U.S. Chamber of Commerce
International Policy Backgrounder

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The WTO and American Business

Securing its Benefits, Advocating for Reform

by John Murphy

Executive Summary

- The World Trade Organization (WTO) and the global rules-based trading system it embodies have brought substantial benefits to the United States. The WTO has lowered barriers facing U.S. exports and guarantees non-discriminatory treatment for U.S. firms doing business internationally.
- While it has achieved much as a forum for negotiations — including, for instance, the Trade Facilitation Agreement which entered into force in 2017 — the need for flexible new approaches at the negotiating table is apparent. This is evident in the e-commerce negotiations, which address a critical area in trade law. Members should also build on recent efforts to put teeth into rules on industrial subsidies.
- Every five years — including this spring — the administration is required to issue a report assessing the value of WTO membership for the United States. A congressional resolution calling for withdrawal may be introduced at that time as Congress, not the administration, has the final authority over U.S. membership in the WTO. In any event, withdrawal would simply invite other countries to raise barriers to U.S. exports and discriminate against American companies.
- Similarly, any U.S. move to withdraw from any of the 18 agreements annexed to the WTO Agreement, such as the highly beneficial Government Procurement Agreement, may not proceed without congressional approval. U.S. law also states clearly that the administration may not raise U.S. tariffs bound under the WTO Agreement without congressional assent.
- While the United States has fared well in WTO dispute settlement, several U.S. administrations have expressed concern about "overreach" in Appellate Body (AB) rulings. The Trump administration has shut down the AB by blocking appointments. While the case for reform of the AB is legitimate, U.S. businesses fear this action will backfire as other governments disregard their WTO obligations and raise new trade barriers against American firms. The Chamber urges the administration to propose its own solution to address these concerns.

Despite a number of challenges, the U.S. business community has long regarded the World Trade Organization (WTO) as one of the most successful multilateral organizations. The global rules-based trading system it embodies has benefited countries around the world — but none more than the United States.

While the WTO was created in 1995, it built on the foundation of the 1947 General Agreement on Tariffs and Trade (GATT). Combined, the WTO and the GATT have revolutionized world trade. Eight successful multilateral negotiating rounds have helped increase world trade from $58 billion in 1948 to well above

$25 trillion today. This 40-fold increase in real terms has brought a rising tide of commerce to nearly the entire world.

A Level Playing Field

It isn't just the tariff elimination brought about under the GATT and the WTO that benefits American companies and the workers they employ. The WTO guarantees that U.S. firms operating abroad will receive "national treatment" (i.e., the same rights and responsibilities granted local firms) and "most-favored nation (MFN) treatment" (i.e., treatment as good as that afforded firms from the most favorably treated country).

In addition, the arbitrary use of technical regulations or standards to block imports is all too common. The WTO provides rules to guard against this kind of protectionism in disguise. WTO rules also prohibit supposed "sanitary" measures that lack a clear basis in science and are protectionist in intent.

American firms rely on these rules — every day of the year — all around the globe.

If the U.S. Congress passed legislation withdrawing the United States from the WTO, the other 163 WTO member states – representing 99% of the world economy – would be free to raise their tariffs against U.S. exports as high as they liked – and Washington would have no legal recourse. U.S. firms would also lose the protection of the WTO's rules against discriminatory treatment.

It's become commonplace to say the WTO's accomplishments are long in the past, but this isn't so. One example of the WTO's recent success is the Trade Facilitation Agreement, which entered into force in early 2017. It is a cost-cutting, competition-enhancing, anti-corruption agreement of the first order. Once fully implemented, it has the potential to increase global merchandise trade by up to $1 trillion annually.

A Forum for Negotiations

That's not to say the WTO doesn't need reform. It does. The WTO must become more nimble as a forum for negotiations by making it easier for members to pursue new market-opening trade agreements. Achieving consensus in an organization of 164 member states is obviously challenging, but the absence of consensus cannot be permitted to block negotiations among those seeking to tear down trade barriers or update trade rules.

The U.S. Chamber strongly supports the move to seek new "plurilateral" agreements covering large numbers of WTO members but not necessarily all. One good example of such a trade agreement is the WTO's Government Procurement Agreement (GPA). Thanks to this agreement, U.S. firms can bid on foreign government contracts worth about $900 billion every year on a level playing field. If the United States were to withdraw from the GPA (as some news reports have suggested), those governments would be free to discriminate against U.S. companies (more below).

Another area ripe for negotiation in a plurilateral format is e-commerce. In this field, 80 WTO member states are now engaged in negotiations. The Chamber supports U.S. objectives in this area for rules ensuring that consumers and companies are able to move data across borders without arbitrary or discriminatory restrictions; preventing forced localization of data; prohibiting web blocking; and ensuring fair, nondiscriminatory, duty-free treatment of digital products and services. Maintaining and making permanent the decades-old moratorium on custom duties on electronic transmissions is another

important issue under discussion within the WTO membership.

Sometimes, striking a deal among a smaller group can lead to bigger gains in the long haul. That's the hope with the proposal to strengthen existing WTO rules on industrial subsidies agreed by the United States, the EU, and Japan in January. This joint effort to put teeth into the WTO's promises on subsidies and the need for state enterprises to act on the basis of commercial considerations should become the basis for a broader effort within the WTO.

WTO members are also seeking a deal to discipline fisheries subsidies by the organizations' 12th Ministerial Conference, which will be held in June 2020 in Nur-Sultan, Kazakhstan. While the ability of a trade agreement to remedy environmental ills is often exaggerated, fisheries subsidies are recognized as a major contributor to overfishing and the widespread depletion of fish stocks. Limiting these subsidies could make a meaningful contribution to addressing this problem.

Report, Resolution, Withdrawal

When Congress approved the WTO Agreement and made the United States a founding member of the organization in legislation known as the Uruguay Round Agreements Act (URAA), it also established a legislative procedure for congressional withdrawal of such approval. As a Congressional Research Service report explained:

> *"Initiation of such withdrawal action is predicated on the transmission by the Administration of a mandatory quinquennial report, next due by March 1, [2020], analyzing the costs and benefits of past U.S. participation in the WTO as well as the value of continued U.S. participation. Thereupon, a privileged joint resolution may be introduced by any Member to withdraw the Congress' approval of the WTO Agreement provided by the URAA… The procedure provides for a (nonmandatory) introduction of the resolution, with mandatory, nonamendable language, and specific expedited (fast-track) consideration."*

These reports have been issued every five years since 2000, and joint resolutions of withdrawal were introduced in 2000 and 2005 but later defeated by wide margins in the House.

In keeping with the Congress's exclusive authority under the Constitution to regulate foreign commerce, the URAA affirms congressional primacy on any decision relating to a possible move by the United States to withdraw from the WTO Agreement. Specifically, the approval by the Congress of the WTO Agreement under 19 USC 3511(a) "shall cease to be effective if, and only if," the Congress passes a joint resolution withdrawing approval.

The statute also makes clear that the final decision-making power resides in the Congress with regard to 18 other WTO agreements, which are annexed to the WTO Agreement. One of these annexed agreements is the Government Procurement Agreement (more below).

The aim of this provision relating to a possible withdrawal resolution is not only to ensure congressional authority over any decision to *get out* of the WTO; it is equally about Congress and the United States *staying in* the WTO and exercising influence within it. In its report on the

URAA issued in 1994, the House Ways and Means Committee stated:

> *"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 for achieving common trade goals and principles and for settling trade disputes among sovereign nations.... Congress wants to ensure that the United States can continue to exercise substantial influence within the WTO and successfully promote goals that benefit American producers, workers and consumers."*

Raising Bound Tariffs?

On a related matter, news reports suggest the administration is considering action to raise U.S. tariffs above the ceilings — bound rates, in WTO parlance — agreed in the WTO Agreement. However, the administration lacks the authority to raise these tariffs absent action by Congress, which the Constitution granted exclusive "power to lay and collect taxes, duties, imposts and excises."

As Senate Finance Committee Chairman Chuck Grassley said on February 13, "They can't do it without Congress's approval... All I can tell you is if anybody's thinking of moving ahead and leaving Congress out of it, they can't do that."

The URAA adds some additional detail: The President may proclaim the modification of duties "if ... the United States agrees to such modification or staged rate reduction in a multilateral negotiation under the auspices of the WTO."

Government Procurement

As mentioned above, one of the 18 agreements annexed to the WTO Agreement is the Government Procurement Agreement (GPA), from which — according to news reports — the administration would like to withdraw the United States. The U.S. Chamber and other business groups strongly oppose such a move, which would harm many U.S. firms without providing any significant benefits.

The GPA is one of the most reciprocal of all U.S. trade agreements. It affords American companies a level playing field in foreign government procurement markets with a total annual spending that approaches $1 trillion. The GPA bars discrimination against U.S. firms in competing for these foreign procurements, so non-American companies enjoy no price or other preference over U.S. companies as they bid. Absent the GPA, other countries could even ban purchases from U.S. firms in these procurements.

There are no free riders in the GPA as its benefits are not extended to the entire world but only to GPA members. Further, the GPA is a club of like-minded countries: Its membership is made up of U.S. allies and partners such as Australia, Canada, Israel, Japan, and the EU. China and Russia are not members.

WTO members seeking to accede to the GPA must negotiate bilaterally with the United States in order to win U.S. approval and negotiate separately with all GPA members as a group. By remaining in the GPA, the United States will be able to shape whether and how other countries might join; if the United States withdraws, other GPA members may well permit non-members such as China and Russia to join with only modest reforms. Underscoring the self-harm U.S. withdrawal would inflict,

firms from those countries would subsequently secure better access to global government procurement opportunities than U.S. firms receive.

Only about three percent of U.S. federal contracts by value have been awarded to foreign industries. Of this small portion, about 80% were Department of Defense contracts (many of which are not covered by GPA commitments in any event), nearly all of which went to the U.S. affiliates of British or other European firms. According to a 2019 GAO report, a large share of U.S. procurements won by foreign firms relate to U.S. military bases overseas where the U.S. Armed Forces procure basic goods and services from local firms.

Pulling in the Welcome Mat?

Withdrawing from the GPA may lead foreign companies to question whether America will continue to welcome foreign investment. Denying a level playing field to international companies that invest and hire in the United States would endanger efforts by the federal government and many U.S. states to attract foreign investment to the United States through programs such as the Commerce Department's SelectUSA. Foreign companies that have invested more than $4.3 trillion in the United States employ 7.4 million American workers. Withdrawing from the GPA — and in effect threatening to discriminate against foreign firms — risks sending a signal to these firms that they may be subject to discrimination even if they invest in the United States.

At the same time, the GPA does not infringe on "Buy America(n)" laws, such as those requiring the use of U.S.-made iron and steel in transportation infrastructure, as the Trade Agreements Act and U.S. commitments under the GPA explicitly allow. These exceptions are extensive, and there is no need to withdraw from the GPA to expand the reach of these rules.

An Adjudicator of Disputes

The WTO also has an important role to play in dispute settlement, in which panels rule on disputes and an Appellate Body (AB) was created to hear appeals of panel rulings.

The United States has been a major beneficiary of WTO dispute settlement, bringing and winning more cases than any other WTO member. In fact, the United States has won or favorably settled 75 out of the 79 completed WTO cases it had brought (as of 2016). These wins include cases against discriminatory Chinese taxes on U.S. auto exports, EU subsidies in the aircraft sector, and India's ban on U.S. poultry. The U.S. could not have secured these wins unilaterally.

The U.S. Chamber supports efforts to improve the effectiveness of the WTO dispute settlement system. As the Office of the U.S. Trade Representative has pointed out, U.S. governments have raised serious concerns about "overreach" in AB rulings for more than 15 years, noting rulings that it argues are not clearly supported in WTO agreements.

In frustration, the Trump administration has upped the ante by blocking appellate body appointments. The United States has come under fire from other WTO members for not offering concrete proposals to resolve its complaints. This crisis has come to a head: In December 2019, the AB was reduced to a single member and was thus left completely unable to function.

Imperceptible at First, Unstoppable in the End

Where will this lead? There is concern across the U.S. business community that the shuttering of the AB invites member states to disregard obligations they have undertaken in the WTO agreements. American companies that trade and invest around the world fear this will increasingly be the case.

The Chamber is quick to make the obvious point that the absence of an AB does not prevent panels from being formed and delivering rulings under the Dispute Settlement Understanding. More fundamentally, the obligations governments have undertaken remain in full force regardless of whatever may or may not happen in the realm of dispute settlement: The law is the law even when no lawman is watching.

However, American companies fear that other countries' compliance with the WTO agreements will decline over time. They are concerned that new trade barriers and discriminatory treatment will become even more common. Like the movement of a glacier, this trend may at first be imperceptible, but in the end we fear it will be unstoppable.

In the Chamber's view, now is the time to engage on reforming the WTO. New Zealand's Ambassador to the WTO David Walker was appointed to chart a path forward in consultation with WTO member states, and the so-called Walker Principles he has prepared represent a good basis for negotiation. The Chamber is urging WTO member states to translate these general principles into a form that can address the concerns that U.S. administrations have articulated over the past two decades. Above all, the Chamber urges the U.S. administration to make its own proposal to address the challenges it has described in detail.

As U.S. Chamber CEO Tom Donohue said in his 2020 State of American Business address, the WTO's "rules protect American business from unfair treatment and protectionism. Safeguarding this institution and its dispute settlement system should be an urgent international priority. Let's not shutter the WTO Appellate Body. Such drastic action doesn't serve America's interests."

As Donohue concluded: "If the World Trade Organization didn't exist, we'd have to create it." Safeguarding its benefits should indeed be a key priority for 2020.

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