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Ongoing Goings On: A News Update on WTO

A Challenging Road Ahead

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From time to time, CSIS Scholl Chair in International Business will be providing news updates about the World Trade Organization. You can find our 2019 update [here](#).

Looking back, 2019 was a momentous year for the World Trade Organization (WTO). This year promises more tumult, especially ahead of the 12th Ministerial Conference (MC12) to be held in Kazakhstan in June. On e-commerce, at stake is the fate of the temporary moratorium on electronic transmissions customs duties, pitting developing states against established digital economies. After missing a self-imposed deadline, WTO negotiators will also look to ink an agreement on fisheries subsidies. Disputes may flare up over India's market access and tariffs on information and communication technology, while China faces salvos aimed at its agricultural and industrial subsidies. Finally, WTO members and leadership will try to build consensus on Appellate Body reform as the United States calls for deeper structural change.

E-commerce Negotiation at WTO

On April 29, 2019, WTO Director-General Roberto Azevedo held an open workshop for member states to [examine](#) the implications of the electronic transmissions customs duties moratorium, focusing on the international development perspective. India and South Africa, however, [issued](#) a joint communique asking the WTO on June 4 to "revisit" issues relating to the moratorium renewal. Certain developing countries argue that the inability to place customs duties on electronic transmissions robs them of revenue and prevents them from producing globally competitive internet companies. The United States, European Union, other developed countries, and the international business community are proponents of extending the moratorium. They argue that the moratorium is necessary to prevent costly distortions in internet-driven commerce.

By September, the International Chamber of Commerce [announced](#) its support for a permanent moratorium ahead of its scheduled years-end expiration, but India and South Africa remained unmoved, both [encouraging](#) a “rethink” of the ban in an internal document. Despite dissent from countries seeking to protect their local digital economies, WTO members temporarily [extended](#) the moratorium on December 10. In a positive turn, Indonesia, which had previously raised concerns over the moratorium, [engaged](#) in these talks along with major economies such as the United States, European Union, and Japan. However, the largest recent plurilateral trade agreement, the Regional Comprehensive Economic Partnership (RCEP), [leaves out](#) a prohibition on e-commerce customs duties, suggesting wavering support at least within a large bloc of member states. Kicking the can down the road, states will have to rehash the issue at the June 2020 ministerial meeting in Kazakhstan.

Several economies put forth proposals on e-commerce in 2019. The United States [issued](#) a statement that calls for an “enforceable” agreement with “the same obligations for all participants.” Washington also prefers to address the issues of cross-border data flows and data localization in an e-commerce deal and will likely seek obligations in line with those in the United States-Mexico-Canada Agreement (USMCA) or the Trans-Pacific Partnership (TPP). In contrast, China has been [more hesitant](#) about setting rules on data flows and storage at the WTO, citing “divergent views” between developed and developing economies. The Chinese delegation seeks to “strike a balance” between international rule-making and the sovereign right to regulate, with a “reasonable level of ambition” in mind. Beijing’s statements appear to be in line with its belief in “[cyber sovereignty](#),” as well as a recent [doubling down](#) on sweeping cybersecurity laws, data localization, and internet censorship.

Brussels issued two broad proposals last year. Its April 2019 statement [sets](#) standards on electronic contracts and authentication, consumer protection, spam mitigation, open internet access, and market access conditioned on source code transfer. It also recommends an update of the WTO reference paper on telecommunication services to include the maintenance of market competition measures, the right for WTO members to self-define universal service obligations, and the obligation for members to create independent regulatory authorities for telecommunications. Finally, on market access, the proposal requests that members join the International Technology Agreement and its expansionary pact, provide national treatment for computer services, and liberalize telecommunications services. In its October 2019 proposal, the European Union [endorsed](#) replacing the WTO reference paper on telecommunication services with disciplines in individual WTO members’ schedules. These disciplines cover competition protections, non-discriminatory interconnection practices, and autonomy for states to define their own universal service obligations.

Sealing an e-commerce deal by MC12 may be too ambitious to be feasible. Instead, members will hope to show some concrete progress by the MC12 and set their sights on the 2022 ministerial conference to wrap up the deal. On January 24, 35 WTO trade ministers looked for common ground at the World Economic Forum meeting in Davos; after discussion, some members still claimed the need to “deepen their understanding of these issues” before taking a stance on the moratorium. MC12 could represent an important inflection point for businesses with a large stake in cross-border data flows and seamless e-commerce to weigh in with top trade officials from around the world. Concerted business advocacy at MC12 would help sustain momentum in the negotiations over the next few years.

Fisheries Negotiation at WTO

Special and differential treatment for developing countries remains a sticking point in fisheries subsidies negotiations. In early May 2019, Director-General Azevedo [opened](#) a trust fund to encourage greater

participation in fisheries talks and support the costs of least-developed countries (LDCs) traveling to Geneva for negotiations. In a gesture of goodwill, [Norway](#) and [Australia](#), both proponents of non-preferential treatment for LDCs, each contributed around \$1 million.

Members of the Negotiating Group on Rules, the forum in which fisheries negotiations take place at the WTO, [met](#) several times in May for negotiations, with some delegates looking to move forward a consolidated draft agreement before the group's August recess. By mid-June, four more groups submitted proposals. These texts [included](#): a joint submission by 10 countries, including the United States, to prohibit illegal, unreported, and unregulated (IUU) fishing subsidies; an Australian proposal against overfishing; a Chinese proposal to cap government support programs with flexibilities for developing countries; and an Indian appeal for special treatment for LDCs. In March, the United States and Australia submitted a proposal to cap a WTO member's harmful fisheries subsidies based on that member's marine capture and exports. That proposal splits members into three tiers based on their marine capture and exports—each with its own subsidy cap rules—and omits special and differential treatment. At the July plenary session of the Global Review of Aid for Trade, Director-General Azevedo [highlighted](#) the need to reach an “ambitious” agreement on fishing subsidies.

Talks stretched on through the fall. Meetings of the Negotiating Group on Rules in September [yielded](#) four more proposals, but without a sitting chairperson, the group lacked central leadership. Speakers at the Public Forum, the WTO's largest outreach event, [reaffirmed](#) the environmental urgency of reaching an agreement; the new chair of the Negotiating Group on Rules, Ambassador Santiago Wills of Colombia, also [emphasized](#) the value of a fisheries agreement for the body's credibility.

Some positive signs emerged in November when members of the Committee on Subsidies and Countervailing Measures [praised](#) improvements in subsidy reporting rates by 17 of the 26 countries believed to most heavily subsidize their fishing fleets, signaling a greater level of cooperation from these states. However, members remained skeptical about reaching an agreement at the Negotiating Group on Rules, resolving to ignore the end-of-year UN deadline and instead [hold](#) six small group and plenary meetings ahead of MC12 in June 2020. In an internal report, Colombian Ambassador and Chair of the Negotiating Group on Rules Santiago Wills [expressed](#) his frustration about the “quite modest” progress made “at this late stage,” blaming member states for refusing to budge on long-held points of contention. Talks resume this month and will continue through May 11.

Countries Not Meeting Their Information Technology Agreement (ITA) Obligations

After years of complaints, three WTO members—the [European Union](#), [Japan](#), and [Taiwan](#)—all opened disputes against India in 2019 over tariffs on information and communications technology (ICT) goods, claiming that the tariffs breach India's ITA obligations. India [claims](#) the tariffs in question do not violate its ITA commitments because they cover products not envisioned under the agreement. In October, a Congressional Research Service report also [cited](#) India's ITA non-compliance as a major barrier to U.S.-India trade relations and a potential bilateral agreement.

Although the United States and other members have raised similar concerns with China over tariffs on semiconductors thought to be covered by the ITA, Washington did not bring a case against Beijing in 2019. Meanwhile, semiconductors have acted as a [punching bag](#) for both sides of the U.S.-China trade spat.

U.S.-EU-Japan Trilateral Yields Results

After more than two years and a half-dozen meetings between trade officials from the three largest liberalized economies, the group [announced](#) a substantial set of agreements on January 14, 2020. The talks

that [began](#) with a shared statement about “serious concerns for the proper functioning of international trade” during the 11th Ministerial Conference in Buenos Aires have now produced concrete methods of bolstering WTO rules on industrial subsidies. The release suggests that the burden of proof should fall on the accused WTO member to demonstrate that it does not offer certain types of harmful subsidies, such as those that are excessively large or prevent market exit for non-competitive firms. It also proposes several additions to the WTO Agreement on Subsidies and Countervailing Measures (ASCM), the document that enables WTO members to bring disputes against countries imposing unfair subsidies. The group supports beefing up provisions in the ASCM to:

- Expand the list of unconditionally prohibited subsidies to include unlimited guarantees, subsidies to entities that are insolvent or unable to obtain independent financing, and certain direct debt forgiveness;
- Identify examples of serious prejudice due to capacity distortions;
- Incentivize proper notification of subsidies;
- Recognize more government-directed subsidizing entities; and
- Empower complainants to construct new prices in countervailing duty (CVD) cases against non-market economies.

The initiative aims to fill gaps in WTO agreements that China has habitually exploited. For example, adding language to the ASCM to “describe the circumstances in which domestic prices can be rejected” would allow members to impose harsher countervailing duties against China or another perpetrator.

The latest statement reaffirms [priorities outlined in prior trilaterals](#), such as encouraging market-oriented conditions, improving WTO compliance, pushing China to relinquish its claim as a developing country, participating in international forums and rule-making platforms, and building consensus on combating forced technology transfer. All of these further opportunities for cooperation see China as at least one of the principal reasons for concern, if not the main reason.

Especially compared to the [limited gains](#) of the bilateral Phase One Agreement between the United States and China, this resolution represents a major step of plurilateral action against unfair Chinese trade practices. However, the trilateral still leaves one major issue unresolved: the “public body” definition. To be eligible for countervailing duties through the ASCM, a subsidy must be provided by “a government or any public body”; private companies under heavy state influence in countries such as China have not fallen within this scope. The statement sets out to broaden the “public body” definition without outlining any specific criteria. The three economies have agreed on the offenses but not the offenders, limiting the utility of the new rules for now.

[More on the Horizon](#)

On April 26, 2019, the dispute settlement body (DSB) [accepted](#) the panel report on Chinese agricultural subsidies; in May, China notified the DSB that it planned on meeting the set obligations. Both complainant and respondent agreed on an implementation deadline for China of March 31, 2020.

Despite threats following its loss of Generalized System of Preferences (GSP) status, India has not filed a new WTO complaint against the United States. The Office of the U.S. Trade Representative [revoked](#) India’s GSP status in March 2019 after an investigation found New Delhi to be preventing equitable market access

for U.S. products. Eligibility for the GSP program, meant to forge trade ties between developing economies and the United States, [requires](#) open market access along with six other criteria. Bilateral talks to [restore](#) India's status have yet to bear fruit.

Meanwhile, the year's most noteworthy event at the WTO was the dissolution of the Appellate Body (AB). As of December 11, the AB lacks a quorum to hear appeals, representing a major blow to the WTO's dispute settlement function and legitimacy. Despite exhortations by Director-General Azevedo to avert the crisis and the "law of the jungle" that would ensue without a rules-based dispute resolution system, the United States refused to allow nominees to be selected to fill vacancies. Just a few days before the deadline, members remained [unsure](#) whether any pending AB cases would be heard after it lost its quorum. The final three AB members have since disclosed that they will [adjudicate](#) on four pending cases before the body ceases to function. Without an AB to hear appeals, members that lose in the initial panel phase of WTO dispute settlement can still exercise their right to appeal, sending the dispute into limbo since action on the appeal could not be concluded. This dynamic may undermine the enforceability of WTO rules in a multilateral framework and erode the value of WTO commitments.

The absence of an AB to hear future appeals has created divergent responses among the WTO membership. The United States [claims](#) that reports issued in the outstanding disputes that will receive an AB report are not technically "Appellate Body reports" as defined by WTO rules; however, the United States has not said that it will block the adoption of reports issued by the three former AB members who are working on a few cases that they had already begun working on prior to the expiration of their terms. Without a functioning AB to hear new appeals, the European Union has corralled a few members, including Norway and Canada, into an interim appellate system that mirrors the WTO's procedure, with former WTO AB members acting as judges. The legal value of those reports also remains unclear. Vietnam, Taiwan, and Indonesia have come up with another alternative in the absence of an AB. The three countries have [agreed](#) not to appeal the panel report in their complaint over an Indonesian steel safeguard without an AB quorum to hear it. Whether other countries agree to abstain from appealing other decisions remains to be seen.

Going forward, Director-General Azevedo has launched consultations on how to relieve the "paralysis" at the AB. In November 2018, the European Union partnered with two separate coalitions to issue joint proposals for AB reform—one [amending](#) the Dispute Settlement Understanding, the other [changing](#) the body's structure and term limits—that were both rejected by the United States. Taiwan [suggested](#) in February 2019 that WTO members begin by clarifying guidelines for the next AB; in April, Honduras [introduced](#) an approach that would codify limits to the AB's ability to set legal precedent in its reports. Brazil's approach [aligns](#) more closely with the United States' stated interests, barring panel and AB reports from setting precedent and restricting AB members from working on appeals after their terms expire without special authorization. Additional communications from [Japan, Chile, and Australia](#); [Thailand](#); [China](#); and the [African Group](#) all present cases for AB reform as well.

Ambassador David Walker of New Zealand, facilitator of the AB reform process, [issued](#) several revised reports in mid-2019 outlining points of convergence among WTO members. These points sought to satisfy many U.S. demands by strongly articulating rules for outgoing AB members, obligating the AB to issue reports within 90 days, prohibiting the creation of precedent, and more. However, the United States remains dissatisfied with the sum of these reform efforts, [accusing](#) the changes of "papering over" systemic problems. Even with the new proposed language, the U.S. delegation asserts that some members will continue to flout WTO rules to the detriment of the United States. Therefore, it asks that members "engage in a discussion on how we have come to this point" before trying to reach a negotiated solution.

Members will seek to resolve the AB impasse by MC12 in June. However, complaints over what reforms it will take for the United States to unblock the nomination process continue to frustrate WTO members. While the U.S. complaints about the AB are well-detailed, U.S. officials have yet to put forward detailed reforms, instead opting to ask members “why” the AB ultimately strayed from many of the requirements members laid out for it. A 2019 survey of WTO delegations reveals that while many members [sympathize](#) with the United States’ position that the AB has “gone beyond its boundaries,” most states support the general structure of the DSU and resent U.S. stonewalling tactics.

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