

**Testimony Before the
United States House Committee on Ways and Means Trade Subcommittee**

Hearing on

“Advancing America’s Interests at the World Trade Organization’s 13th Ministerial Meeting”

Testimony by Kelly Ann Shaw

Partner, Hogan Lovells US LLP
Lecturer in Law, Columbia Law School
Former Deputy Assistant to the President for International Economic Affairs and Deputy
Director of the National Economic Council

February 7, 2024

Chairman Smith, Ranking Member Blumenauer, distinguished Members of the Committee, thank you for the opportunity to discuss America's objectives for the forthcoming Thirteenth Ministerial Conference (MC13) in Abu Dhabi, February 26-29, 2024.

Prior to my current role in private practice, I was privileged to spend a decade in government service representing the United States in multiple trade negotiations, including at the World Trade Organization (WTO) in Geneva, and in litigating WTO disputes on behalf of U.S. workers and businesses. While I will draw on these experiences, I also want to be clear that the testimony I provide this morning is solely my own personal views.

Let me start with the punchline: the WTO is in serious trouble and, when it comes to the upcoming Ministerial, there is very little, if anything, on the MC13 agenda that will advance U.S. interests.

As someone who spent years working in and around the multilateral system I wish I could deliver a more positive message. Following WWII, the United States and other democratic nations spent decades building a rules-based global trading system centered around the principle of non-discrimination, whereby participating countries that played by the rules were rewarded with lower barriers to trade in one another's markets. The WTO in its current form is no longer capable of advancing mutually beneficial concessions or developing new rules that further facilitate trade, address new challenges, and deal with unfair trade practices.

As of today, the WTO's negotiating function—its primary and key function—is effectively paralyzed. The WTO's last major negotiating round collapsed between 2008 and 2011, after which negotiators started going home and diplomatic missions in Geneva began to shrink. While some negotiations still continued under the auspices of the organization, most of these focused on narrow technical issues, only involved a subset of the membership, or simply lacked ambition. In fact, the agenda for the upcoming MC13 demonstrates how limited the role of the WTO has actually become in advancing new trade rules relevant for today's global challenges. Instead, the more ambitious negotiations are occurring outside the WTO framework, through major bilateral and regional trade deals that, at least right now, do not involve the United States.

The key issues on the table for Abu Dhabi include renewal of the e-commerce moratorium, efforts by developing countries to expand the TRIPS waiver, India's demands for a permanent waiver for its public stocktaking program, special and differential treatment for developing countries, a phase II agreement on fisheries subsidies, and various proposals to reform certain WTO functions. With the exception of renewing the e-commerce moratorium (which at this point is uncertain) and a meaningful outcome on fisheries subsidies largely aimed at China and India (which seems unlikely), the overwhelming number of issues, if agreed, would be detrimental to American workers, innovators, and farmers.

The e-commerce moratorium, for example, which has been consistently renewed since 1998, is critical for American small businesses, entrepreneurs, and consumers alike. Some countries like India, Indonesia, and South Africa are actively pushing to terminate the moratorium so that they can impose tariffs and other barriers on electronic transmissions of both digital goods and digital services. And, because renewal of the moratorium requires consensus, India in particular is now

holding the entire WTO membership hostage in exchange for an agreement on its public stockholding practices that distort global agricultural markets and disadvantage American farmers. Indonesia is already poised to start collecting duties and has also stated that it will not renew the moratorium, which will result in increased prices for American consumers and threaten supply chains for small business.

While the focus of today's hearing is on MC13, I also wanted to briefly address dispute settlement reform, which may or may not be part of the formal agenda but, nevertheless, receives the lion's share of attention when it comes to the WTO. Despite outcries by many WTO members regarding a so-called "Appellate Body crisis", a functioning Appellate Body—or second level of review—is inconsequential to the organization's future and not worth the time or American political capital to try to "fix". While the Biden Administration agreed to initiate informal negotiations over dispute settlement as part of the previous Ministerial, MC12, formal negotiations between WTO members regarding the functioning of the Appellate Body had already been ongoing for nearly 20 years through a process called the "DSU Review". For nearly two decades, the United States expressed its concerns with the Appellate Body's lack of accountability to members and judicial overreach. Multiple U.S. Administrations tabled proposals to try to fix the problem, which were never taken seriously by many WTO members that—to this day—continue to prefer a system of judge-made rules because those rules constrain the United States to their advantage. There is no path forward on a two-tier dispute settlement system that would advance American interests and the United States should not negotiate or agree to one.

The single biggest challenge facing the WTO is not dispute settlement but, rather, the inability of WTO members to negotiate new rules. In fact, the lack of new rules adds further pressure to the dispute settlement system, as WTO panelists and arbitrators are tempted to engage in judicial overreach and gap filling to resolve conflicts not covered by the current rules. In other words, the WTO is stuck in a bygone era without the tools to address the core set of modern challenges faced by American workers, farmers, and businesses. WTO rules, which were negotiated during the last century, do not address China's industrial subsidies or the role of state capitalism or state-owned enterprises, nor do they address the digital economy or carbon border measures, which simply did not exist when the rules were originally negotiated.

In short, the WTO of today feels a long way off from the promise of its former self.

In considering the agenda for MC13, I think it's fair for the Committee to ask what exactly is the point of continuing to invest in a multilateral system when the only issues on the table are largely defensive, don't advance U.S. interests, have little relevance for today's economy, and would largely make Americans worse off. Why not join other WTO members in abandoning the organization as a forum for developing new rules and disciplines and start negotiating a series of our own bilateral deals?

The answer, in part, is because the United States already tried that approach during the first half of the 20th century when it negotiated a series of bilateral reciprocal trade deals and very quickly learned the problems associated with doing so. First, a bilateral approach is one of a constantly moving target that, over time, leads to a race to the bottom among trading nations and

discriminatory treatment. For example, policymakers learned that if the United States were to negotiate a reciprocal trade deal with country B, there was nothing to stop country B from negotiating an even better reciprocal deal with country C covering the same products. This meant that, overnight, American producers and exporters selling into country B would lose out to exports from country C, despite having just negotiated a trade deal and having given producers from country B preferential access to our own market. Second, because of the sheer number of trade deals required, a bilateral approach also leads to complicated and fractured global markets, which are difficult for American producers to navigate. Third, some issues like rules on industrial and agricultural subsidies, simply require a broader approach since countries outside the agreement are still free to engage in rampant subsidization, distort global prices, and steal markets away from American producers.

The idea of multilateralism was meant to address this. In effect, the 1947 GATT was intended to be a “club” of preferential trading partners – i.e., Most Favored Nations (MFN). For countries in the “club” imports were subject to lower MFN tariff rates and tougher rules to prevent unfair trade. Imports from countries outside the club were subject to higher duties and faced non-preferential access. This format incentivized countries to want to join and, in exchange, lower their own tariff and non-tariff barriers to trade, expanding the market for everyone. After 50 years and eight successive negotiating rounds, the GATT principles were both broadened and formalized into the World Trade Organization and, by 1995, membership had expanded from just 21 to 130 countries. Today, however, a membership of 164 countries has proven unworkable. The requirement that decisions be taken by consensus among members, including China, has ground the WTO’s negotiating function to a halt as the organization has increasingly come to resemble the United Nations.

Yet, a strong set of global and multilateral rules remains in the United States’ interest, since 96 percent of the world’s consumers live outside our borders and some of America’s strongest, most competitive industries – technology, agriculture, aircraft, semiconductors, energy, pharmaceuticals, industrial machinery – depend on exports to global markets. The United States, like other WTO members, is now faced with two choices: we can either abandon multilateralism and return to an aggressive strategy of bilateral trade deals, or we can put real resources into renegotiating and rebuilding a MFN multilateral framework among like-minded trading partners that addresses modern economic challenges, reflects today’s reality, and results in meaningful outcomes for the American people.

To be clear, international trade negotiations take time and are a significant undertaking. It took the GATT 50 years to become the WTO with fits and starts along the way, mirroring political realities and economic challenges by participating countries. While none of this can be done overnight, the WTO in its current form is on a fast track to irrelevance with or without action from the United States. For WTO members who really do believe in the system, it’s time to stop the bilateral trade deal race-to-the-bottom and pour actual resources into completely overhauling a multilateral global trading framework fit for the 21st century. For our part, that also requires a return to American economic leadership, a role we are well-positioned to play.

Thank you for the opportunity to address these issues today. I look forward to your questions.