



The Legal Framework for Waiving World Trade Organization (WTO) Obligations

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On May 6, 2021, the Biden Administration [announced](#) that it supported negotiating a waiver of certain obligations in the Agreement on Trade-Related Aspects of Intellectual Property Rights ([TRIPS Agreement](#)) at the World Trade Organization (WTO). The announcement represents a shift in the U.S. position at the WTO on South Africa and India’s October 2020 [proposal](#) to waive some TRIPS obligations to address the “prevention, containment or treatment” of Coronavirus Disease 2019 (COVID-19). To date, WTO members remain divided as to the need for or appropriateness of the proposed waiver. As of this writing, South Africa and India are [revising](#) the proposal with the aim of submitting a revised text later this month. (For more information on the proposed TRIPS waiver to address the COVID-19 pandemic, see this [CRS Insight](#).)

After the Biden Administration’s announcement, some Members of Congress have asked, including during a [Senate Finance Committee hearing](#), about the Administration’s authority to agree to such a waiver. This Sidebar discusses how waivers are negotiated at the WTO, and the President’s authority, delegated to the Office of the U.S. Trade Representative (USTR), to agree to waivers of WTO obligations.

Negotiating Waivers at the WTO

Legal Framework for Granting Waivers

WTO members must generally adhere to WTO Agreements absent a waiver or other exception. [Article IX](#) of the Agreement Establishing the WTO permits the Ministerial Conference—the WTO’s highest decisionmaking body—to grant waivers in “extraordinary circumstances” and exempt affected WTO members temporarily from implementing certain WTO obligations. To initiate a waiver, WTO members [submit](#) waiver requests to the relevant WTO body. Requests for waivers of the Agreement Establishing the WTO go to the Ministerial Conference, while requests regarding most of the other WTO Agreements go to the Council for Trade in Goods, Council for Trade in Services, or Council for TRIPS. If a request goes to one of the councils, that body prepares a report for the Ministerial Conference or General Council, which then considers whether to grant a requested waiver. In general, the relevant council [must](#) conclude its deliberations on a waiver request in 90 days, but this time limitation is not always observed strictly.

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The Ministerial Conference must make a [decision](#) on whether to grant a waiver by consensus or with the support of three-fourths of the WTO members. When the General Council, [acting](#) on behalf of the Ministerial Conference, considers waiver requests, it “[will seek a decision](#)” by consensus, but may adopt waivers instead with the support of three-fourths of the WTO members if no consensus is reached. In both decisionmaking bodies, approval by consensus is the norm.

Decisions to grant waivers must [state](#) (1) the “exceptional circumstances” justifying the waiver; (2) the conditions applicable to the waiver; and (3) when the waiver will expire. The WTO must also [review waivers](#) on an annual basis to assess “whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met.” At the end of each review, the waivers may be continued, extended, modified, or terminated. Given Article IX’s strict conditions for granting a waiver, the WTO Appellate Body has [stressed](#) that any waiver must be “interpreted with great care.” Therefore, WTO members are advised to state explicitly which obligations are being waived.

WTO Practice on Waivers

Since the WTO’s inception in 1995, the Ministerial Conference or General Council has granted several waivers each year. A list of waivers granted between 1995 and 2015 is [here](#). The Ministerial Conference or General Council granted additional waivers in [2016](#), [2017](#), [2018](#), [2019](#), and [2020](#). These waivers are generally granted to one or a group of WTO members, and cover a variety of obligations, including some TRIPS obligations. For example, the General Council has [waived](#) certain TRIPS obligations for least-developed countries until 2033, and the United States currently has [four](#) waivers of several nondiscrimination obligations under the General Agreement on Tariffs and Trade so that it can operate certain preferential trade programs.

Arguably, the only IP-related waiver of comparable scale to South Africa and India’s proposed TRIPS waiver for COVID-19 is the General Council’s 2003 waiver of Article 31(f) of the TRIPS Agreement. [Article 31\(f\)](#) generally permits a country that issued a compulsory license for a product to limit its use to that country. A compulsory license is a regulatory tool used by governments to allow companies to produce patented products or processes without the patent holder’s consent. However, the 2003 waiver allowed WTO members to deviate from Article 31(f) and issue compulsory licenses permitting *export* of the product to least-developed and other eligible countries. This waiver [remains](#) in effect for WTO members who have not yet adopted the 2005 amendment to the TRIPS Agreement, which codified the substance of the waiver (see [Article 31bis](#)).

USTR’s Authority to Agree to WTO Waivers

The international agreements that led to the creation of the WTO, and which include the TRIPS Agreement, were negotiated as part of the Uruguay Round. The United States agreed to be bound by these agreements, as a matter of international law, by adopting the Uruguay Round Agreements Act (URAA), codified at [19 U.S.C. ch. 22](#). In that Act, Congress [approved](#) these agreements and provided conditions for continued U.S. participation in the WTO.

Role of Congress

With regard to waivers of WTO obligations, the URAA does not expressly require congressional action or approval before USTR may agree to such waivers. Instead, if a proposed waiver “would substantially affect the rights or obligations of the United States under the WTO Agreement . . . or potentially entails a change in Federal or State law,” then USTR must [consult](#) with the “appropriate congressional committees” before any vote on the proposed waiver in the Ministerial Conference or General Council.

The URAA defines “appropriate congressional committees” as the House Ways and Means and Senate Finance Committees. If the Ministerial Conference or General Council adopts a proposed waiver, the USTR must submit a report discussing the waiver to those congressional committees and consult with them about the waiver. An example is the USTR’s 2006 report discussing the 2005 amendment to the TRIPS Agreement that made the 2003 waiver permanent.

Even though USTR may negotiate and consent to waivers at the WTO without congressional approval, there are several relevant qualifiers. First, waivers generally allow, but do not require, WTO members to derogate from their WTO obligations. In other words, even if a waiver allowed all WTO members to derogate from a specified obligation, the United States could agree to grant the waiver request but not opt to derogate from the obligation. The case of the 2003 TRIPS waiver is instructive. The waiver, which is now incorporated permanently in TRIPS, allowed potentially any WTO member capable of manufacturing pharmaceutical products to issue compulsory licenses and export those products to eligible countries, as of 2019; one member—Canada—appears to have used this authority. Similarly, in the context of COVID-19 and the TRIPS Agreement, if a proposed waiver would allow WTO members to derogate from certain TRIPS obligations, the United States could potentially agree to the waiver request (i.e., agree to allow other WTO members to derogate from the specific TRIPS obligations), but not implement the waiver domestically.

Second, in the unlikely scenario that a WTO member might interpret a waiver as requiring its exercise, and such exercise would need Congress to amend domestic legislation, such a waiver would not be self-executing in U.S. law. Specifically, the URAA expressly provides that neither the WTO Agreements nor an application “that is inconsistent with any law of the United States shall have effect.” Thus, if a WTO waiver imposed international obligations on the United States to, for instance, limit patent rights for COVID-19 vaccines in a way that conflicted with existing U.S. patent statutes, the international obligation would not override U.S. law.

Finally, USTR’s authority to agree to proposed waivers at the WTO is distinct from another part of the URAA, which addresses more generally the United States’ continued participation in the WTO. Section 3535 provides for periodic review of U.S. membership, requiring the USTR to report on the benefits, costs, and effects of current and continued participation at the WTO every five years. Either chamber of Congress may introduce a joint resolution within 90 days of receiving the USTR’s report to disapprove continued U.S. participation in the WTO. The USTR sent its most recent report under Section 3535 to Congress in March 2020. Although some Members of Congress introduced joint resolutions to disapprove continued participation in the House and Senate, due to a separate House resolution and Senate parliamentary ruling, neither was given floor consideration. The next year in which the Section 3535 process may occur again is 2025.

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