an economic embargo imposed on it by the United States as in violation of the GATT. This led to the United States' response that Article XXI is self-judging and thus that no panel can have jurisdiction over the United States' invocation of Article XXI to justify the embargo.[46] Because of the requirement of consensus to establish a panel, the United States was able to exclude the consideration of Article XXI from the panel's terms of reference (jurisdiction). The panel could only examine whether the U.S. embargo impaired or nullified benefits that Nicaragua could reasonably expect from GATT commitments.[47] Not surprisingly, given the consensus rule, the panel report was never adopted. The United States maintained that by declaring Article XXI, it had fully brought its measures within the law.[48]

The meaning of Article XXI was never clarified in the Uruguay Round; divergent readings existed at the time the WTO came into existence; every U.S. Administration since the Nicaragua dispute has taken the position that Article XXI is self-judging.[49] But being the judge in one's own cause, or being able to invoke unilaterally an override of one's obligations, seems simply incompatible with legalism. So, not surprisingly, when the WTO panels were faced with the first disputes invoking Article XXI, they found that the expression "consider" did not obviate the need to make an objective assessment of whether some of the elements of Article XXI were met, such as the existence of a state of "war or other emergency in international relations."[50] Eventually, a panel was faced with considering the U.S. national security justification in a challenge to tariffs imposed in Trump I using a domestic legal framework for national-security-based trade measures, Section

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[43] *Id.*

[44] WTO, GATT ANALYTICAL INDEX 603 (2024). https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf.

[45] Report of the Panel, *Decision Concerning Article XXI of the General Agreement*, L/5426, GATT B.I.S.D. (29th Supp.) (1982).

[46] GATT ANALYTICAL INDEX, *supra* note 44, at 607–08.

[47] *Id.* at 601.

[48] *Id.* at 603–04.

[49] Terence Stewart & Shahrzad Noorbaloochi, *The WTO Panel Report on Article XXI and its Impact on Section 232 Actions*, WITA (Apr. 11, 2019), https://www.wita.org/atp-research/the-wto-panel-report/.

[50] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019), ¶¶ 7.35–.52.

232.[51]Again, the panel rejected the notion of Article XXI as self-judging.[52] It went on to hold that global overcapacity in the steel and aluminum industries did not rise to the level of an "emergency in international relations" and thus, whatever the United States' view of the gravity of the situation, and despite the results of domestic investigations, objectively, the measures could not be justified under Article XXI.[53]

By the time of the Article XXI decisions by panels, the Appellate Body had become non-functional; thus, the United States could simply treat the panel ruling as non-binding through appealing into the void.[54] Had the Appellate Body been there to uphold the panel's view of Article XXI in this and other cases, I believe there would have been a major crisis between the United States and the WTO. Allowing that a dispute panel can second-guess a sovereign state on when an economic situation becomes significant enough to engage its national security would likely not have been acceptable to any U.S. Administration.

C. China: Legalism as Formalism vs. Legalism as "Enforcement"

The accession of China to the WTO also has complications for legalism. In adhering to WTO commitments, China could be seen not only as moving to embrace global *economic* liberalism in the *substance* of the WTO's norms, but also as accepting the ideal of the rule of law as applying to commercial diplomacy—in other words, not only neoliberal economics but liberal legalist ideology. In both respects, China was supposed to be moving in the direction of Francis Fukuyama's *End of History*.

China lost a range of WTO disputes and presented itself as a model law-abider in taking formal measures to remedy the breaches identified by the panels and Appellate Body.[55] But it soon became apparent that China was simply able to duplicate the impugned market access barriers in other, often less formal or transparent, ways.[56] The whole edifice of the WTO legal system, excluding as it did antitrust norms or any discipline on private anti-competitive conduct, depended on the identification of situations where mandatory government actions breached norms and caused commercial harm.[57]As Mark Wu has explained, instead of

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[51] Panel Report, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/R.

[52] *Id.*

[53] "The Panel is not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an 'emergency in international relations' during which a Member may act under Article XXI(b)(iii)." Panel Report, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/R ¶¶ 7, 166, 162–165 (Dec. 9, 2022).

[54] Pahis, *supra* note 40, at 296–97.

[55] Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525 (2014).

[56] *Id.*

[57] Mark Wu, *The 'China, Inc.' Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261, 284 (2016).

moving domestically toward a system where government regulates the economy through transparent general legal norms, China has developed into a system where it is impossible to discern whether private firms are reacting to market signals in their behavior or to various kinds of instructions or pressures conveyed through the Communist Party apparatus that pervades even the private sector there.[58]

WTO legalism has cashed out in a tightening of the policy space for the United States to restrict trade in response to political imperatives, especially ones based on perceptions of national security, including economic security. On the other hand, China has a free hand to escape many WTO strictures through non-transparent or covert government control of markets that slips past the formalism in state responsibility upon which WTO legalism has been built.[59]

D. Most-Favored Nation (MFN)

One can tell a similarly complex story about MFN, the supposed core principle of the multilateral trading system, as the Appellate Body observed in the *Havana Club* case. MFN has considerable power as a normative ideal that justifies multilateralism—an inclusive trading system—as opposed to other arrangements built on reciprocity and discrimination. The ideal is well articulated by Albert Hirschman in a work written during the Second World War, *National Power and the Structure of Foreign Trade*.[60] In the section of the book that addresses the challenges of reconstruction of international economic order postwar, Hirschman writes: "The most-favored clause is one of the typical expressions of . . . what is generally implied in such phrases as 'equality of trading conditions' or 'equality of trading opportunity.'"[61] But, Hirschman warned, perspicaciously, "protectionism without discrimination is quite sufficient to increase the existing inequalities of natural and human resources . . . every tariff implies a certain amount of discrimination against a particular country or group of countries."[62]

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[58] *Id.*

[59] While this may sound similar to the grievance-like critique that China is cheating on its WTO obligations, China did not commit in its protocol of accession to change its political and economic system, only to accept certain particular strictures on for example transparency. The US and other trading partners could have driven a harder bargain for acceptance of China into the WTO or waited to see whether or not China would take the path towards liberal capitalism and rule of law that they were hoping for. Admitting China into the WTO at the time and on the terms in question was a calculated gamble-however much the US heartland has lost from this, Wall Street and offshoring US multinationals have realized big gains. Arguably, the Clinton Administration put the latter before the former interests, hardly the fault of China. On the shape of China's accession negotiations and the interests of the Clinton Administration, *see* PAUL BLUSTEIN, SCHISM: CHINA, AMERICA, AND THE FRACTURING OF THE GLOBAL TRADING SYSTEM (Centre for International Governance Innovation 2019).

[60] *See* ALBERT O. HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE (Univ. of Cal. Press 1945).

[61] *Id.* at 76.

[62] *Id.* at 76–77.

The MFN principle faced several challenges and setbacks from the outset of the GATT. First was the insistence of the imperial or former imperial powers, above all Britain, on the retention of colonial preferences.[63] Despite U.S. opposition, this eventually became part of the MFN exception that also covers free trade areas and customs unions.[64]

Post-war reconstruction also entailed support for some form of European integration, which began with the European Coal and Steel Community, as well as a possible transatlantic economic cooperation arrangement, the Organization for European Economic Cooperation (the predecessor to the OECD).[65] But it was the interest of Canada and the United States in having a free trade agreement between them that shaped the terms of Article XXIV, which, as noted above, seemed to permit only those free trade arrangements where virtually all goods trade was liberalized across all economic sectors.[66] As the EU began in the form of a sectoral arrangement for coal and steel, and indeed featured limited coverage of trade measures even after morphing into the EEC, there was considerable debate in the GATT as to whether it complied with Article XXIV.[67]

While Article XXIV was designed to allow GATT scrutiny of proposed free trade areas and customs unions before they came into existence, little oversight of this kind actually occurred, leading eventually to the Appellate Body coming to the conclusion that there should be judicial surveillance of the criteria and conditions in Article XXIV.[68] But in fact, there is no comprehensive evaluation of whether the existing PTAs comply with these criteria and conditions. Thirty years ago, around the time the WTO came into existence, the eminent trade economist Jagdish Bhagwati warned that the MFN principle and the values of equality and non-discrimination that it represented were being undermined by the proliferation of PTAs, largely undisciplined by processes in the GATT and now the WTO.[69] While MFN was supposedly a means of countering unequal power between states, as articulated by Eyal Benvenisti and George W. Downs, powerful countries adopted a strategy of "divide and conquer" in their use of PTAs to obtain legal terms

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[63] *See* Roy Santana, *70th Anniversary of the GATT*, 9 TRADE, L. & DEV. 1, 7–13 (2017).
[64] *Id.*
[65] Francine McKenzie, *The GATT—EEC Collision: The Challenge of Regional Trade Blocs to the General Agreement on Tariffs and Trade, 1950–67*, 32 INT'L HIST. REV. 229 (2010).
[66] Kerry Chase, *Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV,* WORLD TRADE REVIEW, 2006, at 1, 12–14, https://people.brandeis.edu/~chase/research/wtr06.pdf.
[67] *See* Kenneth Dam, *Regional Economic Arrangements and the GATT: The Legacy of a Misconception*, 30 U. CHICAGO. L. R. 615, 638–654 (1963), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?params=/context/uclrev/article/3.334/&path_info=30UChiLRev615.pdf; *see also* McKenzie, *supra* note 65.
[68] Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (Oct. 22, 1999) This decision and its context are discussed at length in: Howse & Langille, *supra* note 11, at 66–667.
[69] Jagdish N. Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 LAW & POL'Y INT'L BUS. 865 (1996).

of trade to their advantage, as these became harder to win at the WTO, with developing countries forming coalitions to resist U.S. and European pressure.[70]

For example, during Trump I, the Administration negotiated partial or initial trade agreements with China that clearly did not have the wide liberalization content required by Article XXIV; these might be justified as "interim agreements" under Article XXIV.[71] The Biden Administration took the explicit departure from Article XXIV much further in its negotiation of agreements under the Indo-Pacific Economic Framework, which contemplated preferential arrangements in a select range of matters, including critical minerals and critical industries generally.[72]

At the same time, it is a difficult question whether to try in some way to put the PTA genie in the bottle for the sake of MFN. South-South PTAs are on the rise and could produce or reinforce forms of solidarity that, in fact, lessen inequality in the global trading system; there is evidence that Southern countries obtain more developmental benefits from trade with other Southern countries than with the developed world.[73]

E. MFN Tariffs and the False Promise of Equality

This contrasts with the fundamental failure of MFN-based tariff negotiations to achieve what Hirschman described as the normative ideal underpinning MFN, "equality of trading opportunity."[74] While the MFN ideal has frequently been presented as in stark opposition to President Trump's supposed obsession with reciprocity, in fact, the tariff negotiations in the GATT and now WTO have combined reciprocity and MFN—the pattern of concessions is determined by demands and offers, and that generally means the demands and offers of the largest market players. The result of this reciprocal bargaining is then implemented on an MFN basis. The standard fairy tale has been that MFN is good

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[70] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

[71] Joel Adu-Quaye & Petros Mavroidis, *Liberal Trade and President Trump: Never the Twain Shall Meet*, 10 CATÓLICA L. REV. 16 (2026), https://scholarship.law.columbia.edu/faculty_scholarship/4764.

[72] Inu Manak, *Unpacking the IPEF: Biden's Indo-Pacific Trade Play*, COUNCIL ON FOREIGN RELS. (Nov. 8, 2023), https://www.cfr.org/articles/unpacking-ipef-bidens-indo-pacific-trade-play.

[73] Andrew Mold suggests: "there is a wealth of studies that show that South-South trade tends to be more diversified, better at inducing technology transfer, and more pro-developmental than trade between developing and high-income countries . . . wealth that show." Andrew Mold, *Why South-South Trade is Already Greater than North-South Trade and What it Means for Africa*, BROOKINGS INST. (Dec.11, 2023), https://www.brookings.edu/articles/why-south-south-trade-is-already-greater-than-north-north-trade-and-what-it-means-for-africa/; *see also* FRANCIS MANGENI & ANDREW MOLD, BORDERLESS AFRICA: A SCEPTIC'S GUIDE TO THE CONTINENTAL FREE TRADE AREA (Oxford Univ. Press 2024).

[74] ALBERT O. HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE 76 (Univ. of Cal. Press 1945).

for smaller, poorer countries; having little to bargain with, they can free ride on the concessions negotiated among the larger, richer, more powerful countries. But the free rider problem led, not surprisingly, to the developed countries maximizing the benefit to themselves with the structure of concessions, while minimizing that to free riders. Thus, the pattern of concessions resulted in the continuation of high tariffs on products of greatest export interest to developing countries seeking to move up the value chain in their economies, while creating great reductions in tariffs for finished manufactured products of the greatest export interest to rich countries. These results led, as more and more developing countries joined the GATT, often after becoming independent, to a critical economics of the existing international economic arrangements, the dependency theory of Raul Prebisch, and the work on tariff escalation of Bela Balassa.[75] This critical economics powered a Third World movement to create a New International Economic Order (NIEO), often focused on the UN Conference on Trade and Development (UNCTAD).[76] The basic point here is that, as Hirschman predicted in 1942, MFN tariffs could lead to *increases* in inequality (as recent data presented by Nievas and Piketty demonstrated[77]).[78]

On tariffs, the outcome was a compromise: The Generalized System of Preferences (GSP).[79] Developing nations argued they should gain preferential access to developed country markets without the need for reciprocity, seeking thereby to reverse the tariff colonialism just described.[80] The GSP allowed deviation from MFN to facilitate *voluntary* action by developed countries along these lines.[81] But, being voluntary, GSP not surprisingly came with conditions and limitations, such as the possibility of withdrawal when a developing country graduates, i.e., becomes competitive with a developed GSP providing country, either generally or

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[75] Bela Balassa, *Tariff Protection in Industrial Nations and Its Effects on the Exports of Processed Goods from Developing Countries*, 1 CAN. J. ECON. 583 (1968).
[76] Gamani Corea, *UNCTAD and the New International Economic Order*, 53 INT'L AFFAIRS 2 (1977).
[77] Gastón Nievas & Thomas Piketty, *Unequal Exchange and North-South Relations: Evidence from Global Trade Flows and the World Balance of Payments 1800-2025*, World Ineq. Lab, Working Paper 2025/11, 2025), https://wid.world/document/unequal-exchange-and-north-south-relations-evidence-from-global-trade-flows-and-the-world-balance-of-payments-1800-2025-world-inequality-lab-working-paper-2025-11/. Nievas and Piketty explain inequality more in terms of the international financial system as opposed to the trade regime.
[78] Bagwell and Staiger observe "[a] wide range of anecdotal and empirical evidence suggests that developing countries have gained little from half a century of GATT/WTO-sponsored tariff negotiations." Kyle Bagwell & Robert W. Staiger, *Can the Doha Round Be a Development Round? Setting a Place at the Table*, *in* GLOBALIZATION IN AN AGE OF CRISIS: MULTILATERAL ECONOMIC COOPERATION IN THE TWENTY-FIRST CENTURY 91 (Robert C. Feenstra & Alan M. Taylor eds., Univ. of Chi. Press 2013).
[79] Generalized System of Preferences, June 25, 1971, GATT BISD (18th Supp) 24 (1972).
[80] *See* Robert Howse, *India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy*," 4 CHICAGO J. INT'L L. 2, fn. 32 and accompanying text (2003).
[81] *Id.*

in certain industries.[82] The emergence of GSP did not end the GATT/WTO regimes allowing special protective measures (beyond tariffs) in sensitive sectors—agriculture, textiles, and apparel.[83] While the Uruguay Round was touted as having achieved that, the resulting agreements contained very generous "safeguards" for developed countries, and the Agreement on Agriculture consolidated domination of world food markets by multinational food giants through curbing national policies such as stockpiling and price stabilization.[84]

In sum, given the way unequal bargaining power operates in the WTO, the normative aspiration behind MFN has been constantly foiled by the actual rules and practices in the WTO, even where the norm of formal nondiscrimination has been honored, as in multilateral tariff negotiations. It is hard to say whether the situation would be better or worse if the various exceptions to formal nondiscrimination were tightened or closed.

This last issue is highly pertinent to the emergence in recent years of plurilateral negotiations and agreements within the WTO. Some Members, such as India and South Africa, have viewed plurilateral arrangements as in tension with the universal aspiration of multilateralism, even if they are eventually offered on an unconditional MFN basis to all WTO Members.[85] It is argued that plurilateralism, even where multilateralized through MFN, allows a subset of states to set an agenda and become norm entrepreneurs, with inevitable effects on Members who choose not to participate.[86] This controversy is being played out now in the WTO concerning the status of the plurilateral Investment Facilitation Agreement within the WTO legal system. I will have more to say about it in the final section of this paper.

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[82] ÇAGLAR OZDEN & ERIC REINHARDT, THE PERVERSITY OF PREFERENCES: THE GENERALIZED SYSTEM OF PREFERENCES AND DEVELOPING COUNTRY TRADE POLICIES, 1976–2000 (2003).

[83] *See* Bernard Hoekman, Francis Ng & Marcelo Olarreaga, *Eliminating Excessive Tariffs on Exports of Least Developed Countries* (World Bank, Policy Research Working Paper No. 2604, 2001) (explaining that even with GSP tariffs, imports of products significant to developing countries remained in the Quad several times higher than the average MFN bound rates).

[84] *See generally* Sylvia Ostry, *The Uruguay Round North–South Grand Bargain: Implications for Future Negotiations*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC. 285–300 (Kennedy DLM, Southwick JD eds., 2002); Consumers Int'l, *Consumers and the Global Market, The Agreement on Agriculture: An Impact Assessment*, IATP (2001), https://www.iatp.org/sites/default/files/Agreement_on_Agriculture_An_Impact_Assessment_.htm.

[85] Peter Unphakorn, *India and South Africa Pour Cold Water on Alternative Approach to WTO Talks*, TRADE B BLOG (Feb. 22, 2021), https://tradebetablog.wordpress.com/2021/02/22/india-south-africa-plurilaterals/.

[86] *See* Bernard M. Hoekman & Petros C. Mavroidis, *WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements*, 26 EUR. J. INT'L L. *2*, 333 (2015) (presenting this argument not as an endorsement but as an objection that needs answering).

IV. PROPOSALS RESPONDING TO THE TRUMP TARIFF CRISIS

A. Expelling the United States from the WTO

In recent months, several respected scholars have proposed expulsion of the United States from the WTO as a response to the crisis of WTO legalism triggered by the Trump II tariffs. These scholars include Petros Mavroidis and Henrik Horn,[87] both of whom I have co-authored with at times, and Kirsten Hopewell.[88] Clearly, if the United States is out of the WTO, it is not bound by WTO rules, and therefore the threat to the rule of law from non-WTO-compliant Trump tariffs is removed. Unlike the possibility of the United States voluntarily withdrawing from the WTO (which I shall also discuss below), expulsion raises a set of difficult legal and institutional issues.

In an article in the *Yale Law Journal*,[89] and later in their book the *Internationalists*,[90] Oona Hathaway and Scott Shapiro articulate and endorse what they call "outcasting" as a central means of responding to the problem of non-compliance with international legal rules: outcasting involves denying a violating state the benefits of an agreement or international legal regime with which they are out of compliance. For Hathaway and Shapiro, outcasting operates as a form of countermeasure, and the purpose is to induce compliance by the violating state.[91]As Hathaway and Shapiro note, the sole form of outcasting in the WTO is authorized retaliation in the form of proportional withdrawal of concessions by a WTO Member or Members who are harmed by the violation (this enforcement mechanism and its limits are discussed in the previous section of the paper).[92] This *lex specialis* puts into question whether the WTO Membership ever intended expulsion of a member as a countermeasure for violation. Importantly, Horn and Mavroidis do not suggest that expulsion or threat thereof is aimed at inducing compliance on the part of the United States; instead, the goal seems to be to purge the WTO of a frontal challenge with which it cannot allegedly cope and/or a symbolic or perhaps punitive gesture in support of the rule of law.[93] Such a purpose seems incompatible with the current customary law of countermeasures, as arguably stated in the International Law Commission's Articles on State Responsibility.[94]

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[87] Henrik Horn & Petros C. Mavroidis, *Why the US and the WTO Should Part Ways*, VOXEU.ORG, CTR. FOR ECON. POL'Y RSCH. (CEPR) (June 25, 2025), https://cepr.org/voxeu/columns/why-us-and-wto-should-part-ways.

[88] Kristen Hopewell, *To Save the Global Economy, Kick the US Out of the WTO*, POLITICO (July 7, 2025, at 4:00 CT), https://www.politico.eu/article/to-save-the-global-economy-kick-the-us-out-the-world-trade-organization/.

[89] Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252 (2011).

[90] OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (Simon & Schuster 2017).

[91] Hathaway & Shapiro, *supra* note 89.

[92] *Id.* at 266–67.

[93] Horn & Mavroidis, *supra* note 87.

[94] Int'l L. Comm'n, *Report on the Work of Its Fifty-Third Session*, U.N.Doc. A/56/10 (2001), reprinted in [2001] 2; *Yearbook of the International Law Commission*, U.N. Doc.

In contrast to the WTO, the United Nations Charter provides explicitly for the possibility of suspending or terminating membership:

> A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.[95]

Article 6, in turn, provides: "A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council."[96]

Article 8 of the Statute of the Council of Europe provides for suspension and eventual expulsion of a state from its governing body, the Committee of Europe, where it seriously violates its obligations under Article 3.[97] Article 3 provides in turn: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council . . . ."[98] Article 8 has been invoked against Russia following its full-scale invasion of Ukraine.[99]

Unlike the UN Charter or the Statute of the Council of Europe, there are no provisions in the WTO treaties that address suspension or expulsion of Members. Absent as well from the WTO is any provision such as, for instance, that in the International Labour Organisation (ILO) Charter (Article 33) that provides broad discretion to the governing body to recommend disciplinary measures for non-compliance.[100] Article 33 was used to exclude, temporarily, Myanmar from many

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A/CN.4/SER.A/2001/Add.1, at 32 [hereinafter ILC Articles of State Responsibility]. Article 49 makes it clear that countremeassures are intended to be temporary and designed to induce compliance with obligations, and "shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question." (49.3) Expelling the US from the WTO would have the effect of releasing it from its WTO obligations (as well as depriving it of its WTO rights), and so is entirely at odds with the purposes of countermeasures as stated in the ILC Articles of State Responsibility.

[95] U.N. Charter art. 5.

[96] *Id.* art. 6.

[97] Statute of the Council of Europe art. 8, May 5, 1949, E.T.S. No. 1, 87 U.N.T.S. 103.

[98] *Id.* art. 3.

[99] *See* RAFAŁ MAŃKO, SUSPENSION AND EXPULSION OF STATES FROM INTERNATIONAL ORGANISATIONS: ANALYSIS OF THE VIENNA CONVENTION ON THE LAW OF TREATIES AND OF THE PRACTICE AT THE UNITED NATIONS AND THE COUNCIL OF EUROPE (July 2023), https://www.europarl.europa.eu/thinktank/en/document/EPRSIDA(2023)747105.

[100] Constitution of the International Labour Organisation art. 33, Oct. 9, 1946, 15 U.N.T.S. 35.

of its rights of participation in the ILO in the face of its repeated failure to engage with the organization on violations of its treaties.[101]

The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) does, however, have provisions that deal with membership, accession, and withdrawal. Article XI of the WTO Agreement sets out the concept of original membership: all those states that were Members of the GATT at the time of the establishment of the WTO are entitled to be WTO Members if they so accept.[102] The United States accepted, obviously, and is thus an Original Member. Other states may become Members by following an accession process set out in Article XII, which requires that any accession be approved by a two-thirds majority of existing Members (the practice remains consensus).[103] Article XVII allows any WTO Member to withdraw upon six months' notice.[104]

Given that the WTO Agreement has explicit provisions governing original membership, accession, and withdrawal, it is worth asking why there are none on suspension and expulsion. Horn and Mavroidis never raise this question, instead leaping to general international law rules about treaties to find a path to expelling the United States.[105] But it is an important question because it directs us to ask whether the design of the WTO is suited or not to using expulsion as a tool to address persistent violations. As already noted, the WTO framers created a very specific *lex specialis* to provide for countermeasures in the case that a WTO Member failed to comply with its obligations. However, in this *lex specialis*, countermeasures, as noted above, can only be activated once a dispute has been adjudicated and the state in question has failed to comply with the ruling.[106] And, again as already noted, countermeasures must take a specific form: withdrawal of concessions by the injured party or parties that have prevailed in the dispute, subject to a proportionality requirement (the concessions withdrawn must not exceed commercial value equivalent to the harm from non-compliance).[107] Moreover, Article 23 of the WTO Dispute Settlement Understanding provides that no finding of violation may be found outside of or at least prior to the operation of the dispute

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[101] Int'l Lab. Org., International Labour Conference Adopts Resolution Targeting Forced Labour (June 14, 2000), https://www.ilo.org/resource/news/international-labour-conference-adopts-resolution-targeting-forced-labour.

[102] Marrakesh Agreement Establishing the World Trade Organization, art. 11, Apr. 15, 1994, 1867 U.N.T.S. 154.

[103] Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 12, Apr. 15, 1994, 1867 U.N.T.S. 154.

[104] Marrakesh Agreement Establishing the World Trade Organization, art. 17, Apr. 15, 1994, 1867 U.N.T.S. 154.

[105] Horn & Mavroidis, *supra* note 87.

[106] *See* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach,* 94 AM. J. INT'L L. 2 (2000).

[107] Carlo M. Cantore & Petros C. Mavroidis, *Arbitration on the Level of Retaliation: Dispute Settlement System of the World Trade Organization (WTO)*, MAX PLANCK ENCYCLOPEDIA OF INT'L PROCEDURAL L. (Nov. 2021), https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2317.013.2317/law-mpeipro-e2317.

procedures.[108] In addition, the Dispute Settlement Understanding has no provision for collective sanctions of any kind in the case of non-violation, however persistent it may be, or how broadly the membership may be affected.[109]

The WTO legal system reflects the largely bilateral nature of WTO obligations, which has been very well articulated by Joost Pauwelyn:

> Trade is and remains a bilateral occurrence. Goods or services from one country are being exported or transferred to one other country. The rights and obligations negotiated in the WTO are aimed at ensuring market access for a given product from member A into the market of member B. The way WTO obligations are negotiated and re-negotiated confirms their bilateral nature. Most WTO obligations, especially those set out in country-specific schedules of concessions, are first negotiated on a state-to-state, bilateral level: state A gives and takes; state B does the same. This bilateral and mutual reduction in trade restrictions is then multilateralized and applied, respectively, by state A and state B in their bilateral relationships with all other WTO Members, pursuant to the MFN principle. As the Appellate Body remarked: "Tariff negotiations are a process of reciprocal demands and concessions, of 'give and take'." [footnote omitted] The ultimate aim of this "give and take" exercise is to achieve an appropriate balance of trade concessions. Or, as the third preamble to the Marrakesh Agreement puts it, the underlying objectives of the WTO are to be achieved by "entering into reciprocal and mutually advantageous arrangements". As one

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[108] "1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.
2. In such cases, Members shall:
(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding…"
Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, 1869 U.N.T.S. 401; Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 23, Apr. 15, 1994, 1869 U.N.T.S. 401.

[109] Mona Paulsen and Dan Ciuriak observe that in the 1960s Brazil and Uruguay proposed adding to the GATT such a clause, which would have given the states parties taken as a whole the power to "decide what collective measures shall be taken to ensure compliance with the Agreement." As Paulsen and Ciuriak go on to explain, the proposal was highly divisive, with strong differences of view not only as to whether "collective measures" should be included at all but what might be included in their content. Mona Paulsen & Dan Ciuriak, *The Case for WTO Collective Action* (LSE Law, Society and Economy, Working Paper No. 19/2025, June 27, 2025) https://ssrn.com/abstract=5284221.

> commentator noted, collective obligations, in contrast, which "tend to promote extra-state interests, are not of a synallagmatic nature and fall outside the interplay of reciprocity" [footnote omitted].[110]

Pauwelyn contrasts this with treaties that are inherently of a multilateral or community interest character, such as the UN Charter, and human rights and humanitarian law instruments.[111]

With these observations in mind, let us turn to Horn and Mavroidis' argument for the legality of expulsion based on Article 60 of the Vienna Convention on the Law of Treaties.[112] Article 60 provides as follows:

> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
> 2. A material breach of a multilateral treaty by one of the parties entitles:
> (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
> (i) in the relations between themselves and the defaulting State; or
> (ii) as between all the parties;
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
> (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
> 3. A material paragraphs breach of a treaty, for the purposes of this article, consists in:
> (a) a repudiation of the treaty not sanctioned by the present Convention; or
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
> 4. The foregoing are without prejudice to any provision in the treaty applicable in the event of a breach.[113]

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[110] Joost H.B. Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907, 931 (2003).
[111] Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 335–47 (2000).
[112] Vienna Convention on the Law of Treaties, May 23, 1969 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), art. 60.
[113] *Id.*

At first glance, there is little doubt that the Trump II tariffs qualify as a material breach within the definition set out in Article 60. As noted in the previous section of this paper, the tariffs are a flagrant violation of Article II of the GATT, which provides for the legal security of tariff bindings, as well as the MFN obligation in Article I, to the extent that each WTO Member is treated differently.[114] Both Article I and II of the GATT are clearly among those provisions "essential" to its object and purpose in the negotiated reciprocal reduction of tariff barriers and the multilateralization of the results of the negotiations, as described by Pauwelyn.[115] That said, in the absence of dispute rulings, it is not a foregone conclusion that in no case could the tariffs be justified under the national security Article XXI or public morals (Article XX (a))[116] exceptions. As noted in the previous section, GATT panels have rejected U.S. defenses of Trump I-originating tariffs based on the national security exception. The public morals defense remains largely untested. This brings us back to Article 23 of the WTO Dispute Settlement Understanding: the stipulation that a violation will not be found outside the operation of the dispute procedures. As noted above, these still operate despite their weakening through the U.S. blockage of Appellate Body appointments, a policy that started under Trump I but then continued throughout the Biden Administration.[117] The operational provisions of Article 60 apply "without prejudice to any provision in the treaty applicable in the event of a breach."[118]At a minimum, this means that expulsion or suspension of the United States would need to be compatible with the obligation to establish breaches through the dispute system. More broadly, Article 60.4 might be interpreted to mean that any *lex specialis* in a treaty that deals with the consequences of breaches could override Article 60. I have already suggested the possibility that in the DSU the WTO framers created a self-contained regime to address such consequences.

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[114] Simma and Tams suggest: "it may be inferred that flagrant violations of a generally formulated treaty obligation are likely to be seen as 'material breaches' in the sense of Article 60, paragraph 3(b)." Bruno Simma & Christian J. Tams, *1969 Vienna Convention: Article 60 Termination or suspension of the operation of a treaty as a consequence of its breach'*, *in THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 1360 (Oliver Corten & Pierre Klein eds., Oxford Commentaries on International Law, 2011; online ed, Oxford Law Pro), https://doi.org/10.1093/law/9780199573530.003.0121 (accessed July 14, 2025).

[115] On Articles I, II and III as the core of the GATT non-discrimination regime, see Donald M. McCrae, *The General Agreement on Tariffs and Trade,* UN AUDIOVISUAL LIBRARY, https://legal.un.org/avl/ha/gatt/gatt.html.

[116] On XX (a), particularly as interpreted by the WTO Appellate Body, *see* Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products*, 48 GEO. WASH. INT'L L. REV. 81–151 (2015) (NYU School of Law, Public Law Research Paper No. 15–05), https://ssrn.com/abstract=2588509.

[117] Ian Allen, *It's Time for the United States to End its Bipartisan Attack on the WTO*, JUST SEC. (Mar. 4, 2024).

[118] Vienna Convention on the Law of Treaties, May 23, 1969 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), art. 60.4

To amend the DSU in order to allow for expulsion of the United States would require consensus; even if here consensus were to mean that all WTO Members *other than the United States* agreed to the amendment (along the lines of Vienna Convention on the Law of Treaties Article 60.2(a)(i).[119] This outcome is unlikely. To name two states that have strong interests in not creating new precedents for expulsion of Members from international organizations, Israel and Russia would almost certainly oppose crossing the threshold to the expulsion remedy.

We are then left with the remedy that applies to a multilateral treaty, where, as Pauwelyn explains, is the case for the WTO, the obligations are essentially bilateral: "a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State."[120] Under this provision, essentially all the WTO Members targeted with Trump II tariffs could decide to suspend the operation of the treaty between themselves and the United States. But WTO obligations would still run between the United States and parties not "specially affected" or simply parties who do not wish to suspend the United States. The United States could not be excluded from participation in collective WTO decision-making processes or in WTO institutions such as the Secretariat. Such an outcome would be messy, and it is hard to say who would really benefit from it. Even then, the "without prejudice" language in Article 60.4 suggests that any specially affected Member would have to go through the WTO dispute process to establish breach, as required in Article 23 of the DSU.

But this is not all. Where individual parties are seeking to suspend or terminate under Article 60.2(b), Articles 65–67 of the Vienna Convention on the Law of Treaties impose their own rigorous procedures.[121] First of all, there is a three-month notice period for any other state party to object, which applies in all cases except those of utmost urgency.[122] If any party does object, then there must be recourse to the procedures in Article 33 of the UN Charter, which may include negotiation, conciliation, and arbitration, *inter alia*.[123] If after 12 months, the dispute is not thus resolved, then either the party seeking suspension or termination or the party objecting to it, may request a decision from the International Court of Justice

[119] The relevant provision is as follows: "2. A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it … (i) in the relations between themselves and the defaulting State; …" Vienna Convention on the Law of Treaties. May 23, 1969, 1155 U.N.T.S. 331.

[120] As Simma and Tams put it: "violations of those multilateral treaties which give rise to rights and obligations running bilaterally between their parties … specially affect the party to whom the obligation was owed in the particular case." SIMMA & TAMS, *supra* note 114, at 1365.

[121] Vienna Convention on the Law of Treaties art. 65–67, May 23, 1969, 1155 U.N.T.S. 331.

[122] *Id.*

[123] Vienna Convention on the Law of Treaties art. 66, May 23, 1969, 1155 U.N.T.S. 331.

(or these parties may agree to further arbitration).[124] It can be seen from these procedures that Article 60.2(b) does not offer a rapid response to the Trump tariffs and their impact on the WTO. Indeed, by the time these procedures were fully exhausted (and these include, as noted, WTO dispute settlement required under DSU Article 23 to establish the breaches in the first place)[125] a new administration would likely be in office in Washington.

Kristen Hopewell, for her part, suggests a different legal path entirely to expelling the United States from the WTO. She argues that the amendment procedures in Article X of the WTO Agreement could be used to expel the United States from the WTO. Article X allows for amendments to some, though not all, provisions of the WTO Agreements through supermajority (two-thirds) voting, should consensus fail. Where a WTO Member does not consent to an amendment, then, by a majority vote of three-quarters of the Members, the Ministerial Conference may allow that Member either to withdraw from the WTO or continue to be a Member with its explicit permission (presumably without being bound by the amendment to the extent that it affects the Member's preexisting rights and obligations).[126]

Departure from consensus practice under Article X of the WTO Agreement would itself be a radical move for WTO Members. But, since some, but not all, of the provisions of WTO treaties qualify for amendment by supermajority voting, there is the preliminary legal question of *which* WTO provisions are being proposed to be amended. The WTO framers clearly saw some matters as appropriate for amendment by supermajority voting and others as requiring consensus. Amendment to the DSU requires consensus, because, within the terms of Art. X.8 of the WTO Agreement, it is an Agreement in Annex 2.[127] It is the DSU that contains a comprehensive code that addresses the remedies available for breach of WTO law. Articles 22 and 23 of the DSU set out the sanctions available if a WTO Member fails to bring itself into compliance with its obligations within a reasonable period.[128] As already noted, these provisions contemplate authorized countermeasures with a proportionality requirement, but do not contemplate suspension or expulsion as a remedy for breach, however persistent or severe.

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[124] Vienna Convention on the Law of Treaties art. 66 (a), May 23, 1969, 1155 U.N.T.S. 331.

[125] Here, Article 65.3 reinforces the "without prejudice" language in Article 60.4 by stating that these procedures do not alter any obligations in the treaty itself with respect to dispute settlement. These would certainly include the provisions of Article 23 that state the obligations to establish a breach through WTO dispute proceedings.

[126] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144, art. X.3 (1994).

[127] *Id.* art. X.8 ("The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference."). The only agreement listed in Annex 2 of the WTO Agreement is the DSU.

[128] DSU, *supra* note 36. For a clear explanation of how these provisions operate, *see* WTO, *The Process - Stages in a Typical WTO Dispute Settlement Case*, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm (last visited Apr. 5, 2026).

Article 22.4 clearly limits the suspension of concessions or obligations to an amount equivalent to "the level of the nullification or impairment" of benefits that the breach has caused.[129] Also, the suspension of concessions or obligations is to be "temporary."[130] Extending remedies for breach to include permanent suspension of all WTO obligations toward the breaching Member would thus require an amendment to the DSU. As noted, however, the DSU can only be amended by consensus—the supermajority voting rule does not apply.[131] It is notable that Article X does not permit amendment other than by consensus in the case of the MFN obligation).[132] This rule seems inconsistent, at least in spirit, with the notion that a supermajority voting rule could be used selectively to remove a particular state from the rights and obligations of WTO Membership in its entirety.

In sum, the amending procedure in Article X offers no clearer or less problematic path to expelling the United States from the WTO than the route suggested by Horn and Mavroidis—through Article 60 of the Vienna Convention on the Law of Treaties.

B. Voluntary Withdrawal of the United States from the WTO

Article XV of the WTO Agreement provides: "Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO."[133] Thus, from a WTO law perspective, if the United States were to seek to withdraw from the WTO, the process would be quite straightforward. As explained in the preceding section, since state responsibility is only prospective and reparations for past harm are excluded in the WTO, no issue of legacy claims would arise. This lack of legacy claims in the WTO is an important difference with the international investment regime, where a state that denounces an international investment agreement may find itself pursued for years, if not decades, in respect of alleged breaches that occurred while it was still bound by the investment agreement.

In April 2025, while the 30th anniversary of the WTO was being feted at headquarters in Geneva, Representative Tom Tiffany introduced a resolution in the U.S. House of Representatives that the United States should leave the WTO.[134] This

[129] DSU, *supra* note 36, art. 22.4 ("The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.").
[130] *Id.* art. 22.8.
[131] *Id.* art. X.8
[132] *Id.* art. X.2.
[133] General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), art. XV.
[134] Withdrawing Approval of the Agreement Establishing the World Trade Organization, H.R.J. Res. 93, 119th Cong. (2025).

is not the first time such a proposition has been put to Congress—for instance, Bernie Sanders co-sponsored a similar resolution in 2005.[135] The basis for a congressional resolution of withdrawal is contained in a provision of the 1995 Uruguay Round Agreements Act, Section 125, which implemented the results of the Round (reflected in the creation of the WTO and the treaties under its umbrella) in U.S. law.[136]

The possibility of a congressional resolution is triggered by the presentation of a report by the Administration to Congress that evaluates the WTO from the perspective of U.S. interests; this report is mandated by Sections 124 and 125 of the Uruguay Round Agreements Act.[137] The relevant report for the current resolution is contained in Section V of the 2025 Trade Policy Agenda and 2024

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[135] Withdrawing the Approval of the United States from the Agreement Establishing the World Trade Organization, H.J. Res.27, 109th Cong. (2005).

[136] The Congressional Research Service summarizes the procedures as follows: "Since 1995, Section 125 of the URAA has allowed any Member to introduce every five years a privileged joint resolution proposing to withdraw approval of the WTO agreements. The House Ways and Means Committee explained in H.Rept. 103-826 that §125 was to provide an opportunity for Congress to evaluate the transition of the GATT to the WTO and to assess periodically whether continued membership in this organization is in the best interest of the United States. "It is the desire of the Committee not to leave this decision totally in the hands of the Executive Branch but to be active in determining whether the WTO is an effective organization . . . ."

House and Senate consideration of a disapproval resolution is governed by expedited parliamentary procedures contained in § 125 of the URAA and § 152 of the Trade Act of 1974. These procedures are designed to ensure that Congress can choose to pass the joint resolution and present it to the President before the end of a 90-day period that began on the day Congress received the USTR report.

Joint resolutions can be submitted in either chamber at any time during the 90-day period and are referred to the House Ways and Means or Senate Finance Committees. A committee must report the referred measure by the close of the 45th day after introduction or be automatically discharged of its further consideration. Resolutions may be called up on the floor of each chamber by non-debatable motion (two legislative days' notice required in the House). A joint resolution is debatable for up to 20 hours and is unamendable. A motion to recommit is not permitted. In the case of a presidential veto, an override must occur by the later of the end of the 90-day period or by the close of a 15-day period that begins when Congress receives the veto message. The time periods exclude periods of adjournment taken by concurrent resolution and weekends when either chamber is not in session. In the Senate, the non-debatable motion to take up a resolution, coupled with the limits on amendment and debate, mean that a numerical majority in that chamber could take up and agree to a joint resolution without a cloture process and its supermajority requirement.

These provisions are considered to be rules of the House and Senate, respectively, and can be altered or overridden by a special rule in the House, suspension of the rules, or unanimous consent." CATHLEEN CIMINO D. ISAACS, CHRISTOPHER M. DAVIS & KEIGH E. HAMMOND, CONG. RSCH. SERV., IF12997, CONGRESSIONAL REVIEW OF US MEMBERSHIP IN THE WTO (2025), https://www.congress.gov/crs-product/IF12997.

[137] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994), secs. 124–25.

Annual Report, released in February 2025.[138] The document notably does not advocate U.S. withdrawal from the WTO, but rather what might be described as watchful waiting to see if the WTO's supposed ills are terminal or can be fixed.

If a resolution were eventually to pass in both Houses, what would be its legal and political consequences? The Congressional Research Service opines:

> Some question how the joint resolution, should it pass, is to be implemented. URAA §125 does not contain a specific provision on implementation, nor does it direct the executive branch to transmit notice of withdrawal to the WTO. According to H.Rept. 106-672 to accompany H.J.Res 90, while enacting a joint resolution under § 125, "would call into question the future of U.S. participation in the WTO, it does not expressly provide for the President to withdraw from the WTO. Nor would the resolution put the United States in violation of its WTO obligations."[139]

Based on these considerations, it seems clear that, at the international level, the passage of the resolution, even after the period for Presidential veto has expired, would not itself constitute notice within the meaning of Article XV of the WTO Agreement.

For U.S. law, there is a question as to whether, in creating the disapproval resolution procedure, Congress intended to place a limit on the President's power to withdraw the United States from the WTO in the absence of such a prior joint resolution. In a recent analysis, former Congressman and former WTO Appellate Body Chair James Bacchus argues that Section 125 "should be determinative . . . ." Specifically, Section 125 (b) makes it very clear that congressional approval of the WTO Agreement "shall cease to be effective if and only if . . . a joint resolution is passed."[140] In an opinion on U.S. withdrawal from the North American Free Trade Agreement (NAFTA), the Office of Legal Counsel (OLC) opined that in the case of a congressional-executive agreement negotiated by the Executive and approved by Congress, the President may invoke the withdrawal procedure in the agreement without further congressional action.[141] OLC also strongly insisted that the power of the President to withdraw from "treaties" (within the meaning given to that concept in the Constitution) without congressional approval is well-established.[142] The OLC, in supporting its view concerning the President's power

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[138] OFF. OF THE U.S. TRADE REPRESENTATIVE, THE 2025 TRADE POLICY AGENDA AND 2024 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENT PROGRAM § V (2025).

[139] CATHLEEN CIMINO D. ISAACS, CHRISTOPHER M. DAVIS & KEIGH E. HAMMOND, CONG. RSCH. SERV., IF12997, CONGRESSIONAL REVIEW OF US MEMBERSHIP IN THE WTO (2025), https://www.congress.gov/crs-product/IF12997.

[140] James Bacchus, *What Happens if the US Leaves the WTO?*, CATO INST. POL'Y ANALYSIS NO. 996, at 3 (June 3, 2025) (citation modified).

[141] Authority to Withdraw from the North American Free Trade Agreement, 42 Op. O.L.C. 133 (Oct. 17, 2018).

[142] *Id.* at 137.

to withdraw, observed that the NAFTA implementing legislation placed no "limits" on the notification procedure in the NAFTA Agreement itself.[143] Indeed, the NAFTA implementing legislation contains no provisions at all that might give Congress a role in reviewing, or considering the termination of, U.S. participation in the NAFTA. This contrasts sharply with Section 125 of the URAA, especially the language highlighted by Bacchus: "if and only if . . . ."[144]

C. The Consequences of U.S. Departure from the WTO (voluntary or not)

What are the likely consequences of U.S. withdrawal, whether through expulsion or voluntarily, besides the obvious one that the United States will no longer contribute dues to finance the Organization or have rights and obligations under its treaties?

One legal question that would emerge is whether and how such withdrawal would alter U.S. preferential trade agreements (PTA) that incorporate or otherwise reference the WTO rights and obligations of the parties to the PTA. To my knowledge, essentially all U.S. PTAs are calibrated in some way or another to WTO rights and obligations or are premised on all parties to the PTA being WTO Members. It suffices here to illustrate the issues through two examples: the Central American Free Trade Agreement (CAFTA)[145] and the Korea–U.S. Agreement (KORUS).[146]

Article 1.3.1 of the CAFTA provides: "1. The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which such Parties are party."[147] The Chapter on Technical Barriers to Trade provides: "Further to Article 1.3 (Relation to Other Agreements), the Parties affirm their existing rights and obligations with respect to each other under the [WTO] TBT Agreement."[148] On the other hand, with respect to trade remedies the DR-CAFTA stipulates: "Each party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping and countervailing duties each party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping and countervailing duties."[149] The KORUS Article 1.3 stipulates in essentially identical language to the DR-CAFTA: "1. The Parties affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party, including the WTO Agreement."[150] With respect to Technical

[143] *Id.*
[144] Bacchus, *supra* note 140.
[145] Free Trade Agreement Between Central America, the Dominican Republic and the United States of America (CAFTA) (2004).
[146] United States–Korea Free Trade Agreement, S. Kor.-U.S., Dec. 2010, 2025 U.S.T.I.F. 250 [hereinafter KORUS].
[147] Free Trade Agreement Between Central America, the Dominican Republic and the United States of America art. 1.3, Aug. 4, 2004, 2025 U.S.T.I.F. 187.
[148] *Id.* art. 7.1.
[149] *Id.* art. 8.8.3.
[150] KORUS, *supra* note 146, article 1.3.

Barriers to Trade, the KORUS Agreement establishes very specific benchmarks coordinated to WTO law and practice, in addition to the general "affirmation" of the parties' WTO obligations. For example, "in determining whether an international standard, guide, or recommendation within the meaning of Articles 2 and 5 and Annex 3 of the TBT Agreement exists, each Party shall base its determination on the principles set out in Decisions and Recommendations adopted by the [WTO TBT] Committee since 1 January 1995."[151]

In the scenario that the United States is out of the WTO, one could read the general affirmation of WTO rights and obligations in several different ways. 1) One could view these affirmations as incorporating WTO rights and obligations as they existed at the time the US PTA came in effect into the PTA itself, in which case even while no longer in the WTO, the United States would be bound by its rights and obligations in its relations with the other Members of the PTA; 2) One could read these affirmations as applicable only as long as both parties remain WTO Members, and thus, the United States no longer being a Member, these provisions would be of no legal effect; 3) Other PTA Members might argue that WTO Membership was a fundamental condition or premise of the PTA and thus where changed circumstances would vitiate the obligations in the PTA itself, in whole or in part.[152] Where more specific benchmarks from WTO law or practice have been written into the PTAs, it would be difficult not to view them under 1) as incorporations, especially since their non-operation would create gaps in specific provisions for which they serve as benchmarks.

Another significant legal consequence of U.S. exit from the WTO is that it could only regain WTO Membership through following the accession process set out in the WTO Agreement. This process is required even though the United States has the status of an Original Member under the Agreement. This requirement could mean that a current member, China, for instance, could determine the terms on which the United States is allowed to re-enter, as accession requires a consensus among existing WTO Members. There is a curious historical irony here because the relevant precedent for such a process is China's own re-entry. China too was an original Member of GATT, but its membership was withdrawn through actions of Taiwan. When China sought to rejoin the GATT in 1987 far from its original membership being automatically renewed, although China originally argued for this, a burdensome accession process was launched that morphed into an accession under the WTO Agreement once it came into force. China was required to make certain commitments in its protocol of accession that went beyond the existing multilateral WTO treaties.[153] I surmise that China would use the opportunity to make the United States pay a significant price for re-entering the WTO, and perhaps other countries as well would insist on some kind of reparation to the harm done to the system and the rule of law generally with the current Trump policies. The difficulty of reentering is likely overall to make U.S. exit from the WTO permanent

[151] *Id.* article 9.3.
[152] *See* Vienna Convention on the Law of Treaties art. 62.1, May 23, 1969, 1155 U.N.T.S. 331.
[153] Ya Qin, *China and GATT: Accession Instead of Resumption*, 27 J. WORLD TRADE 77 (1993).

or at least long-term—even a new U.S. administration with a more positive view of trade multilateralism might find it politically uncomfortable to come to the remaining Members, cap in hand, prepared to agree to conditions for reentry. Congress would likely need to be involved, as well.

A further legal consequence of the U.S. exit from the WTO is that other WTO Members would be free to counter Trump tariffs with retaliation at whatever level they pleased, without in any way having to compromise their own commitment to the rule of law within the WTO (this subject, of course, to any PTAs with the United States that are in force). For example, while there is currently a moratorium in the WTO on imposing customs duties on digital transactions, if the United States ceased to be a WTO Member, the moratorium would not apply. While there may be some logistical challenges to imposing duties on transactions that are entirely electronic, these are not so insuperable as to make the possibility of such charges a serious counter-threat. The other WTO Members would also be free (subject to any obligations under non-WTO intellectual property treaties) to remove the intellectual property rights that are guaranteed under the Trade-Related Aspects of Intellectual Property Rights Agreement.[154] Assuming there are states that would want to address Trump tariffs through aggressive retaliation while maintaining their reputation for upholding the law, U.S. exit would assist that strategy, perhaps significantly.

1. Systemic and Geopolitical Consequences of U.S. Exit from the WTO

Having raised these possible legal effects or consequences of U.S. exit from the WTO, I now address the broader systemic and geopolitical consequences. One such consequence might be a rapid reestablishment of the Appellate Body. In the wake of the demise of the original Appellate Body, WTO Members undertook a process of identifying various dispute settlement reforms. The premise of this process was that a straightforward return to the original Appellate Body would not be possible. But the United States alone was the sole obstacle to a straightforward return, blocking new Appellate Body appointments.

A U.S. exit could lead to slow-moving ambitious plans for dispute settlement reform involving the complex and difficult process of amending the DSU by consensus, while at the same time achieving a quick win for the rule of law by appointing new Appellate Body Members. This would in turn allow full operation of all the provisions of the DSU designed to function around existence of the Appellate Body to return. There might be some transitional issues to figure out should all the appeals into the void (obviously, apart from the ones involving the United States) be now decided (in some cases appeal into the void may have ultimately resulted in a satisfactory out-of-court settlement between the parties), as well as what happens to proceedings under way under the ad hoc substitute appeals

[154] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

mechanism (MPIA) that some Members devised to operate among themselves as a substitute form of appellate review.

2. Losing U.S. "Leadership" in the WTO—Curse or Blessing for the Multilateral Trade System?

While this might be a positive consequence for the WTO, reinvigorating to some extent the legalist ideal discussed in an earlier section of this paper, there are also dire predictions of the consequences of the U.S. exit. When Donald Trump proposed U.S. withdrawal from the WTO during his 2016 presidential campaign, the neo-liberal Peterson Institute responded with an op-ed-type piece entitled "U.S. Exit from WTO Would Unravel Global Trade."[155]

Among the points the Peterson analysts made was that with U.S. retreat, China would become the preeminent power in the WTO: "U.S. withdrawal from the WTO would hand leadership of the world trading system to China."

This point assumes that the world trading system only functions when there exists a leader or hegemon in the form of a superpower—thus, the United States or China. In making the case for the United States as the leader, the Peterson Institute assumes that the past impact of American "leadership" in the WTO has been largely benign, and that the United States has used its power through leading for the community good.

Such a view of American leadership may, to some extent, be plausible when one thinks of the genesis of the multilateral trading system in the GATT. While the U.S. negotiators asserted American commercial interests against the points of view of other powers like Britain and France, they also made major compromises, given the broader goal of reconstruction of the world after the devastation of World War II, building new institutions that would benefit the United States by raising the rest of the world to the vision of American statesmen like Cordell Hull.[156] Benn Steil, in his writing on Bretton Woods, and Doug Irwin, in his history of U.S. trade policy have emphasized this strain of American enlightened self-interest, if not altruism.[157]

During the first decades of the GATT, the United States was willing to open up its domestic markets to other GATT Contracting Parties, without too much concern about their use of activist industrial policies, state enterprises, and so forth

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[155] Pedro Nicolaci da Costa & Cathleen Cimino-Isaacs, *U.S. Exit from WTO Would Unravel Global Trade*, PETERSON INST. FOR INT'L ECON. (July 26, 2016, at 13:45), https://www.piie.com/blogs/trade-investment-policy-watch/us-exit-wto-would-unravel-global-trade.

[156] Douglas A. Irwin, *Trade Liberalization: Cordell Hull and the Case for Optimism, A Maurice R. Greenberg Center for Geoeconomic Studies* (Council on Foreign Relations, Working Paper, 2008), https://www.cfr.org/sites/default/files/pdf/2008/07/CGS_WorkingPaper_4.pdf.

[157] BENN STEIL, THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER (Princeton Univ. Press 2013); *see* DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY 508 (Univ. of Chi. Press 2017).

to develop competitive industries. The United States was still enjoying industrial supremacy in many areas, and with the expansion of the New Deal social safety net, along with healthy, continuous economic growth, U.S. workers were expected to adjust without too much pain when competition did start to occur.

But where the United States had to pay a significant domestic price for open trade, it always chose its own interests over the community interest in the GATT. This was already apparent with the agricultural waiver episode in the 1950s: when U.S. domestic agricultural policies were in contradiction with GATT norms, against the strong objections of GATT contracting parties, the United States insisted on a waiver of GATT obligations, threatening to leave the GATT if it did not obtain the waiver.[158] The waiver was the first major step towards agricultural protectionism being largely excluded from GATT disciplines, with devastating consequences for many developing countries, where domestic agriculture was decimated by high subsidized U.S. and EU imports, with food security ultimately depending on Big Agriculture. Fast forward to the Cancun WTO Ministerial, when the United States was called upon to resolve a WTO dispute that involved protective measures on U.S. cotton that were destroying subsistence farmers in some of the poorest countries of the world; then, United States Trade Representative Robert Zoellick would not relent on these measures, an indifference to global justice under law that contributed to the collapse of the Ministerial.[159]

The premise of U.S. leadership in the Uruguay Round of negotiations that led to the creation of the WTO was a domestic legal provision, Super 301,[160] which allowed for the possibility of the United States sanctioning through trade restrictions "unfair" trade policies of other countries, even in situations where these policies did not violate any international rules, or did not trigger any GATT-consistent trade remedy, such as anti-dumping or countervailing duties. Instead of using threats of Super 301 action only to force other states to alter their policies on an individual basis, which has been the Trump method, the Reagan Administration deployed the threat of unilateralism as leverage to induce a range of recalcitrant, mostly developing countries, to accept the negotiation of new rules, in areas such as intellectual property, food safety, subsidies, and services that favored U.S. interests in obtaining market access for U.S. exports. U.S. leadership, including pressure tactics associated with the notorious Green Room, led to the adoption of rules for everybody that served U.S. interests. Developing countries agreed, but with full awareness that such rules might not serve their own interests–presumably by

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[158] FRANCINE MCKENZIE, *'Agricultural Anarchy': The Agriculture Challenge to GATT*, *in* GATT AND GLOBAL ORDER IN THE POSTWAR ERA 232, 242 (Cambridge Univ. Press 2020).
[159] *See* Chakravarthi Raghavan, *Process and Substance Caused Failure at Cancun*, THIRD WORLD NETWORK (2003), https://twn.my/title/5420a.htm.
[160] 1988 Trade Act, *supra* note 1, § 1302, 102 Stat. 1176–79 (1988) (codified as amended at 19 U.S.C. § 2420 (1988)); *see* Steven R. Phillips, *The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988*, 22 VANDERBILT L. REV/ 491 (1989), https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2081&context=vjtl; DEBORAH ELMS, SUPER AND SPECIAL: THE SINGULAR POWER OF US SECTION 301 (2026), https://www.hinrichfoundation.com/research/wp/trade-governance/singular-power-of-us-section-301.

agreeing they could forestall unilateral action against them, and there were supposed quid pro quos in areas such as textiles and agriculture. Though these did not amount to much in the end, given the large loopholes that developed countries insisted on. [161]

Much to the disappointment of neoliberal citadels like the Peterson Institute and the World Economic Forum, U.S. leadership began to retreat soon after the creation of the WTO: the collapse of the Seattle and then Cancun Ministerial was brought about, in part, by developing countries, as well as civil society in the developed world, pushing back on U.S. pressure tactics.[162] New liberalizing agreements along neoliberal lines became impossible to negotiate.[163] The BRICs became very active participants in the WTO, particularly Brazil, India, and China. They were unwilling to stand down.[164] When President Barack Obama said, "[w]e have to make sure America writes the rules of the global economy," he was referring not to the WTO, but above all to the TPP, or the kinds of arrangements where a country like China could be excluded or sidelined.[165]

This does not mean that episodes of U.S. leadership cannot still occur, even in the form of compromises with, or deviations from, standard dominant commercial interests. In 2014, President Obama offered a rare late example of the United States making a compromise to allow the advancement of trade multilateralism at the Bali Ministerial, where India had been threatening to block the approval of the multilateral Trade Facilitation Agreement.[166] A compromise between the United States and India on food security (that involved at least some deviation of U.S. policy from the positions of Big Ag) allowed the TFA to proceed; the loose ends in the compromise bargained at Bali itself were tied up through a person-to-person meeting of President Obama with Indian Prime Minister Narendra Modi.[167] More recently, during the Biden Administration, the United States led through supporting a limited waiver from TRIPS obligations for COVID vaccines,

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[161] *See generally* Sylvia Ostry, The Uruguay Round North–South Grand Bargain: Implications for future negotiations. In: Kennedy DLM, Southwick JD, eds. THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC. (2002), 285–300.

[162] Amrita Narlikar & Rorden Wilkinson. *Collapse at the WTO: A Cancun Post-Mortem*. 25 THIRD WORLD Q. 3, 447–60 (2004).

[163] Peter Draper, *What is the Future of the WTO?*, WORLD ECON. F. (Sep. 15, 2015), https://www.weforum.org/stories/2015/09/how-can-the-wto-remain-relevant/.

[164] BRICS IN THE WORLD TRADE ORGANIZATION: COMPARATIVE TRADE POLICIES BRAZIL, RUSSIA, INDIA, CHINA AND SOUTH AFRICA (Vera Thorstensen, Ivan Tiago Machado Oliviera eds., 2014), https://saiia.org.za/wp-content/uploads/2014/07/BRICS-in-the-WTO-Comparative-Trade_20140621_web-version.pdf.

[165] Barack Obama, Remarks by the President on Trade (May 8, 2015).

[166] Institute for Agriculture & Trade Policy, *Seattle 1999: The Battle for Seattle*, https://www.iatp.org/seattle-1999 (last visited March 2, 2026); Amrika Narlikar & Rorden Wilkinson, *Collapse at the WTO: A Cancun Post-Mortem*, 25 THIRD WORLD Q. 447, 447–60 (2004).

[167] *Modi-Obama Meeting Sealed Trade Deal, WTO Says Bali Package Could be in Force in 2 Weeks*, CTR. FOR WTO AND INT'L TRADE VIET. CHAMBER OF TRADE AND INDUS. (Nov. 15, 2014), https://wtocenter.vn/chuyen-de/4333-modiobama-meeting-sealed-trade-deal-wto-says-bali-package-could-be-in-force-in-2-weeks.

to facilitate greater access in poorer countries and deviating from the characteristically pro-IP and pro-Big Pharma approach in U.S. trade policy; the U.S. proposal was a compromise, significantly narrower than what was asked for by the countries proposing a waiver in the first place, led by South Africa.[168] It was widely criticized as being too little too late.[169] But it was not nothing.

These last examples are cases where the United States showed leadership through supporting compromise, yet it is arguable that some of these compromises would not even be needed but for the presence of the United States in the system.

In a different context, negotiations on global taxation norms, Joseph Stiglitz has argued:

> The US has distanced itself from international agreements but, paradoxically, the absence of its diplomacy may help strengthen multilateral negotiations to deliver a more ambitious outcome. In the past, the US would demand that an agreement be weakened (typically to benefit one special interest or another), but in the end, would refuse to sign. This is what happened during the OECD negotiations for the taxation of multinational corporations. Now, the rest of the world can get on with the task of designing a fair and efficient global tax architecture.[170]

Stiglitz may well be right about negotiations on tax rules, but in the case of the WTO, I am less certain that the special interests in question will necessarily be less powerful or influential if the United States isn't in the WTO to do their bidding. In the case of the pandemic TRIPS waiver, pharmaceutical interests managed to get the European Union, Switzerland, and the UK to take positions opposing (at least initially) even the narrow U.S. waiver proposal.[171] Multinational companies may be as adept at lobbying in Brussels as in Washington, D.C. In the WTO tobacco plain packaging dispute, Big Tobacco got Honduras, Indonesia, the Dominican Republic, Cuba, and (initially) Ukraine to challenge Australia's public health regime for tobacco at the WTO.[172] On the other hand, Washington has been a key player in supporting the opposition to regulation of U.S. services industries, whether for consumer protection, privacy, or other purposes, especially Big Tech (with the

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[168] Prabhash Ranjan & Praharsh Gour, *The TRIPS Waiver Decision at the World Trade Organization: Too Little Too Late!*, 13 ASIAN J. INT'L L. 10, 20 (2023).
[169] *See, e.g.*, Prabhash Ranjan & Praharsh Gour, *The TRIPS Waiver Decision at the World Trade Organization: Too Little Too Late!*, 13 ASIAN J. OF INT'L L. 10, 20 (2023).
[170] Joseph E. Stiglitz, *America is Becoming the World's Largest Tax Haven*, PROJECT SYNDICATE (Apr. 21, 2025), https://www.project-syndicate.org/commentary/america-becoming-largest-tax-haven-under-trump-by-joseph-e-stiglitz-2025-04.
[171] Eric Chin-Ru Chang*, The WTO Waiver on COVID-19 Vaccine Patents, in Discourse*, UCLA L. REV., Jan. 27, 2023, fn. 39 and accompanying text.
[172] Alyssa Ayres, *India: Tough Talk and the Bali Trade Facilitation,* COUNCIL ON FOREIGN RELS. (July 29, 2014, at 10:55 MST) https://www.cfr.org/articles/india-tough-talk-and-bali-trade-facilitation-agreement.

notable unwillingness of the Biden United States Trade Representative to push the U.S. tech giants' neoliberal digital services agenda at the WTO).[173]

D. Normalizing the Trump Tariff Shock Within the WTO Legal and Institutional Framework

Mona Paulsen and Dan Ciuriak (both outstanding WTO scholars—jurist and economist, respectively) have developed a strategy whereby a coalition of WTO Members would seek to confront the Trump Administration directly about the disconnect between the tariff shock and the United States' WTO obligations.[174] Paulsen and Ciuriak note that Article XXVIII of the GATT provides for an elaborate procedure for renegotiation when a single WTO Member wishes to change its tariffs beyond MFN bound rates.[175] If these negotiations fail and major trading partners do not come to terms with the Member on an agreed new tariff rate, normally with compensation to trading partners for the restriction of market access, as Paulsen and Ciuriak indicate, "the right to change tariffs is absolute and not dependent on an agreement being reached."[176] In the absence of agreement, trading partners are permitted to take compensatory measures; that is, proportionate withdrawal of concessions to the country raising its tariffs. Paulsen and Ciuriak suggest bringing an unusual type of dispute against the United States: a "situation" complaint, which would raise the issue of the United States not following Article XXVIII procedures to raise tariffs as a systemic concern for the WTO Membership as a whole.[177]

A parallel move could be to negotiate a form of waiver that would stipulate that WTO rules do not apply as between China and the United States. Moving the China–U.S. trade relationship outside the WTO would arguably be stabilizing—— China has already been addressing trade conflict with the United States through bilateral solutions, some of which at least seem to be in tension with WTO rules.[178] Providing for the non-applicability of the WTO to the U.S.–China relationship would acknowledge the reality that the range of dynamic geopolitical tensions built into that relationship cannot be well handled by a set of general multilateral rules. A GATT precedent exists along these lines. In 1951, the GATT Contracting Parties accepted that GATT obligations would not apply as between the United States and

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[173] *See, e.g.*, Phoebe Liu, *AI's Biggest Builders Are Now Its Biggest Lobbyists,* FORBES (Feb. 20, 2026, at 06:30 EST), https://www.forbes.com/sites/phoebeliu/2026/02/20/ais-biggest-builders-openai-anthropic-among-biggest-government-lobbyists/.

[174] Paulsen & Ciuriak, *supra* note 2, at 5.

[175] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), art. XXVIII; *see* World Trade Organization, GATT Analytical Index, GATT 1994-Article XXVIII (Practice).
https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art28_oth.pdf.

[176] Paulsen & Ciuriak, supra note 2, at 11.

[177] *Id.* at 14.

[178] Chad P. Bown, *Unappreciated Hazards of the US-China Phase One Deal*, PETERSEN INST. FOR INT'L ECON. (Jan. 21, 2020), https://www.piie.com/blogs/trade-and-investment-policy-watch/unappreciated-hazards-us-china-phase-one-deal

Communist Czechoslovakia.[179] Further, where the Trump tariff shock results in trade agreements that do not meet the conditions or criteria in GATT Article XXIV because they only apply to selected sectors or issues and may entail some increase in protectionism, these could be authorized by waiver (super-majority vote) as the WTO Agreement allows.[180]

Finally, some of the Trump tariff actions might be the subject of WTO disputes (Canada and China have already filed for consultations, initiating two disputes).[181] The interpretation of the GATT national security exception (Article XXI) might be reconsidered by future panels, perhaps in the direction of greater deference to the United States when it invokes national security.

An immediate and not trivial objection is that this kind of plan would, in effect, reward egregious rejection or repudiation of legal obligations—it would incentivize lawlessness through finding a path by which it can be legalized ex post. But one wonders how different this would be from the agricultural waiver in the 1950s, or the United States imposing its views and interests in the Uruguay Round through the threat of unilateral action outside the GATT framework (Super 301).[182] As Guzman and Stiglitz observe, rules and their enforcement are inevitably shaped by power.[183]

Normalization along the lines suggested assumes as a reality that the United States will be more protectionist in the coming years, even without Trump, and that the U.S.–China relationship will continue to be fraught with tensions that can only be managed through ongoing dynamic dialogue between the rivals. In February 2026, the Supreme Court of the United States held that the International Emergency Economic Powers Act (IEEPA) cannot be used the way the Administration is doing to impose tariffs.[184] While the full implications of this decision, and Administration reaction to it, are still unfolding, it is clear that, in time, more conventional avenues to impose tariffs, some of which are already being

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[179] Suspension of Obligations between the United States with Respect to Czechoslovakia (October 1, 1951), GATT/CP/126, https://spotlight.stanford.edu/gatt/catalog/nr827nh5029.

[180] Marrakesh Agreement Establishing the World Trade Organization, art. 11, Apr. 15, 1994, 1867 U.N.T.S. 154, art. IX.3.

[181] Communication from the United States, *United States – Additional Duties on Imports of Automobiles and Automobile Parts from Canada*, WTO Doc. WT/DS637/2 (Apr. 15, 2025); Communication from the United States, *United States – Universal and Country-specific Additional Duties on Imports from China*, WTO Doc. WT/DS638/3 (Apr. 23, 2025).

[182] At a meeting in 1989 during the Uruguay Round multilateral trade negotiations, which led to the creation of the WTO in 1995, Brazil, India and Mexico claimed that, contrary to prior assurances, the U.S. had threatened them with unilateral trade action in order to pressure them to agree to U.S. negotiating positions in the Uruguay Round on services and intellectual property. *See* GATT Secretariat, Meeting of July 3, 1989, GATT Doc. MTN.SB/10, ¶¶ 5–9.

[183] Paulsen & Ciuriak, *supra* note 2, at 2; *see also* Hirschman, *supra* note 60, at 13 (arguing that economic rules that appear neutral are shaped by pre-existing power asymmetry among states).

[184] Learning Res., Inc. v. Trump, Nos. 24-1287, 25-250, 2026 U.S. LEXIS 714, at *35 (U.S. Feb. 20, 2026).

deployed by the Administration, will have to be used; these take time, involve investigations, and in some cases would result in forms of protection and trade remedies like safeguards and anti-dumping duties that are in principle permissible under WTO rules. If (as mainstream economists have been predicting) tariffs start to significantly increase prices to U.S. consumers, destabilize the financial markets, and depress manufacturing because of the increased costs of industrial inputs, the Administration is likely to come under irresistible pressure to ease off on tariffs. In these scenarios, normalization may become more tractable, even if the ultimate result is legalizing greater protectionism than that permitted under the legal status quo ante. Certainly, it is much too soon to conclude that a more protectionist America, and the realities of U.S.–China geopolitical rivalry, cannot be accommodated through adjustments to the system.

E. Greenfielding a new multilateral trade institution

Recently, EU Commission President Ursula von der Leyen and German Chancellor Friedrich Merz announced an initiative to create an entirely new multilateral trade organization, the initial step being some kind of merger between the EU and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[185] This CPTPP would eventually replace the WTO, at least in Chancellor Merz's view of the proposal.[186] Entirely new multilateral institutions have rarely been established except under circumstances such as war, crisis, or other profound geopolitical change. The WTO itself built upon the GATT in crucial ways. In consolidating the WTO as an institution driven by neoliberal economics and liberal rule of law narratives, the end of the Cold War was arguably a crucial event, especially when perceived through the End of History narrative. It is not entirely implausible to understand the Trump tariff shock as precisely the crisis that leads finally to a decisive rupture with the neoliberal past reflected in the WTO, and as an invitation to build a new post-neoliberal economic order from the ashes of the WTO, as it were. Guzman and Stiglitz, for example, while not calling for the destruction of the WTO, have suggested that a very different set of rules is needed for a post-neoliberal trading order that reflects values of fairness and equality.[187] They propose a framework that is generally permissive of industrial policy but also *empowers* developing countries to undertake industrial policy through technology transfer and financial assistance, as well as "narrow green trade agreements . . . that incentivize developing countries and emerging markets to move forward in the green transition enhanced by trade opportunities for green products, and preserve

[185] Thomas Kohlmann, *WTO: EU, Germany Push for New World Trade Body*, DEUTSCHE WELLE (July 4, 2025), https://www.dw.com/en/eu-and-germany-push-for-new-world-trade-organization-wto-amid-gridlocked-dispute-resolution/a-73143928.
[186] Peter Ungphakorn and Robert Wolfe, *Ursula von der Leyen is Wrong About the WTO and Should Know Better*, TRADE B BLOG (July 1, 2025), https://tradebetablog.wordpress.com/2025/07/01/von-der-leyen-wrong-wto/.
[187] Martin Guzman & Joseph E. Stiglitz, *Post-Neoliberal Globalization: International Trade Rules for Global Prosperity*, 40 OXFORD REV. OF ECON. POL'Y 282, 282–306 (2024).

their ecological heritage (providing carbon storage and biodiversity for the whole world) while making it more productive."[188] Guzman and Stiglitz would also include in the framework rules on taxation and competition.[189] What von der Leyen and Merz have in mind seems quite different–a sort of re-baked neoliberalism, with *constraining* rules on industrial policy (disciplining subsidies and state enterprise).

V. THE UNTOLD STORY OF THE WTO'S FLEXIBILITY AND RESILIENCE IN THE FACE OF NEOLIBERALISM'S DECLINE

The search for an entirely new multilateral trade institution buys into the narrative that the WTO stands or falls with neoliberalism and the related ideology of legalism. What it ignores or underestimates is the extent to which the WTO itself has evolved in response to multiple pressures and events and is morphing into a post-neoliberal institution, the rationale of which doesn't depend on legalism narratives ("rules" vs. "power") and where the underlying normative aspiration of MFN, in Hirschman's words, "equality of trading opportunity," is pursued through a new focus on inclusive trade.[190]

Despite the gap between the various narratives, ideals, and ideologies surrounding the WTO and the reality of its operation, the institution has maintained the support of the vast majority of its member states, even if the Trump Administration has soured on the Organization.[191] This is reflected in the Statement of the Chairperson at the conclusion of the recent MC14 Ministerial: "1.18. Together, we demonstrated unity in setting a clear and forward-looking direction for the reform of this organization. The skill, the intensity, and the energy in the room were absolutely electric. While arriving at agreement on several priority issues will require further work, we depart with clearer pathways, renewed trust, and practical avenues of cooperation across multiple areas- evidence that the WTO is very much alive and capable of improving lives and livelihoods of all our citizens."[192] The critique that the WTO isn't working (that long preceded Trump tariffs) has mostly been voiced by outside experts and commentators, and politicians in developed countries who focus significantly on the WTO's failure to

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[188] *Id.* at 302.
[189] Martin Guzman & Joseph E. Stiglitz, *Post-Neoliberal Globalization: International Trade Rules for Global Prosperity*, 40 OXFORD REV. ECON. POL'Y 282, 301–303 (2024).
[190] Ralph Ossa, *Trade and Inclusiveness: How to Make Trade Work for All*, WTO BLOG (Sep. 10, 2024), https://www.wto.org/english/blogs_e/ce_ralph_ossa_e/blog_ro_10sep24_e.htm.
[191] *See* the recent blog post of the United States Trade Representative Jamieson Greer, Another Fish Story from the WTO Op-ed from the Office of the United States Trade Representative, https://ustr.gov/about/policy-offices/press-office/press-releases/2026/april/op-ed-ambassador-jamieson-greer-another-fish-story-wto.
[192] Ministerial Conference Fourteenth Session Yaoundé, 26-30 Mar. 2026, MC14 Chairperson's Summary, WT/MIN(26)/35, March 31, 2026. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN26/35.pdf&Open=True.

produce new major trade liberalizing bargains.[193] Yet, even after the blockage of the Appellate Body, one finds that the WTO is used by Members to manage trade disputes either through formal proceedings or through various procedures for information exchange and dialogue.[194] Why should this be the case, given the limits of WTO rule enforcement in the real world? The answer is that, most of the time, most of the Members of the WTO treat the legal framework of the WTO as a valuable guidebook for the ongoing operation of international trade.[195] Even if the rules are sub-optimal in terms of fairness, Members have learned to live with them, and to work with interpretations of them by panels and the Appellate Body. Also, in developing new norms, they have accepted the slow nature of consensus-building in an institution with a large and varied membership. Ultimately, having the existing guidebook stabilizes expectations, whether about tariffs, technical regulations, customs practices, or the application of trade remedy laws. In other words, Members generally view the interpretation and administration of the legal framework, as well as the availability of a forum for dialogue and information exchange, as *in their interests*; this remains true even in the minority of cases where pressing domestic interests conflict with WTO legal commitments, and Members may be prepared to engage in various kinds of non-compliance. While rule enforcement against self-interested defectors is the most powerful version of WTO legalist ideology, it is not primarily what maintains the real-world relevance of the WTO to its Members.

A. "Secretariat Strategy 2030": A Game Plan for a Post-neoliberal WTO

Largely ignored amidst the frenzy of networking, book launches, and debates at the 2024 WTO Public Forum, which Financial Times columnist Alan Beattie called "junior Davos," was the unveiling by the leadership of a work plan for the WTO: "Secretariat Strategy 2030.[196] The uncontested reappointment of the Director for a second term reflects confidence in, or at least acceptance of, the mandate set out in this work plan.

One of the priorities is to be proactive in harnessing advances in information technology, including AI, to make the WTO a state-of-the-art

[193] For a detailed discussion of these critiques, *see* Howse & Langille, *supra* note 15, at 10–17.

[194] *See* Fabian Bohnenberger, *What is the 'Regular Work'? Constructing and Contesting Everyday Committee Practices in the World Trade Organization*, 29 REV. INT'L POL. ECON. 6 (2022), https://www.tandfonline.com/doi/epdf/10.1080/09692290.2021.1950808?needAccess=true.

[195] INTERNATIONAL CHAMBER OF COMMERCE, THE WTO'S HIDDEN VALUE: HOW THE MULTILATERAL TRADING SYSTEM DELIVERS FOR BUSINESS BEYOND TARIFFS (2025), https://iccwbo.org/wp-content/uploads/sites/3/2025/11/2025-ICC-The-WTOs-Hidden-Value-1.pdf.

[196] WTO, SECRETARIAT STRATEGY 2030. https://www.wto.org/english/thewto_e/secretariat_strategy2030_e.pdf.

information hub. Information is power and providing real-time information to all WTO Members on domestic and transnational trade regulations, supply chains, trade patterns, and standards in international trade helps to move toward equality of opportunity. Up to now, much of the scholarship on trade policy has largely ignored information economics, the significance of information costs, and particularly information asymmetries, for the functioning of markets.[197] Viewing information about the trading system itself as a public good that should be accessible to all is likely to benefit global competition while responding to the imperative of inclusive trade, i.e., giving all participants in the system the knowledge they need to seize opportunities and manage risks.

Another, not unrelated pillar of the "Secretariat Strategy 2030" is the development of the WTO as a forum for global dialogue on emerging trade-related issues such as climate change.[198] This builds on proposals of some Members, notably the European Union,[199] to enhance the deliberative function of the WTO. Underpinning this priority is the recognition that rapid technological and other changes may create challenges that require a degree of multilateral coordination or cooperation, but the world is moving too fast to depend on the old model of treaty rule negotiations that take years, or on dispute settlement enforcement, which is itself a multi-year process.

The work plan also recognizes the importance of the WTO reaching out to other organizations and stakeholders, both public and private, with overlapping trade-related agendas, which may have needed expertise and resources to tackle today's and tomorrow's issues. Already, the Secretariat had been putting into practice such an outreach strategy, engaging in many dialogues with institutions such as UNCTAD, the OECD, the World Bank, and the United Nations Framework Convention on Climate Change on carbon pricing.[200]

B. Inclusive Trade

The 2024 WTO World Trade Report (Report): Trade and Inclusiveness represents a blunt acknowledgement that trade does not necessarily reduce inequality and, in some circumstances, may exacerbate it.[201] More trade by no means guarantees greater global economic justice. Access to economic

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[197] *But see* Guzman & Stiglitz, *supra* note 187.

[198] SECRETARIAT STRATEGY 2030, *supra* note 196, at 18.

[199] WTO, General Council, *Reinforcing the Deliberative Function of the WTO to Respond to Global Trade Poicy Challenges Communication from the European Union*, WT/GC/W/864 (2023).

[200] WTO, *WTO Issues Information Note on Steel Decarbonization Standards, Readies for March Event* (Dec. 21, 2022); *see also* Decarbonization standards and the iron and steel sector: how can the WTO support greater coherence?; Trade and Climate Change, Information Brief #7, https://www.wto.org/english/tratop_e/envir_e/trade-climate-change_info_brief_no7_e.pdf.

[201] WTO, WORLD TRADE REPORT 2024: TRADE AND INCLUSIVENESS 3, 13 (2024) ("But we also have to be honest: trade has not worked for everyone, everywhere. Many people and many places have been left behind. Domestic and international inequalities have remained high or even increased in some cases.").

opportunities from trade is distributed highly unequally.[202] This is a big chip on the ideological rock upon which the WTO church was originally built. At the same time, it reflects a reality that is no longer obscured by faith in neoliberal globalization. As Guzman and Stiglitz observe, in the heyday of neoliberalism:

> some would claim that trickle-down economics ensured that if the country was richer, each group within its society would be better off . . . Political leaders and economists glided over the fact that there was a big difference between being able to make everyone better off and actually making everyone better off . . . [But] redistribution from winners to losers not only hardly occurs, but the changes in the distribution of income and wealth affect the distribution of power, reinforcing inequalities to an extent that can become dysfunctional for societies.[203]

Echoing Guzman and Stiglitz and discarding a longstanding mantra that the WTO should not be concerned with the distribution of benefits and burdens from trade within societies, the Report declares: "Inclusiveness seeks to ensure that the benefits and opportunities of trade are accessible to all individuals and businesses. Trade brings benefits to many but the disparity between individuals who can effectively adjust to trade and those who cannot creates a risk of widening inequality."[204]

As with the Secretariat Strategy, the Report emphasizes the importance of information sharing and transparency in empowering a wider range of countries and economic actors to take advantage of trade opportunities:

> All WTO members derive important benefits from the various information-sharing and transparency requirements in several WTO agreements . . . . Several transparency tools have been developed, such as the ePing SPS & TBT platform, developed by the WTO in conjunction with the International Trade Centre (ITC) and the United Nations (UN), and which catalogues over 50,000 TBT notifications to provide relevant regulatory information to firms exporting to new markets. However, as discussed above, given the uneven geographical coverage of notifications, the information-sharing processes could be further improved. A recent ministerial decision, adopted at the 13th Ministerial Conference, calls for reinforcing TBT information sharing processes, encouraging early engagement in commenting on draft technical regulations to mitigate unnecessary trade barriers, and sharing best practices. Leveraging digital technologies could further enhance trade policy transparency by

[202] *Id.* at 58 ("In the absence of appropriate complementary policies, trade can exacerbate existing inequalities by concentrating gains in high-productivity firms and regions.").
[203] Guzman & Stiglitz, *supra* note 187, at 287.
[204] WTO, WORLD TRADE REPORT 2024: TRADE AND INCLUSIVENESS 13 (2024).

> providing more efficient data collection, analysis and dissemination tools.[205]

In the case of natural resources sectors, the Report suggests:

> Tailored technical assistance and capacity-building programmes, focusing on specific sectors with competitive advantages and offering individualized assistance to firms based on their unique needs, could help firms in developing economies to move up the value chain and export more processed goods. Implementing robust monitoring and evaluation mechanisms, coupled with continuous feedback loops from beneficiaries, can help to refine and improve the technical assistance programmes.[206]

C. The Financial Crisis as a Watershed

The 2007–2010 financial crisis proved to be a watershed in bringing to the fore transparency, information exchange, and peer review as crucial WTO functions. Recognizing that the threat of dispute settlement would not necessarily prove effective in the circumstances of the crisis, the G20 in November 2008 committed to each other to refrain from "implementing World Trade Organization (WTO) inconsistent measures to stimulate exports."[207]

The second normative innovation, or deviation from the dominant rules enforcement legalist narrative of the WTO, was (as Pauwelyn and Berman note) the recognition that in crisis circumstances, where emergency action is needed to forestall disaster, peer pressure, and maintaining trust in the commitment of others through monitoring and information exchange may be more effective than resorting to hard law dispute settlement.[208]

But there was yet another dimension to the WTO response to the financial crisis that can equally be seen as a deep source of the rebranding. With the failure and fragility of many financial institutions during the crisis, trade finance, especially for traders from developing countries and smaller traders, was threatening to dry up. The WTO itself had no facility to provide trade finance, and traditionally it was not preoccupied with the financing conditions required to take advantage of trade liberalization.[209] The Task Force set up by the WTO Director General in October

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[205] *Id.* at 110.
[206] *Id.*
[207] Group of Twenty, *Declaration of the Summit on Financial Markets and the World Economy*, THE WHITE HOUSE ¶ 13 (Nov. 15, 2008), https://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081115-1.html.
[208] *See* Jan Karlas & Michal Parízek, *The Process Performance of the WTO Trade Policy Review Mechanism: Peer-Reviewing Reconsidered*, 10 GLOB. POL'Y 376, 376–77 (2019).
[209] On the division of responsibilities between the WTO and other international institutions on financial matters, *see* Robert Howse, *Towards an Equitable Integration of Monetary and Financial Matters, Trade and Sustainable Development*, *in* THE RULE OF LAW IN

2008[210] included access to trade financing in its monitoring activities, and accordingly, the Director General of the WTO reached out to other institutions such as the World Bank, as well as the export credit agencies of developed countries, to find ways of bridging the gap.[211]

The WTO response to the financial crisis had lasting consequences. As Karlas and Parizek document, in the decade from 2010 to 2020, WTO Members' interest and participation in the Trade Policy Review Mechanism increased dramatically, reflecting a realization that peer review and monitoring are a significant complement to legalistic dispute settlement.[212] The WTO response to the pandemic built significantly on this realization. Again, keeping import and export restrictions from preventing access to essential products such as personal protective equipment and respirators could not be a role for dispute settlement; at most, a dispute complaint would lead a year or two later to a ruling that the measure be removed or modified, probably much too late to make a difference in saving lives.

As for trade finance, the WTO has continued to be actively involved in monitoring its availability and interacting with other institutions and stakeholders.[213] Its aims extend beyond addressing shortfalls due to financial crisis-type conditions to structural features of finance governance that make it difficult for traders.[214]

D. The Pandemic

In the case of the pandemic, the response supported by WTO monitoring and information exchange went beyond simply avoiding new restrictions by temporarily removing some tariffs, simplifying customs procedures, and easing standards-related barriers to trade in essential medical goods. As with the financial crisis, the WTO Director General and Secretariat collaborated extensively with other international organizations and groupings, such as the World Health

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MONETARY AFFAIRS: WORLD TRADE FORUM 285 (Thomas Cottier, Rosa M. Lastra, Christian Tietje and Lucia Satragno, eds., 2014).

[210] ANTONIA DIAKANTONI, PETER N PEDERSEN & AMALIA MKHITARIAN, WTO TRADE MONITORING TEN YEARS ON - LESSONS LEARNED AND CHALLENGES AHEAD (2018), https://ssrn.com/abstract=3418819.

[211] *See* Marc Auboin, *Restoring Trade Finance: What the G20 Can do*, *in* THE COLLAPSE OF GLOBAL TRADE, MURKY PROTECTIONISM AND THE CRISIS: RECOMMENDATIONS FOR THE G20, at 75 (Richard Baldwin & Simon Evenett eds., 2009).

[212] Jan Karlas & Michal Parízek, *The Process Performance of the WTO Trade Policy Review Mechanism: Peer-Reviewing Reconsidered*, 10 GLOB. POL'Y 376 (2019).

[213] *See, e.g.*, WTO, *WTO, IFC Heads Agree to Enhance Cooperation on Trade Finance* (Nov. 29, 2021), https://www.wto.org/english/news_e/news21_e/igo_29nov21_e.htm.

[214] Financial Action Task Force, *High-Level Synopsis of the Stock Take the Unintended Consequences of the FATF Standards* (Oct. 27, 2021), https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Unintended-Consequences.pdf; Marc Auboin and Isabella Blengini, *The Impact of Basel III on Trade Finance: The Potential Unintended Consequences of the Leverage Ratio, World Trade Organization, Economic Research and Statistics Division* (Working Paper ERSD-2014-02, 2014), https://www.wto.org/english/res_e/reser_e/ersd201402_e.pdf.

Organization.[215] On addressing standards and regulation-based barriers, the WTO Technical Barriers to Trade (TBT) Committee did crucial work.[216] The disappointment surrounding the lateness and narrowness of the TRIPS waiver for vaccines has led to insufficient attention to these other, positive crisis management roles of the WTO in the pandemic.

E. The Trade Facilitation Agreement

The Pandemic response also represented the first real mobilization of the Trade Facilitation Agreement (TFA),[217] which had not yet been fully implemented in the case of many Members. As the Secretariat Information Note details, both the APEC Declaration on the Facilitation of the Movement of Essential Goods and the G20 Statement referred to provisions of the TFA to press states to make their borders work more smoothly to address the pandemic emergency.[218] These provisions included simplifying transit procedures and documentation requirements (to expedite the movement of essential medical goods across borders) and pre-arrival processing. A COVID-19 trade facilitation repository was created by the Trade Facilitation Assistance Facility.

The TFA itself reflects an evolution in the WTO that is now articulated in the rebranding. Trade facilitation was one of the surviving Singapore topics in the Doha Round Agenda, and the TFA was the only multilateral covered agreement to emerge from the Doha Round, indeed the only one concluded since the WTO entered into existence in 1995.[219] Initially, trade facilitation was simply an extension of the neoliberal agenda to eliminate barriers to market access, in this case, protectionism embedded in customs and border control practices. What emerged at Bali was a highly innovative accord more focused on providing resources to improve governance for countries with limited capacities than on exposing protectionism.[220]

The TFA was structured to match obligations to capacities and provide capacity-building/technical assistance where countries needed it to improve governance of the border. It thus set forward a new model of special and differential treatment, which recognized that many developing countries, if their obligations are to be equitable, don't just need long periods but also resources, information-sharing,

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[215] WTO, *Trading Through the Pandemic: The WTO's Response to COVID-19*.
[216] *See* WTO Secretariat, *How WTO Members Have Used Trade Measures to Expedite Access to COVID-19 Critical Medical Goods and Services*, WTO Doc. (Sep. 18, 2020).
[217] Agreement on Trade Facilitation, Nov. 27, 2014, WTO Agreement Annex 1A, WT/L/940.
[218] *See* WTO Secretariat, *How WTO Members Have Used Trade Measures to Expedite Access to COVID-19 Critical Medical Goods and Services*, WTO Doc., 5–7 (Sep. 18, 2020).
[219] Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization*, 14 WORLD TRADE REV. 643, 643–44. (2015).
[220] *See* Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization*, 14 WORLD TRADE REV. 643, 659 (2015).

technology transfer, and expertise to achieve implementation.[221] Improving governance of the border—particularly through deploying information technology to speed customs clearance, documentation, and so forth—not only reduces the logistics costs of multinationals, but it also helps smaller traders, who may not have access to the state-of-the-art clearance services provided by major logistics firms. Since these are positive commitments to improve governance, one would not expect that compliance would come through the dispute settlement rules enforcement model.

F. Experimentalism in Global Economic Governance at the WTO

Contemporary with the rebranding of the WTO around the 2024 Public Forum are a number of governance experiments and initiatives launched at the WTO that reflect principles and approaches underpinning the new brand. Such principles include engagement and cooperation with broader and deeper stakeholder communities, facilitating non-trade objectives through WTO policies, and making trade more inclusive, bringing in hitherto marginalized groups such as indigenous peoples.

In September 2025, enough WTO Members ratified the Agreement on Fisheries Subsidies to allow the Agreement to enter into force.[222] This momentum illustrates that the Trump tariff shock has not destroyed the ability of the WTO to move forward, in this case with an agreement that not only addresses competitive distortions from subsidies but also the harm to the environmental commons that is created by the overfishing that such subsidies incentivize.

One of the most interesting examples of a new governance initiative is the WTO-FIFA "Partenariat pour Le Coton," which aims to integrate African cotton producers into global apparel supply chains, overcoming obstacles through various forms of information sharing, partnership arrangements, and capacity-building.[223]

The last Ministerial Council (MC13) brought forth a 14-page Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastics Trade.[224] The plastics initiative is sponsored so far by seventy-eight WTO Members, who (according to the WTO) account for eighty-five percent of world trade.[225] An essential part of the context for the initiative is the launch of negotiations at the UN

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[221] SUJEEVAN PERERA1, TRADE FACILITATION AGREEMENT (TFA) – IMPLEMENTING IMPLICATIONS (2016), https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/inline/TradeFacilitationAgreement1008.pdf.

[222] *Agreement on Fisheries Subsidies*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/fish_e.htm (last visited Mar. 3, 2026).

[223] *WTO, FIFA Team Up to Use Trade and Football as Drivers of Economic and Social Development*, WTO (Sep. 27, 2022), https://www.wto.org/english/news_e/news22_e/igo_27sep22_e.htm.

[224] *Plastics Pollution and Environmentally Sustainable Plastics Trade*, WTO, https://www.wto.org/english/tratop_e/ppesp_e/ppesp_e.htm (last visited Mar. 3, 2026).

[225] *Dialogue on Plastic Pollution and Environmentally Sustainable Plastics Trade: Background Information for Press*, WTO, https://www.wto.org/english/tratop_e/ppesp_e/ppesp_e.htm (last visited Mar. 19, 2026).

on a binding multilateral agreement to curb plastics pollution.[226] As UN treaty negotiations progress (albeit slowly and with recent setbacks),[227] the sponsors of the WTO dialogue seek to develop a set of approaches in the multilateral trading system that can facilitate these efforts. Here is something innovative and creative on trade and environment: the effort to be proactive in preparing to integrate international environmental norms on plastics pollution into the trading system as those norms are being developed at the UN. Further, in 2023, the WTO launched the Trade Forum for Decarbonization Standards, a multi-stakeholder dialogue aimed at addressing current divergences in international and domestic standards and approaches to regulatory and standards coherence across countries and companies.[228] As with the Agreement on Fisheries Subsidies, the plastics and decarbonization initiatives illustrate a shift to trade governance at the WTO that seeks to address not only the goal of disciplining distortions on competition in trade, but also to facilitate the achievement of environmental objectives.

G. Investment Facilitation for Development

Rebranding the WTO as dedicated to inclusive and equitable trade obviously runs up against the reality, well-articulated by Guzman and Stiglitz, that some of the key existing rules of the WTO betray this ideal, especially those in TRIPS.[229] Even the pandemic was not sufficient to bring about significant new flexibilities—the vaccine waiver was widely and mostly correctly seen as being too little, too late (though some observers suggested that it helped to support broader readings of existing flexibilities). The draft Investment Facilitation for Development Agreement (IFD Agreement), although displaying some of the pro-equitable development features of the TFA, was negotiated on a plurilateral basis, arguably a betrayal of inclusiveness understood as full multilateralism.[230] Significantly, though, India is resisting the insertion of the IFD Agreement into the WTO legal architecture precisely on the grounds that it is not based on a multilaterally agreed mandate. (South Africa only dropped its own objections very recently.)[231] If India is implacable in its opposition, the IFD Agreement could be

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[226] World Econ. F., INC-5.2: The global plastics treaty talks - here's what just happened, August 20, 2025.
[227] *Id.*
[228] WTO Secretariat, *Trade Forum for Decarbonization Standards (and Technical Meeting): Informal Summary*, WTO DOC., https://www.wto.org/library/events/event_resources/tbt_09032023/informal_summary.pdf (last visited Feb. 8, 2026).
[229] Steill & Harding, *supra* note 1.
[230] WTO, *Investment Facilitation for Development Agreement*, INF/IFD/W/55 (Feb. 13, 2024), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W55.pdf&Open=True.
[231] Shanthie Mariet d'Souza, *What is India's Game at the WTO, The Interpreter, The Lowy Institute*, THEINTERPRETER (Mar. 27, 2026), https://www.lowyinstitute.org/the-interpreter/what-india-s-game-wto.

recast as a code of guidance and support for good governance in investor-state relations. With monitoring and peer review of the way in which each state addresses those governance recommendations, the IFD Agreement could creatively transcend the rules enforcement model of WTO legalism.

VI. CONCLUSION

Whether the United States stays in or exits the WTO in the wake of the Trump tariff shock, the shock will not wreck the WTO. The multilateral trading system, from its earliest GATT days, has been shaped—and indeed pervaded by—power politics and has been characterized by the acceptance of rules and practices that, if anything, may have exacerbated inequalities between states, despite its normative ideals, at least in their most high-minded formulation. Legalist narratives concerning the WTO have been especially focused on its dispute settlement system, in which rule enforcement has predominated as the central meaning of legalism. But as they have operated in the real world, the WTO legal institutions have not reflected or implemented this ideal straightforwardly (even when the Appellate Body was in its heyday). The ideology of legalism in the WTO has elements other than rule enforcement; it has its own internal tensions that have led to a counter-ideology of anti-legalism, one of the main forces behind the demise of the Appellate Body through the U.S. blockage of appointments. Proposals to expel the United States from the WTO due to the Trump tariff shock and its challenge to legalism are misguided efforts to preserve the purity of the rule of law at the WTO from contamination by the trade politics of threats and brute coercion. Yet this purity does not exist, and rules and power have always interacted in complex ways in the real world of the multilateral trading system. In recent years, the WTO has pivoted to new roles and agendas—generally under the rubric of inclusive trade—that deviate from the rule creation and enforcement through dispute settlement focus that many observers still see as the entire basis for the WTO's existence. It is more equipped to withstand the current trade winds and to ride the waves than is appreciated by those with nostalgia for days when the WTO was widely seen as the poster child for neoliberal globalism in a neoliberal era, as well as for the post-Cold War liberal narrative of the global rule of law.