



20-1 Developing Countries Can Help Restore the WTO's Dispute Settlement System

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No nation or group of nations has more at stake in salvaging the rules-based multilateral trading system than the world's big emerging-market economies: Brazil, Mexico, India, China, Korea, Thailand, and Indonesia, among others. Trade has fueled rapid economic growth in these countries, raising the standards of living of hundreds of millions of people there. To defend their commercial interests and resolve inevitable trade conflicts, these countries have actively and successfully used the World Trade Organization's (WTO) dispute settlement system. The question is whether they have enough economic or political clout to persuade the United States to cease and desist in its campaign to wreck a pillar of the rules-based trading system.

By refusing to fill vacancies in the WTO's Appellate Body, the Trump administration has paralyzed the key component of the dispute settlement system. On December 10, 2019, the Appellate Body officially lacked the minimum number of judges (or members) to operate. As a result, any disputes that are appealed would remain in legal limbo, effectively allowing the losing parties to block adoption of panel rulings and rendering the mechanism inoperative. Several WTO members are exploring interim appellate review mechanisms; while important to mitigate the damage, they do not aim to resurrect the Appellate

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Body.¹ With the world trading system back to being a power-based arrangement, trade disputes risk turning into small and not so small trade wars.²

An effective dispute adjudication and enforcement mechanism is critical for big emerging-market economies to secure market access for their exports. The mechanism is also designed to protect third parties against any settlements between disputing countries that potentially discriminate against these third countries. Likewise, the system shields trade policymakers in emerging-market economies against domestic protectionist pressures, which prevent their integration into the world economy. Most important, effective enforcement fosters sound rules and good policies, which encourage investment and economic growth across the world, in turn enabling a business environment conducive for firms to invest and trade to thrive.

The Appellate Body crisis is not of the emerging-market economies' making,³ but they may hold a key to unlock it. The Trump administration has also focused its ire on a longstanding practice of giving these economies latitude to seek "special and differential treatment" in trade negotiations because of their developing-country status (González 2019). Thus the largest emerging-market economies, which have a significant stake in preserving a two-step, rules-based mechanism for resolving trade disputes, could play a role in driving a potential bargain to save the appeals mechanism. They could unite to give up that special status in return for a US commitment to end its boycott of the nomination of Appellate Body members.

Because the dispute is more about the nature and function of the Appellate Body, this proposal may be a long shot. More may be required to address US concerns; the timing may not be right. Also, for such a deal to work, the United States must seriously engage. On the contrary, recent moves to cap the compensation of Appellate Body members and to block decisions on pending appeals⁴ have further complicated the discussions. Washington appears ready to return to the pre-WTO days, when any one member could unilaterally block the establishment and adoption of panels.⁵ But the United States may also be looking for a deal. Emerging-market economies could enter the fray to get a negotiation going.

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1. "Stop-Gap Arbitration Process Proposed" and "Australia's Arbitration Proposal," *Washington Trade Daily* 28, no. 250, December 16, 2019.
 2. Alan Wolff, "The WTO and the Future of the Global Trading System," speech at the Council on Foreign Relations, October 15, 2019, www.wto.org/english/news_e/news18_e/ddgra_15oct18_e.htm (accessed on December 18, 2019).
 3. For a discussion of US concerns and potential solutions, see Payosova, Hufbauer, and Schott (2018); Stoler (2019); McDougal (2018); Hillman (2018); and Hoekman and Mavroidis (2019a, 2019b), among others.
 4. Bryce Baschuk, "A U.S. Offer to Keep the WTO Alive Comes with Painful Conditions," Bloomberg, November 26, 2019, www.bloomberg.com/news/articles/2019-11-26/a-u-s-offer-to-keep-the-wto-alive-comes-with-painful-conditions (accessed on December 18, 2019).
 5. For insight into the Trump administration's views on this point, see interview with Stephen Vaughn in "Trade Policy Under Trump," Trade Talks Podcast, episode 111, November 25, 2019, www.tradetalkspodcast.com/podcast/111-trade-policy-under-trump (accessed on December 18, 2019).

GROWING IMPORTANCE OF LEADING DEVELOPING ECONOMIES IN GLOBAL TRADE

Developing countries⁶ have become important actors in global trade, especially since 2000. Their goods exports have grown four-fold, from \$2,239 billion in 2000 to \$8,477 billion in 2017, with their share in world goods trade increasing from 34.7 to 47.8 percent in the same period (table 1).⁷ Rapid trade growth has helped bring unprecedented prosperity across the world, with the expansion of global value chains facilitating the integration of developing countries into the world economy and helping a billion people move out of poverty. By driving consumption and domestic demand, the emerging middle class has contributed to economic progress worldwide.

This remarkable performance has been driven mostly by China, which accounts for about a third of that growth, and by 14 other developing economies: Korea, Hong Kong, Mexico, Singapore, United Arab Emirates, India, Thailand, Saudi Arabia, Malaysia, Brazil, Vietnam, Indonesia, Turkey, and South Africa. The cumulative exports of these 15 economies have grown from \$1,458.1 billion in 2000 to \$6,306 billion in 2017. With 35.6 percent of global merchandise exports in 2017, up from 22.6 percent in 2000, these 15 economies account for some three-quarters of goods exports of all developing countries (table 1).

The data in table 1 also show the importance of the 15 largest developing economies in global trade. In 2000 merchandise exports of these 15 economies amounted to 60 percent of EU merchandise exports and 187 percent of US merchandise exports; by 2017 their share in world goods exports at 35.6 percent was slightly higher than that of the European Union (33.3 percent) and four times larger than that of the United States (8.7 percent).

With such remarkable trade performance comes increased potential for trade conflict, which has enhanced the stake of these 15 largest developing economies in the preservation of a well-functioning dispute settlement system, including its effectiveness as a mechanism for advancing and defending their commercial interests.

6. There is no single definition of developing countries in the WTO; rather, each country self-declares itself as “developing.” For the purposes of this Policy Brief, the term “developing country” refers to all countries that have self-designated as such in the WTO context.

7. WTO, Merchandise exports by product group and destination, 2017, <https://data.wto.org> (accessed on December 18, 2019).

Table 1
World merchandise exports by selected developing and developed economies, 2000 and 2017

Economy	Merchandise exports (billions of US dollars)		Percent increase in merchandise exports in 2017 from 2000	Share in total world merchandise exports (percent)	
	2000	2017		2000	2017
15 largest developing economies	1,458.1	6,306.0	332.5	22.6	35.6
China	249.2	2,263.3	808.2	3.9	12.8
Korea	172.3	573.7	233.0	2.7	3.2
Hong Kong	202.7	549.9	171.3	3.1	3.1
Mexico	166.4	409.4	146.1	2.6	2.3
Singapore	137.8	373.4	171.0	2.1	2.1
United Arab Emirates	49.8	313.5	529.6	0.8	1.8
India	42.4	299.2	605.8	0.7	1.7
Thailand	69.0	236.6	242.9	1.1	1.3
Saudi Arabia	77.6	221.8	185.9	1.2	1.3
Malaysia	98.2	218.1	122.1	1.5	1.2
Brazil	55.1	217.7	295.2	0.9	1.2
Vietnam	14.5	214.3	1378.1	0.2	1.2
Indonesia	65.4	168.8	158.1	1.0	1.0
Turkey	27.8	157.0	464.7	0.4	0.9
South Africa	30.0	88.9	196.5	0.5	0.5
All developing economies	2,239.4	8,476.8	278.5	34.7	47.8
European Union	2,457.1	5,909.4	140.5	38.1	33.3
Japan	479.2	698.4	45.7	7.4	3.9
United States	781.9	1,546.3	97.8	12.1	8.7
All developed economies	4,215.4	9,251.8	119.5	65.3	52.2
World	6,456.2	17,728.5	174.6	100.0	100.0

Source: World Trade Organization Data Portal, <https://data.wto.org> (accessed on November 19, 2019).

LARGE DEVELOPING ECONOMIES MAKE GOOD USE OF THE DISPUTE SETTLEMENT SYSTEM

The WTO brings stability and predictability to global trade through a set of rules based on nondiscrimination and binding commitments on market access. At the heart of the system, its Dispute Settlement Understanding⁸ provides a mechanism to enforce previously negotiated trade rules and concessions through compulsory, third party adjudication of controversies among countries, within specified periods. Since its establishment almost 25 years ago, close to 600 disputes have been brought to the attention of the Dispute Settlement Body⁹ to help countries resolve trade grievances covering both large and small amounts of bilateral trade, adding up to between \$55 billion to \$60 billion of trade per year from 1995 to 2011.¹⁰ While data on the use of the system are important, they do not tell the whole story: The jurisprudence resulting from these cases is likely to extend the reach of the dispute settlement system via the “shadow of the law” to hundreds of billions of dollars in trade each year (Bown and Reynolds 2015).

The United States and the European Union are the main users of the dispute settlement system, participating either as complainants or respondents in a total of 279 and 187 cases, respectively (table 2).¹¹ This level of usage is to be expected, given that they cumulatively accounted for 42 percent of world merchandise trade in 2017.¹² While the system is not perfect, it has served these two members well in protecting their commercial interests.¹³

From 1995 to October 2019, advanced economies triggered the system as complainants in 55 percent of cases and served as respondents in 57 percent of cases. Developing countries lodged 45 percent of the complaints and been respondents in 43 percent of cases. Advanced and developing countries have used the system to defend their interests as both complainants and respondents.

At the regional level, countries in Asia and Latin America have been most actively engaged in the system, as complainants and respondents (figure 1). Participation by countries in the Middle East and North Africa has been more limited. Several factors have hampered filing by developing countries, including lack of legal capacity, financial resources, and market power.¹⁴ The Advisory Centre on WTO Law, established in 2001, has helped developing countries utilize the system to pursue their interests, including filing smaller claims against other developing countries.¹⁵

8. WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed on December 18, 2019).

9. WTO, Disputes by member, www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (accessed on October 28, 2019).

10. Bown and Reynolds (2015) estimate that 15 percent of the caseload involves bilateral trade in disputed products of more than \$1 billion per year and that 14 percent of the caseload involves trade in disputed products of less than \$1 million per year.

11. WTO, Disputes by member, www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (accessed on October 28, 2019).

12. WTO, Merchandise exports by product group and destination, 2017, <https://data.wto.org> (accessed on December 18, 2019).

13. WTO, Importance of the WTO dispute settlement system, www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm (accessed on October 28, 2019).

14. Shaffer and Meléndez-Ortiz (2010) provide an illustrative account of developing countries' experience in the WTO dispute settlement mechanism.

15. Bown and McCulloch (2010). See also Advisory Centre on WTO Law, www.acwl.ch.

Table 2
Participation of the 15 largest developing economies in the WTO dispute settlement system, 1995 to October 2019

Economy	As complainant	As respondent	As complainant and respondent	Third party
China	21	44	65	177
India	24	32	56	162
Brazil	33	16	49	145
Mexico	25	15	40	105
Korea	21	18	39	127
Indonesia	11	14	25	42
Thailand	14	4	18	96
Turkey	5	12	17	95
South Africa	0	5	5	21
Vietnam	5	0	5	33
United Arab Emirates	2	1	3	12
Malaysia	1	1	2	23
Saudi Arabia	0	2	2	49
Hong Kong	1	0	1	22
Singapore	1	0	1	56
Total of the 15 economies	164	164	328	1,165

Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (accessed on October 28, 2019).

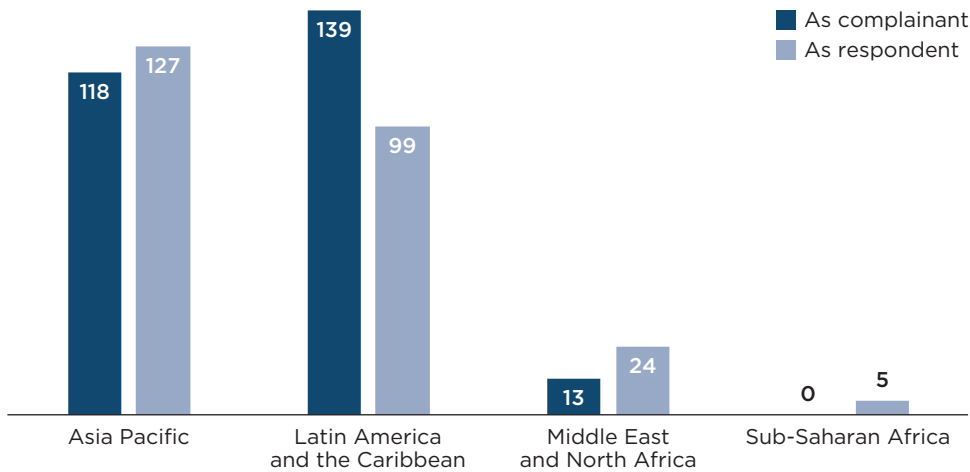
The 15 largest developing-country exporters have become the main users of the dispute settlement system, with a cumulative participation as parties in a total of 328 cases from 1995 to October 2019. They are followed by the United States (279 cases) and the European Union (187 cases).¹⁶ This group of 15 economies has triggered the mechanism in half of the 328 cases and served as respondents in the other half (figure 2).

China, India, Brazil, Mexico, and Korea have participated in a total of 249 cases as complainants and respondents, accounting for about three-quarters of this group's participation (table 2). They are also the most active third parties.

16. Recent disputes associated with US Section 232 steel and aluminum cases and the disputes countering the retaliations of its trading partners overemphasize the participation of the United States in the system.

Figure 1
Asian and Latin American countries drive participation of developing countries in the WTO's dispute settlement system

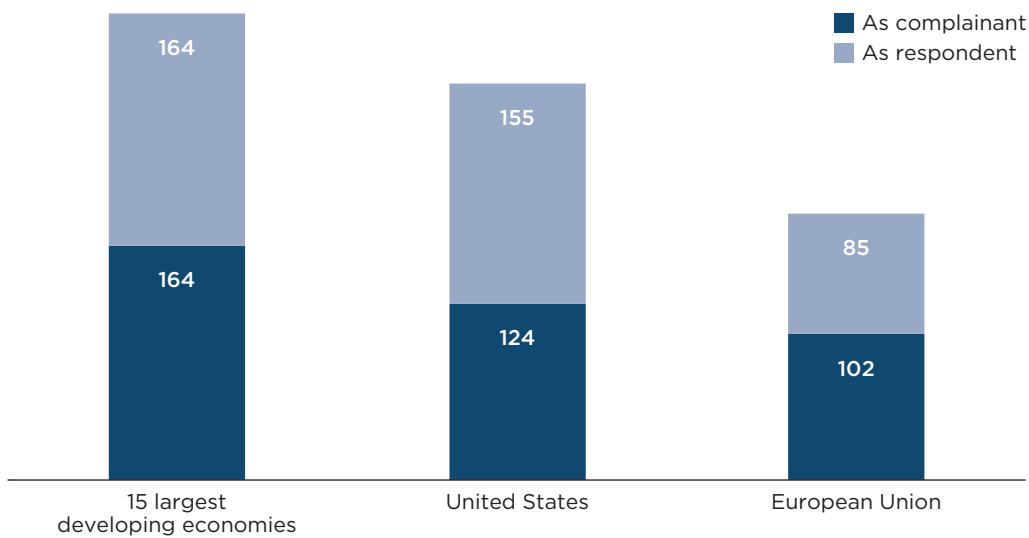
Number of cases brought to the WTO, 1995 to October 2019



Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (accessed on October 28, 2019).

Figure 2
The 15 largest developing economies use the WTO dispute settlement system more than the United States and the European Union

Number of cases brought to the WTO, 1995 to October 2019



Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (accessed on October 28, 2019).

They are clearly in a category of their own. In a second group, Indonesia, Thailand, and Turkey, with 25, 18, and 17 cases each, emerge as important users of the system, though not as active as the first group. The rest of the countries have participated in a few disputes, ranging from 1 to 5. Argentina, Chile,

Table 3
Top users of the WTO dispute settlement system, 1995 to October 2019

Top complainants		Top respondents	
Economy	Number of cases	Economy	Number of cases
United States	124	United States	155
European Union	102	European Union	85
Canada	40	China	44
Brazil	33	India	32
Japan	26	Canada	23
Mexico	25	Argentina	22
India	24	Korea	18
Argentina	21	Australia	16
China	21	Brazil	16
Korea	21	Japan	16
Thailand	14	Mexico	15
Indonesia	11	Indonesia	14
Chile	10	Chile	13
Guatemala	10	Turkey	12
Australia	9	Russia	9
New Zealand	9		
Ukraine	9		

Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (accessed on October 28, 2019).

and Guatemala, while not in the top 15 largest developing-country users are nevertheless among the top users of the dispute settlement system (table 3).

The 15 largest developing countries mostly activate the system to defend against measures from developed countries (see table 4); the five largest developing-country users brought some three-quarters of the cases against developed countries, mostly against the United States and, to a lesser extent, the European Union. Interestingly, while China has never brought a case against a developing country, both Mexico and Brazil have filed a significant number of complaints against other developing countries. While these 15 economies have activated the system to address different types of measures, almost 40

Table 4
The 15 largest developing economies mostly activate the system to defend against measures from developed countries, 1995 to October 2019

Economy	As complainant		As respondent	
	Against developed countries	Against developing countries	By developed countries	By developing countries
Brazil	22	11	12	4
China	21	0	38	6
Korea	20	1	17	1
India	19	5	26	6
Mexico	13	12	10	5
Thailand	10	4	2	2
Indonesia	7	4	10	4
Vietnam	4	1	0	0
Turkey	2	3	4	8
Hong Kong	1	0	0	0
Singapore	1	0	0	0
Malaysia	1	0	0	1
United Arab Emirates	0	2	0	1
Saudi Arabia	0	0	0	2
South Africa	0	0	0	5
Total of the 15 economies	121	43	119	45

Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (accessed on October 28, 2019).

percent of the cases in which they are complainants are on antidumping and countervailing measures, an area of high contention in the system.

Also as respondents, most of the 15 largest developing countries confront cases initiated by developed countries (table 4), with the largest five among them facing charges from the United States in the majority of cases, followed by the European Union. Turkey, China, India, Mexico, South Africa, Brazil, and Indonesia have also faced cases brought by other developing countries. Chad P. Bown (2009) notes there is a reciprocal pattern in disputes involving emerging-market economies. As they have become larger exporters and thus have used the system to defend their market access abroad, other WTO members—including

Table 5
Results of WTO cases in which the 15 largest developing economies participated, 1995 to October 2019

Economy	Won	Mixed	Mutually agreed solution	Terminated/ withdrawn/ dropped	Lost	Ongoing	Total
a. As complainant							
Brazil	9	1	2	15	3	3	33
Mexico	5	1	5	9	3	2	25
India	8		1	11	3	1	24
China	6	3		4	2	6	21
Korea	5	3	1	4	4	4	21
Thailand	6		1	6		1	14
Indonesia	2	2		3	3	1	11
Turkey	2			1	1	1	5
Vietnam	3					2	5
United Arab Emirates						2	2
Hong Kong				1			1
Malaysia	1						1
Singapore				1			1
Total of the 15 economies	47	10	10	55	19	23	164
b. As respondent							
China		3	6	11	18	6	44
India			6	9	10	7	32
Korea	3	5	4	2	2	2	18
Brazil	1		1	10	4		16
Mexico	1	1		8	4	1	15
Indonesia		1		5	8		14
Turkey			2	5	2	3	12
South Africa				5			5
Thailand	1			2	1		4
Saudi Arabia						2	2
Malaysia				1			1
United Arab Emirates						1	1
Total of the 15 economies	6	10	19	58	49	22	164

won = the panel finding is in favor of the complainant in panel a (or respondent in panel b); mixed = some findings are against the complainant while others are against the respondent; lost = the panel finding is in favor of the respondent in panel a (or complainant in panel b); ongoing = case is still in process

Note: Saudi Arabia and South Africa have not been involved as complainants. Hong Kong, Singapore, and Vietnam have not been involved as respondents.

Source: WTO Dispute Settlement Gateway, www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (accessed on October 28, 2019).

developing countries—have similarly acted to defend their own market access in these emerging-market nations. As to the types of measures contested, import restrictions and antidumping and countervailing measures account for 42 percent of all cases in which the 15 largest developing economies are respondents.

In terms of the results obtained from participation in the dispute settlement system, the 15 largest developing countries have a higher record of “winning” when they are complainants than when they are respondents. This confirms the view that countries normally pursue cases they consider potential winners (Johannesson and Mavroidis 2016). As complainants, they have won, partially won, or reached a mutually agreed solution in 48 percent of cases (excluding ongoing cases), whereas as respondents the comparable figure is 25 percent of the cases. In both categories, some 40 percent of cases have been terminated, withdrawn, or dropped for unknown reasons. The “losing” record is higher when these countries participate as respondents, with some 35 percent of cases lost, than when they initiate a case, where some 13.5 percent of cases are lost (table 5).

It is important to note the limitations of the terminology “win/lose” in legal statistics. When a respondent “loses” a case in the legal sense, it most frequently “wins” in terms of its own economic well-being by making the errant policy WTO-consistent. This is analogous to the positive-sum nature of trade itself (Bown 2019).

TRADEOFF TO BREAK THE APPELLATE BODY STALEMATE

Activation of the dispute settlement system by the 15 largest developing countries or a “winning” record do not provide the full picture of the effectiveness of the system to enforce rules and market access commitments. Satisfying the complainant’s interests, in the form of a mutually agreed solution or compliance with the binding recommendations of the report in question or rebalancing of concessions through compensation, is critical. However, repeated activation is a measure of confidence in the system (Reich 2017). It shows a country considers it meaningful to invest human, financial, and political resources in using the mechanism to resolve its trade grievances. On the other hand, lack of utilization of the system does not mean a lack of trust in the system; a country may have other reasons to not want to bring cases to the WTO. Moreover, the sole existence of a functioning enforcement mechanism provides legal certainty, without the need for formal activation. But repeated positive resolution of cases when a country invokes the system shows that countries can and have learned to use the system to seek solutions to trade concerns.

Brazil, Mexico, India, China, Korea, Thailand, Indonesia and, to a lesser degree, Vietnam and Turkey have actively and successfully invoked the dispute settlement system to defend their commercial interests in both advanced and developing countries.¹⁷ As their participation in world trade increases, so does their stake in an effective compulsory and binding mechanism for resolving conflicts, enforcing the rules, and upholding foreign market access. In a global economy riddled with trade frictions, preserving such a mechanism, including the quasi-automatic adoption of WTO panel and Appellate Body reports under

17. As noted in table 4, China has not filed a case against a developing country.

the reversed-consensus rule,¹⁸ becomes a first-order priority. Furthermore, settling disputes in a timely manner by observing statutory deadlines—as advocated by the United States—also improves performance. The mechanism could be perfected further to level power imbalances, and suggestions have been made to that effect.¹⁹ But the task at hand is more fundamental: to break the Appellate Body impasse.

In negotiations, expanding the scope of the discussion sometimes helps to reach a bargain. In this case, another source of the Trump administration's frustration is the perception that the largest developing countries are exploiting the multilateral trading system unfairly because of advantages conferred to them under special and differential treatment they may claim in negotiations.²⁰ This view is overblown—it is no treat being a developing country in the WTO. But while the benefits accrued under special and differential treatment are at best mixed (González 2019b), the loss of the WTO's compulsory third-party adjudication regime is significant and real.

A tradeoff, where the largest developing economies agree to drop their request for special and differential treatment in exchange for the United States agreeing to nominate Appellate Body members, could be the starting point of a bargain to preserve and improve the WTO's appeals process. This would not imply these countries would renounce *ab initio* the flexibilities in ongoing and future negotiations; they would need to bargain for these flexibilities at the negotiating table. Building on the decisions of Brazil²¹ and Korea²² to forego special and differential treatment in future WTO negotiations, a broader group of emerging-market economies could come together to craft such a deal. Unblocking Appellate Body nominations could pave the way for the body to reassert its role. In a recent survey, Fiorini et al. (2019) find that while no other WTO member supports the approach of the United States in blocking new appointments to the Appellate Body, many do share the US perception the Appellate Body has overstepped its mandate.

This bargain, however, cannot work without US engagement. It remains to be seen if the United States will be ready to negotiate if given this deal.

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18. Under this special decision-making procedure, these rulings can go ahead unless there is a consensus among WTO members not to do so.

19. Bahri (2018) lists these proposals.

20. The central issue at hand is the long-standing practice in the system that each country may "self-declare" as developing to benefit from special treatment. While the exact meaning of special and differential treatment is defined in the context of each negotiation, the concept departs from the key principles of reciprocity and nondiscrimination and has been used on occasions to simply block progress on trade negotiations. See González (2019a).

21. See Ministry of Foreign Affairs of Brazil (2019).

22. Jane Chung and Joori Roh, "South Korea to give up developing country status in WTO talks," Reuters Business News, October 24, 2019, www.reuters.com/article/us-southkorea-trade-wto/south-korea-to-give-up-developing-country-status-in-wto-talks-idUSKBN1X401W (accessed on December 18, 2019).

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