U.S. TRADE INFALLIBILITY AND THE CRISIS OF THE WORLD TRADE ORGANIZATION

Daniel C.K. Chow[*]

2020 MICH. ST. L. REV. 599

ABSTRACT

On December 10, 2019, the World Trade Organization (WTO) lurched into a crisis when its Appellate Body became paralyzed due to actions of the Trump Administration. Obligations under the WTO agreements are now effectively unenforceable, threatening the collapse of the WTO itself. There is no viable path forward for the WTO to restore the Appellate Body to its full powers without the agreement of the United States.

A study of current U.S. trade policy, however, indicates that such an agreement is likely not forthcoming or that U.S. demands to end the crisis will be too high a price to pay. The Trump Administration has adopted a doctrine of U.S. trade infallibility, which holds that in any trade dispute in or outside of the WTO, the United States is always right and should always win. The United States will ignore and heap scorn on any WTO decisions that it loses and will recognize and lavish praise on those that it wins. The United States claims the right to enforce U.S. trade remedies against any nation without regard to WTO law or international law. The United States prefers bilateral negotiations to the multilateral negotiations supported by the WTO.

The doctrine of U.S. trade infallibility is an extreme form of nationalism, which is fundamentally incompatible with the multilateralism of the WTO. The crisis in the WTO might mark the end of the high tide of multilateralism as a global norm. Instead, a dangerous new era of vicious nationalism may be emerging in which nations pursue their own interests at the expense of others and create the conditions for global conflict. Only a new round of multilateral negotiations among all WTO members focused on the dispute settlement system can save the Appellate Body and the WTO itself.

---

* B.A., J.D., Yale University. Bazler Chair in Business Law, the Ohio State University Moritz College of Law. The author is grateful to Tom Schoenbaum for helpful comments and to Moritz Law Librarian Natasha Landon for her assistance.

TABLE OF CONTENTS

INTRODUCTION

On December 10, 2019, the World Trade Organization (WTO) lurched into a crisis, precipitated by the United States, from which it may never fully recover.[1] The specific event triggering the crisis was the reduction in the number of members of the Appellate Body of the

1. *See* Ken Roberts, *World Trade's Demise Scheduled for Dec. 10*, FORBES (Nov. 27, 2019, 5:00 AM), https://www.forbes.com/sites/kenroberts/2019/11/27/world-trades-demise-scheduled-for-dec-10/#2f9a62fc2412 [https://perma.cc/BNX7-PQCD]; Adam Behsudi & Finbarr Bermingham, *The End of World Trade as We Know It*, POLITICO (Nov. 20, 2019, 5:21 PM), https://www.politico.com/news/2019/11/20/world-trade-end-donald-trump-072257 [https://perma.cc/2ZPB-N9W3].

WTO from three members to one.[2] This reduction was due to a decision of the United States to block the appointment of new members to replace retiring Appellate Body members.[3] As a quorum of the Appellate Body requires a minimum of three members, the Appellate Body is now unable to convene to hear appeals from WTO panels.[4] The Appellate Body is now paralyzed, and the WTO dispute settlement system is no longer fully functioning.[5]

The most significant consequence of this problem is that the WTO agreements—the bedrock of the multilateral trading system for more than two decades—are no longer enforceable.[6] Any WTO member who breaches its obligations now has the power to completely block efforts by the WTO dispute settlement body to enforce those obligations against that member.[7] The WTO and international trade has now descended into a new era of uncertainty, chaos, and potential anarchy that could result in the complete collapse of the WTO itself.[8] This grievous wound to the WTO that the United States inflicted could result in the reemergence of a tide of vicious nationalism and protectionism as the norm in international trade, with all of its historical risks and dangers.[9]

---

2. *See Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [https://perma.cc/T2YU-CJJ8] (last visited Sept. 13, 2020) (describing each appellate judge's term of office).

3. On May 12, 2016, the Obama Administration made the initial decision to block the reappointment of South Korean national Seung Wha Chang to the Appellate Body, reducing the number of remaining appellate judges to three. *See* Manfred Elsig et al., *The U.S. Is Causing a Major Controversy in the World Trade Organization. Here's What's Happening.*, WASH. POST (June 6, 2016, 7:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/ [https://perma.cc/QYF4-ZBE2]. The Trump Administration continued this blockade. *See* Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS (Aug. 27, 2018, 8:54 AM), https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O [https://perma.cc/FX26-SMMX]

4. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 412 [hereinafter DSU].

5. *See infra* Section I.B.

6. *See id.*

7. *See id.*

8. *See infra* Parts II, III.

9. *See infra* Part III. Historically, nationalism and protectionism reached a peak in the 1930s. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 18 (3d ed. 2017) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW]. During this period,

This Article analyzes and explains these developments and their consequences by examining the background of the United States' opposition to the WTO that led to the paralysis of the WTO dispute settlement body.[10] Soon after the inception of the WTO, the United States became dissatisfied with its dispute settlement system.[11] U.S. dissatisfaction and frustration continued to mount through the Obama Administration and took on a new level of intensity with the ascension of Donald J. Trump to the U.S. presidency.[12] Seeking to revise existing U.S. trade agreements, President Trump adopted the aggressive doctrine of U.S. trade infallibility.[13] U.S. criticism of the WTO has now culminated in precipitating the current crisis.[14] This Article then turns to an examination of the future prospects for the WTO in the face of an intransigent and defiant United States and proposes a viable path forward.[15] In setting forth this analysis, this Article will underscore three major points.

First, the Trump Administration has adopted a doctrine of U.S. trade infallibility, a form of extreme nationalism, which holds that in all trade disputes in or outside of the WTO, the United States is always right and should always win.[16] The elements of this doctrine are found in statements by President Trump and in official documents issued by the United States Trade Representative, the highest U.S. official on international trade.[17] Under this approach, the United States will ignore and heap scorn on any WTO decision that it loses and will accept and lavish praise on those decisions that it wins.[18] The United States will strictly enforce its own U.S. trade law remedies against other nations without regard to or interference from the WTO.[19] The

---

nations erected barriers to trade for the purpose of preventing trade. *See id.* Nations viewed each other with suspicion and mistrust. *See id.* This volatile political climate was one of the triggers of the Second World War. *See id.*

10. *See infra* Section I.B.
11. *See infra* Subsection II.B.1.
12. *See infra* Part II. During his February 4, 2020 State of the Union address, President Trump stated that concern with U.S. foreign trade was one of the primary reasons why he sought the presidency in 2016. *See Full Transcript: Trump's 2020 State of the Union Address*, N.Y. TIMES (Feb. 5, 2020), https://www.nytimes.com/2020/02/05/us/politics/state-of-union-transcript.html [https://perma.cc/FU2Y-D6N4].
13. *See infra* Subsection II.A.4.
14. *See infra* Section I.B.
15. *See infra* Section I.C.
16. *See infra* Subsection II.A.4.
17. *See infra* Part II.
18. *See infra* Section II.A.
19. *See id.*

United States will eschew multilateral trade negotiations in favor of bilateral trade agreements.[20] Although the Trump Administration is trumpeting its adoption of its new approach, there appears to be bipartisan support for a new tough approach to trade.[21]

Second, U.S. dissatisfaction with the WTO dispute settlement system began soon after the establishment of the WTO, as the United States—to its surprise—began to lose important cases that required repeal or revision of U.S. statutes.[22] The United States believed that these results were not part of the bargain when it agreed to join the WTO and support the WTO dispute settlement system.[23] The United States believes that the WTO panels and Appellate Body were exceeding their authority in many of these cases by creating new rights not found in any of the WTO agreements.[24] The United States argued that this "judicial activism" on the part of the WTO was an illegitimate aggrandizement of power and an invasion of U.S. sovereignty.[25]

Third, the current crisis in the WTO cripples the dispute settlement system and threatens the existence of the WTO itself.[26] The WTO represents the high tide of multilateralism that replaced the draconian policies of nationalism and protectionism that many nations adopted during the chaotic years preceding the Second World War.[27] During this era, nations imposed prohibitive tariffs to prevent trade and viewed each other with suspicion and hostility, contributing to a

20. *See id.*
21. *See id.*
22. *See infra* Subsection II.B.1.
23. *See id.*
24. *See id.*
25. *See id.*
26. *See infra* Section I.B.
27. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 18. The Smoot–Hawley Tariff Act of 1930 adopted during this era reflects the draconian nature of U.S. policies. *See* Ch. 497, § 337, 46 Stat. 703–04 (1930) (codified at 19 U.S.C. § 1337 (1976)). Some tariff rates were as high as 59.1%. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COM., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, pt. 2, at 888 tbl. U 207-212, https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p2-chU.pdf [https://perma.cc/7DY2-GQQL]. The Smoot–Hawley rates are still part of the Harmonized Tariff Schedule of the United States and are known as the statutory rates that applied to countries that are not members of the WTO or with which the United States does not have a trade agreement conferring WTO tariff rates. The statutory rates now apply only to certain pariah countries, such as Cuba or North Korea, with which the United States has unfriendly relations—although other legislation bans most trade with these countries. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 138–39 (3d ed. 2015).

catastrophic war.[28] As explained below, there is no path forward in the WTO that can restore the Appellate Body to its full powers without the agreement of the United States. Such agreement is unlikely to be forthcoming, or U.S. demands will be so extravagant that other WTO members will balk.[29] The current crisis then can become a prolonged impasse in which the WTO becomes permanently diminished.[30] The multilateralism promoted by the WTO may be surpassed by a rising nationalism as espoused by the United States, and the world may return to the era of vicious nationalism and protectionism that marked the precarious early decades of the twentieth century.[31]

This Article proceeds in four parts. Part I discusses the WTO dispute settlement system and the dispute that led the United States to paralyze the Appellate Body.[32] This Part then explains why there is no viable path to restoring the Appellate Body to its full powers without the agreement of the United States.[33] Part II then examines the tenets of U.S. trade policy that support U.S. trade infallibility and the specific criticisms by the United States of the WTO dispute settlement system.[34] Part III then explains why U.S. agreement to resuscitate the Appellate Body is likely not forthcoming, leading to an impasse in which the WTO will be permanently diminished.[35] This Article concludes with a discussion of the possible demise of multinationalism and the emergence of extreme nationalism as the norm in international trade.[36] It explains that only a new multilateral negotiation involving all WTO members can save the Appellate Body and the WTO.[37]

I. THE WTO DISPUTE SETTLEMENT SYSTEM

A. The System Established by the Dispute Settlement Understanding

The WTO has two major functions: it serves as a forum for negotiations among its 164 members and as a system of dispute

28. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 18.
29. *See infra* Part III.
30. *See id.*
31. *See infra* CONCLUSION.
32. *See infra* Part I.
33. *See infra* Section I.C.
34. *See infra* Part II.
35. *See infra* Part III.
36. *See infra* CONCLUSION.
37. *See id.*

settlement.[38] Although both functions are now at risk, it is the WTO's role as a dispute resolution forum that the intransigence of the United States has disrupted the most.[39] The WTO represents a major advance over the dispute settlement mechanism of its predecessor organization, the General Agreement on Tariffs and Trade (GATT). Under the GATT, contracting parties were able to form panels to resolve trade disputes.[40] Each party, however, had the power to block the formation of a panel or to block the adoption of a panel report.[41] The WTO created a dispute settlement system that was mandatory and binding in nature, which prevented a recalcitrant member from unilaterally blocking the dispute settlement process.[42] This dispute settlement system was hailed as a major achievement of the Uruguay Round leading to the creation of the WTO in 1995.[43]

The WTO dispute settlement system, set forth in the Dispute Settlement Understanding (DSU), consists of three entities: (1) panels that hear the initial dispute, which function like a trial court of international trade; (2) an Appellate Body, which hears appeals from the panels; and (3) a Dispute Settlement Body (DSB), which adopts panel or Appellate Body reports.[44] The entire membership also acts as

38. Article III.2 of the Marrakesh Agreement Establishing the World Trade Organization states "[t]he WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its members concerning their multilateral trade relations." Marrakesh Agreement Establishing the World Trade Organization, Functions of the WTO, art. III.2, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]. WTO members have permanent offices at the WTO headquarters in Geneva and are constantly in the process of discussing trade issues. The GATT/WTO has engaged in eight major "rounds" of comprehensive negotiations on the reduction of tariffs and other trade barriers. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 50; *see also* WTO Agreement, *supra* note 38 at art. III.3 ("The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes . . . .").

39. *See infra* Section I.B.

40. *See Dispute Settlement System Training Module: Chapter 2.1 The System Under GATT 1947 and Its Evolution Over the Years*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm [https://perma.cc/7TR7-JDXE] (last visited Sept. 13, 2020) (describing the GATT system and its weaknesses).

41. *See id.*

42. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 84.

43. *See id.* at 83.

44. *See* DSU, *supra* note 4, at arts. 6–11, 17; *see also id.* at art. 16.4 (stating the adoption of panel reports); *id.* at art. 17.14 (stating the adoption of Appellate Body reports).

the highest standing authority of the WTO, the General Council, but simply puts on a different hat in the case of dispute resolution.[45] WTO panels first decide trade disputes subject to appeals before the Appellate Body.[46] The DSB has the authority to adopt panel reports that are not appealed and all Appellate Body reports.[47] The DSB will adopt the reports unless a consensus of the DSB decides not to adopt the report, a process known as "reverse consensus."[48] If no member of the DSB objects to the proposed decision when the DSB holds the formal vote, then the matter is adopted by consensus.[49] If all members of the DSB decide not to adopt the report, then the DSB has decided by reverse consensus not to adopt the report.[50] If any member does not reject the report, consensus is defeated, and the DSB must adopt the report.[51] Thus, as a practical matter, the DSB will adopt virtually all

45. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 28. The DSB consists of the entire membership of the WTO. *See Understanding the WTO: The Organization*, WORLD TRADE ORG., https://www.wto.org/english /thewto_e/whatis_e/tif_e/org1_e.htm [https://perma.cc/9AAY-5GZX] (last visited Sept. 13, 2020). All members also form the General Council, the highest standing body of the WTO. *See id.* The General Council also sits as the Trade Policy Review Body, which examines the internal laws and policies of its members to determine whether any potential conflicts with the WTO agreements exist. *See id.* Every two years, all WTO members meet in a Ministerial Conference, the highest authority of the WTO with the General Council just below it. *See id.*

46. *See* DSU, *supra* note 4, at arts. 7.1 & 16.4.

47. *See id.*

48. *See id.* This process is commonly referred to as "reverse consensus" as contrasted with the normal process of consensus, which means that no member present objects to a decision. *See id.* at art. 2.4 n.1. Reverse consensus means that all members must vote to reject a WTO decision. *See Dispute Settlement System Training Module: 6.4 Adoption of Panel Reports*, WORLD TRADE ORG., https://www.wto.org/english/ tratop_e/dispu_e/disp_settlement_cbt_e/c6s4p1_e.htm [https://perma.cc/V2WA-D9AX] (last visited Sept. 13, 2020). If one present member wants to adopt the decision, it becomes adopted. *See id.* The WTO used the doctrine of reverse consensus to ensure that all decisions will be adopted by the DSB except in truly exceptional cases. *See id.*

49. DSU Article 2.4, Note 1 states that "[t]he DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision." *See* DSU, *supra* note 4, at art. 2.4 n.1.

50. *See id.* at arts. 6.1, 16.4, 17.14, & 22.6; *see also Dispute Settlement System Training Module: Chapter 3.1 The Dispute Settlement Body (DSB)*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_ cbt_e/c3s1p1_e.htm [https://perma.cc/T5UM-WSGH] (last visited Sept. 14, 2020).

51. *See* DSU, *supra* note 4, at arts. 6.1, 16.4, 17.14, & 22.6; *see also Chapter 3.1 The Dispute Settlement Body (DSB)*, *supra* note 50.

panel or Appellate Body reports submitted to the DSB.[52] The reports enter into legal effect upon adoption.[53]

Once the DBS adopts the report, the various enforcement mechanisms of the DSU become available.[54] The possibility of enforcement through the WTO is one of the major advancements of the WTO over its predecessor, the GATT.[55] The panel or Appellate Body report will "recommend" that the losing party bring the offending measure into conformity with the WTO agreements.[56] The ultimate goal of the WTO dispute settlement system is to remove the distortion in the multilateral system caused by the actions of a nation that violates any of the WTO agreements by having that nation bring its offending measure or conduct into compliance.[57] In the event that the losing party refuses to immediately bring the offending measure or conduct into conformity, there are two methods available to the WTO to induce compliance: compensation and retaliation.[58] A losing nation can agree to compensate the aggrieved nation by offering additional concessions.[59] For example, A, the losing nation, can agree to reduce tariffs to zero for certain goods from B. The reduction of the tariffs to zero is considered to be compensation to B, the aggrieved nation, because as B's goods are now subject to zero tariffs, consumers in A will purchase more of B's imports because they are now cheaper. The compensation that B receives is an economic benefit in the form of increased sales and trade volumes. The other method is through

52. *See* DSU, *supra* note 4, at arts. 16.4 & 17.14.

53. Article 21 provides the surveillance and implementation of recommendations and rulings. *See id.* at art. 21. It requires the DSB to hold a meeting thirty days after the adoption of the report, at which the member concerned must inform the DSB of its intentions with respect to the recommendations and rulings in the report. *See id.* at art. 21.3. Article 22 then becomes available to enforce the report through compensation and retaliation. *See id.* at art 22.1. However, until the report has been adopted by the DSB, the DSB can take no further action regarding the report. *See id.* at art. 21.6.

54. *See id.* at arts. 21.3, 21.5, & 21.6.

55. *See Dispute Settlement System Training Module: Chapter 2.2 Major Changes in the Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm#changes [https://perma.cc/WT7H-WHHG] (last visited Sept. 13, 2020).

56. *See* DSU, *supra* note 4, at art. 19.1. The WTO eschews more adversarial sounding language, such as "orders" or "directs" and prefers the more diplomatic sounding "recommends." *See id.*

57. *See id.* at art. 22.1.

58. *See id.*

59. *See id.* at art. 22.2.

"suspension of concessions," or retaliation.[60] The aggrieved nation can ask the DSB for authorization to impose trade sanctions in the form of increased tariffs against the recalcitrant nation.[61] The DSU has determined a set order in which retaliation can occur, with the first step being to impose retaliatory measures in the same sector as the subject of the panel or Appellate Body report.[62] Suppose that A is found to have imposed illegal tariffs on imports of widgets from B. The DSB can authorize B to impose retaliatory tariffs of widgets from A imported by B.[63] Both compensation and retaliation are viewed as temporary measures to pressure the offending nation A to remove the illegal tariff that A has first imposed and thus to bring its conduct into conformity with the WTO agreements.[64] The ultimate goal of the dispute settlement system is to remove the offending measure or to bring it into compliance with the WTO agreements.[65] Only full compliance with the WTO agreements will completely remove the trade distortion.

A recent study indicates that there is an 80% compliance rate with WTO reports.[66] The combination of peer pressure through the

60. *See id.* at arts. 22.2, 22.3. The DSU does not use the term "retaliation" and instead prefers the more innocuous sounding "suspension of concessions." *See id.* But this term really describes trade retaliation. Suppose that B has agreed to impose a 1% tariff on imports from A. The 1% tariff is a "concession," as B could have chosen to impose higher tariffs but, after negotiations with A, decided on the agreed upon 1%. A "suspension of concessions" means that B is no longer limited by its agreement to giving A the concession or benefit of a 1% tariff and is allowed to impose a higher tariff as authorized by the DSB. Thus, the suspension of concessions is in reality a form of trade retaliation, so this Article uses retaliation instead.

61. *See id.* at art. 22.2.

62. *See id.* at art. 22.3(a). The order in which trade retaliation is authorized is as follows: the same sector in the same agreement, different sector in the same agreement, and a sector in a different agreement. For example, if Country B is being harmed because Country A is imposing illegal tariffs on imports of widgets from B, then the DSB will first authorize B to impose retaliatory tariffs on imports of widgets from A. If A does not make widgets or does not export them, then the DSB will authorize B to impose tariffs on other industrial goods covered by the GATT. But what if A, a technology powerhouse, is not a manufacturing country and does not export industrial goods in any quantities to B? Then the DSB will authorize B to impose tariffs on software from A. These products might be protected by a different agreement, namely the Agreement on Trade Related Intellectual Property.

63. *See id.* But what if A does not sell widgets to B or sells only a minor quantity? Then the DSB will authorize retaliation in a different sector of A, such as intellectual property.

64. *See id.* at art. 22.1.

65. *See* id.

66. *See* Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* 18 (European Univ. Inst., Working Paper No. 2017/11, 2017),

adoption of reports by the DSB—the entire WTO membership—and the availability of enforcement measures create an effective dispute settlement system that is responsible for underscoring the rule of law in international law.[67]

B. Paralysis of the Appellate Body

The DSB appoints persons to the Appellate Body for a maximum of two four-year terms; a minimum of three persons is required to hear an appeal.[68] New persons must be appointed to replace retiring body members in order to maintain the minimum number of persons required to hear an appeal.[69] On May 12, 2016, the Obama Administration blocked the reappointment of an Appellate Body member because the United States disagreed with a series of Appellate Body decisions going against the United States.[70] The Trump Administration maintained this blockade, and on December 10, 2019, due to their expiring terms, the number of persons on the Appellate Body fell to one, which is below the minimum of three required to hear a case.[71]

The paralysis of the Appellate Body does not affect the work of the WTO panels, which can continue to hear cases much like a trial court.[72] So long as they are not appealed, the DSB can adopt panel

---

https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1 [https://perma.cc/A34P-A6EM].

67. *See A Unique Contribution*, WORLD TRADE ORG. https://www.wto.org /english/thewto_e/whatis_e/tif_e/disp1_e.htm [https://perma.cc/L9YW-KWGJ] (last visited Oct. 14, 2020) ("Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.").

68. *See* DSU, *supra* note 4, at art. 17.

69. *Id.*

70. *See* Elsig, *supra* note 3.

71. *See Appellate Body Members*, *supra* note 2.

72. *See* DSU, *supra* note 4, at art. 11. Articles 11 and 12 of the DSU control the function of panels. *See id.* at arts. 11, 12. These functions of the panel are independent of those of the Appellate Body. *See id.* For example, Article 12.3 requires panels, after consultation with the parties, to establish a timetable for the panel process as soon as practicable. *See id.* at art. 12.3. From this point forward, the DSU requires the panel process to proceed until completion. *See id.* Where the functions of the panels and the Appellate Body intersect is at the point of appeal governed by Article

reports, which are subject to the enforcement mechanisms of compensation and retaliation.[73] The problem lies with panels reports that are appealed.[74] DSU Article 16.4 states, "If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal."[75] Although the Appellate Body cannot convene, a party can still file an appeal.[76] The text of the DSU indicates that the DSU cannot adopt the panel report until the completion of the appeal, which is now impossible.[77] As the panel report cannot be adopted by the DSB, the report has no legal effect and cannot be enforced.[78] Any party that is dissatisfied with a panel report can effectively have it suspended in a legal limbo and block it from taking legal effect.[79] A losing party of a WTO panel report does not have to comply with the report if the party appeals.[80] The result is that all WTO obligations can be effectively rendered unenforceable by any party who does not wish to comply.

The disabling of the WTO dispute settlement system now leaves the WTO in an unstable and dangerous position. The current crisis raises the specter of nationalism, the antithesis of the WTO multilateral system. The winning nation in a WTO dispute might act outside of the WTO by unilaterally retaliating against the losing nation, knowing that the alternative is an endless wait once an appeal is filed.[81] This retaliation could lead to cross retaliation by the losing nation. According to the Deputy Director General of the WTO, Alan Wolff, every trade dispute could become a "small . . . trade war[]."[82] The WTO could become a collection of mini trade wars.[83] An even

16.4. *See id.* at art. 16.4. This point occurs once the panel concludes its process. *See id.*

73. *See id.* at art. 16.4.

74. *See id.* at arts. 16.4 & 17.1; *see also supra* text accompanying notes 1–5.

75. *Id.* at art. 16.4

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*; *see also America May Be Doing Away with WTO Dispute Settlement*, TRADE TALKS, at 02:51–04:21 (Oct. 28, 2018), https://www.piie.com/experts/peterson-perspectives/trade-talks-episode-60-america-may-be-doing-away-wto-dispute [https://perma.cc/D9U5-D5JY].

82. *See DDG Wolff: "There Is Reason for Optimism About the Future of the Multilateral Trading System,"* WORLD TRADE ORG. (Oct. 15, 2018), https://www.wto.org/english/news_e/news18_e/ddgra_15oct18_e.htm [https://perma.cc/49UV-5LWT].

83. *See id.*

more unfortunate situation might arise if many nations feel embolden to disregard their WTO obligations, knowing that such obligations cannot be enforced, and other nations respond with unilateral retaliation.[84] If nations know that WTO obligations are unenforceable, they might feel that it is futile to enter into negotiations for new obligations or agreements. The WTO multilateral system might descend into anarchy, leading to the collapse of the WTO itself.

C. Possible Paths Forward

The most obvious and straightforward path forward is for the United States to end its intransigence and to approve new members to the Appellate Body.[85] As U.S. agreement may not be forthcoming or may be difficult to obtain, the discussion below will first examine whether there are viable paths forward that do not require U.S. consent and that could restore the Appellate Body to its full powers.

1. *Arbitration Under DSU Article 25*

One proposal is to use Article 25 of the DSU as an alternative means of dispute settlement to set up an informal alternative to the Appellate Body.[86] Under Article 25, the parties can agree to arbitration and "the procedures to be followed" instead of using the formal WTO dispute settlement system.[87] Article 25 permits the parties to substitute arbitration for both the panel and appellate process or only for the appellate portion of the case.[88] One suggested approach is that the parties preserve the use of the panels but agree in advance to use arbitration in lieu of appeals to the Appellate Body.[89] The parties could then agree to replicate the WTO appellate process to the greatest degree possible by agreeing to have the arbitration follow the rules and procedures of the Appellate Body, to use prior members from the roster of the Appellate Body as arbitrators, and to use the resources

84. *See* DSU, *supra* note 4, at art. 16.4; *see also America May Be Doing Away with WTO Dispute Settlement*, *supra* note 81.

85. *See supra* Section I.B; DSU, *supra* note 4, at art. 25.1.

86. *See* DSU, *supra* note 4, at art. 25.1 ("Expeditious arbitration within 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.").

87. *See id.* at art. 25.2.

88. *See id.*

89. *See, e.g.*, JENNIFER HILLMAN, GEORGETOWN INST. INT'L ECON. L., THREE APPROACHES TO FIXING THE WORLD TRADE ORGANIZATION'S APPELLATE BODY: THE GOOD, THE BAD, AND THE UGLY? 8 (2018).

that the WTO secretariat provides for researching and drafting reports. Article 25 expressly states that the arbitration award is subject to the dictates of Article 22, which authorizes compensation and retaliation.[90] As a result, the winning party would be able to enforce the arbitration award through the WTO.[91]

The major advantage of this approach is it can be used immediately, as it is explicitly authorized by the DSU.[92] There is no need to amend the DSU or any other of the legal instruments of the WTO.[93] The parties would not need the agreement of the United States or any other WTO member to use the arbitration alternative under Article 25.[94] All that is needed is the agreement of both parties to use Article 25 arbitration.[95]

The use of Article 25, however, has several serious shortcomings.[96] First and foremost, a nation party must agree to use Article 25 arbitration.[97] If a party refuses to use Article 25, that party still has the ability to suspend the adoption of any panel report by filing an appeal.[98] Even parties that agree beforehand to use Article 25 may still be able to appeal, as the language of Article 16.4 can be interpreted to recognize a nonwaivable right to appeal.[99] In addition, each appeal must be the subject of an agreement to arbitrate,[100] which creates the possibility that variations could occur in agreements, leading to a lack of uniformity across arbitrations.

Under Article 25, arbitration awards are "notified" to the DSB but are not adopted by the DSB, as in the case of Appellate Body reports.[101] Thus, arbitration awards do not become part of the jurisprudence of the WTO but are treated as private arrangements

90. *See* DSU, *supra* note 4, at art. 25.4.

91. *See id.* at arts. 22& 25.4.

92. *See id.* at art. 25.

93. *See* HILLMAN, *supra* note 89, at 8–9 (discussing the lack of need to amend the DSU under an arbitration approach).

94. *See* DSU, *supra* note 4, at art. 25.2.

95. *See id.* at art. 25.2.

96. *See, e.g.*, HILLMAN, *supra* note 89, at 8–9 (discussing three shortcomings of the arbitration approach).

97. *See id.*

98. *See id.* at art. 16.4.

99. *See* DSU, *supra* note 4, at art. 16.4 ("If a party has notified its decision to appeal, the report by the panel *shall not be considered for adoption by the DSB* until the after completion of the appeal.") (emphasis added). So long as the appeal is pending, the report is in a state of suspension. *See id.*

100. *Id.* at art. 25.2.

101. *Id.* at art. 25.3.

outside of WTO.[102] Arbitration decisions would have no legal force and provide no guidelines for future conduct.[103] These limitations of Article 25 arbitration indicate that it would be a weak and inadequate substitute for the current use of the Appellate Body.[104] If the WTO adopted Article 25 as a long-term substitute for appeals to the Appellate Body, the WTO would be permanently diminished.

2. *Limiting the Use of the Dispute Settlement System to Panels*

An alternative proposal is to limit the use of the WTO dispute settlement system to panels only.[105] Panel reports that are not appealed can be adopted by the DSU.[106] Once adopted the panel reports become law and are subject to the enforcement mechanisms of compensation and retaliation under the DSU.[107]

Such a proposal would entail an amendment to DSU Article 17 that would suspend the right to appeal, making the panels the final and only recourse.[108] Such an amendment to the DSU would require the agreement of the United States or the use of a vote that would override U.S. objections, a controversial topic that is further discussed in the following section.[109] If we assume for the moment that such an amendment is possible, this approach has the advantage of recognizing that the work of the panels is not affected by the current impasse

102. *See id.*
103. *See id.*; *see also* HILLMAN, *supra* note 89, at 9.
104. *See* DSU, *supra* note 4, at art. 25.3.
105. *See* HILLMAN, *supra* note 89, at 7.
106. *See* DSU, *supra* note 4, at art. 16.4.
107. *See id.* at art. 22.
108. *See* HILLMAN, *supra* note 89, at 7.
109. *See* WTO Agreement, *supra* note 38, at art. IX.2 (providing that the Ministerial Conference, a meeting every two years of the entire membership, and the General Council, the standing body of the entire membership, have the exclusive authority to interpret the WTO agreements). Article IX.2 further states that a decision to adopt an interpretation of the WTO agreements must be taken by three-fourths of the membership. *See id.* However, the GATT/WTO has an entrenched tradition of preceding by consensus rather than by majority vote even where it is allowed to proceed by voting. *See id.* at art. IX.1. A decision is made by consensus when no member present at the voting objects. *See id.* at art. IX.1 n.1. Thus, under the GATT/WTO tradition of consensus, the WTO will need the agreement of the United States for an interpretation of the DSU that will suspend the appeals process. *See id.* at art. IX; *see also* DSU, *supra* note 4, at art. 17. For the reasons stated in this Article, such agreement is not likely forthcoming. Rejecting the tradition of consensus and overriding U.S. objections is a possibility under Article IX.2 of the WTO Agreement, but the costs are high and most likely too high for the WTO to accept. *See infra* Subsection I.C.3.

surrounding the Appellate Body.[110] The dispute settlement process is affected only at the stage of appeal, not before.[111] Nothing would need to change in the current settlement of disputes by panels except to legally suspend the right to appeal.[112] One could also argue that the panels already serve an appellate function, as they are reviewing measures that have been undertaken by nations usually after the use of national procedures that form part of a record that is being reviewed.[113] The WTO dispute settlement system could continue to function effectively even if appeals were eliminated.[114]

The disadvantages of this approach are that the work of the Appellate Body was conceived as a vital part of the WTO dispute settlement system during the Uruguay Round of negotiation.[115] The creation of an appeals court was a major innovation at the time as no other international dispute settlement system had ever installed a higher body to handle appeals.[116] Although its work has been criticized by the United States, the Appellate Body has emerged to play an instrumental role as a high court of international trade in setting forth the law of the WTO, and its reports are regularly studied and scrutinized by government and private trade lawyers as an important source of WTO jurisprudence.[117] Abandoning the Appellate Body would be akin to amputating an injured limb. The WTO would survive but in a permanently disabled state.

110. *See* DSU, *supra* note 4, at arts. 11–12, 16.4; *see also supra* text accompanying notes 1–5.

111. The paralysis of the Appellate Body becomes relevant only at the stage of appeal under DSU Article 16.4, once the panel has completed it process. *See* DSU, *supra* note 4, at arts. 11–12, 16.4.

112. *See id.* at art. 16.4; *see also* HILLMAN, *supra* note 89, at 7.

113. *See* DSU, *supra* note 4, at art. 11; *see also Dispute Settlement System Training Module: Chapter 6.3 The Panel Stage*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm [https://perma.cc/7C76-5GVT] (last visited Oct. 12, 2020).

114. *See* HILLMAN, *supra* note 89, at 7; *Dispute Settlement System Training Module: Chapter 2.2 Major Changes in the Uruguay Round*, *supra* note 55.

115. *See Dispute Settlement System Training Module: Chapter 2.2 Major Changes in the Uruguay Round*, *supra* note 55.

116. *See id.*

117. *See* Gabrielle Marceau et al., *The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation*, 47 J. WORLD TRADE 481, 488–93 (2013).

3. *Overriding U.S. Intransigence by Majority Vote*

A third possibility is for the WTO membership to override the intransigence of the United States by a majority vote. The DSU states that "[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus."[118] Note 1 to DSU Article 2.4 states that a matter is "decided by consensus . . . if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision."[119] The United States has taken the position that the rule of consensus applies to all matters that the WTO decides, including the appointment of new persons to the Appellate Body.[120] Under the U.S. position, no appointments can be made without its consent as its opposition would destroy the consensus required by DSU Article 2.4. The United States' argument is that due to the requirement of consensus, overriding U.S. opposition is not legally possible.

Assuming that the United States is correct that the rule of consensus applies to the appointment of Appellate Body members, there is a legal basis on which to overcome the lack of consensus. Article IX.1 of the WTO Agreement Establishing the World Trade Organization (WTO Agreement) states that "[e]xcept as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting."[121] The DSB could decide to proceed under Article IX of the WTO Agreement to appoint new members to the Appellate Body by a majority vote over U.S. objections and restore the Appellate Body to its full powers.

---

118. DSU, *supra* note 4, at art. 2.4.

119. *Id.* at art. 2.4 n.1.

120. There is an argument that the rule of consensus does not apply to the appointment of arbitrators. DSU Article 17.2 states that "[t]he DSU shall *appoint* persons to serve on the Appellate Body." *Id.* at art. 17.2 (emphasis added). DSU, art. 2.4 states, "Where the rules and procedures of this Understanding provide for the DSB to take a *decision*, it shall do so by consensus." *Id.* at art. 2.4 (emphasis added). Thus, it is possible to argue that an appointment is distinguished from a decision, and thus there is no need to require consensus for appointments. This position would allow the DSB to appoint new arbitrators without a consensus requiring the agreement of the United States. If the DSB has the power to appoint without a consensus, one might assume that appointments can be made by majority vote. The problem here is that nothing in the DSU sets forth procedures for making appointments as opposed to decisions. Moreover, the tradition of the GATT/WTO is to make all decisions by consensus whether or not a textual provision allows for majority decision. *See id.* at art. 3 n.1.

121. *See id.*

Although Article IX provides a legal argument for overcoming U.S. objections by majority vote, such a path forward would be controversial and full of risk. Under the WTO and its predecessor, the GATT, all decisions were by consensus as a matter of tradition, whether or not a textual directive required consensus.[122] Article IX of the WTO Agreement states, "*[e]xcept as otherwise provided*," a decision that cannot achieve consensus can be made by voting.[123] The United States could take the position that this provision applies to decision making only when there is no clear textual directive that decisions be made by consensus. DSU Article 2.4 states, "Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus."[124] In the event that such a clear directive exists, as in the case of DSU Article 2.4, then all decisions *must* be made by consensus, and voting is not possible.[125] In other words, the voting alternative of Article IX of the WTO Agreement is inapplicable to decision making under the DSU.[126]

An additional consideration is that, although Article IX authorizes decision making by voting, the WTO has never departed from decision making by consensus in the entirety of its history since it came into existence on January 1, 1995.[127] Its predecessor, the GATT, also followed decision making by consensus through the entirety of its nearly fifty year history from 1947 to January 1, 1995, when it was replaced by the WTO.[128] The GATT followed decision making by consensus even though its Articles provided specifically for decision by majority vote.[129] Departure from such an entrenched

122. *See* Mary E. Footer, *The Role of Consensus in GATT/WTO Decision-Making*, 17 NW. J. INT'L L. & BUS. 653, 663, 665–67 (1997).

123. WTO Agreement, *supra* note 38, at art. IX.1 (emphasis added).

124. DSU, *supra* note 4, at art. 2.4.

125. *See* WTO Agreement, *supra* note 38, at art. IX.1; *see also* DSU, *supra* note 4, at art. 2.4.

126. *See* WTO Agreement, *supra* note 38, at art. IX.1; *see also* DSU, *supra* note 4, at art. 2.4.

127. *See* WTO Agreement, *supra* note 38, at art. IX.1 ("The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.").

128. Footer, *supra* note 122, at 657–58.

129. When GATT came into provision existence in 1947, it contained Article XXV.4, which stated, "Except as otherwise provided for in this Agreement, decisions of the contracting parties shall be taken by a majority of the votes cast." General Agreement on Tariffs and Trade, art. XXV.4, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Despite this clear directive to proceed by majority vote, GATT countries voted by consensus from 1947 to 1995, when the GATT was replaced by the WTO. *See* Footer, *supra* note 122, at 657–58.

tradition would be considered a seismic shift within the WTO, and many members may be reluctant to depart from such a well-established practice. Aside from the considerations of history and tradition, the practice of decision making by consensus vindicates the longstanding expectation that a majority of the WTO will not ramrod a decision on a dissenting minority.[130] Once this tradition is compromised, then the door is opened for other decisions to be decided by majority vote if a consensus cannot be reached. Countries that view themselves as being in the minority on important issues in the WTO might be reluctant to abandon the tradition of decision making by consensus.

One further important consideration is that overriding U.S. objections will likely further antagonize and anger the United States. Under the leadership of a mercurial president, a defiant United States might take action to further destabilize the WTO or take actions directly against members who vote against the United States.[131] Under the present practice of consensus, it is not possible to single out any one country for retaliation, as the entire DSB acts in unison.[132] If the DSB decided to proceed by a vote to override U.S. intransigence, the

130. MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 14 (3d ed. 2015).

131. For example, the United States could announce that it will no longer follow various WTO decisions rejecting U.S. trade measures, such as the U.S. methodology of "zeroing" in dumping investigations. *See infra* Subsection II.B.2. The U.S. method of zeroing results in higher antidumping duties than if zeroing were not applied. *See id.* Up to the present, the United States has not persisted in using zeroing in the face of WTO decisions rejecting that methodology. *See id.* An irritated United States could, however, resume the use of zeroing and then block any efforts to challenge its actions in the WTO. If the United States imposes higher tariffs on imports by zeroing, imports could be immediately diverted to other markets, such as that of the EU. As the EU has also used zeroing in antidumping investigations, the EU might resume its use of zeroing to avoid having its markets flooded by cheap imports. *See* Sungjoon Cho, *No More Zeroing?: The United States Changes Its Antidumping Policy to Comply with the WTO*, AM. SOC'Y INT'L L. (Mar. 9, 2012), https://www.asil.org/insights/volume/16/issue/8/no-more-zeroing-united-states-changes-its-antidumping-policy-comply-wto#_ednref1 [https://perma.cc/B58H-6K58] ("The DOC, the EU, and some other importing countries originally used zeroing both in antidumping investigations and in administrative reviews of antidumping orders.") Imports to the EU then would be diverted to other markets that in turn might raise trade barriers to avoid being flooded with cheap imports. A single decision by the United States could thus have a cascading effect on many other markets causing a disruption to global markets.

132. The normal practice of the WTO bodies, including the DSB, is to decide by consensus. *See* WTO Agreement, *supra* note 38, at art. IX.1 ("The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.").

United States might make it known that nations that vote against it will suffer retaliation from the United States. Such intimidation tactics might further dissuade some nations from voting against the United States.

The various disadvantages of overriding U.S. objections by a majority vote may be enough to forestall the DSB from proceeding under Article IX of the WTO Agreement.[133] Even if the DSB ignores these disadvantages and proceeds with a majority vote to restore the Appellate Body to its full strength, a disgruntled United States would likely reject this outcome. The United States could take the position that the use of a majority vote to overcome U.S. opposition was illegal and that the appointment of new members to the Appellate Body was therefore also illegal. The United States could refuse to recognize the legitimacy of the reconstituted Appellate Body, refuse to take part in any of its proceedings, and refuse to recognize its decisions. Other nations might support the United States just to avoid reprisals in bilateral trade relations or to curry favor with the United States. As the United States is the most frequent litigant in the WTO, U.S. rejection of the Appellate Body could cast a pall over the entire dispute settlement system and leave it in a permanently diminished and unstable state.[134]

This discussion indicates in part that without the agreement of the United States, there is no viable path forward for the WTO dispute settlement system to restore its previous powers and stature. The proposed alternatives discussed here are full of pitfalls and ultimately fall short by leaving the dispute settlement in a precarious and weakened state.

It is difficult to predict what conditions the United States will demand in exchange for its agreement to restore the Appellate Body. The next Part of this Article examines U.S. trade policy and criticism of the Appellate Body as background for discussing how the United States might plan to move forward with the crisis in the WTO.

---

133. *See* HILLMAN, *supra* note 89, at 14; WTO Agreement, *supra* note 38, at art. IX.

134. *See Disputes by Member*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm [https://perma.cc/ZBZ2-LJW5] (last visited Sept. 13, 2020).

II. TRADE POLICIES OF THE TRUMP ADMINISTRATION

This Article now turns to an examination of the basic tenets of current U.S. trade policy as a background for understanding possible U.S. responses to the crisis enveloping the WTO. To understand how the United States might respond to the current crisis in the WTO, it is necessary to examine the source of the U.S. dissatisfaction that led to U.S. intransigence in the first place. An examination of U.S. criticism of the WTO will help us predict the likely course of future U.S. responses to the crisis of the WTO.

A. Basic Tenets of U.S. Trade Policy

The ascension of Donald J. Trump to the U.S. presidency in 2016 marked a new era of assertiveness in U.S. trade policy symbolized by the motto "America First."[135] In his 2018 State of the Union Address, Trump explained, "America has . . . finally turned the page on decades of unfair trade deals that sacrificed our prosperity and shipped away our companies, our jobs, and our Nation's wealth. The era of economic surrender is over. From now on, we expect trading relationships to be fair and to be reciprocal."[136]

Robert Lighthizer,[137] the United States Trade Representative (USTR), elaborated the basic tenets of this policy in his statement on

---

135. *See* Caitlin Oprysko & Anita Kumar, *Trump Pushes Aggressive 'America First' Message to World Leaders*, POLITICO (Sept. 24, 2019), https://www.politico.com/story/2019/09/24/trump-america-first-unga-1509356 [https://perma.cc/LP66-VGM3]; *see also* Donald J. Trump, President of the U.S., Remarks by President Trump to the 74th Session of the United Nations National Assembly (Sept. 24, 2019).

136. Donald J. Trump, President of the U.S., State of the Union Address (Jan. 30, 2018).

137. In 2017, Trump nominated Robert Lighthizer to the position of the United States Trade Representative, the highest U.S. official on trade. *See* Press Release, Off. of the U.S. Trade Rep., Robert E. Lighthizer Sworn in as United States Trade Representative (May 15, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/robert-e-lighthizer-sworn-united-states [https://perma.cc/E48D-K5TR]. Lighthizer had been deputy USTR under President Reagan and was a well-known skeptic of the WTO and critic of China, a leading beneficiary of the WTO. *See id.*; *see also* Andrew Restuccia & Megan Cassella, *'Ideological Soulmates': How a China Skeptic Sold Trump on a Trade War*, POLITICO (Dec. 26, 2018), https://www.politico.com/story/2018/12/26/trump-lighthizer-china-trade-war-1075221 [https://perma.cc/FDC2-FZUJ]. His nomination sailed through the U.S. Senate by a vote of 82–14. *See On the Nomination (Confirmation Robert Lighthizer, of Florida, to be United States Trade Representative)*, U.S. SENATE (May 11, 2017), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_

the President's 2017 National Trade Policy Agenda.[138] Lighthizer identified four priorities for U.S. trade policy:

> (1) [D]efend U.S. national sovereignty over trade policy; (2) strictly enforce U.S. trade laws; (3) use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services . . . ; and (4) negotiate new and better trade deals with countries in key markets around the world.[139]

1. *Supremacy of U.S. Sovereignty*

The first trade priority, defending national sovereignty, holds that U.S. trade law is supreme over WTO law. For example, the United States declared that it is not bound by decisions of the WTO panels or Appellate Body:

> [I]t is important to recall also that Congress had made clear that Americans are not directly subject to WTO decisions. The Uruguay Round Agreements Act states that, if a WTO dispute settlement report "is adverse to the United States, [the U.S. Trade Representative shall] consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation," confirming that these WTO reports are not binding or self-executing. 19 U.S.C. § 3533(f). The Uruguay Round Agreements Act also specifically provides that "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a)(1). In other words, even if a WTO dispute settlement panel—or the WTO Appellate Body—rules against the United States, such a ruling does not automatically lead to a change in U.S. law or practice. Consistent with these important protections and applicable U.S. law, the Trump Administration will aggressively defend American sovereignty over matters of trade policy.[140]

The USTR left no doubt that as a matter of national sovereignty, the United States believes that it has the right to reject WTO decisions:

---

cfm.cfm?congress=115&session=1&vote=00127 [https://perma.cc/SQ7D-DDN9]. The bipartisan enthusiasm for Lighthizer's appointment indicates that both political parties share a skepticism of the WTO. The idea of that the WTO only has to wait for a change in political parties holding the U.S. presidency is a fallacious one. Both political parties are dissatisfied with the WTO and trade with China.

138. *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, THE PRESIDENT'S 2017 TRADE POLICY AGENDA 1–2 (2017), https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2017/2017-trade-policy-agenda-and-2016 [https://perma.cc/N6G2-76UQ] [hereinafter 2017 Trade Policy Agenda].

139. *Id.* at 2.

140. *Id.* at 3.

"The United States remains an independent nation, and our trade policy will be made here—not in Geneva. We will not allow the WTO Appellate Body and dispute settlement system to force the United States into a straitjacket of obligations to which we never agreed."[141]

2. *Immunity of U.S. Trade Law Remedies*

The second and third priorities hold that U.S. trade law remedies are immune from challenge under WTO or international law.[142] Trade law remedies refer to the group of U.S. federal statutes that authorize the use of trade sanctions against foreign trading nations. The major U.S. trade law remedies are antidumping duties, countervailing duties, and safeguards.[143] The United States considers the enforcement of these trade remedies to be a core part of U.S. trade policies, and protecting these remedies figures prominently in U.S. criticism of the WTO, leading to the current impasse as further discussed in succeeding sections of this Article.[144]

a. Antidumping Duties

Additional tariffs imposed on imports that are unfairly "dumped," or sold at prices in the United States that are lower than prices in the home market, are called antidumping duties.[145] Dumped imports seize market share by undercutting and harming U.S. domestic industries of competitive products; once market share is obtained, the foreign producer can increase prices or lower quality, leading to further damage to U.S. consumers and the U.S. economy.[146] The United States imposes an antidumping duty in the form of an

141. OFF. OF THE U.S. TRADE REPRESENTATIVE, 2019 TRADE POLICY AGENDA AND 2018 ANNUAL REPORT 27 (2019), https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2019/2019-trade-policy-agenda-and-2018 [https://perma.cc/G3UR-9TVF] [hereinafter 2019 Trade Policy Agenda].

142. *See* 2017 Trade Policy Agenda, *supra* note 138, at 3–5.

143. *See* Tariff Act of 1930, ch. 497, § 731 (codified as amended at 19 U.S.C. § 1673 (2012)) (imposing antidumping duties); *see also* § 701, (codified as amended at 19 U.S.C. § 1671 (2012)) (imposing countervailing duties); Trade Act of 1974, Pub L. No. 93-618, §§ 201-03, 88 Stat. 1978, 2011-18 (codified as amended at 19 U.S.C. §§ 2251–53 (2012)).

144. *See* 2019 Trade Policy Agenda, *supra* note 141, at 17, 24.

145. The imports are already subject to tariffs at the normal WTO rate, but an additional antidumping duty is then imposed on top of the existing tariff. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 467–70.

146. *See id.*

increased tariff to offset the margin of dumping.[147] The United States frequently uses antidumping duties to form a core part of U.S. trade policy.[148]

b. Countervailing Duties

Tariffs that are imposed on subsidized imports are called countervailing duties.[149] A subsidy exists in the form of a direct or indirect financial contribution from a government to a business entity.[150] In its most pernicious form, a subsidy is provided to a product that is exported to the United States.[151] The subsidy provides an economic benefit to the producer, who can then charge a lower price for the export and create a competitive advantage for the product over U.S. domestic competitive products.[152] The countervailing duty is an additional tariff that offsets the effect of the subsidy by increasing its costs to consumers.[153]

c. Safeguards

Tariffs, or sometimes quotas or trade bans, on imports in response to a putative trade emergency are known as safeguards.[154] Due to unforeseen circumstances, imports might suddenly surge, resulting in an influx that causes harm to U.S. industries that make competitive products.[155] Section 201 of the Trade Act of 1974 authorizes safeguards as temporary measures to provide breathing room to U.S. industries.[156]

These remedies also include tariffs or quotas imposed through unilateral action under Section 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962, dealing with threats

147. *See id.*
148. *See* 2019 Trade Policy Agenda, *supra* note 141, at 24.
149. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 467.
150. *See id.* at 517–19.
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.* at 399–403.
155. *See id.*
156. *See id.*; Trade Act of 1974, § 201, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2251–53 (2018)).

to national security.[157] The Trump Administration invoked Section 232 as justification for the widespread tariffs against steel and aluminum imposed in 2017.[158]

All of these U.S. trade remedies predate the establishment of the WTO.[159] Some of these remedies, such as the antidumping statutes, have a venerable history of over a century long before the creation of the GATT, the predecessor to the WTO.[160]

The United States has long held the view that its trade law remedies hold a special status in the international trade law arena, as they are used to punish unfair trade practices designed to harm the United States and to pry open foreign markets that are shielded by protectionist trade barriers.[161] In explaining its policy of "Aggressive Enforcement of U.S. Trade Laws," the USTR explained:

> The Trump Administration strongly believes that all countries would benefit from adopting policies that promote true market competition. Unfortunately, history shows that not all countries will do so voluntarily. Accordingly, we also have an aggressive trade enforcement agenda designed to prevent countries from benefiting from unfair trading practices. We will use all tools available—including *unilateral action* where necessary—to support this effort.[162]

By stating that the United States will take "unilateral action where necessary" when enforcing its trade laws, the United States is declaring that it will enforce its trade laws against any nation without regard to the requirements of WTO law and that it considers U.S. trade law remedies to be immune from WTO interference.[163] Such U.S. actions defy WTO law, which prohibits all members, including the United States, from taking unilateral action.[164]

---

157. *See* Trade Act of 1974, § 301, 88 Stat. 1978, (codified as amended at 19 U.S.C. § 2411 (2012)); Trade Expansion Act of 1962, § 232, 76 Stat. 872 (codified as amended at 19 U.S.C. § 1862 (2012)).

158. *See* 2019 Trade Policy Agenda, *supra* note 141, at 17, 23–24.

159. *See Dispute Settlement System Training Module: Preface*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/intro1_e.htm [https://perma.cc/AF4C-9M5T] (last visited Sept. 13, 2020) (stating the WTO's creation was in January 1995); *see also supra* notes 154–156 and accompanying text.

160. *See* Revenue Act of 1916, ch. 463, 39 Stat. 756, 756 (repealed 2004).

161. *See, e.g.*, OFF. OF THE U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT 19–20 (2018) [hereinafter 2018 Trade Policy Agenda].

162. *Id.* at 2 (emphasis added).

163. *See id.*

164. *See* DSU, *supra* note 4, at art. 23.1. WTO members are prohibited from making a determination on their own that their rights have been violated under the

3. *Primacy of Bilateral Trade*

The fourth tenet asserts the primacy of bilateral trade agreements over multilateral agreements.[165] The United States intends to negotiate trade agreements one-on-one with its trading partners as opposed to negotiating as part of a group of countries.[166] One-on-one agreements will allow the United States to exercise greater control over the negotiations and the contents of trade agreements. This policy is in tension with the central role of the WTO, the facilitator of the multilateral trading system, as a forum for multilateral negotiations.[167]

4. *U.S. Trade Infallibility*

This analysis of the basic tenets of U.S. trade policy set forth above indicates that under the Trump Administration, the United States has adopted a doctrine of U.S. trade infallibility. This doctrine holds that in any trade dispute in or outside of the WTO, the United States is always right and should always win. If the United States loses a dispute in the WTO, it will ignore the decision. If the United States wins, it will insist on enforcing the decision through the WTO. When the United States enforces U.S. trade law remedies, the United States will do so without regard to WTO law and, when necessary, will act unilaterally. The United States will insist in negotiating bilateral trade deals outside of the multilateral framework of the WTO.

Under the doctrine of U.S. trade infallibility, the United States heaps scorn on the WTO when it decides against the United States, but will lavish praise on the WTO and trumpet the results when the United States wins. A good example is the latest salvo in the long-running dispute between the United States and the European Union (EU) over the legality of subsidies provided by both to their respective aircraft industries.[168] Starting in 2004 and resulting in four previous panel and

---

WTO agreements but are required to assert such claims through the dispute settlement system in accordance with the rules of the DSU. *See id.* The U.S. position is that it will decide for itself that its rights have been violated and will use trade retaliation without prior authorization from the WTO. *See* 2018 Trade Policy Agenda, *supra* note 161, at 2.

165. *See* 2017 Trade Policy Agenda, *supra* note 138, at 6.

166. *See id.*

167. *See* DSU, *supra* note 4, at art. 3.2 (resolving that one of the primary functions of the WTO is to "provide the forum for negotiations among its Members concerning their multilateral trade relations").

168. *See* Ana Swanson, *U.S. to Tax European Aircraft, Agriculture and Other Goods*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/us/politics/

appellate reports, the dispute resulted in a key U.S. victory on October 2, 2019.[169] A WTO panel authorized the United States to impose $7.5 billion in retaliatory tariffs against the EU for illegal subsidies provided to Airbus, an EU aircraft company.[170] On its government website, the USTR boasted:

> The United States has won the largest arbitration award in [WTO] history . . . . Today's decision demonstrates that massive EU corporate welfare has cost American aerospace companies hundreds of billions of dollars in lost revenue . . . . Finally, after 15 years of litigation, the WTO has confirmed that the United States is entitled to impose countermeasures in response to the EU's illegal subsidies.[171]

When the United States wins, it feels vindicated, extols the WTO, and treats it with esteem.[172] When the United States loses, the opposite occurs.[173] One can only imagine the vitriolic response of the United States had it lost this decision.

While the Trump Administration has taken U.S. assertiveness in trade to new levels, U.S. concerns about the WTO predated the Trump Administration and will likely continue after it.[174] For those observers who believe that U.S. policy could change with election results in 2020 or 2024, it must be emphasized that both political parties in the United States share the current disaffection with the WTO.[175] Although the Trump Administration's intransigence paralyzed the Appellate

---

airbus-tariffs-wto.html. [https://perma.cc/RN2V-H75M] Subsidies are government-provided payments to private businesses. For a discussion of subsidies, see *infra* text accompanying notes 192–218.

169. *See* Press Release, Off. of the U.S. Trade Rep., U.S. Wins $7.5 Billion Award in Airbus Subsidies Case (Oct. 2, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/us-wins-75-billion-award-airbus. [https://perma.cc/V97Z-TKVK] [hereinafter Press Release, Off. of the U.S. Trade Rep.].

170. *See id.*

171. *Id.*

172. *See id.*

173. *See* Jacob M. Schlesinger, *How China Swallowed the WTO*, WALL ST. J. (Nov. 1, 2017, 11:48 AM), https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308 (quoting Peter Navarro on the WTO's "abject failure" to address problems caused by China).

174. *See* HILLMAN, *supra* note 89, at 4 n.8; Lori Wallach, *The World Trade Organization Is Dying. What Should Replace It?*, N.Y. TIMES (Nov. 28, 2019), https://www.nytimes.com/2019/11/28/opinion/seattle-world-trade-organization.html. [https://perma.cc/FAJ3-VTB4].

175. *See, e.g.*, *id.*; *see also* Karen J. Alter, *Time for a World Trade Organization 2.0*, WALL ST. J. (Sept. 16, 2019, 3:50 PM), https://www.wsj.com/articles/time-for-a-world-trade-organization-2-0-11568577021.

Body, the Obama Administration initially blocked the reappointment of an Appellate Body member, setting in motion the events that have led to the current crisis.[176] The U.S. Senate, with a bipartisan vote of 82-14, overwhelmingly approved Robert Lighthizer, the USTR, although he is a well-known WTO and China skeptic.[177] One cannot assume that a change in the U.S. administration or political parties will led to a reversal of current U.S. trade policies.

B. U.S. Criticism of the WTO

With the basic tenets of U.S. trade policy as the background, this Article now turns to specific U.S. criticism of the WTO and the Appellate Body. The USTR set forth the reasons for U.S. dissatisfaction with the WTO in its 2018 and 2019 Trade Policy Agendas. These concerns can be grouped into three main categories: (1) the "judicial activism" of the Appellate Body; (2) WTO decisions that reject U.S. trade law remedies; and (3) various violations by the Appellate Body of its own rules and procedures.

1. *"Judicial Activism"*

Beginning with the Obama Administration, the United States has persistently criticized the Appellate Body and the WTO panels for exceeding their authority by creating new rights not in the WTO agreements. In the 2017 President's Trade Policy, the United States explained:

> The anchor for this new dispute settlement system was an agreement known as the Understanding on Rules and Procedures Governing the Settlement of Disputes, often called the Dispute Settlement Understanding (DSU). The core provision of the DSU was the express legal requirement that the WTO, through its dispute settlement findings and recommendations, could not "add to or diminish the rights or obligations" of the United States, or other countries under the WTO agreements. This requirement was so critical that it was included not once, but twice in the text of the DSU, once in Article 3 as a specific direction to the WTO's Dispute Settlement Body in adopting its recommendations, and once in Article 19 as a specific direction to WTO panels and the Appellate Body in setting out their findings and recommendations to be adopted by the DSB. The Clinton Administration

176. *See* Elsig et al., *supra* note 3; Miles, *supra* note 3 (describing the Trump Administration blocking all appointments to the appeals chamber, thereby paralyzing the process).

177. *See Disputes by Member*, *supra* note 134.

> and Congress both made clear that this language was essential to winning American support for the DSU.[178]

The USTR emphasized that there was a clear understanding between the United States and the WTO that the dispute settlement system was subject to strict parameters and limitations:

> At the time, the American people were assured that, by the express terms of the DSU itself, this dispute settlement process would not alter the terms of what the United States had agreed to in the WTO Agreements, and what Congress thereafter expressly approved when it passed the Uruguay Round Agreements Act. In other words, the United States entered into written agreements that contained rules on a range of [trade] matter[s] . . . . The United States also entered into the DSU, which contained a clear and express legal limitation that the WTO dispute settlement process could not add to U.S. obligations or diminish U.S. rights under those agreements. By insisting on and negotiating the express terms of these agreements, the United States established clear and firm parameters for the role of the WTO in regulating trade.[179]

The USTR added that "[i]t has been the longstanding position of the United States that panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that adheres strictly to the text of those agreements, as negotiated and agreed by its Members."[180] According to the United States, the WTO has repeatedly violated these limitations by engaging in "judicial activism" to create new rights beyond those set forth in the WTO agreements, which amounts essentially to rewriting these agreements.[181] This judicial activism violates the express language of DSU Articles 3 and 19 and breaches the basic understanding between the United States and the WTO that was required for U.S. agreement to be bound by the WTO agreements.[182] As a result, the United States regards decisions that are the product of judicial activism as illegitimate and feels no obligation to follow them. Negotiations between nations should be the process by which new rights are created, not judicial fiat through the dispute settlement system.[183]

---

178. 2017 Trade Policy Agenda, *supra* note 138, at 2.

179. *Id.* at 2–3.

180. 2018 Trade Policy Agenda, *supra* note 161, at 24.

181. *See id.* at 14.

182. DSU Article 3.2 provides "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." DSU, *supra* note 4, at art. 3.2. DSU Article 19.2 states that "the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements." *Id.* at art. 19.2.

183. *See* 2018 Trade Policy Agenda, *supra* note 161, at 2.

The United States is particularly dismayed that the judicial activism of the WTO has benefitted China by protecting its unfair trade practices.[184] For example, according to Peter Navarro, trade advisor to President Trump, "[t]he WTO's abject failure to address emerging problems caused by unfair practices from countries like China has put the U.S. at a great disadvantage."[185]

The United States asserts that China has a massive state-led economy that is fundamentally inconsistent with the free market model of the WTO.[186] The United States argues that China made a commitment to dismantle its state-led economy as a condition of its admission to the WTO.[187] Instead of fulfilling that commitment, China has instead strengthened state control over the economy.[188] China provides subsidies, i.e. financial contributions, to Chinese business entities to give them a competitive advantage over U.S. business entities in the Chinese internal market.[189] The WTO disciplines the use of subsidies through GATT Article VI and the Agreement on Subsidies and Countervailing Measures (SCM Agreement), but it has interpreted these agreements to make it more difficult to impose countervailing duties on subsidies from China.[190]

Article I of the SCM Agreement defines a subsidy as a "financial contribution by a government or any public body."[191] The United

184. *See id.*

185. *See* Schlesinger, *supra* note 173.

186. *See id.*

187. *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, 2018 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 2 (2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/february/ustr-releases-2018-reports-china%E2%80%99s [https://perma.cc/WAM9-VJK9].

188. For a discussion of the United States' argument that China made a commitment to dismantle its state economy and China's own contrary views on the issue, see Daniel C.K. Chow, *The Myth of China's Open Market Reforms and the World Trade Organization*, 41 U. PA. J. INT'L L. 939, 940 (2020).

189. *See* 2018 Trade Policy Agenda, *supra* note 161, at 2.

190. *See* General Agreement on Tariffs and Trade 1994, art. VI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994] (discussing antidumping and countervailing duties). The subject of antidumping and countervailing duties was so important that GATT Article VI was further elaborated in two separate new agreements that came into force with the establishment—the Agreement on Dumping and Anti-Dumping Duties and the Agreement on Subsidies and Countervailing Measures. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1868 U.N.T.S. 201 [hereinafter Anti-Dumping Agreement]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

191. SCM Agreement, *supra* note 190, at 14.

States claims that China's massive state-owned enterprises (SOEs) provide subsidies to business entities that should be the subject of countervailing duties.[192] The WTO's interpretation of a "government or public body," however, limits the entities to those that engage in "government functions."[193] As SOEs are business entities owned by the state, but are not technically governmental entities, they do not engage in government functions under the WTO interpretation.[194] As a result, financial contributions made by China's SOEs may not qualify as subsidies within the meaning of the SCM Agreement and cannot be the subject of countervailing duties under WTO rules.[195]

The United States finds the WTO interpretation of Article I of the SCM Agreement to be an example of judicial activism.[196] The requirement that a public body engage in "government functions" is found nowhere in the text of the SCM Agreement.[197] Instead, the United States believes that the WTO simply invented this requirement.[198] The result is that this WTO interpretation has made it more difficult for the United States to defend against what it believes to be China's unfair trade practices in using SOEs to provide subsidies to Chinese business entities.[199] For the United States, this egregious interpretation means that not only is China not living up to its WTO

192. *See id.* SOEs are companies owned by the state as opposed to being owned by private individuals. For example, China Petroleum and Chemical Corp. (Sinopec) is an SOE in the oil and gas exploration field that is owned by the state. In 2018, Sinopec had revenues of nearly $420 billion and produced over 288 million barrels of oil. *See* SINOPEC CORP., 2018 ANNUAL REPORT & ACCOUNTS 12, 19 (2019) (stating that Sinopec had turnover revenues of 2,891,179 million RMB, which is roughly $420 billion). Its main competitors are privately owned oil and gas companies such as ExxonMobil, a U.S. multinational company. *See id.*

193. *See* Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 134–35, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).

194. *See id.* ¶ 322.

195. *See id.*; OFF. OF THE U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 89 (2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body [https://perma.cc/WLD9-6CHL] [hereinafter 2020 Report on the Appellate Body].

196. *See* 2020 Report on the Appellate Body, *supra* note 195, at 9, 50–51, 82–89.

197. *See generally* SCM Agreement, *supra* note 190 (failing to describe "government functions").

198. *See* 2020 Report on the Appellate Body, *supra* note 195, at 9, 50–51, 89.

199. *See* 2018 Trade Policy Agenda, *supra* note 161, at 2.

commitments, it is also benefitting from the WTO's judicial activism to further bolster its state-led economy from market disciplines.[200]

WTO judicial activism led to a repeal of a popular U.S. statute in *United States—Continued Dumping and Subsidy Offset Act of 2000*.[201] Under the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), the U.S. government was to distribute any collected antidumping duties and countervailing duties to the affected domestic industries on an annual basis.[202] The distribution would be known as the "continued dumping and subsidy offset."[203] The basic concept was that these duties would be paid as a form of compensation to the U.S. industries harmed by the illegal imports.[204] The WTO Appellate Body struck down the CDSOA as inconsistent with the WTO Anti-Dumping Agreement and the SCM Agreement.[205] The Appellate Body held that these two agreements provided specific remedies for dumping and subsidies and that distributing duties to the affected industries was not among the authorized remedies under the agreement.[206] On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005, repealing the CDSOA.[207] Only a year earlier, in 2004, the United States had repealed a venerable U.S. antidumping statute, the Anti-Dumping Act of 1916, because it had also been rejected by the Appellate Body in *United States—Anti-Dumping Act of 1916*.[208]

In the 2018 Trade Policy Agenda, the United States cited the CDSOA case as an example of judicial activism.[209] The United States argues that the Appellate Body treated the offset as a new type of prohibited subsidy not authorized by the SCM Agreement, which sets forth two categories of prohibited subsidies, i.e. subsidies that are

200. *See id.*

201. *See* Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 318, WTO Doc. WT/DS217/AB/R (adopted Jan. 16, 2003).

202. Continued Dumping and Subsidy Offset Act (CDSOA) of 2000, Pub. L. No. 106-387, § 754, 114 Stat. 1549A-72 (repealed 2007). *See* Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, *supra* note 201, ¶ 12.

203. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, *supra* note 201, ¶ 12 n.16.

204. *See id.* ¶ 12.

205. *See id.* ¶ 274.

206. *See id.* ¶¶ 270–72.

207. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

208. Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 156, WTO Doc. WT/DS136/AB/R, WT/DS162/AB/R (adopted Aug. 28, 2000).

209. *See* 2018 Trade Policy Agenda, *supra* note 161, at 24.

illegal per se and subsidies that must be withdrawn.[210] Under the SCM Agreement, these are export subsidies and import substitution subsidies.[211] To these two categories, the Appellate Body had added a third category of prohibited subsidies that had no textual basis in the SCM Agreement: the offset subsidy authorized by the CDSOA.[212] The United States viewed the decision as inventing new law through an illegitimate exercise of judicial power by the Appellate Body. The decision harmed the United States because it led President Bush to repeal the CDSOA and weaken U.S. trade law remedies.[213] Only a year earlier, the United States repealed an antidumping statute that had been in effect for nearly a century in order to satisfy a WTO decision.[214]

Additional examples of judicial activism are set forth by the USTR in the 2018 Trade Policy Agenda. These examples include the WTO's expansive interpretations of "unforeseen developments" to support safeguards;[215] of the nondiscrimination requirement under the Agreement on Technical Barriers to Trade;[216] and of the foregoing of the collection of tax revenue to qualify as a countervailable subsidy under the SCM.[217]

2. *The WTO's Rejection of U.S. Trade Remedies*

The United States is particularly concerned with decisions of the WTO that weaken U.S. trade law remedies, as they are at the core of U.S. trade policy. For example, in *United States— Definitive Safeguard Measures on Imports of Certain Steel Products*, the

---

210. *See* SCM Agreement, *supra* note 190, at art. 3 (discussing prohibited subsidies).

211. *See id.* at art. 3.1(a). Export subsidies are financial contributions given contingent upon export performance, i.e. export of the good produced. *See id.* The exporter is able to charge a lower price for the product gaining a competitive advantage. *See id.* at art. 3.1(b). Imported substitution subsidiaries are financial contributions given to a company to use domestic goods over imports thereby harming the imports. *See id.*

212. *See* 2018 Trade Policy Agenda, *supra* note 161, at 24, 157.

213. *See id.* at 158.

214. *See* Appellate Body Report, *United States—Anti-Dumping Act of 1916*, *supra* note 208, ¶ 156.

215. *See* 2018 Trade Policy Agenda, *supra* note 161, at 24.

216. *See* Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 273–80, WTO Doc. WT/DS248/AB/R (adopted on Nov. 10, 2003) (stating that GATT Article XIX(1)(a) requires that the surge in imports must be due to "unforeseen developments").

217. *See* 2018 Trade Policy Agenda, *supra* note 161, at 23–24.

Appellate Body struck down U.S. safeguards applied to steel imports based on an expansive interpretation of the "unforeseen developments" requirement under GATT Article XIX(1)(a).[218] The United States argued that the Asian and Russian financial crisis in the 1990s constituted "unforeseen developments" leading to a surge in steel imports to the United States.[219] In response, the United States imposed ten safeguards, i.e., new tariffs, dealing with ten different types of steel imports.[220] The Appellate Body rejected these safeguards on the ground that the United States failed to prove "unforeseen developments" with respect to *each* type of steel import covered by each safeguard.[221]

In *United States—Measures Relating to Zeroing and Sunset Reviews*, the Appellate Body struck down the longstanding U.S. methodology of "zeroing" used in dumping investigations.[222] Under this methodology, sales of imports that are not dumped because they are sold in the United States at prices higher than the price in the home market are ignored by the United States.[223] The U.S. Commerce

218. *See* Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, *supra* note 216, ¶ 273–80 (stating that GATT Article XIX(1)(a) requires that the surge in imports must be due to "unforeseen developments").

219. *See id.* ¶ 307–08.

220. *See id.* ¶ 265.

221. *See id.* ¶ 330.

222. *See* Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 190, WTO Doc. WT/DS/322/AB/R (adopted Jan. 9, 2007).

223. For example, suppose that there are four import transactions under investigation. In each, a comparison is made between the price in the U.S. market or export price (EP) and the price in the home market or normal value (NV), or EP-NV. If the EP is greater than NV, then the result in the equation is a positive number or no dumping. If the EP is lower than NV, then the result is a negative number or the product is dumped. Suppose that the values of four transactions are 7, 3, -12, and 2. Here there are three instances of dumping (7, 3, 2) and one instance of no dumping (-12). If all values were counted, then the margin of dumping is zero and no antidumping duty should be imposed. But the United States ignores the instance of no dumping (-12) and assigns it a value of zero instead (7, 3, 0, 2), so the margin of dumping is now twelve under the zeroing methodology and an antidumping is imposed. What is the rationale behind zeroing? The Federal Circuit explained:

> We conclude Commerce based its zeroing practice on a reasonable interpretation of the statute. First, while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction. . . . Second, Commerce's methodology for calculating dumping margins makes practical sense. Commerce calculates dumping duties on an entry-by-entry basis.

Department assigns a value of "zero" to these transactions and ignores them for the purposes of determining whether dumping exists.[224] If these transactions were considered in the U.S. calculations, they would offset dumped transactions, which could lead to a finding of no dumping or could lead to a lower determination of the dumping margin resulting in lower antidumping duties.[225] Zeroing has been approved by the Federal Circuit in *Timken Co. v. United States* and *JTEKT Corp. v. United States* as an appropriate administrative interpretation of the antidumping statute, yet the WTO has consistently rejected zeroing.[226] The WTO has issued a total of fourteen decisions on zeroing, declaring virtually every instance of zeroing as illegal under WTO rules.[227] As of this writing, it is unclear whether zeroing is still used by the U.S. Commerce Department in dumping investigations.[228]

One of the most important cases now pending before the WTO is *United States—Measures Related to Price Comparison Methodologies*, in which China is challenging the U.S. method of

---

> . . . Its practice of zeroing negative dumping margins comports with this approach. . . . [S]uppose a foreign exporter sells the same product to two U.S. customers. The product has a normal value of $0.90, and is sold to the first customer for $1.00 and the second customer for $0.70. Calculated in accordance with [the dumping statute], the dumping margin for the first customer is zeroed (0.90 – 1.00 = –0.10 → 0) and for the second customer is 0.20 (0.90 – 0.70 = 0.20). Assuming sales of 1000 units to each customer, the first customer would not have to pay any dumping duties because it paid a price above normal value, and the second customer would have to pay $200 (1000 transactions × 0.20 dumping margin/transaction = 200) because it paid a price below normal value. This approach makes sense; it neutralizes dumped sales and has no effect on fair-value sales. . . . [If] Commerce could not zero negative transactions, . . . Commerce [would have] to grant the first customer a credit. . . . Commerce could potentially owe the first customer a payment—a result clearly not contemplated by the statutory scheme.

Timken Co. v. United States, 354 F.3d 1334, 1342–43 (Fed. Cir. 2004).

224. *See* Appellate Body Report, *United States—Measures Relating to Zeroing*, *supra* note 222, at ¶ 85.

225. *See Timken*, 354 F.3d at 1342.

226. *See id.*; *see also* JTEKT Corp. v. United States, 642 F.3d 1378, 1383 (Fed. Cir. 2011); Appellate Body Report, *United States—Measures Relating to Zeroing*, *supra* note 222, at ¶ 85.

227. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 508.

228. *See id.*

applying antidumping duties to China as a nonmarket economy.[229] The United States takes the position that due to the Chinese government's extensive intervention in the internal market, actual prices for goods in China are not market prices that can be used for comparison for prices in the United States.[230] Prices for goods in the Chinese market are distorted because goods receive government financial and regulatory support and so are higher than true market prices.[231] Instead, the United States uses prices in a third country market—such as South Africa—that is in a similar stage of economic development to China as a substitute for Chinese prices for the purposes of comparison to U.S. prices.[232] Such a methodology is explicitly authorized by Section 15(a)(ii) of China's Protocol of Accession, granting China accession to the WTO.[233]

Under the explicit terms of the Protocol of Accession, however, Section 15(a)(ii) expired on December 11, 2016.[234] China argues that with the expiration of Section 15(a)(ii), the United States is no longer authorized to treat China as a nonmarket economy; instead, China must be treated as a market economy no matter what the facts are and that Chinese prices must be used for comparison to U.S. prices.[235] The United States is concerned that if Chinese prices are used, the margin of dumping will be much smaller, and the U.S. antidumping duties will be much lower as a result.[236] As antidumping duties are one of the most important and frequently used trade remedies against China, the United States considers this issue to be a vital one. In fact, Robert Lighthizer, the USTR, has called this dispute "the most serious

229. *See* Request for Consultations by China, *United States—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/1 (Dec. 15, 2016).

230. *See* Wayne M. Morrison, *China's Status as a Nonmarket Economy (NME)*, IN FOCUS, Jan. 10, 2019, https://fas.org/sgp/crs/row/IF10385.pdf.

231. *See id.*

232. *See* id.

233. *See* World Trade Organization, *Accession of the People's Republic of China*, § 15(a)(ii), WTO Doc. WT/L/432 (Nov. 10, 2001).

234. *See id.* § 15(d) ("In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.").

235. *See* U. S. DEP'T OF COM., MEMORANDUM ON CHINA'S STATUS AS A NON-MARKET ECONOMY, A-570-053, at 9 (2017).

236. *See* Daniel Griswold & Danielle Parks, *Is China a Non-Market Economy?*, MERCATUS CTR. (Apr. 2, 2019), https://www.mercatus.org/bridge/commentary/china-non-market-economy.

litigation we have at the WTO" and warned that a decision in favor of China "would be cataclysmic for the WTO."[237]

3. *Specific WTO Practices*

The United States also challenges specific practices in the WTO such as (1) the Appellate Body's disregard of the 90 day deadline for appeals;[238] (2) the continued service by persons who are no longer Appellate Body members;[239] (3) the practice of WTO panels and the Appellate Body in issuing advisory opinions on issues not necessary to resolve a dispute;[240] (4) the Appellate Body's review of facts and the review of a WTO member's domestic law *de novo*;[241] and (5) the Appellate Body's claim that its reports are entitled to be treated as precedent.[242] The United States claims that all these issues—judicial activism, rejection of U.S. trade remedies, and procedural irregularities—have been repeatedly raised before the WTO for years with no response.[243] This frustration led the Obama Administration to block the reappointment of WTO Appellate Body members, a practice continued by the Trump Administration.[244]

While frustrations with the WTO dispute settlement system have led the United States to precipitate the current crisis in the Appellate Body, it still continues to actively litigate in the WTO.[245] The United States is the complainant in an extensive list of cases in which it is challenging various measures by other WTO members as illegal under the WTO agreements.[246] The United States also continues to support negotiations with the WTO on various trade issues, although the

237. David Lawder, *U.S. Formally Opposes China Market Economy Status at WTO*, REUTERS (Nov. 30, 2017, 3:37 PM), https://www.reuters.com/article/us-usa-china-trade-wto/u-s-formally-opposes-china-market-economy-status-at-wto-idUSKBN1DU2VH.

238. *See* 2018 Trade Policy Agenda, *supra* note 161, at 24–25.

239. *See id.* at 25–26.

240. *See id.* at 26–27.

241. *See id.* at 27–28.

242. *See id.* at 28.

243. *See id.* at 23–24.

244. *See* Elsig et al., *supra* note 3; Miles, *supra* note 3.

245. *See supra* text accompanying notes 1–5; 2018 Trade Policy Agenda, *supra* note 161, at 21–22.

246. *See* 2018 Trade Policy Agenda, *supra* note 161, at 21–22.

United States has clearly indicated that it prefers bilateral to multilateral negotiations.[247]

III. U.S. TRADE INFALLIBILITY AND THE WTO

As noted earlier in Part I, without U.S. agreement, there is no viable path forward for the WTO that does not result in a seriously weakened, unstable, and diminished dispute settlement system.[248] This Part examines whether such agreement is likely to be forthcoming. Whether such agreement will be possible will depend on the conditions the United States will likely demand in exchange for its agreement to restore the Appellate Body to its full powers.[249]

At the outset, we should note that with the current crisis, the United States now holds the upper hand in its dispute with the WTO and has achieved many of the goals of the doctrine of U.S. trade infallibility.[250] The United States can no longer "lose" disputes in the WTO because if the WTO rules against the United States in a panel proceeding, the United States can suspend the legal effect of the decision by filing an appeal.[251] If the United States wins in a panel proceeding, the United States can seek to enforce the decision.[252] If the losing WTO member files an appeal suspending the decision, the United States can deal directly with that nation, as the United States has repeatedly stated that it prefers to deal in bilateral trade relationships rather than in multilateral trade relationships.[253] The United States can then negotiate a settlement or threaten the unilateral use of U.S. trade remedies against the losing nation.[254] The WTO can no longer reject or limit the use of U.S. trade law remedies, which are deemed by the United States to be essential to U.S. trade policy.[255]

247. *See id*. at 28–29.

248. *See supra* Section I.C.

249. *See, e.g.*, 2020 Report on the Appellate Body, *supra* note 195, at introduction.

250. *See* 2018 Trade Policy Agenda, *supra* note 161, at 1–2; *see, e.g.*, Press Release, Off. of the U.S. Trade Rep., *supra* note 169.

251. *See* DSU, *supra* note 4, at arts. 16.4 & 17.1; *see also supra* text accompanying notes 1–5.

252. *See* DSU, *supra* note 4, at arts. 16.7 & 22; *see also supra* text accompanying notes 54–61.

253. *See* 2018 Trade Policy Agenda, *supra* note 161, at 28–29.

254. *See supra* Subsection II.A.4; *see also America May Be Doing Away with WTO Dispute Settlement*, *supra* note 81.

255. *See* 2019 Trade Policy, *supra* note 141, at 24–25; 2018 Trade Policy Agenda, *supra* note 161, at 19–20; 2017 Trade Policy Agenda, *supra* note 138, at 3–5.

After crippling the Appellate Body, the United States can now assert its "America First" agenda and its doctrine of trade infallibility—an extreme form of nationalism—without interference.

The current impasse will also allow the United States to achieve a satisfactory resolution to one of its most worrisome cases: China's challenge to the U.S. methodology of treating China as a nonmarket economy for dumping investigations.[256] As discussed earlier, China argues that with the expiration of Section 15(a)(ii) of its Protocol of Accession, the United States must treat China as a market economy regardless of the actual facts.[257] The United States rejects this argument and argues that use of a substitute economy is authorized by GATT Articles VI:1 and VI:2.[258] The USTR considers this to be the most important pending case in the WTO because the United States' ability to impose high antidumping duties will be compromised if the United States cannot treat China as a nonmarket economy.[259] If the WTO ruled in favor of China, the United States would be faced with a serious setback, as it will not only need to defy the WTO but also an irate China in order to continue treating China as a nonmarket economy.[260] With the current paralysis of the Appellate Body, if the panel rules in favor of China, the United States can simply file an appeal and suspend the effect of the decision indefinitely.[261] The United States can then continue to treat China as a nonmarket economy.

If the United States has already achieved many of its policy goals, then what would make the United States agree to lift its blockade of the Appellate Body? Reviving the Appellate Body carries many risks.[262] Once the Appellate Body is restored, it might once again

256. *See* Request for Consultations by China, *supra* note 229; *see also supra* text accompanying notes 229–238.

257. *See* U. S. DEP'T OF COM., *supra* note 235, at 9.

258. *See* 2018 Trade Policy Agenda, *supra* note 161, at 19. The United States argues that GATT Articles VI:1 and VI:2 ensure the need to have comparable prices when establishing normal value, i.e. the price at which the product is sold in the foreign domestic market that will be used to be compared to the export price or the price sold in the U.S. market. *See id.* The United States argues that the price in the domestic market cannot be used for comparison, these articles authorize the use of substitute third country markets, such as Brazil, for China in calculating the margin of dumping and the amount of the antidumping duty. *See id.*

259. *See supra* notes 240–243.

260. *See* 2019 Trade Policy Agenda, *supra* note 141, at 2, 26.

261. *See* DSU, *supra* note 4, at arts. 16.4 & 17.1; *see also supra* text accompanying notes 1–5.

262. *See* 2019 Trade Policy Agenda, *supra* note 141, at 25–27.

conduct itself in ways that defy the United States.[263] When the United States first agreed to the dispute settlement system, it did not anticipate that the Appellate Body and the panels would engage in judicial activism.[264] To the contrary, the United States had already insisted in inserting language to prevent judicial activism in Articles 3 and 19 in the DSU that the "rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[265] Yet the United States found that the DSB disregarded these restrictions to the detriment of U.S. interests.[266] The Obama Administration's blockade of new appointments to the Appellate Body took nearly three and a half years to finally decommission the Appellate Body by reducing its members to below the minimum for a panel.[267] Having achieved many of its goals, the United States may be reluctant to restore the Appellate Body without strong guarantees that meet U.S. demands.[268]

If agreeing to restore the Appellate Body carries serious risks, the United States will wish to mitigate those risks by making strong demands as a price for its agreement to end the impasse.[269] Given the U.S. doctrine of trade infallibility, the United States will likely demand changes to the Appellate Body and the panels designed to achieve the Trump Administration's policy goal of always winning trade disputes.[270] Of course, other leading WTO members—such as China, the European Union, and Japan—are likely to reject such extravagant demands as too high a price to pay for the resuscitation of the Appellate Body.[271] While Part I of this Article suggests that there is no viable path forward with U.S. agreement, this analysis now indicates that U.S. agreement is not likely to be forthcoming, or the

263. *See id.*

264. *See* DSU, *supra* note 4, at art. 3.2; *see also* 2019 Trade Policy Agenda, *supra* note 141, at 25–27.

265. *See* DSU, *supra* note 4, at arts. 3.2, 19.2 ("[T]he panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."); *see also* 2018 Trade Policy Agenda, *supra* note 161, at 26–27.

266. *See* 2019 Trade Policy Agenda, *supra* note 141, at 25–27; Elsig et al., *supra* note 3.

267. *See* Elsig et al., *supra* note 3.

268. *See, e.g.*, 2020 Report on the Appellate Body, *supra* note 195, at introduction.

269. *See id.*; 2019 Trade Policy Agenda, *supra* note 141, at 25–27.

270. *See* 2019 Trade Policy Agenda, *supra* note 141, at 6, 27; *see also* 2020 Report on the Appellate Body, *supra* note 195, at introduction ("WTO Members must come to terms with the failings of the Appellate Body set forth in this Report if we are to achieve lasting and effective reform of the WTO dispute settlement system").

271. *See* 2019 Trade Policy Agenda, *supra* note 141, at 26–27.

price of U.S. agreement will be one that other WTO members will find too high.

If the WTO has no viable path forward without U.S. agreement and U.S. agreement is unlikely to be forthcoming, then it appears that the current impasse at the WTO will likely remain for the near future. In the short term, the WTO faces various practical issues concerning how cases are to be litigated, a topic discussed in the first Part of this Article. But for the future of the WTO, resolving the impasse expeditiously is essential. The longer the Appellate Body is disabled, the less likely there will be the political will necessary for its revival. For the long term, the crippling of the WTO raises the specter that multilateralism will fade as the dominant form of international trade to be replaced by a resurgent nationalism, as exemplified by the current approach of the Trump Administration.

CONCLUSION

The crisis in the WTO, precipitated by the United States, is a technical issue of WTO law and procedure, but it has ramifications that extend far beyond the WTO dispute settlement body. Many casual observers may not realize its profound consequences. The attack on the Appellate Body is also an attack on the WTO itself and the entire era of multilateralism in international trade that it helped to create.

During the first several decades of the twentieth century, nearly 100 years ago, the world was spinning out of control due to a vicious nationalism and protectionism, which reached its high point during the 1930s.[272] During this chaotic era, nations erected protectionism barriers in the form of draconian tariffs that prevented trade and created deep suspicion and mistrust, factors that contributed to the Second World War.[273] With the end of the war, under the leadership of the United States, multilateralism gradually began to replace nationalism as the norm in international trade.[274] In 1944, in Bretton Woods, New Hampshire, the United States led a conference of nations that put into place the international economic system that would set the stage for multilateralism for the next seven decades.[275] The high

272. CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 18.

273. *See id.*

274. *See id.*

275. *See id.* The Bretton Woods system was to be a triumvirate of three economic organizations: the World Bank to lend money for the reconstruction of Europe and to developing countries to alleviate poverty, the International Monetary Fund (ITO) to provide stability in cross border currency flows and in currency

tide for multilateralism was reached with the establishment of the WTO in 1995, with its robust dispute settlement system, and may have ended with the recent paralysis of the Appellate Body.[276]

Although the United States was one of the chief architects of multilateralism, a disgruntled United States has now managed to inflict a grievous, and perhaps mortal, wound to the multilateralism it helped to create by crippling the WTO dispute settlement system.[277] The source of the United States' dissatisfaction is various transgressions by the WTO, including the sin of judicial activism in inventing new rights and obligations.[278] Yet the United States appears to only object to the WTO's malfeasance when it loses; when the United States wins, its anger is replaced by smugness, and its vitriol for the WTO is replaced by praise as the United States extols the result and broadcasts it triumphantly.[279]

The United States is particularly frustrated that China has been able to benefit from the WTO's transgressions even though China has not lived up to its commitments to dismantle its state-led economy that gives China unfair trade advantages and benefits.[280] As China appears to be a beneficiary of the WTO's judicial activism, the United States' blow against the Appellate Body also achieves a major U.S. objective to contain China from expanding its influence in the WTO.[281]

The Trump Administration's doctrine of U.S. trade infallibility is a twenty-first century form of extreme nationalism that may foreshadow a new era in which nationalism by individual nations or by a small block of nations will once again become the norm in international trade.[282] The world may be witnessing a return to a dangerous new era of nationalism in which each nation or small

---

exchange rates and the International Trade Organization (ITO) to reduce barrier to trade. *See id.* The World Bank and the IMF were both quickly approved, but the ITO never came into existence due to the opposition of the U.S. Congress. *See id.* The WTO assumed the role that was originally intended for the ITO. *See id.*

276. *See id.* at 109.

277. *See* Elsig et al., *supra* note 3; *see also supra* Section I.B.

278. *See* 2020 Report on the Appellate Body, *supra* note 195, at 50–51; 2018 Trade Policy Agenda, *supra* note 161, at 2.

279. *See supra* text accompanying notes 169–176.

280. *See* Chow, *supra* note 188, at 943–44.

281. *See* 2017 Trade Policy Agenda, *supra* note 138, at 29 (explaining how the USTR states, "[T]here is significant concern that the WTO is unable to manage the rise of countries—notably China—that pay lip service to the values of free trade but intentionally avoid, circumvent, or violate the commitments accompanying those values."); *see also* 2018 Trade Policy Agenda, *supra* note 161, at 2, 4.

282. *See* Daniel C.K. Chow, *Economic Nationalism: U.S. and Chinese Style*, 14 OHIO ST. BUS. L.J. 1, 1, 12–13 (2020).

groups of nations pursue their own interests at the expense, if necessary, of other nations and of the global economy.

What is needed to save the Appellate Body and the DSB is a new round of multilateral negotiations involving all WTO members that can review and make changes to the dispute settlement system. Throughout its history, the GATT/WTO has engaged in eight rounds of negotiations with the Uruguay Round resulting in the establishment of the WTO.[283] A round of negotiations led to the creation of the WTO and now a new round is needed to save it. All questions about the dispute settlement system should be on the table and open for discussion. Such a multilateral negotiation would take at least a year and probably longer; it should proceed under the traditional practice of consensus.[284] This negotiation could be long, arduous, and contentious, but such a difficult process must be endured in order to save the Appellate Body, the dispute settlement system, and the WTO itself.

Such a new round of negotiations can begin, however, only with the agreement of the United States and at the moment, such agreement does not seem to be forthcoming. At present, the United States does not appear to be interested in a true negotiation with the WTO—an open dialogue among equals—but only in dealing with the WTO from a position of power. The United States is holding a list of demands over the heads of other WTO nations as a price for ending its opposition. This is not a negotiation but instead is a face-off in which the United States is pitted against the rest of the WTO membership. While the United States has been obstinate, at the same time—as a practical matter—the WTO must be willing to respond to U.S. concerns and regain U.S. confidence. The United States has too important of a role in international trade for the WTO to survive without its support. Saving the WTO can only occur if the United States agrees to open a multilateral negotiation, takes part, and concurs with the results.

The United States claims that the WTO is essential for global trade.[285] If this sentiment is sincere, then the United States cannot

283. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 9, at 50.

284. *See* WTO Agreement, *supra* note 38, at art. IX.1 (explaining how decision-making in the WTO proceeds by consensus).

285. *See, e.g.*, David Lawder, *U.S. Trade Chief Says China Policy Change 'Not Going to Be Easy'*, REUTERS (Sept. 25, 2018, 12:58 PM), https://www.reuters.com/article/us-usa-trade-china/u-s-trade-chief-says-china-policy-change-not-going-to-be-easy-idUSKCN1M52FS. Referring to the WTO,

always expect to have international trade decided on its terms, under its laws, and by its courts. The United States cannot demand that in all trade disputes, the United States must always win. The price of multilateralism that has existed since the GATT/WTO was founded in 1947 is that all nations, including the United States, need to abandon a power-based approach to trade in favor of an approach based upon consensus and mutual respect.

Robert Lighthizer, the U.S. Trade Representative, stated, "I've said this before, if we did not have it, we'd have to invent it." *Id.*