

CIGI Papers No. 173 – May 2018

Might Unmakes Right

The American Assault on the Rule of Law in World Trade

James Bacchus



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CIGI Masthead

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About the Author

James Bacchus is a senior fellow with CIGI's International Law Research Program, as well as the Distinguished University Professor of Global Affairs and director of the Center for Global Economic and Environmental Opportunity at the University of Central Florida. He was a founding judge, twice chairman and chief judge of the Appellate Body at the World Trade Organization in Geneva. He served as a member of the United States Congress and as an international trade negotiator for the United States. Currently, he is a senior counsellor to the International Center for Trade and Sustainable Development in Switzerland, and an adjunct scholar of the Cato Institute in Washington, DC. He served on the high-level advisory panel to the Conference of the Parties of the United Nations Framework Convention on Climate Change, chairs the Global Commission on Trade and Investment Policy of the International Chamber of Commerce, and chaired the Global Sustainability Council of the World Economic Forum. For more than 14 years, he chaired a global law practice that is the largest in the United States and one of the largest in the world. He is the author of the books *Trade and Freedom* (2004) and *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (forthcoming July 2018, Cambridge University Press). He is a frequent writer in leading publications and a frequent speaker on prominent platforms worldwide. The views expressed in this paper are solely his own.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

As Thucydides taught in his Melian Dialogue, there are always those who believe that might makes right. The human struggle has long been to prove that it does not. Our tool in this struggle is the rule of law. Through the rule of law, right becomes might. Long a champion of the international rule of law, the United States of America, under the leadership of President Donald Trump, has now embraced the belief that might makes right, and is using its might to unmake right by assaulting the rule of law in world trade. Trump, and those who serve him, are taking illegal, unilateral actions and pursuing other trade policies that circumvent and threaten to undermine the rules-based world trading system. They are also engaged in a stealth war against the continued rule of law in the World Trade Organization (WTO) dispute settlement system through intimidation of those who serve at the apex of the system: the judges on the WTO Appellate Body. The other members of the WTO must not yield to the unilateral ultimatums of the Trump administration or to its actions of intimidation that threaten to halt WTO dispute settlement. In the near term, the other WTO members should circumvent the recalcitrance of the United States by using arbitration under article 25 of the WTO Dispute Settlement Understanding as an alternative form of WTO dispute settlement. In the long term, they should eliminate the possibility of intimidation of WTO judges by the United States, or by any other country, by removing the design flaw of the possibility of reappointment to a second term for any member of the WTO Appellate Body. At the same time, the Appellate Body should be recast as a full-time, standing tribunal of judges who will serve longer single terms and will have the resources sufficient to improve the performance of the WTO dispute settlement system. These changes in the WTO in the near term and in the long term will prevent might from unmaking right in world trade.

The Timeless Appeal of Might Makes Right

In 416 BCE, after nearly two decades of intermittent conflict, the Peloponnesian War between Athens and Sparta was going badly for the Athenians.¹ The moderate and the temperate no longer held sway in the unruly popular assembly in Athens. Reason had succumbed to the impulses of passion. An ancient form of populism prevailed. Alone, the Greek inhabitants of the tiny Aegean island of Melos had “stubbornly maintained their independence” and their neutrality, and had refused to join the Athenian-led league.² This “allowed them to enjoy the benefits of the Athenian Empire without bearing any of its burdens.”³ Today, we would say that Melos was a “free rider.”

As recalled by Thucydides, the great historian of that long-ago conflict, those leading Athens, frustrated with their endless war and fed up with Melos, sent a military expedition to bring Melos forcibly into the Athenian empire. The Melians accused the invading Athenians of coming “to be judges in your own cause” and asked what would happen to them “if we prove to have right on our side and refuse to submit.”⁴ Bluntly, coldly, succinctly, the Athenians replied, “You know as well as I do that right, as the world goes, is only in question between equals in power, while *the strong do what they can and the weak suffer what they must.*”⁵

In other words, might makes right.

Firmly believing they were in the right, the Melians refused to submit. The Athenians then besieged Melos for a number of months. As Thucydides tells it, eventually the siege was “pressed vigorously,” and “the Melians surrendered at discretion to the Athenians, who put to death all the grown men whom they took, and

1 John H Finley Jr, *Thucydides* (Cambridge, MA: Harvard University Press, 1942) at 210.

2 Donald Kagan, *The Peloponnesian War* (New York: Penguin Books, 2003) at 247–49.

3 *Ibid.*

4 Robert B Strassler, ed, *The Landmark Thucydides* (New York: The Free Press, 1996) at 351.

5 *Ibid* at 352 [emphasis added].

sold the women and children for slaves, and subsequently sent out five hundred colonists and settled the place themselves.”⁶ The Athenians did what they could to the Melians simply because they could. In the dispute between Athens and Melos, might, in the end, did make right.

Because of Thucydides, we still remember today, millennia later, what would be “an otherwise forgotten act of aggression.”⁷ No one has ever done more to explain why we need the international rule of law. What is known as his Melian Dialogue illustrates the danger of the arbitrary exercise of power in the absence of the rule of law. The timeless lesson it teaches is that, in the unending struggle between right and might, right can make might only if the strong are not the judges of their own cause and only if the strong and the weak are made “equals in power.” This is only possible through the rule of law. The rule of law equalizes the strong and the weak by establishing and upholding rules that apply equally to all and that treat all equally before the law. The arbitrariness of power is thus replaced by the security and the predictability of impartial rules enforced by impartial judges.

The American Turn to Protectionism and Mercantilism

In 2018, the Athenian generals are once again invading Melos, and once again their aim is to prove that might makes right. This time, sadly, the invaders are from the United States of America. This time they are seeking to make might into right in the judicial rulings on the treaty obligations of WTO members in the internationally agreed rules of the WTO. Since its transformation from the General Agreement on Tariffs and Trade (GATT) into an international institution in 1995, the WTO has done much to establish the rule of law in international trade, and thus has done much also to accord reality to the cooperative global enterprise of establishing the international rule of law overall. These institutional achievements are due in no small part

to the United States’ steadfast support through the years for the mission and the work of the WTO. But now, American support for the WTO is much in doubt as one manifestation of the ascendancy of a plutocratic populist with protectionist inclinations to the presidency of the United States.

If there is one consistency among all the myriad inconsistencies in the distorted worldview of President Donald Trump, it is his opposition to free trade. Trump has long been a full-throated (if ill-informed) voice for protectionism. If there is another consistency in his generally erratic thinking, it is his disregard for global cooperation through multilateralism. He prefers confrontation to cooperation. Thus, he has long been an exponent of unilateralism — of the short-term view that the best choice for Americans is to abandon or ignore the international institutions that Americans have done so much to help create and, instead, go it alone in global affairs, sure in the knowledge that the economic and martial might of the United States can be used as leverage to get other countries in the world to do as the United States desires.

Given these personal predilections of the president of the United States, it should come as no surprise that, in his first 16 months in office, he has made no secret of his utter disdain for the WTO and for the architecture of international cooperation through multilateralism that created and sustains it. He has been increasingly vocal about his preference for one-on-one bilateral trade deals, in which the United States can often impose its will on smaller countries, over the multilateral regional and global deals that produce vastly more gains from trade for everyone and that have, in the past, been generally preferred by US presidents, Republican and Democrat alike. Global and other “mega” trade deals are equally and almost universally preferred by economists, trade advocates and, not least, all the 163 other countries that, like the United States, are members of the WTO.

In his tumultuous first 16 months in the White House, Trump has abandoned the Trans-Pacific Partnership, negotiated and signed by his predecessor with 11 other countries on the Pacific Rim. Finding the negotiations with the European Union on a proposed Trans-Atlantic Trade and Investment Partnership in impasse when he took office, he has left them in a frozen limbo. Following repeated campaign threats to unravel and perhaps even withdraw from the North American Free Trade Agreement (NAFTA) with Mexico and

⁶ *Ibid.*

⁷ Finley, *supra* note 1 at 209.

Canada, he has entered into trade negotiations with America's two closest neighbours, with the ostensible goal of modernizing NAFTA, but in which the US negotiating position seems to be largely "my way or the highway" with shrill, tweeted threats of a US pullout still heard. He has coerced South Korea into renegotiating the recent Korea-US Free Trade Agreement at a time when tensions remain high on the Korean Peninsula. In going alone, increasingly, Trump and those who serve him have left the United States standing alone in world trade — with not one new bilateral trade deal to show to his supporters as he approaches the half-way point of his first term as president.

In a presidency increasingly clouded by criminal investigations and hindered by instability in politics and in policy, President Trump's advocacy of protectionism in trade has been one of the few constants. Now he has moved from threats to actions, and these actions have displayed a deep and disturbing indifference on the part of the Trump administration to the constraints of the rules-based world trading system overseen by the WTO. In early March, the president employed a long-unused provision of the US Trade Expansion Act of 1962 — section 232 — to impose 25 percent tariffs on imports of steel and 10 percent tariffs on imports of aluminum.⁸ In late March, he used a long-abandoned provision of the US Trade Act of 1974 — section 301 — to impose up to US\$60 billion in tariffs on imports of about 100 products from China in retaliation for what the United States sees as costly widespread infringement in China of US intellectual property rights.⁹ In the midst of taking these two actions, the president boasted that he was striking back at "free-trade globalists."¹⁰

In acting unilaterally under both section 232 and section 301, the Trump administration has not bothered to go first to the WTO to seek a remedy for the allegedly unfair actions of US trading partners it claims to be addressing. This is a violation by the United States of international trade law. Where the matters in dispute fall within the scope of the WTO treaty, taking unilateral action

without first going to WTO dispute settlement for a legal ruling on whether there is a WTO violation is, in and of itself, a violation of the WTO treaty. Article 23.1 of the WTO Dispute Settlement Understanding (DSU) establishes mandatory jurisdiction for the WTO dispute settlement system for all treaty-related disputes between and among WTO members.¹¹ The WTO Appellate Body has explained, "Article 23.1 of the DSU imposes a general obligation to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and *not through unilateral action*."¹²

The United States has not abandoned WTO dispute settlement altogether. The Trump administration continues to defend complaints made against the United States in the WTO, and it has also initiated a few complaints. In 2017, the United States filed a complaint against Canada relating to measures of the province of British Columbia governing the sale of wine in grocery stores.¹³ In March 2018, while busy also imposing the unilateral trade restrictions under sections 232 and 301, the United States requested consultations with India on a range of Indian export subsidies.¹⁴ Further, in its trade confrontation with China, the Trump administration has filed one WTO complaint, alleging that the Chinese are violating WTO intellectual property rules by failing to enforce the patent rights of foreign patent holders.¹⁵ At the same time, the United States has refrained from initiating additional and broader WTO cases against Chinese intellectual property practices, instead preferring to

8 Jacob M Schlesinger Jr, Peter Nicholas & Louise Radnofsky, "Trump to Impose Steep Aluminum and Steel Tariffs", *The Wall Street Journal* (2 March 2018).

9 Mark Landler & Alan Rappeport, "Trump Plans to slap tariffs and investment restrictions on China", *The New York Times* (22 March 2018).

10 Josh Dawsey & Damian Paletta, "Assailed for remarks on trade, Trump doubles down on claims about Canada", *Washington Post* (16 March 2018).

11 WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 1869 UNTS 401, 33 ILM 1226 (1994), art 23.1 [DSU], online: <www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>.

12 *United States—Certain EC Products* (2001), WTO Doc WT/DS165/AB/R at para 111 (Appellate Body Report) [emphasis added]. It should be noted that, while a member of the Appellate Body, I was the chair of the division in the appeal in that dispute. The Appellate Body has since reiterated and reinforced this ruling in *United States—Canada—Continued Suspension* (2008), WTO Doc WT/DS231/AB/R at para 371 (Appellate Body Report).

13 *Canada—Measures Governing the Sale of Wine in Grocery Stores* (second complaint), WT DS531.

14 *India—Export Related Measures*, WT DS541.

15 *China—Certain Measures Concerning the Protection of Intellectual Property Rights—Request for Consultations by the United States* (2018), WTO Doc WT/DS542/1.

pressure China with steep unilateral tariffs.¹⁶ And, tellingly, the United States has not followed through to pursue a WTO complaint filed against Chinese aluminum subsidies by the Obama administration just one week before Trump's inauguration.¹⁷ Instead, the president chose to levy the unilateral tariffs outside the legal framework of the WTO.

As president, Trump has increasingly recycled his campaign rhetoric that the WTO is "horrible" and has reiterated his campaign threat to withdraw the United States from membership in the WTO. It can only be hoped that this is merely a hollow threat. Even with so capricious a president and so self-destructive a presidency, a formal American pullout from the WTO would be an economically suicidal move. If President Trump does decide to pull the United States out of the WTO, then every other country in the world with which the United States does not have a free trade agreement will be free to discriminate against all American trade in goods and services in any way it chooses. The United States has free trade agreements with just 20 countries.¹⁸ In contrast, US next-door neighbour Mexico has concluded free trade agreements with 45 countries.¹⁹ Therefore, more than 140 members of the WTO will be given a free pass to discriminate against all US trade if the United States leaves the WTO.

Freedom from such trade discrimination is one vital benefit to the United States and to every other member of the WTO from having agreed in the WTO treaty to be bound by the foundational rule of most-favoured-nation (MFN) treatment. The MFN obligation is at the heart of the WTO-based world trading system and can be traced back six centuries to 1417 as the fundamental tool for lowering barriers to international trade.²⁰ As a core of the GATT, this basic trade rule of non-discrimination has prohibited discrimination between and among the

like traded products of other countries for the past 70 years, and has thereby lowered barriers to trade and helped lift the flow and the value of world trade by trillions of dollars annually throughout those seven decades.²¹ The president's secretary of commerce, Wilbur Ross, has cast aspersions on the operation in the WTO of the MFN rule, calling it a "significant impediment to anything like a reciprocal agreement."²² His knowledge of what would happen to US trade without the security blanket of the MFN rule outside the legal shelter of the WTO may be one reason for his preemptive criticism of the rule. Someone should explain to the current occupant of the White House, albeit belatedly, "This, Mr. President, is how MFN works."

At various times during his first 16 months in office, President Trump and assorted members of his new administration have threatened to withdraw from the WTO, ignore the WTO, go around the WTO and refuse to comply with adverse WTO rulings.²³ At home, these and his many other threats to disrupt trade and dismantle trade agreements have thrilled his economic nationalist political base. In Geneva, these threats have generated both dismay at the US renunciation of its long bipartisan tradition of supporting international trade rules and trade and other international institutions, and mystification at what, setting aside the rhetoric, the actual unfolding trade policy of the United States might be. A peculiar combination of US disregard and indifference to the WTO by President Trump has only added to the long-standing difficulties of the members of the WTO in concluding trade negotiations on almost anything. At the WTO Ministerial Conference in Buenos Aires, Argentina, more and more of those from other countries who are engaged in the work of the WTO were asking, "What does the United States want?" With the United States largely on the sidelines, very little of note was agreed in Buenos Aires.

16 See James Bacchus, "How the World Trade Organization Can Curb China's Intellectual Property Transgressions" (22 March 2018) *Cato at Liberty* (blog), online: <www.cato.org/blog/how-world-trade-organization-can-curb-chinas-intellectual-property-transgressions>.

17 *China—Subsidies to Producers of Primary Aluminum*, WT DS519.

18 See Office of the United States Trade Representative, online: <www.ustr.gov/trade-agreements>.

19 ProMexico, online: <www.promexico.gob/my/en/mx/tradados-comerciales>.

20 *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153, art 1:1 (entered into force 1 January 1995). John H Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill, 1969) at 245.

21 See "The Case for Open Trade", online: WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm>.

22 Office of the Press Secretary, The White House, Press Release, "Press Briefing by Secretary of Commerce Wilbur Ross on an Executive Order on Trade against Violations and Abuses" (28 April 2017).

23 Editorial, *The New York Times* (27 February 2017); Damian Paletta & Ana Swanson, "Trump suggests ignoring World Trade Organization in major policy shift", *Washington Post* (1 March 2017); Shawn Donna & Demetri Sevastopulo, "Trump team looks to bypass WTO dispute system", *Financial Times* (27 February 2017); Alex Lawson, "Trump Will Not Comply With Adverse WTO Rulings" (1 March 2017) *Law 360* (blog).

On September 19, 2017, in his first speech to the United Nations, President Trump (in between threatening to destroy North Korea and casting doubt on the legal right of the United Nations to second-guess sovereign states) took time to rail against the WTO without directly mentioning it. “For too long,” he said, “the American people were told that mammoth multinational trade deals, unaccountable international tribunals, and powerful global bureaucracies were the best way to promote their success. But as those promises flowed, millions of jobs vanished and thousands of factories disappeared.”²⁴ The president cited no evidence, however, that global trade deals had caused the effect of the job losses in the United States, and he did not mention the US jobs gained from those trade deals. Nor did he zero in on precisely which “unaccountable international tribunals” and which “powerful global bureaucracies” he had in mind.

On October 25, 2017, during a televised interview on Fox Business by the virulently protectionist broadcaster Lou Dobbs, the president got more specific in his denunciations of the WTO and especially of WTO dispute settlement. “They have taken advantage of this country like you wouldn’t believe,” he complained. The United States, he went on, has lost “almost all the lawsuits” it has brought to the WTO “because we have fewer judges than other countries. It’s set up as you can’t win. In other words, the panels are set up so that we don’t have majorities.”²⁵ The president said he is persuaded that the WTO is “set up for the benefit of taking advantage of the United States.”²⁶ Despite these criticisms, though, he did not say what he proposed for or wanted from the WTO.

Then, on November 10, 2017, at the annual Asia-Pacific Economic Cooperation Forum meeting in Da Nang, Vietnam, President Trump unleashed in full to the assembled Asia-Pacific regional leaders his frustrations with multilateral trade agreements in general and with the WTO specifically. “We are not going to let the United States be taken advantage of anymore,” he said. “I am always going to put

America first, the same way that I expect all of you in this room to put your countries first....What we will no longer do is enter into large agreements that tie our hands, surrender our sovereignty and make meaningful enforcement practically impossible.... [I will] aggressively defend American sovereignty over trade policy....Simply put, we have not been treated fairly by the World Trade Organization.”²⁷

Trump may not have read — or even have heard of — the Melian Dialogue. It does not appear in his musings on the art of the deal.²⁸ But whether he knows it or not, he is channelling the edicts of the ancient Athenian generals on Melos. In trade, as in much else, he is saying that might makes right, and, in his recent unilateral trade actions outside the legal structure of the WTO, he is trying to prove it.

The Trade Views of the United States Trade Representative

In his attacks on the WTO-based world trading system, President Trump has the more subtle, but equally ardent, support of his hand-picked trade ambassador, United States Trade Representative (USTR) Robert Lighthizer. A highly intelligent and highly skilled trade lawyer, an experienced trade negotiator and a long-time trade counsel for the protectionist-minded in the US steel industry, Lighthizer lends a leaven of reflective trade philosophy to the uninformed bluster of the president. More subdued than the president he serves, he espouses, beneath a thin veneer of gratuitous pro-trade euphemism, a deeply felt belief in the virtues of protectionism and mercantilism that seems to animate almost all his actions on behalf of the Trump administration.

Lighthizer rightly denounces protectionism and mercantilism in other countries — notably China, which is touting free trade while turning more and more economically nationalist. Yet he

24 “Remarks of President Trump to the 72nd Session of the United Nations General Assembly” (Address delivered at the United Nations, New York, 19 September 2017), online: The White House <www.whitehouse.gov/briefings-statements/remarks-president-trump-72nd-session-united-nations-general-assembly/>.

25 Interview of President Trump by Lou Dobbs (25 October 2017) on Fox Business.

26 *Ibid.*

27 Ashley Parker & David Nakamura, “At summit, Trump return to tough stance on trade”, *Washington Post* (11 November 2017); John Wagner & David Lynch, “On Trump’s trade trip to Asia, nations keep his one-on-one dance card empty”, *Washington Post* (15 November 2017).

28 Donald Trump, *The Art of the Deal* (New York: Random House, 2004).

advocates both protectionism and mercantilism for his own country in the guise of a Trumpian version of a misguided, short-sighted and inward-looking industrial policy. Lighthizer echoes the view, dating back to some of the ancient Greeks, that all of us in our country will be better off if we discriminate in favour of our own producers while limiting competition from imports from other, “foreign” countries.²⁹ He claims he is committed to “working with other members to improve the functioning of the WTO”³⁰ and, further, to increasing “the WTO’s ability to promote free and fair trade.”³¹ But, whatever soothing reassurances he may offer about supposedly supporting the WTO, Lighthizer, on behalf of his president, is pursuing a protectionist and mercantilist agenda that, if it is fully implemented, and, if it is not resisted, could well destroy the WTO-based world trading system.

The USTR is not new to his views, which he has long professed. After nearly 25 years, Lighthizer remains unreconciled to the decision by the US Congress in 1994 to support inclusion of the establishment of a binding dispute settlement system as part of the WTO, when approving the Uruguay Round trade agreements.³² As a former trade negotiator who had effectively wielded a unilateral club, he did not think it wise for the United States to relinquish its legal right to take unilateral trade actions in exchange for a binding WTO dispute settlement system in which trade rules and trade rulings could be enforced through economic sanctions in the form of the “last resort” of a loss of previously granted trade benefits.³³

Moreover, Lighthizer did not believe then that it was a good idea for the United States to agree to be bound by the judgments of what would often be foreign judges, whom he feared would be biased against the United States and whose delegation of global legal authority, as he saw it, amounted to a surrender of a slice of American sovereignty. During

the rowdy run-up to the congressional approval of the Uruguay Round trade agreements, he pushed unsuccessfully for the establishment of a domestic commission to review WTO decisions whenever the United States lost a case. He would have required the United States to consider leaving the WTO if — in the view of this commission — the United States lost three cases it should not have lost in any period of five years.³⁴ He has given no reason now for anyone to think he has abandoned this view.

The USTR preferred then — and he looks “wistfully” back on now — the pre-WTO system of GATT dispute settlement, in which a GATT panel ruling was not binding unless all the countries that were contracting parties to the GATT agreed that it should be.³⁵ This meant that, for a ruling to be legally binding, the country that lost the legal ruling in the dispute had to agree to make it binding. This meant, as well, the preservation of more national control over disputed trade outcomes and, therefore, to Lighthizer’s way of thinking, the preservation of more national sovereignty. In contrast, in WTO dispute settlement, a WTO panel ruling, as amended by the WTO Appellate Body, is binding unless every WTO member agrees that it should not be binding. This means that, for a ruling not to be binding, the country that won in the dispute has to agree to set its winning verdict aside.³⁶ Not surprisingly, after more than two decades, this has never happened.

During the Uruguay Round, decades of frustration with enforcing winning panel verdicts in the GATT led US trade negotiators to push hard for a binding dispute settlement system in the WTO. They sought rules that could be upheld. They wanted to be able to enforce international legal judgments against other countries that had violated WTO rules, backed by economic sanctions authorized by the WTO. But, unlike many at the time, Lighthizer realized that the United States would lose cases as well as win them in the WTO. He may also have foreseen that the United States would be most likely to lose WTO cases (including cases involving his steel clients) when defending the expansive and highly discretionary US anti-dumping and anti-subsidy trade remedies that would be indefensible under the new and binding

29 James Romm, “Greeks and Their Gifts”, *The Wall Street Journal* (23 May 2015).

30 Bryce Baschuk, “U.S. Pledges Work to ‘Improve’ WTO Rather Than Destroy It”, *Inside US Trade* (9 June 2017).

31 Eduardo Porter, “Trump’s Endgame Could Be the Undoing of Global Rules”, *The New York Times* (31 October 2017).

32 It should be acknowledged that I was one of the six original co-sponsors of the implementing legislation for the Uruguay Round trade agreements and, thus, have long been on the opposite side of Ambassador Lighthizer in the debate over whether the national interest of the United States is best served by participating in the WTO dispute settlement system.

33 *DSU*, *supra* note 11, art 3.7.

34 Shawn Donnan, “Fears for free trade as Trump fires first shots to kneecap WTO”, *Financial Times* (9 November 2017).

35 *Ibid.*

36 *DSU*, *supra* note 11, art 16.4.

trade remedies rules in the WTO Agreement.³⁷ What is more, based on his experience in the 1980s at the USTR in challenging Japan (the commercially insurgent “China” of the time) with singular trade threats, Lighthizer was very much inclined to stick with the old GATT system that left the United States free to go on the offence aggressively in trade by taking unilateral trade actions without any international legal constraint.

Since 1994, Ambassador Lighthizer’s opposition to the basic legal underpinning of the WTO dispute settlement system has remained unrelenting. In January 2001, at a seminar on Capitol Hill, he voiced anew his long-held view that it was a “mistake” for the United States to agree to a binding system that infringed on US sovereignty instead of retaining its previous unilateral discretion to assert its sovereign will. He said then that WTO panels are often comprised of jurists who are “not qualified.”³⁸ Shockingly, he then went so far as to say that he suspected that some WTO jurists “may be crooked, although I have no evidence of it.”³⁹ In making such a serious ethical charge on what he admitted was no evidence whatsoever, he was a Trumpian before Trump’s time. Even if the panels were “fair arbiters,” he contended, they would still be “a threat to sovereignty,” for “our laws are being threatened in a very serious way.”⁴⁰

In 2003, in a bit of trade irony, Lighthizer, perhaps the most fervent and outspoken critic of the WTO dispute settlement system, and someone who had professed that WTO jurists “may be crooked,” was one of two candidates nominated by the United States to become one of the seven members of the WTO Appellate Body. When confronted with this irony at the time by a journalist, Lighthizer was reported as asking himself aloud, “Do you criticize the system and hope to kill it, or do you think it is worthwhile to go to Geneva and apply a strict constructionist’s perspective, and add a certain credibility?”⁴¹ He was not selected by the members of the WTO.

Five years later, invoking the economic nationalist spirit of one of America’s foremost founding fathers, Alexander Hamilton, Lighthizer derided free traders in a fervent opinion column in *The New York Times*:

Modern free traders embrace their ideal with a passion that makes Robespierre seem prudent. They allow no room for practicality, nuance or flexibility. They embrace unbridled free trade, even as it helps China become a superpower. They see only bright lines, even when it means bowing to the whims of anti-American bureaucrats at the World Trade Organization. They oppose any trade limitations, even if we must depend on foreign countries to feed ourselves or equip our military. They see nothing but dogma — no matter how many jobs are lost, how high the trade deficit rises or how low the dollar falls.⁴²

By 2010, Lighthizer was telling the US-China Economic Security and Review Commission, “Trade policy discussions in the United States have increasingly been dominated by arcane disputations about whether various actions would be ‘WTO-consistent’ — treating this as a mantra of almost moral or religious significance....WTO commitments are not religious obligations.”⁴³ He maintained it made little sense to have “an unthinking, simplistic and slavish dedication to the mantra of ‘WTO-consistency.’”⁴⁴ Rather, he recommended that “where a trade relationship has become so unbalanced that the threat of retaliation pales in comparison to the potential benefits of derogation — it only makes sense that a sovereign nation would consider what options are in its own national interest (up to and including potential derogation from WTO stipulations).”⁴⁵ In other words, if you wish to do so, ignore the WTO.

37 WTO, *Agreement on the Implementation of Article VI of GATT 1994*, 1868 UNTS 201 [Anti-dumping Agreement]; WTO, *Agreement on Subsidies and Countervailing Measures*, 1869 UNTS 14.

38 Greg Rushford, “Bob Lighthizer, WTO Jurist?” (October 2003) *The Rushford Report*, online: <www.rushfordreport.com/2003/10_2003_Publius.htm>.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 Robert E Lighthizer, “Grand Old Protectionists”, *The New York Times* (6 March 2008).

43 Robert E Lighthizer, “Evaluating China’s Role in the World Trade Organization Over the Past Decade” (Testimony before the U.S.-China Economic and Security Review Commission, 9 June 2010) at 33, online: <www.uscc.gov/sites/default/files/6.9.10Lighthizer.pdf>.

44 *Ibid* at 35.

45 *Ibid* at 33.

The American Attempt to Unmake Right in the WTO

Little wonder that Lighthizer was appointed as the USTR by Trump. Now, thanks to President Trump, he is doing his best to turn back the clock in world trade to a time when the United States could employ its considerable leverage without the inconvenient constraint of WTO rules, and often did so. While taking reckless unilateral and other highly publicized trade actions outside of Geneva, at the same time, inside Geneva, Trump and his atavistic acolytes have been waging a “stealth war” against the WTO, cleverly disguised by Lighthizer and his lieutenants at the USTR as an arcane procedural challenge to the appointment and the reappointment of the members of the WTO Appellate Body. The European trade minister, Cecilia Malmström, speaks for a great many worried WTO members in warning that this procedural challenge by the United States risks “killing the WTO from the inside.”⁴⁶ Continued success in this stealth war could turn out to be all the United States needs to topple the WTO.⁴⁷

This stealth war was not started by Trump and Lighthizer. For the past 12 years, dating back to the second term of President George W. Bush and then continuing and gradually intensifying under the administration of President Barack Obama, the United States, through the USTR, has voiced concerns about some of the rulings and about some of what the United States perceives as the aggrandizing inclinations of the seven members of the WTO Appellate Body, the final tribunal of appeal in the WTO. The United States tried unsuccessfully to raise some of its concerns in the failed Doha Round of multilateral trade negotiations. They voiced their concerns from time to time within the councils of the WTO. Unfortunately, over time they succumbed to the temptation to apply inappropriate pressure outside the legal norms of the system, but, for the most part, they worked within it to try to resolve their professed concerns.

46 Eduardo Porter, “Trump’s Endgame Could Be the Undoing of Global Rules”, *The New York Times* (31 October 2017).

47 Gregory Shaffer, Manfred Elsig & Mark Pollack, “Trump is fighting an open war on trade. His stealth war on trade may be even more important”, *Washington Post* (27 September 2017).

As he has done in so many instances, Trump has, in the WTO, seized on an inherited conflict and has made it immeasurably worse by making it his own. Trump, Lighthizer and other political appointees at the USTR have used the pretext of this pre-existing and low-key controversy as a convenient cover for what has become their systematic assault against rules-based multilateralism and dispute settlement. Within the broader geopolitical context of the overall direction and disruption of Trump trade policy, this previously arcane internal debate largely among trade diplomats and trade legal theorists has been transformed and elevated by Lighthizer and his USTR colleagues since Trump’s inauguration into a political wedge issue against the WTO as an international institution. They have eagerly enlisted in this stealth war against the WTO and escalated it to the point where it now poses an existential crisis for the WTO.

Substantively, as voiced, the concerns raised by the United States have, during most of the past 12 years, been mainly about the Appellate Body rulings in a long string of “zeroing” and other trade remedies disputes in which the United States has repeatedly ended up on the losing side.⁴⁸ Zeroing is a methodology used by US trade agencies to determine whether a foreign producer is dumping and to calculate the margin of dumping; WTO panels and the Appellate Body have consistently ruled that the use of zeroing does not result in the making of a fair comparison between the export price and the normal value of an imported product, as required by the WTO Anti-Dumping Agreement.⁴⁹ This series of WTO rulings has had the effect of limiting the latitude of US trade agencies in finding the existence of dumping and in levying high anti-dumping duties — not a result that has been welcomed by Lighthizer and other US trade lawyers for steel and other trade-sensitive and trade-exposed US industries.

48 See *United States—Zeroing (EC)* (2006), WTO Doc WT/DS294/AB/R (Appellate Body Report); *United States—Zeroing (Japan)* (2007), WTO Doc WT/DS322/AB/R (Appellate Body Report); *United States—Zeroing (Japan)* (2007), WTO Doc WT/DS/322/21 (Article 21.3(c) Arbitration Report); *United States—Zeroing (Japan)* (2009), WTO Doc WT/DS322/RW (Article 21.5 Panel Report); *United States—Zeroing (EC)* (2009), WTO Doc WT/DS294/AB/RW (Article 21.5 Appellate Body Report); and *United States—Zeroing* (2011), WTO Doc WT/DS402/R (Panel Report). The initial dispute in which the Appellate Body ruled against the use of zeroing methodology in determinations of the existence of dumping and of dumping margins was *European Communities—Bed Linen* (2001), WTO Doc WT/DS141/AB/R (Appellate Body Report), in which the United States was not a party to the dispute. It should be noted that I was one of the members of the division of the Appellate Body in that appeal.

49 See *Anti-dumping Agreement*, *supra* note 37, art 2.4.

Procedurally, as voiced, these US concerns, throughout the past 12 years and continuing now, have been mostly about what the United States has increasingly seen as a gradual expansion by the Appellate Body of the scope of its jurisdiction beyond what is mandated in the WTO treaty. In the deliberations of the WTO Dispute Settlement Body (DSB), the United States has, throughout those 12 years, from time to time, charged the Appellate Body with exceeding the bounds of its treaty mandate by either adding to or subtracting from the obligations in the WTO-covered agreements in violation of the terms of the DSU.⁵⁰ In the view of the United States, these alleged procedural excesses of the Appellate Body are creating an unhealthy imbalance among the internal bodies within the WTO, an imbalance that could have serious substantive consequences.

The United States has been frustrated in addressing these substantive and procedural concerns by the rules-based reality of WTO dispute settlement — a reality the United States played a major role in shaping during the Uruguay Round of trade negotiations that led to the establishment of the WTO and WTO dispute settlement. When a panel report is appealed, the Appellate Body must hear the appeal.⁵¹ It has no discretion not to do so. When a legal issue on appeal claims a violation of a WTO obligation, the Appellate Body must render a judgment clarifying the meaning of that obligation, and it must do so even when the trade negotiators who wrote it may have left its meaning less than crystal clear.⁵² Again, the Appellate Body has no discretion not to do so.

The appellate judges can rule only on those legal issues that are appealed. They cannot wander from those legal issues into mere conjecture on others that have not been appealed. Their job is to answer the legal questions they have been asked — nothing more and nothing less. The frustration of the United States is found in the instructions the members of the WTO — including the United States — have given the Appellate Body on how it must answer legal questions when they are appealed. The members of the Appellate Body have been told by the WTO members in the dispute settlement rules that they must

fulfill their mandate in strict accordance with the “customary rules of interpretation of public international law.”⁵³ Although those customary rules exist independently of any treaty because of their status as customary international law, they find reflection in the Vienna Convention on the Law of Treaties⁵⁴ (the Vienna Convention). Article 31.1 of the Vienna Convention states the general rule of treaty interpretation: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁵ These interpretive rules assume not only that treaty obligations have a meaning; they also assume that they have one meaning — a single meaning that must be clarified by the Appellate Body when a legal issue is appealed that requires a judgment on the meaning of an obligation.

From this requirement springs the bulk of the American accusations of “overreaching” and “gap-filling” by the Appellate Body. But what the United States derides as overreaching and as gap-filling is almost always only the Appellate Body doing its job for the members of the WTO according to its specific instructions in the WTO treaty. For instance, when the legal issue is, say, whether a fair comparison has been made between the export price and the normal value of a product when making a dumping determination in a process called zeroing, as is required by article 2.4 of the Anti-Dumping Agreement, then the Appellate Body has no choice but to decide what a fair comparison is, and then to apply that decision to the measure in question, given the facts as found by the panel in that appeal. No one argues for the infallibility of the Appellate Body in making legal judgments — least of all those who serve on it. The Appellate Body may be right or wrong in the eyes of others in any given judgment — like any other tribunal in the world. But the act of judging and applying the meaning of, in this example, a fair comparison is not overreaching or gap-filling. It is simply the Appellate Body fulfilling its mandate by doing the job it is supposed to do.

In fulfilling their mandate, the seven members of the standing Appellate Body must use their own

50 DSU, *supra* note 11, arts 3.2, 19.2.

51 *Ibid*, art 17.1.

52 *Ibid*, art 17.12.

53 *Ibid*, art 3.2.

54 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) [*Vienna Convention*].

55 *Ibid*, art 31.1.

judgment. Under the dispute settlement rules, they “shall be unaffiliated with any government.”⁵⁶ Furthermore, under those rules, Appellate Body members “shall not participate in the consideration of any disputes that would create direct or indirect conflict of interest.”⁵⁷ The WTO Rules of Conduct reinforce these treaty requirements. As a “Governing Principle,” the Rules of Conduct state, “Each person covered by these rules... shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest.”⁵⁸ The Rules of Conduct go on to say, “Pursuant to the Governing Principle, each covered person, shall be independent and impartial.”⁵⁹ Furthermore, “such person shall not incur any benefit that would in any way interfere with, or which would give rise to, justifiable doubts as to the proper performance of that person’s dispute settlement duties.”⁶⁰ These Rules of Conduct explicitly apply to the members of the Appellate Body.⁶¹ Indeed, the Appellate Body adopted these Rules of Conduct in 1995 even before the rest of the WTO did.

Significantly, the DSU provides that the members of the WTO, acting together in their dispute settlement role as the DSB, “shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once.”⁶² This is the institutional source and pivot of the current crisis involving the Appellate Body. As with virtually all decisions by the WTO, a decision on a reappointment of a member of the Appellate Body is made by consensus.⁶³ Apparently, the treaty drafters during the Uruguay Round negotiations that created the Appellate Body overlooked that this beckoning possibility of reappointment puts those members of the Appellate Body who have not yet been reappointed in the highly uncomfortable position of sitting in judgment on appeals involving countries whose

support they need to help make the consensus that is required for their reappointment.⁶⁴

Oversight or not, the possibility of reappointment for a member of the Appellate Body is a design flaw in the architecture of the WTO dispute settlement system.⁶⁵ Clearly, there is no right to reappointment for any member of the Appellate Body. Clearly as well, a decision on whether to approve a reappointment is a decision reserved for the members of the WTO, and solely for the members of the WTO. No one member of the Appellate Body has any role in this decision, nor does the Appellate Body as a whole. Should the members of the WTO be unable to reach a consensus on reappointment of a sitting member of the Appellate Body, then that member will not be reappointed. Moreover, because of the necessity for a consensus, any one country among the 164 that are members of the WTO — whether it be the United States or any other WTO member — can block the reappointment of a member of the Appellate Body.⁶⁶ Yet evidently unforeseen by the designers of the DSU was that this provides every WTO member with the potential of employing the leverage of its right to veto a reappointment as a tool for trying to influence the actions of those members of the Appellate Body desirous of reappointment.

For the first decade and more of WTO dispute settlement, the reappointment of members of the Appellate Body occurred entirely without controversy. Although members had no right to reappointment, no one member who sought reappointment was denied it. Despite the inevitable disappointments of some WTO members with Appellate Body legal judgments that went against them, not one member of the WTO interjected such disappointments into the reappointment process. This show of mutual self-restraint for the sake of the entire cooperative enterprise of the WTO contributed much to the establishment of the legitimacy and the credibility of the WTO dispute settlement system worldwide. But human nature is human nature. One who has a post will tend to want to keep it. One who

56 DSU, *supra* note 11, art 17.3.

57 *Ibid.*

58 WTO, *Rules of conduct for the understanding on rules and procedures governing the settlement of disputes* (1995), WTO Doc WT/DSB/RC/1, art II.1 [Rules of Conduct].

59 *Ibid.*, art III.2.

60 *Ibid.*

61 *Ibid.*, art IV.1.

62 DSU, *supra* note 11, art 17.2.

63 *Agreement Establishing the World Trade Organization* (1994), 1867 UNTS 154, 33 ILM 1144, art IX.1, n 1 [WTO Agreement].

64 *Ibid.*, art IX.1. The late Julio Lacarte-Muro, who chaired the dispute settlement negotiations during the Uruguay Round, was the principal author of the DSU and was also a founding member and the first chair of the Appellate Body, lamented to me on numerous occasions that this was indeed an oversight.

65 I owe the phrase “design flaw” to my friend and CIGI colleague, Hugo Perezcano Diaz.

66 WTO Agreement, *supra* note 63, n 1.

has leverage will be tempted to use it. Under the cumulative domestic pressures of losing politically sensitive WTO trade disputes, the United States has yielded to this temptation and has, for the past 12 years, sought to exploit the all too human tension felt by sitting WTO judges between their devotion to responsibility and their desire for reappointment in the United States' accelerating stealth war against the WTO.

Since long before the Trump ascendancy, the United States has been trying to intimidate both aspiring judges who have been nominated for vacant seats on the Appellate Body and sitting judges on the Appellate Body who have been candidates for reappointment by attempting to pressure them into ruling the way the United States wants them to rule as the price for US consent to their appointment or reappointment. The first inklings of the US campaign of intimidation were heard during the second Bush administration at a time when the United States had become increasingly vocal in its complaints about adverse Appellate Body rulings in various trade remedies disputes. The first public confirmation of US intimidation occurred in 2011 during the Obama administration, when the USTR informed a sitting judge from the United States that, because of continued adverse Appellate Body rulings in trade remedies disputes, the United States would not support her for reappointment. She protested publicly, but she was not reappointed.

Emboldened by this experiment in judicial intimidation, during Obama's second term (from 2013 through 2016) the USTR broadened the sweep of its pressure tactics in Geneva to include sitting Appellate Body members from countries other than the United States, employing such tactics as requests for one-on-one *ex parte* meetings to discuss their candidacies for reappointment. The United States and any Appellate Body members who chose to participate in these *ex parte* meetings were, of course, both to blame for the harm these meetings threatened to the WTO dispute settlement system. Such *ex parte* meetings between Appellate Body members and individual WTO members pose possible legal conflicts in violation of the WTO Rules of Conduct and should be specifically prohibited by an amendment to the Appellate Body working procedures. Over time, other WTO members became aware of these dubious US tactics and were increasingly disturbed by them. However, to avoid embarrassing the United States and further

risking the integrity of the world trading system, they chose not to say anything publicly about these US tactics, while working quietly and informally to fashion a reappointment process consistent with the rule of law and acceptable to all.⁶⁷

Then, in 2016, the United States stoked the intensifying conflict by announcing that it would not support the reappointment of Appellate Body member Seung Wha Chang of South Korea. The United States maintained that Appellate Body divisions on which he had served had exceeded the bounds of their jurisdiction by overreaching in their judgments in some disputes during his tenure. An uproar ensued in the DSB, with many other WTO members protesting the US action. Nevertheless, while Obama was still president, the United States succeeded in preventing Chang's reappointment by blocking the required consensus. Other WTO members ultimately acquiesced because of the legal straitjacket of the consensus rule. This only encouraged the United States to persist in its bullying inside the councils of the WTO.

As the jurisprudence of the schoolyard teaches us, if not stopped, bullying only begets more bullying. The inauguration in January 2017 of a president unabashedly inclined toward bullying only intensified the US campaign of intimidation of WTO judges and, more broadly, of other members of the WTO. Eventually, the US pressure tactics were broadened to extend to stonewalling the appointment of any new Appellate Body members to fill the vacancies occurring on the seven-member tribunal. In the normal course of regular turnover, as some of the incumbent judges completed their allotted mandates, more vacancies opened up on the Appellate Body. Seeing a chance in the second half of 2017 to link its long-standing grievances to the process of judicial reappointment, the United States decided to hold the Appellate Body hostage. These vacancies have not been filled.

Moreover, the United States opened a new front in its stealth war by contesting for the first time the long-standing practice — set out for more than 20

67 I rely here, in part, on my personal knowledge of these events. Among numerous accounts, most of them in the trade press, see e.g. "Pressure on U.S. Mounts as it maintains link between Appellate Body seats, WTO reform", *Inside US Trade* (15 September 2017); Alex Lawson, "WTO Dispute Roundup: Appellate Body Impasse Persists" (29 September 2017) *Law 360* (blog); "Dispute Unsettled", *The Economist* (23 September 2017); Alex Lawson, "WTO Members Clash Over Appellate Body Reappointment" (23 May 2016) *Law 360* (blog) [Lawson, "WTO Members Clash"].

years in the Appellate Body Working Procedures following due consultations with the DSB — of having retiring judges complete their work as members of divisions on pending appeals when their mandate ends before the Appellate Body report is submitted.⁶⁸ Until the United States raised its objection in 2017, this practice had enjoyed the universal support of WTO members since the inception of the WTO as the most practical way of proceeding to the goal identified in the WTO treaty of a “positive solution” of pending trade disputes.⁶⁹ This US objection is not without merit. At the outset, the seven founding members of the Appellate Body sought consultations with the DSB on this issue to make certain that the practical extension of the service of a departed member to complete a pending appeal would not raise issues of legal jurisdiction.⁷⁰ Urged to do so by the DSB so as to facilitate the resolution of disputes, the Appellate Body adopted the working procedure permitting such temporary holdovers of judicial authority. But much has changed since then. Holdovers that, for many years, lasted only a few weeks are now, amid a proliferation of more complex and more prolonged disputes, lasting for months on end. This is a legitimate issue for due attention by the DSB.

This said, the way in which the United States has chosen to address this issue in the DSB is far from being legitimate. In late September 2017, when an appellate report was circulated that was signed by two judges whose terms had already expired and was therefore not signed by three sitting judges, the United States went so far as to suggest that this was grounds for reviving the old GATT practice of permitting any one member to veto a dispute settlement ruling.⁷¹ Although this retro US gambit likely gladdened the heart of Lighthizer, there is no legal basis for this view in the DSU or elsewhere in the WTO treaty. It could conceivably be argued with some merit that an appellate report signed by fewer than three sitting members of the Appellate Body does not fulfill the requirement in article 17.1 of the DSU that each appeal be decided

by “three persons.”⁷² Presumably, and logically, the three persons to whom this requirement applies must all be members of the Appellate Body. The DSU does not, however, permit a singular veto of an Appellate Body report by the United States or any other one member of the WTO. Under the so-called reverse consensus rule, “an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.”⁷³

This may or may not have been an idle threat. The United States has, in the past, been known from time to time to utter such sentiments in part to encourage other WTO members to pay more heed to US frustrations with the dispute settlement system. Ultimately, the United States agreed to join in the consensus to adopt that appellate report. The mere mention, though, of reviving the rejected GATT practice of dispute settlement by allowing just one WTO member among all the 164 WTO members to block the adoption of a WTO ruling “set off alarm bells in Geneva from trade officials who are already worried that the U.S. is trying to undermine the WTO’s dispute settlement system.”⁷⁴ Many WTO members saw flashbacks to the frustrating days before the creation of the binding WTO dispute settlement system, when a country that lost before a GATT panel could single-handedly block the implementation of a ruling against it. This happened in a number of major GATT disputes. Ironically, the American consternation with this less-than-binding GATT practice led the United States to lead the charge for a binding dispute settlement system in the Uruguay Round.

All the while, throughout Trump’s first year, the United States continued to use the WTO dispute settlement system and take part in the sessions of the DSB. But the new administration of the United States seemed determined at the same time to paralyze the rules-based system. As their condition for getting on with the necessary task of supporting the continued resolution of international trade disputes by appointing new Appellate Body members, Lighthizer and other politically appointed and like-minded minions of Trump at

68 Shawn Donnan, “WTO chief warns of risks to world peace”, *Financial Times* (1 October 2017); see WTO, *Working Procedures for Appellate Review* (2010), WTO Doc WT/AB/WP/6, Rule 15 [*Working Procedures*].

69 DSU, *supra* note 11, art 3.7.

70 This is based on my personal recollections as a participant in those discussions with the DSB at the time.

71 Bryce Baschuk, “U.S. Claims Right to Veto any Errant WTO Dispute Rulings”, *International Trade Daily* (29 September 2017).

72 DSU, *supra* note 11, art 17.1.

73 *Ibid*, art 17.14.

74 Baschuk, *supra* note 71.

the USTR demanded of other WTO members what they described as “reform” of the WTO dispute settlement process. But they refrained from saying what they meant by reform. Hence the increasingly widespread question asked by more and more WTO members: “What does the United States want?”

At year-end in 2017, three of the seven Appellate Body seats were open, leaving only four members, and there were fears that, if the stalemate on appointment continued, the Appellate Body would be reduced in 2018 to three members, just enough to comprise the division of three required by the DSU to hear an appeal.⁷⁵ If the appointments impasse continues beyond December 10, 2019, when two more members are due to complete their second terms, the Appellate Body will be reduced at that time to just one member and will be rendered incapable of forming a division. Meanwhile, as 2018 began, facing an avalanche of appeals and approaching appeals, including some with myriad legal complexities, the Appellate Body and WTO panels alike laboured with inadequate financial and personnel resources, leading to a lengthening of the times taken to render judgments and diminishing the timely responsiveness of the system in resolving trade disputes. As the United States continued its intimidation and intransigence, there were growing fears that the work of the Appellate Body would be undermined and the entire WTO dispute settlement system would grind to a halt. All in all, it appeared to many that the United States, under the sway of Trump, was bent on using American might to unmake the right of the rule of law in world trade.

Making Right into Might through the Rule of Law

In its ever-increasing pressure tactics in the WTO, the United States, as led by Trump and enabled by Lighthizer, seems to think that it has enough power to get its way, and that because it has this power, it is entitled to use it, whatever that may do to the supposedly equal power of every other member of the WTO. This goes against all the United States has long asserted and defended internationally.

⁷⁵ DSU, *supra* note 11, art 17.1.

The rule of power is the very opposite of the rule of law. With the rule of power, power alone is all that matters. The law is uncertain and arbitrary. The law means only what those with power say that it means for any one person on any one issue at any one time. With the rule of law, power is subdued. The law is certain and not arbitrary. The law is written and the rules are known in advance. The law is written to apply to all equally, and all — in practice — in reality — are equal under the law and before the law. No one — no one — is beneath the concern of the law, and no one — no one — is above the law. Anything less than this cannot rightly be called the rule of law.

Through all the long centuries of experience since the sad events on Melos, four basic elements have been identified as a “core definition of the rule of law.” First, the power of the state must not be exercised arbitrarily. There must be the rule of law and not the “rule of men.” Second, the law must be applied to sovereign and citizens alike, with an independent institution such as a judiciary “to apply the law to specific cases.” Third, “the law must apply to all persons equally, offering equal protection without prejudice or discrimination. Furthermore, for there to be the rule of law, the law must be of general application and consistent implementation; it must be capable of being obeyed.”⁷⁶ Words in a statute book or in a judicial ruling are not enough. The words must have reality. What matters is not only what the law *says* but also, even more, what the law *does*. The rule of law is more than simply “law in words;” it is “law in action.”⁷⁷ These four considerations, to my mind, apply as much to law between nations as to law within nations.

A tendency in some places is to speak of “rule by law” instead of the “rule of law.” But the two are not the same. Rule by law is a means for imposing the power of the state. Not surprisingly, it is favoured by authoritarian rulers in authoritarian states. The rule of law is a means of ensuring individual freedom, including freedom from the arbitrary say of the state. Compliance with the caprice of some potentate as expressed in law is not the rule of law. Where the law is subject to the whim

⁷⁶ Simon Chesterman, “An International Rule of Law?” (2008) 56 Am J Comp L 331 at 342.

⁷⁷ This description in this paragraph paraphrases the classic definition in Roscoe Pound, “Law in Books and Law in Action” (1910) 44 Am L Rev 12; see also AW Bradley & KD Ewing, *Constitutional and Administrative Law*, 12th ed (New York: Longman, 1997) at 105.

of whoever happens to be wielding the power of the state at the time, there may, as a useful expedient of autocratic rule, be rule by law, but there is no rule of law. This distinction between rule by law and the rule of law applies equally to every country — to Russia, China, Turkey, Poland, Hungary, Venezuela and the Philippines — and also to the United States of America.

The truest test of whether there is the rule of law is whether there is an independent judiciary. As Anne-Marie Slaughter has explained, “The definition of an ‘independent judiciary’ is a judiciary that is not the handmaiden of State power, that answers to law rather than to the individuals who make it.”⁷⁸ Those who advocate rule by law favour subordinating the judiciary to those who hold power in the executive branch of governance. In contrast, those who favour the rule of law understand that it can only exist if there is a strict separation of the judicial powers from the executive and the legislative powers of governance. Judges can be impartial in applying the rule of law only if they are independent, and judges can be independent only if they are free from all outside control and influence — including that of those who appointed them.

During the Enlightenment of the eighteenth century, Baron de Montesquieu of France was one of the first to see the need for an independent judiciary as being at the very core of the rule of law. “There is no liberty,” he said, “if the power of judging be not separated from the legislative and executive powers.”⁷⁹ In 1788, Alexander Hamilton — the American founding father whose views on trade are much admired by Lighthizer — quoted this assertion by Montesquieu approvingly in one of his contributions published in *The Federalist Papers*, the essays written in support of the ratification of the United States Constitution.⁸⁰ Today, in the institutional context of the WTO, the separation of powers is that between the WTO panellists and Appellate Body members fulfilling their mandates to the members of the WTO sitting as the DSB (the judicial branch) and all the rest of the endeavours of the members of the WTO sitting as the WTO General Council and overseeing the WTO Secretariat (the executive and legislative branches).

78 Anne-Marie Slaughter, “International Law in a World of Liberal States” (1995) 6 *Eur J Intl L* 503 at 511, n 18.

79 Baron de Montesquieu, “The Spirit of the Laws” (1748), as quoted in Alexander Hamilton, *The Federalist Papers, Number 78* (1788).

80 *Ibid.*

There is no lack of those in the world today who continue to believe, like the Athenian generals on Melos, that the strong, because they have power, should be able to use it as they choose — including by wielding power arbitrarily over the weak. All of human history through all of the centuries since the Peloponnesian War can be seen as a commentary on the events on Melos — as a struggle to curb and tame the worst in our nature by replacing the arbitrary exercise of power with the rule of law.⁸¹ Might does not make right where there is the rule of law. In our pursuit of something worthy of being called human civilization, we can choose the arbitrary rule of might in all its manifestations, or we can choose the lawful rule of right through the rule of law. On this central issue, there can be no in between, and there can be no compromise. Anything less than the rule of law is only the rule of power as described long ago by Thucydides in the Melian Dialogue.

Not long ago, the United States was among the foremost in the world in understanding and in communicating all of this. The United States has long preached the need for the rule of law and for the international rule of law to the world’s unpersuaded. But, when Lighthizer and other appointees of the current US president invoke the rule of law now, their words ring hollow. Their words are betrayed by many of their actions. Under the sway of its wayward president, the United States is not only failing to speak up against authoritarian actions abroad,⁸² it has succumbed to the lure of arbitrary executive actions on the outer edges of lawfulness at home.⁸³ The WTO is only one of a growing number of arenas — domestic and international alike — in which, under the mercurial auspices of Donald Trump, the executive branch of the federal government of the United States seems in sad retreat from the rule of law.

81 I first explored this point in James Bacchus, “The Rule of Law: Reflections on Thucydides and the World Trade Organization” Winter/Spring 2000 *Vanderbilt Magazine* 16. I have made it many times since on numerous platforms and in numerous other appearances worldwide. For a broader discussion of this point, see James Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (Cambridge, UK: Cambridge University Press, 2018) ch 4.

82 Declan Walsh, “As Strongmen Steamroll Their Opponents, U.S. Is Silent”, *The New York Times* (1 February 2018).

83 See e.g. Bob Dreyfus, “Trump’s All-Out Attack on the Rule of Law”, *The Nation* (1 February 2018); Yascha Mounk, “Donald Trump Just Asked Congress to End the Rule of Law”, *Slate* (30 January 2018); Jeffrey Toobin, “Donald Trump and the Rule of Law”, *The New Yorker* (6 January 2018).

Defending Right against Might in the WTO

Missing in the US assault on the WTO and especially on the WTO dispute settlement system is the strong support for the rule of law that results from taking the longer and more enlightened view of the self-interest of the United States. The shorter, myopic view is that the American self-interest lies in reserving the right to throw America's weight around unilaterally in world trade. The longer, better view is that the American self-interest lies in relinquishing the right to act unilaterally outside the bounds of law by supporting a binding dispute settlement system with the authority and the ability to uphold and enforce trade rules on which all the countries comprising the world trading system have agreed. The shorter view favours the rule of power. The longer view favours the rule of law. In taking the shorter view, the United States is turning back toward Melos.

The animus of President Trump and his administration against the WTO and against WTO jurists seems to be an end product of their visceral belief that the United States should never allow itself to be second-guessed by foreigners. Instead, they think the United States should cling to the solitary preserve of their perception of American sovereignty. Trump and his followers appear to believe that any national decision to defer to the judgment of an international tribunal or some other international institution is a subversion of national sovereignty. This helps explain why the president mentioned "sovereign" or "sovereignty" 16 times in his first speech to the United Nations.⁸⁴ In explaining Trump's new trade policy, the USTR put this concern this way in March 2017, soon after the president took office: "Ever since the United States won its independence, it has been a basic principle of our country that American citizens are subject only to laws and regulations made by the U.S. government — not rulings made by foreign governments or international bodies. This principle remains true today. Accordingly, the Trump

administration will aggressively defend American sovereignty over matters of trade policy."⁸⁵

John Bolton, President Trump's latest national security adviser and a former US ambassador to the United Nations, who seems to oppose the very idea of multilateral cooperation through the United Nations, has had high praise for Trump's condemnation of the WTO and, in particular, of WTO dispute settlement. It is not clear that Ambassador Bolton has ever read the GATT. Yet he assumes the trappings of a legal authority on trade in denouncing the "faulty decisions" of WTO jurists in the WTO's "faltering" dispute settlement system. He tells us, "Although technical, even arcane, the DSU is dear to the hearts of global governance advocates. The Trump administration is right to criticize its performance... The unspoken objective is to constrain the U.S., and to transfer authority from national governments to international bodies...The common theme is diminished American sovereignty, submitting the United States to authorities that ignore, outvote or frustrate its priorities...U.S. sovereignty is at stake."⁸⁶ In recruiting Bolton as his national security adviser, Trump is simply enlisting an echo. His own stress on the sanctity of national sovereignty has been equally insistent and equally strident. In such a singular stress on such a narrow view of the notion of sovereignty, Trump rejects the very foundation of the liberal international order, which is based on a sharing of national sovereignty through international cooperation.

Those now in the ascendancy in the United States cite their contorted view of national sovereignty as an excuse for employing America's considerable economic leverage to try to bully other countries into doing as the United States demands on trade. They impose illegal unilateral trade actions. They issue ultimatums. They threaten more unilateral actions. They tell other countries, in so many words, to take it or leave it. They see the rules of trade as tools they can choose to acknowledge or not, ignore or not, in the singular exercise of an American commercial *realpolitik*. Internationally, they answer to no one but themselves — not to their allies or their friends, not to the previous promises of their predecessors, not to the

⁸⁴ Philip Zelikow, "The Logic Hole at the Center of Trump's U.N. Speech", *Foreign Policy* (20 September 2017).

⁸⁵ "New USTR agenda dismisses WTO dispute settlement authority, says U.S. to stress 'sovereignty'", *Inside US Trade* (1 March 2017).

⁸⁶ John Bolton, "Trump, Trade and American Sovereignty", *The Wall Street Journal* (7 March 2017).

commitments of their predecessors as participants in international institutions, and not to their trading partners and to the rules and obligations of the global trading system that the United States long helped lead the world in creating. They are in the thrall of might makes right.

But bullying will get them only so far. Although still considerable, the economic leverage of the United States is not, relatively speaking, what it used to be. Other countries have growing economic leverage in a world in which the US share of global GDP has declined significantly since the first decades after the Second World War. The United States accounted then for about half of global GDP. Now it accounts for about one-fifth. Other developed countries have long since recovered from that global conflict and have continued to grow. Developing countries have emerged from poverty and grown as well. All the trading countries of the world have become not only interconnected through a global division of labour and the fragmented production of global supply chains, they have also become interdependent, economically and in many other ways. The initial response from some countries to the economic bullying of Donald Trump and his cohorts may be a reluctant acquiescence. But, in time, the limits of this acquiescence will be reached, and other countries will in turn assert their own significant economic leverage against the United States. If there is not a return to multilateralism through the WTO, the results of such a mutual descent into unilateralism will be fateful for the rules-based world trading system.

One problem with the Trump administration's constricted view of sovereignty in the twenty-first century is that it will not work. Not for the United States. Not for any other country. And certainly not in world trade. This is a century in which economic and other concerns are increasingly global in nature and in which many of those concerns can therefore only be addressed through cooperative international action. The late John Jackson, the greatest of all trade law scholars, pointed out soon after the dawn of this century that "[i]n the area of trade policy...and...in the real world of today's 'globalization,' there are innumerable instances of how actions by one state (particularly an economically powerful nation) can constrain and influence the internal affairs

of other nations."⁸⁷ In such a world, a stubborn, insistent invocation of an insular sovereignty solves no problems, globally or — often — domestically. Cooperative international action is necessary, and such action is usually much more likely to succeed if the United States is actively engaged and is helping point the way toward a solution.

The WTO is one example of cooperative international action to solve a global problem — that of easing and increasing the flow of trade worldwide so that all in the world can have the opportunity to share in the gains from trade. Together, the 164 members of the WTO have rightly resolved that this problem can best be solved if they agree on rules for trade as part of a global framework enabling trade. And they have rightly realized that the rules on which they have agreed in the WTO treaty will not truly be effective as international laws unless they are upheld and enforced in accordance with the rule of law in a binding dispute settlement system. This is why we have the WTO, and this is why we have WTO jurists, including those on the WTO Appellate Body.

The WTO is a realization of what Jackson called "sovereignty-modern."⁸⁸ It is not a subversion of national sovereignty. It is an expression of their national sovereignty by each of the members of the WTO — including the United States of America. The WTO is a sharing of sovereignty resulting from 164 sovereign decisions to take the longer view of national self-interest. With the death of distance, the advance of transport, the ubiquity of instant communication, the emergence of digital trade and the arrival of global value chains that cross the globe back and forth many times over, it is simply not the case that, in the absence of the WTO, individual nation-states would, in the consoling sanctuaries of their sovereign territories, be able to achieve their national economic goals by acting alone. In the twenty-first century, almost every national issue is also international in its causes and in its effects. Joshua Meltzer has it right in saying that "growing interdependence and globalization has reduced the ability of states to achieve optimal policy outcomes acting alone."⁸⁹

⁸⁷ John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge, UK: Cambridge University Press, 2006) at 69.

⁸⁸ *Ibid* at 61.

⁸⁹ Joshua Meltzer, "State Sovereignty and the Legitimacy of the WTO" [2014] 26:4 U Pa J Intl L 693 at 702.

To maximize outcomes for the people of every trading country — including the United States — global rules for trade within an enabling global framework for trade are essential. The only alternative to acting alone is to design and to support the WTO — or something very much like it. In the absence of the WTO, we would soon have to reinvent it. Ironically, in the light of the recent US rhetoric, one reason why we would be engaged in this reinvention would be to preserve our national sovereignty and to make the most of it. Every nation-state in the twenty-first century faces the challenge of proving anew that the Westphalian system of nation-states established in the seventeenth century remains the best way to organize and to govern the world. In this globalized world in this twenty-first century, where so much of what happens that affects each of us seems to be out of our reach and beyond our control, it falls to nation-states to reaffirm their relevance by demonstrating their continued effectiveness. This aim can only be achieved if nation-states work cooperatively and in concert toward shared aspirations. Thus, the continued success of the WTO does not undermine national sovereignty; it reaffirms it. The WTO makes sovereign states stronger, not weaker. It proves that national independence is still possible in an interdependent world.⁹⁰

A binding dispute settlement system in which the rules are upheld and enforced is imperative to providing the “security and predictability” WTO members seek through the enabling WTO framework.⁹¹ WTO rules are the guiding rules for the daily conduct of WTO trade. Agreement on trade rules creates an atmosphere of certainty that helps advance the flow of trade. Awareness that trade rules can be enforced and that there will be an economic price to pay for not following them encourages trading countries to comply with the rules. As a result, almost all WTO members comply with almost all WTO trade rules almost all the time.⁹² By far, this has been the biggest success to date of the WTO. Although they draw most of

the public attention, international trade disputes are rare exceptions to the day-to-day conduct of world trade within the agreed rules. The media is endlessly fascinated by the prospect of trade wars; the WTO-based world trading system prevents trade wars every day — and has been doing so for 70 years. But, without a binding dispute settlement system in which all sovereign states are equal in power and equally subject to the rule of law, and without a continuing willingness by the United States and all other members of the WTO to keep their treaty commitments to resolve all their trade disputes in that system, the current security and predictability in world trade will vanish, with grave economic consequences for all the members of the WTO, not least the United States. We would be left with only might makes right, in a wary world of reduced trade gains and diminished economic possibilities.

But what of President Trump’s trumpeting that the WTO and the WTO dispute settlement system are rigged against the United States? Here the president is indulging, as he often does, in the fabrication of alternative facts. He claims that the WTO is “set up for taking advantage of the United States,” and that Americans “have not been treated fairly by the World Trade Organization.”⁹³ This utterly unfounded assertion must surely amuse many other members of the WTO, who are long accustomed to the United States playing an outsized role in the doings of the WTO. The United States did at least as much as any other country to set up the WTO, and, by any credible and rational economic measure, the United States must be numbered among the major beneficiaries of the WTO. As what President Trump would quite rightly call a “huge” trading nation, the United States benefits “hugely” from the fact that world trade flows more smoothly, more quickly, in greater volumes and in greater value because it is conducted within the enabling WTO rules framework.

Does the United States, as Trump alleges, lose almost all the lawsuits? Far from it. With an army of accomplished trade attorneys in the USTR, and with the frequent outside assistance of equally accomplished private attorneys, the United States is far better equipped than the vast majority of other WTO members to win WTO disputes. And it does win. Several similar studies have reached slightly different conclusions due to differing

90 I have made this same point in “A Few Thoughts on Legitimacy, Democracy, and the WTO” (2004) 7:3 *J Intl Econ L* 667 at 670.

91 *DSU*, *supra* note 11, art 3.2.

92 Here, of course, I echo the famous dictum of Louis Henkin half a century ago that “[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Frederick A Praeger, 1968) at 42.

93 Parker & Nakamura, *supra* note 27.

methodologies. They come, however, to the same conclusion: in WTO disputes, complainants mostly win, and respondents mostly lose. In this, the United States, the most frequent litigant in the WTO, has done somewhat better in both roles than the average. In data compiled by Bloomberg, the United States, as complainant, has won 86 percent of the time, slightly more than the WTO average, and the United States, as respondent, has lost 75 percent of the time, less than the WTO average of 84 percent. By comparison, since becoming a member of the WTO in 2001, China has won six of the nine cases it has brought and has lost all but one case when a case has been brought against it.⁹⁴ Yet China remains a strong supporter of WTO dispute settlement (no doubt in part because China knows that, without the shelter of WTO rules against non-discrimination, Chinese trade would be singled out for discrimination all over the world).

The fact is, WTO members do not file a complaint in WTO dispute settlement unless they think they have a very good chance of winning. The political fallout back home from initiating a dispute and then losing it can be high. Often, as well, WTO members resort to WTO litigation only after years of trying unsuccessfully to resolve a dispute without litigation. Why do negotiations fail? Often, it is because the political cost of changing the offending measure is considerable. On occasion, a WTO member has even been known to suggest that another WTO member file a complaint against it so that it can lose in the WTO and, in losing, secure the political leverage back home to change what the member knows is an illegal measure. As Louise Johannesson and Petros Mavroidis have said, “WTO Members pick winners, and do not litigate *ad nauseum*.”⁹⁵

It should come as no surprise, then, that complainants usually prevail in WTO cases. But what really is a win? Is there a win only if the complainant prevails on *all* the legal claims it makes? What if the complainant prevails on more legal claims than not? What if it prevails on only one legal claim, but that verdict results in the alteration or withdrawal of the contested measure? This raises yet another question: can

there be a win only if the contested measure is altered or withdrawn? And what about the nature of the legal claims? Are they all equal? Or are some claims more significant than others? Is winning a legal claim that there has been a denial of national treatment more significant than winning a claim that the respondent has not filed a required notification? Most members of the WTO would say “Yes.” Like many others, the president of the United States likes to win. But when does he know he has won? It is not at all unusual in the WTO for both sides to claim victory.

What is more, the fact is that every WTO case is actually two cases. It is the discrete dispute over the unique facts of a particular instance of trade in a specific good or service, and it is the dispute over the legal principles that are the focus for resolving that discrete dispute. Thus, a win can be a win in the particular dispute before a WTO panel and the WTO Appellate Body, or it can be a win in the interpretation and the clarification of the legal principles brought to bear in that single dispute resolution. Often, in a given dispute, it will be both. But not always. A win in the dispute at hand involving trade in some specific widget is, of course, pleasing and beneficial. It is vital to the success of the trading system for WTO members to know and see that WTO obligations will be upheld. But a win on a legal principle may prove over time to be far more valuable to the prevailing WTO member and to WTO members as a whole.

Sometimes, as well, a complainant will be better off over the long term if it *loses* on a legal principle at issue in a dispute. In a natural desire to prevail in the immediate legal battle over the widget at hand, there will sometimes be a temptation to take a legal position on the meaning of a WTO obligation that, while it may be helpful in winning in that widget dispute, may not, in the eyes of an objective outside observer, serve the overall interest of the complaining WTO member in the long term. To be sure, WTO members are free to determine for themselves what is or is not in their national interest. But, take, for example, the United States. If the United States were to prevail in defending a sanitary or phytosanitary measure that was not based on scientific principles and that was maintained without sufficient scientific evidence, then what would happen next? Other WTO members would line up to apply trade restrictions

94 Andrew Mayeda, “Trump’s No Fan of WTO, but U.S. Lawyers Often Win There”, *Bloomberg* (29 March 2017).

95 Louise Johannesson & Petros C Mavroidis, “The WTO Dispute Settlement System 1995-2016: A Data Set and Its Descriptive Statistics” (2016) European University Institute Working Papers RSCAS 2016/72 at 24.

on all kinds of US agricultural exports for equally phony scientific reasons.⁹⁶ Is that truly a win?

In totting up the wins and the losses of the United States in WTO dispute settlement, there is also, unavoidably, the sore subject of US trade remedies. As Rufus Yerxa, president of the National Foreign Trade Council and a former deputy director-general of the WTO, has explained about US losses in WTO dispute settlement, “Most of the...losses were a result of the United States refusing to change its anti-dumping methodology even after it lost cases, thereby incurring repeated rulings against them for continuing the same practice. If you take those cases out, the United States has a better record as a defendant than China or most others.”⁹⁷ Behind the scenes of the American stealth war against the WTO, the issue of US discretion in the employment of trade remedies is — in my considered judgment based on several decades of legal and political immersion in these matters in the United States and worldwide as negotiator, legislator, lawyer and judge — the true core of the grievance of much of the current leadership of the United States against the WTO and against WTO dispute settlement.

In brief, the Trump administration wants to retain the freedom to do whatever it wishes to do in applying trade remedies without the annoying constraints of WTO rules. The president supports a broad sway for applying anti-dumping and other trade remedies for one compelling reason: the businesses and workers that desire them are centred mostly in the Midwest political swing states that gave him his narrow presidential election, and he will need the support of those same voters in those same states to get re-elected. Lighthizer and other highly experienced trade attorneys he has assembled at the USTR take the same position for the same political reason. Also, their previous legal experience has been largely in the specialized trade silo of representing US steel companies and other US industries that want to use trade remedies more freely as a tool against their foreign competition.

Their problem is this: WTO rules on which the United States agreed long ago govern the application of all trade remedies, and a refusal to

comply with these largely procedural rules can lead to losses in WTO dispute settlement and to the possibility of economic sanctions in the form of the loss of previously granted trade concessions that can in some cases add up to billions of dollars annually. “WTO jurists have engaged in an all-out assault on trade remedy measures,” Lighthizer claimed back in 2007, when he was leading the charge for steel protectionism while still in private practice.⁹⁸ Since then, US trade remedies have suffered even more of a beating in the WTO. This is not due to any actions initiated by the WTO or by WTO jurists. The WTO cannot bring WTO cases. The WTO is only the members of the WTO acting together as something they have chosen to call the WTO in a pooling of their national sovereignty. Only members of the WTO can bring cases. When they do, the WTO jurists are required to rule on all the legal issues on which they must rule “to secure a positive solution to a dispute.”⁹⁹ And the fact is that the United States often acts inconsistently with WTO rules in applying trade remedies. Thus, other WTO members have brought a series of cases against the United States, and, according to the calculation of Dan Ikenson of the Cato Institute, since 1995, and as of 2017, WTO jurists have found it necessary on 38 occasions to find aspects of US trade remedy measures inconsistent with WTO obligations.¹⁰⁰

The disregard for the WTO treaty obligations of the United States that is sometimes shown by US agencies when applying trade remedies guarantees that, when those actions are challenged in the WTO, the United States will lose. What is it that keeps the United States from simply complying with the WTO rules? In part, it is the tacit assumption by many in the US government that the United States is somehow not bound by the strictures of the rules that apply to everyone else. Other countries must, of course, comply. The United States need not. Dan Ikenson, an astute American trade observer, rightly sees this US sentiment as Orwellian, harking back to the barnyard animals in *Animal Farm*: “Agreeing that ‘all animals are equal,’ then adding the famous caveat, ‘but some are more equal than others’ is what is

96 WTO, *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, 1867 UNTS 493, art 2.2 (entered into force 1 January 1995), online: <www.wto.org/english/tratop_e/sps_e/spsagr_e.htm>.

97 Robert Farley, “Trump Wrong About WTO Record” (27 October 2017) *FactCheck* (blog).

98 Council on Foreign Relations, “Is the WTO Dispute Settlement System Fair?” (26 February 2007), online: <www.cfr.org/article/wto-dispute-settlement-system-fair>.

99 *DSU*, *supra* note 11, art 3.7.

100 Dan Ikenson, “US Trade Laws and the Sovereignty Canard”, *Forbes* (9 March 2017).

meant by ‘defending our national sovereignty.’”¹⁰¹ Seemingly, in the current view of the United States, all members of the WTO are equal, except for the United States, which is more equal than others. This is not the rule of law. This is the rule of power.

What, then, of Trump’s charge that the United States is “losing” in the WTO “because we have fewer judges than other countries”? This charge is an expression of either demagoguery or ignorance. Either the president knows the facts and is simply disregarding them for inflammatory political purposes or he is ignorant of the rules of the WTO dispute settlement system and how they work. Either way, the rule of law in world trade is jeopardized by the recklessness of such a charge, and, once again, the view of the current US president and his administration is revealed as merely a flexing of might as the would-be maker of right in world trade. In making this charge, President Trump seems to assume that all WTO jurists will always rule in favour of their own countries in WTO disputes. There is no evidence whatsoever in more than two decades of WTO dispute settlement to support this assumption — and plenty to refute it. There are numerous instances where members of the Appellate Body have found it necessary to rule against their own countries because their own countries had not fulfilled their WTO treaty obligations in a particular dispute.¹⁰²

The fact is that the number of judges of any one nationality is of absolutely no significance in WTO dispute settlement. WTO jurists — wherever they may happen to be from — serve the world trading system as a whole and not their own countries. The “independence” of jurists is mandatory under the dispute settlement rules.¹⁰³ The seven members of the Appellate Body, as already noted, “shall be unaffiliated with any government.”¹⁰⁴ The WTO Rules of Conduct reinforce these treaty requirements by insisting on both the independence and the impartiality of all WTO jurists.¹⁰⁵ Indeed, at the WTO panel level, nationality is in fact a bar to being a panellist, which means

that — unless the parties to a dispute agree otherwise (which rarely happens) — no one from any of the disputing parties or the third parties to a dispute will be eligible to serve on the panel.¹⁰⁶ Nationality is not a bar to judging a dispute on the WTO Appellate Body. If it were, Appellate Body members from the United States, the European Union, China and Japan — which, as the largest trading countries, are parties or third parties in most WTO disputes — would rarely be permitted to judge an appeal in a dispute. Furthermore, the fact is that every new member of the Appellate Body leaves the cloak of nationality behind when crossing the threshold of the Appellate Body. Any one of the seven members of the Appellate Body who ever so much as uttered even the slightest hint of national bias would lose all credibility with the rest of the Appellate Body forever.

Apparently, President Trump wants WTO judges who are partial, not impartial, and who are, especially if they are Americans, dependable parrots of the American point of view at any given time, and not independent in their judgments. This attitude is not original with Trump. It originated in the two previous American administrations as the United States was put more and more on the defensive during the depths of the Great Recession about its errant application of a series of largely politically motivated trade remedies in WTO dispute settlement. The blame for this departure from the traditional American view that respect for the independence of the judiciary is central and indispensable to the rule of law must be put in part on Presidents Bush and Obama.

This acknowledged, it is Trump who has intensified the US attack on the independence and impartiality of WTO jurists to the point where it threatens the future of the world trading system. First, under Bush and Obama, the United States sought, through its tactics of intimidation, to impose its will *on American judges* — based evidently on the premise that, because they were American, they should be shills in the judicial deliberations of the Appellate Body for every argument made by the United States in every dispute. Emboldened by the lack of pushback from other WTO members against these tactics, next, under Obama, the United States sought to impose its will *on Appellate Body members from other countries* by blocking or threatening to block their reappointments. Now, under Trump, the

101 *Ibid.*

102 While a member of the WTO Appellate Body, I found it necessary to do so on a number of occasions myself.

103 DSU, *supra* note 11, art 8.2.

104 *Ibid.*, art 17.3.

105 *Rules of Conduct*, *supra* note 58, arts II.1, III.2, IV.1.

106 DSU, *supra* note 11, art 8.3.

United States is paralyzing the WTO appointment and reappointment process altogether by refusing to cooperate in any kind of process to replenish the thinning ranks of Appellate Body members.

Not only the United States, but also all the members of the WTO, afford far too much emphasis to nationality in the process of selecting Appellate Body members. Certainly, the seven members of the Appellate Body must be “broadly representative of membership in the WTO.”¹⁰⁷ And it would be naïve for anyone — especially a former politician — to think that politics (diplomacy by its real name) never plays a role in the international selection of judges.¹⁰⁸ But the fact is that nationality is irrelevant to the actual work of the Appellate Body. Far more important in the selection process should be ensuring that those appointed to the Appellate Body are “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally” — no matter where they may happen to be from.¹⁰⁹ (To my mind, this means, for future appointments, that Appellate Body members must, at a minimum, be lawyers.) Has the United States, as Trump claims, had “fewer judges than other countries” on the Appellate Body? In fact, more Americans have served on the Appellate Body than citizens of any other country (primarily due to the dissatisfaction of the United States with some of the Americans who have served).

In a letter provoked by the intimidating tactics of the United States even before Trump became president, all of the 13 living former members of the Appellate Body at the time wrote to the DSB in May 2016:

There must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgments in the WTO’s rule-based system of adjudication. As our revered late colleague Julio Lacarte once said of any action that might call into question the impartiality and the independence of the Appellate Body, “This is a Rubicon that must not be crossed.” The unquestioned impartiality and independence of the Members of the Appellate Body has

been central to the success of the WTO dispute settlement system, which has in turn been central to the overall success of the WTO. Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the future of the entire WTO trading system at risk.¹¹⁰

In explaining US actions, Ambassador Lighthizer has said, “We think the Appellate Body has not limited itself...to precisely what’s in the agreement.”¹¹¹ In this statement, Trump’s trade ambassador has not expressed a novel view for the US government. A statement submitted by the Obama administration to the DSB in 2016 attempting to justify the administration’s opposition to the reappointment of Seung Wha Chang offers detailed criticisms of a number of appellate reports as supposedly exemplifying a pattern of overreaching in rendering legal judgments by the Appellate Body.¹¹² The United States did not mention in this statement any of the zeroing disputes it had lost. With respect to the several disputes it did mention, the United States emphasized that “the US position on this issue is not one based on the results of those appeals in terms of whether a measure was found to be consistent or not.”¹¹³ The United States acknowledged that, in WTO dispute settlement, “there can always be legitimate disagreement over the results.”¹¹⁴ Instead, the United States insisted in its statement to the DSB that its “concerns with the adjudicative approach” of the Appellate Body are “systemic

¹⁰⁷ *Ibid*, art 17.3.

¹⁰⁸ I am, I confess, a former member of the Congress of the United States.

¹⁰⁹ *DSU*, *supra* note 11, art 17.3.

¹¹⁰ Letter from 13 former Appellate Body members to Ambassador Xavier Carim, chairman of the DSB (31 May 2016) [May 31 Letter], online: <<http://worldtradelaw.typepad.com/files/abletter.pdf>>. I was one of the 13 former Appellate Body members who signed the letter.

¹¹¹ Interview of Ambassador Robert Lighthizer by John J Hamre, “U.S. Trade Policy Priorities” (18 September 2017) at the Center for Strategic and International Studies, online: <<https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative>>.

¹¹² Statement by the United States to the DSB (22 May 2016) [May 22 US Statement]. The four appellate reports referenced by the United States were *Argentina—Financial Services* (2016), WTO Doc WT/DS453/AB/R (Appellate Body Report); *India—Agricultural Products* (2015), WTO Doc WT/DS430/AB/R (Appellate Body Report); *European Communities and Certain Member States—Large Civil Aircraft* (2014), WTO Doc WT/DS347/AB/R (Appellate Body Report); and *United States—Countervailing and Anti-Dumping Measures (China)* (2014), WTO Doc WT/DS449/AB/R (Appellate Body Report).

¹¹³ May 22 US Statement, *supra* note 112.

¹¹⁴ *Ibid*.

concerns.”¹¹⁵ Professedly for these reasons, the United States opposed the reappointment of Chang, explaining that “we do not think his service reflects the role assigned to the Appellate Body by WTO Members in the WTO agreements.”¹¹⁶

Although only the three members of the Appellate Body sitting as a division “serve on any one case” and sign the Appellate Body report in that case, all seven of the members of the Appellate Body engage in an exchange of views in every case.¹¹⁷ The purpose of the exchange of views in an appeal is to reach a broad consensus among the seven on the legal issues appealed that will inform the decision of the three on the division while ensuring — in the words of the DSU — “security and predictability” for the WTO trading system.¹¹⁸ The aim of the exchange, for example, is to avoid having a basic trade principle such as “national treatment” be interpreted in one way by a division in one case and in another way by a division in another case.¹¹⁹ Furthermore, any separate opinions expressed in an Appellate Body report by individuals “shall be anonymous.”¹²⁰ With the Appellate Body speaking almost always by consensus, with all seven of the Appellate Body members working in some fashion on every appeal and with any dissents required to be anonymous, how confidently can the individual views of any one member of the Appellate Body be discerned and somehow distinguished from those of the other six?

With respect to the Chang reappointment in 2016, the United States said, “We have reviewed carefully his service on the divisions for the various appeals and conducted significant research and deliberation. Based on this careful review, we have concluded that his performance does not reflect the role assigned to the Appellate Body by Members of the DSU.”¹²¹ So far as this US assessment of Chang’s performance was based on the recommendations and rulings he signed, and given how the Appellate Body is structured and works, this statement could as easily have

been made by the United States about any of the members then serving on the Appellate Body. In their letter to the DSB, the Appellate Body members serving at the time noted this and added, “We are concerned about the tying of an Appellate Body Member’s reappointment to interpretations in specific cases. The dispute settlement system depends upon WTO members trusting the independence and impartiality of Appellate Body Members. Linking the reappointment of a Member to specific cases could affect that trust.”¹²²

In other words, intimidation could possibly lead to accommodation and capitulation in rendering appellate judgments. Moreover, even the appearance of bowing to the will of the United States in an appeal could undermine the continuing credibility of the entire dispute settlement process and thus of the whole WTO. Given all that has already happened, going forward from here, when the Appellate Body rules in favour of the United States — as it often does — will it do so because the United States is correct on the legal merits or, instead, because some members of the Appellate Body desire the support of the United States for reappointment? Inevitably, this question will be asked. Due to the pressure tactics of the United States, some extent of institutional damage has already been done.

The 13 former Appellate Body members made much the same point, but more bluntly: “A decision on the reappointment of a Member of the Appellate Body should not be made on the basis of the decisions in which that Member participated as a part of the divisions in particular appeals, lest the impartiality, the independence, and the integrity of that one Member, and, by implication, of the entire Appellate Body, be called into question. Nor should either appointment or reappointment to the Appellate Body be determined on the basis of doctrinal preference, lest the Appellate Body become a creature of political favor, and be reduced to a mere political instrument.”¹²³ South Korea was even more straightforward in its statement to the DSB: “This opposition is, to put it bluntly, an attempt to use reappointment as a tool to rein in Appellate Body Members for decisions they may make on the bench. Its message is loud and clear: ‘If AB Members make

115 *Ibid.*

116 *Ibid.*

117 DSU, *supra* note 11, art 17.1; *Working Procedures*, *supra* note 68, Rule 4.

118 DSU, *supra* note 11, art 3.2.

119 *Ibid.*

120 DSU, *supra* note 11, art 17.11.

121 May 22 US Statement, *supra* note 112.

122 Quoted in Lawson, “WTO Members Clash”, *supra* note 67.

123 May 31 Letter, *supra* note 110.

decisions that do not conform to U.S. perspectives, they are not going to be reappointed.”¹²⁴

In its statement to the DSB about the Chang reappointment, the United States said as well, “We are concerned about the manner in which this member has served at oral hearings, including that the questions posed spent a considerable amount of time considering issues not on appeal or not focused on the resolution of the matter between the parties.”¹²⁵ If loquaciousness were a cardinal sin in judges, we would have many fewer judges. Often, too, it may be necessary to ask questions that do not seem to be to the legal point to litigators but are nevertheless very helpful to judges in doing their job. Ninety percent of judging an appeal in a WTO dispute is deciding what judgments *not* to make so as not to pre-judge future disputes. Sometimes, this may lead to questions in an appellate oral hearing that may not seem legally relevant to those of whom the questions are asked. There is also this: the United States assumed that the questions asked by Chang were his own questions reflecting his own views of the legal issues in the dispute on appeal. This is an assumption. Who can say with any assurance that Chang was asking his own question and not asking a question of another Appellate Body member? And since when has the Socratic method of questioning that should be familiar to all legal advocates everywhere been a method that necessarily reveals the personal views of the one doing the questioning?

In its 2016 statement, the United States stressed that it was not contesting the outcomes of any disputes. Should the United States or any other WTO member ever want to contest a legal outcome, the 13 former Appellate Body members have pointed in their letter to the DSB to an alternative course provided in the WTO Agreement:

Should WTO Members ever conclude that the Appellate Body has erred when clarifying a WTO obligation in WTO dispute settlement, the Marrakesh Agreement establishing the World Trade Organization spells out the appropriate remedial act. Article IX:2 of the Marrakesh Agreement, on “Decision-Making,” provides, “The Ministerial Conference and the General Council shall

have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements” by a “three-fourths majority of the Members.” Any such legal interpretation would, of course, be binding in WTO dispute settlement. We observe that, to date, the Members of the WTO have not seen the need to take any such action.¹²⁶

Of course, as these 13 jurists know, the path to approval of such an authoritative legal interpretation is far from an easy one. This is undoubtedly one reason why this path has yet to be taken. Nevertheless, this is an appropriate avenue set out by the members of the WTO in the WTO treaty.

Whatever the merits of the concerns professed by the United States about the performance of the Appellate Body, engaging in tactics that threaten to shut down the whole WTO dispute settlement system is not the appropriate way to address these concerns. Instead of assaulting the continued rule of law, the United States should work within the rule of law. To be sure, before Trump became president, the United States tried and failed to forge a consensus on proposals to change the DSU to address its concerns. That failed, an effort should now be made to resolve the US concerns — where they are legitimate — within the DSB through improvements that do not require changing the DSU. Ideally, this should be done after consultations with the Appellate Body. If legitimate US concerns cannot be resolved in this way, and, if other WTO members agree, then the concerns should be resolved by revising the dispute settlement rules to provide added clarity to the instructions given to the Appellate Body for rendering appellate judgments. If the United States cannot find support for its positions among other WTO members — if other WTO members do not share the US view that the Appellate Body has been increasingly overreaching the bounds of its proper jurisdiction and engaging in inappropriate gap-filling — then that speaks for itself as to the merits of the US concerns.

It is inappropriate for the United States to use its professed dispute settlement concerns as an excuse to slow the WTO dispute settlement system toward a halt. It is even more inappropriate to do

124 Lawson, “WTO Members Clash”, *supra* note 67.

125 May 22 US Statement, *supra* note 112.

126 May 31 Letter, *supra* note 110.

so if the underlying goal is to intimidate Appellate Body members into allowing the United States, in effect, to be the judge of its own cases. That would be the very opposite of the rule of law.

Options for Ending the Appointments Impasse for the Near Term

In every way they can find, the strong in power in the United States are doing what they can in the WTO to assert their ascendancy. Must the weak suffer what they must? As the campaign of US intimidation has intensified, increasingly, some of the most influential voices in world trade have protested. Pascal Lamy, a former director-general of the WTO and also a former European trade minister, has said that, of all Trump's scattered flurry of trade initiatives, the real risk is the destabilization of the WTO dispute settlement system. In Lamy's judgment, "This is the only manifestation so far of a clear danger for the (global trading) system."¹²⁷ Speaking of WTO dispute settlement, the current director-general of the WTO, Roberto Azevêdo, has cautioned, "If we compromise this pillar (of the trading system), we will be compromising the system as a whole. There is no doubt about that."¹²⁸

Yet, so far, the increasingly firm opposition of what appears to be, at the least, almost all other WTO members to the pressure tactics of the United States has yielded no result in ending the WTO impasse over Appellate Body appointments. While some have suggested that there may be room for compromise if other WTO members agree to address what the United States has described as its systemic concerns,¹²⁹ other WTO members seem disinclined to negotiate on these concerns with the United States unless and until it removes its roadblock to the continued working of the WTO dispute settlement system. The media, when not

ignoring the impasse, is mostly portraying it as an arcane political sideshow to Trump's more bombastic threats and actions on trade when, in truth, it should be centre stage. When journalists do report on the impasse, they treat it mainly as a political tug of war between the United States and its trading partners without addressing the critical fundamental issue at stake. What is more, back in the United States, not one single member of either party in the House of Representatives or in the Senate has denounced this assault by their country on the rule of law in world trade.

For the near term, a number of respected WTO scholars and experienced WTO lawyers who are concerned about the future of the WTO dispute settlement system and of the WTO trading system have suggested various creative means, largely within the existing rules of the WTO trading system, that the 163 other WTO members might employ to circumvent and thereby to overcome the continued adamant opposition of the United States to appointments and reappointments of Appellate Body members. One proposal, by Steve Charnovitz, a leading thinker on the knottier questions of international trade law, is that "the Appellate Body amend Rule 20 of the (appellate) Working Procedures to state that in the event of *three or more expired terms* in the Appellate Body membership, the Appellate Body will be unable to accept any new appeals."¹³⁰ WTO rules give the Appellate Body sole control of its working procedures.¹³¹ Appellate "[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information."¹³² There is, however, no requirement that the Appellate Body consult with the DSB as a whole or that the DSB as a whole approve the appellate working procedures. Therefore, the United States does not have a veto over the working procedures.

Charnovitz contends,

Although the Appellate Body does not have the right to formally take away the right to appeal, it does have the right to

¹²⁷ Tom Miles, "WTO Is Most Worrying Target of Trump's Trade Talk: Lamy", *Reuters* (14 November 2017).

¹²⁸ Donnan, *supra* note 68.

¹²⁹ Robert McDougall, "Standoff on WTO tribunal is more about the scope of intergovernmental adjudication than Trump unilateralism" (12 January 2018) International Centre for Trade and Sustainable Development.

¹³⁰ Steve Charnovitz, "How to Save WTO Dispute Settlement from the Trump Administration" (3 November 2017) *International Economic Law and Policy* (blog) [emphasis in original].

¹³¹ DSU, *supra* note 11, art 17.9.

¹³² *Ibid.*

declare in advance that under extreme circumstances, the “completion of the appeal” will occur automatically on the same day that any new appeal is lodged. In other words, by removing itself from the dispute process for new cases, a disabled Appellate Body will step aside so that the panel decision can automatically be adopted by the WTO Dispute Settlement Body on a timely basis. For a depleted Appellate Body bench to continue processing new cases would necessarily cause huge delays, thus frustrating the Uruguay Round goals of a prompt dispute system.¹³³

The United States may well be perfectly content, of course, for this to happen when the United States prevails before a panel. But the United States will not prevail before every panel. Like any other WTO member, it will want to preserve its right of appeal. Moreover, while on some of the most contentious current legal issues, the United States has been satisfied with simply a panel result, on others, it may prefer to have a result that has been vetted by the Appellate Body. Recall that every WTO case is really two cases, the immediate dispute and the legal principles involved, and the fact — decidedly contrary to the Trump telling — that the United States wins the vast majority of the cases it takes to the WTO. As Charnovitz puts it, “By limiting the potential damage to WTO dispute settlement in this way, the Appellate Body could, in effect, call the Trump Administration’s bluff.”¹³⁴ Does the United States want to continue to be able to use the appellate process in WTO dispute settlement, or does it want to shut it down?

A second proposal, by Peter Jan Kuijper, a former principal legal adviser to the WTO, is that, to circumvent the US intransigence, the other members of the WTO resort to majority voting. He maintains that “recourse to majority voting is perfectly legal, once it is clear that consensus cannot be reached.”¹³⁵ Just so, article IX:1 of the WTO Agreement provides that “where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting,” and that

“[d]ecisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreements.”¹³⁶ This option has rarely been used by the members of the WTO. They prefer always, if they can, to operate by the general rule of consensus. Yet, Kuijper advises, “This is no small matter, it is a true emergency. Times of emergency justify emergency measures, also in the law of international organizations.”¹³⁷ He contends, “Direct appointment of AB members by the General Council applying majority vote, under the strict limitation that this is an exceptional one-off measure connected to the threat of malfunctioning of the Appellate Body, and accompanied by explicit openness to further discussions with the United States, seems to be the best possible option for action inside the WTO. Ideally, merely the threat of majority voting may create leverage to arrive at consensus.”¹³⁸

Kuijper also offers an alternative to majority voting, saying that “if WTO Members are so strongly opposed to majority voting as to shy away from action inside the WTO, they will have to seek a solution outside the WTO.”¹³⁹ For guidance, he points us to the customary rule of international law on fundamental change of circumstances, reflected in article 62 of the Vienna Convention on the Law of Treaties.¹⁴⁰ Article 62 provides that a fundamental change of circumstances that has occurred with regard to those existing at the time of the conclusion of a treaty, and that was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from a treaty or suspending the operation of a treaty unless: the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; the effect of the change is radically to transform the extent of obligations still to be performed under the treaty; the treaty does not establish a boundary; and the fundamental change is not the result of a breach by the party invoking it either of an obligation under

133 Charnovitz, *supra* note 130.

134 *Ibid.*

135 Peter Jan Kuijper, “Guest Post from Peter Jan Kuijper on the US Attack on the Appellate Body” (15 November 2017) *International Economic Law and Policy Blog* (blog).

136 WTO Agreement, *supra* note 63, art IX:1.

137 Kuijper, *supra* note 135.

138 *Ibid.*

139 *Ibid.*

140 Vienna Convention, *supra* note 54, art 62.

the treaty or of any other international obligation owed to any other party under the treaty.¹⁴¹

On the basis of a change in circumstances, Kuijper argues that all the members of the WTO *except the United States* could negotiate and conclude *outside the WTO* a new treaty that would essentially duplicate the appellate provisions of the DSU or even the entirety of the DSU. “Then [t]he sitting members of the Appellate Body would resign and be taken over as members of the Appellate Tribunal of the new treaty, to be joined by new selected members. On a voluntary basis, the Members of the Appellate Body Secretariat could leave the WTO as well and join the new Appellate Tribunal.”¹⁴² He adds, in another innovation, that “this new Tribunal could be opened up as an Appeals Tribunal from decisions of the dispute settlement mechanisms of regional FTA agreements.”¹⁴³ The costs would be defrayed by member contributions which, he predicts, would be offset by declines in contributions to the WTO budget due to the WTO no longer having to pay for the Appellate Body or perhaps even for dispute settlement.¹⁴⁴ In sum, the WTO dispute settlement system could be recreated outside the legal framework of the WTO — while excluding the United States.

A third proposal — by Scott Andersen, Todd Friedbacher, Christian Lau, Nicolas Lockhart, Jan Yves Remy and Iain Sandford — resembles Kuijper’s proposal for a new dispute settlement treaty based on changed circumstances outside the WTO, but it has the practical virtue of, in effect, creating an identical parallel dispute settlement system *within the WTO*. These private practitioners of WTO law — who have also previously worked for governments and for the WTO itself — are steeped in knowledge of how the WTO dispute settlement system works. Confronted by this impasse, they point to article 25 of the DSU, a hitherto largely neglected legal provision that relates to arbitration.¹⁴⁵ Article 25.1 of the DSU expresses the agreed treaty view of the members of the WTO that “[e]xpedient arbitration with the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined

by both parties.”¹⁴⁶ Article 25.2 provides, “Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed.”¹⁴⁷ Other members may become parties to the arbitration with the agreement of the parties that have decided to arbitrate.¹⁴⁸ Arbitration awards shall be binding and notified to the DSB.¹⁴⁹ Furthermore, the usual DSU rules relating to the implementation of recommendations and rulings under article 21 of the DSU and to compensation and the suspension of concessions under article 22 of the DSU will apply.¹⁵⁰

As Andersen and his colleagues see it, “Article 25 is drafted in terms that are sufficiently flexible to allow a process that replicates closely the essential features of the appellate process under Article 17 of the DSU.”¹⁵¹ Article 25 does not define arbitration. Therefore, arbitration can be defined as WTO members may choose to define it consistently with the provisions of article 25, which say nothing about not duplicating the usual WTO dispute settlement procedures, including the procedures for appeals. The arbitration under article 25 thus need not follow the familiar parameters of private arbitrations around the world, but can mirror the more truly adjudicatory dimensions of WTO dispute settlement. What is more, under article 25 (which, ironically, was first proposed by the United States during the Uruguay Round¹⁵²), “[a]rbitration...does not depend on any action by the DSB...and the binding character of an arbitration award does not depend on adoption or approval by the DSB. Instead, an award must simply be notified to the DSB and the relevant WTO Councils and Committees.”¹⁵³ Thus, the United States could not block an arbitral award by refusing to join in a consensus to approve it. Much like Kuijper, Andersen and

141 *Ibid.*

142 Kuijper, *supra* note 135.

143 *Ibid.*

144 *Ibid.*

145 DSU, *supra* note 11, art 25.

146 *Ibid.*, art 25.1.

147 *Ibid.*, art 25.2.

148 *Ibid.*, art 25.3.

149 *Ibid.*

150 *Ibid.*, arts 21, 22.

151 Scott Andersen et al, “Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals” (2017) Center for Trade and Economic Integration Working Papers CTEI-2017-17 at 1.

152 GATT, *Improved Dispute Settlement: Elements for Consideration: Discussion Paper Prepared by United States Delegation*, GATT Doc No MTN.GNG/NG13/W/6 (25 June 1987) at 2.

153 Andersen et al, *supra* note 151 at 2.

his colleagues envisage that the arbitrators could be “selected randomly from an agreed roster of individuals comprising current and previous Appellate Body members, with membership of the roster being broadly representative of WTO membership.”¹⁵⁴ In their proposal, Andersen and his colleagues spell out in some detail how this alternative process of what they call “appeal-arbitration” would work in practice.¹⁵⁵

There are legal quibbles aplenty, mainly about the first two of these proposals. The provisions of the WTO treaty are rarely without legal nuance, and there are legal nuances yet to be resolved. With the first proposal, the United States would likely argue that the singular authority of the Appellate Body to adopt its working procedures does not extend to, in effect, denying the legal right of appeal mandated by the DSU, even if the Appellate Body is unable to hear the appeal. With the second proposal, the United States would likely insist that the provisions of the DSU requiring a consensus trump (if you will) the provisions in article IX:1 of the WTO Agreement allowing for majority voting. As Charnovitz, Kuijper and others have set out at some length, counter-arguments can be made to both of these potential US arguments.¹⁵⁶ With the third proposal, arbitration, it is more difficult to discern an argument on which the United States could base an objection. Where in article 25 does it say that any one WTO member can object to any other WTO members having recourse to arbitration? And where does it forbid WTO members having recourse to arbitration to duplicate the existing WTO appellate procedures and employ whomever they choose as arbitrators? For these reasons, the third proposal may be the best way to proceed with the ongoing work of WTO dispute settlement within the existing WTO rules for the near term.

¹⁵⁴ *Ibid* at 5.

¹⁵⁵ *Ibid* at 4–8.

¹⁵⁶ See the illuminating exchange of views among scholars and practitioners on the *International Economic Law and Policy Blog*.

Reinforcing the Rule of Law in WTO Dispute Settlement for the Long Term

For the long term, more must be done. For the long term, the existing rules must be improved. The sturdiest frames in the enabling framework of WTO dispute settlement have been those raised by the rulings of the WTO Appellate Body. The Appellate Body has a unique and unprecedented authority for an international legal tribunal. Yet, after the still short span of slightly more than two decades, its authority remains fragile, and it remains dependent on the continued willingness of all WTO members to comply with the rule of law and otherwise to uphold the rule of law. The continued success of the WTO requires that the Appellate Body continue to be true to its treaty mandate so that it will continue to have the strong support of the members of the WTO against those both within the WTO and without who would undermine its necessary judicial authority. Moreover, through further WTO rule making, the WTO must be strengthened to the task of continuing to serve its members while meeting the new challenges facing the world trading system in the twenty-first century.

The members of the WTO should make the standing WTO Appellate Body a full-time instead of a nominally part-time tribunal. Serving on the Appellate Body has never really been a part-time job. It is certainly not one now. The rules must be changed to acknowledge this. As full-time jurists, given the nature of their work, Appellate Body members need not necessarily be resident full-time in Geneva. As it is now, they will need to be in Geneva only for hearings and deliberations. (A legal brief and a panel record and report can be read anywhere.) Moreover, as members of the highest court of world trade, the members of the Appellate Body should be given pay and benefits appropriate to their high standard of service on an international tribunal dealing with trillions of dollars in trade disputes. Currently, they make in a day with the WTO what they could make as international arbitrators in an hour. In addition, Appellate Body members and WTO panellists alike should be given the full extent of the financial, personnel and other resources they need to get the job done. In its first year, 1996, the Appellate Body was given a budget for its legal library for the entire year of

just 50 Swiss francs.¹⁵⁷ Things have changed since then but, all considered, not all that much. The WTO is hardly the biggest financial drain among international institutions on the limited treasuries of WTO members. The time when the members of the WTO could afford to run a worldwide international dispute settlement system on the cheap has long since passed. In the end, as with so much else, with the international rule of law, in the long term, we are likely to get what we pay for.

“What remains essential,” the 13 former members of the Appellate Body wrote in 2016 to the DSB, is “the unflinching independence of the Members of the Appellate Body in fulfilling their pledge to render impartially what they see as the right judgments in each dispute by upholding the trade rules on which all WTO Members have agreed.”¹⁵⁸ Will precedes law. Law builds institutions. Will, then, must sustain both law and institutions. An indispensable part of the expression of such will is the ongoing exercise of restraint. Mutual self-restraint is the underpinning of the framework of law and of the institutions that make law and aim to uphold law through the rule of law. The ultimate test of the show of such self-restraint in a system dedicated to the resolution of international disputes is when a dispute is *lost*. A legal loss in any one dispute, or even in a series of disputes, should not lead a country to undermine the upholding of the rule of law that is the transcendent purpose of an international dispute settlement system, and that is in the long-term interest of every country. Real respect for the rule of law is shown by what you do not when you win, but when you lose.

It can be hoped that those entrusted, for now, with leading the American people will remember in time why the United States has long supported a rules-based world trading system and the rule of law in world trade. Perhaps this is too much to expect from Trump and those who pay obeisance to him. Yet America is bigger and better than those who may happen to govern it at any given time. In time, America will rediscover the better angels of its nature. When it does, it would be best for the WTO simply to remove the continuing temptation for the United States — or for any other WTO member — to engage in the tactics of intimidation to which the United States has descended lately. The possibility of reappointment

for Appellate Body members should be eliminated. This one change in the dispute settlement rules would end this form of intimidation and would reinforce the essential independence and impartiality of the Appellate Body.

Two options for implementing this change in the current WTO rules seem most attractive. There could continue to be seven members of the Appellate Body, but with each appointed for a single seven-year term and with one of the seven rotating off the tribunal each year. Or, as an alternative, the size of the Appellate Body could be increased to nine members, with each one appointed for a single nine-year term and with one of the nine departing each year. The first option, by preserving the current number of seven judges, would do more to ensure the continued collegiality of the Appellate Body in working toward a desired consensus in each dispute. The second option, by adding two more judges, would do more to make the Appellate Body representative of the membership of the WTO, given that there are many more members of the WTO now than when it was established in 1995. Provisions could be made in the transition to retain the current members of the Appellate Body on new and revised terms.

With either of these two options for improving the existing WTO dispute settlement rules, the original design flaw permitting the possibility of the reappointment of a member of the Appellate Body would be eliminated. No longer could the United States or any other errant WTO member risk undermining the rule of law in world trade over Appellate Body appointments and reappointments because it had been lured by low political motives into forgetting the enduring lesson of *Melos* — that might must never be allowed to make right. No longer could might threaten to unmake right as it is doing now so sadly in WTO dispute settlement.

¹⁵⁷ Alas, this is a personal recollection.

¹⁵⁸ May 31 Letter, *supra* note 110.

THE UNITED KINGDOM'S JUNE 2016 BREXIT VOTE

sent shockwaves throughout the European Union and the world.



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Oonagh E. Fitzgerald and Eva Lein, Editors

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